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ANTITRUST LAW

4°ANNO CLMG - elective

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ANTITRUST LAW – general notions:

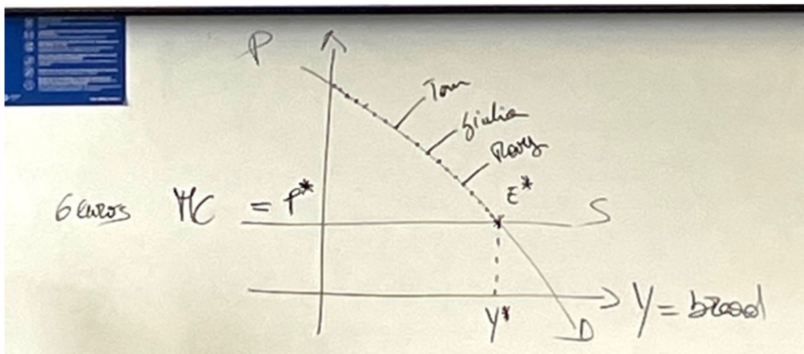
Antitrust law is a set of legal rules (art. 102 TFEU, art. 101 TFEU, merger regulation 139/2004) aimed at preventing practices from harming the functioning of the market. Those rules find their functional equivalent also in the US ← the rules in the US are section 2 of Sherman Act, section 1 of Sherman Act and section 7 of Clayton Act.

- Art. 102 of TFEU and section 2 are about → **monopolistic conduct**
- Art. 101 of TFEU and section 1 are about → **anticompetitive agreement**
- Merger regulation and section 7 are about → **mergers**

The kind of conduct with which antitrust deals are monopolistic conduct, agreements and mergers → nothing else → those are the topics we will be looking at.
Antitrust law is a set of legal rules aimed at preventing firms' practices from harming the well-functioning of the market →

- What does "***aimed at preventing***" mean? We are going to study that who violates antitrust law is subject to fines, very high fines → intended to prevent violating antitrust law, to prevent harming the well-functioning of the market → deterrent goal.
- Why "***firms***" and not anybody else? Antitrust law addresses firms → we use antitrust law to analyze the behavior of firms operating in the market, of market operators. Art. 101 and 102 TFEU refer to undertakings → we don't apply antitrust law to govern, analyze the decision of a government, of a public authority. What falls in the purview of the state does not belong to antitrust law → even if the antitrust authority of a country may tell the government is some of its decisions are good or bad, these advocacy power have nothing to do with the application of antitrust law.
- Definition of what the "well-functioning" of the market is → **understanding what harms the well-functioning of the market is the core of antitrust law** → the articles are open-ended; they are written in a loose form. When a legal rule is so loose, we need to add some content to fill the gaps → where do we find that content? In economics → social science that explains how the social market works, it explains how firms behave → if we look at economics, we get a model that tells us when a market is working well → the market is working well when it follows the model of perfect competition.

If we look at the economics, we find the **MODEL OF THE PERFECT COMPETITION**.
The equilibrium is called E* (you produce the maximum amount of output possible, and you give this output to consumers at the lowest price possible).
When you are there (E*) you satisfy all the consumers that are in the line:

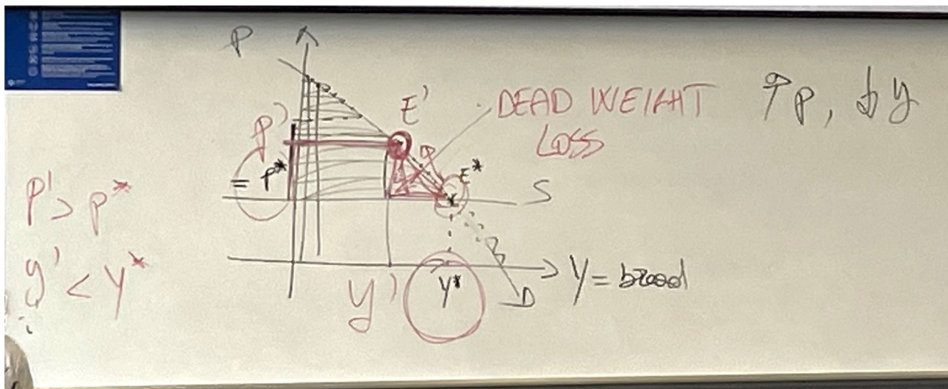


Each of them can afford the product because the price with which you charge the product is the perfect one.
We talk about the perfect competition because you have product the maximum possible at the lowest price. **You were very efficient because you have produced every unit at the marginal cost**. And because of the price you have sold the products, the consumers are satisfied.
What should happen in order to make you satisfy the same amount of people at lower prices? To change the technologies you use to produce the units. If you want to low the marginal cost, you should change the

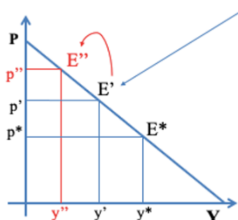
technology (but this is for a medium-long time perspective). **Therefore, since we are in a perfect competition model, we want to prevent firms from raising prices and consequentially reducing the output ← the firm becomes anti-competitive**.
So, what are we preventing with antitrust law? Since we are in a perfect competition model, we want to prevent firms from raising the prices and reducing output → as long as the practice is capable of increasing prices and reducing output it is anticompetitive because it harms the well-functioning of the market.

Let's suppose that because of the behavior of a company, or of a group of companies, the market went from E* to E1. Because of the behavior of one company (monopolistic conduct → unilateral), or because of the behavior of a group of companies (agreement or merger → multilateral), **the market went from E* to E' → the triangle between E', E* and the supply line is the dead weight loss (perdita secca)→ the amount of output was maximum in E*, so now it is lower** → a lower number of people can now afford bread → by reducing the output, there is a loss in efficiency, because there are resources that are not used to produce, we are not using the resources at their best. In addition, the consumers' surplus is being reduced → now they pay more → there is a dead weight loss + a shift of wealth from consumers to entrepreneurs → **wealth distribution effect** from consumers to entrepreneurs.
What are the costs of this behavior?

- Loss of efficiency → you produce less than what you could
- Consumers pay more → wealth transfer from consumers to entrepreneurs



← we have a space that is a dead weight loss.
The amount of output was maximum in the E*, so now it is lower → a lower number of people can afford the product → **by reducing the output there is a loss in efficiency**! In addition, the consumers pay now more → there is a **shift of resources from consumers to entrepreneurs** → wealth distribution effect from consumers to entrepreneurs.
You lose efficiency because you produce less than what you could, and consumers pay more.



What if we go from E' to E''? Suppose we cannot find any behavior of firms explaining why the market moved from E' to E'' → can we punish the firms using antitrust laws? No!
Let's look at another market, which is in E''' → can we use antitrust law make the market move to E*? No, we can only use it to prevent firms from harming the well-functioning of the market, we can't use it to change the structure of the market and improve competition → no pro-competitive effects.

Antitrust law is made of prohibitions, of orders to impose firms to remedy to the wrong doings they have done → it is not a set of positive rules. We have to check whether the firms' practices have worsened the market.

Let's take into consideration another market. The perfect competition is in E*, but in reality, it is in E3. Can we use antitrust law to make the market move from E3 to E*? No, because we use antitrust law to prevent firms' practices from harming the well-functioning of the market. We cannot make the market move from a point to another one. if a market is not very competitive by itself, you can do anything.
If you want to change the structure of the market so that from the very beginning you are in E*, you have to intervene in a different way. But antitrust law hasn't this aim.

But what about the long run? Suppose we create a new product consumer like a lot (we launch a new technology to produce bread, thus we are able to cut off production costs, making a cheap product) and we acquire lots of market shares, becoming a monopolist→ as monopolists we are able to charge very high prices and reduce output a lot → should we accept this? Yes, because it is a reward to entrepreneurs that reached the best position in their market due to investments they made, inventing new technologies or creating new products → the possibility to charge higher prices is the reward for the investments made, the competition and innovation undertaken → otherwise the investments in innovation and competition would not be incentivized anymore. Over the long run, what we observe is the ability of the firms to produce better products, more innovative products, more differentiated products→ **we also look at quality, variety and innovation**.

- **Second**, antitrust institutions endorse those economic theories showing that, over the long run:
  - consumers benefit from varied and good products, that is, from **increasingly larger ranges of products of better and better quality** and
  - **innovation** increases consumer welfare much more than any policy aimed at pushing prices down to marginal costs.
- Therefore, **antitrust law also forbids the practices that reduce product quality, consumers' choice (that is, product variety), and that reduce innovation! (These are called "long run effects")**

- Pay attention: In practice, many cases are decided on the basis of short run effects. Yet, sometimes (for example, when inventions are involved) long run effects are taken into consideration.
- In cases of conflicts, often (not always) the effects on innovation are deemed more important than effects on market output and price. For example, the practices promoting innovation are deemed lawful even when they make market price increase.

An anticompetitive conduct is a conduct that in the short run reduces output and increases prices, and/or in the long run it reduces quality, variety or innovation of products ("in the long run" because it takes time to change the degree of diversification of your offer, while it takes less time to change prices and output quantity). In antitrust law, we look to actual effects, but also to potential effects → we do not have to wait for the actual effects: we apply antitrust law when a conduct is capable of reducing output and increasing price, or reducing quality, variety or innovation of products.

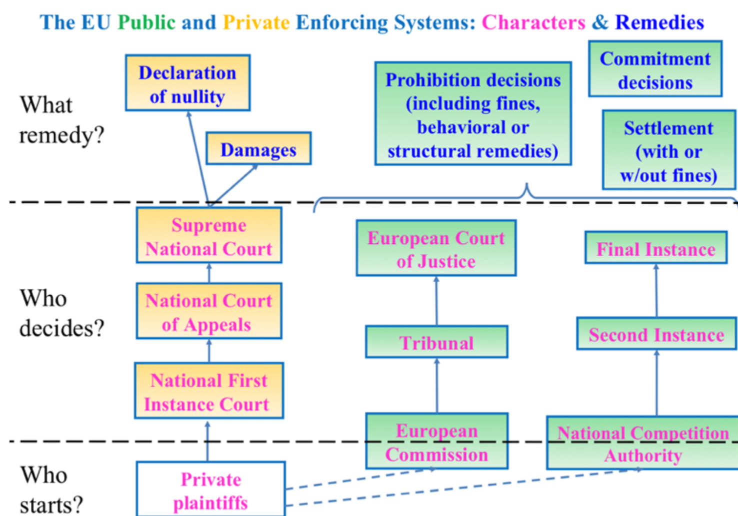
In summary

The practices that may worsen market well-functioning are the practices that may harm consumer welfare over the short and long run, that is, the practices that may:

Practice	Period
increase market price reduce market output	Short run
worsen product quality worsen product variety lower innovation rate	Long run

Economics teaches us market works well when it guarantees the highest output possible at the lowest price possible. Who tells us this? **Economics**, and we use it to fill the gaps since it's the social science that studies how the market works. Other people around the world say in order to give meaning to the words of the Treaties and of the Shermann Act in the US, we should also take into consideration other interests. When we tell *antitrust law punishes negative conducts that increase prices or reduce output*, we mean antitrust law is meant to protect efficiency and innovation. The kind of antitrust we learn is the one that protects efficiency (*when the output is the highest possible and the price is the lowest possible, the level of efficiency is the highest possible*) and innovation (*when we say that a conduct is anticompetitive, it means it reduces quality, variety and rate of innovation*): when we innovate, we change the quality of the product, we add new products to the old ones, and in general we increase our capability of launching new technologies and services.
Antitrust law protects efficiency and innovation: still, there are other points of view around the world, let's be aware of it! Some others say antitrust law should protect fairness or equal distribution of wealth or the well-being of consumers or of the competitors. These are the other goals antitrust law was traditionally used to protecting. Furthermore, in the last few years, there are also those who believe antitrust law should protect workers, the environment, sustainability and privacy. Traditionally, we have dealt with those discussions. In addition to this, there are those who wants antitrust law to protect other interests, such as privacy, workers, consumers and so on and so forth.
In the following classes, we will tell why Maggiolino sticks to the traditional definition of antitrust law. We will understand what ***protection of efficiency and innovation*** means on the one side, and what *protecting environment, distribution, consumers, and workers* means: for now, keep in mind Maggiolino sticks with the first one.

THE ENFORCING SYSTEM:



Let's now deal with the **enforcing system**: who applies antitrust law in Europe? What kind of remedies do I get when I enforce antitrust law? In order to tell us something about the enforcement system of antitrust law, let's get started from the end. How is it possible for us to start enforcing antitrust law? **Articles 101 and 102 of the Treaty**, or even **national competition laws** in Germany, France, Poland, Italy, ..., those are the 2 guidelines. 2 possibilities:

- We might have a **private plaintiff**, someone like us or firms that claim that an antitrust violation took place
- We may have **competition Authorities** that claim that an antitrust violation took place.

It may happen that companies A, B and C say: "*here there is a cartel going on*!", or it may happen that an Authority, while monitoring markets, realizes something is getting wrong, and a cartel is taking place.

We may have the case of a **private plaintiff** that makes an announce, or he makes an antitrust violation action, or it can be the case of a **competition Authority** that opens up an investigation, either because it received an announce from a private party, or because it decided to open the investigation *ex officio*, meaning by itself.
The **private plaintiff** has 2 opportunities:

- Either ***he makes a claim in a Court*** à he brings the case to a Court by making an antitrust violation action
- The ***private plaintiff may decide to knock at the door of the Authorities***

On the other side, the **Authorities** has two options as well to start investigating:

- They can start an investigation because the ***private plaintiff has knocked at their doors***
- Otherwise, ***they open investigations ex officio on their own***

Who starts? Either private people (individuals or companies, both physical or legal persons) or Authorities.

Who are those Authorities?

- If you ask for the application of European Law (mainly articles 101 and 102 TFEU), the EU Commission: it's the authority entitled to apply articles 101 and 102 TFEU.
- The other Authority is a **national competition Authority**.

What do you do? You can either ask for the application of articles 101 or 102, or you can ask for the application of your own law (if you are Italian, you go to *Autorità Garante Della Concorrenza e Del Mercato*): if you want to claim article 101 was infringed, either you bring a claim to a Court or you go to the European Commission or you go to the national Authority of your Member State. Competition law can be applied both by the European Commission and by national competition Authorities. Competition law is something applicable equally by EU institutions or by national institutions.

There are many rules we follow in order to guarantee "***the utility of the useful effect of EU law***": wherever you are in the EU, when you are under article 101, you get the same result and rights and powers of investigation.
Either you bring the case to a national tribunal, or to the European Commission, or the National competition Authority. *What does make me choose between tribunal or among the national competition Authorities, or between the national competition Authority and European Commission?* The **remedies**! I look for damages? I look for declaration of nullity? If there is an agreement, I go to tribunal. If I want those kinds of remedies (prohibition decision including fines, or a settlement decision), I go to an antitrust Authority.
This is the first main answer to the question, whereas the second answer is: to make an antitrust case, it's tough and expensive, you have to do a lot of economics to prove an antitrust case, you have to find the relevant market, and this may be very expensive.

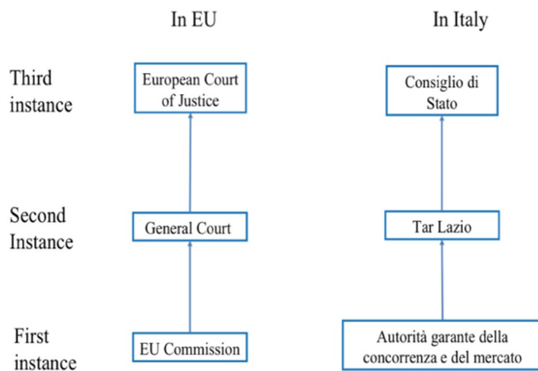
- If you go to **Court**, you have to bear the cost of showing that an antitrust violation took place, you have the burden of proof since you are the claimant.
- If you go to **European Commission**, the burden of proof is on the Authority.

It's very common in EU that individuals - both consumers and undertakings - go first to the Authorities to make them open investigations collecting the evidence, and then go to Court, having the so-called "**follow-on action**".
Firstly I got the decision, then I ask for damages, and this is more frequent than a private plaintiff that brings the action to Court and collects the evidence to show the antitrust violation.
Let's repeat this point: in Europe, it's frequent that private plaintiffs do not go to Court, but they go to Authorities, because they don't want to bear the burden of proof. They ask the authority to make the case, and if they decide that a violation took place, afterwards they go to Court with a **follow-on action**.
Because of a directive, when tribunals receive an antitrust action which follows an antitrust prohibition decision, the judges are bound to what the Authority has said. If the Authority says Company A violated antitrust law, the judge cannot say "*this is not true*", and this is meant to improve private enforcement, meaning the enforcement that is done by judges.
How can I choose? Why should I go to a Court or to an Authority? It depends on the remedy I want, but also on the costs I have to bear to win the case.

Usually, we go first to Authorities and then to judges, knowing the judges are bound by what authorities said. In the US, it doesn't work like that: in the US, 90% of cases are intimated by private plaintiffs and go directly to Court. Why is this the case? Because in the US we have a rule that says that ***if you win the antitrust case, you get tripled damages***, meaning you get three times the value of the damage you suffer. People are therefore willing to bear the cost of making the case, because they look for three times the damages they deserved!
It also happens that even somebody involved in a cartel (which is an antitrust violation) decides to quit and deviates from the cartel, "*cheating on their partners in crime*": in that case, they do a leniency application, which is when you are part of the violation, but you denounce yourself by saying "*look, I was violating antitrust law, but I want to get clean by denouncing myself: I want you authorities to know about the infringement and to find all the evidence needed to prove the infringement, and because of that, I need a reward, mainly the non-application of the fine!*". We may have consumers that have suffered a damage, as well as Authorities that work *ex officio*, and in addition we may also have an undertaking that has violated antitrust law, but it wants to benefit from the **leniency program** and get the immunity from fines, and therefore it denounces itself and its partners in crime.
The first who makes the leniency application, as long as he gives all the evidence he has to prove the infringement, he gets all the benefits. The second ones may not get the immunity, but they could get reductions of the fine. This was done to push and **incentivize people towards denouncing the existence of cartels**, and that's because usually cartels are kept hidden.

PRIVATE AND PUBLIC ENFORCEMENT SYSTEMS:

Let's look at the **private enforcement system**: nothing peculiar, you go to the first instance Court, and you make your claim, for example "*Companies A, B and C made a cartel*", you try to meet the burden of proof, the defendant tries to show he didn't violate antitrust law: nothing peculiar. At the end, when the decision will be final after the 3 potential grades of appeal, you will get either damages or declaration of nullity.
Let's look at the **system of public enforcement**. I go to the Authority, or the Authority decides to open an investigation by its own, or the Authority receives the leniency application and opens up the investigations as a consequence. Then, the Authority becomes the public plaintiff, and we will have defendants: one company or many companies, depending on the kind of violation. The Authority will make the case, and it will make a decision.
US people say our enforcement system has a problem, the so-called **prosecutorial bias**: it's the coexistence within the same institution of the public prosecutor and judges. In the European Commission and in national competition Authorities, we have together these 2 groups of people: In the European Commission, we have the DGCompetition (DGCOMP) that makes the case, and then we have the Commission made of 27-Member-State- commissioners that make the decision. In Italy, we have the officers making the case, and the Authority (*collegio*) who makes the decision. US people say the commissioners of EU Commission and the members of the committee that make the decisions are not fully independent from their officers, meaning from the one at DGCOMP and the national competition Authorities that make the case. Indeed, any time the case is investigated, generally in the great majority of cases, if it's not dropped at the beginning, it achieves the end and it closes with a prohibition decision, and this is peculiar: how is it possible that any time an Authority opens up a case it ends up with a prohibition decision? US people say there is no independence!
Actually, it's not like that, and there is a good number of cases which are dropped at the very beginning, and secondly, when private plaintiffs make an announce, the Authorities can reject it. The cases they open and then the ones they really want to investigate, those are real cases that have more solid roots that the ones private plaintiffs may open by their own.
Nevertheless, if we are not satisfied with the decision of EU Commission or with the decision of a national competition Authority, I can make an appeal against the Tribunal or against the European Court of Justice. In Italy, we do it making an appeal to *TAR del Lazio*, which is obviously an administrative tribunal, and then to *Consiglio di Stato*, another administrative tribunal. What is peculiar is that judges who make these 2 appealed decisions, they are **administrative judges**, and not ordinary judges, and this is the big difference between the private enforcement system and the public enforcement system.



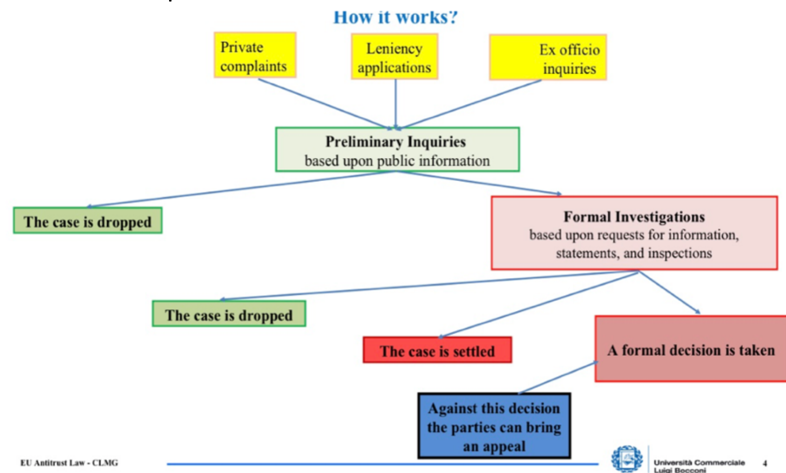
The difference between ordinary and administrative judges is a difference in the distinction of competences. In Continental Europe, whatever is decided by an Authority, it's reviewed by an administrative judge. Firstly, it's a matter of competences, then they have a different educational ground: obviously they have a law degree, but over their carriers, administrative judges have always dealt with administrative issues, they are very familiar with the use of powers and the abuse of powers by Authorities, and the amount of fines and whether the fines are proportionate or not. There is another difference: if I go before an ordinary judge with an antitrust case, the ordinary judge may establish if my definition of relevant market is correct or not, if it is well-founded or not. The ordinary judge has the power to make a decision about the relevant market. In administrative cases, the administrative judges cannot review the matter of substance, they cannot review the technical issues of antitrust law: they cannot review the market definition, they can only assess whether the conclusion of the EU Commission or of the national competition authority was consistent with the law and logic, but they cannot say "*this definition of the relevant market is right or wrong*", they cannot make technical decisions.
These differences then change from jurisdiction to jurisdiction: for the Italians, if they are technical judges, they are subject to "*discrezionalità amministrativa*": they cannot review matter of substance, but they can only judge whether a decision was consistent with law or not. At the first instance, we get a very authoritative decision from a specialized person, whereas we don't know about second and third instance. At first and second instances under public enforcement, we have an analysis of the procedure and process of law. People in Continental Europe, where we are familiar with the administrative system, they rely on the administrative authorities rather than on judges.
If we go for the **public enforcement system**, what we can get is:

1. ***Prohibition decisions***
2. ***Commitment decisions***
3. ***Settlements***

We will talk about these issues in details.
Let's do a bit of wrap-up: we have Articles 101 and 102 TFEU, that can be applied by public enforcers (EU Commissions and national competition Authority), or they can be claimed by private plaintiffs, because as rules of the Treaty, they create individual rights to every EU citizen. ***EU public enforcement system*** is the one that goes through Authorities, and altogether EU Commission and national competition Authorities create what we call the **ECN+**, which stands for *European Competition Network*. How do they split cases among themselves? There are rules, generally the authority in charge is the authority of the country where the violation took place. If the violation took place in many countries, the authority in charge is the one who has the best evidence available, unless the country involved are 3, and in such case the authority involved is generally the Commission: once the case is so big to involve more than 3 countries, the **EU Commission** will take care of it.
In day-by-day reality, it's not as goofy as we said: what happens is that they talk with each other frequently to decide who should be in charge: "*I have this piece of evidence that is good, I should be in charge for this case", "do you have the same evidence of lower quality evidence*?". They keep on taking among themselves, and if they found out pieces of evidence, they exchange them across counties. It may happen that the Italian competition Authority gives pieces of evidence to the German competition Authority that is in charge for the case in hands. This gives us an idea on how decentralized the enforcement of EU

competition law is, and this is quite peculiar. Sometimes, the Commission advocates the case for itself, in particular this happens if the case involves many countries, or when the case is peculiar and brand-new.

How does the process work within the EU Commission and within administrative Authorities in Europe?



We may have a ***private complaint***, or a ***leniency application***, or even an ***ex officio inquire*** that made preliminary inquiries, and then either they drop the case, or they open formal investigations, which may close with the closing of the case (such thing doesn't happen often times: if you have to drop the case, you do it before opening formal investigations), or the case is settled (this is the one of the remedies I get from the public enforcement), or the case is closed with formal decision, either a prohibition decision or a commitment decision, against which you can bring an appeal to the administrative judges).
Let's see how **NCAs** are (NCA stands for "national competition Authority"). In many countries, we have administrative Authorities, in some other countries we may have committees or special tribunals.
Over time, especially during the last few years, people have complained about the different powers of different Authorities, and different rights parties may enjoy according to the country. The "***effect utile***" specific of EU law was not guaranteed: finally, in 2021 in Italy, but a couple of years before in Europe, we apply a new **directive** that changed the powers of all the Authorities working in Europe, let's see the **new powers and features Authorities must have**:

1. This is very much important, right now **it is legitimate for Authorities to have an agenda power**, which is the power to make a list of priorities. If I care about the environment and I want to protect it, I may say that one of my priorities will be making investigations about cartels and abuses of dominance connected to air and water pollution, or to the use of energy. I can do it, I can still be very traditional in applying antitrust law that prosecutes cartels and abuses of dominance, but instead of doing it in the digital world, I do it in relation to something which has a clear impact on the environment: this would be a traditional way to use antitrust law to protect the environment by setting the agenda instead of changing the goals of antitrust law.
   Now, we have this power guaranteed by the law: in the past every authority had its own agenda (you cannot do anything at the same time), but it was not explicit.
2. Second, ECN (European Competition Network) remarks **the importance of having independent officers**, and those are the criteria and rules they have to comply with to be independent: they cannot be subject to the orders and opinions of the government or other public bodies. Why? Because we do apply antitrust law against public companies, meaning against companies who are owned by the State.
3. They have **stronger investigation powers**: they can do down raids in the houses of officers or directors of companies. On the other hand, *the parties and the undertakings have stronger defensive safeguards*: antitrust Authorities, when they make an investigation, they can ask information. That request of information must be ***proportionate***. If you want to defend yourself, you can question the proportionality of the request of information.
4. **The ECN has increased the fines**: the remedies can be both structural and behavioral.

We said that we have the ECN, among the Authorities in the network they exchange information and cooperate a lot, but still, the **Commission** is the ***princeps inter pares*** → it means the Commission is the boss, since it is the Authority which applies EU antitrust law from 1957 when the Treaty of Rome was enacted as the first European Treaty. The Commission is the **real expert in applying competition law**: generally, we are deferential to what EU Commission says. It is more authoritative than the other national Authorities, it's nothing like "*EU interests v. national interests*"! Remember: the **ECJ** (European Court of Justice) is always above anything else, since it can review and overrule Commission's decision, but it also interprets the Treaty: the final word about what an abuse of dominance or a cartel is, it is left to the ECJ. As we said, in Europe we have a lot of **follow-on actions** for the reason we mentioned; in the US, the greatest majority of cases are **stand-alone actions** because of treble damages.

THE REMEDIES:

Let's now get to the remedies. First, let's go with **prohibition decisions**: they say: "*you violated the law, stop doing it*". Sometimes, the ***content*** of this decisions is not only ***negative***, it's not only about what you are supposed to stop doing. Sometimes, they are ***positive***, mainly they impose affirmative and positive actions. Let's see an important case: abuse of dominance because of refusal to deal. For example, the Wall Street Journal refuses to give the advertising spaces to a firm. If it were an antitrust violation, the Commission would impose to Wall Street Journal to share the space. This is a prohibition decision with a positive action imposed, it's a positive behavioral remedy. Right now, because of ECN+, its' clear that among the remedies, we can impose not only behavioral remedies, but also structural remedies: "*you are a dominant firm holding many companies, you must sell 2 companies and disinvest from one of your markets*". In Europe, nobody has never made such decisions. Back in the 70s, before the Chicago School, the Antitrust community has understood that being so intrusive can be a problem.
This is the law, **art. 7 Regulation 1/2003**: suppose the Commission makes an action against me, it wins the case, it sends me a prohibition decision imposition me some behavioral remedies. A way to fight back against this remedy is to show it is not necessary to bring the infringement effect to an ed, it is not proportionate and goes beyond what is necessary to restore competition.
This is important, we'll come back to this in the future: if they showed that I abused the dominant position because I was not clear enough in disclosing my policy - for example, my private policy -, my remedy must be a **disclosure obligation** in order to be necessary to bring the infringement to an end and in order to be both effective and proportionate. They cannot charge me for not being clear in disclosing my policy, and then as a remedy impose me to split my databases or to stop collecting some data. We will talk about the German Facebook case, and we will come back on this point: when authorities try to be over-deterrent, I can say "*your remedy is not proportionate to the end you are supposed to pursue*".
SETTLEMENT DECISIONS: they are settlements, nothing peculiar. "*To make a case is expensive, to litigate the case afterwards is expensive as well: just admit what you did, I will give a reduction of 10% in the fines, saving money*". A settlement is a **procedural efficiency instrument**. *What is the difference between this settlement decision and a leniency procedure?* People usually put everything together: there is always a reduction in the fine, still they are two different things, the rationale behind leniency decision and settlement decision is completely different.

- ***Settlement decisions*** are meant to reduce costs
- whereas ***leniency decisions*** are meant to gather evidence and learn about a violation by getting the evidence.

Then, **commitment decisions**: Maggiolino hates them, the idea is that something wrong goes on. The Authorities decide to open investigations. The parties say: "*we are not guilty, but still, we want to help you: tell us what we should do to make you quiet, we will do it!*". Many people do support commitment decisions, since they are an easy way to solve the case: the Authority is upset about something, the company takes those behaviors to solve the issues the authority sees. What is the problem of these decisions? **My deterrence decreases a lot**: my power to impose fines and to teach companies not to violate the law goes down, as I can always argue I can find a way to solve the problem without investigating the case. Indeed, these commitment decisions cannot be applied when we talk about cartels and very serious violations of antitrust law, since this would be an easy way out.

This would deprive the antitrust system of its deterrence. Indeed, in Europe you cannot make those decisions for cases that are severe and serious infringements: there may be cases such as vertical agreements where it's difficult to say if there was a violation or not, it would take 2 years to investigate the case as usual, and therefore since those violations are not that serious and significant, then you make a commitment decision.
Then, there are **interim measures**: they are not final decisions, they are made during the proceedings when you think that on the basis of a *prima face* finding of the infringement, **when you think there is urgency due to risk of serious and irreparable damage for competition**, then you make interim decisions.

FINES AND SANCTIONS:

How do we conceive **fines** within antitrust law? For antitrust people, undertakings are economic agents supposed to be rational. Suppose that "C" is a conduct, *when does an economic agent undertake a conduct?* When the expected benefits of the conduct are higher than the expected costs of the conduct.

E[B(C)] > E[C(C)]

When does an economic undertake an action or a conduct? When the expected benefits of the conduct are higher than the expected costs of the conduct: when this happens, **we say that the conduct is rational**. If it happens that the expected benefits are lower than the expected costs, the rational agent should not undertake the conduct, which is irrational.
Within antitrust law, we assume agents are not irrational, we consider impossible that somebody undertakes a conduct whose expected benefits are lower than expected costs. *And if it happens? If in real life I see a company taking an action whose expected benefits are lower than the expected costs, what does it mean?* It means I'm not seeing a piece of the puzzle, mainly the **strategic expected benefits of the conduct** that, together with the expected benefits of the conduct, changes the quality of the conduct: these are superior to the costs, and the conduct therefore becomes rational.

strategicE[B(C)] + E[B(C)] > E[C(C)]

Why are we saying all of this in relation to fines? If we believe undertakings are rational, we assume that fines F must be higher than the expected benefits from unlawful conducts UC.

F > E[B(UC)]

We try to conceive of sanctions in order to disincentivize firms from undertaking unlawful conducts: we try to create fines which are higher than the benefits that firms get from violating the law.

FINES AND EU LENIENCY PROGRAM:

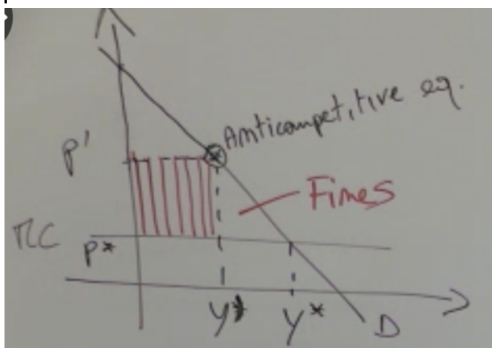
EU law and system is based on the idea that **fines must deter companies from violating antitrust law**: they should be as highest as possible in order to prevent companies from finding unlawful conducts to be convenient. The idea is to make the punishment so harsh in order to firms not being interested in having unlawful conducts, because that would be too costly. The fines should be good enough to change the pay-off of the unlawful conduct.
In particular, let's see **how we calculate them**. Our fines are calculated based on the gravity and duration of the infringement, and the amount of the fine S depends on those variables:

1. First, we have to consider a *percentage of the turnover of the company up to 30% of the company's annual sales of the product concerned in the infringement*: if I made a cartel in the candies' market, you take my turnover (meaning the amount of my sales of candies) and you calculate the fine in relation to the 30% of my turnover.
2. *The amount we have just calculated must be multiplied by the number of years and months during which the infringement lasted*.
3. *That amount can be increased or decreased according to certain aggravating circumstances*, such as recidivism (you did it twice, for example) *or attenuating circumstances* (companies may be very much willing to collaborate with the Authority: they do not contest the charge, they admit what happened, they provide some evidence, ...).

As a matter of theory, once you have decided the amount of the fine S on the basis of those criteria, we know that **the actual amount of the fine we apply depends on 2 other variables**:

1. The probability of finding out the anticompetitive behavior
2. My ability to prove it

These probabilities are lower than one: if the event is certain, the probability is 1; if an event is not certain, the probability is lower than 1. The maximum amount possible is actually always higher than the real amount we apply, because the maximum amount possible is multiplied by numbers that are lower than 1. Therefore, there is a strong interest among Authorities in increasing the ability to find out arrangements, and the ability in proving them, and that's why in EU we got a **leniency program**: cartels are the most difficult infringement to find out, because firms know cartels are forbidden, therefore they hide them. It may happen that you make a distribution agreement, which happens to be anticompetitive, but as distribution agreement may be pro-competitive and anticompetitive, firms do them in a clear way, concluding distribution agreements without hiding them, because they think of them being lawful. As a general matter, distribution agreement is always lawful. **Cartels are always unlawful** on the contrary, and firms hide them, and this is why we created the leniency program that works in a way that firms who run to the Authority by saying "*I took part to a cartel*" is entitled to get a full reduction of the sanctions (full immunity), whereas the second commers have a right to get reductions depending on the kind of evidence they provide the Authority with.
We saw in antitrust we got two kinds of **monetary remedies**:
§ ***Fines***
§ ***Damages***
How do they coexist? How is it possible we have these 2 kinds of monetary remedies existing at the same time? Remember the **perfect competition model**: suppose that because of the anticompetitive behavior, we achieve the **anticompetitive equilibrium** deriving front the cartel or from the abuse of dominance. We have a higher price and a lower outcome. When an Agency within a system of public enforcement applies a fine, it is as if the fine was the counterpart of the dead weight loss: the idea is that behavior has produced inefficiency which regards the whole society, therefore you have to give something back to society: the behavior has produced inefficiency by harming the well-functioning of the market, and the inefficiency regards all of us, therefore the public Authority defending the interest of the market asks for **fines**, which are meant to give back to society what the unlawful conduct has taken away.
Damages are meant to give back to each individual the overcharge they have paid in order to buy the product.



How do damages coexist with fines? **Damages** are meant to redress individuals for what they lost (the so-called overcharge), whereas **fines** are meant to give back to society the dead weight loss.
Let's wrap everything up: we have studied the notion of **antitrust law**, which is a set of legal rules aimed at preventing firms from harming the well-functioning of the market. We use economics to understand what the well- functioning of the market is: as a consequence, a firm violates antitrust law when it reduces output, increases prices, reduces quality, variety or innovation. There may be other way of conceptualizing antitrust law: we may use antitrust law not only to protect efficiency and innovation, but also to protect other values (fairness, equal right distribution, workers, consumers, environment, privacy, ...).

We discussed about the enforcing systems which are the systems of rules we apply in order to understand who applies antitrust law, and what kind of remedies you can get once a violation of antitrust law has been established.

NOTION OF UNDERTAKING:

Let's get to another basic concept of antitrust, the notion of **undertaking**. Why do we deal with the notion of undertaking? Sometimes, we will talk about undertakings, some others we will talk about firms or even companies. We deal with the notion of undertakings because if we read **articles 101 and 102 TFEU**, they say we punish cartels, agreements and associations of undertakings. Our issue is to understand what an *undertaking* is: we have to understand what the scope of antitrust law is "***ratione personae***", meaning *on the basis of the individuals involved*. Who is the final interpreter of the Treaty? The ECJ: over the years, the ECJ defined what an undertaking is.

An undertaking must be an entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. An **economic activity** is any activity consisting in offering goods or services on a given market. The various activities of an entity must be considered individually. If we consider some of them as "*non-economic activities*", still we can consider the other as economic activities. An undertaking is to be considered as a **unitary organization** of personal, material and immaterial elements which pursues on a stable basis a certain end of an economic nature and which may contribute to the realization of an infringement envisaged by that provision.

These definitions altogether define what an undertaking is.

We commonly say that **our notion of undertaking is functional**: differently from what happens in business law, here we are not interested in listing the features an undertaking should have, we don't focus our attention on the elements that something should have in order to be considered as an undertaking. Our point of view is → **whoever can infringe antitrust law, that is an undertaking** → *whatever is capable to harm a competition, it is an undertaking*.

This is a **functional notion of undertaking**: we don't list its features *ex ante*, we know what we want to prevent, mainly the harm of competition and whoever is able to harm the competition, that is to be considered as an undertaking.

Let's look at the first 2 notions of undertaking:

- An undertaking must be an entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. It doesn't matter whether you are a company or a human being, it doesn't matter whether you are a listed company y or an individual company. It doesn't matter whether you are State owned or not, it doesn't matter whether you received fundings from individuals or companies. None of these features have a say, the point is whether you are engaged in any economic activity.

  Why are we so worried in discovering if somebody is engaged in an economic activity or not? Because the only ones who can harm the competition are those ones engaged in economic activities. If I have 1 million euros and I make a donation, I'm acting out of solidarity what harming, even potentially, the well-functioning of the market. The idea is: as our goal is that of preventing a competitive harm and an antitrust injury, we look for those who can harm the well- functioning of the market, and to do so, you must be somebody who develops and carries out an economic activity.

We can now understand the second definition: the economic activity is the act of offering goods and services to the market! What is crucial in this definition? Not the act of offering, but the fact that you offer goods on a given market, always according to the market rationale and logic.

Consider digital companies, they offer their products and services for free. Do Facebook and Instagram carry out economic activities? Yes, they do, because the products are not given for free actually, but they are exchanged for personal data. Their activity is economic because it makes sense, because any rational agent would engage in that activity as it is carried out at market conditions, meaning expecting something back.

The Google case:

Google offers *Google search*, which is free at first sight. 10 years ago, we didn't know Google was collecting data: wasn't it an economic activity? The answer would be "*no, I would have kept on saying it is an economic activity: you do not offer such service globally if you don't find a way to get a profit out of it, and you won't have other people competing with you to gain something by doing the same activity as Google's*". It's not about making profit, the point to whether it is rational or not for human beings to be involved in

that activity, and the answer is *yes if they get something in return*. What do they get back for their services? Google is paid by advertisers, and they are paid by data that are collected from users. Economic activity in the end is an activity that mirrors the market's rationale and logic: the economic activity is something that tries to get a profit, creating its market with its consumers, given some resources.

Let's give an example of non-economic activity: think about **INAIL**, which is a pension fund created to guarantee a minimum pension to any worker. They are managed to guarantee this equal amount of money, they are not created to gain a profit: they are designed in order to give everybody at least a minimum pension for the stake of equal wealthiness distribution. When we do antitrust, we don't care about civil code: we don't care whether an institution is considered as a legal person or not: if you donate something, you are not in the market. The act of donating does not belong to the market logic. Think about undertakings: we may have undertakings making donations for social needs in order to be perceived as good: still, those acts of donation are not in competition with other economic activities that do follow the market logic.
"*Please, tell me if this entity is an undertaking or not*", firstly I should understand whether or not they carry out an economic activity: if the answer is "*yes*", that is an undertaking, otherwise it is not. Suppose that entity (or human being) works at the same time in different markets: it produces candies, but at the same it purchases sugar from somebody else. The ECJ says that if somebody is not an undertaking in one market, that doesn't mean that it cannot be an undertaking in another market.
Suppose I am a **hospital in Italy**, I provide health services out of the market: our health system is a universal one, anybody in Italy has the right to be treated in a public hospital, even if he or she is not Italian. When they provide people with health services, they are not undertakings. In the market for health services, public hospitals working within Italian health system are not undertakings: those hospitals though buy lots of things, such as drugs, papers, pens, machineries, and when they work in the market where they collect resources, they do work as undertakings.

When they buy drugs, they may be consumers for pharmaceutical companies, or better, they are undertakings buying pharmaceutical products, and they stipulate agreements to reduce the cost of the input. Hospitals can join together in agreement to ask for lower price to pharmaceutical companies. This is subject to antitrust law, in doing this, hospitals are undertakings: the same entity may be an undertaking in one market, and it may be not an undertaking in another market. I have to base my analysis on a **case-by-case basis**, I have to understand whether the entity is engaged in an economic activity or not in that particular field I'm considering.
Undertakings are unitary organizations of personal, material and immaterial elements: the notion of undertaking is functional, *whoever and whatever is capable to harm competition, that is an undertaking*. We are looking for a ***center of interests that can be interested in harming competition***.
Suppose to have a **group of companies**: we have the mother and the daughters, the company that controls the other companies. This is considered to be as one single undertaking in antitrust law, we do not distinguish among different legal persons, the group altogether represents a center of interests, it is interests in harming competition or not. There are some exclusions, but the general idea when it comes to antitrust law is that although there may be different legal persons (company A, company B, company C ,...), if they all below to the same group, I look for the **single economic unit**, I consider them all belonging to the same undertaking because I look for the idea they pursue the same economic interest.
This means a lot: suppose we have a group of companies (A, B and C), suppose A controls B and C at 100%. Suppose that in t0 company B violated article 101; suppose that in t1 A violated article 101. B and A had 2 different conducts, still in a range of some years they both violated article 101. I can apply recidivism to A because of the behavior of B because they are considered as one for an antitrust person: we see the **single economic unit Alpha**, and not the single companies A, B and C. Antitrust people don't see three guys A, B and C, but just one guy, Alpha.
Suppose we apply the fine to B, and B does not have money to pay me: we can go to A and C, for antitrust people we don't say they are mutually liable, but they simply say that they just see Alpha, therefore in our understanding we apply the sanction to Alpha: due to the total control A has on B and C, I consider it to be a unity.

What if we have 51%? It wouldn't work like this: if we still have a majority control, but not total control, we cannot presume once for all that they all belong to the single economic unity: did B receive some orders to violate antitrust law? Was A aware of what was going on? If the control is not 100%, we look at the effects, trying to affect whether there is a single economic unity or job. If the control is 100%, we assume that there is a single economic unity.
This conceptualization of the single economic unity is important also for the safe of companies. We got A and B, with A that has a control over B for 100%. Suppose they make an agreement whereby B will provide A with the product X at a price of 3, where 3 is lower than the marginal cost of producing X. The price A pays is lower than the cost of producing the product X. Under some conditions we will see, I could wonder whether this agreement is lawful or not, whether it is competitive or anticompetitive. Abuse of dominance? We can discuss it. Still, B and A belong to the same economic unity, and in order to have an agreement, we need 2 undertakings: if we have just one undertaking, we cannot have an agreement! This is what we call "**intra-firm theory**": if 2 legal persons or human beings belong to the same economic unity, there cannot be any agreement, since they represent the same center of powers. They don't meet the plurality conduction according to which in order to have an agreement you have to have at least 2 undertakings.

