



# **EU and German Competition Law I (Basics, Cartels, Sanctions)**

Winter term 2019/20

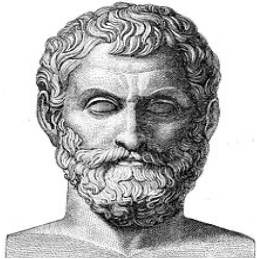
Thursday, 17h15 - 18h00

Room III, Alte Universität

**Prof. Dr. Florian Bien**, Maître en Droit (Aix-Marseille III)

Chair for International Business Law, International  
Arbitration Law and Private Law

# I. Introduction to Competition Law

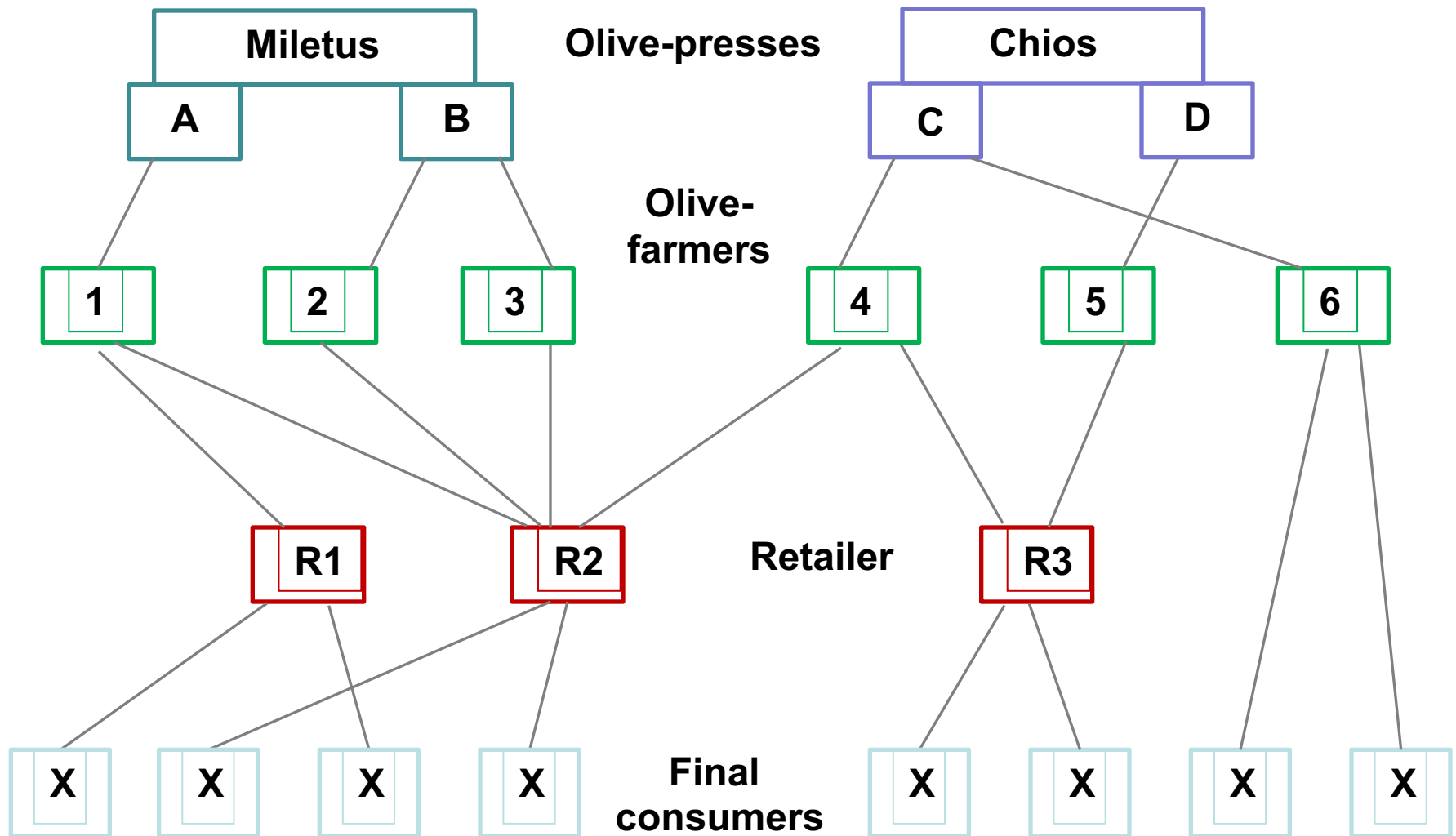


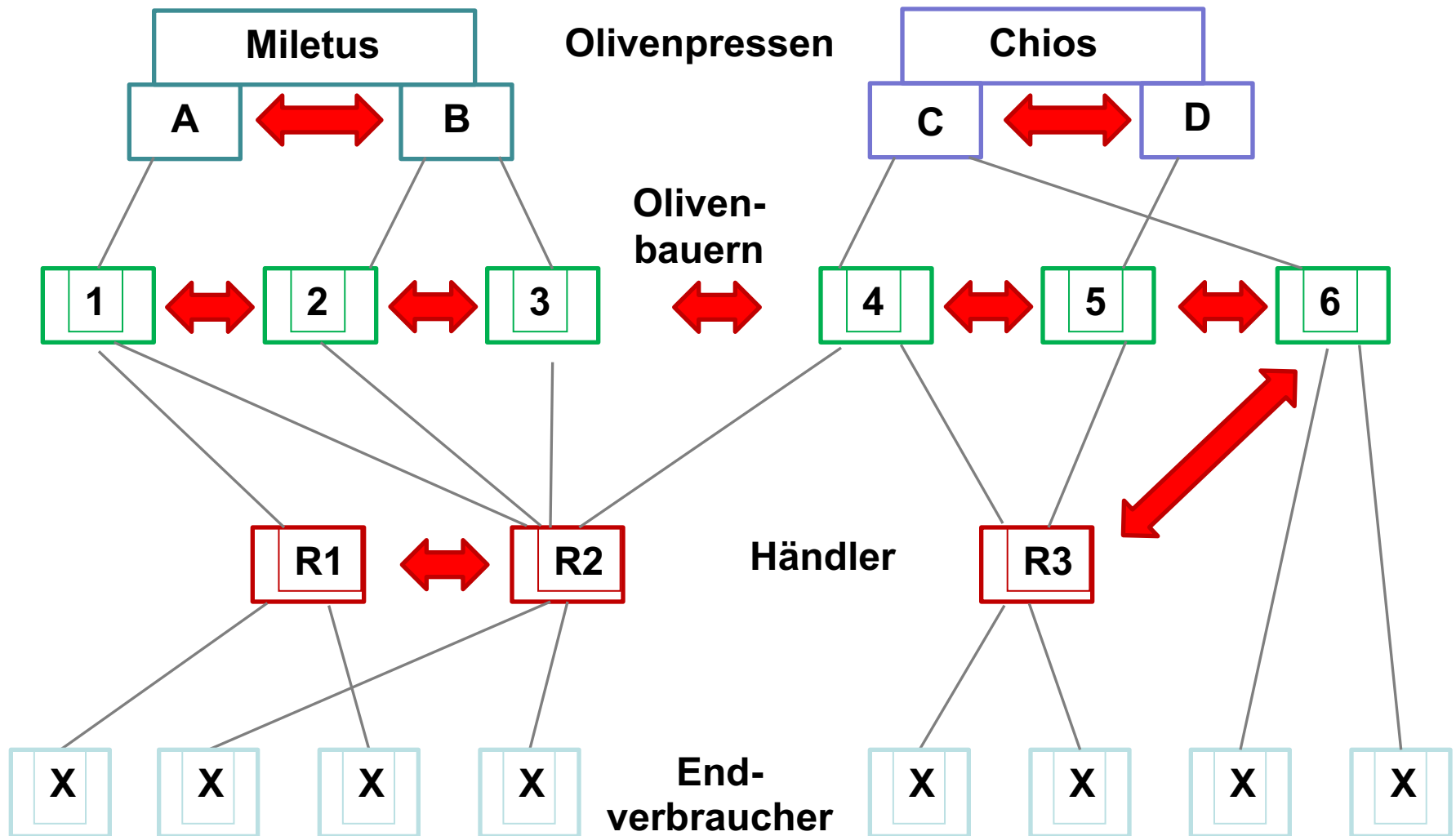
“Thales [of Miletus, c. 624 – c. 546 BC], so the story goes, because of his poverty was taunted with the uselessness of philosophy; but from his knowledge of astronomy he had observed while it was still winter that there was going to be a

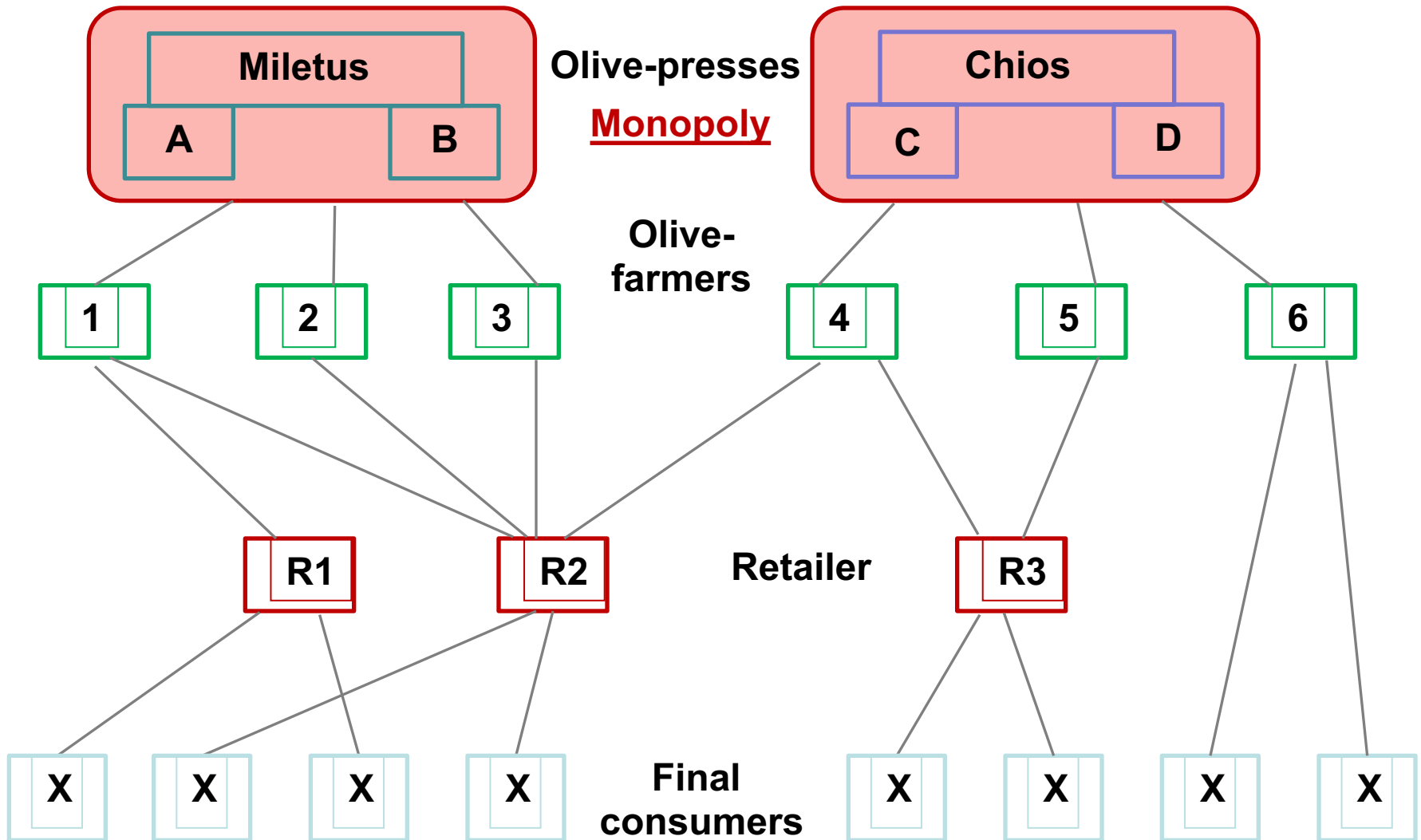
large crop of olives, so he raised a small sum of money and paid round deposits for the whole of the olive-presses in Miletus and Chios, which he hired at a low rent as nobody was running him up; and when the season arrived, there was a sudden demand for a number of presses at the same time, and by letting them out on what terms he liked he realized a large sum of money, so proving that it is easy for philosophers to be rich if they choose, but this is not what they care about. Thales then is reported to have thus displayed his wisdom, but as a matter of fact this device of taking an opportunity to secure a monopoly is a universal principle of business; [...]

