

COMPETITION LAW

Introduction

Prof. Dr. Francisco Marcos
Professor of Law, IE Law School
Moena, 17 June 2019

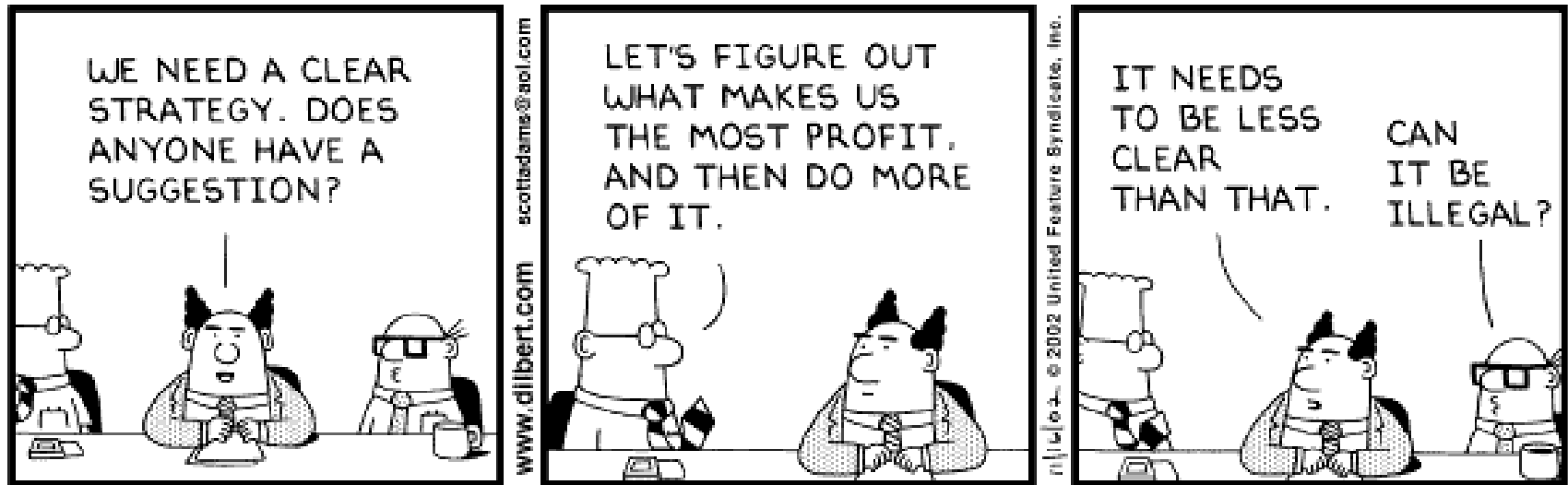


Agenda

1. Introduction

2. Why do we have antitrust/competition rules

3. Design & enforcement of competition rules



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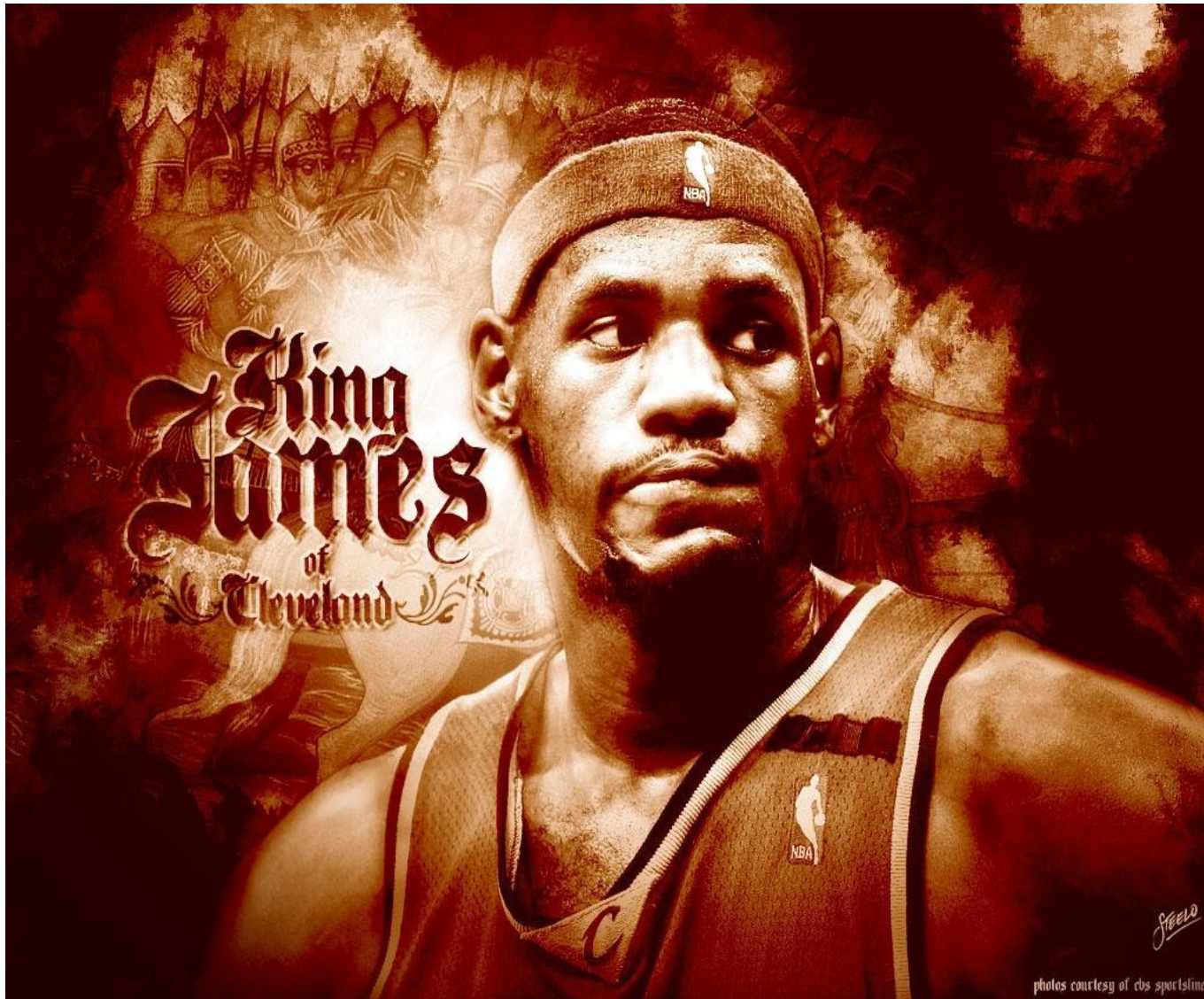
Learn the rules like a pro
so that you can break
them like an artist.