1 **According to the case law**

- In order to be an undertaking an entity must be "engaged in an economic activity, irrespective of its legal status and the way in which it is financed" – *see Hofner and Elser v. Macrotron GMbH*, case C-41/90 [1991], § 21
- **An economic activity is any activity consisting in offering goods or services on a given market** – *see Pavlov*, case C-180/98 [2000], § 75
- The various activities of an entity must be considered individually. If we consider some of them as "non-economic activities", still we can consider the other as economic activities – *see Selex sitemi integrati spa v Commission*, case T-155/04 [2006]
- An undertaking is "a **unitary organization** of personal, material and immaterial elements which pursues on a stable basis a certain end of an economic nature [and] which may contribute to the realization of an infringement envisaged by that provision" – see *Akzo Nobel NV v Comm'n*, case T–112/05 [2007] ECR II-5049, §§ 57–58

2 **Therefore,**

The notion of undertaking in EU competition law is traditionally described as functional, because its boundaries are defined in light of the goals that EU institutions pursue when they apply Articles 101 and 102 TFEU. More to the point, given that EU competition law sanctions unilateral or multilateral business practices that are capable of altering the functioning of the market, **an undertaking is any natural or legal person capable** of putting in place those business practices – that is, of behaving so as **to limit the available output, increase the market price, reduce the quality and variety of the offer, and/or slow down the rate of innovation**. Thus, to hold that a person is an undertaking, **it does not matter** whether that person:

1. is a human being;
2. is incorporated under a national company law,
3. has any other legally recognized form,
4. is owned by a Member State,
5. is financed with public founds,
6. is intended to earn profits. It is enough that the firm is subject to market forces (demand and supply) and carries out its activity to cover its costs.

What matters is that the physical or legal person at hand is capable to harm competition.

CLMG – EU Competition Law 3

3 **In details, when wondering about the qualification of a person …**

First, one must assess whether, in the specific scenario, **it would be rational** for the natural or legal person at stake to carry out an economic activity – that is, an activity that consists of offering goods or services in a given market. In other words, to be qualified as an undertaking, **the person involved in a potential antitrust case must perform a behaviour that makes economic sense, one that any rational agent would consider worthwhile in the given market scenario**. Very often the answer to this inquiry is self-evident because, at least in principle, the activities subject to the scrutiny of antitrust authorities imply expected benefits that are higher than their expected costs – that is, they are performed with the purpose of covering expenses and remunerating investments.

Still, there are two exceptions.

- The entities carrying out **pure solidarity-laden activities** are not undertakings, because no rational agent would ever devote time and resources to them! For example, state-managed pension funds are not undertakings, when they work to redistribute wealth among their members, i.e. when they calculate the amounts of pensions regardless the connected contributions. In other words, **if the activities are not carried out under market conditions but instead under the solidarity principle, there is no market at all, and thus there is no competition to be distorted or an undertaking within the meaning of EU competition law that can distort it**.
- Likewise, no person gives rise to a system of rational economic exchanges capable of being qualified as a market when he or she is called on to **perform a task in the public interest or in fulfilment of an administrative role** (such as anti-pollution or funeral services or such as air space control). In such cases, the activities at issue are **within the purview of Member States**, whose decisions do not fall under EU competition law but – at most – under state aid control.

CLMG – EU Competition Law 4

If a company carries out a task in the purse of a public interest, it's true that is a company, but it is a peace of the State, and that's why **we do not apply antitrust law**. Let's make a case of the ECJ. Suppose you are the municipality and have to deal with funeral services. Your resources are not enough, you don't have people, and you ask a company to do that for you. In running the activity of burying people, that company is doing something in the public interest, not necessarily according to market logic or not: they are taking the place of public officers, and they are working as if they were public officers.

Another example, there are companies who do air space controls: they guarantee that when airplanes fly, they do not crash with each other's. In some countries, these companies work as if they were bodies of the State, and in such case, we do not apply antitrust law: it doesn't depend on the ownership of the company or on who gives funds to the company, but it rather depends on the activity that is carried out, and if the activity is in the purse of the public interest, that is not an economic activity.
You make your analysis market-by-market: if somebody is an undertaking in one market, that does not mean it is an undertaking in another market. The final conclusion is that a firm may be an undertaking within EU competition law just in relation to some of its activities.
Finally, in characterizing a person as an undertaking, the "criterion of the minimum efficient unit" must be respected: when you deal with scenarios with several persons, you must identify the minimum combination of natural and legal persons who are autonomously and independently engaged in that conduct. It would be ineffective to apply the prohibitions of Articles 101 and 102 to those who, because of

the role that they play in the economic process, belong to the same center of economic interests and are not bound together in a competitive relationship that they could limit or distort. If we all belong to the same economic unity, why should limit competition among ourselves, if we all have the same interest?

4 **Therefore,**

- the EU institutions consider as belonging to the same single economic entity:
  - **legal entities** that, subject to the effective (legal and factual) control of another legal entity, pursue the latter's commercial and strategic interests. In particular, in the EU unincorporated divisions and wholly-owned subsidiaries are deemed to belong to the same undertaking, because it is assumed that they pursue the same economic interest of the parent firm. Instead, as to not wholly-owned subsidiaries, they form a single economic agent with the parent corporation *if* this last exercises a determinative influence on the incorporated subsidiaries.
  - **an entrepreneur and its commercial agents** when, *in dealings with third parties*, the agents do not bear any autonomous business risk and therefore have no financial-commercial interest distinct from that of their principal; and
  - **the employer and its employees**, as the relationship of subordination requires the latter to act as auxiliary instruments of the former *in commercial relations with third parties*.

Employer and employees: this is the big issue. The law says that employer and employees do belong to the same undertaking in the relationship with third parties. If I am a worker in a firm that produces sugar, there is no difference between the industry and I when the company sells its products. I'm part of the company, and I don't have any economic interest different from the one of the companies, I wish the company performs in the best way possible to have an increase in my wage. What about their relationship in the labor market? Remember the **principle of separation**: if I am in the market for products and services offered to third parties, they are the same unity. *Should we argue employees and employers belong to the same entity even in the labor market?* Maggiolino says no, in the labor market employees are not part of the same undertaking of their employers: there are people who says they are part of the same undertaking. In Maggiolino's understanding, *as long as we use a functional notion of undertaking,* ***since employees can harm competition in the labor market by making collective agreements, it's possible to consider them as undertakings***. In every jurisdiction in the world, collective agreements and trade unions are exempted from the application of antitrust law, but why? Because if they were not exempted, we would apply antitrust law: employees trading for their jobs are undertakings, and trade unions are associations of undertakings, and if they fix via collective agreements wages, they are fixing the price of the job!
Those who say "*no*", they say that employees are not autonomous and independent from their employer, therefore they cannot make autonomous decisions in the market. As a consequence, they cannot be undertakings. Maggiolino fully disagrees: employees obey to the orders of employers, but when they have to provide services to clients (in such case, they belong to the same undertaking), but do they have to obey to the orders of the employers in the market for labor? There is no piece of law that says employee have to accept the wage demanded by the employer, there is no piece of law saying employees are subject to the orders of employers when it comes to define the job contract. It's true that technically they can quit, but they have no bargaining power to do it: are we available to create a notion of undertaking which takes into consideration the differences in bargaining power?
Suppose we have a car producer that asks to a little company to produce a specific mechanical part of the car. The little company is completely subject to the commands of the car producers. Still, *any antitrust person would consider it as an undertaking different from the car producer*, they have an agreement with the car producer: in antitrust law, we don't give weight to bargaining power in order to consider those who don't have a bargaining power as a part of the economic unit. When we look for the different interest, it's enough to say that workers have interests different from those of the employers: workers want higher wages, employer want lower wages.
The law says that in the market for products and services offered to third parties, employer and employees do belong to the same economic unity. We can wonder "*what happens in the labor market*?", and **up to**

now antitrust las has been seldom applied to labor market: there are those who believe employees and employers are separated in the labor market, but according to somebody else they are not, and the problem in this second case is the **intra-firm theory** (if you want to punish an employer because he is abusing bias power and you consider the employees as part of its undertakings, you can't. If you want to punish an employer because he imposes non-competitional agreements to his employees if they are part of the same undertaking of the employer you can't). *Considering employees and employers as belonging to the undertaking in the labor market prevents the application of antitrust law against those behaviors, such as abuse of bias power and no- competitional agreements between employer and employees*. This is the case where Maggiolino fights against those who want antitrust law to protect workers: they say: "*they are tiny with no bargaining power: let's protect them*". Maggiolino agrees with it, but if you use traditional antitrust law and instead of describing them as part of undertakings you describe them as undertakings separate from the employers, then you can apply antitrust law to protect them in the labor market. If you use the tradition antitrust, you can do something for the stake of workers and you can do more than what you can do by using the protection of workers as a further goal of antitrust.

Now we have to deal with another basic concept, which is **MARKET POWER**.

MARKET POWER:

We have to remember the perfect competition model. Antitrust law intervenes when because of firms' practices, market moves from E* upward to E'. How is this movement possible? In order to move, firms need market power.
What is market power? Is the power of firms to increase price over marginal cost in a profitable and durable way. It is the power to move from P* to P' in a profitable and durable way.
What does is it mean in a profitable way? Any time you increase prices, you lose costumers, consumers. The point is the way you have market power, **the amount of profit you lose because of the lost costumers is lower than the amount of profit you gain because you sell your products at higher prices →** in a profitable way means that it must make sense.
Let's suppose that I am a producer of markers. I am in perfect competition. On day 1 I charge for the marker 5. What do the competitors do? They lower the price in order to have consumers going to them. They want to steal consumers from your rivals. When you increase price, you lose so many consumers that the practice of increasing prices becomes nonsense. Because of the amount of consumers you lose, you lose profits ← it is not a reasonable choice, it's nonsense.
If I have market power, I can increase price independently from my rivals, U can even increase prices without losing a sufficient amount of consumers.
"**In a durable way**" has two meanings:

- ***Administrative meaning*** → any time we apply the law in the market, as an administrative authority or tribunal we have to find it worthwhile. When we say the market power must produce durable effects, we mean that those effects must be significant to justify a tribunal to intervene, otherwise it would not be worthwhile for the enforcement system. This is the administrative meaning of durable.
- ***Economic meaning*** → when I say that I have market power when my rivals cannot undercut me, I also refer to potential rivals. Suppose that in my market there are just a few companies that cannot undercut me, when I increase the price, nobody is capable of cutting me off. Suppose that from the market and actual rivals, I do not receive any challenge, therefore I exercise market power. What if somebody enters the market with a capacity to give consumers their market at 3$? Potential rivals will be capable to demolish my ability to increase price over the marginal cost, they will enter the market and undercut me.

What is market power? It what makes firms undermine the well-functioning of the market, it's what I need to move from E* to E': market power is the ability to charge a price higher than marginal cost in a durable and profitable way.

Let's make 2 clarifications:
We do remember the notion of consumer wealthier, which depends on 5 variables: price, output (over short run), quality, variety and innovation (over long run). When they give me the definition of what makers power is, we focus on prices, one of those variables: I could rephrase the definition of market power also looking at output: still, I would convey one simple and single massage, that if a firm has market power, it can operate independently from its rivals' reactions, because even if firm reduces output under the competitive level, it can do it profitably and in a durable way. We can do it also by focusing on other variables: I can say that a company has market power when it is capable to reduce quality under the competitive level in a profitable and durable way. Remember it: after the digital revolution, people started saying the notion of market power did not fit with Digital market where many services are sold for free. Still, we can see the changes in quality: digital company does exercise market power by decreasing the quality of a product without losing consumers and without having rivals challenging them. From a theoretical point of view, these notions of market power are substitutable, and from a practical point of view, it's hard to understand whether the price is going under a competitive level. From a theoretical point of view, we can apply the option of market power even when the price is 0, such as in the digital market.

The second clarification is: how do you collect/gain market power? There are two scenarios:
1. You already have it (when the antitrust authority investigates on you, they realize that you already have that power, that you have a dominant position)
2. You gain it via agreements and mergers.

Why does antitrust law focus on abuses of dominant positions on agreement and mergers? Why are these the 3 behaviors that antitrust law forbids? Because dominant position is the case where you have a substantial amount of market power, which si what you need to move the market from E* to E'. Antitrust law wants to focus on those firms that have market power because they are dangerous and in the best position to harm the market (it doesn't mean they will do it, but it means they can do it, since they have a substantial amount of market power). Antitrust law focuses on agreements and mergers because they are tools to create and to put together market power. If we make mergers, we put together our market power → so, we acquire more chances to harm the well-functioning of the market.
Let's remember that in order to have market power you don't need to be in a dominant position.

How do I assess market power? How can I major it? Economists have developed an index, that is the "***LEARNER INDEX***" ← if you apply this, you can say if somebody has market power or not. Actually, nobody uses it, because in order to apply this index you should know the marginal cost that is an ideal variable, it's difficult to associate it to an undertaking.
We cannot major our market power. We need to find another way to understand if a company has market power or not. And what's the other way?

RELEVANT MARKET.

Definition of the **RELEVANT MARKET**. How do we do?

a) **We calculate the market shares of the firm under scrutiny.**
b) **We calculate the market shares of its rivals.**
c) **We assess the countervailing bargaining power of suppliers or costumers**
d) **We assess the barriers to entry**

This is the algorithm in both EU and US. You have to follow those aspects, starting from the definition of the relevant market.

Let's see how it works:
1. You define the relevant market
2. You follow points a, b, c and d

Let's start from the beginning.
We know that a firm has market power when they can independently from the rivals. In order to establish if this happens or not, what are we supposed to do? In order to understand if I can increase the price in a profitable and durable way, what should I know? What do we need to know in order to know if someone is

able to undercut me? You want to know if there are rivals capable of producing markers (the products I produce). I need to know if there's someone else in the market. You want to know who many rivals or companies could produce the same product.
But we also need to know if someone is able to produce alternative products. What's the point? I have to put in the relevant market not only those who produce markers, but also those who produce other tools to write. Is it correct? It depends on the product. Producers of normal pen should not be taken into consideration. We need to look at the purpose of the product. If consumers are professors that have white boards, they have a certain purpose and they need tools to write on white boards.
Suppose the consumer is a kid and he uses the marker to paint his face. He could you the marker or a lipstick → the definition of the relevant market depends on the demand. And you do it via surveys or via theoretical analysis of the tastes of consumers.
So why do we define the relevant market by looking at the demand? Because consumers are those who can switch to other products.

In real life, we distinguish two definitions of relevant market:
1. **Product market definition** → which comprises all those products and services that can be regarded as substitutable. Antitrust enforcers assess interchangeability looking at what economists call "substitution of demand" and "substitution of supply".
2. **Geographical market definition** → it comprises where the firms in questions act under similar conditions.

Demand substitution: what's the goal? Antitrust enforcers want to understand whether or how many consumers will abandon the firm under scrutiny when it increases its price above the market price. We want to understand whether consumers will switch and how many of them. The task is to identify goods and services that can substitute. How do we do it? We use our brain and take into consideration the product under scrutiny, and we start wondering what its features are and that the purpose of the existence of this product is. I make a quality analysis to understand the needs and means of consumers, and sometimes we do it via consumers surveys: marketing people are those who know the tastes of consumers.
Then there is the **SSNIP test** (simple but significant non-transitory increase price test). How does it work? We use it often. You make a simulation: suppose that the firm under scrutiny will increase the price of 0.5 cent. What will happen than to the quantity sold? Will it increase or not? If the firm A increases prices, what would happen to the quantity sold by firm B? If the price of A increases and the quantity of B increases, this means that their products are fungible. If I increase my price, consumers switch to you → for consumers our products are fungible → we are in the same market. And this is called "**CROSS ELASTICITY OF DEMAND**" → if I increase price and my consumers swarth to B, B and I are rivals.
If the quantity sold by B doesn't increases or increases in a marginal way, then the products are not fungible.

Let's give a few EXAMPLES of relevant markets: it's an EU decision about the market of milk.
There are 3 kinds of milk: fresh milk and preserved milks (UHT and sterilized milk). The EU Commission was asked to find the relevant market. Should we put fresh milks with the preserved milks?
They start analyzing consumers' preferences, and they realized that for consumers fresh milk is different from preserved milks: when you buy fresh milks, you have to drink it in a few days, whereas preserved milks last for a while. We have different prices and different competitive markets for fresh milks and preserved milks.
Preserved milks are of 2 kinds: UHT and sterilized. They exist because the industrial techniques are different: still, for consumers these differences are not material, and consumers consider UHT and sterilized milk the same, they are interested in knowing these 2 milks last for a while. This is how antitrust law works, I am not supposed to be theoretical, I have to listen at what consumers want and make choices based on data I collected.
Another example: it's about search engines. We have general search engines and vertical search engines. Vertical search engines are specialized in one specific product: Trivago is a website that can be used for specific research. What do I put within the market? Only general search engines, or even vertical search

engines, together with the searches can I do on social networking sites? Are they part of the same market, or do I have 3 different markets? This is the same for advertising: with WSJ, the question could be "what's the relevant market for advertising spaces? Just the one of advertising spaces on economic newspaper, or this goes together with the one of advertising spaces on different newspapers?" ← we cannot know it in advance, we do not have the data.

Now, let's go back to **CROSS ELASTICITY OF DEMAND** → **if I increase prices and my consumers switch to you, we are rivals**.
Once you have defined the relevant market, you have to calculate the market shares of the people there. The more the companies are in the market, the less the shares are.
If I say that in a market there are A and B, I'm available to say that it's a duopoly or to say that one of the two is a dominant firm and the other one is a tiny rival.
Suppose you increase the price of A, and you see consumers switching to B → they are rivals. You calculate the market shares and as a consequence suppose A has 15% and B has 85%.
Let's now suppose that when you made the simulation, Pa was already very high, and it was very next to the monopolistic price. After you do that, people switch from A to B. You calculate the market shares, and you see that A has 15% and B 85%. How is it possible that the price is very next to the monopolistic price and still the result tells me that A and B belong to the same market? The result of the test tells me A and B belong to the same market, and when we make the quantification of the shares, A is 15% and B is 85%: B is even dominant to A.
When we applied the test to Pa, Pa was already very high and next to the monopolistic price of A. If I have a monopolistic price and apply the cross elasticity of demand test, the result should be that nobody switches. Instead, we have many cases that say that if we apply this test to monopolistic prices, actually the test makes us enlarge the relevant market. Probably there is a maximum over which consumers switch because the price is too high. What's the moral? We do not apply the SSNIP test to prices which are already very high, because the SSNIP test will tell me there is no dominance, it gives me wrong results. The test will tell me that consumers switch, so I should conclude that the product towards they switch is a rival, is a substitute, is a product of the dominant firm. But the reason why they switch has nothing to do with the substitutability, but has to do with preservation price, so the willingness to pay of consumers for that product (preservation price).
Now, why do we call it "**THE CELLPHONE FALLACY**"? Because this problem happened in a famous case involving Du Pont. Du Pont was a US company producing cellphone. At that time, it had a patent over the cellphone, because Du Pont was capable of creating it, so it got the patent on this new wrapping material. And when they apply the SSNIP test to cellphone, they realize that many consumers switch to other wrapping materials and so they put Du Pont together with other rivals, and as a consequence, they found out Du Pont had no dominant position, because consumers and SSNIP test told them that there were many products fungible with the cellphone, many other wrapping materials. They realized, letting aside the quantitative analysis, and looking at quality analyzes, that for consumers cellphones and the other materials were not substitutable, were not fungible. Why? Because imagine going to a butcher and trying to buy a piece of meat and consider have it wrapped with another wrapping material that doesn't make you see the meat. Do you trust the two products in the same way? Transparent wrapping materials were considered by consumers much more worthwhile than the other wrapping materials. **So, consumers never switch from transparent materials to non-transparent ones, unless the transparent ones were so costly, they do not have any other opportunity, therefore they accept the other wrapping materials**.
We cannot measure market power directly; we have to find an algorithm that tells me to find the relevant market and then make those 4 steps (calculate market shares etc.). Now, we have to define the relevant market: defining the product's relevant market means understanding who, according to consumers, are the rivals to who. In order to do that, we make qualitative analyzes, and we may also consider doing some econometrician exercises. They work well, and we apply them unless we deal with dominant forms: if we were to apply the cross elasticity of demand to dominant firms, the result you will get will always be that the market is larger of how it should be. So, it's a classical result, because it will lead to consider the firm not dominant when indeed it is.
So, use econometrics but with a bit of attention.

SUPPLY SUBSTITUTION:
We have analyzed the product market by looking at the demand substitutivity. Now we have to look at supply substitution.
Actually, both in US and EU, we take into consideration, but only to reinforce the conclusion we achieve by analyzing the demand substitution. It's a kind of further investigation. What's the goal? Antitrust enforcers want to understand whether or how many actual rivals will start offering goods interchangeable with that of the firm under scrutiny, when it will increase its price above the market price.
Suppose we are in a market that is differentiated: there are different markers, not only markers for white boards, but also markers to underline words on papers. When I increase the price of my marker, those who produce highlighters switch their production and start producing markers. We want to understand whether actual rivals have the capacity to increase their own production to flood the market with their own products when the firm under scrutiny will increase its price above the market price. You always look for the same thing: if someone will be capable of undercutting you in a credible way.
How do we assess supply substitution? We take into consideration:

- divertible production: the production that can be used and converted from producing one product to producing another one
- the excess capacity of actual rivals: the kind of plans and machines that you were not using but that you start using.

Example:
Let's see an example about something we will learn to be familiar with, the market fall operating system. Operating systems are middleware. In the EU Microsoft case, there are 2 operating systems: the operating systems of PC (among them, Windows/Microsoft), and the operating systems for networks (networks are the architecture that exists and puts together different PC). The question was: do these 2 operating systems belong to the same relevant market or not? Operating systems for PC and operating systems for networks belong to the same relevant market or not? If they proved that the relevant market was only the one of operation system for PC, windows' market shares would have been 90%. If they had put everything together, the market shares of windows would have been less than 50%. In the first case we have the 102 cases, in the second one not. If I make a case against Microsoft and I want to argue that Microsoft has a dominant position, you have to find the relevant market where it has market shares that are higher than 50%. According to how they define the relevant market, they had a case or not. It was crucial to find the relevant market to argue that the market for operating system for PC was different from the market for operating systems for networks. The EU Commission argued so saying that for developers of operating systems, moving from one of OS networks to OS PC systems would have been too costly and too time consuming to be capable to undercut a price increase by Microsoft. They say: "the producers of OS for networks cannot revert their production to operating systems to PC, or at least, if they were capable to do it, it would be too costly and time consuming, therefore markets are separated".

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Let's see another example concerning the market of buses:

With regard to the market of **buses**, the Commission identified three distinct relevant product markets:

1. the market for **city buses** - designed for public transport in urban areas and typically low-floor to facilitate entry and exit;
2. the market for **intercity buses** - designed and used for public transport in rural districts and public intercity travel;
3. the market for **touring coaches** - aimed at the leisure market and, in particular, at the long-distance tourist travel market.

The Commission found evidence of considerable supply-side substitution in bus production:

- First, it was noted that intercity buses are "derived partly from city buses and partly from touring coaches," which implies that "entry barriers to the intercity bus market for a producer of either city buses or touring coaches are … very low."
- Furthermore, the Commission recognized that "the different types of bus can normally be produced in the same plant with the same machines, and there are many common components between them."
- Therefore, in sum, "from a technical point of view… provided a supplier produces different types of bus, switching production from one type of bus to another is … not particularly difficult, and most of the big producers … have a full product range." - See COMMISSION, 14 February 1995, *Mercedes*, O.J. L211/1, para 21

BARRIERS TO ENTRY:

Let's see some examples → if we think about two pharmaceutical products, ***what will be the relevant geographic market? We have to take the point of view of consumers*** → we have to consider what could be the smallest geographic area in which there are people in competitive conditions in the eyes of consumers. Could some drug against headache be commercialized at the same market conditions both in the US and in IT? Probably not, probably the markets for pharmaceutical products are not worlds market, because the drugs allowed in some countries are not allowed in some others.
We experienced this with covid-19 → some vaccines were allowed somewhere and were not somewhere else. ***First of all, there could be regulations that split the market → we have to consider them first***.
Something more in the eyes of consumers: what could change? If I buy a drug, how is it possible to learn how to use it? We read the instructions, that generally are written in our own language ← it is very difficult to assume that Italian consumers can read the instructions in English and vice versa.
When it comes to geographic markets, we take into consideration differences in languages, in cultural habits, etc.
Ex. → there was a case many years ago, where the commission was required to define the market of morning foods. Did it consider the EU as a whole single market? English breakfast is common in many EU countries, but its' not in IT and FR. EU Commissions said → when it comes to morning foods, Italy is not part of the EU market. What could be another feature that we take into consideration? Suppose there is a market for health service → I'm going to give birth to a child. What would be my relevant geographical market? Where do I go? I have to go to the nearest hospital. Instead, consider the situation where I have to go under a significant heart surgery → I could go wherever in the world in order to save my life, depending on my wiliness to pay. Whereas the market of hospitals where I can give birth to babies is a very local market, if we think about the geographical market for a very sophisticated surgery, it could even be the global market → it depends on transportation costs and distance I'm willing to cover → **we take into consideration administrative rules, transportation costs, languages, habits, cultural tastes, and what consumers are available to do**.

The geographical relevant market changes overtime → think about the banking services market. What could be its geographical spread? Right now, probably if we use online services, there could be room to argue that market for banking services is a national market, or even an European market. 30 years ago, the

relevant market for banking services was local, why? There was no Internet + they did not want to travel that far to get money, and they trusted neighbors.
→ **Every time the antitrust analysis is a case-by-case analysis, it depends on the case we are analyzing → therefore we have to take into considerations the many features that may characterize the scenario** → for ex. habits, cultural issues, language, religion, etc.

Suppose we defined the relevant market, both product and geographical market. Because of the market we defined, we can apply the algorithm →

- ***we have to calculate market shares of the firms under scrutiny*** → we take the turnover of the market, we take the turnover of the company we take into consideration, we make a division and get the percentage.
- ***we calculate market shares of the actual rivals*** → those companies that produce goods fungible to the one we produce in the same geographic area. Everything depends on the comparison of what the firm under scrutiny has and what its rivals have.
- ***we take into consideration the countervailing bargaining power of customers and suppliers*** → if our suppliers and our distributors or customers are bigger than us, even our bargaining power is not very effective → because others can give us take-or-leave-it conditions. Suppose we are a big mall or a big drug store → one thing is dealing with Coca-Cola; another thing is dealing with a local producer of cheese.

→ we are making this analysis to find out **what market power is → it's the power to behave independently from actual rivals, and from suppliers and distributors** → therefore, we analyze the reciprocal market shares and the potential countervailing bargaining powers of suppliers and distributors that could answer us.

- **Finally, we have to analyze barriers to entry**. We analyze barriers to entry for 2 main reasons. One is the reciprocal of the other:
    1. ***we want to understand for how long the market power is going to last*** → it is sheltered and defended from potential rivals who could enter the market and undercut me.
    2. → what's the goal of making this analysis? We have understood we are independent from rivals, suppliers, and customers; **now we want to understand if we are independent from potential rivals coming from the outside** and that are able to undercut us, making us lose consumers.

We have to analyze barriers to entry, which are something which protect my relevant market. How would we define a barrier to entry? **They are the cost to enter in a market, they are there to protect the relevant market** → how can I translate it into an economic definition? **They are the cost of getting started**. Suppose we want to create a network of distribution → to enter the market, we have to make upfront investment. **Barriers to entry are cost potential rivals must bear in order to enter into that market → Harvard's definition**.

What could be a counter argument coming from the incumbent (those who are already in the market) → if we were the incumbent, how would we react to this definition (which is the Harvard's definition of barriers to entry)? It's unfair! If we consider that the costs in order to enter the market are barriers to entry, we are assuming that we didn't bear them! *Instead, we should consider the barriers to entry the difference between the new cost they have to bear to enter the market, and those that we have already suffered in order to stay in the market*. The idea is → ***in order not to create unfairness between incumbent and potential rivals, one should not consider barriers to entry the cost of entering the market, but the difference between the cost incumbent have already bore, and the further incremental costs rivals have to bear.***
The secondo notion of barriers to entry was created in the 70s by the Chicago School → 20 years after the first definition → **nevertheless, the antitrust community in the US and in EU rejected this second definition**, since it was too difficult to test + too comfortable for the incumbents. For the antitrust community all over the world → **BARRIERS TO ENTRY ARE THE COSTS A POTENTIAL RIVAL HAS TO BEAR TO ENTER THE MARKET**.

For those who endorse this structural approach → barriers to entry are very much higher than how they could have been under the Chicago's definition.
Once we say it, we have to analyze it. There are different categories of barriers to entry:

- ***Natural barriers to entry*** → they are the barriers coherent to the market we are taking into consideration. Suppose you want to produce plastic. To do so, we need big plans. The money we need to create those big plans is the so-called **sunk costs** → **it means that if we don't produce enough plastic, we never recoup the upfront investment**. It means that once we enter that market, we cannot have thousands of competitors, because each of them needs a scale in order to recoup the upfront investment → because of that, the market of plastic has very high barriers to entry. In that kind of market, we cannot undertake an inner-runs strategy → you cannot enter the market, undercut the price, and go out of the market when it is not profitable anymore. Why? *Because in order to enter the market, we have to spend so much money that it will take years to recoup that*. Such markets have natural barriers protecting them. Generally, when we got some costs, we got **economies of scale** → and this is one of the most celebrated and popular barriers to entry we can read about. ***It means that in order to have a profitable business, you need a scale, and to have a scale, you have to have a market with just a few guys in there***. Economies of scale are often inherent to the structure of the market ← it means we cannot do anything against them → they are not a target of antitrust people, who cannot do anything against economies of scale, which are natural element of the market → forget about an antitrust enforcement who lowers barriers to entry when are connected to the very nature of the scale.
    - Let's give an example about **direct network effects** → we discovered them when we created the telephone networks → the utility each of us enjoys in using the product or the service, it does not depend on us → with networks, the utility we get in using the product or the service increases the more people use the network. Why is this a barrier? Because it's expensive to gain new consumers → in order to steal consumers from our rivals, we have to convince them not only that our network is superior, but also that they will join more people entering into our network and abandoning the other one. We said what network effects are → the utility increases when the number of consumers using the network increases → it depends on the number of people who enjoyed the network. They are there with my people in my market and network. Let's take the point of view off potential rivals → "in order tom enter the market, I have to create another network which must be faster, with better technology and fancier". If nobody is in the network, that network is useless. As a rival, I have to convince many people to switch from one network to another in order to make my network preferable → this is why the network is a barrier to entry → in order to challenge the position of the incumbents, we need to create a product which is not only superior, but superior enough to make a lot of consumers switch from the incumbent to us → this is costly + we need good luck as well to have this change from the old network to the new one.
    - In the last few years, we have discovered **indirect network effects (cross-platforms effect)** as well. What are they? Let's talk about Facebook or Instagram. Try to describe the relevant market for Instagram: social media, the market for social network services. The consumers are the users. What do users exchange? What do they get from Instagram? Social networking services in exchange of personal data (price is 0, still Instagram is an undertaking) → Instagram gets data attention in exchange of social networking services. How is it possible for Instagram to get money? From advertisers → these are called two-sided markets → Instagram gets money from advertisers, who pay a lot for their advertising spaces, and in exchange they get a service. It is called behavioral advertising, which consists in this: Instagram has advertising spaces on which advertisers can place their adv according to the preferences of each single users → ex. I look for make-up, and as a consequence the kind of adv I see is different from the one of another people → personalized advertising spaces is what Instagram gives to advertisers. Platforms enjoy direct network effects → why? Because we join Instagram if the people we want to follow are on Instagram. The utility increases the more people use Instagram. Instagram enjoys

indirect network effects as well → what are they? The utility that advertisers enjoy in being on Instagram increases the more users are on Instagram → platform effects work like that → the utility of one group of individuals increases the more units of other individuals are there. Handbook example of this: clubs. How is it possible that females enter in disco for free, whereas males usually pay? Young boys were there because women were there → the club attracts women to be there in order for men to be there as well, and this is the indirect network effect → we create a SKEWED STRUCTURE OF PRICES.

Why are indirect network effects barriers to entry? Try to make the reasoning as if we were a potential rival → I'm a start-up that wants to compete against Instagram, what should I do to enter the market? I need something to ask consumers to join me, but in particular, I need to convince a critical mass of consumers to join me because otherwise I won't have advertisers to pay for me.

When it comes to social networks, they enjoy direct network effects and indirect network effects. The barriers to entry for these businesses are high, but these are natural barriers to entry, meaning we cannot do a nothing against it. Don't even imagine a case in which antitrust law tries to work against indirect network effects, because they do not derive from any behavior, they are there simply because the market exists, they are inherent to the business.

- There is a third type of barrier to entry that is natural and typical to digital market → it's the **tipping effect (the winner takes it all effects)**. There are markets where we can conceptualize the growing of market shares like that → there are markets where we conquer the overall market once we have conquered a critical mass of consumers. Suppose the overall market is made of 1 billion of consumers → if we conquer the 30% of them, because of the winner-takes-it-all effects, we will get them all. This is typical of digital markets (think of BeReal). If I am a potential rival, I'm interested in getting into the market in between t0 and t1 → but after t1, once somebody has conquered it, my interest, and my ability to enter into the market decreases, because the market has already been conquered by somebody else → in order to challenge them, I should do a lot. Still, this is once again a natural barrier.

  Let's repeat it → the winner takes it all. Consider a market where at the beginning there is a lot of fight against different companies trying to conquer a critical mass of consumers. Once one of them is successful in conquering the critical mass, maybe just because of luck → that company will take it all, winning the competition → market share increases in time. After we gain a mass of consumers, we get it all. This is problematic for potential rivals → they know they have to enter the market before the tipping point, otherwise after that it will cost them a lot of money to make consumers change their minds.

- **Administrative barriers to entry (or legislative barriers to entry) →** if they tell us that in order to produce a pen, we have to comply with anti-pollution requirements, those are legislative barriers to entry → costs imposed by the law and by some administrative authorities → compliance costs that must be paid in order to produce products and services in a legal way.

Let's focus on a specific case of administrative barriers to entry. **Let's think of intellectual property rights** IPRs → why are they administrative barriers to entry? Why is our patent a barrier to entry? Because potential rivals can't enter the market until the patent is expired. Either you wait 20 years (duration of a patent), or we have to invest a lot of money to find another way to produce a similar product to make consumers switch to our product. If I get a patent, am I a monopolist? Patents exist to remunerate investors for their investments. If I'm the patent holder, I'm the only one allowed to produce one given product → but that does not mean that my product is the only one that meets consumers' preferences → we may have many patent holders in the same relevant market → ex. drugs for stomachache.

When it comes to IPRs we always have to remember that there is a difference in being the only one allowed to use a given technology and make a given product, and being the only one to be capable of meeting the demand → it may happen that a patent holder is also a monopolist, but do not take for granted that in order to enter the market we will need to get around, to invent around the given technology the patented won and we cannot take for granted that we will wait for the expiration of the patent → what we know is that my cost for entering the market will be higher because we will be asked to

create something different → it could be costly, or not so costly according to the kind of demand we have to meet.

- **Strategic barriers to entry**. Suppose We go to the mall, we look for biscuits → we got biscuits with eggs, others with chocolate, some others with milk, but also biscuits without chocolate, without eggs and without milk, and so on. We go to the supermarket, and we figure out one company (let's think of Mulino Bianco) produces a great variety of biscuits. Why do they do so? Why do they fill the range? Why do they produce so many differentiated biscuits? To meet the tastes of whoever! In doing so, they increase variety → when they fill the range, they increase variety, therefore they increase innovation and also the quality of their products. Thinks as if we were a potential rival → Mulino Bianco is taking options away from us, "you don't leave me space in which I can produce in order to enter the market" → potential rivals have no space, or if they enter a niche, they have to face the incumbent (in this case, Mulino Bianco), or a fortiori, if they want to fight against the incumbent, they have to fill the range as well, giving all the services and products the incumbent gives → this action (filling the range) that is good for consumers, is at the same time arising rival cost strategy, which is a barrier to entry → this strategy that increases consumer welfare at the same time is rising recall cost strategy.

→ antitrust law does not intervene against administrative barriers to entry. They are not the result of firms' behaviors, they come from government, and antitrust law does not intervene against governments nor states + antitrust law does not intervene against natural barriers, because they are inherent to the structure of the market. The question is: as this is a business conduct and a firm's practice, should we intervene against it? If a firm undertakes a fill-the-range strategy, suppose that the firm is dominant, should we prohibit this practice? Or should we allow it because it increases consumers' wealth? Can antitrust law intervene? Yes, because we are talking about firm's practices. Should antitrust law intervene or not? In the long run, we will have a consumers' wealth decrease → because of lack of competition, the incumbent will keep on charging high prices → it is possible many companies produce so many products and services. Why do they fill the range? There is not a legal solution, there's nothing in the law that says what we should do → we should try to think as if we were policymakers → would we sacrifice the consumers' welfare increase in the short run for preventing the consumers' welfare decrease in the long run? It's better to have the consumers' welfare short run increase today than worrying about the decrease for consumers' wealth in the future → this has been established in the '80s and in the '90s.
Therefore we do not act against this kind of behaviors that were typical in the '80s. These strategies were common in the '80s and '90s in the mass production society → they said it was better to guarantee consumers the welfare increase in the short run instead of worrying about the arising-rival-cost strategy, and as a consequence the consumers wealth decrease in the long run → also because it's just an hypothesis, we assume that the missing entrance of rivals will cause bad consequences to consumers, but this is just something hypothetical.
Agencies and authorities do look at the short run more than long run, because we have to live day-by-day. But probably, this approach is changing with the digital society → on Apple, we have Apple Pay, iTunes, iMusic, Apple TV, …→ we are loyal to Apple. How does Apple focus on it? How does Apple guarantee this fill-the-range strategy? All Apple products are compatible. They work on technological compatibility to increase our incentives to stay there, in order to lock us in → locking effects → we are in the Appel world, and we chose Apple at the beginning because they were batter. Now, we prefer Appel over Samsung because of its compatibility → Apple fills the range giving consumers a full experience. We enter the Apple word, and they try to give us everything we want. Google does the same as well, and Amazon is doing the same. This fill-the-range strategy, common.

ECOSYSTEMS:

In the '80s and '90s, is still very common in the digital world, and it's one of the elements of the ecosystems, one of the pillars on which ecosystems are based. Are we still interested in consumers' welfare increased in the short run? Our tradition pushes us to say → "it's true, when these ecosystems envelop new products in their ecosystems, they raise rivals' costs and so barriers to entry, but at the same time they increase consumers' welfare". Our temptation is to say: "their strategies are fine; consumers' welfare increases in the short run". But the number of people that is willing to argue: "look, we are not taking of

biscuits, but of things that could last for 20 years → there is a monopoly there" → they stress the idea to consider long run as well. There is the tendency to bring the long run perspective into the analysis. ENEL-Google case in IT → the Italian competition authority decided to fine Google for abuse of dominance, by having in mind the long run effects that this abuse of dominance could lead to. As it is a policy decision, we can change perspective according to the different scenarios → still, our stare decisis theory brings us to say that we look at the short run. What if we prohibit this conduct? What if we say to biscuits' producers "stop filling the range"? As a consequence, what would be the effect of that choice? No big firms would have the incentives to keep on investing in innovations, diversification, quality and variety!

CASE OF ECOSYSTEM:

We started talking about ecosystems. We said that there are a few big ecosystems (Apple, Google, Amazon and some other big tech companies). First of all, consider that ecosystems are complex systems of hardware and software that stay together because they are compatible with each other. So, the point when we talk about ecosystems is that they are interoperable systems of components → **interoperability** is the technical feature that characterizes them, as compatibility is the feature of every durable good. think about razors and blades ← they are compatible from a mechanical point of view. Compatibility is a key element of many durable product, and it has become even a more important element of software, hardware and digital products ← we talk about **interoperability**.
Second, ecosystems are systems that put together products which are very different one from the other → es. Google is a system for exchanging emails, for paying money etc. it put together many different things. *They put together different products and serviced that for people from 21° century are very different among others*.
Apples gives you iTunes and gives you a payment system as well and no bank does the same.

Then, why do companies differentiate their products and services? In order to differentiate the risks and to have good turnovers. Then, they give you consumers full range experiences; they give consumers whatever they like. Once consumers got into an ecosystem, many of their desires and needs are meant.
Finally, **ECOSYSTEMS ARE COLLECTORS OF DATA**. Because of that, **they can exploit a knowledge advantage** → these big companies collecting data both personal and non-personal data (not only data that are protected by personal privacy) do analyze them. Once they analyze them, they can provide a lot of inferring information from those data, and on this information the build up their knowledge.
How was possible for Apple and Google to enter the market of payment systems? This was a market dominated by banks that have all the data of money transactions, about the money habits. Because of that banks had enough experience to know what kind of offers and services offering to clients.
That experience was built up on years and years of knowledge. Those companies entered the payment market only in a few years. How was that possible? Because they analyzed data and by analyzing data, they were capable of profiling consumers and understanding what kind of services consumers want to be provided for.
In addition, they were capable of developing technologies + they had the capital, the money to make such experiments. When you are very rich you can run the risk of having a big failure (like Google + that was a failure, but Google could afford it).
For digital companies it's common to develop many innovations and make mistakes and still have people and investors available to invest money in their systems.
Ecosystems are all these things together with all these features.
Because of these features, they can exploit the knowledge they have to see new opportunities faster and better than rivals. They can understand where the market can go, and they can do it quickly and in a better way than rivals.
They benefit from **economies of scope** → because consumers' utility grows when they enjoy interoperable products and services, and on the supply side, because platforms' new products/services are adds-on items, using sharable inputs. Consumers utility grow because they use products that are interoperable with each other.
Why is this a barrier to entry? In what terms? Why is this an economy of scope? In order to understand if something is a barrier to entry you have to take the point of view of potential rivals. **Why is interoperability**

a barrier? Because if you offer a product that is not compatible with the others, you do not enter the market. For you, creating products compatible with each other is easy**, for the others to create products compatible with you are costly and it requires the other to ask you a permission, because you need the code of inter compatibility (APIs).**
Overtime is less and less costly because you have economies of scope. For the others, the more time passes, the higher costs they suffer in order to enter the market.
Consumers enjoy having products that are compatible among each other. For Samsung the idea of getting an apply guy to switch to android compatible products means to ask him to change the computer, the smartphone, the television and so on.
Because of this, and because of the knowledge they have because of the data they collect, ecosystems have strong incentives to enter ever new markets and can do so at a lower cost than rivals, and they can do it quickly. They try to be all over the places. The faster they act the better they stay, since they can exploit tipping and winner-takes-all effects. Digital markets are characterized by these effects.
In addition, they try to enter new markets also because they always fear that the others will find in another market the technology that will be capable to disrupt them. Many of them believe that at a certain time one can enter the market and displace them by a new revolutionary technology. They always try to be at the cutting edge of technology in order not to be displaced by the others.
They try to get in new markets because in every new market there are potential new consumes than can be enveloped and can be a source of knowledge advantage.
There is nothing unlawful here: to create an architecture of software and hardware that are compatible among each other's is totally lawful. In our tradition, we look at consumers' short run welfare: how the market could develop in the future doesn't matter. When we'll do exclusionary conducts, we will say why collecting data is not exclusionary.
These features are natural barriers: as natural barriers, nothing of this is unlawful. This is how it is.

Nevertheless, is the existence of ecosystems problematic? Many people say no, because they have brought to market new products and services and then because the new entrance in the market has represented a challenge to the incumbents which often were the old economy incumbents → the entrance of Google, Apple and Amazon in the payment system market has challenged the incumbents. Still, this is fine, you increase innovation, and you increase wealth.
On the contrary, other people that are still authoritative think that these ecosystems could be problematic, since they are growing and they are set to grow, because of the way they work and their incentives. They fear that in a few years we will have just a few ecosystems competing with each other's and nothing more. In next future, we may have 6 ecosystems driving the economy, and then many other companies being suppliers, distributors, but always behind the ecosystems. They are worried because ecosystems hold a tremendous power, which is not only market power, but they also hold a significant amount of economic power: they are rich, their turnovers are higher than the PIL for many countries.