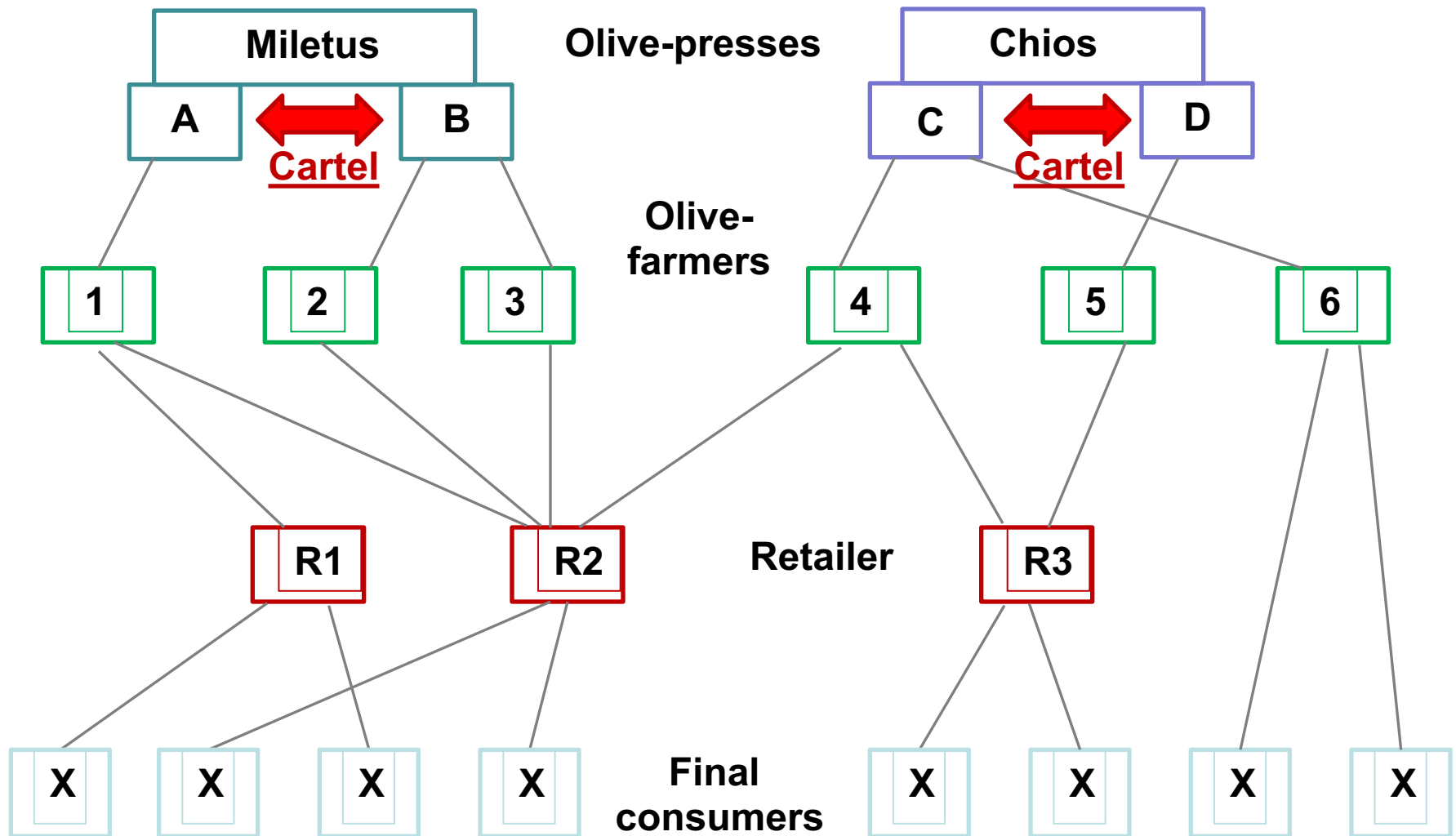
(Aristotle (384 - 322 BC), Politics, Book 1, Chapter 11, Section 1259a)

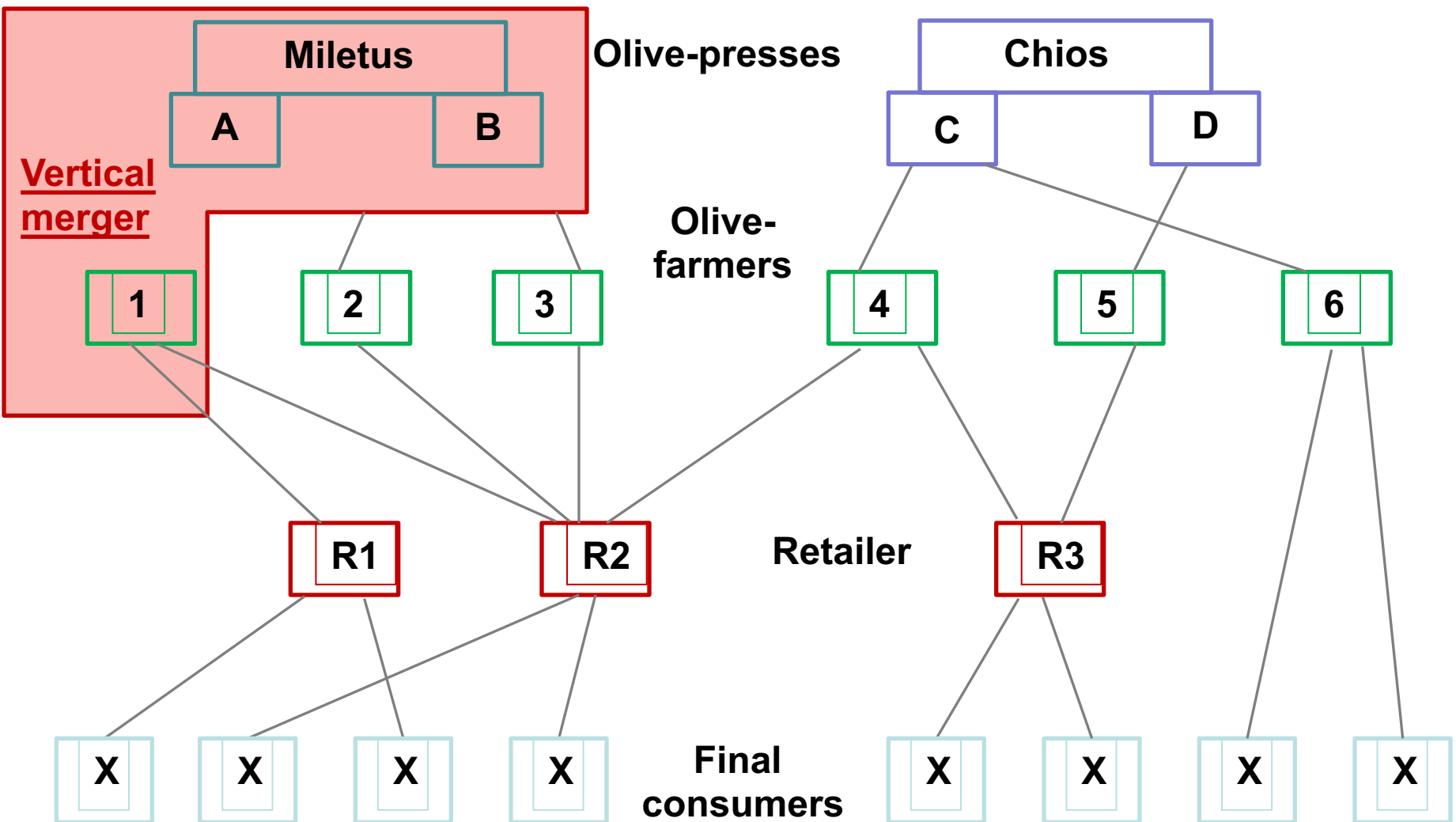
(<http://data.perseus.org/citations/urn:cts:greekLit:tlg0086.tlg035.perseus-eng1:1.1259a>)













**“Emperors Zeno to Constantinus, City Prefect. (Codex Iustinianus, 4, 59, 2)**

We order that no one shall have a **monopoly** [...] of any kind of cloth, fish [...] or of any other article [...] used for any other purpose; nor shall anyone swear or **agree in any unlawful meeting** not to sell the various articles of commerce for less than the price agreed on.

1. Building artificers also and contractors [...] are entirely forbidden to agree among themselves **not to complete any work let to someone** else, or not to interfere in any undertaking put in charge of another [...]
2. And if anyone shall dare to carry on any **monopoly**, his **goods shall be confiscated** and he shall be sent into **perpetual exile**.
3. If the chiefs, moreover, of the various trades hereafter dare to make **agreements as to fixing prices** of things, or if they enter into and bind themselves by any other illegal contracts, we decree that they shall be punished by a **fine** of fifty pounds of gold. [...] Your **official staff** will be punished by a fine of forty pounds of gold, if condemnations pursuant to our salutary order for prohibited monopolies and forbidden agreements of guilds are not, perchance, inflicted by reason of any venality, dissimulation, or some other disobedience of duty.

Cf. Art. 102 TFEU

**“Emperors Zeno to Justinianus, 4, 59, 2)**

We order that no one [..] **by** [...] of any kind of cloth, fish [...] or of any other article [...] purpose; nor shall anyone swear or **agree in any unlawful meeting** not to sell the various articles of commerce for less than the price agreed on.

Cf. Art. 101 TFEU  
(cartel, price fixing)

Cf. Art. 101 TFEU  
(cartel, market sharing)

1. Building artificers also and contractors [...] hidden to agree among themselves **not to complete any work let to some** interfere in any undertaking put in charge of another [...]

Sanctions for abuse of  
a monopoly

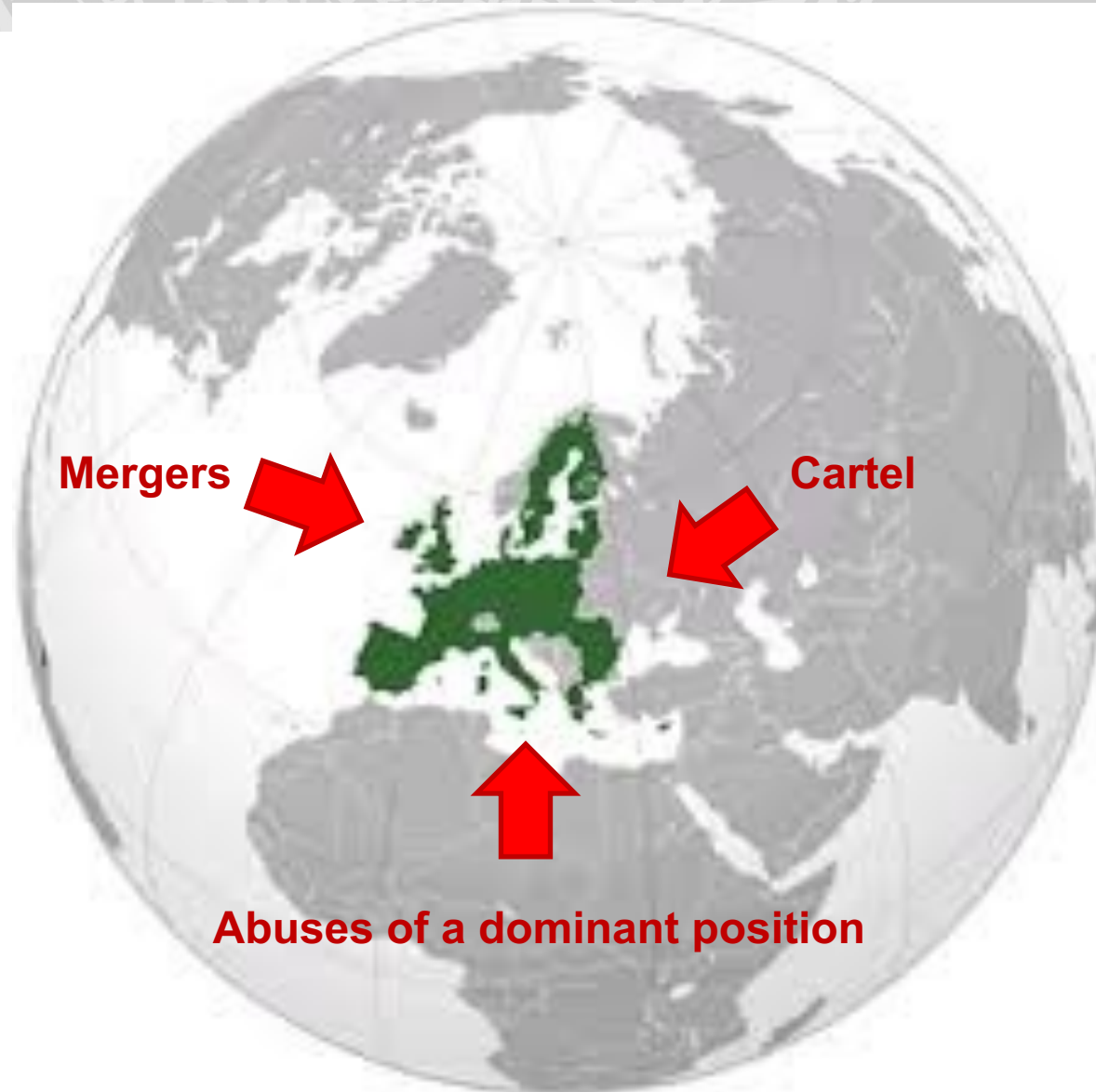
2. And if anyone shall dare to carry on any **monopoly**, his **goods shall be confiscated** and he [...] **exile**.