PABLO PICASSO

Topics

Lebron James in the market

A basic theoretical explanation of markets and why competition law is needed







P. Cezanne, *Pewter Pitcher and Fruits* (1888-90) oil on canvas (50 x 61 cm)

The New Criterion

Features

December 2009

The art market explained

by James Panero

Why the bubble won't pop for Pop.



Sale of 200 One Dollar Bills, Sotheby's, November 11, 2009, c/o Sotheby's

What are the legal institutions underpinning markets' existence?

- ✓ Property rights
- ✓ Contracts (exchange)
- ✓ Business freedom
- ✓ Enforcement (institutions)

Legal certainty/stability

CONSTITUTE

<http://www.constituteproject.org/>



Brazilian Constitution (1988 rev 2015)

ART 170. The economic order, founded on the appreciation of the value of human labour and free enterprise, is intended to assure everyone a dignified existence, according to the dictates of social justice, observing the following principles:

I. national sovereignty; II. private property; III. social function of property; IV. free competition; V. consumer protection; VI. environmental protection, including through differentiated treatment in accordance with the environmental impact of the products and services and the processes by which they are elaborated and rendered; VII. reduction in regional and social inequalities; VIII. pursuit of full employment; IX. preferential treatment for small-scale firms organized under Brazilian law with their headquarters and management in the Country.

SOLE PARAGRAPH

Free exercise of any economic activity is assured for all, without need for any governmental authorization, except as provided by law.

ART 170. §4º. The law shall repress abuse of economic power seeking to dominate markets, to eliminate competition and to increase profits arbitrarily.

Colombian Constitution (1991 rev 2015)

ARTICLE 333. Economic activity and private initiative must not be impeded within the limits of the public good. For their exercise, no one may demand prior permission or licenses without authorization of an Act.

Free economic competition is a right of everyone, entailing responsibilities.

The enterprise, as a basis of development, has a social function that implies obligations. The state shall strengthen the joint organizations and stimulate enterprise development.

The State, mandated by an Act, shall check the impediments to or restrictions of economic freedom and shall avoid or control any abuse that individuals or enterprises may create thanks to their dominant position in the national marketplace.

An Act shall delimit the scope of economic freedom when the social interest, the environment, and the cultural patrimony of the nation demand it.



Industria y Comercio
SUPERINTENDENCIA

Portugal (1976 rev 2005)

ARTICLE 81. In the economic and social field the State shall be under a primary duty: [...]

f. To ensure the efficient operation of the markets, in such a way as to guarantee a balanced competition between businesses, counter monopolistic forms of organisation and repress abuses of dominant positions and other practises that are harmful to the general interest;



Peru (1993 rev 2009)

ARTICLE 61. The State facilitates and oversees free competition. It fights any practice that would limit it and the abuse of dominant or monopolistic positions. No law or arrangement may authorize or establish monopolies.



ART 38. Free enterprise is recognized within the framework of a market economy. The public authorities guarantee and protect its exercise and the safeguarding of productivity in accordance with the demands of the general economy and, as the case may be, of economic planning.