Antitrust law can do just a few things against these big companies. Why can antitrust law do just a few things? Because it can forbid unlawful exclusive dealing contracts and unlawful tie-ins, but not much more.
The accumulation of data is fine, and as a consequence we cannot impose data sharing. Antitrust law works against market power: market power can be assessed by making market definition, which is focused on one single product or service, it does not work ad cross products and services.
Suppose we consider Google, which has a dominant position in the search engines market. Aside from this, where does it hold a dominant position? Not in many other markets, but its' everywhere: it's in the fridge market, in the market for smart devices, in the market for televisions and so on. But still, it holds a dominant position only in the search engines market. Antitrust law cannot go after the effect that these big companies are everywhere and can grow in the future in these markets. Antitrust analysis takes years. Google shopping took 7 years, and it if takes 7 years to decide a case, you decision is useless. So what? This is why in EU and in the US as well legislators decided to deal with these ecosystems by using pieces of regulations which are supposed to be companies of antitrust law → they do not focus on specific conducts such as agreements or abuses of dominance, they try to work on the structure of the market, and then on some conducts which are deemed unlawful ex ante, and not ex post as antitrust law does.

Right now, what I'm supposed to know is that we have ecosystems, and that antitrust law is not dude at controlling they behaviors, therefore in the EU the EU Commission has decided to create an ad hoc piece of legislation (the Digital Market Act), to govern and exercise an ongoing supervision over those big tech companies.
We say it all to have an idea on how antitrust people work with barriers to entry. This is the starting point of the great majority of antitrust analysis: you look at the firm under scrutiny, and you try to describe what the company does, what is the rational underpinning its conduct, and why the conduct is so profitable for the company itself. This seems to be economics, but still its' a way to understand the business. If I do not understand the business, I cannot realize why companies do what they are doing.

ART. 102 TFEU:

When it comes to art. 102 you have to remember that it is about abuses of dominant and it's made of 2 main elements:

1. **Dominant position → structural element**
2. **Behavioral element, that can come in 2 shapes:**
    - **Exploitative abuse**
    - **Exclusionary and anticompetitive abuse**

If you are a claimant, a plaintiff, and you want to show that someone has violated art. 102 you have to show first of all that that company owns a dominant position of the company (structural element) and then you have to show the behavioral element, that can come in two shapes.
There's no subjective element. It includes any subjective elements among its building blocks, I don't have to show the intent or whether the company was negligent or not. The subjective element matters only if I want to get fines → if I want to impose fines, I have to prove either intention or negligence. I don't have to make any reasoning about the mental element of the conduct if I simply want to prove that there has been a violation of art. 102.
The drafters of treaty of Rome thought those wrongdoings are so serious that they did not want anybody to be able to escape for the fact plaintiffs are not able to prove the mental element.
When you will read the cart decision or the authority decision you will stumble in words such as "the company intended to do so" → when authorities or judges write their decisions, they use words that have to do with the intent, but they don't regard the state of mind of the company they address the economic rationality that the company has followed in engaging the conduct.
While reading antitrust decision you can find many words addressing the mental state of companies, but **while taking into consideration the violation of art. 101 and 102, you don't have to take into consideration any subjective element**. Those words are meant to describe economic rationality underpinning the companies' decisions and conducts.

STRUCTURAL ELEMENT → suppose you are a lawyer, and you want to contest an art. 102 violation. You first of all say that the company owns a dominant position → **a company owns a dominant position when it holds a significant amount of market power**. The difference between this and market power is a quantitative difference, not qualitative. How can I assess the holding of market power? In this way, I follow the algorithm we already talked about:

- ***You define the relevant market***
- ***You calculate the market share of the company under scrutiny, and you have to verify that it is at least 40%***
- ***You look at market shares of the potential rivals***
- ***You analyze the bargaining power of suppliers and customers***
- ***Finally, you analyze the barriers to entry***

I follow this algorithm to assess market power → I will establish the existence of a dominant position by combining all these elements. Back int he 90s, when he EU Commission opened up Microsoft case, they

said Microsoft held a dominant position in the market for operating systems for PC: Microsoft had 90% of the market, super dominant position. Microsoft tried to argue it was not true.
First, they tried to argue the relevant market was different, giving a broader definition of the relevant market, trying to put in the market also operating systems for networks. Then, it tried to argue that actually that 90% was not enough to hold that Microsoft had a dominant position.
Suppose we were the lawyers of Microsoft: they told I have 90% market shares, and they already decided the relevant market is the one of operating systems for PC. I cannot discuss the mathematics: my turnover split the overall turnover of the market makes 0.9. still, I want to prove I don't hold a dominant position. What could be a good argument? Let's go through the steps of the algorithm:

- I cannot contest the market share of Microsoft, I cannot either contest the market shares of rivals. How would I try to discuss that the 90% of market shares is not a dominant position? Who are the suppliers of Microsoft? Think about the industry for PC: what does Microsoft do? Software, and an operating system is a middleware. Who are Microsoft's suppers? Companies that produce hardware. Hardware, middleware, and software, this is the chain. One PC costs 1.200$: the price of hardware dropped overtime. Who are the producers of hardware? Dell, Acer, IBM, Mac, Sony, HP and so on. They are many, competition in the hardware market was strong, and the price of hardware dropped down overtime. Software are very cheap. Guess who applied a monopoly price over time: around 350/400$ for any computer, and this was Windows. Consumes never had the idea of the price of the middleware, because although the price was high and constant over time, the price of hardware dropped down: consumers had the perception the cost of PC was going down as well, but it went down because Microsoft held a monopoly.
  The suppliers of Microsoft were not so powerful to make it change the price and to limit its market power. The customers of Microsoft were the customers of the hardware + middleware which were manufactured, and they were many. What did the lawyers of Microsoft say? The market for computers, software and hardware changes so much over time. They argued that 90% does not mean anything, because competition is a takeaway. In a few years, we will have hand devices on which consumers will work out the operating systems for desktop will be displayed by the operating system for hand devices. The argument of Microsoft was good for 2 reasons:
  A) they focused on the displacement effect (I'm now today, but what about tomorrow?)
  B) they guessed it right (after the introduction of tablets and smartphones, Microsoft market share fell down, and Windows has no monopoly).

Google android is now holding a dominant position. But the EU Commissions said: Microsoft has been holding dominant position for 10 years, we don't know when this switch will happen. The switch did happen, but almost 15 years after the time when Microsoft case took place at the end of the 90s.
Remember that to demonstrate the existence of a dominant position means to go through the algorithm and check all the requirements and to contest it you can use all of them. To argue somebody has a significant market share is not enough, I have to go through all the steps. Second, remember it, when it comes to innovative markets to argue that the innovation will bring new products and services is always good.
The Commission said: if I cannot see it, I don't trust it → short run look at the case and that was very significant. They said that they cannot admit that they don't have a dominant position in light of the fact that in the future someone will come and displace you. This is reasonable for an authority that has to control how firms act in the market.
This example shows us that the dominant firms always know where the market is going to go. They know the innovative paths of the market because they know the market and they have the technology to know what will happen in the future. They guess it right, as for Microsoft that guessed it right 15 years earlier. Firms know the innovative paths of the market, and this is why they have advantages over rivals. And this is the reason why they might have some advantages over competitors because they know the market better, they have the technology to know what will happen in the future.

Indeed, art. 102 doesn't prohibit the dominant position. **When we require the structural element, we say that to hold a dominant position is fine, to have a monopoly is lawful**. **<u>What we punish is the abuse of a dominant position and the exclusionary and anticompetitive practices firms do</u>**. But we don't punish

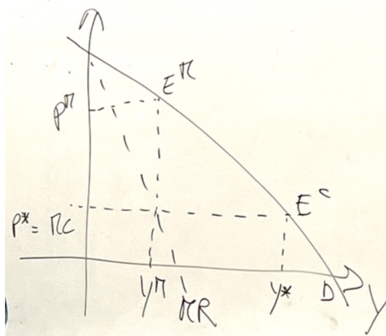
dominant position. The economic rationale for the acceptance of dominant positions is that if we consider them unlawful, nobody would be incentivized to create new products and services.
From an economic pov, dominant positions are the reward for investments, risks, innovation, competitions, and so on → nobody prohibits dominant positions as such.
There is also an historical reason why in Europe we don't punish dominant position → who owns a dominant position in 1957? USA. We didn't want to go after dominant position as such, otherwise we should have gone after the French monopoly over many markets, the Italian govern monopoly in many markets etc. too. This is the historical reason why art. 102 doesn't punish a dominant position.
It only punishes its abuses, and we have two kinds of abuses:

- exploited ones
- exclusionary and anticompetitive ones

EXCESSIVE PRICES:

If I look for exploitative practices, I have to look at letter A of article 102: "[…] **impose unfair purchase or selling prices, or other unfair trading conditions**". Imposing unfair purchase or selling prices, or other unfair trading conditions is abusive, it's an exploitative abuse. This wrongful conduct is specific of the EU jurisdiction, it does not exist in the US. Section 2 of Sherman Act punishes exclusionary and anticompetitive conducts, but it does not punish unfair purchase or selling prices or unfair trading conditions. This is specific of the EU experience for many reasons:

- at that time, we had many state-hold-companies in many member states. The drafters of TEU thought those guys should not exploit their customers, they had to behave firmly. **The prices could not be excessively high: it was a matter of fairness towards taxpayers.** Whatever they bought or sold, **they should never apply unfair prices for the shake of fairness and equal wealth distribution**. You cannot take money out of the pocket of consumers, distributors or input providers, because you are a state-hold company!
- At the same time, the idea was the following: if we have an instrument at EU level that can govern the market in this way without making differences among countries, we should use it, although in each country there are rules that prevent the exploitation of bargaining powers. In the US instead, they do not have these rules, because they assume other pieces of law can govern this phenomenon: tort law and contract law. In order to prevent an unfair trade condition, in antitrust law you have to go through the definition of the relevant market, and you have to demonstrate the dominant position. If you use contract law or tort law, it's easier and quicker than going through antitrust law.
- There is another argument why in the US they do not punish unfair prices →



if I'm a dominant firm, the price I charge is the monopoly price (PM). If you are a monopolist, it is rational to maximize my profits by applying the monopoly price (PM). Should it be an excessive price? Should it be an unfair price? It is optimal for me to apply the monopolistic price: should we say the monopolistic price is unfair? If I say it, my counterargument would be that I have invested money to reach that point. **To say that PM is excessive, it's like saying the dominant position is unlawful**. We said that holding a dominant position is lawful: what could be a solution? I do not consider excessive the monopolistic price, but *it's excessive any price that is higher than PM* → at this point, I would punish something that is not rational. But why on earth a company would ever

apply a price that goes over PM, something that is not rational? Because over PM it's not profitable anymore, because the amount of profit I lose because I lose consumers is higher than the amount of profit, I gain because of the overcharge on consumers that are still in the market. The argument of American people is → to punish excessive prices is nonsense, because either you are punishing the dominant position, or you are punishing something that firms do not apply because it's not rational. Third – the American say - even if a fool and irrational firm would ever apply a price that is higher than PM, one company would enter the market and automatically undercut the former monopolistic company.

So, in the US those two prohibitions do not exist, for 3 main arguments:

- They do not deal with fairness via antitrust law, because they are not interested in using antitrust law to guarantee fairness and equal wealth distributions
- They don't think it's rational to punish something which is rational for monopolists to apply
- They think that dominant firms will never apply prices that are higher than monopolistic price because they are rational and because if they did so, somebody would undercut them.

In EU and in the US, nobody considers monopoly evil: monopoly is fine. In EU, we punish the abuse of dominant position, and in the US, they punish the abuse of monopoly power as well as any exclusionary and anticompetitive conduct whereby they monopolize the market. **In the US, they look at the way you achieved the monopoly, and they punish you only if you monopolize the market by exclusionary and anticompetitive conducts**.

EXPLOITATIVE PRACTICES:

We started talking about **abuses of dominance**: we don't punish dominant positions, we punish the abuse of dominance, and they do almost the same in the US, where they punish monopolistic conducts or attempt to monopolize, meaning conducts whereby you acquire dominant position in an anticompetitive way. We are not going to study Section 2 of Sherman Act.

In order to argue someone has violated Article 102, you have to show the dominant position, and then I have to show an unlawful conduct. There are **2 families of unlawful conducts**:

- ***Exploitative practices***
- ***Exclusionary and anticompetitive practices***

We were talking about **exploitative practices**, described in Article 102 letter A, and they consist in 2 hypotheses:

- **unfair purchasing or selling prices**
- **unfair trading conditions**.

  Let's talk about **unfair prices**: when we talk about monopolies, we talk about excessive prices. Monopolists can charge consumers with prices that are excessively high. When could monopolists apply purchase prices which are excessively low when they have a dominant position on the demand side, meaning when they are dominant in an input market, and therefore they can extract surplus from suppliers? Suppose you are a dominant firm; you can apply excessively low wages. Suppose you are a dominant firm using wheat, you can be so dominant in that input market that you apply prices that are excessively low for that input, as it may happen if you are a drug store buying from little producers of vegetables. In such case, you may have an abuse of dominance on the side of the demand (**abuse of bihar power**: this is not very common, we didn't do it a lot in the past). We don't have many cases of abuse of dominant purchasers, but we have many abuses of dominant firms on the supply side, therefore they apply excessive prices.

  As we were saying, letter A of Article 102 that is about unfair prices and unfair trading conditions, it's an article specific of EU law, it does not exist in the US. It's reasonable to ask for the reason why there is this difference among the 2 jurisdictions. Let's see the reasons why especially in the **US** they don't want to prosecute excessive prices:

1. *Monopolists deserve to be remunerated with high prices, because they deserve that dominant position*, and if you do not give them the chance of applying excessive prices or at least monopolistic prices, you would punish dominance itself in the end, and this is not a part of the law

as long as we believe that dominance is an incentive to innovative and compete. If you punish dominance, you take these incentives away from firms.
2. Second, *markets may self-regulate themselves*: potential competitors that see the dominant firm applying excessive prices, they may enter the market and undercut the firm.
3. *To fix a fair price and say "if you are a dominant firm, it is rational for you to apply the monopolistic price. I think it's excessive. What should be the price you apply?".* At that point, if you are prevented from doing what is rational for you and then it must be up to the authorities to find out the fair price. This has nothing to do with antitrust law, which is a way of correcting prohibiting unlawful behaviors, whereas in such way, antitrust becomes a positive action whereby you impose a price regulating.
4. *We don't know what ever could be a price which is higher than the competitive price, lower than the monopolistic price, but still fair*.
5. *To control the fair price imposed would be costly*.

Antitrust authorities are supposed to work as if they were judges. They are supposed to apply antitrust law *ex post*, or while the unlawful takes place. Antitrust authorities do not make any ongoing supervision of the market. The idea is: if I punish excessively high prices, which are different from monopolistic prices, first I have to guess what they are, second, I have to control that the firm does apply them, and that's a way of regulating the market that is not specific of antitrust authorities and even judges.
The counter arguments from the **EU side** are these ones:

1. *Rarely, dominant firms acquire dominant positions because of their merits*. The EU monopolies in 1957 were State-hold companies, and not private companies that had conquered the market. They were there because governments put them there. For us, as Europeans, it's tough to conceive someone has deserved to acquire a dominant position. This is what we thought in 1957 with the European public monopolies, but this is an argument some scholars have played recently in relationship with the digital industry
2. As for the digital market, why could you argue that in digital industries monopolies do not deserve their positions? Because it's hard to enter that kind of market. And why those who are there should not deserve such position? The Americans say some firms can come from the outside and undercut the incumbent price; my counterargument could be that they cannot, since *there are high barriers to entry*.
3. What did we study yesterday? What is something that may depend on good luck, or something that may lead us to think those who are there have been kissed by luck? The **tipping effects**, which are the winner-takes-it- all effects: you need a critical mass, and once you get it, you get all the market (network effects). This idea is what some scholars use in order to say: *"they are good at innovating and competing, but still, they should not deserve the overall market and such super dominant position". This is justified by the tipping effect: we should be skeptical towards these monopolists that were State-hold companies that were there because of taxpayers' money*.
4. This is another strong argument in Europe, scholars use it a lot to justify letter A of Article 102: *they must guarantee nobody is exploited and that dominant firms do not steal consumers' surplus*. To do so, we have to put a cap to prices, or a floor on the prices they apply. This is typical of the EU Commission.

Amato, one of the most authoritative Italian scholars, he says that if we look at the US experience comparing it with the EU experience, we can tell US people do worry about public monopolies, whereas Europeans worry about private
monopolies. We prefer the State to intervene, whereas in the US they rather prefer that some private companies hold the market making some potential mistakes. Those are the reasons that explain why we have letter A of Article 102, whereas in the US we don't.
Once we have **this letter A** (we punish dominant firms if they apply super competitive prices when they are excessively high), and once we said we cannot equate excessively high prices with monopolist prices, the question is: **what is an excessive price?** We have to find out a way to establish if a price is excessively high, although it is not monopolistic. This is the test the EU Commission has developed back in the 70s in the **Bananas case**. The test is simple: *take a price as a benchmark and compare it with the price that is actually applied. If the difference is unfair, you must punish the undertaking*. The idea is: you look at the dominant

firm, you take its price, you compare that price to a hypothetical competitive price there should be (benchmark price), and if you notice that the different to me is too big and large, then I can say it is excessively high.
The test makes sense, but still, it makes me wonder about *what the benchmark price should be*. At the same time, *how do you measure unfairness?* How do you describe it? The test developed in the 70s by EU Commission is consistent with the law. We have **2 big problems with such test**:

- *What's the benchmark price?*
- *What's unfairness?*

Let's see some examples: in reality, **cases of application of Article 102 were just a few**. In 1957, the drafters of the Treaty of Rome wrote Article 102, and they were proud of it because of its political meaning. In real life, the EU Commission has not applied it in many cases, because of the practical difficulties in finding out the benchmark price and in describing unfairness.

I. What the Commission actually did overtime was to say that *in order to find a* ***benchmark price*** *you have to look at what happens in other geographical market, what happens in the past, what happens for similar products*.
 How do you create the **benchmark price**?
 1. Either you look at the price that the dominant firm applies in ***another geographical market***
 2. Or you look at the price that the dominant firm applied ***in the past in that same market***
 3. Or you look at the price that the dominant firm applies to a ***similar product at that time in that market***

Then, good antitrust people would counterargue: if you take the price form a different geographical market, either you have a single geographic market, or the comparison doesn't make sense! In order to have a geographical market, you have to have equal conditions. At the same time, if you look at the price in the past, you must consider that probably something happened overtime in between. This benchmark price is questionable in the end: in **2001**, in one of the last cases of 102, Commission said that instead of using such test to assess the benchmark price, they would take a measure of the cost, we find out an **average cost**, and we use it as benchmark price against which we compare the actual price.

II. *Then what about* ***unfairness****?* In the cases, *the Commission between the 70s and 2012 opened cases when the difference was equal to 400%, meaning when it was very huge*. Sometimes, the Italian Competition Authority applied excessive prices when it found out that the dominant firm asked for money in exchange for nothing. Telecom was used to asking a certain amount of money for nothing, and in that case, the Italian Competition Authority said this was unfair.

Indeed, in 2009, the Commission said: "*Article 102-A is a symbol, but still, we do not apply it frequently: we will write down our agenda, telling that exploitative practices are not our interests: if we look for abuses, we will be looking for the others - exclusionary and anticompetitive practices -, we do not care of exploitative practices, which are not a real problem in Europe*".
Then what? In recent times, in the UK, Italy, Germany and France, there have been **many cases regarding pharmaceutical companies** where national authorities did apply Article 102-A. They applied it in specific cases where it was clear that dominant firms were trying to apply significant high prices for drugs and treatments that were necessary to save lives. As in those cases even the patents were expired, still those products and drugs were essential to cure some dangerous diseases, the authority intervened to block the increases up to 1500%!
Letter A of Article 102 is a symbol of EU competition law, it is meant to protect fearless, equal wealth distribution against dominant firms who try to exploit costumers, customers and suppliers. Many Europeans are proud of Article 102-A. Since the beginning until 2010 though the EU Commission applied the article in just few cases because of *practical difficulties in finding out the benchmark price and in assessing what unfairness should be*. Indeed, in 2009 the Commission even published a document where they said article 102-A was not among their priorities anymore. Surprisingly, National Competition Authorities in many Member States started to apply Article 102-A especially against pharmaceutical companies that tried to apply high prices in relation to drugs that could save lives. To limit the public money spent to cover those expenses, especially in countries where the public system for guaranteeing health services is important, these authorities started applying Article 102-A for excessive prices.

Article 102-A talks about **unfair trading practices** as well. What is an unfair trading practice? The EU Commission did not apply this rule very often. What happened? There have always been a lot of conflicts concerning letter A about unfair trading conditions:

- On the one hand, we have those who want to protect fairness and justice and equity and redistribution via contractual clauses.
- On the other hand, we have those who say we should not apply article 102-A to unfair trading conditions, because we have other pieces of law we can apply to fight against these conditions in a quicker and easier way than by applying competition law.

The enforcement of antitrust law is costly and expensive, let's not waste our time in order to go after an unfair clause of a contract or an unfair trading condition if we can use tort law or contract law to punish it.
Second argument: *how should I say that a clause is unfair? How do I appreciate unfairness? it's questionable*, better not to it!
Third argument: *because of these trading conditions, consumers' welfare doesn't change* (you don't chance price, nor output, nor quality, variety and innovation). If antitrust law is meant to protect the well-functioning of the market, why should we care about unfair trading market conditions? Antitrust law should also protect fairness and equal redistribution, according to the drafters of the Treaty.
Article 102-A has been applied just in a few cases, and generally, when the clauses on which the Commission focused were unjustifiably unrelated to the purpose of the contact, they were unnecessarily limiting the freedom of the parties, they were disproportionate and unilaterally imposed, or seriously opaque. This is the list of situations in which Commission admitted that the trading condition was unfair (because it was opaque, unnecessary, disproportionate, or because it was a take-or-leave-it condition).

THE FACEBOOK CASE**:**

Interestingly, one of the best cases for the application of article 102-A could have been the **German Facebook case**. The case was decided by applying German law, it was not a case of 102-A, but it could have been. it's a digital case, an interesting and famous case that is better to know.
Facebook is a platform for social entering services. When you accept to use Facebook, you sign their privacy policy conditions. The German Court discovered that among these privacy policy terms there were not clauses specifying from which sources Facebook was taking our personal data: the Court discovered that for sure when you go to the platform, Facebook takes your data. But even when you go to another website (for example, website of Wall Street Journal) and you put thumb-up next to an article, still Facebook takes your data bringing them to the platform. When you use applications connected with Facebook, it already takes your personal data and brings them to the platform, putting all the data together. The German Court said the point was not this was unlawful, but the point was that Facebook had not told to the users what the exact sources of data were. The Court said "*Facebook, you violated competition law, since you were not clear with your consumers about your privacy policy*".
Why would it be a clear example of Article 102-A? In this case, the conditions imposed by the dominant firm would have been opaque! Look at the conditions on which Commission found Article 102-A claim: the Commission found it on trading conditions that are unproportionate, opaque or unnecessary. In such case, **the clauses of the privacy policy of Facebook were opaque, somehow unnecessary, and for sure they are imposed**. The German Court could win the case by applying Article 102-A. ***Instead***, German Court decided to apply German competition law and to argue that a breach of the privacy policy by a dominant firm is a breach of competition law. The German Court decided on the basis of German competition law to establish an automatism between the breach of privacy policy and the violation of competition law. It says: "*if you are dominant and you breach private policy, then you are abusing your dominant position*". This approach of German Court was highly criticized because if you are a dominant firm, you may violate many pieces of law: if you are a dominant firm and you don't pay your employees, or if you don't guarantee safety to your employees, this should not be an antitrust violation! The idea is that if you are a dominant firm and you violate a piece of law, that violation is automatically an abuse of dominant position as well, it's an extreme point of view many scholars have criticized by saying: "*antitrust law has its own requirements, and to have an antitrust violation you must meet the requirements. it's not enough to say that whoever is dominant when violating other pieces of law, he violates antitrust law as well*!". It would be a second punishment to

those who have already violated other pieces of law (there would be a problem of "ne bis in idem" in such case).
The appeal against the German Court is pending, we are still waiting. **From a European point of view, that would be a wonderful 102-A case**. If the EU Commission took it, they owl apply article 102-A. Under EU law, the Facebook case would be a wonderful Article 102-A case, since it would have been a case of unfair trading conditions.
Why did the German Court apply German law instead of EU law? The great majority of people thought the **Court was looking for fame**: that was one of the first cases about big tech, and they wanted to do it under German law not to go through the revision of European judges: if you apply German law, the appeals will be brought in from to national courts, and not in front of the European Court of Justice (ECJ).

Reasons for prosecuting and for not prosecuting unfair conditions

By and large, this was the EU approach, at least at the very beginning … when the treaty was drafted

Reasons for prosecution	Reasons against prosecution
Antitrust law must protect fairness, justice, equity, re-distribution	Antitrust law protects competition and not competitors .... There is an antitrust violation as long as there is an antitrust injury (i.e. harm to consumer welfare), at least a potential one
If you can intervene, better to do it … even when the risk of making mistakes is high, and even when such an intervention is expensive	It's hard to say what a fair clause should be: antitrust enforcers do not know it! The enforcement of antitrust law is expensive… better to use other pieces of law, such as tort law, or consumer protection law than antitrust, in order to protect customers and consumers

But for few minor cases, this has been the US approach

At the very beginning, the German Court tried to show that Facebook's behavior was exclusionary and anticompetitive. They didn't succeed; therefore they came up with the automatism we told about. If the German Court had decided to deal with this case by applying Article 102-A putting aside the case of exclusion and anti-competitiveness, then probably they could have immediately applied EU law without making any confusion with German law. At the beginning, the German Court was concerned about data accumulation. The problem for the German Court was not that users were somehow deceived, but that Facebook was accumulating too many data. Because of the knowledge advantage, Facebook would be too powerful: still, data accumulation is never exclusionary and anticompetitive, there is no way to stop data accumulation by using antitrust law. As a consequence, when the German Court realized it, they decided not to prosecute Facebook as an exclusionary and anticompetitive practice, but by taking that piece of German competition law. If the German Court had understood it correctly from the beginning, they would have used Article 102- A, with one specification: if I say Facebook violates Article 102-A by imposing unfair trading conditions, my remedy is to change the privacy policy conditions, to make them more transparent, telling the users about the sources from where Facebook is taking data. **Remedies under Article 9 of Regulation 1/2003** must be *proportionate and strictly necessary to restore competition*: I cannot use Article 102-A to stop data accumulation, and this is the big problem with the German Court's decision: among the remedies, the Court included the obligation for Facebook to split up the data it gained from different sources, but this has nothing to do with transparency! If you care about transparency, to split up the basket where you put the data doesn't make any sense, it's unnecessary; the only way to reduce data accumulation is to argue that accumulating data is anticompetitive and exclusionary, but nobody can't do it!

Example:
Suppose a dominant firm, supplying industrial machines, obliges its customers to advise it back of any technical improvement or modification made to the equipment, and ***to grant it back*** *the ownership of the possible intellectual property rights acquired upon such improvements and/or modifications.*
What is this? Try to analyze it from an antitrust point of view.

Let's try to apply article 102.A:

- Do we have a **dominant position**? Yes, it is written.
- We have to show this is unfair. This is a **grant back clause**, which is very frequent in intellectual property rights contract. Why is such clause unfair? Because it's **unilaterally imposed**. We perceive it as unilaterally imposed because nobody would ever accept it if he were not obliged to, because customers do not gain anything.
  What do customers gain and lose because of such clause? They lose the ownership on the technical improvement that cool be their own intellectual property right. This is **clearly unfair**.
- **It is not necessary as well**: why on earth the dominant firm should have the right to be the owner of technical improvements as well? This is completely unnecessary, you don't need it to make the contract work, it's not a remuneration. This is clearly an **unfair trading condition** *which limits the purchasers potential use of goods of which the dominant firm has supposedly granted him full ownership. Not only does it have no connection with the purpose of the purchase contract, but also distorts its very nature. It also limits outlets and technical development by granting [the dominant firm] sole ownership of the rights upon any improvement made by the client. The fact that the purchaser is deprived of the right to use his invention as he wishes must also be considered unfair, even if compensation is theoretically provided for*. Even if you paid for the grant back, still, this is unfair. In addition, this is also **exclusionary and anticompetitive**. Grant back clauses are not only unfair, but under some conditions you can also show that they are exclusionary and anticompetitive.

EXCLUSIONARY AND ANTICOMPETITIVE PRACTICES:

What exclusionary and anticompetitive practices are? Let's work on **exclusionary and anticompetitive conducts**. Suppose a dominant firm creates a new product. Suppose consumers like it a lot, and suppose that because of this new product, the dominant firm sees his market shares grow and increase. Would we punish the dominant firm for such innovation? Probably not, it's the remuneration for the investment the firm made. This is still a partial argument: try to work on the **definition of what antitrust law is**: *it's a set of rules that are aimed at preventing firms from harming the well-functioning of the market*. How do we assess the well-functioning of the market? By looking at consumers' welfare. If the dominant firm creates a new product, it increases innovation, and therefore it increases consumers' welfare. At the same time though, how would we argue that actually the firm decreases consumers' welfare?
I produce innovation I, and because of that my market share increases. Such increase in innovation, it is an increase in consumers' welfare. My increase in market share implies the exit of some rivals, and as a consequence, the possibility for the dominant firm to charge high prices. This entails a consumers' welfare decrease, or at least the maintenance of high prices prevents a consumers' welfare increase.
Why nevertheless we allow dominant firms to innovate, even though this entails the exit of rivals? Because if we did not allow it, we would remain without innovation. *According to economists, this consumers' welfare increase due to innovation is much higher than any possible consumers' welfare decreases due to the lack of competition in the long run*.
Let's say it again: a dominant firm launches a new product on the market. Consumers appreciate it and buy it, and because of that, the dominant firm sees its market share increasing. Rivals are pushed out of the market as a consequence, and because of the exit of some rivals, in the long run the possibility of reducing price will be low, since the dominant firm will lack of price competition coming from rivals. In the long run, because of this structural effect (mainly, the exit of rivals from the market), you will have a negative impact on consumers' welfare in the long run.

Nevertheless, according to economists, the increase of consumers' welfare due to the creation of a new product (mainly, innovation) is much higher than any possible consumers' welfare decreases in the long run.
Once again, **we endorse a short run perspective here**. In addition, if we take from dominant firms away the possibility of developing innovation, they will lose incentives to do so.

We would remain without dominant firm creating innovation, and this would be bad (as we said yesterday, Microsoft was capable of figuring out how the market would have gone with hand devices).
This is an example to tell antitrust law and Article 102 do not punish exclusionary behaviors that strengthen dominance. Indeed, it punishes exclusionary behaviors when in addition they also determine a reduction in consumers' welfare. **Innovation does not produce that effect, innovation is exclusionary, but it's not anticompetitive**.
Under Article 102, we prohibit exploitative abuses and exclusionary and anticompetitive abuses. When it comes to this second category of abuses, we have 2 key words to remember:

1. **Exclusionary →** we say that *a conduct is exclusionary when it leads to one of these 3 alternative consequences*:
    1. when **it pushes actual rivals out of the market**
    2. but also, **when it prevents potential rivals from entering the market**
    3. but also, **when it marginalizes actual rivals into a niche of the market**.

Think about innovation, which is exclusionary: if a good product is good, it is exclusionary; if a product is a break-through innovation, rivals cannot match it, they may leave the market, or they may be marginalized in a niche of the market. If we say: "*antitrust law punishes exclusionary conducts*", then we should punish innovations, but we don't know to deprive dominant firms on the incentives to keep on innovating! Therefore, we say that in addition to exclusion, we want to have anti-competitiveness to punish a firm's conduct.

2. **Anticompetitive →** it is **reduction of consumers' welfare**, generally over the short run.

Innovation is exclusionary, but it is not anticompetitive, because over the short run, it increases consumers' welfare.
The many strategies we are going to study in future classes will be about exclusionary practices. We will talk about predation, foreclosure, and preemption. Those are economic words to adder exclusionary practices. The case of the producer of cookies that fills the range is a preemptive strategy, since it takes the place of rivals before them.
To show and prove that a practice is predatory or foreclosing or preempting rivals, this doesn't mean to show I should be forbidden: in addition to it, I also have to demonstrate that the practice reduces consumers' welfare.
In real life, what happens is that the plaintiff shows exclusion, and then makes this argument. Plaintiff says: "*because of dominant firm's conduct, it has strengthened its market power by excluding rivals, or marginalizing rivals, or preventing potential rivals from entering the market"*. Because of this structural effect, in the long run the dominant firm won't be forced to challenge rivals and face price competition coming from rivals, and this will cause long-run reduction of consumers' welfare.
The anti-competitiveness comes with the exclusion over the long run, but I lose the case if the dominant firm - defendant - is capable of showing that in the short run (or even in the long run in some cases) the exclusionary practice admits a business justification for the sake of consumers. "*It's true I have excluded my rivals, but I've created innovation*". Antitrust people do not really measure the effects; indeed they have an idea on how things will go. This is the **theory of harm**: this is the ***combination of the structural effects with the consumers' welfare impact***. The defense is showing that this consumers' welfare impact will not exist, or it's marginal. Antitrust people do not balance anything against anything else: we have 2 narratives (plaintiff's and defendant's ones), one is more convincing than the other on the basis of facts and evidence. In the vast majority of cases, dominant firms lose because they do not have any business justification for this, or they are minor in comparison with the high anticompetitive effects their conduct has generated.

Exercise for final exam:

- *Can we show grant back clauses are exclusionary and anticompetitive? Try to show why they are exclusionary, and why they can be anticompetitive* → grant back clauses may be exclusionary and anticompetitive
- *Think about data accumulation, Facebook collecting data from different sources: why could data accumulation be exclusionary and anticompetitive?* à data accumulation is never exclusionary and anticompetitive

Try to figure out the reasoning whereby I achieve those results.

Es. A (patent licensing contract) makes a contract with B (that is allowed to use machines of A in its own production) and in this this contract there's a **grant back clause**.
Suppose that in t1 B produces an innovation and because of the GBC the property right on the innovation hast to go back to A. In order to apply art. 102 you have to meet some conditions. Which is the first requirement?

- The dominant position → the situation becomes problematic if A holds a dominant position.

Suppose that this is true. The GBC can be considered exploitative. Can it also be considered exclusionary and anticompetitive?

- Does the GBC clause exclude rivals of the dominant firm?
- Does the GBC reduce the consumer welfare?

So, how would you develop this analysis? Is this exclusionary? B could go to someone else if he's not okay with A, but this depends on the existence of someone else. In this case you may argue that when B goes to A's rivals to get some more machines, the other rivals do not provide people with machines that are equally good. **What do we mean when we say that this is exclusionary? That we force rivals to have lower quality machines, with lower quality standard for products and services** → the point is not that they are excluded, but the point is that we force them to produce lower quality products and services, because we have imposed them to use some input or machines that are less efficient than ours.
We are not saying that GBC are always exclusionary, it depends on the practical case. **In this specific case where there are no other providers of machines or they provide lower quality machines, the GBC is exclusionary**.
You don't need to have actual effects in order to apply art. 102, you can apply art. 102 also when the negative effects are only potential. I have to check whether the GBC has this potential negative effect (exclude or reduce the CW).
Does the GBC reduce the CW? In the long run it reduces the CW, because of the structural effect.
Then, how would you describe this reduction of consumer welfare? Because B loses the incentive to innovate. Every time B innovates, he has to give the rights to someone else → he loses the incentive to innovate. Even in the sort run you have reduction of CW because of reduction of innovation.

DATA ACCUMULATION:

- Could it exclude rivals?
- Could it reduce CW?

Let's consider any big data company. The point is: when I collect data, do I exclude someone from the market of data? Clearly no. This doesn't prevent anybody else from accumulating data. Somebody came up with this example: suppose I have Facebook and I chat with someone. Somebody said that the data of the conversation can be collected only by Facebook, whereas nobody else can. What is wrong in this consideration of data accumulation? The data that are in that conversation can be easily substituted with some other data, because actually what we are looking for is not the string of 1 and 0 that makes one datum, but we are looking for is the information that we can infer from the data we collect.
Suppose that in this conversation I talk about food, only facebook will know that I love pancakes. But is there another way in which you can realize it? If you want to know what people eat, you can use google because everybody uses it. But also amazon can collect those data because you can order food. Apple pay or credit systems collect such data because I pay my orders with that. There can be and actually exist data that cannot be produced by somebody else.
Collecting data is not exclusionary, because unless you create a very specific scenario where the info you are looking for can be derived only be a specific set of data, data accumulation is not exclusionary.
Suppose that somebody can show that it is exclusionary. What can you argue to say that it doesn't reduce CW? Because once you got data, you use such information to improve your products and your services → you increase consumer welfare.
It's a variable we use to understand whether the market can improve or not. Data accumulation does not reduce output, does not increase prices, does not reduce quality, variety, and innovation. Because of data accumulation, you don't move upward in the demand line. For example, cartels make you move from A to A' that is higher than A.

There's another thing that you can realize then → suppose you are a policymaker, and you see this big company accumulating data and because of those data they improve their services, and they enter new markets better and faster than the others. They are very strong. Thy fight with rivals and they win. The policy maker realizes that the accumulated data are a source of knowledge advantage that gives them the opportunity to be there. You think that every time they improve their services, the competitive gap between you and tiny companies grows. But what are these big data for antitrust law? Every time they collect data and because of that data they grow and the competitive gap with other companies increases, **BIG DATA ARE BARRIERS TO ENTRY**. This is the job of antitrust people: they give labels. In order to enter the market and match the offer, they have to know what the big company knows → it takes time to collect data, it takes technologies and so on. The point is: data accumulation is not exclusionary and is not anti-competitive, but when you collect data, you can say that you have create a barrier to entry. This is a **STRATEGIC BARRIER TO ENTRY**. Can we do something against it? We could, but we don't because the activities that bring you here are not exclusionary and are not anticompetitive.
Every time we have to analyze a scenario, we have to consider: the relevant market, barriers to entry, exclusionary and anticompetitive behaviors.

THE GENERAL TEST:
We don't want to prevent dominant firms from innovating, although innovation can be dramatically exclusionary.

In the Intel and in the Post Danmark cases the CJEU stated that:

"It must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market. Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation".

We don't fight against people who want to dominate market as long as they reach this purpose with their own merits. We are there to protect competition. If the competitors are worse than you, they must be excluded from the market → the market is an exclusionary mechanism → marginalization of competitors that are less efficient.
Therefore, art. 102 cannot punish exclusionary practices, it must look for something more.
A practice is exclusionary – that is, it strengthens monopoly power – when it:

- excludes actual rivals and/or
- marginalizes actual rivals to a niche, and/or
- prevents the entry of potential rivals

In order to exclude rivals, a dominant firm may undertake several strategies, like:

- **predatory strategies** → when the dominant firm accepts to suffer short run losses in light of the long run gains that it will collect after rivals' exclusion
- **raising rivals' costs strategies** → when the dominant firm obliges its rivals to be less efficient and, hence, less competitive than it is
- **foreclosing strategies** → when the dominant firm subtracts relevant suppliers and relevant customers to its horizontal rivals
- **pre-emptive strategies** → when the dominant firm subtracts competitive spaces to its horizontal rivals → this is the case of cookies. Don't consider this as mutually exclusionary. you may have cases in which the same behavior can be qualified in one way or another.

Now, we have a big change. We said that if the exclusionary practice at stake is a non-pricing practice, then you have to verify if it increases or decreases, but you apply this when … in the cases that we saw.
You will never make a mistake by affirming that in order to check that in order to understand if a practice is exclusionary or not, you have to look at the effects. But, if you look at **case law**, it is inconsistent in practice → **your focus is not really on CW effects, but on the reasons that explain the behavior**. When it come to the family of exclusive and anticompetitive practices, you have to move on and check what's the impact on CW, as long as they don't involve prices. By reading case law, we discovered that when it comes to price in practices, the focus is not on CW and on the impact on CW, but the focus is on whether the pricing practice is the result of efficiency or innovation or not.

When we deal with dominant firm, we have to consider 2 main scenarios:

- the dominant firm work only in one market
- the dominant firm works in many market

Predatory pricing is something that is applied only when a firm works in only one market. From a technical pov, those dominant firms are named mono-product not to vertical integrated firms. Because in antitrust law, when a firm works in many markets, we say that it is vertically integrated. When a firm works in only one market, we say that it is horizontally integrated. Otherwise if the company produces only one product it is not integrated.
How does predation work? You are in t0, and you have a dominant firm and many rivals. The market price is 10. What happens then? It happens that the dominant firm charges a predatory price (5) to exclude its actual rivals from the market. in t2, the dominant firm acquires a monopoly, and the new market price is 15. Predation is a multi-period strategy over one single strategy. Multi periods practice because we have the first moment, a second and a third moment.
Predation is not dumping (one single period and different geographic market → you apply one price in one country, for ex. Very high price in your own country, but you apply the product at very low prices – you lose money for exportation because you gain a lot of many by selling the product in your own country), because we have **ONE SINGLE MARKET AND MANY PERIODS**.
In t0, A charged 10
In t1, A charged 5 → because of this price, the other firms exit.
In t2, A charged 15
What happens to consume in t1? It increases. What happens to consume in t2? It decreases.
Should this behavior be forbidden or not? In the end, the price is in a point in which the CW is low. I see exit and CW decrease → the practice looks exclusionary and anticompetitive.
But the CW increases as well in the long run → **we have a problem between short and long run**. In the short run, that is procompetitive → CW increases → no violation.
In the long run, that is anticompetitive → CW decreases → violation.
Antitrust law, in order to act, should monitor the situation and see what happens in the long run.
The missing part is that we don't know what the marginal costs of A are. If PA1 is higher than the marginal cost of A in t1, we see exit and CW increases. Probably in t2, we'll see CW decrease. In t2 the price is 15 and it is a reward because you have been good and innovative and efficient. I accept that in t2, you can become a monopolist and apply 15 and this is a reward for what you have done.
Suppose that, instead, PA1 < MCA1, we see exit and CW increase in the short run, but since P is lower than the marginal cost, they have losses and in t2 they have to recoup the losses → price goes to 15.
In t1 they apply a price that not even the firm itself can match, but who hares, the purpose is to become a monopolist → then the firm will recoup the losses, because they will be the monopolists of a market and they will be able to charge A to 15. The dominant firm was not meritorious. We don't care about the CW increase in the short run. The company should never charge a price that is lower than the marginal cost, because you have a CW increase in the short run, but we don't care about that. **We don't want you to exclude rivals without merits** → how CW changes don't matter. What matters here is how you exclude somebody: for your merit or not. Charging a price lower than the marginal cost is not rational, is not natural, is not the only thing that monopolists can do. You are stupid, unless you apply those low prices in order to exclude rivals having losses and recouping those money in t2.
In one case we accept the price as a reward, in the other case we punish it.

What makes you distinguish what is good or not, is the reasoning, the reasons that brings the dominant firm to apply a certain price.

PREDATORY PRICES:

Last time, we were talking about **predatory prices**. The story goes like it:

- In t0, the dominant firm charges 10. We start from a scenario in which PA = 10 is a rational price and it's higher than the marginal cost MC, which at the beginning is 8.
- In t1, the dominant firm charges 5, whereas the marginal cost is lower than 10 (the decrease of marginal cost is due to innovation, which makes the firm be capable of reducing its costs of production): we have an increase in consumers' welfare. Is PA in t1 higher or lower than the marginal cost of firm A in t1? **If the price in t1 is 5, and this is higher than 3, which is the marginal cost, the price decrease is lawful, it results from an efficiency gain**. We see the consumers' welfare increase as the results of the merits of the dominant firm A.
- At the same time we accept the monopolistic price that A charges in t2 since this would be the reward of the merit (because of the exit of rivals that could not match 5 in t1, A is a real monopolist in the market).

There is **second hypothesis then**:

- The case in which **the price charged in t1 is 5** (PA at t1 = 5) **and it's lower than the marginal cost MC of A**, which is our dominant firm: in this second scenario, **marginal cost is 7** (compared to the first scenario, the dominant firm was not as good as it was before, since it was not able to demolish costs of production from 10 to 3, but costs are 7). In such case, the dominant firm is making losses.
- It's true that in the short run we have a consumers' welfare increase, but still, A's practice is to be considered unlawful: in particular, let's consider that again in t3 A will apply the monopolistic price, which is 15.