Sanctions for cartels

3. If the chiefs, moreover, [...] hereafter dare to make **agreements as to fixing prices** of things, or themselves by any other illegal contracts, we [...] at any [...] be punished by a **fine** of fifty pounds of gold. [...] Your **official staff** will be punished by a fine of forty pounds of gold, if condemnations pursuant to our salutary order for prohibited monopolies and forbidden agreements of guilds are not, perchance, inflicted by reason of any venality, dissimulation, or some other disobedience of duty.

(Public) enforcement  
of competition law

## II. Extraterritorial reach and enforcement of competition law





Effects Doctrine (Alcoa-Case, 148 F.2d 416 (2d Cir. 1945))

... allows for jurisdiction over foreign offenders and foreign conduct, so long as the economic **effects** of the anticompetitive conduct **are experienced on the domestic market**

Cf. § 130 Abs. 2 GWB (German Code against Restraints of Competition):

„Dieses Gesetz findet Anwendung auf alle Wettbewerbsbeschränkungen, die sich im Geltungsbereich dieses Gesetzes **auswirken**, auch wenn sie außerhalb des Geltungsbereichs dieses Gesetzes veranlasst werden.“

Implementation test (Court of the European Union)

... measures the **impact** of a anticompetitive behavior originating from outside the EU for the European market



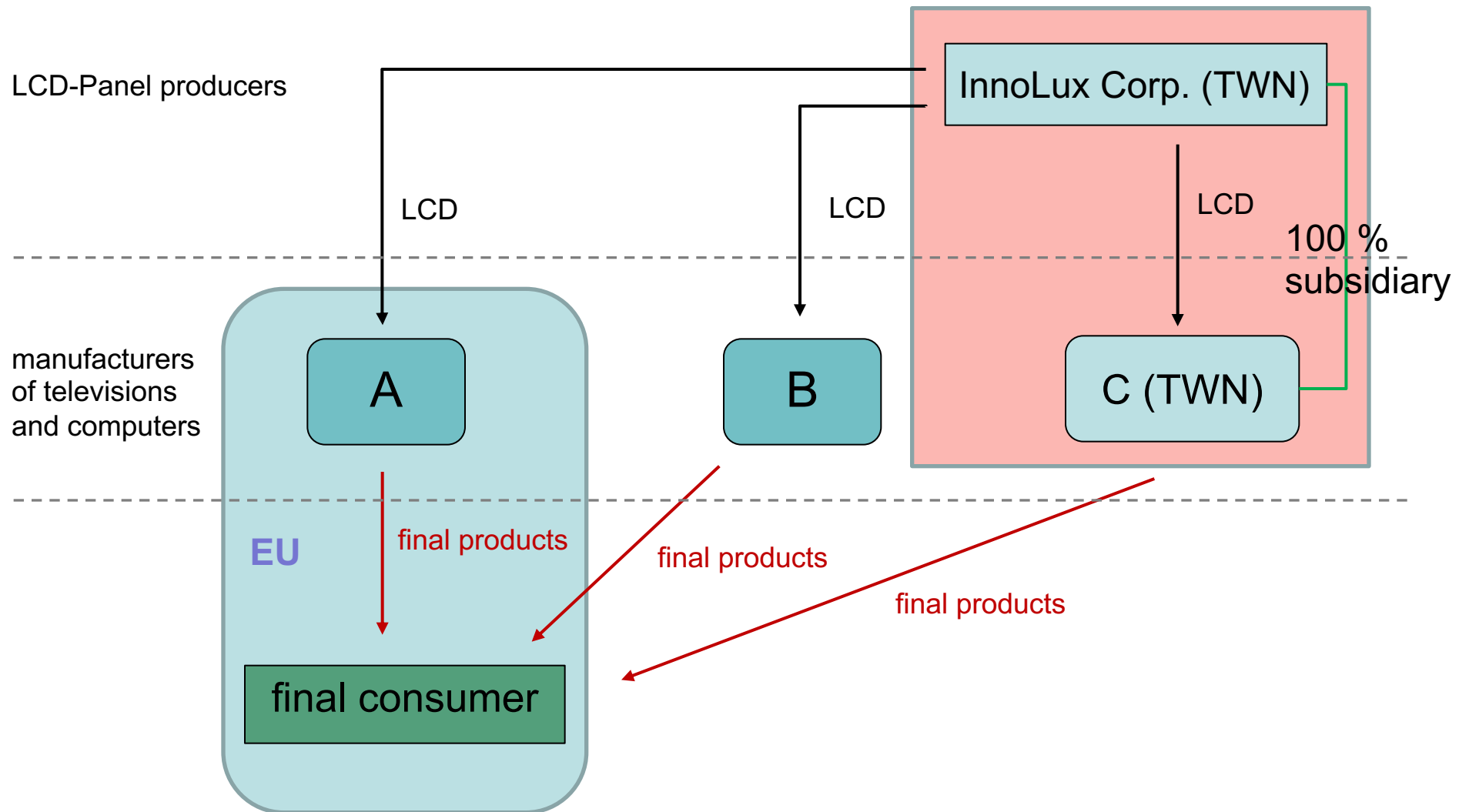
## **1. LCD-Cartel**

Judgment of the Court of 9 July 2015 (Case C-231/14 P) InnoLux Corp. v. Commission

Cartel of six Korean and Taiwanese producers of liquid crystal display panels (LCD panels) which are the main component of flat screens used in televisions and computers

Three different ways of distribution of the cartelized panels :

- direct sales into the EU (to European manufacturer A of televisions and computers)
- sales into the EU of the final products (televisions, computers) manufactured by third party B outside the EU
- direct sales into the EU of the final products (televisions, computers) manufactured by subsidiary C of the members of the cartel





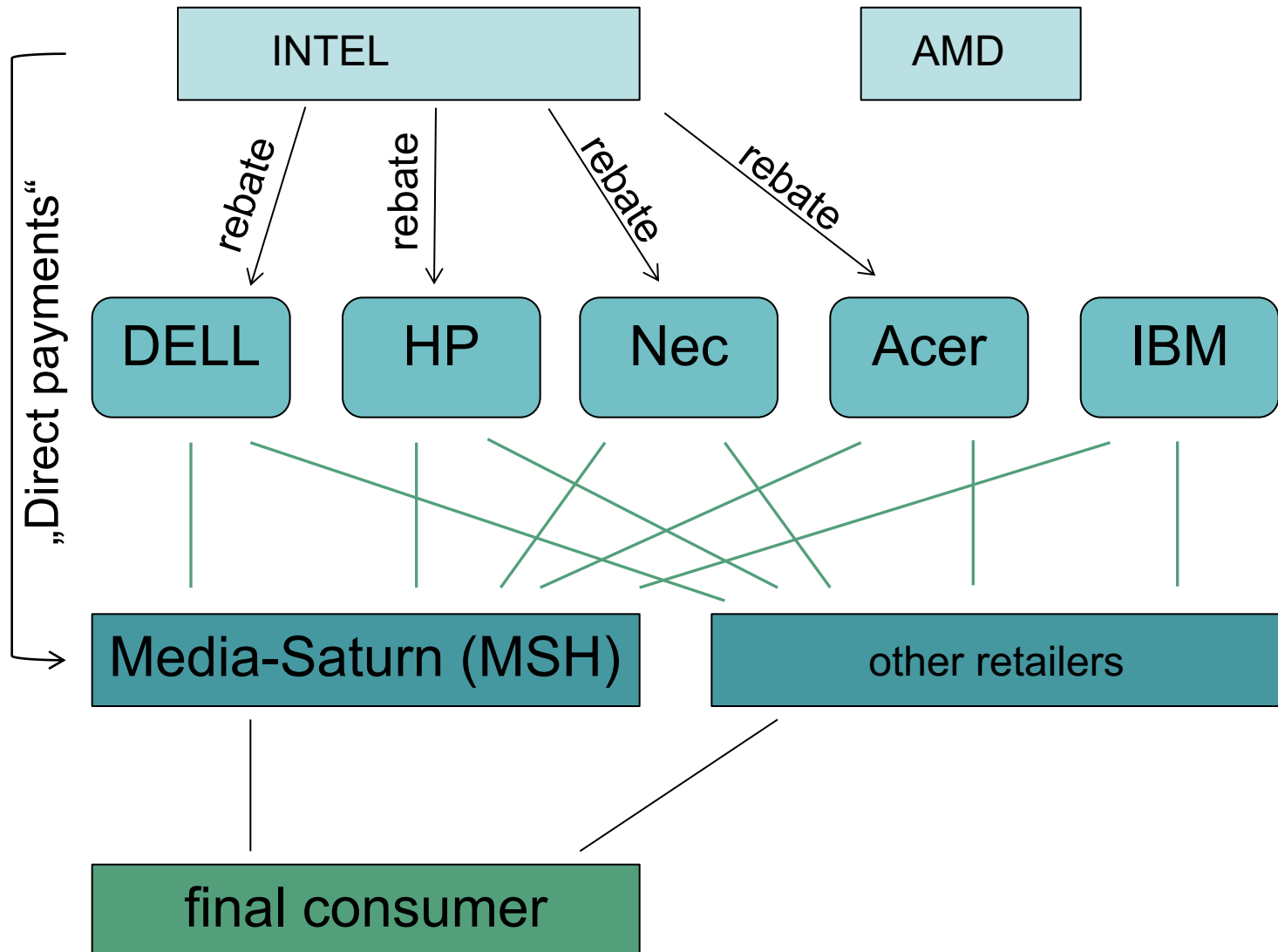


## **2. Abuse of a dominant position by INTEL Corp.**

Commission decision of 13 May 2009 against Intel Corp.: Abuse of a dominant position by

- granting rebates to PC manufacturers such as Dell, HP and Lenovo conditional on them obtaining all or almost all of their supplies in processors from Intel Corp.,
- making direct payments to an important downstream computer retailer (“Media Markt”) conditional on it only selling PCs with Intel processors only







### **3. Merger**

Merger of Boeing and McDonnell-Douglas

- Cleared by the FTC (US) on 1 July 1997
- Cleared subject to conditions and requirements by the European Commission on 31 July 1997

# III. The relationship between national and EU competition law

## **Council Regulation 1/2003**

### **Article 3 – Relationship between Articles 81 and 82 of the Treaty and national competition laws**

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they **shall also apply Article 81 of the Treaty to such agreements**, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall **also apply Article 82 of the Treaty**.
2. The application of national competition law may not lead to the prohibition of **agreements**, decisions by associations of undertakings or concerted practices which may affect trade between Member States but **which do not restrict competition within the meaning of Article 81(1) of the Treaty**, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory **stricter national laws** which prohibit or sanction **unilateral conduct** engaged in by undertakings.