Venezuela (1999 rev 2009)

ARTICLE 113. Monopolies shall not be permitted. Any act, activity, conduct or agreement of private individuals which is intended to establish a monopoly or which leads by reason of its actual effects to the existence of a monopoly, regardless of the intentions of the persons involved, and whatever the form it actually takes, is hereby declared contrary to the fundamental principles of this Constitution. Also contrary to such principles is abuse of a position of dominance which a private individual, a group of individuals or a business enterprise or group of enterprises acquires or has acquired in a given market of goods or services, regardless of what factors caused such position of dominance, as well as in the event of a concentration of demand. In all of the cases indicated, the State shall be required to adopt such measures as may be necessary to prevent the harmful and restrictive effects of monopoly, abuse of a position of dominance and a concentration of demand, with the purpose of protecting consumers and producers and ensuring the existence of genuine competitive conditions in the economy.

In the case of the exploitation of natural resources which are the property of the Nation or the providing of services of a public nature, on an exclusive basis or otherwise, the State shall grant concessions for a certain period, in all cases ensuring the existence of adequate consideration or compensation to serve the public interest.

Why do we have antitrust /competition rules?

*“The Antitrust laws... are the Magna Carta of free enterprise. They are as important to the preservation of **economic freedom** and our **free enterprise system** as the Bill of Rights is to the protection of our fundamental freedoms”**

* **United States v. Topco Associates, Inc.,**
405 U.S. 596, 610 (1972)

Markets exist and are popular worldwide as the main way of allocating and distributing resources

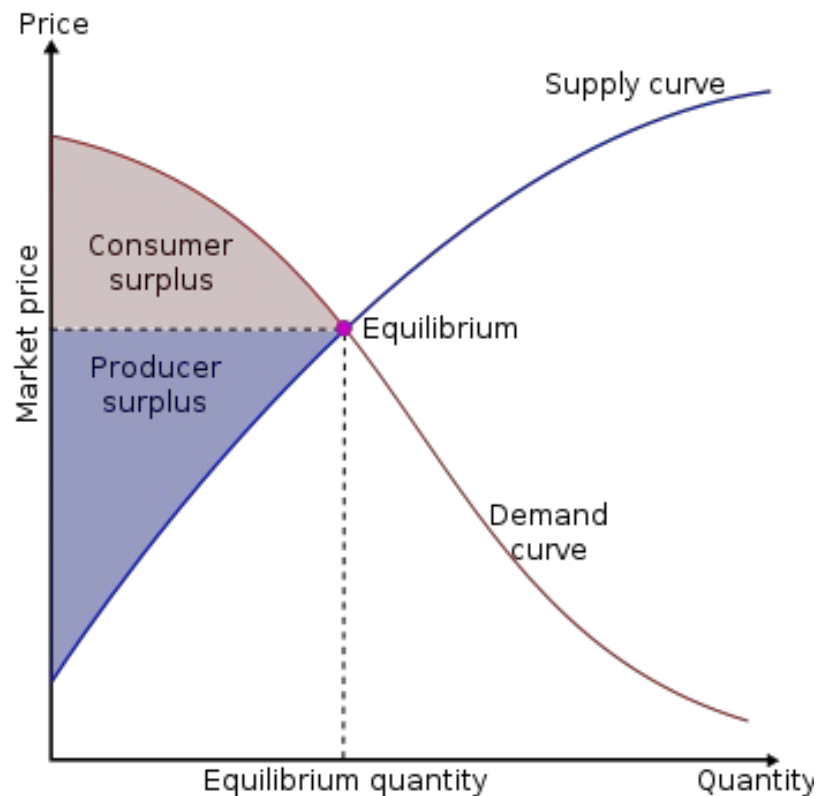
Why are markets so prevalent?

Resources are allocated via the free match of offer and demand

- **Offering agents (producers)** use their entrepreneurial and business skills.
- **Demanding agents (consumers)** act following their preferences.

Markets increase social welfare:

Consumer and producer surpluses are maximized



Markets have many advantages:

- In terms of participants' incentives
- Due to natural selection
- From an efficiency perspective:
 - Productive
 - Allocative
 - Dynamic

WHY IS IT NECESSARY TO REGULATE/CONTROL COMPETITION IN MARKETS?

Rectius are competition rules
really needed?

**Why do we
have antitrust
/competition
rules?**



What is the goal of any company?



What are the types of antitrust/competition concerns?

A purple sphere with a glossy finish and a white shadow underneath.

**Collusion
-Agreement
s**

A red sphere with a glossy finish, resting on a grey rectangular pedestal with a white shadow underneath.