If you decrease the price because of your efficiency, you are good, and we accept it, and you gain the results of your merits in t2; on the contrary, if you charged a price which is irrational because P is lower than your marginal cost MC, then the strategy does not make sense, unless you consider the recoup period, meaning the period through which you will be capable to recoup the losses via a monopolistic price in t2. This is an example on how we assess this strategy not on the basis of consumers' welfare's variation (in both situations, we have a consumers' welfare increase in the short run and a consumers' welfare reduction in the long run). ***What changes is the price and whether this is higher or lower than marginal cost***: *if the price is lower than marginal cost, then the price is predatory, and the practice is unlawful*. Antitrust law is not a matter of intention, I should not take into consideration the reason why someone else is engaging into a strategy, but what I have to do is to compare my price with the costs I bear to produce services and products.

If my PA in t1 is 5, how should the marginal cost be to have a lawful strategy? It should be lower; it should be 3 or 4.

A) If the marginal cost of A in t1 is 3 and the price of the dominant firm in t1 is 5 → *PA1 > MCA1* → **the practice is lawful**

B) If the marginal cost of A in t1 is 7 and the price of the dominant firm in t1 is 5 → *PA1 < MCA1* → **the practice is unlawful** → in this case, we got losses: the strategy is irrational, unless they recoup money in t2.

This was the easy story, let's now complicate it. First specification, **in real life we cannot see marginal costs**: authorities, judges and economists are not capable of analyzing marginal cost. According to the scenario, I can take into consideration different measures of costs: the most used one is the **average variable cost AVC** (still, this is a matter of economists). Second thing, **in the US** they make such comparison between prices and costs without saying whether the price is predatory or not in t1, but they wait for t2: they will punish a strategy if and only if they can show that in **t2** the monopolist will recoup the losses (if the firm is not even able to recoup its losses, then nobody cares of their irrational practice!).
In the **US**, they look for the recoupment test based on t2.

In **Europe** we compare prices and costs to see whether the price is predatory or not: in the US they do it as well, but in the end, they want to check if the monopolist is capable of recouping the losses.

The **Americans** developed the recoupment test to capture *phase 2* of the strategy (meaning the strategy that is applied by the dominant firm A in t2): *either they wait for the recoupment test to take place in t2, or if they want to intervene in the market before the recoupment takes place, what could they look at?* They want to argue the price is predatory, they guess there will be losses: they have to check whether the dominant firm will recoup losses or not. They want to act before in order to argue it's very likely the firm will recoup its losses.
You make losses because in t1 you applied a price P that was lower than your marginal cost MC; you see your rivals exit, and you are in t2 ready to charge 15. You charge 15, but you do not recoup the losses: this means someone else has entered the market: barriers to entry were not so efficient to prevent rivals from entering the market.
In the US, they either go with the recoupment at the end of t2, or they look at barriers to entry that can help the dominant firm to recoup by preventing other firms from entering the market.
What do we do in **Europe** indeed? We punish at t1 when PA is lower than the average variable cost AVC, and then we complicate our life with an alternative test: **if PA is higher than the average variable cost AVC and lower than the average total cost AVT, then we look at the intent of the firm**.

AVC<PA <ATC

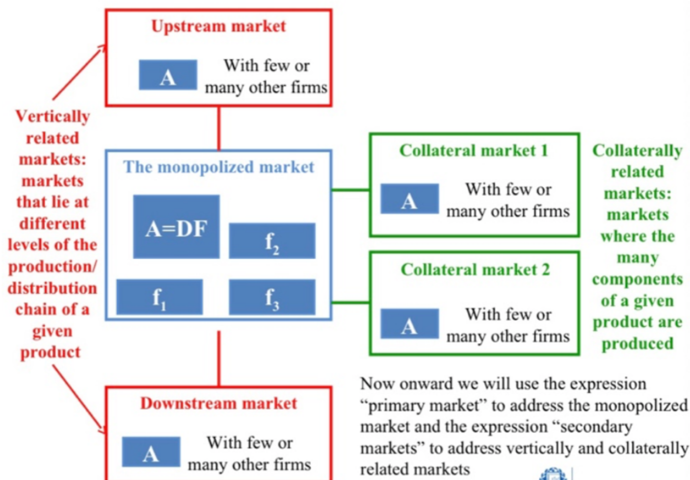
*We look **at the intent of** the firm*

This is the **big bug in EU Competition Law**. For 3 times, the **European Court of Justice** mentioned "*at the intent of*" in 3 different rulings. This is the law: the EU Commission does not apply it, the Commission says that either they see PA lower than the average variable cost AVC and recoupment, or they will make the economic analysis. The ECJ said we should stop at t1, and if we are in between AVC and ATC, we look at the intent. The law is not consistent with the general principles because of these rulings that are different from decisions of the Commission.
AVC is a proxy to marginal cost, whereas the **ATC** are all kinds of costs that a firm sustains.
We are considering a strategy that regards a monopolist which is not vertically integrated, or even integrated over the horizontal. Is this strategy anticompetitive? The price decrease could be due to an efficiency gain, or to an irrational strategy aimed at excluding rivals. We have to look at something else: we have to look at costs, making a comparison between prices and costs. What we do when dealing with such prices practice, it's to look at whether the exclusion is good or bad. **We look at whether the competitor which is excluded is as efficient as the dominant firm or not**. We could then argue: "in t1, we look at the marginal cost of the dominant firm A, and not at the marginal costs of rivals". The point is that we do not analyze what happens in the market. We don't look at marginal cost of rivals because of this: suppose we are the CEO of a dominant firm; we have to decide our pricing practice. This is lawful or not according to your cost. As long as our price is higher than our marginal cost, everything is fine, otherwise it's unlawful. From a theoretical point of view, <u>when we have no pricing practices, we look at consumers' welfare variation, otherwise we look at the equal efficient rivals</u>.
The ECJ says we don't have to do the recoupment test, but actually, EU Commission always applies the recoupment test. Why is the Commission so interested in trying to apply the recoupment test? Because within the Commission there are economists: in each competition authorities there are groups of economists that push the analysis towards the economic model and the analyze of the second run.
Little specification: in t0, they apply 10; in t1, A applies 5; in t3, A applies 15. Let's now have the same scenario which must be analyzed under the law of predatory prices, and the scenario says that **in t1 the dominant firm applies a discount of 5**: in the end, it's always moving from 10 to 5. This could be silly to us, but when the interpretation of article 102 was very formalistic, there was a debate own whether a price decrease was different from a discount. Nowadays, we are less formalistic, therefore a case of price cut can be considered as a price decrease.
If I compare the dominant firm's price with its marginal cost and I figure out the price is lower than marginal cost MC, that means that even a hypothetical rival having the same marginal cost MC of the dominant firm would not be capable of matching the price without incurring in losses. **A hypothetical rival**

as good as the dominant firm would not be capable to match a price without making losses if in t1 PA < MCA. If I make this reasoning, I'm applying the **equally efficient rivals test**.
The **recoupment test** is meant to understand whether the dominant firm will be able to apply high prices that make it possible to recoup from losses. If the price was higher than marginal costs, **equally efficient rivals** would not exit the market, and they would undercut the firm which tried to apply the monopolistic price.

Multi-product dominant firm:

Let's now deal with the case of a **dominant firm working in 2 markets at least**. It's not a mono-product dominant firm, but it's a **multi-product dominant firm**: it's a firm which is either vertically integrated or collaterally integrated. Let's look at this scenario:



In these cases, I will always have a monopolized market: I got a dominant firm A, and some tiny rivals. The monopolized market is the **primary market** where you got the dominant position. What's the primary market of Google? The market for search engines. What's the primary market of Facebook? The market for social networking services.
What happens? It happens you may have **upstream and downstream markets** that are vertically correlated to the monopolized one. Suppose you are a dominant producer of candies. Who supplies me with sugar is my supplier, and it is vertically integrated. Over the vertical, I have suppliers - producers - distributors - consumers. If I say someone is vertically integrated, I mean that dominant firm A is present in many markets. If we say that A is vertically integrated upstream and downstream, to means A works not only in the market of candies, but also in the market of inputs it sues, and also in the distribution market. If I produce candies and I have a monopoly, I'm vertically integrated if I have a plant to produce sugars and a chain to distribute my candies.
You don't have to be present in all the 3 phases to be vertically integrated, you can be in 2 out of the 3 markets (for example, in the market of candies and in the one of sugar production). Vertically integration means you are present at least in 2 phases among the supply-distribution chain. What is the relation over the collateral market? Consider a printer, which works if you put together the machine - durable good - and some spare parts, such as cartages and toners. The market for toners and the market for printer machines are collaterally integrated. If someone produces both toners and printers, he is horizontally integrated.
We have A in the monopolized market, and we also have A in both upstream and downstream market. A excludes people from secondary markets (both upstream and downstream markets). What are the pro-competitive and the anti-competitive reasons why A, which has already monopolized the primary market, excludes rivals from the secondary markets?
First, why do we worry about the pro-competitive and anti-competitive effects? Because we want to see what reasons will drive to a consumers' welfare increase, and what reason would explain a consumers' welfare decrease. When I look for anti-competitive reasons, I look for the anti-competitive effects of exclusion from the secondary market. If a dominant firm excludes rivals from the secondary market, what are the expected pro-competitive effects? What could be the expected anticompetitive effects?

The practice whereby you exclude rivals from secondary markets may be many. Whatever practice brings dominant firm's rivals out of the secondary market, it admits some pro-competitive justifications, and we will check if the actual scenario fits into this hypothetical pro-competitive justifications, and anticompetitive justifications.
Let's see the **pro-competitive effects**. We have to list pro-competitive and anticompetitive effects of it: this is a practice that consists in changing the interface. When talking about **ecosystems and compatibility**, they work like this: they change the APSs instead of changing a mechanical interface.
What could be **pro-competitive justifications** of such a change? "Pro-competitive" means consumers' welfare increase:

1. We may have an ***increase in quality and innovation***.
2. We can also say that ***because of this new interface, the good will last more and will cost less***: the firm may have **cost savings** because of the production of new toners.
3. Another reason would be ***to defend firm's reputation***: they decide to change the interface to become the only one to produce the toner.
4. There is another pro-competitive justification: ***we want to avoid Cournot effect***. What's this? We have the primary market, which is monopolized. The price that is in there is a very high price, let's say it is the monopolistic price. Then, we have the secondary market: I make rivals go out, and because of that, I'm alone in the secondary market. What is the price I apply? The monopolistic price. Is the consumer interested in buying a product on which there are 2 monopolistic caps? If I'm the dominant firm and I control the horizontal line, I will guarantee that the monopolistic cap is only one, charged either in the primary or in the secondary market. If I allow someone else to monopolize the secondary market, we will have 2 monopolistic prices, and in the end the number of consumers able to afford the prancing machines will be lower. In order to guarantee that the monopolistic cap will be just one, the dominant firm control all the line, and they apply the monopolistic price only in one market: in the end, the amount of consumers that will afford the product will be higher than the amount of consumers that will afford the product if I have many monopolistic caps along the lines. "*Dear authority, I therefore monopolize the secondary market to avoid the Cournot effect, meaning in order to avoid the case where the number of consumers that can afford the package product is lower than how it could have been because the number of monopolistic caps is larger than one*".

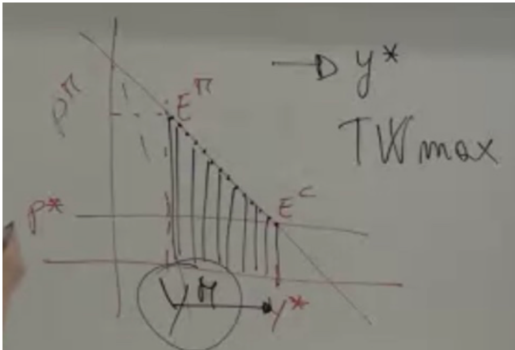
PRO AND ANTICOMPETITIVE JUSTIFICATIONS FOR CREATING INCOMPATIBILITIES

Today we go back to what we were discussing last time: the case of a multi-product vertically or horizontally integrated monopolist who tries to exclude somebody from the secondary market. The case we focus on is the case where the rivals of the monopolist exist from the secondary (vertically or collaterally integrated) markets. We want to have a checklist of the **possible pro-competitive reasons why monopolists undertake such conduct**, and a checklist of anticompetitive justifications explaining such conduct.

- "***Procompetitive***" means justifications that support a practice that will increase consumers' welfare
- "***Anticompetitive***" are justifications of practices that are able to reduce consumers' welfare.
  We are considering any practice, the point is not the kind of practice you dealt with, but the impact that it produces on the secondary market. We are talking about practices that create incompatibility (we made the case of a producer of printing machines and toner: because of the change in the toner, the rivals of the dominant firm in the market of toners go out of the market).
  Last time, we went through few of these **possible pro-competitive justifications**:

a) **Cost savings**
b) **Avoiding the Cournot effect**
c) **Defending quality and increasing innovation**
d) **Defending reputation**

e) The final procompetitive effect is **price discrimination** → let's think of some products that go together. The blades are much more expensive than the razor, although they are just a little piece of it. Think about printing machines: a printing machine costs 80€. How much are toners? 30€!
Suppose I'm the monopolist: clearly, I cannot sell razors only, but I have to sell both razors and blades. Suppose I make the monopolistic price for them all → I will sell the razors at 30€. Probably, if a consumer uses the razor each and every single day, he will buy, but someone who does not shave everyday but uses the razor once every 3 days, he will think it is not worthwhile to spend so much money: his willingness to pay the product is lower than the price that the monopolist applies.
What could be a way for the monopolist to give all the consumers the razors? Those you shave everyday pay a lot of attention to the razors, whereas the others are not very focused on the razor. If you create different qualities, you have to apply different prices. What can I do to apply just one price to all the razors? Change blades' price! I make the razor very cheap, so that everybody can afford it. *Those who are very interested in the quality and use it very frequently, they will need to spend a lot to have the blades. The other ones will buy just a few blades per year*. In such way, you have been capable of doing **price discrimination**, meaning applying different prices to different groups of people with different willingness to pay. I apply different prices to different groups of people with different willingness to pay → I can do it by applying the same low price for the durable good, and then using the spere parts as tools that measure consumers' willingness to pay.
Let's repeat it: I apply one flat and low price to the durable good (so that everybody has a printer, or a razor). Then, I apply a very high price on the toner (or blades, depending on the example we make) in order to measure consumers' willingness to pay: *my parents will buy just one toner, whereas a student will pay thousands of euros for having many toners since he uses the printer a lot*! I apply a low price to the durable good, and high price to spare parts, which are used as an instrument to understand if the willingness of consumer to buy the product is high or low.
If I create incompatibility, I can control the spere part; more, **if I make my rivals exit from the secondary markets**, once I will be almost the only one in the market for blades or toners, **I will be able to apply there the monopolistic price**. *This strategy is meant to shift the market power - or even the monopoly power - in the secondary market*.
Why am I excluding rivals out of the secondary market? Because once I'm there alone, I can overcharge my spare parts, and then I can use the spere parts as a measuring device. *Why does not the Cournot effect apply here?* The Cournot effect is about applying two times the monopolistic market caps: in this case, we do not apply the monopolistic price two times, because I will apply a low price in the monopolized market of printing machines and razors, although I could have applied the monopolistic price: I shifted the power downstream, and once I'm almost alone in the downstream market, over there I will apply the monopolistic price).
*How could I argue that because of this strategy I make consumers' welfare increase? How could we argue this is a **procompetitive justification**?* Because I make the product (whether it is the printing machine or the razor) accessible to a larger and higher number of users (if I applied 30€ per one razor, only a few consumers would buy it; if instead I apply 5€ for the razor, all of us will buy it, therefore we will have access to the product, and then according to our preferences, we will use it more or less buying more or less blades).
From an **economic pov**, it means that if we do price discrimination, *if the price discrimination works perfect, we could move along the demand curve, applying to each consumer the price he is willing to pay*. In this way, we achieve the **output of perfect competition**: total welfare is maximum again.
Price discrimination is procompetitive as long as it increases the output available in the market, allowing the market to achieve the output of perfect competition or any level of output that is higher than the output in monopoly, although we have a monopolist in there. Once this is done, we eliminate the loss of efficiency due to the output reduction (*dead wealth loss*). Instead of being in YM, we increase the output towards Y*.



With perfect discrimination, the output is the output of perfect competition. This is the typical case in which the kind of welfare I protect makes my antitrust assessment change:

- If I protect efficiency and the amount of output available in the market, I consider price discrimination as procompetitive.
- If I protect consumers' welfare, meaning the way in which I distribute wealth among people, they punish price discrimination, since it minimizes consumers' welfare, even neutralizing it.

What kind of price discrimination brings me to E* with digital technologies? With price personalization: "I was on the Internet, looking for a flight to Barcelona, and the day after, I searched it again and the price increased": they discovered your willingness to pay, they realized that you were interceded in going to Barcelona, therefore they increased the price. For antitrust law, price personalization is lawful and procompetitive since it's a way to increase output. The kind of law that may have something to do and which can consider price personalization evil are data protection law and consumers protection law. Antitrust law cannot punish price personalization: price discrimination is lawful any time it increases output, and this according to antitrust law.
This is why I can consider price discrimination among the procompetitive justifications of a practice meant to create incompatibility.
Let's switch to **anticompetitive justifications for creating incompatibility**. We have to read letter B), we are working with a multi-product monopolist who produces both the durable good and the spere parts. *What could be an anticompetitive reason why I push rivals out of the secondary market?*

a) The **justification of letter B)** is called "**defensive leverage**": I want to exclude rivals from the secondary market in order to shelter the dominance in the primary market, because *I fear that those who are in the secondary market could lip and jump from the secondary market into the first primary market*.
   This is an **exclusionary anticompetitive justification**. Anticompetitive, since the exclusion will bring higher prices
   → once I have proved they are doing it to shelter the primary market, then I could say that as a consequence the price there will keep on being high. The good example of it is not the case of printing machines, but it comes directly from the US **Microsoft case**.
   We were in the '90 in the US, Microsoft had a monopoly in the market for operating systems for PCs. Then, there was the market for browsers, and there, there was Netscape. In 1995, people were using Windows plus Netscape in order to surf on the Internet. What happened then? Windows released Explorer, and therefore there were people who were trying to use ***Windows + Explorer***. They realized that this bundle was better than the combination Windows + Netscape. When Microsoft released Explorer, it also released a new version of Windows, that did not work well together with Netscape. **Microsoft changed the interoperability codes that make the browser working with the searching machine**.
   After a couple of years, Netscape went out of the market. This change in the interoperability code of Windows was capable of excluding Netscape, as it happened indeed. Netscape was replaced by the browser of Microsoft.
   At that point, everybody was trying to discover why it happened: people were saying Microsoft was about to monopolize also the market for browsers, and actually they were doing it (Netscape was going out of the market): why Bill Gates would ever be interested in having 2 monopolies on the

same line if he cannot apply 2 monopolistic price because of the Cournot effect that must be avoided? If you have 2 monopolies over the vertical or horizontal line, you cannot apply 2 monopolistic market caps, otherwise you go over the willingness to pay of consumers (avoidance of double marginalization, that is avoidance of Cournot effect) This is avoidance of double marginalization (avoidance of Cournot Effect). Why on earth is Bill Gates interested in acquiring a second monopoly on a collateral market if in the end he will not apply 2 monopolistic prices? Indeed, Explorer was out for free at P=0: Bill Gates was not applying 2 monopolistic prices, and this was correct. Why was Gates doing it? Because Gates feared Netscape was going to enter the market of operating system: Netscape was developing with Java an operating system what worked outside the desktop computer, a sort of virtual operating system that could have worked with every machine and that could have replaced Windows. The goal of Bill Gates was to prevent Escape from jumping into the primary market, challenging his dominant position in the market of operating system. This is **defensive leverage**: *I leverage my power downstream in order to defend my power upstream. Why is this **anticompetitive**? Because, as the Microsoft case showed, **the exclusion of Netscape**, meaning the absence of rivals in the primary market, it **allowed Microsoft to keep high the price of Windows***. The price of the operating system has always been high over time, even if the price of hardware was dropping down.
why couldn't such increase in price be seen as an "*award*"? When you gain your dominant position on the merits because you created efficiency or made innovation and then because of that you apply monopolistic price, that is fine: that price is the reward for your innovation and your efficiency.

a. Indeed, since in the **US** this practice was not considered unlawful, when Microsoft ended up having a monopoly, Microsoft kept on applying the monopolistic price as a reward for its merits (in this case, Microsoft's merit was to have created a new browser that together with Windows was faster and better than Netscape).
b. Another thing is saying "*you didn't do anything because of your merits and efficiency, you excluded your rivals just because of your powers, and then you applied high prices*". In such case, the high prices cannot be seen as the reward of Microsoft's merits!

This is a matter of what the source of your high price was. Let's talk about predatory prices: in t1, I exclude my rivals, and in t2 I apply the monopolistic price. If I exclude my rivals because I have reduced my cost, and my lower price is the result of my efficiency gain, then the high price is the reward for what good I did. If in t1 I have excluded my rivals by applying a price that is lower than marginal cost, that exclusion is possible just because I'm big and powerful, and which is not good. In this second case, we do not consider the monopolistic price in t2 as the reward of some merits. I have to compare whether the price is higher or lower than the marginal cost.
Defensive leverage is an anticompetitive justification, because it's a way to explain the exclusion that is justified by the goal and rational and goal of keeping the price of the monopolized product as high as possible. Any time you have exclusion, in order to show anti-competitiveness I have to show that in the long run the exclusion will deprive the monopolist of rivals capable of challenging the price. By showing exclusion, I argue that in the long run that exclusion will eliminate rivals capable of challenging the price of the dominant firm, which therefore will be capable of applying high prices. If I have to go against Microsoft, I can say "dear Microsoft, you excluded Netscape from the secondary market in order to defend your monopoly: why is this anticompetitive? Because you want to keep the price of Windows as high as possible!". The answer of Microsoft will be "look, I did it to increase innovation and quality: consumers' welfare increases over the short run!".
If I want to fight back Microsoft, in the US the government can say that Microsoft's innovation is fake, it's a sham. Nobody has ever won a case in the US by arguing that innovation was a sham apart from one case, but it was a jury trial. In EU, when we wanted to fight Microsoft for the integration between Windows for PCs and Windows for networks, we made such theory: "dear Windows, you are excluding rivals from the market of operating systems for networks in order to protect the market of operating systems for PCs where you are dominant. In the long run, this will lead you to bring your price as high as possible, and this is anticompetitive". Microsoft replied to the Commission by saying "We launched the second version of Windows, and this was an

innovation increase: the quality of new Windows is higher than the quality of the previous one".
The EU Commission said: "we don't care, we don't look at the quality of product, but we look at the interoperability code (API), and we believe that the interoperability code is an essential feature, and we want you to share it with your rivals".
What's the moral of it? The same facts can be pictured in different ways according to the point on which we focus: in the US, they said the new Windows was a fake and a shame, and they lost. They also said that the bundle between Windows and Explorer was not procompetitive, and they lost. In Europe we didn't try to attack the new product and the bundle between Windows PCs and Windows for networks, but we said that they worked together thanks to a code, mainly the **interoperability code**, and we considered it as essential facility for competition, therefore we obliged Microsoft to share it with its rivals, as they did.
Remember we can change the result of a trial and of a proceeding according to whether we focus on one thing or another, although the facts are always the same.

b) In this family of anticompetitive justifications, there could be another one → **the monopolist enters the secondary market and makes people exit in order to build up barriers to entry that shelter his dominant position** → the reasoning of the monopolist could be "look, from that moment, whoever wanted to fight against this operating system, it had also to provide consumers with Explorer: not only with the operating system, but also with the browser compatible with it". This makes the challenge for the operating system more costly, since you have to add something more: not only the operating system, but the Explorer as well.

TYING:

What's tying? When we put two different products together, that is a bundle. A tying is an antitrust word, it's a case of bundling that happens when given A and B, the items put up for sale are B and the package A+B, so that the acquisition of B is condition on the purchase of A, and A is not sold on a stand-alone base. The case is the following: I don't sell Windows alone (which is our A), but if you want Windows, you also have to take Explorer (which is B). You can create a bundle in 2 ways:

A. either via an agreement, and if one of the 2 parties is a dominant firm, generally we apply Article 102 although there is an agreement, and this is also referred to as "contractual tying"
B. or I can even get a bundle because of incompatibility: the tying in such case is tech tying.

Let's look at the procompetitive justifications for both tech tying and contractual tying:

a. Cournot effect
b. A better control of product quality and dominant firm's goodwill, meaning reputation
c. Many kinds of cost savings: for instance, reduction of transaction costs searching costs, production and distribution costs
d. Tying as a metering device

These are the examples and exemplifications of what we said previously in a more general way. In EU, if a dominant firm makes a tying, we have to show foreclosure in the tied market, meaning exclusion from the tied market; we also have to show exclusion from the secondary market; we have to show there are no procompetitive justifications (no cost savings, no reputation effects, no innovation, no increase in quality, no price discrimination, no Cournot effect, ...); then, we have to meet other 2 conditions which are specific of the tying case:

A) we have to show that **the products tied together are 2 separate products**. If I sell the right shoes with the left one, I'm not making a tying, since the product is a couple of shoes
B) then, I have to show that **consumers suffer from coercion**.

This is a requirement I have to meet in order to win the case. Then, what it should be and why it exists is a matter of opinions: ***if there is foreclosure, coercion comes without saying it***: if you exclude rivals from the secondary market, I'm coerced to buy only products of the dominant firm. Others would say "*no, you have to show coercion resulting from the contractual clauses, or from economic schemes of incentives*".

Others say: "*you have to show coercion because the point here is to have consumers free to choose*".
Maggiolino's opinion is the following: it's a redundant requirement. If I have to write a claim against a dominant firm making a tying, I have to give evidence about all those requirements: 2 separate products, dominant position in the tying market, coercion on consumers, and I also have to show that there is no business justifications.

BUNDLE REBATES:

Consider that when we talk about incompatibility and time, we have dealt with non-pricing practices. Many of the effects I can product via non-pricing practices can be reached also via pricing practices. Consider bundle rebates à let's talk about skis and biddings. A produces both skis and bindings, and A charges a discounted for the bundle of its products (skis + bindings). If I sell them separately, you will pay 15 in total (5 + 10). The bundle of the two products is 12 → this is a ***bundle rebate***. That's a discount that regards two products and therefore two markets (market for skis, which is the dominating one, and the one for bindings, which is the secondary one, where you have competitors).
Now suppose that the market of skis is monopolized and the market for bindings is competitive.
First scenario: there is somebody who competes against me, and he is present both in the primary and in the secondary market. He is the one that produces the skis as I do, but he also produces bindings as I do. At the beginning, I sold them for 10 + 5, then I decided to do all for 12. He is capable to work on the same products, and if he wants to match my price, he has to find a way to charge 12 as well. If we both compete on the 2 markets by selling the same package, and I have to understand whether the monopolist applies a price that is too low, what do I have to do? **I have to look at the marginal cost, I have to look at predatory prices**. Why? Who cares whether the products are two or one. In the end we are behaving that if the product was one, in t0 I charged 15, in t1 I charge 12. If he can match 12, he doesn't exit from the market, if he doesn't match 12, he exits from the market. then you have to understand whether my 12 was higher than the summon my marginal cost or not. If it is higher than the summon my marginal cost, I'm fine, he's not as efficient as me. If my price 12, instead, is lower than my marginal cost, then I suffered losses, and he was pushed out because I'm the big boss here → predatory prices strategy. You apply the rule about predatory prices → this is the way we write the rule about predatory prices, which happens when the price that the dominant firm applied for the bundle is lower than the sum of the average variable cost of the dominant cost for two products.

First scenario – the easiest:

- The dominant firm produces all the products of the bundle. In our example, both skis and bindings.
- The rivals of the dominant firm produce **all the products** of the bundle. Thus, we are in a case where…

… A bundle can compete against another bundle

- **Therefore, EU enforcers** check whether the "price of the bundle as a whole" is predatory. In other words they establish if
  - **either** $P_D^{(Sk+B)} < \underline{AVC}^{Sk} + AVC^B$
  - **or** $\underline{AVC}^{Sk} + AVC^B < P_D^{(Sk+B)} < \underline{ATC}^{Sk} + ATC^B$ *and* intent

The fact that he is capable of producing the two products in the end makes this complex situation.

Let's look to something more difficult.
Second scenario: we assume that he does not produce skis, but he just produces bindings. I sell these two for 12. He wants to compete against me in the market of bindings. What is he supposed to do? He puts the price at 2, because the other is 10. He has to assume that consumers cannot play around with the price of the dominant product (skis), because the price of the dominant product doesn't depend on him. He has to take it because it's the price made by the monopolist. The only thing he can do is try to push down its only

price, the only price oh which he has control, which is the price of bindings. He has to shift the amount of the discount on the only product/price he can control, which is the price of bindings.
Why such a behavior could be anticompetitive? We're dealing with a case where we have a price, a price reduction, and you have to establish whether the price reduction that was forced to make in order to match my price was competitive or anticompetitive. We can understand this by taking into consideration what other valuables? Marginal cost, of whom? Of the dominant firm. Why of the dominant firm? You have to understand whether 2 is higher or lower than the marginal cost of the monopolist for producing what? The skis. ***You have to understand whether the bundle rebate makes the price that the rival has to charge on the market predatory or not***.
Example of the second scenario →

Second scenario:

- The dominant firm produces all the products of the bundle. In our example, both skis and bindings.
- The rivals of the dominant firm do not produce all the products of the bundle. Suppose, for example, that they produce only bindings and not skis.
- Thus, given that:
  - in t_0, $\mathbf{P_0^{Sk} = 5}$ **and** $\mathbf{P_0^{B} = 10}$ and
  - in t_1, the dominant firm makes the bundle rebate $\mathbf{P_D^{(Sk+B)} = 12}$

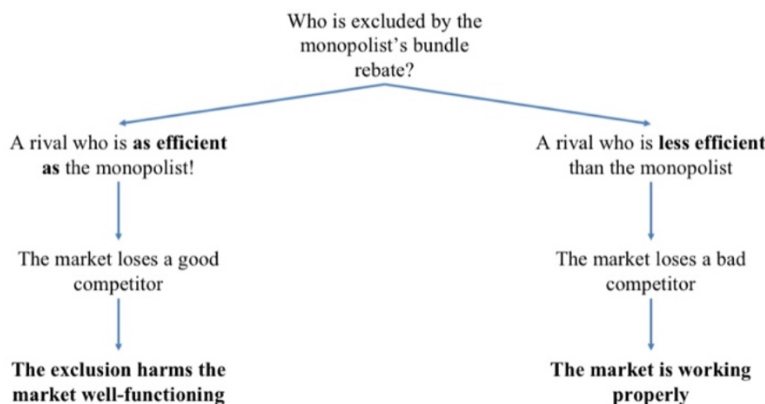
  What is the price that the monopolist's rivals producing only bindings have to charge for their bindings to match the bundle rebate of the dominant firm?

  - Granted that they cannot modify the price for skis, that is, granted that for their customers it is still true that $P_0^{Sk} = 5$,
  - **they must charge** $\mathbf{P_R^{B} = 7}$. In other words, they must shift the amount of the whole discount (15-12 = 3) on the only product that they "control," that is, on bindings, pushing their price down to 7 (10-3).

What if the rivals cannot do this? ***We have to understand whether they cannot match the price because they are not efficient or if they cannot match the price because I was predatory***. These are the 2 cases:

The equally efficient rival criterion

In order to distinguish between the two above-mentioned cases antitrust enforcers apply the criterion of the **equally efficient rival**. In other words:



I have to apply the equally efficient rival test, and I have to compare the price for the bindings made by the rivals with the marginal cost of long run average incremental cost of the dominant firms for the bindings. If the price is lower than the cost, the bundle was predatory.

How would you identify the equally efficient competitor?

In the EU

A multi-product rebate may be anti-competitive if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle, that is when:

$$P_R^B < LRAIC_D^B$$

No check about a possible recoupment … due to cross-subsidization. The extra-profits in the monopolized market finance the losses in the competitive market

We do not discus about possible recoupment, why? Because there is not a problem of recoup possible losses in the long run, in P2, because as you are doing the strategy at the same time on two different markets, here we don't have a case of recoupment over time, but **we have a case of on-going recoupment over 2 different markets → CROSS SUBSIDIZATION → you use the extra profits in the market for skis for monopolistic products to finance the losses in the market for bindings.**
How is it possible that a monopolist charge 12 for the bundle? Going down the marginal costs of producing bindings, because it uses the extra profits in the primary market to finance the production of bindings. We don't do recoupment, because there is no point in looking for what will happen in P2, P3, P4... here at the same time the extra profits that come from a market are used to keep on producing products in the secondary market, although at the price that creates losses.
Now, what is peculiar of this strategy? **When dealing with pricing practices, we apply this rule to distinguish between lawful loyalty rebates, and unlawful loyalty rebates**. We don't deal with foreclosure, pro-competitive and anti-competitive behaviors. We just use the equally efficient rivals test to check whether the practice is lawful or not. The story about why the monopoly is excluding rivals form the secondary market can be played, but it is not crucial in order to win the case à I win the case if I show that the price is lower than the cost.
So, here we have this difference between the test and the approach, the method we use when it comes to non-pricing practices and the approach, the method we use when it comes to pricing practices.
Although, when you do a bundle rebate, in the end, you are studying rivals from the secondary market with the aim of sheltering your dominant position and keep the price the highest possible in the monopolized market, and you could always try to defend it with the extra-competitive justifications, but no. As it is a pricing practice, all the discussion was done to this analysis of prices and costs.
If your bundle rebate is efficient, because the price for the secondary product is higher than the marginal cost of the dominant firm for the secondary product, the exclusion of rivals is fine. We don't worry about it.
And as a consequence, if in the second and third run the dominant firm, after the bundle, will be capable of applying higher prices, there will be the reward for its efficiency, **because the bundle rebate was the result of its efficiency in integrating products.**
Indeed, I don't make bundle rebates between smartphones and markers, but you do bundle rebate on products that are complementary make bundles on things that are reasonably sold together. Instead, if the is anticompetitive, and afterwards the dominant firm that was not punished for such an anticompetitive behavior increases prices, we do not admit that price increase, and we consider it a result of anti-competitiveness, and not as a reward, just because it results from an anticompetitive and unlawful behavior.

NOW...
I got a producer of candies (P). I got the world seller as well. Suppose there are other world sellers (W1, W2, W3). Suppose that P makes exclusive agreements with W, W1 and W2, that together cover the 70% of the market. Because of that, who will be excluded from the market, and from which market? The last word

seller W3 will be excluded from the market. The other producers P', P'' and P''' will be excluded from the down-stream market whereby they can distribute they products, because there won't be world sellers available: W, W1 and W2 will be linked to the monopolist (P) and obliged to deal only with the monopolist, and W3 either will be out of the market, or it will tiny, somebody to whom consumers don't go, because in the end it doesn't have the dominant product.
So, in vertical relationships, it may happen that the monopolist acts to subtract a big supplier of distributor to its horizontal rivals, in order to leave his rivals without either an essential resource or an essential distribution channel.
Suppose you make an exclusive dealing and vertical dealing with the 3 guys: what could be the anticompetitive justification for such a behavior? That you won't prevent you horizontal rivals (the producers) to have the possibility to achieve consumers. Why is this anticompetitive? Because if you push them out of the market or you marginalize them into a niche, which is W3, in the long run your dominant producer will be allowed to charge high prices.
This is the anticompetitive justification of exclusive dealings.

Let's look at the **procompetitive justifications of exclusive dealings** → what are they? If you exclude price discrimination that works only in collaterally related markets, the first four are procompetitive justifications that work also over the vertical to justify in a procompetitive way exclusive dealing. Because you can say "I do it in order to save money because I will have a long relation with my dealer...". Maybe I make this agreement because W, W1 and W2 are the best ones in the market, and I do this for my reputation... and so on.
Double marginalization → the consumers here will buy candies. Now, he is available to pay 10 for candies, and if the monopolist and the distributors apply 2 monopolistic mark cups, the final price is 15, therefore consumers do not buy the product. In order to avoid the double marginalization, the producer says: "let me control the price down-stream and let me make these exclusive agreements whereby I control the price". We will see that when anybody makes a vertical agreement with the world seller, he cannot fix the sell price. The only way you can control the price of world sellers if you are a produce is to vertically integrate à to merge.
You cannot make an exclusive agreement, because if you do it, and then you fix the world sell price, according to art. 101 you are violating antitrust law, **because you cannot fix prices**. This is admitted in the US.

WHAT SECONDARY MARKETS ARE? Is generally the name for markets which are either vertically or collaterally related markets. It may happen that you may see dominant firms pushing rivals out of the secondary market.
Once we have such a market scenario, it may happen that we see a dominant firm pushing rivals out of the secondary market and in that case, we must understand what the pro-competitive and anti-competitive justifications for such a behavior could be → this is what antitrust law looks at.
What are *pro-competitive justifications*? We have seen many of them when talking about tying, but we could play the same arguments also in relation to cases such as exclusive dealings. **Exclusive dealing** is when customer purchase its good or services only from the dominant firm → this kind of exclusivity can result from a contract or from a scheme of incentives via loyalty rebates.

Exclusivity happens when a customer purchase its goods or services only from the dominant firm. Then, this situation may result:

- from an explicit **exclusivity clause** of the kind: "*You must buy only from me... or You cannot buy from any other than me*" – **legal exclusivity**;
- from a **requirement contract** asking the customer to buy a quantity which is next to its whole needs;
- or from **a set of incentives** that pushes the customer to find the exclusive purchase convenient → **fidelity (or loyalty) rebates**

In addition, the effects of exclusive dealing contracts may arise also from the so-called **English clauses**, whereby the dominant firm retains the right to: (1) learn about its competitors' offers and then (2) make an offer that matches the best alternative.

We have to look at different criteria to distinguish between procompetitive and anticompetitive **exclusive dealings** or procompetitive and anticompetitive **loyalty rebates**. From the economic point of view these are two tools that we use to create a bound between the producer and the distributor. Another way to do that is for ex. to write a **requirement contract**, asking the costumer to buy a quantity which is an excess to what he needs, so that in the end it is as if he was buying whole his products and services from the same producer.

What are the pro-competitive effects? What can happen? You have a producer, a seller. The producer makes an exclusive dealing with some sellers. The rationale explaining this behavior has to do with the horizontal rivals of the producer. If I make an exclusive dealing with some world sellers, I leave my horizontal rivals without the opportunity to reach consumers → I prevent them from competing with me. I exclude them from the market ← this is why we say that this is another leverage theory of harm. Why? Because the producers' leverages its power downstream in order to exclude his horizontal rivals in order to be alone in the primary market and to market and keep the prices as high as possible, even increasing it. The idea as a consequence is that these vertical agreements are anti-competitive when they put together significant amount of power and when they last a lot (more than 5 years). On the basis of our experience, generally we said that **if this exclusive dealing involves produces that own more that the 30% of market share and lasts for many years (more than 5), the anti-competitive effects of this agreement overcome the pro-competitive effects**.

What are the pro-competitive effects?

- ***Efficiency gains*** (reduction of costs of transaction, economies of scale, quality increase).
- ***Exclusion of double marginalization*** → the product that you give to consumers is always the same. This is the price that consumers are willing to pay. If you are the producer in a dominant position, you will try to apply your monopolistic mark-up. In a perfect world, you will apply a price that makes world distributors and retailers apply 0. *Since the world is not perfect, you apply a price which is lower than the perfect price that consumers are available to pay, but still you don't want them (world distributors) to add their own monopolistic mark up, because you don't want them to make the final price be higher than the price that consumers are available to pay* → you don't want distributors and retailers to have enough market power to add a monopolistic markup to your own monopolistic price, because you know that if they do that the amount of output that you will sell will be lower.

  → this is the price you want to apply, if somebody along the chain adds a markup, in the end the price will be higher, and in that price the quantity that will be distributed will not be the perfect quantity, the quantity that maximizes your profit. So, in order to prevent double marginalization, meaning the application of two markups you make these exclusive dealing agreements and generally you include in those some clauses about the prices of distributors. Actually, retail price maintenance, so the fixation of price of distributors, is forbidden in EU, but it is allowed in the US, because there they say that if you fix the retail price of your distributors, you do it in order to prevent double marginalization. But still, from a theoretical point of view, exclusive dealings and vertical agreements are meant to give the producer the possibility to control distributors to prevent them from applying additional markups.
- ***Exclusion of free riding*** → what does it mean? Suppose that the producer is selling a washing machine. Washing machines are commodities, you cannot distinguish the one from the others. There is a pre-sale service that aren't for free, they are expensive. Suppose that the produce in a specific territorial area ask world distributors to sell its own washing machine with pre-sail services ← because of that, the price is 15. The W1 realizes that actually, as long as W2 provides consumers with pre-sail services, it can avoid doing that, it can stop doing that and therefore sell the washing machine at 10 and starts selling the washing machine at 10. We may think that consumers go to W2, listen to the explanation of the washing machine, and then go to W1. What's the idea? Pre-selling instructions are public goods → goods which produce policy externalities. It means that once you explain how the washing machine works, you don't have any immediate tool to appropriate from the goods that come from your

explanation. In this scenario, W2 explains how the washing machine works but them go to W1 to buy it for 10. One way to prevent free riding is imposing the same price to W1 and W2, but you can't do that in EU. You can say: if consumers move to W2 to W1, I give a territorial exclusivity to W2 so that it will have a place where it can sell machines with nobody challenging its sails. Even if it gives pre-sail services and therefore keeps the price quite high, consumers will not be tempted to walk around and find some else who sells at 10. Why does this reduction of intra-brand competition increase consumers' welfare? The quantity is the same. This way of preventing free riding is considered pro-competitive because we assume that pre-sail services increase the experience of the consumers, they make the consumers be more informed and therefore they will be able to take better choices → why do we accept this exclusivity? Because we assume that it is a way to exclude free-riding and therefore it is a way to increase consumers' welfare.

If we have pro-competitive and anti-competitive effects and there are no rules to balance them → the anti-competitive effects overcome the pro-competitive effects.

In particular, in the European Union **courts are still following a kind of formalistic approach. Once the authority shows the inter-brand foreclosure effect took place, EU enforcers do not give a lot of credit to the procompetitive justifications of the exclusive dealing!**

LOYALTY REBATES → are schemes differentiating the purchase price for each costume according to costumer's behavior. For instance, if the customer buys more than a certain amount of product:

- Either each of the subsequent unit of the product will cost less → ***incremental discount***
- Or all the purchased units (also those already bought) will cost less → ***all units' discount***

I'm the producer, I say "a pair of skis cost 10, but if you pay for 5 units, you will receive a discount" → 2 possibilities:

1. Either the incremental discount → where I will apply the discount on the 6th unit and so on
2. Or an all-unit discount → where I will apply the discount on everything ← on the first 5 units + on the subsequent ones.

Which is the most convenient one for the consumer? The second one.

Suppose a dominant firm applies this discount policy → is this discount procompetitive or anticompetitive? It might exclude competitors, how? These discounts are anticompetitive when they are predatory. So now how do we establish whether they are predatory or not? Suppose we are selling 8 units and the discounted price, instead of 10, is 7:

- in the first kind of discount, we will sell 5 units for 10 and 3 units for 7. The final price is 71. How much is it for 1 unit? It's 8,9 and it should be compared to the marginal cost of the dominant firm → if it is lower of the marginal cost, this strategy will exclude someone that is as efficient as the dominant firm → therefore it is unlawful.
- In the second kind of discount, if you buy 8 units each of them will cost 7 → you will pay 56. Here we have to compare 7 with the marginal cost of the dominant firm → again, if it is lower, then it is a predatory discount.

→ we deal with the pricing strategy and as a consequence of this test to verify who is excluded is the equally efficient rival test → when it comes to prices, we always apply the framework of predatory prices, the different part is how we calculate this price.

We have to deal with the last kind of anti-competitive behavior.

REFUSAL TO DEAL

We are talking about the case of a dominant firm and a competitor that would like to share with the dominant firm some resources. If the dominant firm says no, can we consider this an anti-competitive behavior and an abuse of dominant position? It reminds us of the case of financial times of the first class (advertising spaces). It's difficult to consider refuses to deal as anticompetitive.