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and applying on their territory **stricter national laws** which prohibit or sanction **unilateral conduct** engaged in by undertakings.
- Regulation 1/2003, Article 3 (1):**  
**National competition authorities (NCA) and national courts not only have the power, but even the *obligation* to apply EU competition law to conduct which falls within the scope of Articles 101 (restrictive agreements) and 102 TFEU (abuse of a dominant position)**

## **Council Regulation 1/2003**

**Article 3 – Relationship between Articles 81 and 82 of the Treaty and national**

### **co Regulation 1/2003, Article 3 (2):**

**Relationship between EU and national competition law:**

1. Do national authorities may apply stricter national laws to agreements or unilateral conduct?
  - Agreements authorized by article 101 TFEU  
...must not be prohibited by national law
  - Unilateral conduct which does not constitute an abuse of a dominant position within the meaning of article 102 TFEU  
...may be prohibited or sanctioned by *stricter* national laws.
2. The application of national competition law may not lead to the prohibition of **agreements**, decisions by associations of undertakings or concerted practices which may affect trade between Member States but **which do not restrict competition within the meaning of Article 81(1) of the Treaty**, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory **stricter national laws** which prohibit or sanction **unilateral conduct** engaged in by undertakings.

|   | EU law | National law | Actual result |
|---|--------|--------------|---------------|
| <b>Art. 101 TFEU</b>                    | +      | +            | +             |
| „agreements, concerted practices“       | -      | -            | -             |
|   | -      | +            | -             |
|   | +      | x            | +             |
| <b>Art. 102 TFEU</b>                    | +      | +            | +             |
| „unilateral conduct of a dominant firm“ | -      | -            | -             |
|   | -      | +            | -             |
|   | +      | -            | -             |

Regulation  
1/2003

→ Art. 3 I 1

→ Art. 3 II 1

→ Art. 3 I 2

→ Art. 3 II 2

- = prohibition (strict competition law)
- + = permission (less strict competition law)



## **CJEU, Judgment of 9 September 2003 Case C-198/01 - Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato**

By Royal Decree No 560 of 11 March 1923 [...], the Italian legislature introduced a new regime for the manufacture and sale of matches by establishing a **consortium of domestic match manufacturers, the CIF** (Consorzio Industrie Fiammiferi). The decree conferred on the consortium a **commercial monopoly** consisting of the exclusive right to manufacture and sell matches for consumption on the Italian domestic market.

[...]





Thus the CIF came into being as a consortium, membership of which was compulsory and restricted and which was established by Italian law for the production and sale of the matches necessary to satisfy national demand.

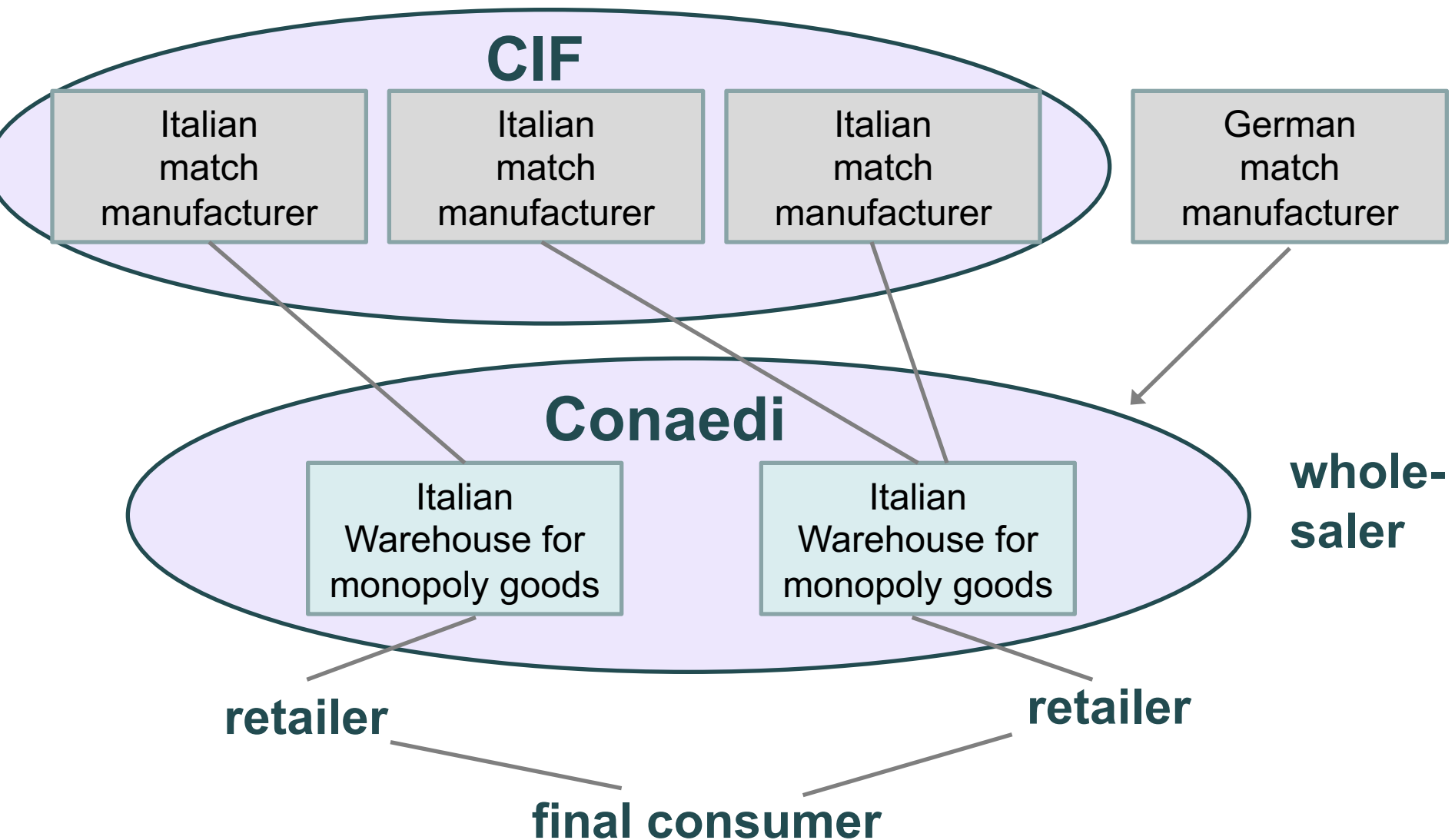
The CIF's activity was regulated by an agreement between the CIF and the Italian State – which was annexed to the decree and formed an integral part thereof. Under that agreement the Italian State undertook

- **to prohibit the distribution on the domestic market of products originating from undertakings which did not belong to the CIF,**
- **to prevent the formation of new match-producer undertakings and**
- **to set, by a measure issued by the Ministry of Finance, the selling price for matches.**



The agreement also set out detailed rules concerning the internal operation of the CIF. Under Article 4 of the agreement, responsibility for the setting and **allocation of match production quotas** between the CIF undertakings was conferred on a special committee (the quota-allocation committee). [...]

Acting on the basis of a **complaint from a German match manufacturer** who was alleging that it was experiencing difficulties in distributing its products on the Italian market, the Authority opened an investigation in November 1998 in respect of the CIF (Consorzio Industrie Fiammiferi), the member undertakings and the Consorzio Nazionale Attività Economico-Distributiva Integrata (the Conaedi), a body representing almost all the operators of the Magazzini di Generi di Monopolio, warehouses for monopoly goods, who act as wholesalers, in order to ascertain whether [...] the CIF's constitution and the various agreements entered into by the CIF and the Italian State infringed Article 85(1) of the Treaty. [...]





In its final decision of 13 July 2000, the Authority found that the conduct adopted by the operators on the Italian market for matches, although being a more or less direct consequence of the legislation which had governed the sector since Royal Decree No 560/1923, was none the less partly attributable to **autonomous economic decisions**.

**Preliminary question n° 1:** “Where an agreement between undertakings adversely affects Community trade, and where that agreement is required or facilitated by national legislation which legitimises or reinforces those effects, specifically with regard to the determination of prices or market-sharing arrangements, does Article 81 EC (now 101 TFEU) require or permit the national competition Authority to disapply that measure and to penalise the anti-competitive conduct of the undertakings or, in any event, to prohibit it for the future, and if so, with what legal consequences?”

[...]



THE COURT,

in **answer** to the questions referred to it by the Tribunale amministrativo regionale per il Lazio by order of 24 January 2001, hereby rules:

1. Where undertakings engage in conduct contrary to Article 81(1) EC (now Article 101 TFEU) and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed:

- **has a duty to disapply the national legislation;**
- **may not impose penalties in respect of past conduct** on the undertakings concerned when the conduct was required by the national legislation;

[...]

IV. The prohibition of restrictive  
agreements in  
Article 101(1) TFEU

## Horizontal Agreements

[Arrangement between actual or potential competitors of the same level of the production or distribution chain]

*Suppliers' cartel:*



*Buyers' cartel:*



## **Competition parameters**

[Parameters possibly covered by the arrangement]

- **Prices**
- **Market sharing (allocation of sales areas or customers, bid-rigging)**
- **Quality**
- **Innovation**
- **Product development and diversification**
- **Capacity adjustment**
- **Production quantities (agreements on quotas)**
- **Warranty**



## **Market Entry Barriers**

Market entry barriers are factors that prevent or hinder companies from entering a specific market. They facilitate the formation of cartels.

### **Natural Barriers:**

- *Transportation costs*
- *High investment costs*

### **State originated Barriers:**

- *State Taxes and Tariffs*
- *Customs duties*
- *Legally required industrial standards*
- *Licensing requirements*

## **Homogenous Products**

The homogeneity of products (e.g. cement, fuel) and cost structures make illegal concertation more probable.

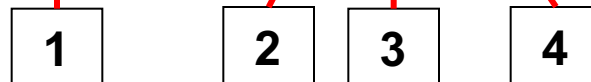
## **Vertical Agreements**

[Agreements for the sale and purchase of goods or services, which are entered into between companies operating at different levels of the production or distribution chain, e.g. between brand manufacturers and retailers]

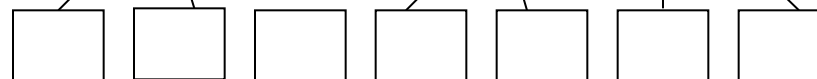
***Suppliers***



***Dealers***



***Final consumers***



## **Important forms of vertical agreements**

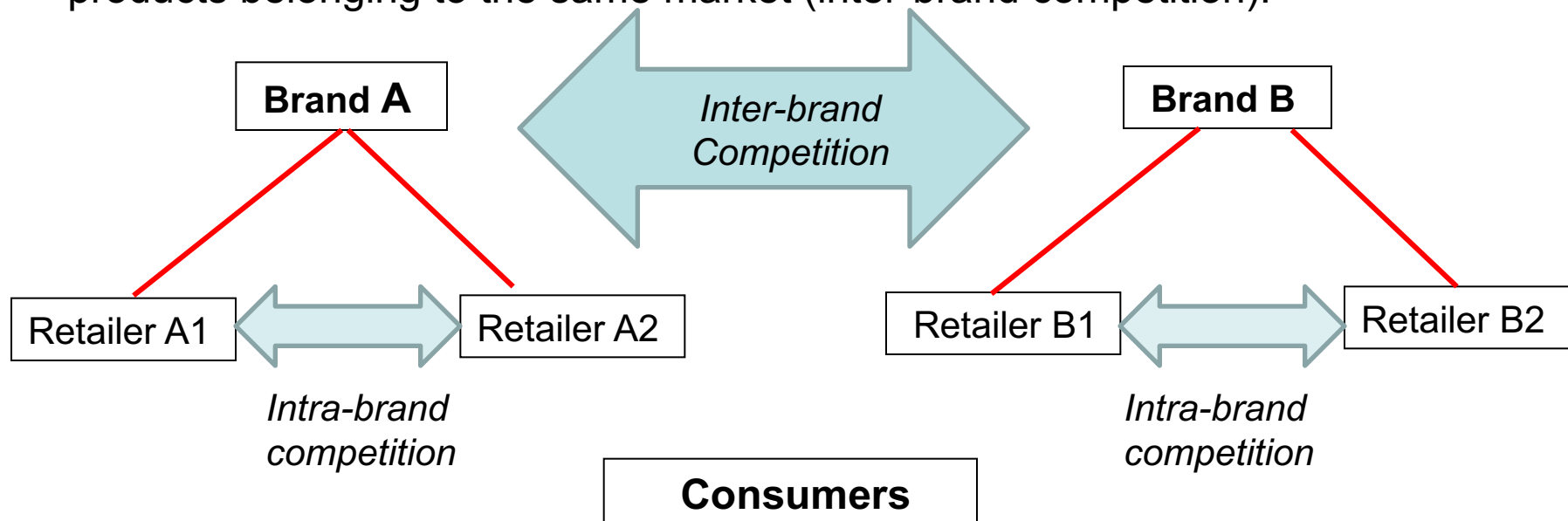
- ***Price recommendation or resale price maintenance***: e.g. for the resale to the consumer.
- ***Single branding***: agreement which causes the buyer not to purchase, sell or resell the major part of his requirements of the contractual products from a competing brand.
- ***Exclusive purchase agreement***: obligation of the retailer to purchase a certain type of product exclusively from one supplier.
- ***Exclusive supply agreement***: obligation of the supplier to sell a specific product exclusively to one retailer.