Mergers

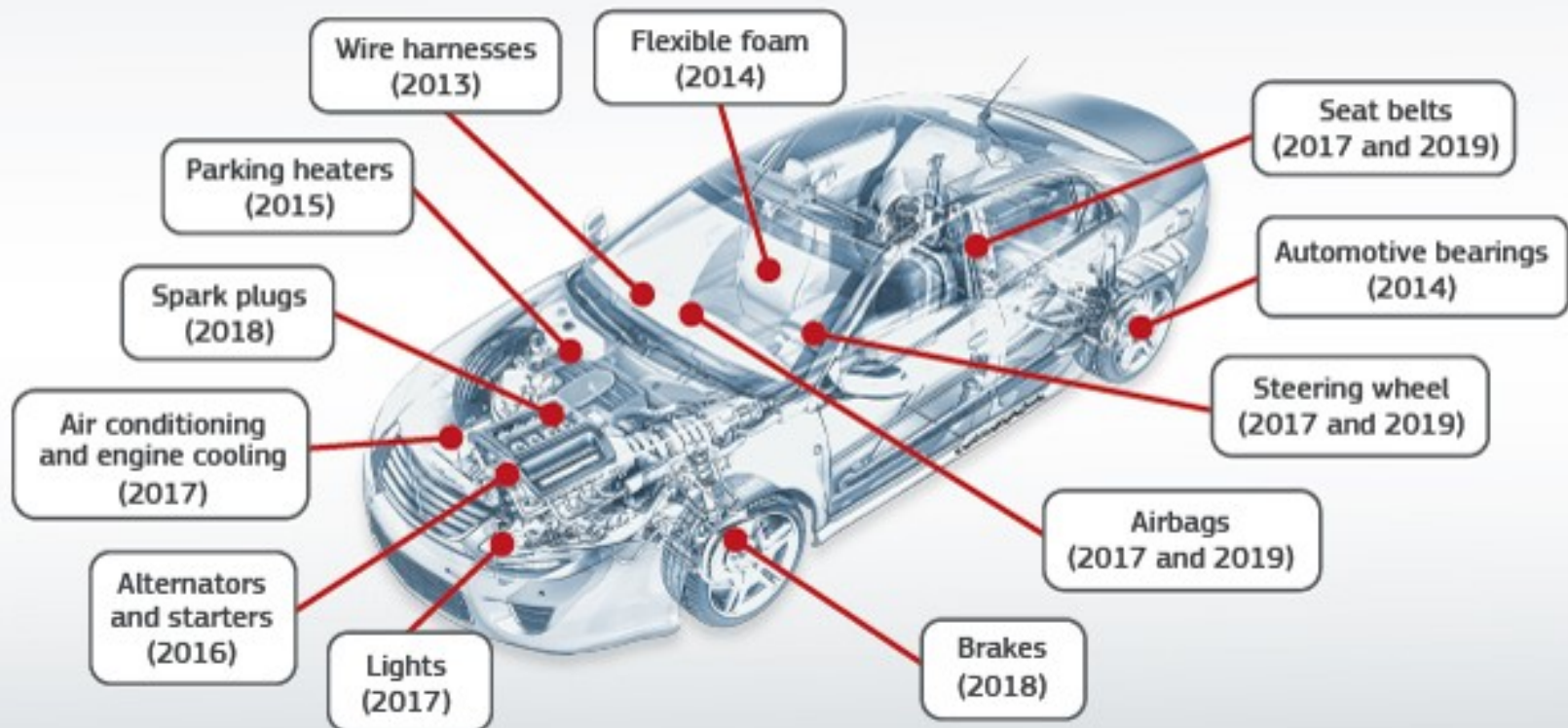
A green sphere with a glossy finish and a white shadow underneath.

**Abuse of
dominance**

A blue sphere with a glossy finish and a white shadow underneath.