Why? Because the remedy that you would apply would be an obligation to share goes against the right of property and the freedom to trade with whoever you like. Everybody should be free to deal with whoever he wants. It's his own property. It's kind of problematic to come up and say that he has to share it with a competitor → the cultural environment of market economies is not very familiar, very happy about this kind of remedy.
Furthermore, from the economics, we know that if you cannot be the only one who benefits from the advantages coming out from the resource, you will lose incentives to produce that resource.
On the other hand, if I can stay seated on my own and let others and wait for somebody else to find out an innovation, then go there and ask for it, why should I ever worry about innovating? And that's the same for every property right.
The idea is that a duty to share would induce a kind of laziness in the competitors.
Furthermore, a duty to share is weird for antitrust people because it makes rivals cooperate. Agreements are the worst kind of behaviors that rivals can make for antitrust people. The focus of antitrust enforcement is not on unilaterally practices, but always on agreements. This is a way in which you impose rivals to find an agreement. The real point is that when you impose a duty to deal, what should the conditions of this deal? Generally, judges do not work like central planners → as a consequence, the antitrust law is not very happy about imposing the duty to share.
After the Tollgate case in the USA, we came up with this idea, that even dominant firms must be free to contract by choosing whether and with whom to make a deal. We have seen the rationale why, especially in the US, but also in EU, the cases of unlawful refusal to deal are just a few.
What are these circumstances? In order to find the amount, you have to consider two different scenarios:

An EU institution can oblige a dominant firm to share its proprietary resources in two **alternative** scenarios:

1. When the refusal terminates an existing business relationship, if
   - the refusal is likely to have a negative effect on competition; **and**
   - the conduct does not have any objective justification

Or

2. When the refusal prevents a new business relationship from starting, if
   - the refusal is likely to have a negative effect on competition; **and**
   - the conduct does not have any objective justification, **and**
   - the claimed resource is indispensable.

1. The case where who goes to the dominant firm is a rival who was **already involved in a business relationship with the dominant firm** → in such case the refusal to deal is unlawful if it has likely **negative effects on competition** and if **it does not have any business objective justifications**. The last case of this kind in EU was at the end of the 80s (maybe 1986)→ many years ago.
2. The second scenario is when the one who goes to the dominant firm is somebody who has not business relationships going on with the dominant firm but wants to start a new one. The only way to impose a duty to deal is showing that the refusal is likely to have a negative effect on competition + the conduct does not have any objective justification + the claimed resource is indispensable. This is the famous essential facility doctrine → when you impose the duty to deal because you assume that without the resource claimed the competitors will never be capable of competing with the dominant firm → since the resource claimed is essential, it cannot be reproduced by anybody else.

What's the example? The pipeline for distributing oil in every country. In the EU it is governed by governments. A few years ago that pipeline has been created by governments and that it has been privatized but they have kept the managing of the pipeline and they have become dominant. At that point, the competitors of this company managing a pipeline asked to use it and those companies refused → in that case, many authorities over Europe said that the pipeline is an essential facility, and it is essential to let

rivals use it → the dominant firm is obliged to share this pipeline with competitors. It would be not possible to build up a pipeline → we are talking about a resource that cannot be reproduced. Actually, the point is that reproducing that facility would cost so much that it would never be economically positive → the dominant firm is obliged to share that facility at FRAND CONDITIONS → fair, reasonable and not discriminatory conditions.
The Microsoft case → the one we have already talked about. We have the operating system for PC (OSPC) and the operating system for networks (OSN) and has we have already seen. What happened? Windows 98 allows the producers of operating systems for networks to with itself, so the OSPC. W98 can work with any OSN. When Microsoft released the new version of the operating system, W00 was not capable anymore to work with these operating systems for networks. The lawyers could have said: W00 is a sham innovation with the only goal of excluding rivals, but it was not. What the commission could have done as an alternative was to argue that W00 + the new operating systems that Microsoft created for networks was a bundle, a tying. And try to analyze this as a case of production integration. but the commission said: if I go along this street, I will lose because I will always find procompetitive justifications for this integration and there is no real evidence that somehow this integration is a sham.
So, the Commission said: in order to make these 2 products inter-operable, you need some pieces of software that are called APIs. Is it true that companies producing OSN asked Microsoft for APIs? Yes, it's true. They went to Microsoft and asked to give them the APIs and Microsoft denied → the commission said that it was a refusal to deal
The commission framed the case in the way that was most convenient for itself.
Guess what → some pieces of the APIs were covered by IP rights because software is always covered by copyright. The commission said that in order to oblige a dominant firm to share its resources when its resources are covered by IP rights, I need something more → I need some more elements that justify why I'm asking to share something → we are not satisfied with the essentiality, we must look for another requirement, that justifies why we are asking to share something that is supposed to be only for the one who has invented it, because the rational of IP rights is that the one who has them is the only one who can do or use something.
Here the problem was not only with IP rights, but the conflict was also with an instrument of law that was given to ensure exclusive property rights.
In order to consider unlawful a refusal to deal to create a new business relationship we have to verify not only the traditional conditions (negative impact, no objective justifications, …) but also a forth condition → the refusal is likely to block technical development. the incentive to innovate will be reduced → since the commission was able to show that because of this behavior the amount of innovation in the market of OSN was decreasing, the commission won the case. And from then on, the rule is that when somebody wants to impose a duty to deal to a dominant firm over IP rights, he has to show → likely of negative impact on competition, no objective justification, the indispensability of the IP right and that the refusal will prevent further innovation.

PRICE SQUEEZE:

Suppose that you have a dominant firm that is both in the primary and secondary market. it produces the inputs and the final products. you have price squeeze when the price that the dominant firm charges to the rivals is either high than the final prices that the dominant firm charges consumers or lower than the final price that the dominant firm charges consumers, but still insufficient to cover all the costs that the dominant firm has to incur to satisfy consumers.
The dominant firm sells the product for 10. If you are the rival of the DF downstream, at what price would you sell the product? 10. But you don't produce the inputs necessary to create the product, you have to buy the inputs from the dominant firm which sells the inputs at 15 → the rival is not capable to match the price downstream because it can be squeezed. In real life nothing of this happens.
What happens? If the dominant firm charges 9, so at a price that is quite close to the sell-out price (the price charged to consumers), and this price is insufficient to cover all the costs of the dominant firm cannot price 10 and to satisfy consumers. Here, again, the cost of the dominant firm, not the cost of the rivals!!

We have to create a rule that says to the CEO: as long as your price (the one you charge to your rivals in the upstream market) is higher than the costs you bear to make the product move to consumers you are fine, if you go under you are predatory. We accept that somebody who is not as efficient as the dominant firm goes out of the market → why? because we want to save the efficiencies that vertical integration creates and guarantees. Don't think that it is a mild rule → it is a rule that requires rivals to be efficient, to be very efficient, because sometimes the cost that the dominant firm has to encounter to satisfy consumers are low because of vertical integration → but the neoliberal or economic answer to this observation is → if in order to be efficient you need to vertically integrate, why don't you do that? The argument is harsh → the equally efficient rival test makes a lot of sense because it gives us a very clear benchmark → it says "as long as you are not predatory, that's fine" → but this has implications, because sometimes the costs are very low not because you are very good at producing that piece, but just because you are integrated over the vertical or horizontal market → if this is the case, people should integrate, even if it is not easy.

Cases about abuses of dominant → big tech.
The first case about a facebook case that was discussed under the German competition law, but still they could have prosecuted it under art. 102 letter A, because the clauses that Facebook wrote to describe its privacy policy were opaque, vague, not necessary. They impose that a subject to share an amount of data was not necessary to fulfill, to realize the different operations that Facebook realized and therefore, that privacy policy could be seen as a violation of art. 102 letter A, as an unfair trading condition. The Bundeskartellamt didn't do that. We have to remember that if you blame somebody for a violation of art. 102 letter A because he was not transparent enough or not clear enough, the only remedy that you can impose is a disclosure obligation. You can impose facebook to clarify the condition under which it collects data from users. You cannot ask Facebook to trash some of its data, to split or organize differently its data.
This is the bottom line of the facebook case, that the Bundeskartellamt was so worried about the data accumulation, about the amount of the data that facebook was capable to collect working or putting its attention on the transparency of the privacy policy was not a good strategy to follow in order to attack that data accumulation.
On the other hand, **data accumulation is not an exclusionary practice and it's not even an anticompetitive practice, so there's no way to prosecute data accumulation under antitrust law**.
What we can do is trying to use consumers' protection law to go after data accumulation, but it's not easy even under consumers' protection or privacy law.
Then, there are many cases even in the US → we started prosecuting tech giants in 2017 with google shopping case. In the US they didn't do anything → there was a political debate because the FTC was not doing anything against Facebook, Google and Amazon just because they are its own companies, and he tolerates the anticompetitive practices of these giants because these are Americans. We can consider it somehow true, but the real reason why they were not prosecuting them is that there was a big debate about the tools that should have been used to prosecute them and the claims that should have been brought against them.
In 2020, the FTC decided to attack Facebook for these behaviors, because it made the APIs available to third parties on the condition that third parties refrain from:
- Offering Facebook's core services
- Connecting with other social networks or promoting them

← what is this? This is clearly an exclusionary practice based on compatibility issues. This is similar to the Microsoft case, because the APIs of Facebook are what help facebook and provide the, their applications to work together. In order to put together the platforms we need those applications, so the applications must dialogue with the platforms → we need interoperable codes, and these interoperable codes are governed by APIs. Facebook is the owner of APIs, so Facebook decide to share them under conditions.
First of all, third parties should refrain from offering Facebook's core services, so to do what? To jump into the primary market. Why was Facebook interested in preventing these developers of APIs its primary market? because Facebook wanted to protect its dominant position.
Then, he said that the third parties are also refrained from connecting with other social networks of promoting them.

← these 2 conditions are clearly meant to defend the monopolized market from possible challengers, so from potential rivals. According to the FTC, this is a very traditional exclusionary practice. Here we have an exclusionary conduct meant to shelter dominants in the primary market, which is capable to produce anticompetitive effects, limiting additional innovation and limiting pricing competition in the market, which is connected to the one of Facebook, which is that of advertising services.
Likewise, also the DOJ brought an action again Google under sect. 2 of the Sherman Act which is the equivalent of art. 102.
Sect. 5 of the FTC Act says that it prosecutes unfair matters of competition, and so abuses of dominant position. The DOJ applies sect. 2 of the Sherman act and says that Google, which hold a dominant position in the market for internet search, has entered into:

- **exclusivity agreements that forbid pre-installation** of any competing search service
- **tying and other arrangements that force pre-installation** of its search applications in prime locations on mobile devices and make them undeletable, regardless of consumer preference
- **long-term agreements with Apple that require Google to be the default** – and de facto exclusive – **general search engine** on Apple's popular Safari browser and other Apple search tools

and

Google has used its monopoly profits to buy **preferential treatment for its search engine on devices, web browsers, and other search access points**

→ traditional exclusionary practices. What is Google doing? Who is injured by these behaviors? Search engines competitors. What's the idea here? The idea is locking up distribution channels and denying rivals scale and product recognition. If you make agreements with the producers of those devices in order to have you own search engines, you lock up your distribution channels and you prevent other search engines to be known by consumers, so to have scale enough, products recognition enough to become your competitor.
Those were exclusionary conducts. Do they produce anticompetitive effect? Yes, how? Reducing variety, innovation and quality in search, because you prevent other search engines from developing. Then, it left Google with the power to charge advertisers with high prices and low-quality services → you have an anticompetitive effect also in the monopolized market, because you have Google to keep on charging high prices, not to search engines, but to advertisers.
Why are these two examples important? Because here we are talking about two very sophisticated markets, but the strategies are always the same. That's why, if you learn the foreclosure strategy (I cut off the distribution channels of my horizonal rivals) or the case in which you prevent your rivals from jumping into your market and if you have these strategies in mind, you can analyze almost every scenario.
These two most recent US cases were very similar to the previous Google cases, for example **Google android 2018** → it was a case where the commission fond all these exclusionary practices on the side of Google again meant to control pre-installation on devices and the commission found it exclusionary and anticompetitive because the reduction of innovation. What is important of this case is that the commission took this decision during the years of migration. What where they? In 2013 human beings went on internet thanks to PCs. From 2013 award, people around the world get access to internet via hand devices, smartphone and tablets, because they are less costly. Suppose you were back in 2010 and you were a dominant search engine, and then you realize that people were stopping using PCs and were starting using more and more hand devices. Then, what could you do in order to maintain your dominant position? Because, that case was as if the number of PCs was going to burst. They decided to engage an agreement with the producers of tablets and smartphones in order to get those channels, to control those channels of distribution of their search engines and they succeeded in doing that.
The commission discovered it and sanctioned Google with millions of euros because of these behaviors.

Now, here there is a kind of sophisticated question → if you were Apple, you would have had your search engines of you PCs? And then, you would have had you own search engines on your iPhone and iPad. So, you would have produced the same result of Google without making an agreement, with the manifecturer of these devices, because you are the manufacturer of your own devices. Apple is vertically integrated as it produces hardware and software. Apple doesn't need to make agreements, because one single company makes everything. Instead google, for example, must make an agreement with Samsung in order to be the search engines application on Samsung's devices.
Why is possible for Apple to do that, but is not possible for Google to do that? Because there is a difference when you are vertically integrated or you are not, and because Apple was not a dominant as Google. More importantly, the point that was made was: so if google was cleverer than Apple, it should have had a closer structure, it should have been producer of software and hardware that do not make any agreement, it should have been vertically integrated as apple is? This question is not good. you are an entrepreneur, you take decision. If you decide to have an open architecture, is because you want to make profits by making agreements with third parties. You can be good enough in getting a lot of market shares because of that strategy, but the counter effect is that you become dominant, as Apple has never become. Is true, apple is not dominant and is a close architecture and cannot be prosecuted for its behavior, even though they produce the same effects that Google's behaviors produce. But this is not a good argument to consider Google's behavior lawful.
Although, the anticompetitive nature of those behaviors is a con against open architecture system.
Then, standing for an open architecture system doesn't mean forcing people to use your search engine. If your search engine is the best, people will use it without a need of exclusivity agreements.
We have another decision against Google in 2019 → very traditional anticompetitive behavior. Google AdSense. On the internet you can make behavioral advertising → websites collect information with our consent; once they profile us, they can give us the advs that fits us the best. Now, who takes care of profiling people collecting personal data? Advertising networks, that on the one hand are those that out cookies in our computers. On the other hand, there are those who are called publishers, that are those who own websites. The ad networks take care of putting in the advs space of a specific website the advs we want. The ad networks take care of the need of the publisher (if you are Disney, they ask not to put advs on drugs for example). Google is also an ad network. Google AdSense is what put on websites the kind of advs that users want to see. What happens?

In contracts with publishers Google inserted a series of **exclusivity-type clauses** requiring the counterparty:

(1) to **source all or most** of their search ads requirements from Google;
(2) to **reserve the most prominent** space on their search results pages for a minimum number of search ads from Google; and
(3) to **seek Google's approval** before making changes to the display of competing search ads.

← exclusivity clauses that google AdSense made with the publishers. These are a series of clauses that replicate exclusive dealings.
Here the commission said that these are obviously exclusionary practices meant to shelter dominance in the market for online search advs, by subtracting clients to AdSense's rivals and hence marginalizing them into a niche of the market → in this way, AdSense maintained the power to apply higher prices to both advertisers and publishers.

On the empirical premise that all together, the publishers to whom AdSense imposed exclusivity-like clauses represented a significant part of the EEA-wide market for online search advertising intermediation

← what is important? What are the key words? A significant part of the EEA-wide market. why is this important? What if google AdSense made an exclusivity agreement with just one publisher? Why is this important that the ones with whom Google makes an exclusivity agreement are many and not only one? Suppose we have distributor 1 (is 10%), D2 (is 50%) and D3 (40%). Is exclusionary if I make an agreement with D1? No, because there is the 90% of the market left. So why that empirical premise is important? Because the point is not that they cannot make an exclusive agreement, that would be wrong. Even Google can make exclusive agreements and loyalty rebates, the point is: how many competitors they push out of the market? The rivals still have the other part of the market to flourish. So, the conduct is not even exclusionary. that empirical premise is important in order to argue that it is exclusionary. then, on the basis of that, without a business justification from google, you can say that it is also anticompetitive. Because once you have excluded a lot of people from the market, you have an effect on prices that will keep as high as possible and an effect on quality that will keep it as low as possible. But that is a kind of default effect that goes after exclusion and that makes the difference if the dominant firm doesn't come up with a business justification for its behavior, and in this case, Google didn't have any business justification.

Google shopping case: 2017
It's a very important case because it introduces a new offence in competition law, which is SELF-PREFERENCING.
What was the story? We know how google search pages look like. At the top we have sponsored links. The company pays to be at the higher part at the page. Suppose you search for Starbucks. If you make the search, at the beginning you will have the sponsored links, and under that you will have pictures. Then, you will have blue links ← you can click on them to read the websites. Who makes the rankings of the links? Google search engines that produce and lists the results for your search. The commission, at the very beginning, in 2012, discovered that the pages that were indicated by a picture were pages of google itself. In particular, if we consider for example Canon, the pictures were about cameras coming from Google shopping, which is the website where you compare prices and buy products. Whereas, on the rest of the page there were other websites (Canon website, eBay and so on). According to the commission, the act of placing Google shopping as the first result and putting it at the top of the page was an exclusionary conduct. Why that? Because the commission made many surveys that showed that those who are at the bottom of the age have low traffic and so they have not enough consumers, while those who are at the top of the page have most consumers. The effect of putting somebody up and somebody down was exclusionary → the commission was capable of showing that over time, because of this behavior, Google shopping market shares grew and became much higher than the market shares of others comparison websites → because of that, it was capable to increase merchant fees. So, the commission portrayed the strategy in a very simple case → the commission said: this is the monopolized market, the market for search engines. Here google is dominant. In the secondary market for comparison websites, google shopping shares increased because its rivals were forced to go out of the market → this was exclusionary → afterwards, the merchant fees paid to google shopping increased → this was the anticompetitive effect.
What was the ***critique*** that came from many scholars? Google was only preferencing their own products. what should be the bottom line of this case? That if you are a dominant, you cannot promote youself? You cannot self-promote your products? They say: unless you establish the principle of equal treatment, unless you argue that dominant firms are obliged to treat everybody equally, google should be free to promote its product with more strength than how it promotes somebody's else's products.
There is a piece of the story missing → how was possible that the algorithm of google always resulted in that organization of the content? Because the algorithm was written in this way → the algorithm was asked

to rank websites on the basis of how the cameras, the products were described. If in the description of the comparison websites the cameras were described as they were described in the website of the producers of the camera, the comparison website should have been put at the bottom of the page. If somebody looks for a camera, you have to read the description of the technical features of the camera as the producer did it and then you compare this description with the one that the other did of the same camera. If the description of the comparison websites is equal or very similar to the one of the camera producers, then you have to put it at the bottom of the page because that's not good. These websites are not adding value so they should go at the bottom of the page. If google shopping was always in the first line because it was very careful in analyzing products and describing them, then google should always be first because of its merits. But here the point was that the algorithm was manipulated. The algorithm didn't apply it to google shopping → it was always the first because the rules applied to the others do not apply to it. So, the business justification that google could have made saying that its products were always first because they were the better was not available. The only justification that Google could use was that these were its products, its own search engine and on it google do what he wants.
The claim of the commission was: you put google shopping first and you exclude rivals → conducts both exclusionary and anticompetitive.
Google could have said: look, my product was the first because it was the best. It could have been a business justification. But the commission said that they manipulated the algorithm. So, the business justification was → suppose I grant you that I manipulated the algorithm, but the search engine is Google's own product, and they do what they want. It is promoting itself.
When do we stumble in the property rights, the right of the dominant firm to do whatever he likes with his own resources? Refuses to deal. So, what was the argument? **Self-preferencing** cases should be cases of essential facilities. Since we are dealing with proprietary resources, since google is saying that the products are its own product and they do what they want with it, the answer of the commission should have been: NO! because this is an essential resource, so you cannot do whatever you like with it. But as the commission was not capable of showing that google search engine was an essential resource, then the commission came out with **self-preferencing**.
There is a part of scholars who wrote that this is a way to circumvent the law, which says that the commission can oblige owners of resources to do what they don't want if those resources are essential. But, unless you prove that the resource is essential, this is a way to walk around the refusal to deal doctrine.
This idea that self-preferencing establishing the principle of equal treatment has been analyzed by the court of first instance in Europe in the appeal of the case Google shopping and in that decision the tribunal was very confusing → on the one hand, the tribunal said: yes, dominant firm are subject to the equal treatment principle ← the tribunal said that there's the principle of equal treatment; on the other hand, the tribunal said: google shopping case is a case of exclusion, where the exclusion produces an anticompetitive impact. So, the tribunal did not analyze the case as it was a discriminatory case. It analyzes the case as it was a case an exclusion + anticompetitive impact.
So, the tribunal says that it's true, but then it doesn't apply the principle, because in this specific case Google excluded rivals and produced anticompetitive impacts. So, this sentence was superfluous in relation to what made google liable. Critique of those scholars who said: so, in the end you are applying a sort of equal treatment principle. The tribunal said yes, asking why they were so shocked for the application of that principle. At the same time, in the decision, the court wrote that the behavior of google was anticompetitive. They do not specify what was the point in applying that principle, we have to wait for the ECJ.

Also, **this principle is not included in art. 102 lett. C → discriminatory practices**. Art. 102.c says that dominant firms are liable if they apply the similar conditions to equal situations causing a competitive disadvantage for rivals → art. 102.c requires three features:

1. The similar conditions
2. Equivalent situations
3. Putting rivals at a competitive disadvantage

The third requirement stands for the idea that the principle of equal treatment doesn't exist within EU antitrust law. If I ask you: the principle would have existed if the conditions for applying 102.c were just the 1 and 2? Yes, that's enough. But lett. C asks for an additional element.
So, why some scholars reacted so shocked to the decision of the tribunal? Because they say: why should google treat everybody in the same way? The principle of equal treatment doesn't exist. Then, they argue that google is the owner of google search engines so he can do whatever he likes with its own product → this case is wrong, because self-preferencing is a way to walk around the essential facility doctrine and google should be free to promote its own products, even at the expenses of the others.

We have studied that under art. 102 there are two families of practices:

A) Exploitative
B) Exclusionary + anticompetitive

Where do we put discriminatory practices? Now, just because of the last decision of the tribunal we have good reasons to consider ***discriminatory practices as sub-speeches of exclusionary and anticompetitive practices. Discriminatory practices are not a third family of practices***. When it comes to exclusionary and anticompetitive practices, we distinguish between:

a) Lawful
b) Unlawful

← on the basis of the effects. And because of that, we agree that **a conduct is unlawful on the basis of its effect when it produces exclusionary effects, anticompetitive effects which are not counterbalanced by pro-competitive effects**. **These effects can also be potentials**. Up to here, there is a kind of general consensus to this.
If we agree that this is the definition of exclusionary and anticompetitive practices, it means that the three building blocks of the notion of exclusionary and anticompetitive practices are those three:

- Exclusionary
- Anticompetitive
- Absence of anticompetitive effects counterbalanced by pro-competitive effects

If these are the effects, these are the three things that you have to verify in order to show that something is unlawful. Whether the resource is essential, whether the practice is called self-preferencing, is called refusal to deal, is called exclusive dealing, it should not matter for the application of the law if you agree that the three building blocks of the notion of exclusionary and anticompetitive conducts are those 3.
If I say that in order to have exclusionary and anticompetitive practices I need those 3 elements, all the other circumstantial elements that I consider (es. the essentiality nature of the resource, coercion, the duration of the contracts) are NOT the building blocks of the definition. They are factual elements that tell us if the exclusion is taking place. If there is coercion, there is exclusion. If the resource which is taking away rivals is essential, you are telling me that there's exclusion. But all these factual elements are circumstances that you take into consideration to show me that there are the THREE ELEMENTS. All the other circumstances showing exclusion are fungible.
According to Pablo Cologno, the point is that → if you are the commission and you say that somebody is charged with tying, you have to show dominant, position, coercion, 2 separate products and exclusion and anti-competitiveness. But the coercion is just a factual circumstance showing exclusion.
Now, if you come from continental Europe, generally you think cases rules as pieces of abstract that must occur in reality in order to have a violation. Generally, if you come from common law countries, these elements result from layer and after layer cases and so it's more difficult to convince one colleague from a broad to say that coercion is not independent from the other one, but it demonstrates exclusion.

ART. 101 TFEU:

With the class of today, we are going to start a new topic, the law about arrangements. We will be talking about article 101 TFEU. When it comes to arrangements, everything is much clearer: antitrust authorities around the world want to fight strongly against arrangements practices and agreements. The initial idea is that **economic agents should work on their own, they should decide what to do in an independent and autonomous way without coordinating themselves**. In a perfect world, firms do what they want on their

own. If they decide to do something together, that behavior must be put under scrutiny to assess whether that behavior is pro or anticompetitive. Still, the starting point is that they should work on their own making their autonomous decisions.
Whenever we have an agreement/arrangement, then we have to decide whether it is pro-competitive or anticompetitive. Today we'll see what an agreement is.
We have to get started from the **notion of arrangement** → it's written in **par. 1 art. 101 ← every agreement, decision or association of undertaking and concerted practice should be forbidden**. These all together tell us what an arrangement is.
With art. 101 we use an **ex-post approach** → those who must be capable of understanding whether a conduct is an arrangement or not are the lawyers. Who bears the duty to understand what is going on, whether the arrangement is pro-competitive or anticompetitive are the lawyers of the company.
In par. 1

«1. The following shall be prohibited as incompatible with the internal market: all ***agreements between undertakings****,* ***decisions by associations of undertakings*** *and* ***concerted practices*** *which may affect trade between Member States and which have as their* ***object*** *or* ***effect*** *the prevention, restriction or distortion of competition within the internal market, and in particular those which…»*

- **Notion of arrangement:**
    1. Agreements between undertakings
    2. Decisions of association of undertakings
    3. Concerted practices

- **The constituent elements of arrangement are three:**
    (a) Multilateralism (it's a pre-requisite: two or more undertakings, as opposed to abuses of a dominant position)
    (b) the arrangement
    (c) the subjects that are part of it (see *EU notion of undertaking*)

If two or more part belong to the same undertaking and there is an arrangement, that agreement is not important for antitrust law, because we need two arrangements, **we need multilateralism**→ two autonomous and independent subjects.
When we saw the notion of undertaking, we saw that we need two legal entities. Example: mother and daughter → if they make an arrangement, this agreement is not relevant for art. 101, because we miss multilateralism.
AGREEMENT → the notion of agreement is absolutely **very broad; it includes any kind of cooperation among firms**. A genuine concurrence of wills among parties: you got an agreement any time you have a **meeting of minds.** What does it mean? It means that **the form of the agreement doesn't matter**, whether it is written or not doesn't matter, and it does not matter the way how they express their will. **You got an agreement when you have an enforceable contract**, but it doesn't matter if it's in standard form or not, or if it's incomplete, or signed by somebody who was not authorized to sign it. **<u>You have an agreement any time we have concurrence of wills</u>**. Even if we have guidelines and warning issues by a firm and then they are followed by the others, meaning in case we got a kind of proposal and somebody who complies with it without accepting them expressive, still we got an agreement.
Any time we can say 2 or more undertakings decide together what to do, then we have an agreement. Why do you have such a broad notion? Because they don't want companies to elude art. 101, to escape from art. 101.
For antitrust law, formalities don't count. What counts is that the two companies have done agreed to do something together
Now, we always have to consider these three elements:
- **The constitutive phase** → companies A and B reach an agreement (ex. We will increase the market price up to 10%)
- **The implementation phase** → A and B implement the agreement (ex. We change the price list accordingly)

- **Market impact** → given the agreement, market price is increased by 10%

An agreement is any kind of cooperation among firms, and this means that they meet their minds.

We have an agreement … regardless of …

1. **The "form"** that this "meeting of minds" took – whether such a form consists in a valid binding contract or … in a unilateral declaration happened during a business meeting that rivals have not refuted (see EU Tribunal, T-41/96, Bayer (2000): the concept of agreement "centers around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention"). *Furthermore*, the fact that an undertaking has voluntarily signed it or has been nudged, or even forced into an agreement by other undertakings does not affect the existence of such an agreement. This is a matter of liability / fine calculation.
2. **The specific practices endorsed in compliance with the meeting of minds** – whether they are consistent with it or not
3. **The effectiveness of these practices**, i.e. the effects of the meeting of minds

Even if you have been forced to agree, still you are part of the agreement. As long as your will meets the will of somebody else, there's an agreement.

Why for an authority that wants to apply antitrust law the conduct of the firms doesn't matter? The point is not what the practice is going to produce, but what they could have done without the practice. The point is: since you are expected to decide on your own, once you decide something with someone else, you are limiting your freedom to make a market decision, and nobody can tell me that otherwise you could have been taken amore procompetitive behavior. The idea is: I consider the counterfactual scenario that would have been without the agreement, and I always say that you could have done something more procompetitive. If we agree on 10, and then the other party charges 8, in absence of the agreement he could have charged 6 encase he didn't know I was going to charge 10.

Then, the effectiveness of these practices doesn't matter as well. How is it possible that a behavior produces effects on a market? **We have to think about market power** → first, generally the agreements produce effects on the market if the parties that join together have a significant amount of power. Even if the parties don't have market power (and very little market shares), we still have an arrangement. The notion of arrangement is not affected by the effectiveness of the arrangement itself. This is a sort of contraction, because we usually look at arrangements because they have the power to affect the well-functioning of the market.

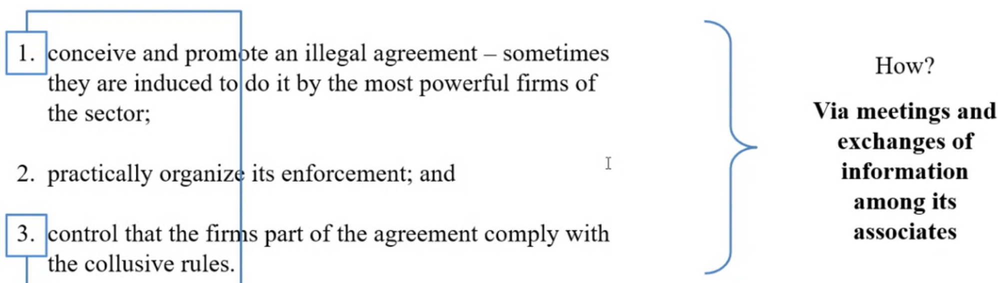
The point is → in order to define what an agreement is, the market power of the parties is useless. We can have an agreement even if the parties have no market power. We know that only agreements with market powers can affect the market, but it doesn't matter, it's always an arrangement.

"**DECISION OF ASSOCIATIONS OF UNDERTAKINGS**" → in Europe there might be associations of undertakings, like federation of farmers and so on. The drafters of the TFUE, decided to take this association of undertaking under scrutiny, because our experience teaches us that *those are the places where firms do collude and decide to make anticompetitive behaviors, since they meet each other talking about prices and costs, and they can decide to take anticompetitive behavior*.

Why those places are natural places where they can make agreements? Because the association can work as a kind of director of the cartel, of the agreement.

When you make a cartel, what do you have to do? You have to decide the price that everybody should charge, then you have to tell everybody what the price is, and then you have to control that nobody deviates from that price. You need a director, a coordinator of the cartel, and this is why associations of undertakings are the natural places for arrangements. Why do the treaty talks about it? Because the firms may argue: "look, we didn't decide anything, it was the associations who decided" → they could try to use the association to elude art. 101.

Even if the association takes the decision, I assume that the firms agreed too. Any act of the association is an arrangement, because multilateralism is checked by the same fact that those companies belong to the association.



Therefore, art. 101 directly focuses on the decisions of these associations.
Why do the drafters of the treaty talk about this specific kind of arrangement? Because it's easy for firms to try to elude the law by saying "we did not decide anything, the association decided, and this is a unilateral decision and not a multilateral decision!" → **they decided to write it down clearly: decisions of undertakings are arrangements**.
Then, this doesn't mean that associations of undertakings are always liable for what the association did. There might be different cases. You may have the case where the association is not liable at all and it was only the place where the agreement took place. You charge only the companies for what they do → the association is not liable.
There may be other cases in which the association was the main leader and decided the anti-competitive behavior → the association is liable.
There might be cases in which the association took firms to make the arrangement → the association will pay a fine which is higher of the fines of undertakings.
How do we establish the amount on which you calculate the fine for the association? You take the turnovers of the associates, we sum them up, and that is the turnover of the association. This was decided a few years ago, and it was an important reform, increasing the deterrence power of EU competition law: think about any association, the quotas associates pay are small; if you calculate the fines on the base of that amount of money, you do not apply significant fines; on the contrary, if you calculate the fine by summing all the turnovers of the associates, you may have huge turnovers, and as a consequence huge fines, and therefore associations are disincentivized to undertake anticompetitive behaviors, especially because very recently it has been approved the new modification of the law: if the association has not money to pay the fine (it's true you can consider as its turnover the sum of the turnovers of its members, but at the same time it may happen the associations does not have enough money to pay the fines), then the members have to pay, mainly the undertakings.
In this way, you incentivize firms not to take anti-competitive behaviors and you recall to undertakings that if they want to take an anticompetitive behavior by an association, they will be forced not only to pay their own fines, but also the fines of the associations, if the association is not solvent (which happens often).

But what is a decision of an AoU? A decision is any act of the AoU, such as:

- a deliberation taken by the council/board of the AoU;
- a non-binding recommendation adopted by the president of the AoU;
- a regulation governing the operations of the AoU;
- a code of conduct establishing advertising practices, tariffs, hours of labor and so forth…

But what is a decision of an association of undertakings? Any act, such as a deliberation, or a non-binding recommendation, or a regulation governing the operations of the association, or a code of conduct establishing advertising prices, tariffs, hours of labor and so on and so forth.
If you are part of an association, the only way not to be is to take distance from what the association did. Suppose you are member of the association, the board of the association met and decided to collude. You receive that communication, the only way not to be involved in that decision is to take distance by writing an email "I'm not going to charge that price, or to produce that amount of products". The best solution

possible would be to denounce that behavior, but if you do not want to do that, then at least you have to take distance from such behavior, otherwise you are part of it.

We said that the notion of agreement is broad and so the notion of decision of association of undertaking is broad → so, what is NOT an arrangement? What is outside? We have to focus on the third element: CONCERTED PRACTICES → they stand on the outer boundary of the notion of agreement. So, what is that? In economics, firms should decide on their own what to do. They should decide independently from each other. Suppose that you are an officer, and you see 2 firms doing the same behaviors (ex. charging the same prices), technically called ***parallel behavior***. So, you should conclude that, if they are taking the same behaviors, they have decided to collude. So, there are two possibilities:

- Parallel behaviors are the result of collusion → you have to intervene and fine the companies.

Economics tells us that there might be ***two scenarios in which firms do take the same parallel behaviors without colluding***:

1. **OLIGOPOLISTIC INTERDEPENDENCE** → when you have oligopolistic markets (with 2/3/4 competitors which are very transparent, where the products are homogeneous, where the costs are very similar one to the other). You have oligopolistic market. the firms do the same parallel behaviors because the market requires that. So, it's not because they meet their minds, but because the structure of the market asks to take such behaviors. The oligopolistic price is very similar to the cartel price, that is much high that the perfect price. But, as long as art. 101 says that meeting of minds is arrangement, here you don't have meeting of minds, so you don't have arrangements. We punish firms that meet their minds and agree to do something. We do not punish firms that decide on their own, in an autonomous and independent way. So, here the firms take parallel behaviors on the basis of an independent choice. **THIS IS WHAT AN ARRANGEMENT IS NOT**! When firms naturally adapt to the structure of the market and therefore, they take parallel behaviors, in this case it's not an arrangement.
2. You have a **PERFECT COMPETITION**

But how can the officer distinguish this situation (collusion) and the other two situations (oligopolistic market and perfect competition)?
Usually, we generally work in this way: in order to distinguish the case of collusion and the case oligopolistic interdependence, we look for evidence, for circumstantial evidence showing one situation or the other. This approach was taken by the US system → once they see parallel behaviors, they look for elements showing collusion → these elements are called ***PLUS FACTORS***.

PLUS FACTORS

sustaining a finding of conspiracy, such as:

(i) **Conspirational rationales**, i.e. those factors suggesting whether the firms have any rational motivation to collude. (For instance, are the regarded actions contrary to the defendants' self-interest, unless pursued as part of a collective plan?)

(ii) **Opportunities to conspire**, i.e. those factors indicating whether these firms have the opportunity to collude, and

(iii) **Market plus factors**: i.e. those factors mainly connected to market features that explain whether the firms have the economic incentives to collude.

If the behavior that I see cannot be explained otherwise in no way other than with collusion, then it's collusion. If there is not any other plausible explanation of collusion, then that's collusion. If the behavior does not admit any plausible explanation different from collusion, that's collusion.
We have concerted practices any time we have firms exchanging strategic information → if we have companies exchanging the information about their prices, their costs, information that neutralize the competitive risk, then we presume that those firms will use that information in order to collude.

In majority of cases, in order to have this, you have exchanging of strategic information and therefore we got concerted practice any time we have strategic contracts, and we presume that because of the fact firms exchange that information, they are colluding.

Hence, today it is true that …

1. To show that firms do not undertake the same conduct on the market **is not enough** to rebut the presumption. According to the Commission, "when a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), **it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data**" – see *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, § 63 → **No need of bilateral disclosure of information**

2. Taking **public distance** from the exchanged information – i.e. stating that you are not interested in receiving that information – is **the only way out**, i.e. the only way to defend a firm from the charge of being a party in a concerted practice! The Commission considers public distance crucial because it creates distrust!

if a company receives some strategic information, if it doesn't want to be part of a concerted practice, it has to email back saying that it doesn't want to be part of it → taking public distance is the only way not to be considered liable of concerted practice. If you don't, we assume that you are part of this behavior.

Consider the following facts:

Facts	
1. The CEOs of two firms, A and B, share some data about their business strategies … about prices, costs …;	Contacts
2. Afterwards, the two CEOs use those data to shape and design the strategies of their own firms;	Internal use
3. A and B try to put in practice these new strategies by, for example, increasing their own prices – P_A and P_B;	Parallel market behaviors
4. The market price – P_{mkt} – aligns to P_A and P_B	Market effects

Which of these events are the building blocks of the notion of concerted practices? The first two, granted that the second is presumed

Here we have contacts (1° phase), internal use (2° phase), parallel market behaviors (3° phase), market effects (4° phase). Phases 3 and 4 are useless in order to argue that there is a concerted practice.
In the US you need phase 3 in order to say that parallel conduct was the result of an opportunity to conspire.
If you don't have to wait for parallel market behavior, you anticipate a lot the moment in which you are able to act and to prosecute such conducts. Otherwise, you could prosecute only the exchange of information.
So, this is another way to say that when it comes to concerted practices, we do not need implantation and effects; this new notion of concerted practice was very helpful for those who love interpreting the law: the way in which we interpret the notion of agreement now is equal to the way in which we interpret the notion of concerted practice. In the 2 scenarios, we stop at phase 1 with no need to go to phases 2 and 3.
We got parallelism when you apply same prices or when you produce the same amount of output. We have parallel behavior when companies split the market.
Let's imagine we have 4 companies taking part to the tenders and each of them wins 3 times, then we have a parallel behavior: we have a coordinated behavior that makes the market to be split in equal parts.
The last element of art. 101 is the one that is not written in the law → **when cartels happen, when very huge, concerted practices happen, we have different behavior over time**. They start with an agreement, a decision of association of undertakings and so on.
You have many things together over a significant amount of time (like 10 years) → The ECJ together with EU Commission thought that requiring authorities to show that each behavior was an agreement, a

decision, a concerted practice, then again, an agreement, and then it was again a concerted practice, and so on and so forth would be meaningless, the overall behavior must be assessed. They created a new notion of arrangement, which is the **SINGLE OVERALL AGREEMENT**, the case where over a certain amount of time more or less the same companies take collusive behaviors in different forms. 3 conditions must be met:

a) the existence of an **overall plan** pursuing a common objective (raise the price);

b) the **intentional contribution of each undertaking to the plan**; the fact that some members participate less than others or had some reservation whether to participate, or cheated does not mean that they are not party to an overall agreement (all the firms participated, even if in different ways, to the plan);

c) Awareness (presumed or proved) of the offending conduct of the other participants. **Need to prove that each undertaking knew, or ought to have known, about the offending conduct of the other members of the cartel (or at least some of the elements of the overall cartel – partial liability).**

Suppose the 2 of us are in a market where we agree to charge 10. Why is this effective? Because I trust the other company will apply 10, because if it applies 9.5, it will undercut me. In order to argue that for 20 years many firms took part to this single overall agreement, you have to show they trust each other, and nobody will deviate from the collusive price, and that's why this third condition is awareness.
The creation of this new class of arrangement was useful for Commission, since it helped it to prosecute cartels without wasting time in showing every single detail, since in such case you can apply one fine for all the behaviors taken place in 20 years, and you do not suffer time limits: if you are capable of showing the behavior lasted 30 years, the limitation period runs from the end of those 30 years.

Art. 101 is made of three paragraphs:

- The text of art. 101 says that the three elements (agreement …) are forbidden if their **object or effect is eliminating or limiting competition** → in par. 1 you find the prohibition.
- In par. 2 you find the **sanction**.
- In par. 3, you find **4 conditions which, if are met, make the unlawful agreement lawful**. If an agreement is anti-competitive under par. 1, it can still be lawful if it meets the following four conditions.

So, we can have:

1. Arrangement that does not fall under par. 1 → lawful, as they can't fall under the prohibition
2. Arrangement that falls under the first and third paragraphs → they become lawful
3. Agreement that falls under par. 1 but not under par. 3 → unlawful

"**OBJECT OR EFFECT IS ELIMINATING OR LIMITING COMPETITION**" → these two requirements are alternative, not cumulative. What is necessary in order to hold that the agreement is anti-competitive, either the object or the effect.
If the object is clearly anti-competitive, there is NO need to prove that it also produced anti-competitive effect to apply art. 101.
If the object is not anti-competitive, you have another chance to apply the prohibition, that is looking at the effects.

So, art. 101 TFEU includes 3 paragraphs → the first one includes the prohibition, the third one is about the exception, the second one is about fines and sanctions, because anticompetitive agreements are null and void.
We have 2 alternatives, and what is needed to trigger a prohibition is either an anticompetitive object or the anticompetitive effects → this is enough to trigger the application of the prohibition. Usually, when the object is anticompetitive, also the effects are anticompetitive, but you don't have to look at them in order to apply the prohibition.
What can we say about the prohibition? Agreements in EU are forbidden either when the object is anticompetitive or when the effects are anticompetitive.

When we talk about agreements and there is an agreement that is anticompetitive → it reduces consumers' welfare → it increases market price or reduces output, or it reduces quality, variety or innovation. When we say "anticompetitive", we mean something that increases market price, or reduces output, or it reduces quality, variety or innovation in the long run.

Let's look at what the object is → what do we mean when we say that the object of an agreement is anticompetitive? We mean that the only reason why the agreement exists is reducing competition → it is the only rationale explaining the existence of an agreement. When we talk about the object, we talk about the rationale of the agreement. Another way to state it is that the object is anticompetitive when the agreement does not admit any plausible procompetitive justification.

Let's see some examples → let's talk about price fixing → when A and B agree to fix their prices. Try to think about procompetitive justifications for this conduct → what could be a procompetitive argument? Even if they decided to set a low price, what could a counterargument be? The increase of consumers' welfare → if they fix low prices, you could argue that those low prices in comparison with the previous ones do increase consumers' welfare, and therefore they should be allowed. Still, there is always the argument in behind, you are taking away the chance of charging a lower price different form that one fixed. More importantly there is a deeper argument → price mechanism is what makes competition → the ability of price to change overtime and to signal the market how efficient companies are is the essence of competition. If you stop price mechanism from working, you are harming the very inner nature of competition → fixing prices is never good → there is no possible procompetitive justification for it. From the consumers' welfare perspective, even if you argue that their welfare has increased, still, it has not increased as much as it could without the agreement. And even if we went beyond the consumers' welfare perspective, we could say that markets work because the price mechanism works → something that stops it gives a strike to the heart of the competitive mechanism.
→ Price fixing does not admit any procompetitive argumentation.
That's the same for share markets, clients, outlets, quotas. If you make a cartel, you move very close to the monopolistic price → you can fix the collusive price or the quota, meaning the output. Agreements meant to limit output do not admit any procompetitive justification as price fixing doesn't. It is the same also for market shares' agreement → I will sell my products in this region, and you will sell the product in that region → you split the market to ensure yourself enough business → those are restrictions by object because they don't admit any procompetitive justification as long as they are naked, as they say in the US → they do not come with anything else.