## **Important forms of vertical agreements**

- ***Exclusive distribution agreements***: obligation of the supplier to sell his products only to one retailer in a specific territory.
- ***Selective distribution agreements***: restriction of the number of authorised distributors in the same geographic area (e.g. depending on characteristics like sales space or a certain way of presenting the product) **and** the prohibition of sales to non-authorised distributors. (*Def. Art. 1 I lit. e VBER (EU) Nr.330/2010*)
- ***Franchising***: one undertaking (franchiser) grants to the other (franchisee) the right to exploit a package of industrial and/or intellectual property rights.
- ***Tied selling***: commercial practice of conducting the sale of one product on the purchase of another.

## **Inter- / Intra-brand competition**

The effect of vertical agreements can be the reduction or elimination of competition among distributors or retailers of the same branded product (intra-brand competition), whilst there is still strong competition between branded products belonging to the same market (inter-brand competition).



***Possible justification:***

- May allow new brands to get access to the market.
- May ensure qualified advice and good service.
- May strengthen the company's brand image.

***Possible dangers:***

- May block distribution channels at the expense of potential competitors (new entrants).
- Tying agreements might have a leveraging effect (monopolisation of a third market).

**Art. 101 TFEU**

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:
  - (a) directly or indirectly fix purchase or selling prices or any other trading conditions; [...]

**For the prohibition in Art. 101(1) TFEU to apply the following must be established:**

- **Existence of undertakings (or an association of undertakings)**
- **Collusion**
  - Agreements between undertakings (e.g. price fixing)
  - Decisions by associations of undertakings (e.g. boycotts) and
  - Concerted practices (e.g. information exchange)
- **Restriction of competition by object or effect**
- **Effect on trade between Member States**
  - Trade between Member States
  - Possible affectation (“may affect”)
  - Appreciability of the affectation.
- **Appreciable effect on competition („De-minimis-notice“)**



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## “Undertaking”

For the purpose of EU antitrust law, any entity engaged in an economic activity, that is, an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed, is considered an undertaking. To qualify, no intention to earn profits is required, nor are public bodies by definition excluded.

### ***Court of Justice, Judgment of 11 July 2006, Case C-205/03 P. – FENIN (recital 25)***

“In accordance with the case-law of the Court of Justice, the Court of First Instance also stated, [...] that it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity”.

**For the prohibition in Art. 101(1) TFEU to apply the following must be established:**

- **Existence of undertakings (or an association of undertakings)**
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**Agreements between undertakings:**

***Court of Justice, Judgment of 26 October 2000, Case T-41/96 –  
Bayer (recital 67)***

“In order for there to be an agreement [...] it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way.”

**Decisions by associations of undertakings:**

***Court of Justice, Judgment of 8 November 1983, Joined cases 96-102, 104, 105, 108 and 110/82 – NV IAZ International Belgium (recital 20)***

The Court of Justice has interpreted the term decisions by associations of undertakings broadly. In this case the Court held that:

“a recommendation, even if it has no binding effect, cannot escape [art. 101 (1) TFEU] where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question.”

**Concerted practices:**

***Court of Justice, Judgment of 14 July 1972, Case Case 48-69 –  
Imperial Chemical Industries Ltd. (recital 64)***

“coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”

**For the prohibition in Art. 101(1) TFEU to apply the following must be established:**

- **Existence of undertakings (or an association of undertakings)**
- **Collusion**
  - Agreements between undertakings (e.g. price fixing)
  - Decisions by associations of undertakings (e.g. boycotts) and
  - Concerted practices (e.g. information exchange)
- **Restriction of competition** by object or effect
- **Effect on trade between Member States**
  - Trade between Member States
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## **Restriction of competition „by object“:**

***Communication of the commission, {C(2014) 4136 final}, (p. 3)***

“The distinction between *restrictions by object* and *restrictions by effect* arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. Restrictions of competition "by object" are those that by their very nature have the potential to restrict competition.”

e.g.: price fixing, output limitation, sharing of markets and customers, fixing (minimum) resale prices, restrictions which limit sales into particular territories or to particular customer groups



**For the prohibition in Art. 101(1) TFEU to apply the following must be established:**

- **Existence of undertakings (or an association of undertakings)**
- **Collusion**
  - Agreements between undertakings (e.g. price fixing)
  - Decisions by associations of undertakings (e.g. boycotts) and
  - Concerted practices (e.g. information exchange)
- **Restriction of competition by object or effect**
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  - Trade between Member States
  - Possible affectation (“may affect”)
  - Appreciability of the affectation.
- **Appreciable effect on competition („De-minimis-notice“)**

***Court of Justice, Judgment of 9 July 1969, Case 6/69 – Völk v. Vervaecke,  
ECR 295, 302***

*AN AGREEMENT FALLS OUTSIDE THE PROHIBITION IN ARTICLE 85 WHEN IT HAS ONLY AN **INSIGNIFICANT EFFECT ON THE MARKETS**, TAKING INTO ACCOUNT THE WEAK POSITION WHICH THE PERSONS CONCERNED HAVE ON THE MARKET OF THE PRODUCT IN QUESTION. THUS AN EXCLUSIVE DEALING AGREEMENT, EVEN WITH ABSOLUTE TERRITORIAL PROTECTION, MAY, HAVING REGARD TO THE WEAK POSITION OF THE PERSONS CONCERNED ON THE MARKET IN THE PRODUCTS IN QUESTION IN THE AREA COVERED BY THE ABSOLUTE PROTECTION, ESCAPE THE PROHIBITION LAID DOWN IN ARTICLE 85(1).*

→ TFEU is not concerned with agreements which have an insignificant effect on trade between Member States and/or on competition

***Commission notice: Guidelines on the **effect on trade** concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)***

52. The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:

(a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed **5 %**, and

(b) In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed **40 million euro**.

**For the prohibition in Art. 101(1) TFEU to apply the following must be established:**

- **Existence of undertakings (or an association of undertakings)**
- **Collusion**
  - Agreements between undertakings (e.g. price fixing)
  - Decisions by associations of undertakings (e.g. boycotts) and
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- **Appreciable effect on competition („De-minimis-notice“)**

***Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (2001/C 368/07)***

7. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1):

(a) if the aggregate market share held by the parties to the agreement does not exceed **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 these markets (**agreements between competitors**); or

(b) if the market share held by each of the parties to the agreement does not exceed **15 %** on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (**agreements between non-competitors**). [...]

# V. The application of Article 101(3) TFEU providing exemption for agreements and categories of agreements

## **Art. 101 TFEU**

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:
  - (a) directly or indirectly fix purchase or selling prices or any other trading conditions; [...]
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
  - any agreement or category of agreements between undertakings, [...]which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
  - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101(1) TFEU prohibits agreements and other collusion between two or more undertakings which has as its object or effect the prevention, restriction, or distortion of competition.

Article 101(3) TFEU provides that this prohibition may be declared inapplicable to agreements which fulfill its four criteria, broadly where pro-competitive benefits produced by that agreement outweigh the anti-competitive effects. The provision thus provides a defence to undertakings against a finding of an infringement of Article 101(1) TFEU. Agreements which satisfy the conditions of Article 101(3) are valid and enforceable, no prior decision to that effect being required.



Article 101(3) TFEU provides that the prohibition contained in Article 101(1) TFEU may be declared inapplicable in case of agreements which

- contribute to improving the production or distribution of goods or to promoting technical or economic progress (criterion 1),
- while allowing consumers a fair share of the resulting benefits (criterion 2), and
- which do not impose restrictions which are not indispensable to the attainment of these objectives (criterion 3) and
- do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned (criterion 4).

When these four conditions are fulfilled the agreement enhances competition within the relevant market, because it leads the undertakings concerned to offer cheaper or better products to consumers, compensating the latter for the adverse effects of the restrictions of competition.

The burden of proof under Article 101(3) rests on the undertaking invoking the benefit of the exception rule (Article 2 of Regulation 1/2003: “The undertaking [...] claiming the benefit of Article 101(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.”

The four conditions are cumulative and exhaustive.

## **First condition of Article 101(3): Efficiency gains (Criterion 1):**

The agreement must lead to efficiency gains, i. e.

- an improvement in the production of goods or services or
- an improvement in the distribution of goods or
- or the promotion of technical progress
- or the promotion of economic progress

Example for cost efficiencies by economies of scope : a producer of frozen pizzas and a producer of frozen vegetables may obtain economies of scope by jointly distributing their products, e.g. using the same refrigerated vehicles. The combination of their operations may lead to lower distribution costs per distributed unit.

Example 2: Technical and technological advances (qualitative efficiencies)

## **Second condition of Article 101(3): Indispensability of the restrictions (Criterion 3)**

The restrictions contained in the agreement must be indispensable to the achievement of the benefits shown to result from the agreement (no less restrictive agreement is conceivable). This condition is an application of the principle of proportionality.

## **Third condition of Article 101(3): Fair share for consumers (Criterion 2)**

The concept of "consumers" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers,

The concept of "fair share" implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 101(1)

The greater the restriction of competition found under Article 81(1) the greater must be the efficiencies and the pass-on to consumers ("sliding scale approach").

## **Fourth condition of Article 101(3): No elimination of competition (Criterion 4)**

Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. This condition recognizes the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation.

The condition is not fulfilled, if the agreement eliminates competition in one of its most important expressions, i. e. price competition or competition in respect of innovation and development of new products.

## **Application of Article 101(3) TFEU**

Article 101(3) can be applied in two different ways:

- it can be applied in individual cases (individual assessment needed) or
- to categories of agreements and concerted practices by way of block exemption regulation. According to Article 1(2) of Regulation 1/2003 agreements which are caught by Article 101(1) but which satisfy the conditions of Article 101(3) are not prohibited, no prior decision to that effect being required (“legal exemption”).



## **Block exemptions**

A number of EU regulations grant exemption to categories of agreements.

The majority of them is adopted by the Commission.

Types of agreements concerned:

- Vertical agreements (“umbrella regulation”) → Regulation (EU) No 330/2010
- Research and development agreements → Regulation (EU) No 1217/2010
- Specialization agreements → Regulation (EU) No 1218/2010
- Technology transfer agreements → Regulation (EU) No 316/2014

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The Block Exemptions are directly applicable (Automatic exemption of the agreement)

Market Share Thresholds – most block exemption regulation contain market share thresholds (e. g. 30 per cent according to Art. 3 of the Verticals Regulation No. 330/2010)

Hardcore restraints (black list) – preclude the application of the entire block exemption (e. g. clauses establishing fixed or minimum sales prices in Art. 4(a) of the Verticals Regulation No. 330/2010)

Severable, non-exempted obligations (“grey list”) – preclude (only) the specific clause of benefiting from the block exemption (e. g. non-compete clauses in Art. 5 of the Verticals Regulation No. 330/2010). The remaining provisions of the agreement may nevertheless be covered by the block exemption

**Sale of luxury cosmetics (Judgment of the Court, 13.10.2011 – C-439/09 –  
Pierre Fabre, Slg. 2011 I-9447)**

**Facts of the case**

The undertaking P manufactures and markets cosmetics and personal care products and has several subsidiaries, including, inter alia, the Klorane, Ducray, Galénic and Avène laboratories. The cosmetic and personal care products are sold, under those brands, mainly through pharmacists, on both the French and the European markets.

For those products, the undertaking P had 20% of the French market. In other Member States, where the products are sold, P has market shares of between 10 % and 15 %.

Distribution contracts for those products stipulate that such sales must be made exclusively in a physical space, in which a qualified pharmacist must be present. According to the distribution contracts, in the event of violation a contractual penalty in the amount of xxx has to be paid by the distributor.

### **Sale of luxury cosmetics (*Pierre Fabre*-case) – cont'd**

The undertaking P explained that the products at issue, by their nature, require the physical presence of a qualified pharmacist at the point of sale during all opening hours, in order that the customer may, in all circumstances, request and obtain the personalised advice of a specialist, based on the direct observation of the customer's skin, hair and scalp. Furthermore, the ban on internet sales at issue contributes to improving the distribution of dermo-cosmetic products whilst avoiding the risks of counterfeiting and of free-riding between authorised pharmacies.

The authorised distributor V sells cosmetics of the undertaking P via internet. According to P sales via internet violate the distribution contract and a contractual penalty has to be paid.

### **Sale of luxury cosmetics (*Pierre Fabre*-case) – cont'd**

V refuses to pay the contractual penalty. According to V the distribution contracts violate European competition law and are void. The prohibition restricts the choice of consumers wishing to purchase online and ultimately prevented sales to final purchasers who are not located in the 'physical' trading area of the authorised distributor.

In addition, V argues, the practice falls within Article 4(c) of the regulation. The ban on internet sales does not meet the conditions for exception provided for in Article 4(c) of Regulation No 2790/1999, according to which those restrictions on sales are without prejudice to the possibility of prohibiting a member of the system from operating 'out of an unauthorised place of establishment'.

Does V have to pay a contractual penalty?