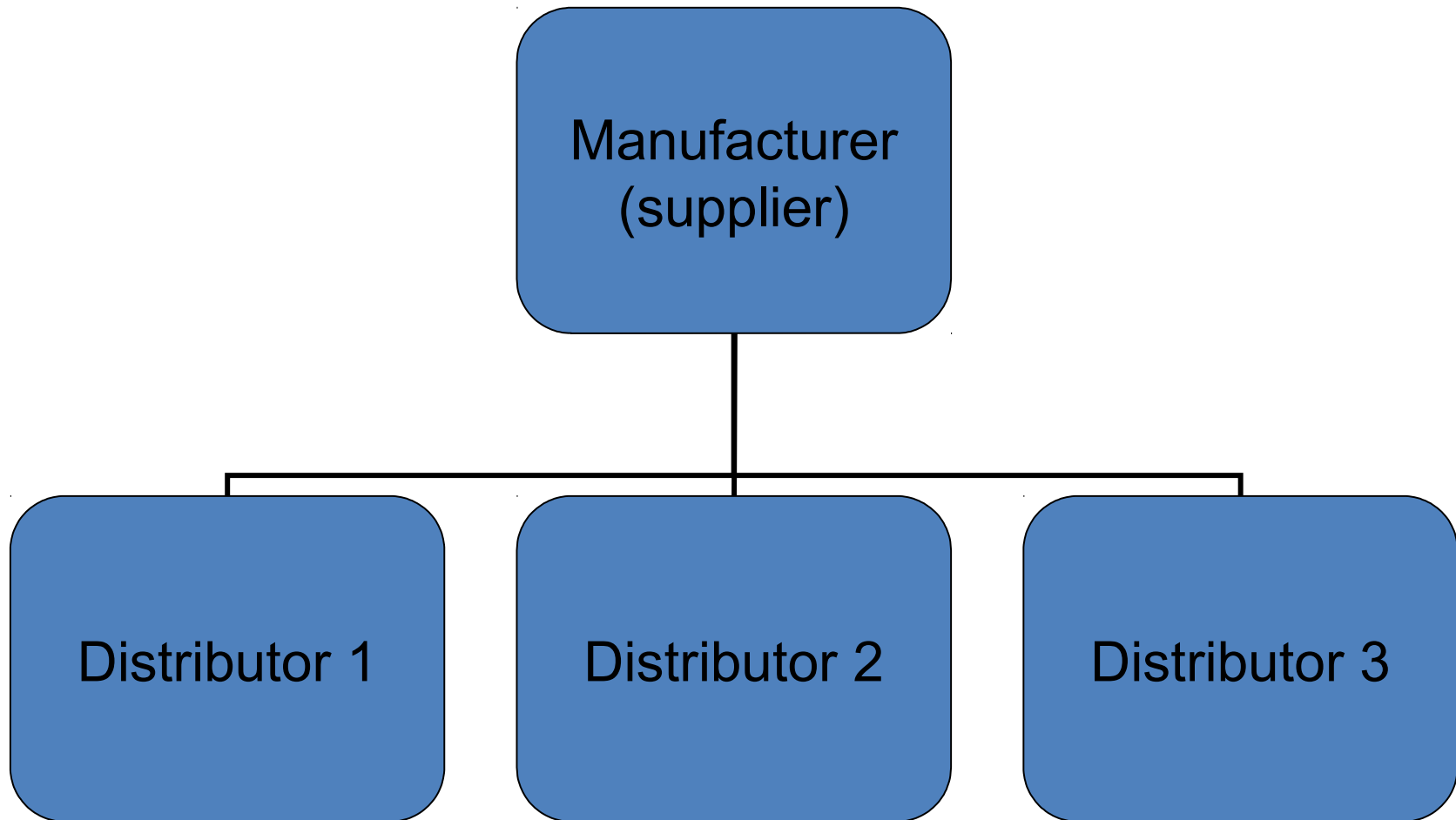
State Aid

Commission has fined **car parts cartels** over €2 billion since 2013



Commission fines **Nike** €12.5 million for restricting cross-border sales of merchandising products