Let's repeat → an agreement has an anticompetitive object when it does not admit any plausible procompetitive justification → ex. price fixing, limiting output, market sharing. This is true so far, they are naked, unless they come with something else → they are restrictions by the object, unless they come with something else.

Price fixing does not admit any procompetitive justification → suppose we have 2 entrepreneurs, A and B, who wants to develop together a new engine which is capable of reducing pollution → they share plans, engineers, machineries, row materials and investments and finally they produce that engine. What would be the price of that engine? Will they ever be capable of charging two different prices for the same engine? No → they have shared everything, so they will come up with one single price for that engine. Would we say this is a price fixing agreement? Or is it an agreement meant to develop a new engine? This is an agreement meant to develop a new engine within which there is a price fixing clause which is strictly necessary, inherent to the agreement itself → this is not a naked price fixing agreement, because if you look at the agreement from the side of price-fixing, it does not come alone, but it comes with something else → it comes with the production of the new engine. The only thing the agreement does is not simply price fixing, but also the creation of a new engine. This means it is not a naked price fixing agreement, but it's an agreement meant to produce a new engine, which has a price fixing clause which is strictly necessary for the working of the agreement. As a consequence, the object of the agreement is lawful because there is

a procompetitive justification for the agreement, which is the production of the engine. When dealing with agreements, we have to understand we cannot use labels, we cannot have prejudice when reading agreements → we read them, and we ask ourselves: "what is the rationale of such agreement? Is it meant to do something good?" As long as it is meant to do something good, that good is the procompetitive justification for the agreement. When the only justification explaining the existence of the agreement is limiting competition (limiting output, increasing price, reducing quality, variety and innovation) it is a restriction by object → when you look at the agreement naked, you can see that is meant to reduce competition only. Whereas when you read an agreement and you discover that within some clauses that could be price fixing clauses (and therefore anticompetitive) still there is something good, that is the procompetitive justification for the agreement → you cannot conclude that the agreement is a restriction by object → it could become a restriction by effect, because those clauses could produce anticompetitive effects.

When we say that something good comes with the agreement, we don't want to say that the agreement was made for the sake of peace, of wealth distribution and protection, but we are saying that the good that the agreement must bring along in order to have a procompetitive justification must be that the agreement reduces the price, increases output, quality, variety and innovation. The idea is that the good part of the agreement must be interpreted with competitive eyes → in terms of price, output, quality, variety and innovation.

A restriction is not a naked restraint when the other tings which come with the restrictions have a procompetitive justification → let's think about collective agreement of workers → they are cartels, they are price fixing agreements → if 2 or more workers decide to set their salary, as trade unions do, those are decisions of undertakings that fix prices. They are exempted from the application of antitrust law because of a decision of the ECJ, the Albany decision, that said that the protection of social rights is much more important than protection of competition. Prof. agrees with it → there are cases in which we want to protect people and let them have decent working conditions. But if the exemption did not exist (it exists as well in the US), and if we took collective agreements as they are, they would be price fixing agreements → still, they serve to improve the working conditions of employees, but this is not a competitive issue, but it's a social issue. The good justification for the existence of the agreement we have to look for to say the agreement is not a restriction by object must be related to a competitive issue → think about a collective agreement → we could try to justify its existence with social issues, but those are not in the kingdom of antitrust law → if it were not for the exemption, collective agreements would be naked restraints!

First thing we have to remember → the notion of restriction by object tells us that a restriction is by object when it does not admit any procompetitive justification → which must be procompetitive according to the lenses of antitrust people. It doesn't matter whether the agreement in environmentally friendly or something like that → indeed, in the example about the engine, we said that it increased innovation. We can frame arguments to comply with antitrust framework → a procompetitive justification is something that increases variety, quality and innovation, or that reduces price or that increases consumers' welfare.

The other thing is → don't be afraid of labels, read the agreements in order to understand what they are for, and once we do so, we will be capable of saying whether there is a procompetitive justification or not → if the procompetitive justification doesn't exist, those are restrictions by object.

Let's go back to the example of the engine → we have A and B who decided to produce together a new engine → the agreement has a procompetitive justification → it increases innovation, quality and variety. We read the agreement, we will see clause n. 1 → the price of the new engine will be 100 for both of us → this is a price fixing clause, but since they share costs, expenses, plans, materials and engineers, they cannot do anything else → that clause is strictly necessary for the existence of the agreement, it results from the agreement itself → as a consequence, this clause is what we call an **ANCILLARY RESTRAINT** → we qualify it as we qualify the object of the agreement.

ANCILLARY RESTRAINT:

To be clear → if you have an agreement whose object is procompetitive, you read it and you find there is a clause which is strictly necessary for the working of the agreement → ancillary restraint → the destiny of the clause depends on the way in which I define the object of the contract. If the agreement has a rationale of producing an innovative engine, I could say that the object is procompetitive, I read the agreement and

the only weird clause is the one about price fixing. It's an ancillary clause, its destiny is the destiny of the agreement, and since the agreement is procompetitive, also the clause is not subject to the prohibition.

Any time we have ancillary restrains, meaning clauses of an agreement which are strictly necessary for the working of the agreement itself, we qualify them in the same way as we qualify the object of the agreement → if the object is procompetitive, the clause is procompetitive.

Let's change the scenario → A and B produces the engine together, and a clause says: the price is 100 ← this is an ancillary restrain which follows the destiny of the object. Then, we see that the parties have agreed to distribute the engine alone → each of them will use its own distribution channel to distribute the engine → they will use their own marketing sale agencies and distributors to sell the engine. They will be on their own to distribute the engine, and the clause says → the consumer's price of the engine will be 150. → so, in the first part of the agreement they say → we will produce the engine altogether, sharing everything → as a consequence the price of the engine will be 100. Then there is a second part of the agreement that says → we will distribute our engine separately, but the final price for consumers will be 150. What do we say about this other agreement clause?
What do we think about this other price fixing clause? It's not necessary → does this mean we could change the qualification of the object? No, because the agreement is still meant to increase innovation. It's a restriction by effect! We don't like that clause, it's price fixing which is not strictly necessary for the working of the agreement, A and B did not cooperate all over the chain, the distribution is on their own → so why should they have the same price? It is a cartel! A and B are limiting competition in the distribution chain → one could have less costs than the other in the distribution channel, and what could ever be the procompetitive reason why you fix the final price? If you don't share distribution channels, what could ever be the procompetitive reason why you fix the distribution price? There is no procompetitive justification for it → that clause is a naked price fixing → but as we are not analyzing it alone, but within a more general agreement → we could say that even if it is not necessary, the agreement is still meant to increase innovation and therefore it is procompetitive → we don't change the qualification of the agreement as procompetitive.
If there is this other clause, the agreement become a restriction by effects → so it falls under article 101 TFEU and the prohibition applies → the agreement can be a restriction by effect for the second part, therefore the restriction applies, and the article 101 applies to all agreement. It's an ex-post evaluation → we got the overall agreement, and an authority makes the analysis, and it understands it has to apply article 101 to the second part, therefore the total agreement is unlawful because of restriction by effects.

There is a third paragraph of article 101 → if the clause met these conditions, we can conclude that the agreement is lawful.
Let's first make another example. Let's think about non-competition agreements → how do they work? Let's think of two companies, A and B → A agrees not to compete against B in the market for candies for 5 years → this is a restriction by object → can we come up with a procompetitive justification for it? Not at all, what's more anticompetitive than this? This would be a restriction by object, like price fixing.
Now we change the scenario → we add something more that changes the analysis. A agrees not to compete against B in the market for candies for 5 years, and B will buy from A its plants to produce candies → this is an acquisition → B buys A's plants and goodwill, and that B says "dear A, I will buy you as long as you remain out of the market for at least 5 years". What's the procompetitive justification? In every acquisition there is a non-competition clause → what's its procompetitive justification? If B buys A at 100 and then A enters the market with its own new plans, the price of A should be reduced, because if I buy A for 100, I buy A for its goodwill and good reputation, guaranteeing myself that I will have time to recoup my expense. If A comes back in the market and starts competing with me, A loses value when B wants to make an acquisition over A, and therefore A doesn't sell, and B doesn't buy → there is no market for corporate control.

In order to increase efficiency, economic theories say that you should give resources to the ones you value the most. Suppose there is a company producing candies and the owner wants to get rid of it → he puts it up for sale at 100. Whoever buys it wants to be ensured that he will have time to recoup the value he puts to buy the company → you have to guarantee a non-competition agreement for a certain time in order to make the sale possible → the non-competition agreement is strictly necessary for the sale. To sale a company is a procompetitive justification? Yes, because it increases efficiency and it may increase innovation, quality and variety → if you don't have a market for company sales, you are stuck in a given scenario. This is the procompetitive justification → it is not a restriction by object, because selling A is a procompetitive justification. The non-competition agreement is essential for allowing the sale → it is an ancillary restraint in relation to the sale of the company. Even our c.c. provides for non-competition agreements.

If we have a case where we have a company sale together with a non-competition clause, we should say that the object is procompetitive, and the non-competition clause is an ancillary restraint, strictly necessary whose destiny is the same of the object → if the object is procompetitive, then the agreement is lawful and article 101 does not apply, because even the ancillary clause - the non-competition clause - is good.

Let's change again the scenario → A agrees not to compete against B in the market for candies and chocolate for 10 years (and B will buy from A its plants to produce candies). Does it have a procompetitive or anticompetitive object? It has a procompetitive object → it is always the same as before. What about the other part of the agreement → is it an ancillary restraint? No, because it's not strictly necessary for the agreement, because we have another market and because it's very long. Since this is not an ancillary restraint, it cannot follow the destiny of the object. We got a procompetitive object, but the overall agreement could be a restriction by effect! The object is procompetitive, but can it be a restriction by effects? Yes! The overall agreement may produce anticompetitive effects. The object is procompetitive, still it can be a restriction by effect, because the ancillary clause is larger → and because of its spread, of its scope, which is not strictly necessary for the working of the agreement, the overall agreement may produce anticompetitive effects.

Does the agreement have a procompetitive justification? If it does, the restriction is never anticompetitive by object. Then, either article 101 does not apply at all, or there is something wrong in the other clauses of the agreement that tell us the agreement could be a restriction by effects.

The tricky part are those ancillary restraints. If the other provisions are not strictly necessary those are restriction by effects → it does not mean that the agreement is unlawful, but it means that you should move to the third paragraph of the article 101 TFEU.

RESTRICTIONS BY OBJECT:

Article 101(1): Restrictions by Object

The object of an agreement is its **purpose/rationale** that has to be assessed in the economic context in which the agreement has to take place. Thus, an agreement restricts competition by object **when it does not admit any procompetitive justification**. If you wonder about its existence, you realize that the agreement exists only to harm competition.

On the bases of what do you achieve this conclusion?

(a) Experience (previous case law)

(b) Economic analysis showing that such restrictions are likely to produce negative effects on the market and to jeopardize the objectives pursued by EU competition rules.

The subjective intentions of the parties cannot play any role.

This category of restrictions **reduces administrative costs and increases legal certainty**. It is a waste of public resources to spend time to demonstrate something that is already evident: the classification of certain types of agreement as restrictive by object "sensibly conserve resources of competition authorities and the justice system. Furthermore, the existence of a well defined category of restriction forbidden by object creates legal certainty and allows all market participants to adapt their conduct accordingly. It is a clarifying guideline for undertakings, but if the indication is wrong the risk is that of overdeterrence (or underdeterrence)

The intention of the parties does not count at all → there is no subjective element in antitrust law → when we talk about the goal, we mean the economic rationale explaining the behavior → we don't mean the motivation, the intention of the parties, what was in their minds when they decided to do something. It means that in that factual scenario, what is the objective justification explaining that behavior? If you do price fixing, the only objective justification for it is harming competition.
Restrictions by object are the equivalent of naked restrains in the US, and they exist to give legal certainty → if you do price fixing, that is a restriction by object. If you got price fixing, you go straight to fines and sanctions.

Restrictions by object are:

HORIZONTAL AGREEMENTS, i.e. to:
- ❑ Fix prices (and prices components, costs, etc.)
- ❑ Exchange information on future price and which reduces uncertainty about future behaviour
- ❑ Share markets, clients, outlets, quotas
- ❑ Limit output, including the removal of excess capacity
- ❑ Limit sales
- ❑ Perform collective exclusive dealing schemes (collective boycott)
- ❑ Adopt pay for delay strategies (pay competitors to delay the launch of competing products) and…
- ❑ Spreading misleading information?

VERTICAL AGREEMENTS, i.e. to:
- ➢ Impose fixed or minimum resale prices
- ➢ Impose export bans

Cartels – some examples

1. **Price fixing**: price increases, target prices, rebates, costs, surcharges, price announcement. Price fixing is prohibited downstream but also upstream (buyers' cartels: buyers agrees on the "sell in" price).

2. **Market sharing**. Geographical market sharing; market sharing according to classes of customers; no active-aggressive competition agreements ("don't touch my clients rule"). Geographical market sharing is considered a particularly serious infringement also because it may run contrary to the main EU Treaty goal (common market, and now internal market).

3. **Quotas and other restrictions on production**; client allocation (agreements are usually reinforced with monitoring and compensating payments in case of overriding the assigned quota); cross supplying on a continuous basis

4. **Collusive tendering/bid rigging**. A number of possible alternative schemes (rotate orders; tender sharing; preselection of the winning firm; respect for existing traditional customer relationship).

Why do we put 2 kinds of agreements in red? Let's point out the last 2 points, mainly the adoption of paying for delay strategies and agreements and agreements meant to spread misleading information.
Thanks to some recent cases, we kind of enlarged the notion of restriction by object to pay for delay agreements and to agreements meant to spreading misleading information.
Let's talk about this case → you got a patent, suppose that the patent is dominant → you are a pharmaceutical company, the drug does not admit any fungible product and therefore you are dominant. To treat one disease, only my patent works. You are a patent holder and a monopolist as well. Patents last 20 years → at the end of those 20 years generic producers can enter the market because they can copy the drug, and the price of the drug drops down dramatically, since it is produced by many → consumers' welfare increases.
The fact that you have a patent over one drug, does not prevent rivals to find another drug that could treat the same disease. Suppose someone has headache, drug A was the only one capable of treating headache. Nobody can reproduce A, but my rivals are allowed to produce B, C and D, which are capable of treating headache.
Ex. → I'm the patent holder of A, and another company enters the market with B by arguing that B is not a copy of A → so it is not infringing my patent. I think it is infringing my patent instead, and I make a patent action against B. B counterclaims that my patent is invalid. Suppose the 2 parties decide to settle → they

achieve a patent settlement agreement. There may be cases in which the patent holder gives money to the producer of generic products → there may be cases in which the settlement agreement states → "dear B, you settle with me this case, and I will pay you 1 billion of euros" → those are called reverse-patent settlements → defendant - patent holder - pays plaintiff the validity of the patent to settle and to put it out of the market. Reverse patent settlements are restrictions by object or not? When we got patent settlements, are they restrictions by object or not? They are not → what's the procompetitive object? They work to limit trial expenses, they save resources, they may enhance efficiency → they have a procompetitive justification, and the fact that someone pays someone else, and in particular the holder of the patent pays the generic to stay out of the market, is anticompetitive? It may be an ancillary restraint, because the real point is to understand whether the amount pays is strictly necessary for the working of the agreement or not → when it is not strictly necessary, because the amount paid is higher than the litigation cost and higher than any service that the plaintiff may buy from the defendant, what remains is a pay for the agreement → it is an agreement where you pay your rivals not to enter the market and not to compete with you → and this is a restriction by object. In real life, you don't have an agreement that results layer after layer. If you have a patent settlement where the amount of the price paid is higher than litigation costs and of the value of any service that the plaintiff may buy from the defendant, this is not a patent settlement, but this is a pay-for-delay settlement, and this is a restriction by object, since it does not admit any procompetitive justification. Once you are capable of analyzing a scenario putting away facts which are not material, not interesting and you come to that what you remain with is a pay-for delay agreement, then they are restrictions by object. The settlement is a veil for a naked agreement.

How to determine a (new kind of) restriction by object?

- Settlements agreements have a procompetitive objects: they save resources
- Patent settlements as well
- Reverse patent settlements as well (Here, the defendant/patent holder pays the plaintiff/producer of generic drug claiming the invalidity of the patent to settle and, hence, to stay out of the market)
- ***Pay for delay settlements do not! By looking at the facts of the case, you must recognize these last kind of agreements…***
  - ***You consider if the amount paid is higher than the litigation costs and of the value of any service that the plaintiff may buy from the defendant***

Let's see **another important Italian case → Avastin Lucentis.** We have 2 pharmaceutical products, one was used to treat pancreas cancer, the other one was used to treat glaucoma. The second product was very good to treat pancreas cancer as well. Still, product for glaucoma was off label → when you create a pharmaceutical product, you have to tell the disease for which it must be used → and you cannot use drugs out of that label. Still, doctors started to prescribe patients the glaucoma drug for treating pancreas cancers to save lives. When the 2 companies realized that they said to the market and to the doctors that they could not do that because it was an off-label use → this was something burocratic + they said it was risky for the life or their patients, and that was misleading information → there was no empirical evidence about it. The reason why the two companies decided to give this giant communication was to prevent one of the two pharmaceutical products to make competition against the other. They started to prevent the off-label use of the less expensive pharmaceutical product in order to save the profits of the more expensive pharmaceutical product → and that was clearly a cartel.
They tried to justify it by saying → we were disclosing information, there is always a good procompetitive justification → we want to increase efficiency, since market works well when the information is complete and transparent. Remember that when we give the procompetitive justification, we have to explain why we needed to make an agreement in order to undertake that conduct. The point is not whether the information was misleading or not → we are not here to discuss the morality of this behavior. The point is → if you want to say something to the market, why do you need to do it jointly? Why do you need to call

your competitors and make an agreement by saying "from tomorrow, we will tell this is risky for patients' lives?". They needed to decide it jointly otherwise the cartel would not work.
Do we need this list where we put restrictions by object? Probably it helps, but this is not the point → the point is that in that case what was wrong was not the nature of the information, but that they agreed to spread together information when they could have done it on their own. If the information was correct, spreading correct information jointly would it be a procompetitive justification for the agreement? No, you could do It on your own → then we would never prosecute them for a restriction by object, because there would have not been any anticompetitive effect. But still, the point is → why are you doing it with an agreement? We have to understand the rationale of the agreement in that particular case.

How to determine a (new kind of) restriction by object?

- Product 1 has a market authorization for glaucoma and its price is 800 €;
- Product 2 has no market authorization for that disease but it is known that it can be used as a substitute of product 1 because its composition is exactly the same. Its price is 80 €
- The two companies agree to disseminate the same misleading information as to the off-label use of Product 2
- Disclosing information as to the impact of a drug is not anticompetitive by object
- However, there is no reason to disclose the same misleading information jointly
  - Especially, for the pharmaceutical company producing product 2
- This serves to **reduce the competitive pressure** that Product 2 had on Product 1

Remember: Not every restriction of competition is caught by Article 101(1)

Often, **lawful agreements may include restrictions of competition.** Think, for example, to the non-competition clauses included in a contract for the sale of a company. There is nothing "evil" in selling a company. Nevertheless, one may wonder if the agreement whereby the seller is kept out of the market for some years turns the agreement to sale the company into an unlawful practice.

The answer is: If the restrictions at stake are **indispensable and strictly necessary** for the pursuit of the procompetitive purpose of the agreement, the agreement remains lawful. In other words, if the scope of the **non-competition agreement** is indispensable and strictly necessary for making the sale happen, the sale remains lawful.

- In general, this kind of restrictions – named, ancillary restrictions – are indispensable and strictly necessary if, absent them, the agreement under scrutiny **would not take place at all**.
- Differently, where the absence of these restrictions make the agreement in question more difficult to implement or even less profitable, the restrictions are not indispensable and strictly necessary. So what?
  - So, the overall agreement becomes a restriction by effect … and, hence, must be subject to the analysis required by Article 101(3) …
  - And, within the meaning of 101(3), it will be established if the overall procompetitive effects of the agreement – in our example, the sale of the company – overcome the anticompetitive effects of the restrictions – in our example, the non-competition restraints. If yes, the agreement will be saved. If no, the agreement will be forbidden, unless the non-competition clauses are narrowed down.

Let's say a few words on what it means to make an analysis on **restrictions by effect**. Consider the case of the engine where they decide also to fix the consumer price of the engine. In that case we have a restriction by effect → meaning that in economic context, given the product and the structure of the market, you are capable of showing that it is likely that the agreement will produce or is capable to produce significant anticompetitive effects → when you say that a restriction is by effect, we say that the agreement is capable of producing significant anticompetitive effects. We establish it by making counterfactual analysis → by saying that without that restriction, competition would be higher. If I do not fix the price of the engine at the consumer level, we would have more competition between the 2 producers at the distribution level → because they would try to sell engine at a lower price thanks to their different distribution chain.
We have to consider what would be the position in the absence of the agreement → it has to produce significant anticompetitive effects, you must be capable of appreciating the effects, which cannot be marginal, but they must be somehow significant, and here is the reason why we came up after a few years → **we need materiality in order to prohibit a restriction**, we came up with this solution to establish either the anticompetitive effects are significant.

DE MINIMIS DOCTRINE:

We assume, and this is a de facto assumption, restriction by object is always significant; when it comes to restriction by effects, it depends on cases, and we have created De Minimis doctrine:

The De Minimis Doctrine (not valid for restrictions by object)

Agreements between undertakings which may have as their **effect** the restriction of competition **do not appreciably restrict competition** within the meaning of Article 101(1) of the Treaty if:

- the aggregate MktSh held by the parties to the agreement ≤ 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets **(agreements between competitors)**; or
- the MktSh held by each of the parties to the agreement ≤ 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings **which are** not actual or potential competitors on any of those markets (**agreements between non-competitors**).
- Where, in a relevant market, competition is restricted by the **cumulative effect of agreements** for the sale of goods entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds are reduced to 5%.
- A cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects.

This is a very important safe harbor: someone says that it wipes out more than 95% of the agreements between EU undertakings. On the other hand, this safe harbor derives from Commission's guidelines, which are not binding for EU courts, National Courts, or National Competition Authorities, though they are taken into consideration.

RESTRICTIONS BY EFFECT:

We were talking about anticompetitive agreements, discussing the notion of **restriction by objects**. We have a restriction by object any time we cannot find any plausible justification for what we are looking at. If by reading the agreement we discover something good may come out of the agreement together with possible restrictive effect, then the restriction is by effect.
Because of our experience, we generally consider the following ones as restrictions by object:

Restrictions by object so far

HORIZONTAL AGREEMENTS, i.e. to:

- ❑ Fix prices (and prices components, costs, etc.)
- ❑ Exchange information on future price and which reduces uncertainty about future behaviour
- ❑ Share markets, clients, outlets, quotas
- ❑ Limit output, including the removal of excess capacity
- ❑ Limit sales
- ❑ Perform collective exclusive dealing schemes (collective boycott)
- ❑ Adopt pay for delay strategies (pay competitors to delay the launch of competing products) and…
- ❑ Spreading misleading information?

VERTICAL AGREEMENTS, i.e. to:

- ➢ Impose fixed or minimum resale prices
- ➢ Impose export bans

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The last 2 were added a few years ago.
We have the example of price fixing: if 2 or more parties agree on the price they are going to apply, that is a restriction by object, there is no plausible procompetitive justification for price fixing. This does not mean that any time 2 or more undertakings agree on prices, that price fixing is a **naked price fixing** that is a restriction by object. If we have an agreement in which 2 or more parties decide to build an engine and then one clause fixes the price, that would be a restraint that is *ancillary* to the object of the agreement, and therefore **lawful**.
Therefore, when dealing with ancillary restraints, then you ask yourself: *are they strictly necessary for the working of the agreement?* If the answer is yes, they must be judges as we judge toe hobbit of the agreement: since the shared price of the engine is strictly necessary for the working of the agreement, as the agreement is procompetitive, also the restraint is procompetitive, since it is ancillary.
We have 2 companies who develop together the engine and then they decide to distribute it by using different distributing channels by fixing the same price. The fixing of the consumer price in this case is not strictly necessary for the working of the agreement, since they do not share the distribution channels: it's redundant, therefore it is something that can make the overall agreement anticompetitive. The overall

agreement becomes a restriction by effect, we have to understand whether it meets or not the 4 conditions or article 101 TFEU.
We always have to read the overall agreement, trying to understand what comes out of it.
When dealing with **restrictions by effect**, we look at those who creates significant restraints, which means restraints which are not De Minimis. When we have a restriction by effect, we apply article 101.1, meaning the prohibition, ***we have to overcome the quantities threshold***: there could be cases where the agreement produces anticompetitive effects, but when those are tiny, prosecuting them is not worthwhile in relation to the benefits you create once you punish those behaviors. If the 2 thresholds are overcome, then the restriction by effect must be prosecuted and ultimately sanction, otherwise we don't analyze it.
This threshold does not apply to restrictions by object: even if farmer Bob and farmer Brown decide together the price of beans, you know that each of them has a small amount of shares, but still, this is a restriction by object. *When it comes to price fixing, we don't care about the magnitude of the agreement nor the chance the agreement will ever produce anticompetitive effects*. If you have price fixing agreement among small companies, they won't have enough power to change the market price, the agreement will be ineffective: still, we apply the prohibition in any case, here we become dogmatic instead of being consequentialist.
We all know that effects are potential and possible when the parties hold enough market power altogether, otherwise you cannot produce any effect and you cannot undermine the well-functioning of the market. In case of ***restrictions by effect***, we look at the market shares held by companies, whereas we don't care of such analysis when dealing with ***restrictions by object***: in such case, we prosecute the anticompetitive behavior in any case, we endorse a dogmatic and moralistic approach in such case, assuming that companies can never fix prices, or share markets, of fix quotas. It doesn't matter whether they have a lot or just a tiny amount of market power when it comes to restrictions by object.
Restrictions by object are in the class of behaviors, we assume the only effects that are capable to produce are anticompetitive. Price fixing are in the class of behaviors because we assume that the only thing they can do is to harm competition. Once we have reached this conclusion and we have beaten them all, then case-by-case we don't care about the market power, and we prosecute even companies that fix prices without market power.
When we analyze agreements and we try to understand restrictions by effects and we try to understand whether they will be capable to produce significant anticompetitive effects, we look at the **degree of intrinsic restrictiveness of the agreement**, we look at the market power and we look at the scenario in which the agreement takes place.
Let's give an example on this: suppose I'm a hotel, and the room I put out for sale is charged 100€/night. Then there is Booking: I make an agreement with Booking, which accepts to promote my rooms, and the price of my room per night is again 100€. I make an agreement with Expedia as well; the price will be always 100€/night.

- This happens in t_0: a consumer will pay that room 100€ if he comes to me, or if he goes to Booking or to Expedia.
- Suppose that in t_1 I decide to make a discount, and to charge 90€ for my room. What should be the room's price on Booking and Expedia? It depends on what the agreements say: there could be a **parity clause** which says: "*dear Hotel, we – Booking and Expedia - will charge the rooms at the price you give us, but any time you will change the price, you have to ensure us the chance to match your price*". The **parity clause** is "*every time you will have the price, you have to tell me you have changed your price: in that case, I want to have the possibility to match your price or not*". Suppose there is such clause both in Booking and Expedia's agreements, therefore the price of the room in t1 will be 90€.

The agreement between Booking and Expedia with the Hotel says: "*Booking and Expedia will promote the Hotel's room as long as you give them the chance to match the hotel's price*". A consumer comes to me asking "*what about the agreement? Is it procompetitive or not? What about the clause*?".
A **procompetitive effect of this clause** is *avoidance of free riding* → who invested in order to promote your Hotel? Booking and Expedia, therefore they say "*dear Hotel, in order to promote you, I put money in my platforms, therefore you have to recognize that if some consumers come to you, it is because they have seen your room on my pages. At that point, you cannot take a free-ride and reduce the price: any time the*

price is lower, we must have eh chance to match your price, and that's in order to avoid free-riding and to keep having the incentives we need to create the platforms and maintain them".
Can we see any **anticompetitive effect**? Do we see anything suspicious? Do we like all these prices that are all the same? The Hotel charges 90€, Booking charges 90€, Expedia charges 90€: there is *no room for price competition*! It's true that they are lowering price, but still, they are charging the same price. Booking will match the Hotel's price, but it will not charge 85€. This is not a cartel, but they increase the ability to make a cartel, or to make people converge towards the cartel (or collusive) price. The negative side of such behavior is the ***increasing probability of collusion***, because you make the market more transparent reducing the chances of having price competition.
Let's rephrase the clause of the agreement. The **agreement in t_1** used to say: "*dear Hotel, if you will ever charge a different price, please tell me, so that I - Booking - will have the chance of matching your price*".
There is now another **clause in t_2**: "*dear Hotel, if you will ever charge a new price on Expedia independently from what you will charge on your own, please tell me, so that I - Booking - will have the chance to match the Expedia's price*". What are you looking at if you make such a clause? Booking tries to avoid competition with Expedia: ***you – Booking - avoid horizontal competition among platforms***. Can we still argue that this clause is meant to avoid free riding? No, because we are not interested in what is going on on the Hotel's website! The problem is whether the Hotel will ever charge a price that is lower than Booking's, once Booking has already invested on its platform; the point is that if a consumer looks at the price on Booking and then he looks at the price on Expedia, Booking and Expedia are competitors, and consumers look for the lower price. *In this second situation, the procompetitive situation we mentioned before disappears, and what just remains is the increase of collusive likelihood*.
When it comes to parity clauses, distinguish between **2 types of parity clauses**:

A. **Narrow parity clauses** → they are the clauses in which I say to the hotel "*if you charge a price different to one of my rivals, tell me so that I can match it*". Narrow parity clauses are void and anticompetitive everywhere in Europe.
B. **Large parity clauses** → those clauses are anticompetitive in some Member States, whereas in other they have been deemed as restrictions by effect that need article 101.3 TFEU because of the avoidance of free riding.

Expedia and Booking cases were a big deal: Commission did not treat them, but it left to the national authorities the chance to deal with them separately.

- Some national authorities made the analysis focused on avoidance of free-riding, concluding that those are restrictions by effect that meet the conditions of article 101 thanks to the avoidance of free-riding (Italian authority was among them).
- Other national authorities said we should make a distinction among parity clauses: there are ones where this justification works, and there are those between the platforms and the Hotel, but when the scope of those parity clauses enlarges including also horizontal rivals, then the narrow version of parity clauses that is connected just to the rivals, those are pure restrictions by object meant to increase collusion, and they must be void.

ART. 101.3 TFEU:

Finally, let's see the **4 conditions that made an anticompetitive agreement lawful**. If an anticompetitive agreement - either restriction by object or restriction by effect - meets these 4 conditions, then the agreement is lawful.
For recommendation: *even if we find a restriction by object, I have to check on whether it meets or not those 4 conditions*. **Restrictions by object never satisfy these 4 conditions, bit still, the law says we have to go through such analysis**. Even if we have a cartel, we must say that the cartel does not meet these conditions. You can never skip article 101.3 analysis, and this is the big difference between EU and US: we say that restrictions by object must be subject to the analysis of article 101.3.
Why? Probably because *at the beginning of the antitrust experience, there were people that believed that article 101.3 should be interpreted on the basis of some political goals and not only in economic terms*: if a restriction by object should be saved via article 101.3 for the sake of some political goals.

After the 90s, this point of view did not find many supports: *from 90s onward, article 101.3 has never been applied for political reasons*, but it has always been applied on the basis of economic analysis, therefore right now it's paradoxical that an agreement which is a restriction by object could ever meet the 4 conditions.
Independently from this all, the point is: we have to go through, we cannot skip this analysis, otherwise our claim is invalid. Once we have a restriction by object, to save it, **we have to verify 4 conditions**, 2 positives and 2 negatives:

1) "*The agreement must contribute to improving the production or distribution of goods or to promoting technical and economic progress*" → it must produce efficiency, reduce price, avoid free riding, create innovation, increase the quality or variety of products. We take the 5 variables on which consumers' welfare depends and check if those increase because of the agreement.
2) "*The agreement must translate to consumers a fair share of the resulting benefit*" → because of the agreement, consumers will benefit of what you are going to produce thanks to the agreement: they will benefit from lower prices, higher variety, quality and innovation or efficiency. Indeed, what do we need to be in the position not to share benefits with consumers? We don't need to be monopolistic, but it's enough to have a certain amount of market power. If you have made such agreement for the sake of innovation or efficiency, actually you will share it with consumers. Indeed, if you do not have market power, there is no point you will be forced to share it with consumers. If the likelihood of negative effects is *higher, why on earth should you share it with consumers?*
3) "*The* agreement must not impose unnecessary restrictions" → you must be capable of finding a cause-effect relationship between the restraint - meaning what produces the negative effects - and the procompeititve effects it produces.
   Narrow parity clauses do not meet article 101.3 since they do not meet the third condition of article 101.3, because there is no cause-effect relationship between the restriction they impose and the benefit they were supposed to produce, because that benefit doesn't even come out of it. On the contrary, large parity clauses among companies can meet the third condition (think of the case of avoidance of free riding).
4) "*The agreement must not eliminate competition*" → you cannot eliminate competition at all, you cannot make an agreement which eliminates overall competition.

Who is supposed to work on the application of article 101.3? The firms, this is a defense: Commission has to prove the application of article 101, whereas the parties in order to defend themselves are supposed to show first that is not a restriction, and second, if the Commission says that is a restriction, even if it was a restriction, still they try to show the agreement meets the conditions of article 101.3. *The 4 conditions are all cumulative conditions*, to be lawful the agreement has to meet all 4 conditions.
What kind of efficiency we generally claim? Let's see the **first condition**, according to which all **efficiency must be substantiated** in order to verify some stuff:

First condition: All efficiency claims must be substantiated in order to verify:

A. **The nature of the claimed efficiencies**, so that it would be possible to verify that they are **objective in nature.** That is:
   - **Cost efficiencies** (development of new production methods and technologies; integration of existing assets, economies of scale and scope, better planning of production, etc.) and
   - **Qualitative efficiencies** (R&D agreements; distribution agreements with pre or post-sales services)
   - Cost savings that arise from the mere exercise of market power cannot be taken into account. e.g.: reduced competition may lead to lower sales and marketing expenditures, as a consequence of the reduction in output and value. These cost reductions do not produce any pro-competitive effects on the market: they merely allow the undertakings concerned to increase their profits and are therefore irrelevant from the point of view of Art. 101(3).

B. **That the link between the agreement and the efficiencies is direct**. For example:
   - a **technology transfer agreement** allows the licensees to produce new or improved products, or
   - a **distribution agreement** allows products to be distributed at lower cost or valuable pre/post sale services to be produced.
   - *Instead* an example of **indirect effect** would be a case where it is claimed that a restrictive agreement allows the undertakings to increase their profits, enabling them to invest more in research and development to the ultimate benefit of consumers

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First condition: All efficiency claims must be substantiated in order to verify:

C. The likelihood and magnitude of each claimed efficiency

- In case of efficiencies in the form of new or improved products and other non-cost based efficiencies, undertakings claiming the benefit of Article 101(3) must describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit.
- They must also describe the method(s) by which the efficiencies have been or will be achieved (will be…. for long term agreements).
- The data submitted must be verifiable, so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.

D. How and when each claimed efficiency would be achieved

- Where the agreement has yet to be fully implemented the parties must substantiate any projections as to the date from which the efficiencies will become operational so as to have a significant positive impact in the market.

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If you are in a scenario where your company is improving and makes the production more efficient, I cannot argue that the efficiency is the product of that agreement: that's why ***the agreement cannot be saved by claiming the existence of those efficiencies***, I always have to show the link between efficiencies and agreement itself.
I have to be capable of showing the magnitude and when the efficiency will be achieved.
Second condition, fair share for consumers. If more groups of consumers are affected, we have to share which one will benefit from the agreement. If we will ever have an agreement that increases prices, I have to show that the consumer will benefit from innovation, quality and variety which increase.

Second condition: fair share for consumers

The fair share for consumers condition is a "pass on" requirement to buyers of the product (other firms or consumers) on the relevant market/s.

- **Consumers** are considered as group/s. Thus, if more groups are affected, each group must be better off.
- Some agreements may increase market power and thus prices together with other kind of benefits to consumers. In that event, those **benefits** (in terms of quality, quicker development of a new product, etc.) **must more than compensate the potential increase in prices**.
- The greater the restriction of competition under Art. 101(1), the greater must be the efficiency and the pass-on under Art. 101(3). However, the Guidelines specify that when both restriction and pro-competitive effects are substantial, the Commission must take into account **that rivalry and competitive pressure are important long-term drivers of efficiency and innovation**

All I want is my fair share...all I want is what I got coming to me!!

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The greater is the restriction, the greater the efficiency must be under article 101.3 TFEU.
Indispensability is the **third condition**: we must look at the cause-effect link, the efficiency must be specific to the agreement. *I must show the indispensability of every restriction in relation to the procompetitive effects it produces*. Let's see an example:

Third condition: Indispensability

EXAMPLE: A and B combine in a new entity (JV) their respective production technologies to achieve higher output and lower raw material consumption.

The JV is granted an exclusive licence to their respective production technologies. The parties transfer their existing production facilities to the JV. They also transfer key staff in order to ensure that existing learning economies can be exploited and further developed. It is estimated that these economies will reduce production costs by a further 5%.

The output of the JV is sold independently by A and B.

In this case the indispensability condition needs an assessment of whether or not the benefits could be substantially achieved by means of e.g. a mere cross-licence agreement, which would be likely to be less restrictive because A and B would continue to produce independently.

This is unlikely to be the case since under a licence agreement the parties would not be able to benefit in the same seamless and continued way from their respective experience in operating the two different technologies, resulting in significant learning economies.

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JV stands for "*joint venture*". The idea is that *we have 2 firms that decide to put together their production systems by creating a JV to which they give their production technologies and even key stuff*. Because of that, we claim that the production cost will be reduced of 4%. When the JV will produce products and services, the output of the JV will be sold independently by A and B. **The JV is a production unit, which is at service of A and B**. The question is: *the creation of a JV and the sharing of key stuff is indispensable for having the reduction of cost production? Or can we reach that procompetitive effect with a cross-selling agreement?* In order to understand it, we should develop this analysis: *putting together the 2 technologies within the JV, does it make production more efficient than cross-selling or not?* This is the kind of analysis we do under the **indispensability requirement**; we look for alternative solutions to achieve the procompetitive effects which are associated to the agreement.
Fourth condition, we cannot eliminate competition, we cannot destroy the existence of alterative rivals.
Block exemption regulations
Over these 70 years of experience, Commission has figured out the application of article 101.3 was time-consuming, there they decided to create **Block Exemptions**, which are *regulations which are specific of some categories of agreements*. In those regulations, the Commission tells the conditions under which those agreements meet article 101.3. talking about vertical agreements, the Commission makes a list of conditions that once verified guarantee that the agreement will meet article 101.3, therefore in order to reduce the administrative coast we have to bear in order to verify whether article 101.3 is met or not.
What's the form of safe harbors? In every block exemption, they have been built up following **2 criteria**:

1) The commission has set a ***market threshold below which agreements are safe***. In vertical agreements, if they combine together less than 30% of market shares, they are fine, they fall within the safe harbor.
2) Commission has created safe harbor by mentioning "***hard-core restrictions***", meaning restrictions that once are in one of those agreements, they prevent the agreement from benefit from the safe harbor.

Let's repeat this point: in order to reduce the costs of applying article 101.3, commission created block exemptions, which are regulations specific for does categories of agreements. Those regulations create safe harbors: if an agreement falls within the safe harbor, the agreement is supposed to meet the 4 conditions of article 101.3, it is supposed to be lawful. *How did Commission create those safe harbors?* They are created on the basis of 2 mechanisms:

- The commission identifies the market shares under which agreements do not fall within the safe harbor: the Commission put a market share threshold and says that if the agreement will fall beyond that threshold, the agreement will not be presumed lawful.
- Second, Commission says that independently from the market shares, in order to be safe and fall within the safe harbor, raw agreement cannot include hard core restrictions, which are clauses.

Block Exemption Regulations (BER)

Art. 101(3) provides that the prohibition of Art. 101(1) could be declared inapplicable both in relation to agreements and to **categories of agreements**.

The Treaty thus envisages non only (*ex post*) individual assessments, but also more general provisions aimed at regulating categories of agreements.

Block Exemptions Regulation (BER) are very useful because they grant an automatic exemption and then a sort of automatic "**safe harbour**" for specific contracts/agreements.

In fact, an agreement covered by a block exemption regulation cannot be declared invalid by the Commission, and also by a National Court or by a National Competition Authority.

If an agreement complies with a "BER", it is valid not only for the past, but also for the future! (for all the duration of the Regulation). Thus, they are very important (and appreciated) for LEGAL certainty.

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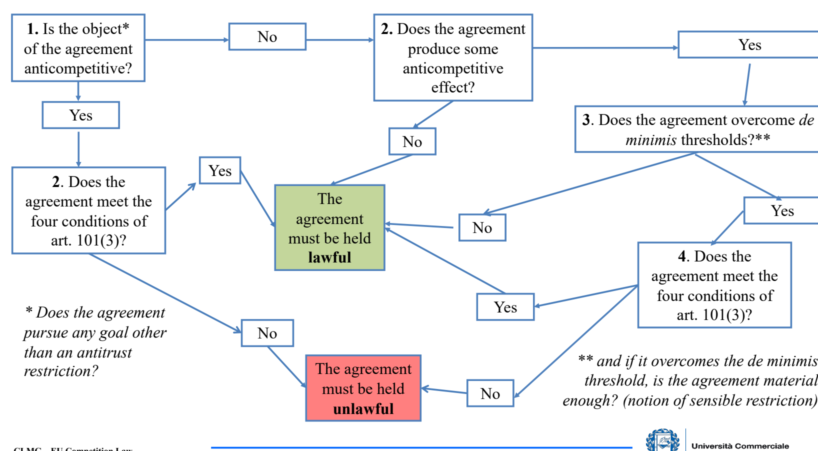
How do safe harbor work? If you meet the conditions, you are in the safe harbor and the agreement is automatically lawful, otherwise you have to undertake an individual analysis.

THE ALGORITHM FOR THE APPLICATION OF ART. 101:

Let's see the algorithm we follow to analyze an agreement, as we did with **article 102 TFEU**: when it comes to article 102, we said first we have to establish whether there is a dominant position or not, and then we have to establish whether the practice is exploitative or exclusionary and anticompetitive, and in order to understand whether it is exclusionary and anticompetitive, I have to establish whether it produces exclusionary effects and whether it is anticompetitive.
Let's get started from 1: first questions hold be asked is "*is the object of the agreement anticompetitive*?". If the object is anticompetitive, then we know that it should be void. Still, I have to go through the 4 conditions of art. 101.3, checking on whether the agreement meets 4 conditions. If the answer is "yes", the agreement is lawful, otherwise it isn't (as it always is).
If the agreement does not have any anticompetitive object, at that point: *does the agreement produce some anticompetitive effects?* If the answer is "***no***", then the prohibition does not apply, and the agreement is totally lawful. If the answer is "***yes***", and the agreement produces anticompetitive effects, then remember, we need significance: the restriction cannot be De Minimis, we have to see whether the thresholds are overcome or not: *does the agreement overcome de minimis threshold?* If it's a ***tiny case***, we don't want to lose recourses, if the effects are not significant, it means they do not have significant market powers, they are not capable of undermining the market. If the answer is ***no***, the agreement is lawful; if the answer is yes, then I have to look for procompetitive justifications, going through the 4 conditions of article 101.3: if the conditions are met, then the agreement is lawful, otherwise it is not.