## **II. Suggested Solution**

P could claim payment of the contractual penalty according to Art. 1.1/1.2 of the distribution contracts. These contracts could conflict with Art. 101(2) TFEU.

### **I. Violation of Art. 101(1) TFEU**

1. Addressee: Undertaking (+)
2. Agreement: (+)
3. Restraint of competition:
  - a) Constraint of freedom of action (+) as contracts exclude de facto all forms of selling by internet
  - b) Negative impact on the market for the distribution of cosmetics and personal care products (+)
4. Effect on trade between Member States: (+)
5. 'De minimis'-Threshold: (+)

*“Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.”*

## II. Exemption according to Art. 101(3) TFEU?

### 1. Vertical Agreements Block Exemption according to Art. 2(1) of the Regulation No 330/2010

- a. Scope of application: (+) as distribution contracts are vertical agreements
- b. The agreement does not fall within the scope of another block exemption, Art. 2(5) of the Regulation

*“This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation.”*

## II. Exemption according to Art. 101(3) TFEU?

### 1. Vertical Agreements Block Exemption according to Art. 2(1) of the Regulation No 330/2010 – **cont'd**

- c. Market share gap, Art. 3(1) of the Regulation No 330/2010: (+) as market shares are 20 % in France and 10% to 15 % in other Member States
- d. But hardcore restriction according to Art. 4(c) of the Regulation? (+) as internet sales do not qualify as 'unauthorised place of establishment'



*"Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements."*

## II. Exemption according to Art. 101(3) TFEU?

### 1. Vertical Agreements Block Exemption according to Art. 2(1) of the Regulation No 330/2010 – **cont'd**

- c. Market share gap, Art. 3(1) of the Regulation No 330/2010: (+) as market shares are 20 % in France and 10% to 15 % in other Member States
- d. But hardcore restriction according to Art. 4(c) of the Regulation? (+) as internet sales do not qualify as 'unauthorised place of establishment'

*"The exemption provided for in Article 2 shall apply on condition that 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."*

*"The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:*  
(...)  
*(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment"*

2. Individual assessment according to Art. 101 (3) TFEU
  - a. Contribution to improvement of production or distribution of goods or promotion of technical or economic progress: (+) as products require the physical presence of a qualified pharmacist at the point of sale during all opening hours, in order that the customer may obtain the personalised advice of a specialist and ban on internet sales contributes to improving the distribution of products whilst avoiding the risks of counterfeiting and of free-riding between authorised pharmacies.
  - b. No indispensability to the attainment of objectives: (+) because product information cannot replace individual advice, but a constant level of service seems to be achievable through contractual obligation or a discount system

- c. Fair share of benefit for consumers: (-) as advantages and disadvantages have to be balanced and disadvantage of exclusion of all forms of selling by internet outweighs advantage of personalized advice.
- d. No possibility of eliminating competition in respect of a substantial part of the products in question: (-) because of complete exclusion of selling by internet

3. Conclusion: The agreement does not fall into the scope of Art. 101(3) TFEU. It is thus void according to Art. 101(2) TFEU and therefore cannot serve as a basis for the claim made by P.

# VI. Enforcement of competition law by the Commission I (prohibition and commitment decisions)

**Overview: important types of decisions the Commission can take:**

- **Prohibition decisions (Article 7 of Regulation No 1/2003)**
- Interim measures decisions (Article 8 of Regulation No 1/2003)
- **Commitment decisions (Article 9 of Regulation No 1/2003)**
- Decisions imposing fines (Article 23 of Regulation No 1/2003)
- Decisions withdrawing the benefit of a block exemption regulation (Article 29(1) of Regulation No 1/2003).

## **Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty**

### **Article 7 Reg. 1/2003 Finding and termination of infringement**

1. Where the Commission, acting on a complaint or on its own initiative, **finds that there is an infringement** of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to **bring such infringement to an end**. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to **bring the infringement effectively to an end**. [...]

2. [...]

## **Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty**

### **Article 9: Commitments**

1. Where the Commission **intends to adopt a decision requiring that an infringement be brought to an end** and the undertakings concerned **offer commitments** to meet the concerns expressed to them by the Commission in its **preliminary assessment**, the Commission may by decision make those commitments **binding** on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.
2. The Commission may, upon request or on its own initiative, reopen the proceedings:
  - (a) where there has been a material change in any of the facts on which the decision was based;
  - (b) where the undertakings concerned act contrary to their commitments; or
  - (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

## **Article 9 Reg. 1/2003 – origins**

- Consent Decree of US competition law
- No explicit provision in former Council Regulation No 17/62
- Before Art. 9 came into force: exemption decisions by the Commission on condition of compliance with commitments suggested by companies concerned ("informal settlements")
- Inspired by Council Regulation No 139/2004 on the control of concentrations between undertakings, see its Art. 8(2)2:  
*"The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market."*



## **Article 9 Reg. 1/2003 – procedure**

- Opening of administrative procedure by the Commission
  - on its own initiative or
  - acting on a complaint by a third party (eg. competitor)
- Preliminary assessment (cf. statement of objections)
- Commitments offered by the companies concerned
- Publication of a concise summary of the case and the main content of the commitments in the Official Journal and invitation to third parties to submit their observations, Art. 27(4) Reg. No 1/2003
- Possible modifications of the commitments in reply to the third party's observations
- Acceptance of the commitments by the Commission

## **Article 9 Reg. 1/2003 – advantages**

### **Commission**

- Procedural gains (only preliminary analysis)
- Greater speed of procedure and impact on competition (Google?)
- **More freedom of choosing an effective remedy**

### **Undertakings**

- No determination of an infringement (no binding effects, see Art. 15 of Reg. 1/2003)
- No fine
- More freedom of choosing an effective remedy
- Greater speed of procedure and conservation of corporate resources

## **Microsoft cases “Windows Media Player” (2004) and “Internet Explorer” (2009)**

Abuse of a dominant position on the markets of

- Operating systems for PCs (quasi-monopoly of Microsoft, tying product)
- Media player (tied product in the 1st affaire)
- Web browser (tied product in the 2nd affaire)

Definition of tying: The sale of a given product (the tying product) shall be conditional upon the purchase of another product (the tied product) of the dominant undertaking

## **Tying**

Preconditions for a restriction prohibited by Article 102 TFEU

- a) The tying product (operating system) and the tied product (WMP or Internet Explorer) are two different products
- b) The concerned undertaking holds a dominant position on the market of the tying product
- c) The concerned undertaking does not offer another choice than obtaining the tied product with the tying product
- d) The tying leads to a restraint of competition

**COMP/C-3/37.792 „*Microsoft I (Windows Media Player)*“, decision of 24 March 2004**

**Fine:** 497.2 million euro

**Remedies:**

- Microsoft had to offer a version of the operating system (Windows) without the WMP to OEMS/clients
- Microsoft must disclose to competitors, within 120 days, the interfaces required for their products to be able to 'talk' with the ubiquitous Windows OS

**COMP/C-3/39.530 „*Microsoft II (Internet Explorer)*“, decision of 16  
December 2009**

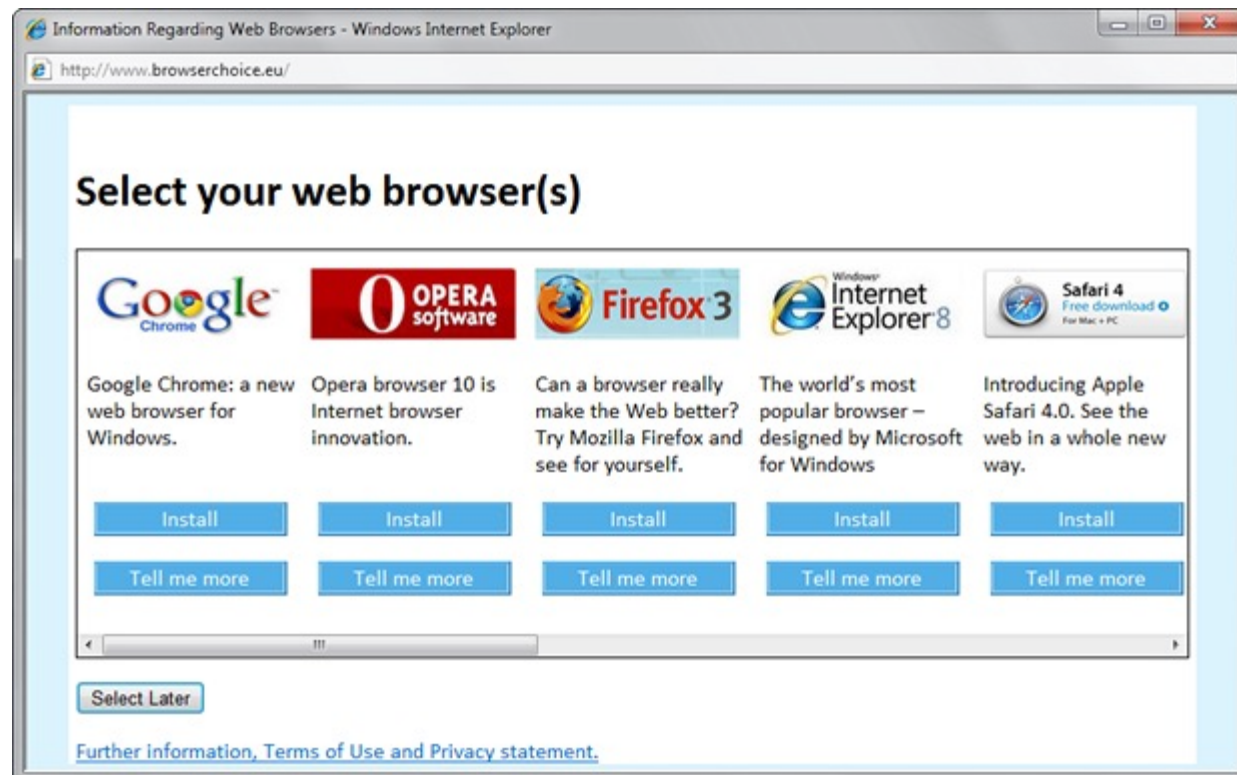
**No fine** (only later for non-respecting the commitments, see case AT.39530 of  
6 march 2013: fine of 561 millions euro)

**No remedies (Art. 7), but accepting commitments offered by Microsoft  
(Art. 9)**

- Microsoft offers European users of Windows choice among different web browsers
- Microsoft allows computer manufacturers and users to turn Internet Explorer off

**COMP/C-3/39.530 „Microsoft II (Internet Explorer)“, decision of 16  
December 2009 (cont'd)**

**Choice screen**



## **Disadvantages and risks of commitment decisions**

- No clarification of legal situation
- No evolution of jurisdiction because of lack of possibilities to complain against a commitment decision
- High amount of Art. 9-cases (as well as the German equivalent § 32b GWB)
- Risk of under-enforcement
  - No fine like in cases of obvious infractions (e.g. VISA)
  - Aggravation of private enforcement because of no binding effects
  - No absorption of illicit profits
- Risk of over-enforcement
  - Disproportionate remedies (“blackmailing”)
  - Different (much more larger) proportional measurement than in Art. 7-cases, see ECJ, decision of 29 June 2010. C-441/07 P – “Alrosa”



# VII. Enforcement of competition law by the Commission II (fines)

Art. 23 Reg. 1/2003 empowers the Commission to take decisions imposing fines on undertakings and associations

- infringements of substantive competition law (Art. 23(2) ), e.g. Art. 101 and 102 TFEU
- infringement of procedural law (Art. 23(1) , e.g. supply of misleading information in response to a request of the Commission (cf. 18 Reg. 1/2003)

The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

- (a) they infringe Article 81 or Article 82 of the Treaty; or
- (b) they contravene a decision ordering interim measures under Article 8; or
- (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year. Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

- infringements of substantive competition law (Art. 23(2) ), e.g. Art. 101 and 102 TFEU
- infringement of procedural law (Art. 23(1) ), e.g. supply of misleading information in response to a request of the Commission (cf. 18 Reg. 1/2003)

. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

- (a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);
- (b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;
- ... [other procedural infringements]

## **Two objectives of fines: punishment and deterrence**

“The level of a fine must be sufficiently high both to punish the firms involved and to deter others from practices that infringe the competition rules.”

(Commission, Guidelines for setting fines, 2006)

What about confiscating the possible illegal gains made by the infringement?

EU law empowers the Commission to levy fines only on undertakings and not on natural persons such as company directors and executives (unlike German , English or US Antitrust law )

Problem: undertakings can act only through human agency (directors and employees). Are corporate fines the most effective way to improve compliance with competition law? What is the optimal sanction of competition law infringements?