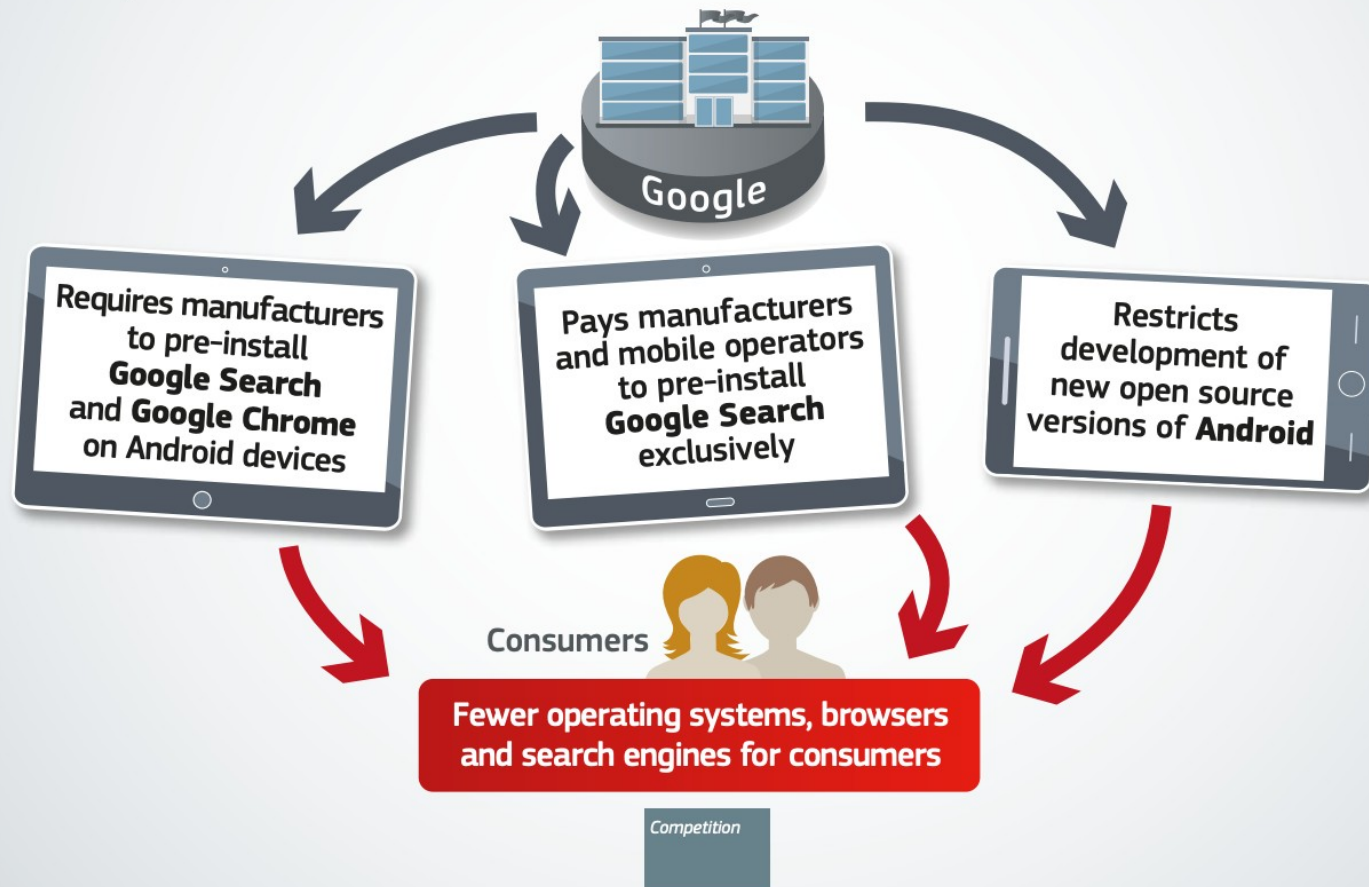
AB InBev commitments will facilitate beer imports from the Netherlands and France (labels in both languages)



Google's AdSense restrictions protect its dominance in search advertising



Google's Android restrictions illegally protect its internet search dominance





Google abuses dominance as search engine to give illegal advantage to “Google Shopping”

Google promotes Google Shopping by placing it at the top

Google shows rival comparison shopping services much lower in results, where consumers do not see them

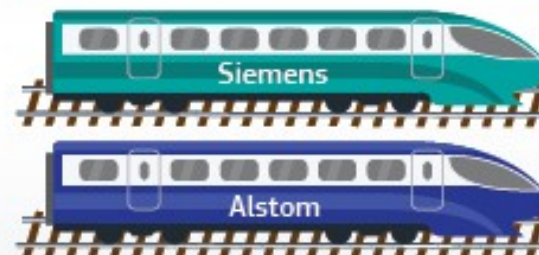


Commission prohibits Siemens-Alstom takeover to protect rail operators and passengers

Rail signalling systems are essential to prevent collisions and keep train and metro passengers safe



Very high-speed trains travel at 300 kilometres per hour or more and are important for the transition to environmentally sustainable transport



If combined, Siemens and Alstom would no longer compete resulting in higher prices, less choice and less innovation for rail operators

Market as an system of **efficient**
allocation and distribution of
resources

And that, at the end, benefits
consumers

But market is not perfect, it may fail

.....or someone may make them fail....