Where would we put ***ancillary restrains***? It's implicit in the question "*does the agreement produce some anticompetitive effects*".
Now we can consider two different groups of agreements, that generally are restrictions by effect. Why? Because when you get familiar with this kind of agreement, then you learn the tools that you can use in your everyday life when somebody will ask you to assess an agreement.
We'll do this exercise on the basis of what the Commission has done over the years → the EU Commission has created guidelines about some specific groups of agreements in order to help companies and entrepreneurs what was right and what was wrong about their agreements, whther they were lawful or not and under which circumstances. The application of art. 101 is an ex-post application → you must e capable of creating a lawful agreement without asking to the authority → you must be able to understand the procompetitive and anti-competitive effects on your own.
So, today we are going to discuss about horizontal cooperation agreements that generally are restrictions by effect, and they can produce procompetitive and anti-competitive effects according to the circumstances. Many of them are discussed in specific regulations.
Here there is a very simple observation → **when you deal with HCA (horizontal cooperation agreements) generally you deal with the contracts**. Sometimes the contracts result in the creation of a joint venture, which is a cooperative joint venture, meaning a company that is created in order to serve A and B, the mothers of that company and to fulfill some specific goal. This makes the analysis more complex → what you have to look at is the contract.

If the joint venture is not at service of the 2 companies that have created it, but it has its own life (so, it does something for those two companies but it's also at service other clients around the world), then the joint venture is not an agreement and doesn't go under art. 101 and must be analyzed according to control regulations.
When you have A and B that create together a joint venture (50% and 50%) → when you have joint control, you can have different scenarios.

1. **The joint venture is at service of A and B** → in this case, it goes under art. 101. What does it mean that the joint venture is at service? That the reason why the joint venture exists is to fulfill some goals and activities which are necessary for A and B (for example, it takes care of producing some goods or of distributing some services and so on).
2. **The joint venture is full function** → in this case, the joint venture goes under merger regulation. If the joint venture is also on its own on the market, so it has many other clients and it has also its own capitals for designing new projects independently from what is made by A and B, then the joint venture has the resources to stay on its own → it's not just like a branch of A and B, but the different undertaking is full function and so the assessment must be judged according to merger regulations.

So, when it comes to HCA, there might be different kinds of these agreements and each of them are the object of some regulations. We may have:

- *R&D agreements*
- *Standardization agreements*
- *Production-specialization agreements*
- *Purchasing agreements*
- *Joint commercialization agreements*
- *Information exchanges*

Now we will try to work in the last four which are more complex, because the first two are easy to analyze, because there is always a very good justification for them, which is that they bring innovation.
Standardization agreements have to do with innovation because they are meant to create technological standards. You talk about standardization agreements when you put on the table the producers of some goods and you ask them to define a standard, a common technology that they are going to use for their equipment.
Now, on the one hand, you have also the improvement of technology, the creation of new products and services as a justification for those agreements. On the other hand, according to circumstances, they may become anti-competitive. When could this happen? What kind of clauses could be put in such agreements to make the agreement a restriction by effect? It could be a kind of way to stop technical development by preventing further innovation ← it doesn't happen frequently, but it could be an anti-competitive clause in such agreements.
One thing which is very common is that **two or more competitors meet in order to do something, and they take the chance to exchange information about their prices and costs**. **This is always a possibility that you have to exclude**. Anytime you write an agreement whereby you put together competitors for example to develop together a technology or to fix a standard, remember to write **clauses which are called "Chinese walls"** → what are they? In order to develop one standard you have to put in the same group engineers, scientists and so on, people who create technologies. You don't need to put marketing experts there. You have to discuss about technicalities. It may happen that, as they are meeting all together, maybe someone from the marketing comes → they take the chance to exchange strategic information about their prices and costs.
In order to prevent this from happening, you have to write in your agreements that once you'll be in charge of this project, you will never have had any contact with people from the marketing. This means that you create a Chinese wall, a barrier.
So, first of all you say that the ones who will be involved in the project will not be people who deal with prices and costs, and then you specify that they should not talk with people who deal about prices and costs → **these agreements are the veil that you put over a possible cartel**.

And what could be another possibility which is very common with standardization agreements? TIP → Every time you analyze an agreement, the first thing that must come up to our mind is there will be a **restriction of competition among the parties → when we deal with agreements, the first kind of restrictive effect is the reduction or elimination of competition between the parties**.
So, first of all, each of those agreements can produce this possible anti-competitive effect. There can be overcome by joint development of innovation, but still is there.
And then you have another anti-competitive effect. Think about two or more companies' development a standard that then becomes the standard, the technology that everybody must have in order to stay on the market → what could be an anti-competitive effect in such agreement? That other companies may not have access to the standard → what we have to write in order to exclude this possibility is to write a clause that keeps the agreement as open as possible. You have. To write that you are developing together the standard and whoever will be capable of meeting the technical requirements which are needed to use the standard will be allowed to use it, maybe in exchange of a fee.
So, the idea is you have to prevent exclusion → when you deal with agreements, the first anti-competitive effect is the reduction of competition among parties, the second anti-competitive effect is the agreements that excludes those who are not part of it.
Now, this is natural → you say: we invested in the standard, we enjoy it, we take the benefits of it. That's okay, but you don't have to exaggerate. You can put a clause that says that as long as you will be technically viable to use the standard, you will be admitted using it for money. Obviously, the amount of money cannot be too high to prevent the participation of someone else.
!! ALWAYS CHECK THESE THREE POSSIBILITIES:

1) Reduction of competition among parties → the reduction of competition that you create is strictly necessary for achieving the procompetitive effects.
2) Exclusionary effects → openness under some conditions
3) Veil for a cartel → Chinese walls

It doesn't mean that there cannot be other anti-competitive effects, but these are very frequent.
If you use this framework, you can do a good first analysis of the agreement.

PRODUCTION AND SPECIALIZATION AGREEMENTS:

Two or more firms active on the same product market agree to cease the production of certain products, usually inputs or intermediate products, and to purchase them from the other party (or from a common JV), who agrees to produce and supply those products.
What are the procompetitive and anti-competitive effects?
What about the **possible procompetitive effects**? We could argue that in this way they could reduce the costs, and as a consequence ceteris paribus increase the output. They will become quicker, or they will produce better products because they will be more specialized, they will give to the JV or to the new branch all it needs to produce for example a certain amount of products or services for which you need a scale. For example, if you need a scale in order to recoup costs, you put your production together with somebody else → you reach the scale.

Possible anticompetitive concerns
A direct restriction of competition between the firms, even if they produce and market the final products independently
Coordination of the firms' competitive behavior downstream, in particular when the production agreement leads to a high commonality of their variable costs and to sharing information on quantities.
Foreclosure of third parties from a related market (only if one of the parties to the agreement has very strong market power) and possible foreclosure of downstream competitors.

← **possible anticompetitive effects**.

What's the problem? The last two → these are the two main concerns that this kind of agreement create.

The regulation about HCA says these things:

- There cannot be any exemption if the agreement contains some **hard core restrictions like: a) price fixing, b) limitation of output or sales, c) allocation of markets or customers**.
- If the agreement enables the parties to enter a market that they would have otherwise been unable to enter, the agreement does not have any restrictive effect.
- No problem if parties lack **market power**. No safe harbors, but for "specialization agreements" (similar to production agreements) there is a **20%** threshold in the Block Exemption.
- Even if the parties have a combined market share > **20%,** no problem where the agreement leads to **strong efficiencies** (reducing variable costs; increasing capacity; bettering the quality of a product) and the relevant **market is dynamic**, i.e. where there is a very high entry rate or market positions change frequently.
- Some elements could make procompetitive effect prevail, such as: a) the involvement of more than 2 participants; b) no restrictions on sales by the jv to third parties; c) chinese walls on information sharing.

These regulations create safe harbors that are built upon two features:

a. **They fix a threshold** and say → **if the agreement involves market share which falls below the market share threshold, then there is no problem. With specialization agreements, this market share threshold is 20%** → as long as you do specialization agreement putting together market power which is lower than 20%, you know that your specialization agreement is safe, because it falls in the safe harbors.
b. The regulation says that **what helps these agreements to survive even if parties have a combined market share > 20% are strong efficiencies** (reduce invariable costs, increasing capacity, bettering the quality of a product) **and the relevant market is dynamic** → the more dynamic is the market when you make these kind of agreements so, the more competitors are there, the lower the barriers are, the higher is the likelihood that the agreement will be procompetitive. A dynamic market is a market where there is a very high entry rate or market positions change frequently.

What are the hardcore restrictions that may be included in these agreements?

a) Price fixing
b) Limitation of output or sales
c) Allocation of markets shares or costumers

→ these are the 3 traditional hypotheses of cartels → **what is the problem here? That the agreement works as a veil for the cartel** → that's why the professor told us to use that kind of framework.
What are the hardcore restrictions that prevent you from making the agreement fall within the safe harbors? The case when the agreements is a tool to fic prices, to fix quotas or to share markets.

So, let's make some examples:

EXAMPLE NO. 1

- **Arta** and **Bosk,** suppliers of car batteries, decide to close down their old production plants and build **a larger and more efficient plant run by a joint venture (JV)**, which will have a **higher capacity** than the total capacity of the old plants of A and B.
- No other capacity investment is planned by competitors C, D, E, which are using their facilities at full capacity.
- A and B have market shares of 20% and 25% respectively.
- Their products are the **closest substitutes** in a specific segment of the market (batteries for diesel cars), which is **concentrated**. The market is **transparent** and rather **stagnant**, there is **no entry** and the market shares have been **stable over time**.
- **Production costs** constitute a major part of A and B's variable costs.
- **Commercialization is a minor economic activity in terms of costs** and strategic importance compared to production: marketing costs are low as car batteries are a homogenous and established product and demand is relatively anelastic, and transport is not a key driver of competition.

This could be a scenario question for the exam. Let's try to give an assessment for this agreement → the easiest way to do that is writing on a paper the key issues or the key words that you can see. What are the issues that strike you? ASK: **What is good and what is bad about the agreement**?

- ***Higher capacity*** → it doesn't mean that you increase efficiency unless we are in a market where you have very high fixed costs → so you have economies of scale. But at the same time higher capacity may bring about what? More outputs. So, higher capacity brings two effects. But is it always true or not? Let's look at it from another perspective. Let's think about the four conditions of art. 101.3 →
  - All the variables of consumer welfare (efficiency, innovation and so on)
  - Sharing with consumers

  → higher capacity translates into higher efficiency and higher capacity as long as firms want to do it because they are forced to do it by competition. If they have a lot of market power, they will use that higher capacity in order to limit output.

Indeed, what is the second point of the slide? That the other ones cannot increase their capacity as well. What does it mean? That they are not going to share the higher output with consumers. Why? What does a dominant firm do with prices? The dominant firm decides the prices → it charges high prices. When there is competition, what do the rivals do? They charge lower prices, they undercut. In order to be credible in undercutting, you have to be credible to increase your capacity of production when you undercut. Now, their capacity is stuck, is fixed. And they acquire higher capacity you cannot take for granted that they are going to share his higher capacity with consumers. They are acquiring the 45% of the market, with the possibility of flooding the market with their products, when the rivals cannot undercut. We are saying that **higher capacity is a procompetitive effect, because it can increase efficiency and it can increase output, but at the same time a counterargument is the 45% of market share and fixed capacity of rivals**. The idea that when you undercut you have to flood the market with your product, and you need capacity to do that is an idea that we have already analyzed while studying the abuses of dominance → we have to translate it.

- What about the **fourth point of the slide**? Do you think it's good or it's bad? There is low competition coming from the market, because it's not dynamic, and there are barriers or whatever. But why is it important that they are closest substitutes? Why is it a key element? When you compete, who do you fear the most? Those who products that are different from yours, or those who produce products which are very similar to yours? The latter. So, in the agreement, the first thing you have to consider is the limitation of competition among the parties. Now, if the parties are quite different among the others, the limitation of competition among the parties is low. But if parties are the big competitors in the market, it means that the agreement will reduce a lot the competition among them.
- **Fifth point of the slide** → what is it, good or bad? If their costs depend on the production and if they make efficiency on the side of the production, the agreement will really reduce costs. But, what's the other side of this? If we read that sentence together with the final one, and we go back to the example about the production of the engines → we said that if we produce together an engine, we put everything together (engineers etc.) and the price of the engine would be the same for the two firms and that would be natural. But then, what will not be natural is that we charge the same price for the commercialization, as long as we have two different distribution costs, distribution networks and two different sales force. Here, this scenario tells us that a great part of the price will be homogeneous, that a very important component of the final price of the battery will be the same. So, that the kind of price competition among the parties will be limited just to commercialization → **among the negative effects of this agreement, there will be less price competition**, **a lower space for price competition**.

Let's see the analysis of the example.

If A & B share most of their variable costs, this production agreement could lead to a direct limitation of competition between them. In fact:

- Given the combined market power of A & B, the agreement may lead the parties to limit output of the JV compared to what they would have brought to the market if each of them had decided their output on their own. In light of competitors' capacity constraints, the output reduction could lead to **higher prices**.
- Given that A and B share a significant part of their variable costs, this production agreement can lead to a **collusive outcome** between A and B. The likelihood of this depends not only on the issue of **commonality of costs** (which are high in this case), **input information sharing**, but also on the **characteristics of the relevant market** such as **transparency, stability and the level of concentration**.

In either of the 2 situations, it is likely that the production JV would give rise to restrictive effects on competition within the meaning of Art. 101(1).

However, the replacement of 2 old production plants with a larger and more efficient one may lead the JV to increase output at lower prices to the benefits of consumers.

The production agreement could only meet the criteria of Article 101(3) if the parties provides **strong evidence that the efficiency gains** would be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition.

First point → don't take this for granted, because if they have no competition coming from rivals, they will be incentivized to limit output because of their higher capacity, not to increase it.

What is peculiar of this answer? First of all, the professor underlines the anti-competitive effects → because firs of alla you have to understand whether the prohibition should be applied or not. In a possible answer to an exam question, we would have said: this agreement has not an anti-competitive object, because we can find at least a procompetitive justification for it (more the increase of capacity or the elimination of two old plants and the replacement).
But then, in order to apply art. 101, you have to show the anti-competitive effects → you have to get started from the negative part of the agreement, from what doesn't sound good and so you have to start from the possible dominant like behavior and from collusion.
You have to show first of all that there is a restriction of competition among the parties (the collusive part) and then that there is exclusion of rivals (the monopolistic part).
You can be very detailed in giving this intuition. You can find in the scenario some evidence supporting your intuition → **collusion is supported by the characteristics of the relevant market (transparency, stability, level of concentration); the monopolistic effect is supported by the constraints over the capacity of the rivals**.
In order to collude, you need to see the prices and the costs. Making a cartel is complex. In order to make a cartel, you need to know your own costs and the costs of rivals, your own prices, and the prices of the rivals. You have to agree on the collusive price, and you have to check that nobody deviates from the collusion → you need information exchange, and you need transparency, so you must be capable of seeing what the others are doing → that's why everything that makes price transparent it's a tool that facilitates collusion.
Think about the parity clauses we were discussing about yesterday → parity clauses increase the likelihood of collusion, because they make the price transparent, and you inform your rivals of the price that other rivals are doing.
Then, after saying the negative sides, you have to check whether art. 101.3 can find application → that's why we go through the 4 conditions of art. 101.3 and you see that the first condition is met (increasing efficiency and innovation). What I need to guarantee is the sharing with consumers → that's why, with a very simplistic sentence, one says that this would be wrong unless they come up with good evidence that they are going to share the efficiency with consumers.
To be more precise, that sentence (the first point of the slide, "given the combined market power […] on their own") would mean what under art. 101.3? That they are capable to increase capacity more than they could have done on their own. We have to look after **indispensability** → the third condition asks you to verify whether the restriction is indispensable to produce the procompetitive effects. Here, the procompetitive effect is the increase of efficiency due to higher capacity. You have to show that higher capacity cannot be achieved in another way.

EXAMPLE NO. 2

Two suppliers, A and B, form a production joint venture for the production/brewery of beer. Companies A and B each have a 15% market share on the market for beer. There are 3 other players on the market: C with a market share of 30%, D with 25%, and E with 15%. B already has a joint production plant with Company D.	The market is characterized by very few players and rather symmetric structures. The product is rather homogeneous. Co-operation between A and B would add an additional link in the market, *de facto* increasing the concentration on the market for beer, as it would also link D to A and B. This co-operation is likely to increase the risk of a collusive outcome and thereby likely to give rise to restrictive effects on competition within the meaning of Article 101(1). The criteria of Article 101(3) could only be fulfilled in the presence of very significant efficiency gains which are passed on to consumers to such an extent that they would outweigh the restrictive effects on competition.

On the right we have the analysis.
Let's analyze the scenario → look at market shares and to the number of rivals. How many rivals do we have? 5 rivals. We have 15+15 = 30 % (A and B that produce beer). Because of this agreement, you risk of having an oligopoly market → a market where you have a homogeneous product where the likelihood of transparency is high because they are just a few producing more or less the same things. What's the risk here? Here is the risk is collusion → collusive outcome → restrictive effects on competition within the meaning of art. 101.1
Generally, the most difficult part this kind of analysis is not finding out the good solutions (what overcomes the anti-competitive effects because generally the answer is efficiency gains innovation as long as they are shared with consumers), but the difficult part is understanding the mechanism that will bring you about anti-competitive effects.

PURCHASING AGREEMENTS:

When do they happen? They happen when you put together purchasers in order to increase their bargaining power. What are the procompetitive and anti-competitive effect?

Possibile Procompetitive effects	Possible anticompetitive concerns
More buyer power to obtain lower purchasing prices, but also **efficiencies in transaction, transport, logistics, storage costs** (supermarket chains form central purchasing bodies to negotiate lower prices with some big suppliers, such as Coca Cola, Colgate, Procter & Gamble, Henkel, etc)	They will also pay the same price for those products (same variable costs) and may be able to know the quantities their competitors will buy (information sharing on quantities through the central body). Therefore, …
By paying less those products, buyers' associations may become more competitive downstream, by decreasing consumer prices	**Downstream**. If the parties have a significant degree of market power, it may be that they have no incentive to pass on to consumers any lower price they extract from their suppliers (and information sharing on quantities can increase this quiet-life danger). Furthermore, the agreement may lead to possible reduction in variety (they buy from the same suppliers).
	Upstream. If the parties have significant market power, by pushing to reduce the sell-in price, they can force their suppliers to reduce the range or quality of the goods they produce. Similarly, they can raise their rival costs (producers that are obliged to undercut prices due to buyer power, increase the selling price to parties outside the purchasing agreement). Also, they may cause foreclosure of competing purchasers by limiting their access to efficient suppliers.

On the side of the demand you reduce the costs. The argument could be → if you reduce the prices of the input, then you can increase the amount of the output ← not always! But only as long as the price of the input is overcompetitive
If the input market is not perfectly competitive and the price of the input is higher of how it could have been in perfect competition, when you have bargaining power you push the price of the input toward perfect competition and so, because of this price reduction, you are capable of increasing output, because you are still buying the amount of input that you could have bought in perfect competition, but at a lower price.
Differently, if the input market is not competitive, but it is a monopsony (a market in which the price of the input is already very low), if you allow buyers to agree, they will keep the price of the input even lower and this would make them buy less input, less products. because of the less input they will buy, they will use

less output → **the idea that the reduction in input costs always brings you higher output is wrong**. **It depends on whether the initial input cost was already over the competitive level, or whether the input cost was below the competitive level, and you push it even lower toward the monopolistic price**. We can easily understand it if we think about the labour market → if it is really competitive, if employers associate among themselves to gain a kind of bargaining power, that's cool because it will make you pay less the input that you need in order to use the output of perfect competition. But if workers are already underpaid, then any association among employers will reduce the price of labour and also the quantity of labour acquired and so will turn out in lower output.
For example, there have been a lot of discussions on labour economics about the effects of minimum salary thresholds. If labour markets are competitive, minimum salary threshold produces inefficiency. If the labour markets are nonopsonized, minimum salary increase the welfare in those market → everything depends on the structure of the market.

What are the possible anti-competitive effects?

If the buy products at the same price, they could collude over that price, or they will have another element that takes their price very similar one to the other → it will bring some effects downstream and upstream.
Downstream → if the parties have a significant degree of market power, it may be that they have no incentive to pass on to consumers any lower price they extract from their suppliers (and information sharing on quantities can increase this quiet-life danger). Furthermore, the agreement may lead to possible reduction in variety (they buy from the same suppliers). Sharing the benefits with consumers is possible or can be taken for granted as long as the parties have no market shares. Therefore, we have this threshold in this regulation → because, you know that when parties do not have market power, they cannot have competition.
Upstream → if the parties have significant market power, by pushing to reduce the sell-in price, they can force their suppliers to reduce the range or quality of the goods they produce. Similarly, they can raise their rival costs (producers that are obliged to undercut prices due to buyer power, increase the selling price to parties outside the purchasing agreement). Also, they may cause foreclosure of competing purchasers by limiting their access to efficient suppliers.
What does the regulation say? That you must go below 15% in order to be safe and that in order to prevent some risks from happening you have to adopt those measures, those contractual provisions:

- Chinese walls
- Allowing a second contractual phase between the parties and the producers
- Allow for flexibility on product and quantities
- Limit the cooperation to some products/categories

So, here we have an example:

150 small retailers reach an agreement to form a joint purchasing body.

They are obliged to purchase a minimum volume through the organization, which accounts for roughly 50% of each retailer's total costs. The retailers can purchase more than the minimum volume through the organization.

The retailers have a combined market share of **23**% on both the purchasing and the selling markets.

Company A and B are their two largest competitors. "A" has a 25% share on both the purchasing and selling markets; "B" has a 35% share on those markets.

There are no barriers which would prevent the remaining small competitors from also forming a purchasing group.

The 150 retailers achieve substantial cost savings by virtue of purchasing jointly through the purchasing organization.

The retailers have only a moderate market position on the purchasing and the selling markets.

Furthermore, the co-operation brings about some economies of scale.

Even though the retailers achieve a high degree of commonality of costs, they are unlikely to have market power on the selling market due to the market presence of Companies A and B, which are both individually larger than the joint purchasing organization.

Consequently, the retailers are unlikely to coordinate their behavior and reach a collusive outcome.

The formation of the joint purchasing organization is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101. On the contrary, it may increase competition in the market.

What could go wrong? What's the role of A and B? A has 25 while B has 35 and retailers all together 23.
So, what? Probably you will have kind of collusive effect among these 150 purchasers, but still that collusive effect will be limited to the 23% of the market → it will not produce any significant impact on the competition.
At the same time, there are no barriers → people from the outside can undercut and do what they want and for sure **the agreement can be justified because of the economies of scale and because of cost reduction**.

INFORMATION EXCHANGE:

One of the most frequent examples of anti-competitive agreement.
First clarification → we have already studied the case of information exchanges. When we discussed about the notion of concerted practices, the professor told us that right now in the EU the first building block of that notion is strategic conducts, meaning the exchange of strategic information (of future/present, prices, costs, quantities) → you neutralize any type of competition on prices and quotas. If you are facing an exchange of strategic information, you can qualify it in two ways:

- You could say that this is the first building block of a concerted practice which intends to fix prices. The second building block can be presumed and it's the internal use of that strategic information. If you are in such a situation, you are claiming that a cartel is going on, a price fixing agreement is going on, which has taken the shape of a concerted practice → you can see strategic conducts and you presume the internal use of them.
- You don't remark what could happen thanks to this strategic information exchange, but you look at it and you say that this is a restriction by object. The parties agree to exchange information which is strategic → there is no plausible procompetitive justification for exchanging information about prices/costs/quantities → so, this is a restriction by object.

None of them is wrong, both of them are correct. If you go for the first solution, you are trying to impose higher fines, generally you don't do that just because of the strategic information, but you do that because you can also see the effects on prices, so you are going to argue that there is price fixing in the shape of concerted practice.
Here we are not talking about exchanges of information whose object is anti-competitive, here we are talking about exchanges of information whose object is procompetitive, but that may produce anti-competitive effects. Why that? Transparency has a double nature → if the market is transparent, the market will be collusive, or the likelihood of collusion will be higher. Because if you have transparency and then you have just a few competitors and you have homogeneous products and very similar structure of costs, then collusion is very. But even in perfect competition you have a transparent market. If you have many competitors, transparency becomes good, because when you see the price of the other ones, you undercut. **Transparency is one of the conditions of perfect competition indeed. If you don't deal with the case in which you exchange information about future costs, prices, but they exchange other kinds of information, for example past costs or aggregated information (not about the price of every product, but about all the chemical products, so macro information), this information can help competitors having benchmarks to undercut the rivals instead of not having any kind of benchmark and so instead of not having elements to compete.**
So, once you have an exchange of information whose object is procompetitive, you have to undertake a case-by-case analysis.

→ we are here in the case in which information exchange is restrictive by effect → the parameters that we have to use to recognize whether an exchange of information is procompetitive or anti-competitive:

- You have to analyze the structure of the market → if it's an oligopoly or not. If it is, the probability that the exchange will produce anti-competitive effect it's higher; if the market is not an oligopoly, the probability of anti-competitive effects will be lower.
- You have to consider the content of information
- You have to consider all these other elements:

3. Market coverage: For an IE to be likely to have restrictive effects on competition, the companies involved in the exchange have to cover a sufficiently large part of the relevant market.

4. Aggregated/Individualized data. Exchanges of genuinely aggregated data, where the recognition of individualized company level information is sufficiently difficult, are less likely to lead to restrictive effects on competition than exchanges of company level data. Conversely, exchanges of **individualized data facilitates a common understanding on the market and punishment strategies by allowing colluding companies to single out a deviator or entrant**.

5. Age of data. The exchange of **historic data** is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or to provide a common understanding on the market.

6. Frequency of the information exchange. Frequent exchanges of information that **facilitate both a better common understanding of the market and monitoring of deviations** increase the risks of a collusive outcome.

7. Public/non-public information. Genuinely public information is generally equally accessible (in terms of costs of access) to all competitors and customers. For information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information. **Public information means lower risk of determining a collusive outcome on the market.**

8. Public/non-public exchange of information. An information exchange is genuinely public if it makes the exchanged data equally accessible (in terms of costs of access) to all competitors and customers. **The fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market** to the extent that non-coordinating companies, potential competitors and costumers may be able to **constrain** potential restrictive effect on competition.

If you have aggregated data, it's okay, because you won't give rivals the possibility to find out the collusive equilibrium. Aggregated data, instead, can be useful to have benchmarks.
If the exchange of information happens once a while, then it can work as a benchmark tool.

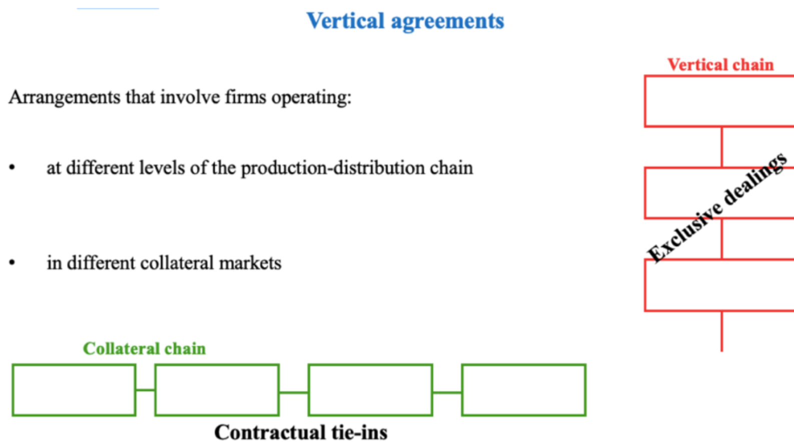
Public/non-public information exchange of information → the key part is whether you are involving consumers in knowing the kind of information you are exchanging or not. If consumers are involved, then it means that all they have the opportunity to choose among the companies.

Those are the parameters that we'll use every time to analyze exchange of information. You have these 8 parameters. Suppose that 1 is content and 2 is market structure and suppose that you have low/medium/high danger (like green light, yellow light and red light), as long as the content and the market structure are okay, then the parameters can change and you have to establish, when you analyze the agreement, what can you do in order to bring these red light parameters toward yellow light.
You have to find out a way, every time you are in the red-light area, to bring those parameters more towards the yellow light area.
For example, if they exchange information every week, ask them to exchange information every month. If they exchange data of the previous months and those are kind of present data because of the structure of the market, ask them to exchange information about the previous 4 months and so on.
Because the idea is to put yourself in the yellow light area.
If the market is an oligopoly or is a very regulated market so that everything is already transparent and the space for competition is very low, you cannot work on it, because you cannot change it → you have to try to put yourself in the yellow column the more you can, because every exchange of information can become very dangerous.

Now we are going to discuss together the case of **vertical agreements** → generally they are restrictions by effect, and only in a few cases they can be qualified as restrictions by object. What are vertical agreements? We talk about vertical agreements in 2 situations:

- Strictly speaking, when we have companies working at **different levels of production and distribution chain** → a typical vertical agreement is an exclusive deal → I make a contract with a distributor whereby the distributor will be the only one to commercialize my product; or I make a distribution agreement whereby the distributor will commercialize only my product and not the product of somebody else. *These are exclusive dealing contracts*. Typically, vertical agreements are exclusive dealings.
- We call vertical contract also the cases of tie-ins, although the contract does not work over the vertical chain, but it works over **collaterally related markets**.
  A tie-in contract is a contract for ex. whereby the manager of a fast-food chain obliges whoever is in the fast-food chain to but bread from one producers of bread, or to buy meat from one specific producer of meat → in these cases we have a contractual tie-in → we say to somebody who wants

to be a part of the fast-food chain: if you want to be a part of it, so if you want to buy the possibility of being a fast-food restaurant, you have to oblige yourself to buy products from some specific supplier. Technically, this should not be a vertical contract, because here we work over collaterally related market, but to be quick we say that vertical contracts are all of them → meaning every contract that is not horizontal → every contract that does not happen between competitors that operate over the same market.



As we said, when it comes to this kind of economic relationship over vertically related markets or over collaterally related markets, the suggestion is to work with a checklist of the possible procompetitive and anti-competitive effects → it does not matter whether we are talking about a unilateral conduct of a dominant firm or if we are talking about a vertical agreement, or it doesn't matter if we are going to talk about a vertical merger → every time we have these behaviors (meaning behaviors that create exclusivity or that create a tie-in) → these are the possible procompetitive and anti-competitive effects that those behaviors produce:

The checklist of the pro- and anti- competitive effects that vertical restrictions (exclusive dealings, tie-ins and the like) may produce

- Pro-competitive effects, such as:
  - Efficiency gains (i.e. reduction of costs of transactions, economies of scale, quality increase)
  - Exclusion of double marginalization (with, for example, resale price maintenance clauses, or minimum quantity clauses)
  - Exclusion of free-riding (for example, with territorial exclusivity clauses)
- Anti-competitive effects, such as:
  - Intra-brand reduction of competition
  - Inter-brand foreclosure
  - Increase in the propensity to collude

→ those effects also come if you make an exclusive dealing of a dominant firm or if you make an exclusive dealing contract among two firms which have not significant market power, or at least not a dominant position. Remember that we cannot say that the kind of business behavior firms undertake don't matter at all (if we have a dominant firm we have a unilateral conduct, if we have 2 or more firms that do not have dominant position we will have a vertical contract, or if we have a merger we will have a merger), but when it comes to the possible procompetitive and anti-competitive effects, each of these behaviors is capable of produce procompetitive and anti-competitive effect.

The truth is that the anticompetitive effects are more likely the more market power you have, so they are very likely in cases of dominant position → they may be significant in cases of mergers (if the parties have significant market share), they may be significant in cases of vertical agreements (if the parties have significant market shares), but when the parties in vertical agreements don't have significant market shares, we assume that these anticompetitive effects will always be lower than the procompetitive effects

→ it will depend on the case, but our rule of thumb is that when the market power of the parties involved is low, than the likelihood and the impact of the anticompetitive effect is not significant. In order to apply art. 101 TFEU and in order to argue that an agreement is anticompetitive by effect we need to have significant market effect → in order to have significant market effect we need to have a certain amount of market power. Indeed, we have a block exemption about vertical agreements → the threshold says that as long as the parties have less than 30% of market share, the agreement falls within the safe harbor ← we presume that the agreement is lawful. Why? Because of the rule of thumb → when the market power is not high, we assume that the likelihood of anticompetitive effects will be low.

If we wonder about how we put together what we have studied about dominant firms and their exclusive dealings and their contractual ties and the law about art. 101 TFEU this is the way to put everything together. Suppose you have an exclusive dealings or behaviors that reproduce exclusivity (you don't have an exclusive dealing contract, but you have a contract that creates a scheme of incentives that in the end is an exclusive dealing contract) → in such cases:

- if the market share is lower than 40% you will apply art. 101 TFEU.
- If the market share is between 30 and 40% you will make a case-by-case analysis
- Then, you will apply art. 102 TFEU when at least one party has over 40% of market share → why? Because 40% is the threshold we us in order to appreciate dominance. Here we apply the 5 conditions we have to meet in order to have un unlawful tying → dominant position, 2 separate products, coercion, foreclosure and no objective justification.
  → it is the same with ties-in and the alike.

The assessment of vertical restraints

	Under Article 101 Mkt share < 40%	Under Article 102 Mkt share > 40%
Exclusive dealings and the like	Either Block exemption (< 30% and no hard core restrictions) or case by case analysis	Case by case analysis … not very friendly toward dominant firms
Tie-ins and the like		Apply the 5 liability conditions of the Microsoft case

As we said last time, every time you got a block exemption, its structure (so the structure of the safe harbor) goes around 2 turning points:

- The first is market share threshold → the safe harbor of this vertical agreement says → if you put together companies with less than 30% it's okay.
- Unless the agreement includes some hard-core restrictions → restrictions that should never be present in vertical agreements → if they exist, the agreement cannot enjoy the safe harbor → we have to check case-by-case, knowing that if these hardcore restrictions exist the likelihood that the agreement will be find unlawful, and therefore anticompetitive, is high.

The EU block exemption about vertical arrangements

The vertical arrangements that fall within the safe harbor are deemed lawful

The boundaries of the safe-harbor: Block exemption no. 330/2010 – now under review – maintains that:

- when the market share held by the supplier **does not exceed 30%** of the relevant market on which it sells the contract goods or services, ***and***
- the market share held by the buyer **does not exceed 30%** of the relevant market on which it purchases the contract goods or services

there is no need to make any balance between procompetitive and anticompetitive effects: the former are assumed to prevail over the latter …

- …**unless** the arrangement encompasses some specific clauses – named **hard core restrictions** – such as:
  - Resale price maintenance
  - Passive sales restrictions

We should now talk about some of the most frequent vertical restrictions. We know them because of our experience in the digital economy → popular in the offline world and now have become even more popular in the online world:

1. Total ban of online sales
2. Restrictions on selling on online marketplaces
3. Resale Price Maintenance
4. Dual Pricing

→ we will see how they are assessed in contemporary antitrust law.
We get started from the case of a **total ban of online sales** → a producer wants to distribute his products and says: I will distribute my products offline, and nobody of my distributors is allowed to go online → case in which somebody decides to prevent its distributors, via contract, to sell the products online. We are talking about a producer who is an independent undertaking from the distributor → we have 2 different undertakings.
Is it procompetitive or anticompetitive? What was the answer of the ECJ in the **Pierre Fabre Dermo-Cosmétique case** (case about a producer of prestigious cosmetics)? It said that it was a **restriction by object** → there is no procompetitive justification for preventing someone to sell online. In writing this, the ECJ stressed a lot the fact that in this way consumers were preventing from getting access to the products online. For the court, nothing could justify a contract that made consumers unable to find those products online. The party tried to find out some procompetitive justification → they tried to say: we want to be offline because we want to explain how our products work, so we want to consult consumers, we want to give them information + the products are so prestigious that they should not be sold online. The court did not find this argument convincing → it said that it was just a market sharing agreement → a restriction by object, because in this way distributor and producer take for themselves only one channel.
The prof. did not agree with this decision of the ECJ → it should not have been a restriction by object, but a restriction by effects. We can explain it by taking into consideration that the court at that time wanted the digital market to flourish, it wanted the digital market to be trustworthy; so it didn't want to support the idea that going online was like underestimating the values of goods and services → it was not something that guarantees consumers lower quality products.
The court rejected those two arguments because they shad bad light in the digital market, whereas the court wanted to promote the flourishing of the digital market → so it said it was a restriction by object because it didn't have any procompetitive justification.

Then, things changed. After this case, which was highly criticized, we had a new case, always connected to luxury cosmetics → the **Coty case**. The question was: can a producer prevent it distributors from selling its products through online marketplace? The idea was → here we have a producer of luxury goods that are distributed online via website (so here we don't face a total ban of online distribution), but the distributor is prevented from selling products via marketplaces like e-Bay and Amazon.
In this judgement, the ECJ was asked to say whether this was lawful or not. The answer of the ECJ was yes → it said that it is true that you cannot make a total ban on online sales, but as long as you allow online sales someone, then you can reproduce online what we call a **selective distribution system** → contracts whereby you tell your distributors to whom they can sell your products and services. Selective distribution systems are very popular in the offline world. Think about the fashion industry → there, you tell your world distributor who he can sell your products to. Why? You fix some quality standards, some criteria on the basis of which you select the point of sales. You select the characteristics, the appearance, the quality of your points of sales. The court says that we can admit reproducing this system online. The producer can say that its online distributors cannot go to sell its product on e-Bay and Amazon since he perceives them as not good enough → not prestigious enough, not elegant enough, etc.
As I created a list of objective qualitative criteria, I can say these clauses are possible and lawful, we can say that this system, this clause within a vertical contract is lawful.

The total ban of online sales is a hard-core restriction → you cannot create a vertical contract in which you say that distributors are prevented from going online, but you can create a vertical contract in which you say that distributors, who are allowed to go online under certain conditions, ensuring certain qualitative criteria, are prevented from reselling the products from specific marketplaces.

In this way we understand that a vertical contract is a way to control how products and services are distributed → generally, you make these contracts in order to have a say on the way in which your distributors, although they are independent, distribute your products and services.

Copad/Dior case → case in which this principle was reestablished → third-party platforms ban:
- is coherent with the aim of guaranteeing that the contract goods will be exclusively associated with authorized distributors +
- it is coherent with the idea of monitoring the qualitative criteria according to which the products are sold +
- it is coherent with the aim of contributing to the high-end image among consumers.

It was a very recent case in which the choice of Dior of creating this selective distribution system online was judged procompetitive, because the procompetitive effects were supporting the investments and the prestige of the goods and products. Increase in quality and variety → those were the procompetitive effects. Indeed, the ECJ said → the quality of luxury goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury → in order to create such an image you have to invest.
Producers and distributors are allowed to choose other entrepreneurs to which they will resell the product → selective distributions systems are lawful as long as you choose the other entrepreneurs of the chain that will distribute the products and services, but they can never choose consumers → they can prevent somebody from buying, unless he or she cannot pay → choosing consumers would be a hardcore restriction, which is restriction of passive sales.
You could do it on the basis of nationality in order to partition the market. Example: in every member state there are different average incomes → on average, German citizens are richer than Italians, which are richer than Greeks. Therefore, if you operate all over EU, generally you price discriminate if you have some amount of market power. Why? If you put the price at the level of German consumers, they will be the only ones who can afford the product, but if you put it at the level of Greek consumers, you will lose a lot of surpluses → you have to find a way to discriminate in order to find the price which meets the income of consumers. One effective way to price discriminate is to use nationality and geographic boundaries ← for ex. when you know the availability to pay depends on the member state where you are, you could have geographical boundaries within your contracts; so, for ex. you can tell your Italian distributor that he is not allowed to promote the sales of the products in Germany. That's because the Italian distributor will have lower prices than the German one and therefore you don't want them to be in competition → therefore you prevent him from soliciting the sales in Germany. Why do we allow territorial exclusivity clauses? Because price discrimination is a way to increase output, via price discrimination you allow people who wouldn't otherwise afford the product to get access to it. Also, territorial exclusivity gives each distributor enough business to recoup the initial investment.

When we say that we give territorial exclusivity, and therefore that we allow Italian distributors to solicit sales only in Italy, we don't mean that if a German citizen comes to Italy and wants to buy something from an Italian shop, he is not allowed to → he must be allowed to, because we cannot limit passive sales. Even if you give territorial exclusivity, that limits the power to solicit consumers, to do active sales, to promote the products and services behind the territorial exclusivity region, but the producer has never the possibility of limiting passive sales.

In summary, the new regulation establishes that a restriction that can significantly reduce the overall amount of online sales must be considered a hardcore restriction → this is the Pierre Fabre decision, which is still a good piece of law.

Still today you can never prevent someone from selling online, still the online version of selective distribution system is allowed and, in particular, what is allowed is the case of a producers preventing his distributors from the use of marketplaces: the revised version of the Vertical Agreements Regulation accepts:

- the 'online version' of selective distribution; and, in particular,
- the case of a producer preventing its distributors from the use of marketplaces

Let's now take into consideration **another vertical agreement → RPM that is resale price maintenance**. The question is: can a producer fix a minimum or maximum resale price for its distributors? If I am a producer, can I say that you will distribute my laptops and sell them at least at 1000? The answer is that in the EU you are not allowed to fix minimum resale price, you can never say to distributors "this is the minimum price at which you can sell the product". You must let the distributors go below the price you recommend → you are allowed to recommend the prices, but distributors must be free to apply discounts, must be free to go below the price recommended. When we say that they must be free to do it, we mean that you cannot create a system of incentives or accounting mechanisms that push the distributor to apply the price you recommended. They must be free to charge the price they want. No argument is allowed in this regard → you cannot talk about reputation, you cannot talk about the defense of prestige, you cannot even talk about the need to exclude double marginalization, because generally when you fix prices from an economic point of view, you could say: I fix prices to my distributors so they will not have a further mark up, so I will avoid double marginalization. It does not matter → according to EU law no one should ever be allowed to limit distributors' ability to charge the price they like. You can recommend the maximum resale price, and this may help the distributors to understand when the price will be out of the market → you reduce the experience cost of the distributor.

Remember that as long as you are not dominant, you can always sell under cost (otherwise you are under the risk of predatory prices), but here we are not talking about selling under costs.
Let's be clear → you are a producer and your sell in price is 5 and you will sell to the distributors at 10 → this is the sell-out price. The rule about RPM says that distributors must be allowed to decide the sell-out price. The rule about RPM is absolutely well know and popular, but there is always someone trying to violate it. The rule about RPM is absolutely well know and popular, but there is always someone trying to violate it. This is the Guess case → Guess was charged with 3 different anticompetitive conducts:

1. RPM
2. impossibility for distributors to decide to whom to sell the products without a prior authorization from the producers
3. clause preventing distributors from using the Guess brand names and trademarks for online search advertising.

The *Guess* case

Guess specializes in the design, marketing and distribution of apparel and accessories. Guess distributes its products in the European Union through a selective distribution network of authorized retailers.

The Commission initiated proceedings against Guess in June 2017, following the e-commerce sector inquiry. It found that Guess's distribution agreements unlawfully prevented authorized retailers from:

- **independently determining the retail prices** of Guess products **(RPM clause)**;
- selling online without a **prior specific authorization** from Guess. Guess retained full discretion for this authorization
- using Guess **brand names and trademarks for online search advertising** (particularly in Google AdWords)

Let's look at each of these vertical agreements.

Art. 11 of the General Sales Terms used by Guess stated that: *for each sample range GUESS EUROPE shall fix a minimum price for sale to the public of its own products, by means of a «recommended pricelist» inclusive of VAT, for the purpose of making the product image uniform on the market. The Purchaser undertakes to sell the goods purchased at prices that comply with those indicated on the aforementioned pricelist. Failure to observe this obligation by the Purchaser shall give rise to the obligation to reimburse the damages incurred and shall entitle GUESS EUROPE to discontinue all future supplies.*
Guess is the seller, and the distributor is the purchaser. Here Guess was very clear in saying that: I will give you the recommended price and you should comply with it → if you don't you have to reimburse me of the difference, and I can decide to stop supplying you.
The commission found that it was an RPM → this is not only a clear RPM clause, but also an RPM clause supported by a retaliation mechanism. They have to give back damages and they can also interrupt the contract because of this behavior → it was not only that they should apply this price (something that you should never write in a contract), but in addition they said also that they had to be paid back and that they could interrupt the contract. This was a strengthen of the RPM clause. That's why the commission had an easy life in saying that this was void and that guess could not do that → you can never limit brand retailers' freedom to determine the resell price and no argument can ever win against the idea that this is not possible.