Cf. § 81 of the German Act  
against restrictions of competition  
– GWB”

Commission to levy fines only on undertakings and not  
such as company directors and executives (unlike  
German , English or US Antitrust law )

Problem

employment

with co

infringements?

**Art. 1 Sherman Act**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce [...] is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, **if any other person, \$1,000,000**, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

## **Optimal sanction of competition law infringements? (cont'd)**

Possible sanctions against natural persons:

- personal fines (cf. examples of national law provisions above)
- imprisonment (cf. Art. 1 Sherman Act, § 298 German Criminal Code – STGB)
- director disqualifications (cf. § 70 German Criminal Code – STGB)
- Recovering corporate penalties from directors and employees who had engaged in the anti-competitive conduct by suing them for damages (cf. the [Safeway Stores Ltd v Twigger \[2010\] EWCA Civ 1472](#)).

## **Setting the fines**

Very little guidance in Article 23 Reg. 1/2003 about the level at which fines should be set:

- gravity and the duration of the infringement as determining factors (Article 23(3) )
- ceiling: maximum fine is 10 per cent of turnover in the preceding business year (Article 23(2)2 )



## Setting the fines

Very little guidance in Article 23 Reg. 1/2003 about the level at which fines should be set:

- gravity, determining factors

3. In fixing the amount of the fine, regard shall be had both to the **gravity** and to the **duration** of the infringement

(Article 23(3) )

- ceiling: maximum, preceding

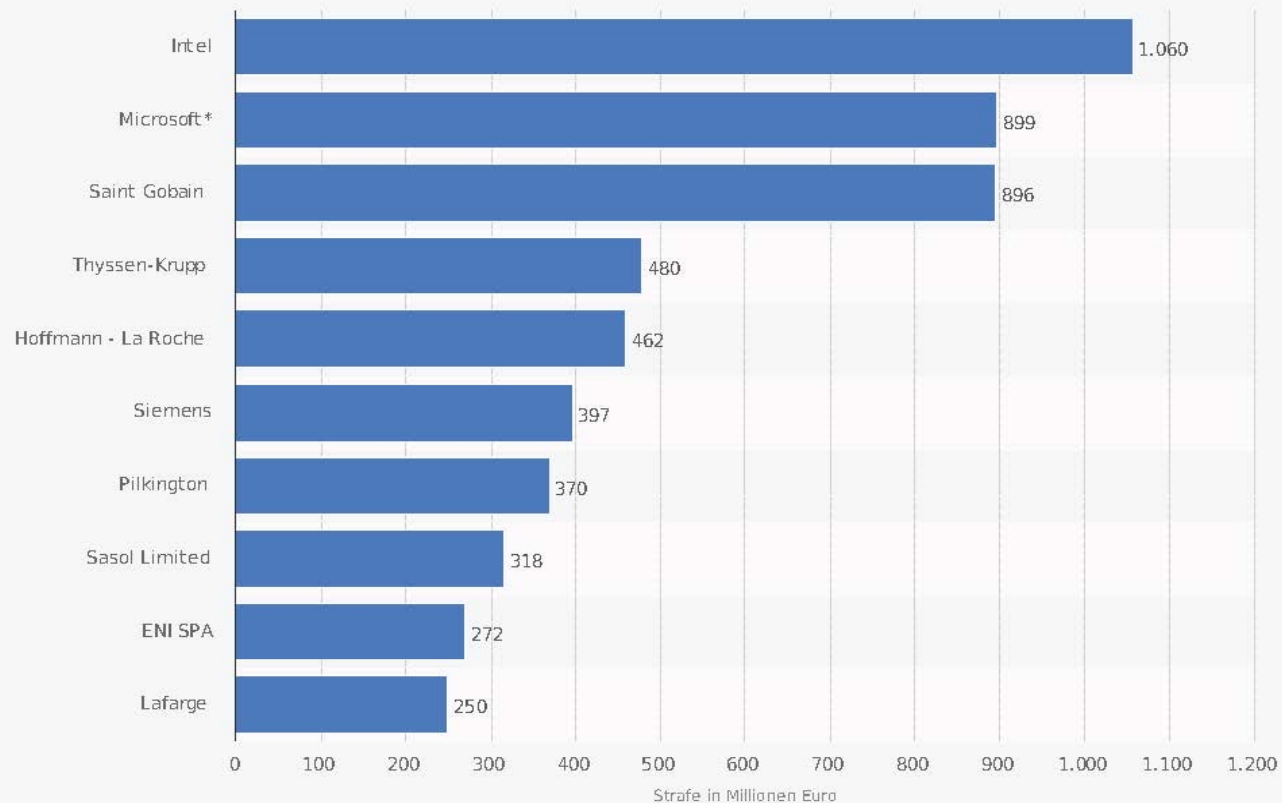
For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed **10 % of its total turnover** in the preceding business year.

business year (Article 23(2)2 )

Open questions:

Is certainty in fining practice is desirable? Will undertakings, when knowing what infringements will cost them, engage in a cost-benefit analysis and act accordingly? Does the fact that undertakings will face unknown amounts of fines in case of violations have a deterrent effect?

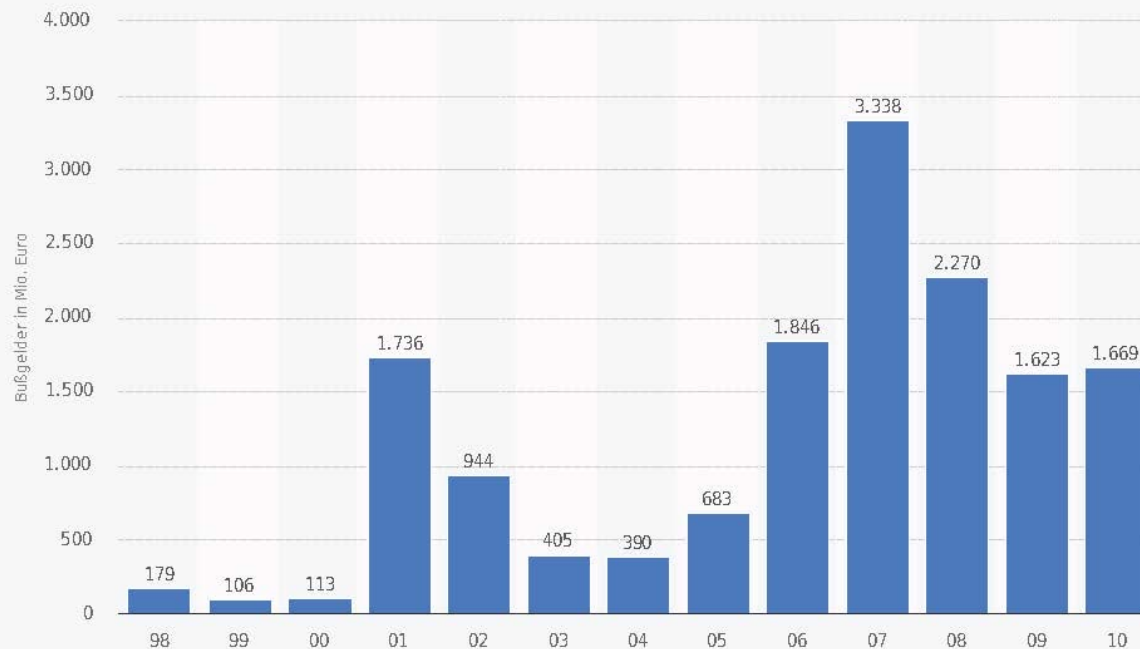
**Die höchsten Einzelstrafen in EU-Kartellverfahren in Millionen Euro**



Sources:  
TNS Infratest; Handelsblatt  
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Weitere Informationen:  
Weltweit; EU-Kommission

**Von der EU-Kommission gegen Unternehmenskartelle verhängte Bußgelder  
(in Mio. Euro) 1998 bis Juli 2010**



Source:  
Europäische Kommission; Experte(n)  
Weitbrecht/Mühle (2008)  
© Statista 2015

Weitere Informationen:  
EU; Europäische Kommission; Experte(n) Weitbrecht/Mühle (2008)

## **Setting fines (cont'd)**

### ***Commission, Guidelines on setting fines (2006)***

#### ***First step: Basic amount***

Defining the **basic amount**. It is calculated on a **proportion (percentage) of the value of the sales**, depending on the degree of **gravity** of the infringement.

The maximum is 30 per cent. The Commission takes into account, inter alia, the nature, the combined market share of all the parties concerned, and the geographic scope of the competition law violation.

The basic amount is then multiplied by the number of **years** the infringement has been taking place.

## **Setting fines (cont'd)**

### ***Second step: Adjustements***

#### ***Aggravating circumstances (upward adjustment)***

- Repeat offenders (repeating the same or similar infringement after having previously been found by the Commission or an NCA)
- Refusal to cooperate with the Commission
- Role of leader in the infringement

## **Setting fines (cont'd)**

### ***Second step: Adjustements (cont'd)***

#### ***Mitigating circumstances (downward adjustment)***

- Sufficient cooperation with authority
- Limited involvement in the infringement
- Authorisation or encouragement of the anti-competitive conduct by public authorities or by legislation
- Successful application for leniency (downward adjustment or even full immunity)

## **Leniency Program of the Commission** (see its Notice on Immunity, 2006)

Leniency rewards firms which denounce cartels in which they have participated by granting them **total immunity** or a **reduction of the fines**.

Leniency is an important tool for the public enforcement of Union competition law.

**Total immunity** will be granted to the firm which is the **first** to provide the Commission with crucial information enabling it to establish the existence of a cartel (no leniency in cases of unilateral conduct).

A **reduction of the fine** (up to 50 per cent) is granted to firms supplying the Commission with evidence which represents significant added value.

**Further condition:** firms have to cooperate fully, quickly and on a continuous basis with the Commission.



## VIII. Private enforcement of competition law

## **Private antitrust enforcement - Introduction**

Commission and NCA (national antitrust authorities) play a central role in the enforcement of European and national competition law.

This role includes

- the detection [→ fact finding by using the powers conferred to the Commission by Reg. 1/2003, i. e. inspections on private premises, requests for information, sector inquiries, leniency programs etc.]
- the punishment [→ fines]
- the deterrence [→ idem]

of violations of the rules.

## **Private antitrust enforcement – Introduction [cont'd]**

Public enforcement can be supplemented by private parties. They can raise Articles 101 and 102 TFEU either as a

- **shield** [→ nullity of an agreement prohibited by Article 101(1) and not satisfying the conditions of Article 101 (3) TFEU]

either as a

- **sword** [→ private damages actions made in national courts].



## **Private antitrust enforcement – Introduction [cont'd]**

Main goals of private antitrust enforcement:

- **Nullity** of an agreement prohibited by Article 101(1) and not satisfying the conditions of Article 101 (3) TFEU [**Shield**]:
  - Severe civil law sanction.
  - Infringers cannot rely on their anticompetitive agreement.
  - Nullity claims bring anticompetitive behaviour to an end and prevent future breaches of the rules.

## **Private antitrust enforcement – Introduction [cont'd]**

Main goals of private antitrust enforcement:

- **Private damages actions [Sword]:**
  - Another severe civil law sanction.
  - Corrective justice: compensation of victims.
  - Disgorgement of illegal profits (depriving defendants of the proceeds of their wrongful conduct and preventing unjust enrichment).
  - Supplementary deterrence (esp. in the case of joint and several liability)

## **Private damages actions – overview of some key issues :**

- Standing, esp. standing of indirect purchasers and collective redress
- The defendants, esp. joint and several liability among of the undertakings having infringed competition law
- (Binding) effect of decisions adopted by competition authorities
- Access to evidence, esp. inter partes disclosure and access to evidence included in the file of a competition authority
- Limitation periods for bringing actions for damages
- Quantification of harm, esp. the passing-on of overcharges
- Interaction between leniency programmes and actions for damages

## **Features of the US legal system making it easier and more attractive for plaintiffs to bring actions**



- Very broad discovery rules
- Binding effect of court decisions for follow-on suits
- Class actions on an opt-out basis
- Contingent attorney's fees
- Treble damages
- Joint and several liability among the defendants combination with the rule of no-contribution and pro-tanto reduction
- American Rule (attorney's costs)

## **Features of the US legal system (cont'd):**

### ***Very broad discovery rules***

#### Federal Rules of Civil Procedure:



#### 26 (b) (1)

Unless otherwise limited by court order, the scope of discovery is as follows:  
Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense [...].

#### 26 (b) (5)

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.



## **Features of the US legal system (cont'd):**

### ***Binding effect of court decisions for follow-on suits***



15 U.S. Code:

#### § 16 - *Judgements*

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: [...]