Market failures

Endogenous

- Public Goods
- Externalities
- Natural monopolies



Regulation

Exogenous

- Provoked by conduct or decisions of market agents

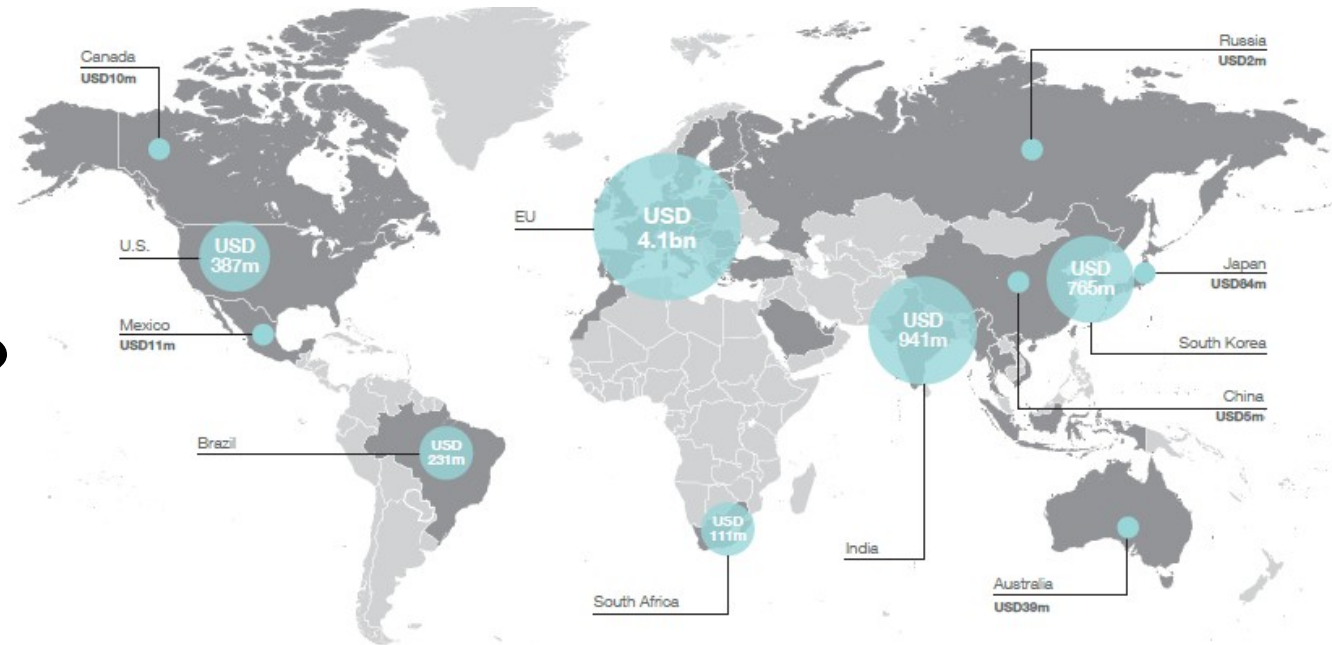


Competition Law

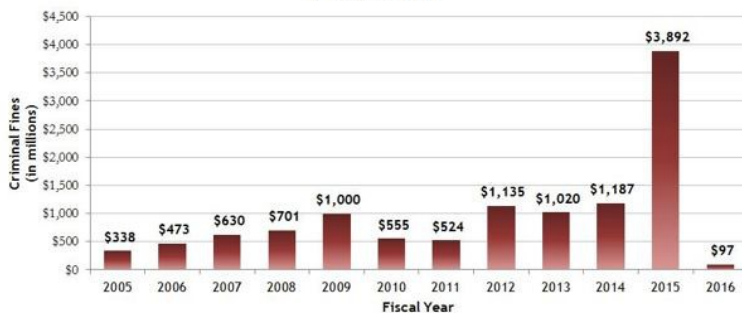
Antitrust/Competition Law tools:

	Restrictive agreements	Abuse of dominant position	Mergers & Acquisitions	State aid
General rule	NOT	NOT	YES	NOT
Exception	Possible	NOT	They may be blocked or conditioned	Possible

How important is antitrust/competition?



**Total Criminal Fines
from Antitrust Division Investigations
(FY 2005-2016)**

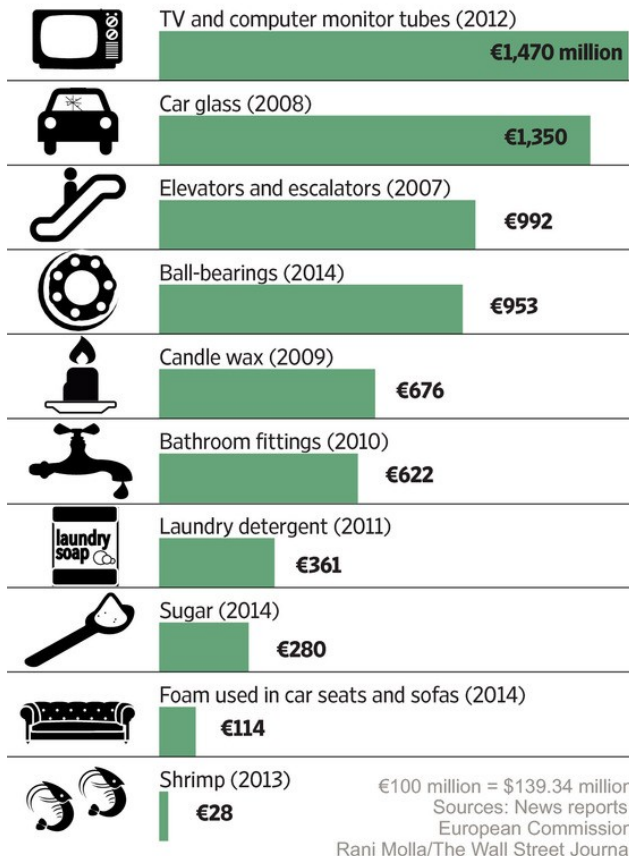


**Fines Levied by the European Commission (in millions)
(2008-2015)***



Cartels of All Kinds

Ten European price-fixing settlements, by fines



MULTA RÉCORD

Sanción de la Comisión Europea por cártel de fabricantes de camiones

	Reducción por aportación de información	Reducción por aceptar un acuerdo	Multa en euros
	100%	10%	0
	40%	10%	670.448.000
	30%	10%	1.008.766.000
	10%	10%	494.606.000
		10%	752.679.000
			TOTAL CUANTÍA DE LAS MULTAS 2.926.499.000
Fuente: Comisión Europea			Expansión

Big Load

The EU slapped its heaviest cartel fine ever on a handful of truck makers.