Let's take into consideration the second case → the Commission set out its position with regard to restrictions of online sales in its Guidelines on Vertical Restraints ("Vertical Guidelines"). In the Guess case, the written authorization requirement was not linked to any specified quality criteria. In this case Guess retained for itself the possibility of choosing retailers on the basis of its own will and preferences. The commission said that this was a violation of competition law, because it did not qualify as selective distribution system → the selection of distributors was not based on objective quality criteria.

In relation to the third case → we know that who own a trademark can say who can use it and who cannot. Guess said to its retailers that they were not allowed to use its trademarks in online advertising. In particular, Guess said that they were not allowed to use Guess trademark as a keyword in online advertising. When you want to advertise something on the internet, you buy keywords → so that when users search for one of those keywords your website pops up. Guess wanted to prevent its distributors from using Guess keywords, but according to the ECJ this was not allowed. Guess did not pursue any legitimate objectives in making this prohibition → it only wanted to maximize traffic on its own website.
The idea was: the law about e-commerce says that you can use someone else's trademark as a keyword as long as you sell those products and services. As long as I legitimately sell Guess products and services, I can use Guess among my keywords → I would be prohibited to do that if I sold counterfeited products. If I did, I would confuse consumers. Authorized Guess distributors must have the right to use Guess name in their advertising. If Guess prevents them from doing it, Guess was doing it in order to maximize the traffic on its own website at the expenses of independent distributors → therefore to minimize the amount of money it put on advertising, because it uses independent distributors.
The Commission considered this clause unlawful because it was a way to abuse the bargaining power. It was a way to impose Guess distributors an exploitative clause.
In antitrust words we can say that this clause was meant to minimize competition between Guess website and the websites of independent distributors → the contract was a way to limit competition among the parties as to the amount of people that will go on those websites.

Other example → **dual pricing** → can a producer charge different prices for the same product to the same retailer depending on whether the products are intended to be sold online or offline? Can a producer undertake a dual pricing strategy? The answer is yes, as long as these different prices are objectively justified → as long as the higher price (online or offline) is based on cost.

Let's go back to what we were saying: can a producer limit the passive sales of its distributors? Difference between active sales and passive sales:

"Active" sales happen when a seller actively approaches individual customers by direct mail, including the sending of unsolicited e-mails, or visits

"Passive" sales, instead, happen when a seller responds to unsolicited requests from individual customers including delivery of goods or services to such customers.

But what about the internet? Having a website is an active or passive sale? We need a website in order to sell online, but just the fact of having a website is like to promote your sales? Or is it just a passive sale? It is important to understand whether we can limit somehow the distributors from selling in different languages for ex. There was a lot of discussion about that → the final result is that traditionally, online sales were deemed passive sales → you can never limit your distributors' ability to open up a website in any country and in any language.
The revised version of vertical agreements regulation instead says clearly that we talk about active sales in these 2 scenarios:

1. when producer prevents his distributors from opening a website in a language different from that of the distributor's territory
2. when producer prevents his distributors from registering domains corresponding to territories other than those of the distributor himself.

Let's be clear → suppose I am the Italian distributor of somebody → can I open my website in Italian? Yes, I can. Can my producers say that I'm prevented from opening up my website in Germany? Yes, he can → because creating a website in a language which is not the one of my territories is an active sale and limiting active sale is lawful.

Opening up a website in a language which is different from the language of my territory is equivalent to an active sale → therefore, it can be limited.
Also, registering a domain name for a territory different from the one in which I work is an active sale → it can be limited.
There is one big exception → this does not work for English → if you are an Italian distributor, you can open your website in Italian and also you can have an English translation of it. And nobody can prevent you from doing that.

MERGER AND MERGER CONTROL:

Antitrust law/competition law has three main pillars:

1) art. 101 → anti-competitive arrangements
2) art. 102 → abuses of dominant
3) EU regulation of 2014 → merger control

They are all part of competition law. at a technical level we talk antitrust law to refer to the first to the two pillars. We talk about competition law to refer to the three pillars.
Why we have competition law? what do we want to protect? Why do we care about competition? To protect the well-functioning of the market.
How do we assess if the market is functioning well? What are the criteria that we use to see if a market is functioning well? By looking at consumer welfare, which is made of variables.
What is consumer welfare then? What do we want to look at? 5 different variables:

1. *price*
2. *quantity*
3. *quality*
4. *innovation*
5. *variety*

Usually what happens is that a practice that can be either an agreement/arrangement/abuse/merger can be wrong under competition law because it harms the well-functioning of the market, meaning that it has an impact on prices (increases prices) and quantity (decreases the quantity), or on quality (decreases), the innovation (decreases), the variety (decreases).
So, at the end, this is what we have to look at.

When we look at art. 101 and 102, we are doing an ex-post assessment → something takes place in the market and then we intervene, when the infringement already took place. So, we have antitrust authorities going after the infringement. Firms in their ordinary business should be aware that they should respect TFUE.
On merger control, instead, we have a system of ex ante assessment, ex ante control, meaning that a merger can't take place unless we have a prior assessment under competition law (ex-ante evaluation → something that takes place before the practice).
In order to do that, since we are intervening before something takes place, we need a system, something that is an overall structure that gives us some rules to do intervene. Firms should do something before they do merge → company A acquires company B.
I'm Barilla and I want to acquire Nestle ← this is a merge.
If Barilla wants to acquire Nestle, they have to **notify the intention to merge to the antitrust authority**.
They ask for a green light to the Commission. There are 3 possible scenarios:

1. It might be a problem for the market because it can harm the well-functioning of the market.
2. It might not affect the market → green light
3. You can go with the merger but there might be some conditions → they can merger by satisfying some conditions, doing certain things

We are acting ex-ante.

What is a merger? We have different hypothesis. We have an Eu regulation of 2014 which is directly applicable to every member state.
A merger has something to do with the control, the change in control of an undertaking → **we have to look at the control structure in a given undertaking**. Ex. What happens if Barilla acquires Nestle? What changes in the market? A merge affects how a firm is controlled. At its very essence, **a merger is something the control of an undertaking on a long-lasting basis, so it has to be durable**.
Mergers can happen in different market, in the same market, in market that are vertically or horizontally related.
Ex. We have a market which is split in 4 undertakings. A has 30%, B has 30%, C has 30% and D 10%. D is the youngest and the one with the lowest market share and the one who tries to compete because he wants to steal some costumers from the more established firms.
If C and D merge together, we do see a change in our relevant market structure → the market will be made of 3 firms and the third one will have 40%. We have a relevant change. This merger can actually harm the well-functioning of the market, because it can have an impact on consumer welfare (think about increasing prices). After the merger, a costumer couldn't afford the offer of D anymore. That's why we do care about mergers and that's why mergers are a way to abuse of market power → we have a company who has acquired a dominant position on the market and in that dominant position it can do something that affects the consumer welfare.
One of the most dangerous effects that a merger can have is to create a dominant position → if A and B merge, we can have a problem on the market → the market will function less well than before and we have a firm that acquires the 60% of the market and this could be a problem (art. 102).
This is to have a general view.

In order to be able to perform this kind of control on mergers and acquisition that take place in the market, we have to establish a system, a set of rules that tell us what to do prior the merger, during the merger and after the merger. We need to have some criteria to know when an acquisition has to be notified.

If I have a small firm in a small town and I want to acquire my competitor next door, do I have to communicate it to the antitrust authority? **What are the criteria under which we assess whether a merger can take place or not? Who has to decide? An authority, a judge, the government?**
We can see the difference between law and policy → we have a system that is made of a series of laws. They are influenced by the policy decisions that are even above the law → we do take some policy decisions. We decide that is should be fair that a power is exercised by a judge for instance → we decide the criteria to decide in the concrete case who is the judge having jurisdiction. There are very complex policy decisions that are resolved at EU level and then they are implemented in the laws → regulation of 2014.
The policy that is beyond the system is constantly under discussion or it can be, and sometimes in the public debate you do proposal to renew the regulations.
For instance, there was a big debate when the Commission a few years ago denied a merger between Alstom and Siemens, that were the two biggest producers of trains in Europe. They wanted to merge together to create what we call a European championship → very big firm with a lot of employees, clients, assets. What they said was that they wanted to create this European champion because they wanted to compete with the Asian firms supported by governments and public policies.
We are talking about a global market. to compete in it they needed to create a champion and to out their powers together. The Commission said no because this would have harmed the well-functioning of the market → increase prices and decrease the quality and so on, because they wouldn't have had competitors anymore.
That's a huge decision that creates a very strong debate and they were thinking about renewing the system control to give a green light to those companies that wanted to create a champion.
The systems are the outcome of policy decision. Today the system is based on this → we do admit all the mergers that do not affect the well-functioning of the market.
However, other debates are emerged → for instances, do we look at the effects of a merger on the employment of the system? No. Do we look at the effects of a merger on the distribution of money? No.

Also, there are several reasons why two firms might decide to merge → for instance, you might want to acquire market power by growing. If it gives you a market power you can abuse of, then it's something we can look at.
What are other reasons which are completely legal? **Efficiency → economies of scale** → if I produce more, I'll be more efficient, and my economics will be much better because I produce more, and it costs less. Instead of producing just one good, we produce more goods, and it can create efficiency.
When we see that those efficiencies are created, this is something that brings the authorities in charge to admit de merger to give a green light. **When those efficiencies are at the very core of the reasons why two firms want to merge, then it is evaluated as a positive element**.
Another thing that we should consider about the ex-ante control is → why do we need an ex-ante control? We can say: all firms are free merge. They don't have to notify; they don't have to assess the merge ex-ante. If then an antitrust authority sees that there's a problem in the market, it will open a case. If he finds that there's something wrong in the market, it obliges the firms to unmerge.
What would be the problem of that scenario? First of all, **these are such big transactions. We want to give to the firm legal certainties**. Try to think about the effects that those operations have on the stock of a market. The second reason, the most important one, is that "**we cannot unscramble the eggs**". **It's impossible to unmerge two firms**. It's impossible and extremely costly and inefficient to go back to the previous situation.

We can look more in details at what are the different hypothesis of mergers that are taken into account the regulations → (merger: change of control on lasting basis). We have 3 main hypotheses:

1) **Merger** → we can have for instance company A and company B that merge together and create company C. A and B don't exist anymore.
2) **Acquisition of control** → we have company A acquiring company B. We don't have the creation of company C. They stay two different identities, but before the merger company A was controlled

80% by company C; after the merger company C leaves and 80% is acquired by A ← what changes is that at the beginning B was an undertaking owned by company C, while now it's owned by A.

3) **Creation of a joint venture** → A and B are two independent firms. They come together and create a joint venture → A and B have 50% of the new company. Company A and B do remain independent undertakings (that's the difference with the merger!). There is not an acquisition of control. They create a business partnership by acquiring together another firm. Under competition law, a JV is considered as a merger only at a certain condition:
    - **The JV has to be an autonomous undertaking operating on the market, performing all the function of an intended undertaking**. This is another way to say that if the JV is not an autonomous undertaking on the market, competition law says that there is another way to coordinate your behavior. JV is a firm who stays in the market, who takes strategic decisions, who invest, who has a management and so on. In this case, it is beneficial. A and B go to the European commission asking if they can create a JV and in this case the commission would give a green light. Instead, if you are not an autonomous undertaking on the market you can at any time be considered as a way for company A and B to coordinate their behavior. In the current system, you don't go to the commission to notify the agreement. At the very beginning, any agreement had to be notified. After the entry to force the regulation of 2013, since the system was too heavy and costly, the commission couldn't continue to analyze any agreement carried out by parties → we said: you are free, go ahead and do all the agreements that you want, but there is always a certain amount of risk that your agreement might be considered infringing art. 101 TFUE. For instance, what we do is that company come to a lawyer, they tell the lawyer that they want to do an agreement with a competitor, and they ask if that is anti-competitive or not. The lawyers give to the company a legal memorandum saying that considered all the elements, the lawyer thinks that the agreement does/doesn't infringe art. 101.

These are the most peculiar cases.
We'll see the **meaning of control** → competition law has a very broad definition which is not just the … that We have under the civil law in the civil code, but it's a different definition. **It is the possibility to exercise a decisive influence over another undertaking. The key concept is the decisive influence**. If A can exercise decisive influence over B, we can say that A controls B.
If A has 80% of the share, we can assess the possibility of influencing the decisions of another undertaking. **You have control when you can influence the strategic decision of another undertaking**. What are the **strategic decisions** of an undertaking? The decision about who is the CEO and all the top managers in general.
What is another strategic decision? **You want to be able to decide the budget, so how much your company can spend**. How much money your company can spend in a certain year. The maximum budget. Another strategic decision is deciding investments.

Control can be:
- Direct control → A on B when A has for instance 80% of the share.
- Indirect control → you have direct control when two companies, for instance, are part of a bigger group and you have a holding company over them → they are holding an indirect control over B. the holding, at the end of the day, is the controller of B. at the end of the day, the data of company B are the ones of your group.
- Sole control → you are the only one exercising the control. A over B has a sole control.
- Joint control → you can split the control over a company with someone else. in the case of a JV usually you have a joint control, since you have two or more shareholders controlling a company.
- Positive control → when you are able either alone or with another company to exercise the decisive influence over another company.
- Negative control → you are still exercising the decisive influence, but you are not able to decide de budget for instance because someone can exercise the veto powers. You can be in

the position of providing your veto → there is another shareholder that proposes a budget, and you can be the one having the power saying no. that is also control under competition law (broad notion). Negative control can be sole or joint → you can be the only one to put your veto over a decision or you can split this power with someone else.

You can have all these types of control. Keep in mind that you also have to notify when there is for instance a change in the quality of control if you have joint control of a company and, for instance, you acquire sole control of a company, you have to notify it, because there is a change in the control of a company.
You have to notify whether you have joint control, and the company becomes sole controlled or when you pass from sole control to joint control or also when you are changing the number of the identity of the controllers.
For example, A and B control C. B decide to exit and to sell its shares to company A which now will be the only one controlling C. That is a merger that has to be notify.
If A is controlling alone company B and then another company comes in and controls as well B, then you change from sole control to joint control → you have to notify the merger, because first you had B controlled just one company and now you have B controlled by two companies.

At the exam we can look at the laws and not at the guidelines of the EU commission. We can bring the text of art. 101 and 102 and of the regulation 2014.
You have to ask yourself if a change is affecting the market structure and is going to harm the well-functioning of the market. if the operation is able to change the market (because the market for instance before was split between 4 undertakings and now is split between 3 undertakings that of course is going to harm the well-functioning of the market and the market changes). So, for instance, is different if B is controlled only by A or if it is controlled also by another undertaking.

Consider that control can be **de iure** or **de facto**. Since competition law wants to go at the very essence of what control is, you can have control by having legal rights that you can exercise on the company (for instance you have the right appoint the top manager, to decide the budget and so on) ← **de iure control**.
On the other side, you have de facto control → for instance, if somebody acquires just one part of a business (affitto di un ramo di azienda), on this specific branch you don't have the control anymore. If this affects the control of your company, because for example that branch is the 80% of your business, then you can have a merger as long as it's durable. If it's just for a year, if it's temporary, something that is meant to last only for a short amount of time, then it's not changing the market structure and we don't look at it as a merger.
If it lasts for 20 years, it can be a de facto merger. The same applies to assets → if a company acquires part of the assets but they are not just sold and become part of another undertaking, but there are other undertakings in the contract about those assets operating with you, then it can be a merger.

As we said, competition law is made up of three pillars (101/102/regulation 2004). In general, we want to protect the well-functioning of the market.
Since our aim is this one, we consider all the conducts that can have an impact on it → if we see a market divided into 4 firms: A 30%, B 30%, C 30%, D 10% → those behaviors can be:

- **Cartels – arrangements in general** → two undertakings who are supposed to act independently, for instance, create a cartel. They can come up with an agreement, an exchange of information and so on.

How do you affect the well-functioning of the market? you increase prices or decrease quantity, quality, variety, and innovation.

- **Abuse of dominant position** → if we have A 30%, B 60% and C 10%, B has a responsibility not to harm the well-functioning of the market.

We make a difference between internal and external growth. A firm can grow increasing market share independently on the market ← if the firm does something wrong, we consider it under 102. If the firm is

very good, its market share can grow without stealing costumers. That is an internal growth. The capability to grow by itself. Of course, the firm has to do it without infringing art. 102.
A firm can also decide to grow externally → instead of putting together investments ecc., the growth can be done externally by buying another firm. There is an acquisition. We have a merger here ← the two firms become an independent undertaking and we care about that merger because, by doing that, the firms modify the market structure and therefore to harm the well-functioning of the market.
So, at the end of the day, those three pillars are the same way to look at the same thing, that is the harm of the well-functioning of the market.

Since we want to catch everything that can modify the market structure, we said that we are dealing with three hypotheses:

- Proper merger
- Acquisition of control
- Joint venture

Why do we care about all these hypotheses? Because they can interfere change the market structure, because they change the control structure of a firm → the control can be acquired in these three different forms.
Since we want to catch all those conducts that bring a change, we want to know what control is → (see last lesson) the possibility to have a decisive influence on another firm (strategic decisions → budget, investments, appointment of the top managers).

REGULATION 139 OF 2004 (EU merger regulation)

<u>→ ART. 3 DEFINITION OF CONCENTRATION</u> (merger) → **a concentration shall be deemed to arise where a change of control results from a merger of 2 or more previous independent undertakings (full merger) or the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).**
Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking
(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or
(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

The JV can be considered as a special case of a joint control, since it's a peculiar case of acquisition of control.

Focus on **proper merger** → legally, you can have a JV by adding A + B amalgamating into a new undertaking, which is company Alpha, and A and B do not exist anymore, but they come up with a new legal entity Alpha. We may have another case where A absorbs B, therefore only B stops to exist, and we have only one legal entity, which is A. Those are 2 ways of conducting a merger.
Consider that <u>competition law goes at the hearth of the economic reality of the market</u>, we can have a ***de facto*** **merger** as well: if there are different means to obtain the same result, for the result that is a merger, no matter what. This happens when <u>2 firms combine their activities, and such combination results in the creation of the single economic unity</u>. Usually, we have a mixture of different elements: despite the legal definition of the creation of the transaction, we can still have a merger if the activity results in a change in

the market structure, and the firm is able to create a ***single economic unity*** in charge of carrying out such activity, having a permanent economic management.
What is control? **Control** is the effective possibility of exercising decisive influence on an undertaking so to decide its commercial strategies on a lasting base.
What are the means of control? Control may exist on the basis of rights (typically shares and shareholders' agreements giving rise to voting rights, and veto rights); then we have contracts; we can have ***de iure* control** as well (anything connected to the law, such as contracts and rights), or even ***de facto* control** (control can be sole or joint: we have *de facto* control when companies are owned by just one family: we may have different shareholders, but the son always votes together with the father: this can be a case of joint control, since at the same time there is control *de facto*).
If we work on corporate law, it's useful for us to have a knowledge of antitrust law: any time there is an acquisition or a merger, you will deal with contracts and shareholders' agreements, and you have to have the sensibility to understand whether the notification has to be done before the actual transaction.
What is the object of control? The object of control can be one or more, or also parts of undertakings, which constitute legal entities, or the assets of such entities, or only some of these assets (for example, if you are a telecom company operating on telecommunication, you don't sell your company, but you sell all your assets: in this case, since you are selling the core assets of your business, that is like selling your business for competition law purposes: you remain Vodafone, but you sell the assets that give you the power to perform 90% of your activity, that can be acquisition of control for merger control purposes).
We have the distinction between **sole control and joint control**: usually, joint control is somehow negative, it's more about the *power to block action through the exercise of veto powers as a general consideration*, it's more about nobody can decide what to do without consensus. You can block he others, you are exercising joint control.

Joint control

- Joint control exists where **two or more** undertakings or persons have the possibility of **together exercising** decisive influence over another undertaking
- Decisive influence in this sense normally means the **power to block actions** which determine the strategic commercial behavior of an undertaking.
- Unlike sole control, which confers upon a specific shareholder the power to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a **deadlock situation resulting from the power of two or more parent companies to reject reciprocal strategic decisions**. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they **are required to cooperate**.
- Examples are:
  - 50-50 scenarios and joint ventures
  - No equality as to shares, but veto rights for the minority

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Sole control

Sole control is acquired if **one undertaking alone can exercise decisive influence** on an (other) undertaking; this happens when one single undertaking enjoys alone the power to determine the strategic commercial decisions of the other undertaking. It may arise from:

- the acquisition of the **majority of voting rights**
- the acquisition of a **minority shareholding *plus some special rights***
- the exercise of veto rights on strategic decisions, even when this shareholder does not have the power, on his own, to impose such decisions. **This is the case of negative sole control**.
  - In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly controls a company, i.e. the power to block the adoption of strategic decisions.
  - In contrast to the situation in a jointly controlled company, however, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behavior of the controlled undertaking.
- ***De facto* situations** as it happens with free float that allows even minority shareholders to take strategic decisions

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Sole control is more about having positive abilities to make strategic decisions.

Remember that when we talk about **acquisition of control**, it fits into the second hypothesis also the change from sole control to joint control, or the change in the number or quality of the controllers. However, there is no changing in the quality of control if a change from negative to positive sole control occurs or if mere changes in the level of shareholdings of the same controlling shareholders occur. Let's make an example to be clearer on this: you can have A and B controlling C, and this is a case of joint control; if B sells its shares to A, we will have a change from joint to sole control, A will be the only controller of C, and it must be notified. On the other way around, at the same time, if you have only A controlling C but then A sells some shares to B, you change from sole to joint control, and that must be notified as well.
If we have e merger that does not meet the European threshold, but it meets the Italian threshold, then we have to notify it to the Italian authority only. If the merger meets the threshold of many countries around,

lawyers have to prepare more forms to notify the merger to the different authorities (German, French, Spanish, and even European). Depending on the jurisdiction, we have different thresholds.
Let's think of a ***change in the numbers or identities of the controllers***: if C was controlled by A and B, and then D comes up and acquire control, then this must be notified. If instead we have a case where C is controlled by A, B and E, and E is not controlling anything having just 5% of market shares and it leaves the controlling structure, this does not have to be notified.
As we said, we have a peculiar case of **Joint Venture**: The creation of a JV performing on a lasting-basis all the functions of an **autonomous economic entity** (so called full-function joint ventures) shall constitute a **merger**. We have some requirements to be satisfied:

- ***Joint control***
- ***Two or more independent undertakings that create an economically autonomous legal entity from the operational viewpoint***. If the new legal entity does not perform autonomously as regards the adoption of its strategic decisions, then it can be considered as an arrangement. We have 3 ways to assess whether the new legal entity enjoys autonomy:
    - *Sufficient resources to operate independently on a market*
    - *Activities beyond one specific function for the parents*
    - *Percentage of sale/purchase relations with the parents*

We have to consider them all, it's an assessment you have to do: antitrust law is a matter of facts, you want to assess the situation based on the facts, you have to take into consideration all these 3 criteria, which are not set out in the Regulation: EU Commission, based on its practice, comes up with these 3 criteria, saying that when these 3 criteria are met, then the JV is full-function.
Let's consider this case: we have 2 companies setting up a JV which is not full function, they conclude an arrangement (it does not to be notified, there can be an *ex post* evaluation). However, since if you are performing a merger and you do not notify it to EU Commission you can be fined heavily by Commission, you can try to file a memorandum to the Commission to ask for their opinion. In case they agree that is not a JV to be notified, the JV is characterized as arrangement under art. 101.
There are **cases that are not considered as mergers**: this is the case when we have financial institutions involved, meaning that you only acquire shares, but *you do not intend to acquire control over a company, you do it just because of revenue purposes*. For example, you are a big US investment fund, you invest into a company just to have the revenues at the end of the year to grow your investment fund, but you are not intended to exercise control, and usually those shares are acquired on a temporary basis: those are contracts whereby you enter the company, and you leave the company in a few months or years. For instance, that is not a merger: the acquisition of securities by **companies whose normal activities include transactions and dealing in securities** for their own account or for the account of others is not deemed to constitute a concentration if such an acquisition is made in the framework of these businesses and if the securities are held on only a **temporary basis**: usually, *the acquiring undertaking is a credit or a financial institution or an insurance company* (think about an investment fund). The securities must be acquired with a view to their resale (you acquire something, you exploit it, and then you sell it again putting the revenues in your financial statement). The acquiring undertaking must not exercise the acquired voting rights, and the acquiring undertaking must dispose of its controlling interests within one years of the date of the acquisition (we do have a timeline).
In case of liquidation, winding-up, insolvency, cessation of payments, …, those are other proceeding you do not qualify as a merger. **It may be the case you are just acquiring shares because of financial purposes, you do not have intention to control or intervene with the strategic decision of the company**. In those cases, we have such hypothesis in the Regulation, and if you do something like this, you do not have to notify it to the Commission.
Since antitrust law wants to go to the heart of what happens in the market, there can be some cases where you do not carry out just one transaction (for example, you acquire another undertaking), you may have a **set of different little transactions**. First, a shareholder sells his shares to another one, but that does not have an impact over the control of the undertaking. Then, the shares are sold to another shareholder within the company, and then there is a selling of assets. It may be that the contracts are quite articulated, and the merger is implemented with tiny transactions that do not constitute a merger separately, but the economic rationale is that of implementing a merger! You can treat as a single concentration, many

transactions when they are unitary in nature, that is, when they are interdependent as one transaction would not have been carried out without the other. This may happen when the operations are linked by condition or take place, one after the other, within a reasonably short period of time. Why should it make a difference whether control was acquired by one or several legal transactions? **The approach is very much substantial**. You must establish if the many operations combined together lead to conferring one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. Usually, the Commission looks at those cases carefully, since it can file complains if the aim is to carry out a merger without giving the impression of doing so: for the assessment, the economic reality underlying the transactions is to be identified as well as the **economic aim** pursued by the parties.

There may be cases where concentrations and mergers are carried out only if there is a **non-competing clause in the contract**: company A and company B control company C, and B wants to sell its shares of C to A. Company A will only buy the shares of C from B if B says: "*I'm not competition against you on the market for 5 years*". Usually, if we have the non-competing clause the money of the transaction will be higher, since A will keno that for 5 years B will not be its most challenging competitors for at least 5 years. What comes to our minds is that non-competing clauses between 2 independent firms can be considered as arrangements: *if B is not competing with A, that is harming the well-functioning of the market*. Can it be considered as an ancillary restriction? If we say that the non-competing clause is ancillary to the merger, then it is not considered as an arrangement, and its assessment will be carried out by the EU Commission within the same decision related to the merger. We look at the merger, Commission says "*there is a restrain that can be considered as an arrangement, but since it is strictly connected with the merger, I'm not considering it as an arrangement, and under certain conditions, the arrangement is considered within the concept of the merger, and therefore I give you the green light*". In order to qualify is an ancillary restraint, the restraint must be directly related and necessary for the implementation of the concentration.

1. *For restrictions to be considered **directly related to the implementation of the concentration***, they must be closely linked to the concentration itself.
   The assessment has to be carried out on objective basis, it has to have an economic link to the merger. Restrictions which are directly related to the concentration are economically related to the main transaction and intended to allow a smooth transition to the changed company structure after the concentration.

***Necessary** to the implementation of the concentration* means that in the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty.

In determining whether a restriction is necessary, it is appropriate not only to take account of its nature, but also to ensure that its duration, subject matter and geographical field of application does not exceed what the implementation of the concentration reasonably requires: you can have a non-competing clause of 5 years (usually, this is the maximum period allowed) which is just limited on the market whereby the merger is implemented. You can't oblige B not to compete forever in any market against A. If equally effective alternatives are available for attaining the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.

SIX STEPS ANALYSIS:

When do we prohibit a merger? When we deal more in a technical/legal way with this question, we do not refer to consumer welfare. The idea is that we apply what we call the **SIEC test** → we prohibit a merger when this happens. ***How do we assess whether we have a substantial impediment of effective competition of the mark (SIEC)?*** We carry out an analysis that we refer to six steps (this is not written in the regulation) → **six steps analysis**. Which are these 6 steps? **FIRST OF ALL WE DEFINE THE MARKET** (vertical, horizontal or conglomerate relationship).

1. **Actual competition** → we take a picture of the market. how are the competitive dynamics in a given market? how do we assess it? We look at ***market shares*** (a market share of 50% usually means a presumption of dominance, but you can try to convince the European commission that despite the market shares there are other elements that can be considered in your favor) and at ***market concentration***. The regulation considers the ***creation of strength on a dominant position*** as

a way of example, so this happens usually (the most common way) when ***the merger entities do acquire because of the merger a dominant position*** of the market. This is not the only way in which this can happen. About market concentration, we refer as HHI index. The trick is that **you take the market shares, you square them, and you sum all the market shares**. What happens (disclaimer: you don't have to remember every single range that you find on the slide, but you have to understand the reasoning of the Commission) is that *you have an index that is the picture of the market as it is but summing together all the squared market shares you can see how the market can change in the future because of the merger*. You have guidelines issued by the EU commission telling you when a problem arises → you square the market shares, you know that the index has a range for ex. that goes from 1k to 0 → the guidelines tell you that **when this index is below 1k, usually you don't have any problem, the market is not concentrated. You have a market that is a bit concentrated when the index is between 1k and 2k. when it's above 2k, generally you have a very concentrated market.** then you assess the **DELTA** → how the concentration changes in the market because of the merger. here the commission has issued more guidelines → usually, you don't have a problem (the merger will not give rise to a significant impediment of effective competition) when you have any DELTA in the index, but the index remains below 1k; or the delta is below 250 and the index is between 1k and 2k; or you have a delta that is above 150 and the index overall is above 2k. This usually is not a problem, unless there are specific circumstances. Even if we have a moderate market share and a moderate change in market concentration after the merger (ex. merger between companies that have 10% + 20% → 20% we usually don't have a problem). However, we have a problem if one of the following circumstances occur:

- **The merger involves a potential entrant or a recent entrant**
- **One or more merging parties are important innovators in ways not reflected in market shares**
- **Significant cross-shareholdings among market participants**
- **One of the merging firms is a maverick firm**
- **There are indications of past or ongoing coordination, or facilitating practices**
- **One of the merging parties has a pre-merger market share of 50% of more**

Market concentration

- The overall level of concentration in a market is measured by the Herfindahl-Hirschman Index (HHI), which is the sum of the squares of the market shares of all participants. For instance, a market with four equal-sized firms has an HHI of 2500 ($25^2 + 25^2 + 25^2 + 25^2$).
- The HHI ranges from 10.000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market).
- The EU horizontal Merger Guidelines classify markets into 3 types:
  - Unconcentrated Markets: HHI < 1000
  - Moderately Concentrated Markets: 1000 < HHI < 2000
  - Highly Concentrated Markets: HHI > 2000
- The Commission employs the following general standard. Say, ΔHHI = the increase due to the merger. The Commission *is unlikely to identify horizontal competition concerns if:*
  A) any ΔHHI, but HHI remains < 1000;
  B) ΔHHI < 250 and 1000 < HHI < 2000;
  C) ΔHHI < 150 and HHI > 2000.

These are the guidelines issued by the EU commission which are important indicators for the firms to understand where the assessment of the commission will go.
It's an exercise that the commission does in order to understand how the competition is carried out in a market → is not just about market shares, but it's also about market concentration and how it changes, and we use the HHI index. At the exam we won't be asked to determine the index.

2. **Consideration of the effects → theories of harm** → how competition can be harmed in that scenario? In this context, you have to consider the theories of harm which are different whether we consider *horizontal mergers* (we have what we call a merger to monopoly when our theory tells us that what can happen is that we have a dominant position → unilateral effect; or we may have

coordinated effects) or *non-horizontal ones*. **Horizontal mergers → we have a market, and our firms are operating in the same market.** A, *B, C and D are the four companies operating in the same market. If we know that B (30%) and C (30%) are merging, our problem would be the unilateral effect, because we have a new entity with 60% → we'll have quite a dominant position. This merger changes the market structure and reduces the competition of the market by creating a sort of monopoly, meaning a dominant position. Different is the case if we have a merger between C and D → here our problem would be the coordinate effects*, because here the new market share of the company would be 40% (C is 30% and D is 10%). You have three operators almost of the same size, you don't have a firm that has a totally different %. D could be the maverick since is the one with the lowest % and has many interests in merging. If our maverick is acquired, then our situation would be with a market and 3 firms (no more 4 firms). *The maverick is gone and it's very easy for them to coordinate without even talking*. The idea is that they would be very willing to coordinate, and they have the incentives to do so, and also the ability to detect others. In order to have an effective coordination to take place on the market, you must have the ability to do so, the incentive to do so (the market power to do that). In this case, since they have the incentive and the ability to do so (most likely consumers would not switch), and you need to have also the ability to detect who is infringing the collusion. If you have just 3 operators on the market, you don't need much to understand if something bad is taking place. If for some reasons A decides to apply a very low price, it's easy to detect it and to punish A.

What about theories of harm on non-horizontal mergers? Our theory of harm when dealing with non-horizontal mergers is **foreclosure**. We may have input foreclosure or costumer foreclosure. We are in a market. there is a vertical relationship between two entities. One (A) is providing inputs to the other (B) who is producing goods. If they merge together, they may be able to prevent C to access to B or to prevent D to access to A, if they have market shares obviously. If they have market power, if they amount to quite a large % of the market by becoming one same group, B might say "I want to keep all the materials for my production", and so D (which is a competitor of B in the same market) may not be able to access the inputs → input foreclosure. If C is producing materials, he won't be able to sell them to someone.

That's why we say that theories of harm in vertical mergers is foreclosures. Those are theories → you need to assess them in practice. During the procedure, the commission would try to understand whether is likely that those facts will happen in the market. the demonstration is about the likelihood. We need a procedure to assess in every single case if it is likely or not.

What about conglomerate mergers? The problem is foreclosure. Usually they do not harm the market, they are problematic in our analysis. This however can change with the digital economy.

3. **BUYER power** → we need to assess whether there is a countervailing factor that can constraint the position of the new entity, the market power of the new merging entity → meaning that if we know that there's for instance in the downstream market a very big buyer (company that has 80% of the market shares and is the strongest buyer), if those firms are not involved in the mergers, we know that A for instance would not have an incentive to provide its input only to B, because it would lose a buyer that accounts for a huge majority of the market. it wouldn't be rational to cut the firm out. We need to assess the constraint → we refer to actual competition of the first constraint, meaning all the elements that can constraint the behavior of the new entity in a good pro-competitive way, that can constraint the market power of the new entity. Buyer power is our second. And then we have a third one → after having assess how is competition, we want to assess also potential competition. It's not that common → producers of inputs (A and C) and producers of goods (B and D). If D is a very strong buyer of A, meaning that in this market it buys 80% of the inputs, even if A and B merge, they would not have any incentive to foreclose D, because D it's so big that it accounts for a lot of sales → it would not be rationale for them, as a new entity, to impede D from accessing inputs. It is a countervailing factor.
4. **Potential competition** → why so? Because in a way markets are living creatures. They live and they evolve in every single minute. Even if today the market is like this, we may know that there are firms that can enter the market very fast, because they have the money/resources to do so and because they are operating in a market that is different by the one we are considering but is very

closely related to it. So, we may know that if the merging firm for instances raise prices, a new firm operating in a closely related market, can enter the market without any barriers. **So, we assess potential competition by looking at the likelihood of entry of a new firm and the barriers**. They are basically the same thing. The entry must be easy and likely and also sufficient to impede an effective impediment of competition; then, we look at the barriers. There are markets that are highly regulated, and it may not be easy to enter a new market. when we consider entry, entry can be significant in our analysis (positive) whether the entry is **likely** → entering into the market must be profitable taking into the account the potential response of the incumbent and the effects on prices that the additional output into the market may cause + **timeliness** → an entry may be considered a competitive constraint only if the new entrant may enter the market/swift its production in a timely manner (2 years) and be determined to defeat the market power acquired by the merged entity + **sufficiency**: entry must be of sufficient scope and magnitude to defeat the anticompetitive effects. Also, when talking about barriers, you consider all the factors that can actually impede an entry to happen:

Regulatory rules (limiting the number of market participants, trade barriers (e.g. tariffs))

Technical advantages like patent rights (or other IP rights and R&D), essential facilities, natural resources

Licensing restrictions

Cost of capital

Incumbent advantages (brand loyalty, established relations to consumers)

If the cost of the capital is very high, is likely that the firms won't be able to enter the market. Entry may also take a long time, and consumers would be paying higher prices all that time. And, finally, the new firm may fail to attract customers away from existing firms, particularly in markets where existing firms have a proven track record. This is another way to say what we have already said. Try to, even if is very profitable and you want to enter the market of for instance social networking services, convince a costumer that it's locking in a platform to switch. You have the incumbent advantage. Thus, assessing entry conditions is a crucial part of the analysis, **the likely anticompetitive effects of a merger may be significantly downsized if entry is possible and easy**. Yet, it must be recalled that assessing entry conditions calls for intensive fact-finding and though it is unique to each industry. So, at the end, why do we care about entry? Because usually entry is very positive. We may have high market shares, a quite likelihood of anti-competitive effects, no buyer power, but we see that entry is very likely → this provides the commission to say that overall the merger is not problematic for antitrust law. however, in the same scenario, if you don't have any likelihood of entry, the same situation can be considered as the opposite by the commission, and they can consider that this can be a problem.

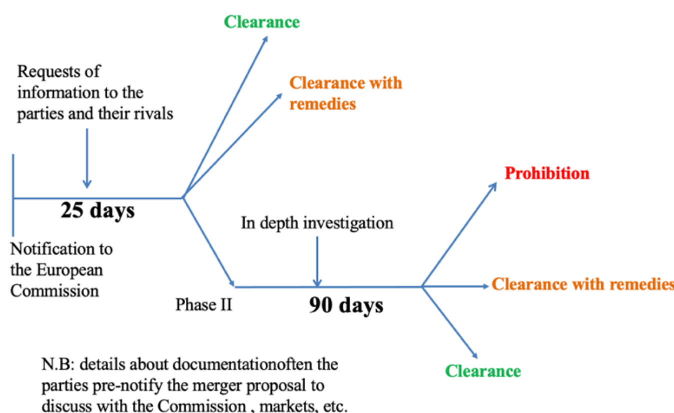
5. **Defenses** → how do we defense a merger? Imagine Fiat and Peugeot merging. How can we defend them? By merging the plans, the resources, the ability to raise capitals and so on, the companies would be way more efficient than being separate. You can reach economies of scale. In general, the most straight forward efficiency every merging firm try to say is that they lower the costs. What you have to say is that you are able to pass on the decreasing costs to the consumers. You don't have to keep this advantage all for yourself. In order for efficiency to be taken into account, first of all the commission must be able to verify that. You cannot claim that you can be more efficient, but the commission must verify that in practice you enrich the efficiencies. There must be specific efficiencies, meaning that they must be closely linked in a relationship with the merger. if you can reach the same efficiency in a way that is impacting less on the market, then you should choose that way + the efficiency must be passed on costumers too → it must reflect in the prices that consumers pay on the market. Those defenses are always appliable.
6. **Failing firm defense** → this one only applies to particular circumstances → commission I'm acquiring a company that is about to fail. In this case, what changes is the counterfactual analysis → we may have both a counterfactual scenario and a factual scenario and this changes the analysis and the likelihood of an anti-competitive effect on the market.

The Commission may authorize a merger even if it results in the creation or strengthening of a dominant position when:

A. the acquired firm is failing and in the near future will exit the market;
B. there is **no less anti-competitive alternative** than the notified merger (for example, another merger offer by an out of area competitor or a smaller company; an alternative way of saving the company - e.g. debt restructuring);
C. in the absence of the merger not only the failing firm, but also its **assets** would inevitably exit the market.

Now we are going to see the **PROCEDURE**. With the procedure we are seeing everything bout merger (we know what it is, we know what control is, we know how to assess a merger). Remember that the pillar of merger control is that you have an ex-ante notification → compared to art. 102 and 101, you are not assessing the practice ex post when it is already carried out in the market. You are before it happens. You are going to merge → you need to notify to the commission. You are saying: dear commission, we want to merge. What do you think? Should I go ahead or not?

The EU Procedure



At the very beginning, you have what we call "**phase 1**", which is **25 days after the notification where the commission for instance assesses whether it is a merger, whether it provides relevant information about turnover and a very first analysis of the effects on the market.**
The commission authorizes the merger in Phase 1. The assessment is very fast (25 working days). However, there is also another possibility → clearance with remedies → what do remedies can be? The commission can say yes, merge; no, don't merge or a "mid-way" → yes, go ahead, merge, but disinvest certain part of your assets, for instance. Remedies are usually used as measures that can eliminate the potential concerns for competition. You can be very creative if you are the merger parties and offer to the commission the remedies that you consider to be enough and to counterbalance the anti-competitive effects that can be likely in your case. This can happen at the end of 1° phase, but also at the end of the 2° phase. In this second phase, which is very longer since the commission has up to 90 days, the commission can carry out an **in-depth investigation**. When there is smell of burnt, meaning the doubt of anti-competitive effects on the market, before saying NO, the Commission has to carry out an in-depth investigation, going through all the details of a single case (it can request information to the parties, it can do economic analysis, it can interview competitors and so on). In this phase you have the most serious right of defense of the parties → the parties have strong defenses, they can act, they can go in front of the commission and explain their views and their analysis. So, the commission does the investigation and only after this investigation, the commission can say NO. In order to prohibit a merger, the commission has to carry out a very detailed assessment. At the end of the in-depth investigation, the commission can approve the merger, or it can be clear with remedies.
Consider that usually, since the analysis is quite detailed and complex, there is also a pre-notification to the EU commission. Before notifying, you do a pre-notification procedure → you inform the commission that you are about to notify a merger. You start a discussion with the commission and tell the commission why

you think that it is not problematic. The commission can answer for instance to consider some other markets before notifying the merge.
It can happen that the EU commission requests some information, and the timeline is suspended. For instance the firm hasn't provided information about the entry. You need to provide them. If you miss some information, the commission asks for such details. Therefore is in the interest of the parties to give all the information in advance, in order to obtain the decision in 25 days.

REMEDIES:
Two types of remedies:

- **Structural remedies** → they cause a permanent change in the structure of the relevant market:
  - e.g., divestment of a business (of a market position through the disposal of assets, shares or IP rights)
  - the termination of exclusive distribution agreements or
  - removal of links with suppliers, customers or competitors

Some remedies are "quasi-structural" if they have a structural effect on the market (i.e. facilitate new entry or prevent foreclosure) without amounting to a divestiture (e.g., access remedies allow third parties to access key infrastructure, networks, key technology (including patents, know-how or other IP rights))

- **Behavioral remedies** → commitment by the merging parties to act or not in a certain manner in the future. You may achieve that by outing a member of the board that is independent, for instance ← it would compensate the interest of competitors. What is problematic about behavioral remedies is that you cannot control the outcome. It's very difficult to control and monitor whether the remedy is actually effective, because you may say that that measure can be helpful, but it's difficult to verify it → commission is not very keen on behavioral remedies. They prefer structural remedies.

There is a case issued by the Eu Commission → it was about the merge between Tre and Wind. Here the market structure was similar to the example that we always do for coordinated effects. Tre was the equivalent of the firm D (maverick). Wind was bigger. They decided to merge, but the commission obliged those entities to disinvest some of their assets in order to allow another operator to enter the market. part of their network had to be given to Iliad → this decision follows an in-depth review (phase 2 of investigation) of the deal that combines Wind with Tre. The effective structural remedies offered by Tre/Wind fully address the commission's competition concerns. They will ensure the mark entry of Iliad as a new mobile network operating in Italy → this means that the parties can grow and take the benefits of combining their assets, while Italian mobile consumers will continue to profit from effective competition. the idea is that we had 4 competitors in the market: wind, tre, tim and Vodafone. Then, on the market the commission says that there were also virtual operators → operators that do not own the network (ex. poste and fastweb) which live on the market because the owner let them access to its network.
The commission assesses certain competition concerns (they would have created the largest Italian network operator on the Italian market + it would have created a market with similar market shares → coordinated effects /coordinate behaviors).
The merging entities assessed that the merger could be prohibited → they smartly offer remedies that fully address the commission's concerns → they disinvest sufficient assets to let another company enter the market. you disinvest some assets (obviously selling them) so that another firm can enter the market.
You have a third part undertaking that is wishing to buy these assets on the market. in case you find none willing to find the assets, this is not a remedy that you can use. The commission found that this proposed remedy was sufficient → the merger would not have caused a damage to consumer welfare.
The commission was able to approve the transaction of this merger.