## **Features of the US legal system making it easier and more attractive for plaintiffs to bring actions (cont'd)**



### ***Class action on an opt-out basis***

#### Federal Rules of Civil Procedure:

23 (a)

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

[...]

## **Features of the US legal system making it easier and more attractive for plaintiffs to bring actions (cont'd)**



### ***Contingent attorney's fees***

Clients can agree with their attorney that they do not have to pay his services if the attorney is not successful. Contingent fees are usually calculated as a percentage of the client's net recovery. Also known as "no win no fee-agreement".

## **Features of the US legal system making it easier and more attractive for plaintiffs to bring actions (cont'd)**

### ***Costs of the procedure: the American Rule***



#### Federal Rule of Civil Procedure:

54 (d)

(1) *Costs Other Than Attorney's Fees.* Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. [...]

## **Features of the US legal system making it easier and more attractive for plaintiffs to bring actions (cont'd)**



### ***Treble damages***

15 U.S. Code :

#### § 15 - *Suits by persons injured*

(a) *Amount of recovery; prejudgment interest.* Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [...]

**Features of the US legal system making it easier and more attractive for plaintiffs to bring actions (cont'd):**

***Joint and several liability among the defendants***

(see for instance *Dextone Co. v. Bldg. Trades Council*, 60 F.2d 48-49 (2d Cir. 1932)):



→ Plaintiffs may collect their judgment from one or more of the liable defendants in whatever proportion it wishes.

**combined with**

- ***the rule of no-contribution***

and

- ***pro-tanto reduction***

**Features of the US legal system making it easier and more attractive for plaintiffs to bring actions (cont'd):**

***Joint and several liability among the defendants (cont'd)***



combined with

- ***the rule of no-contribution***

(see Texas Indus. v. RadcliffMaterials, 451 U.S. 630 (1981): in creating antitrust damage actions Congress did not intend to disturb the common-law doctrine that no right of contribution existed among joint tortfeasors)

and

- ***the pro tanto reduction***

**Features of the US legal system making it easier and more attractive for plaintiffs to bring actions (cont'd):**

***Joint and several liability among the defendants (cont'd)***  
***combined with***



**- *the rule of no-contribution***

**and**

**- *pro-tanto reduction***

(see Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 348 (1971))

→ The judgment is reduced pro tanto, i.e., the settlement payment is subtracted from the trebled amount of the damages found at trial rather than reducing the plaintiff's pre-trebled damages.

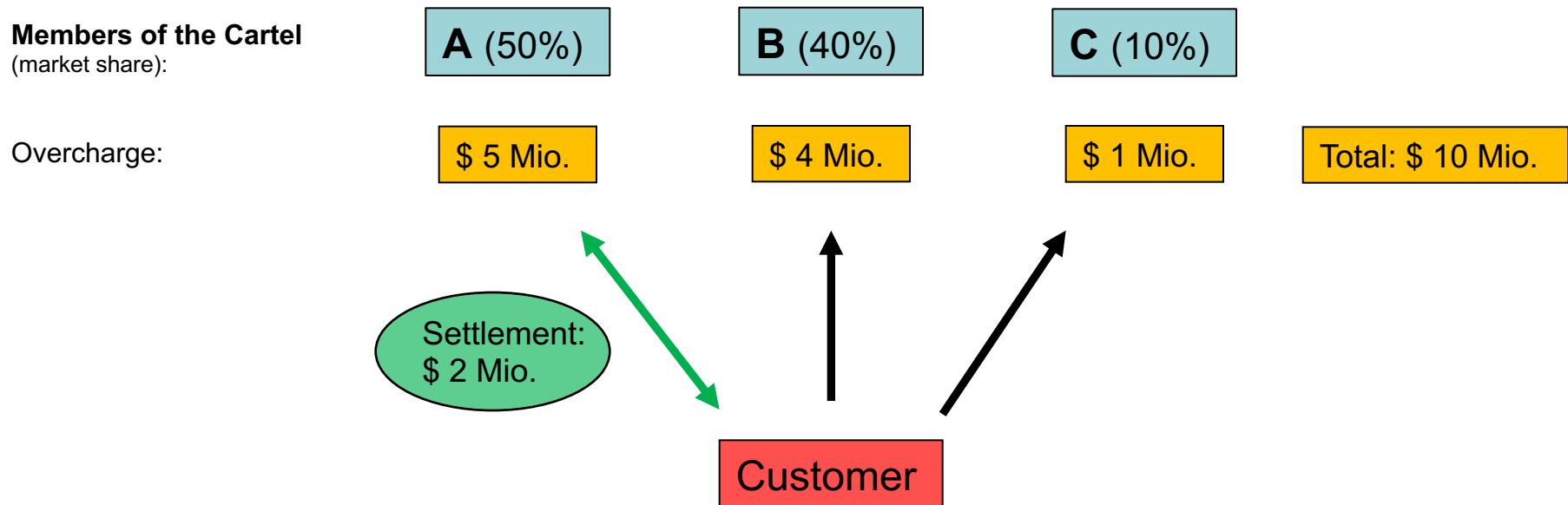


**Features of the US legal system making it easier and more attractive for plaintiffs to bring actions (cont'd):**



***Joint and several liability among the defendants (cont'd)***

***Example***



**Features of the US legal system making it easier and more attractive for plaintiffs to bring actions (cont'd):**



***Joint and several liability among the defendants (cont'd)***

***Example (cont'd)***

**Members of the Cartel**  
(market share):

**A (50%)**

**B (40%)**

**C (10%)**

Overcharge:

**\$ 5 Mio.**

**\$ 4 Mio.**

**\$ 1 Mio.**

**Total: \$ 10 Mio.**

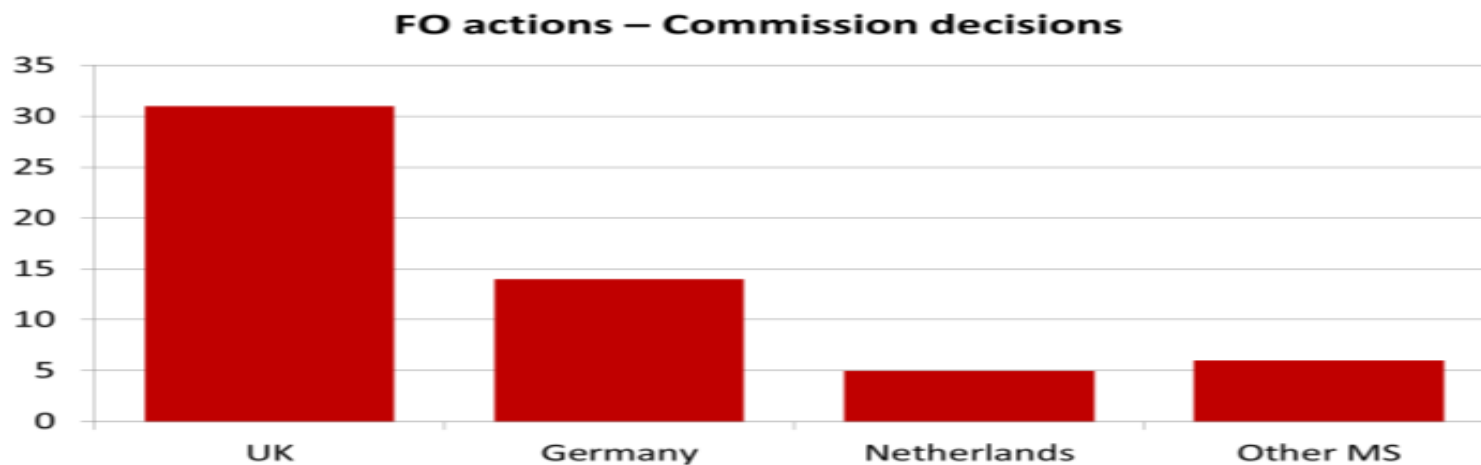
**Court:** 1) Trebling the \$ 10 Mio. in damages → total of \$ 30 Mio.

2) Subtracting the \$ 2 Mio. (sum of the settlement) → \$ 28 Mio.

3) The two nonsettling defendants B and C are jointly and severally liable for the remaining total damages of \$ 28 Mio. Thus, the plaintiff is entitled to collect the whole sum from either B or C. He could also elect to enforce only a part of the sum from one of the two defendants and collect the rest of the other.

## Situation in Europe

- enforcement of competition law is widely based on the action of specialized public authorities (European Commission, Bundeskartellamt, Autorité de la concurrence...)
- small number of private actions
- big differences in the different member states



## **Directive 2014/104/EU on antitrust damages actions (November 2014)**

- aims at making it easier for victims of antitrust violations to claim compensation.
- has to be implemented by the member states of the European Union within two years



## **Main improvements of the new Directive include:**

- National courts can order companies to disclose evidence when victims claim compensation.
- Binding effect of a final decision of a national competition authority (NCA) finding an infringement
- Prolongation of the Statutory Limitation of a claim
- Clarification that even indirect purchasers can claim for compensation
- Settlements are made easier.



## **One of the central problems:**

The interaction between private enforcement of EU competition law and public enforcement carried out by the Commission and NCAs.



## **Private damages actions – key issues (cont'd):**

***Standing, esp. standing of indirect purchasers and collective redress***

### **Directive 2014/104/EU:**

Recital (13)

The right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — **irrespective of the existence of a direct contractual relationship with the infringing undertaking [...]**.

This Directive should not require Member States to introduce **collective redress mechanisms** for the enforcement of Articles 101 and 102 TFEU.

## **Private damages actions – key issues (cont'd):**

### ***Standing, esp. standing of indirect purchasers and collective redress (cont'd):***

#### Article 14 – Indirect purchasers

1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an **overcharge was passed on to the claimant**, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.



## **Private damages actions – key issues (cont'd):**

***The defendants, esp. joint and several liability among of the undertakings having infringed competition law:***

### Article 1 – *Subject matter and scope*

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an **undertaking** or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.

### Article 11 – *Joint and several liability*

1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are **jointly and severally liable** for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

Do groups of companies form an „**economic entity**“ so that parents are jointly and severally liable even for infringements of its subsidiaries?

See the judgement of the ECJ in Akzo Nobel, 10.9.2009, on a Commission's **fines** decision: *“it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary”* → rebuttable presumption)?

#### Article 17 – Right to full compensation and scope

1. This Article sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an **undertaking** or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.

#### Article 11 – Joint and several liability

1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are **jointly and severally liable** for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

## **Private damages actions – key issues (cont'd):**

### ***(Binding) effect of decisions adopted by competition authorities:***

#### Article 9 - Effect of national decisions

1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is **deemed to be irrefutably established** for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.
2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as **at least prima facie evidence** that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

## **Private damages actions – key issues (cont'd):**

***Access to evidence, esp. Inter partes disclosure and access to evidence included in the file of a competition authority***

### Recital (14)

Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

## **Private damages actions – key issues (cont'd):**

### ***Access to evidence, esp. Inter partes disclosure and access to evidence included in the file of a competition authority (cont'd)***

#### Article 5 – Disclosure of evidence

1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control [...]

#### Article 6 – Disclosure of evidence included in the file of a competition authority

1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.

## **Private damages actions – key issues (cont'd):**

***Access to evidence, esp. Inter partes disclosure and access to evidence included in the file of a competition authority (cont'd):***

### Article 8 - Penalties

1. Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the event of any of the following:
  - (a) their failure or refusal to comply with the disclosure order of any national court;
  - (b) their destruction of relevant evidence;
  - (c) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;
  - (d) their breach of the limits on the use of evidence provided for in this Chapter.

## **Private damages actions – key issues (cont'd)**

### ***Limitation periods for bringing actions for damages***

#### Article 10 - *Limitation periods*

2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:
  - (a) of the behaviour and the fact that it constitutes an infringement of competition law;
  - (b) of the fact that the infringement of competition law caused harm to it; and
  - (c) the identity of the infringer.
3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.
4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.



## **Private damages actions – key issues (cont'd)**

### ***Quantification of harm, esp. the passing-on of overcharges***

#### Article 13 - *Passing-on defence*

Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.



## **Private damages actions – key issues (cont'd):**

### ***Interaction between leniency programmes and actions for damages***

Recital (26)

[...] as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programs are also important for the effectiveness of actions for damages in cartel cases. [...] Such disclosure [of leniency statements] would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability [...]. To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. [...]

## **Private damages actions – key issues (cont'd)**

### ***Interaction between leniency programmes and actions for damages (cont'd)***

#### Article 6 – *Disclosure of evidence included in the file of a competition authority*

6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

- (a) Leniency statements; and
- (b) Settlement submissions

#### Article 11 - *Joint and several liability*

4. By way of derogation from paragraph 1, Member States shall ensure that an immunity recipient is jointly and severally liable as follows:

- (a) to its direct or indirect purchasers or providers; and
- (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.