Top five EU cartel fines

2016 Trucks

€2.93 billion

2012 TV/computer monitor tubes

€1.41

2008 Car glass

€1.19

2014 Automotive bearings

€0.95

2007 Elevators/escalators

€0.83

€1=\$1.11 Source: Eurostat

THE WALL STREET JOURNAL.

THE FIVE HIGHEST CARTEL FINES OF THE PAST YEARS

2.93 Billion €

Truck Cartel

1.7 Billion €

Libor cartel (fixing the reference interest rate)

1.4 Billion €

Picture tube cartel

1.384 Billion €

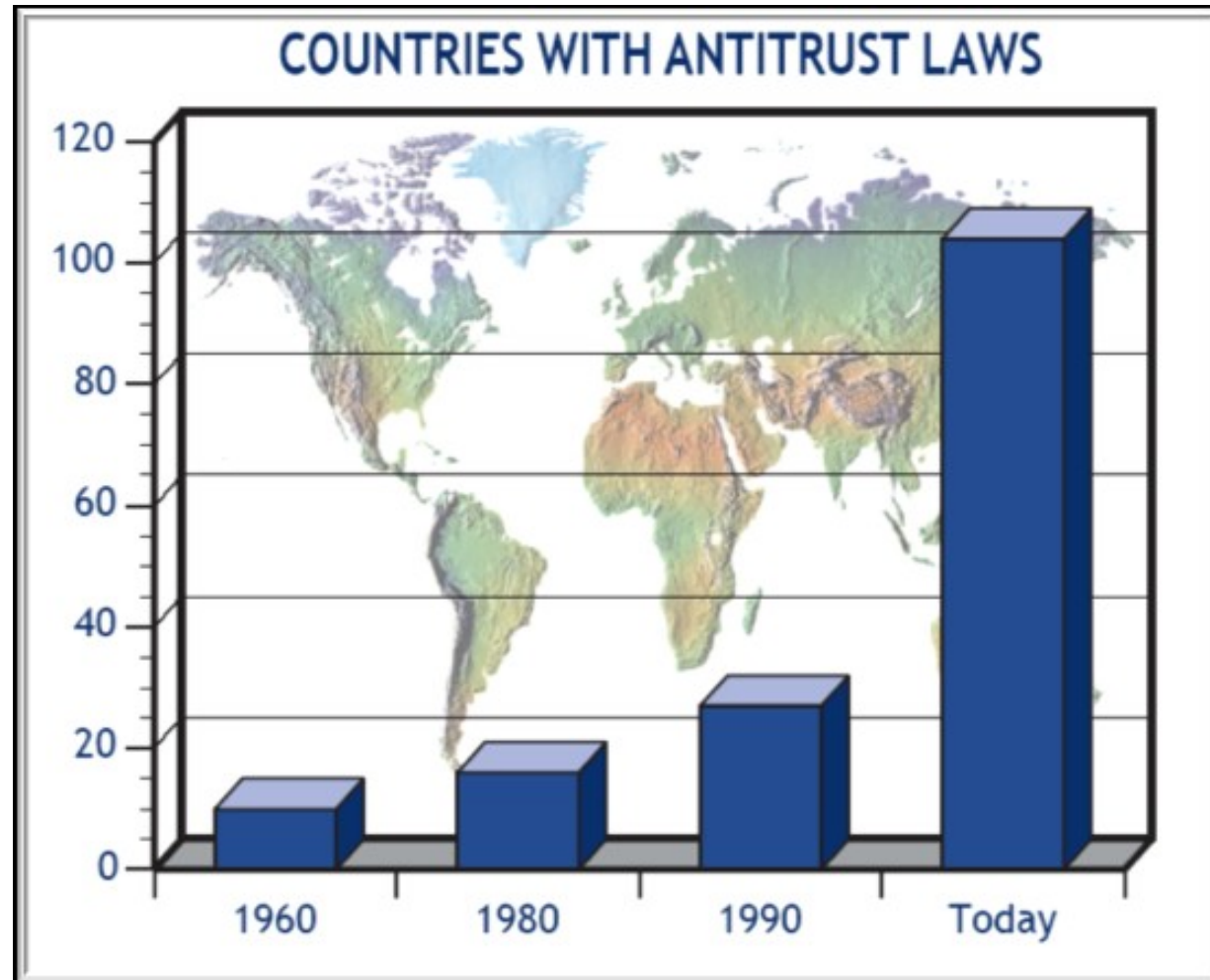
Car glass cartel

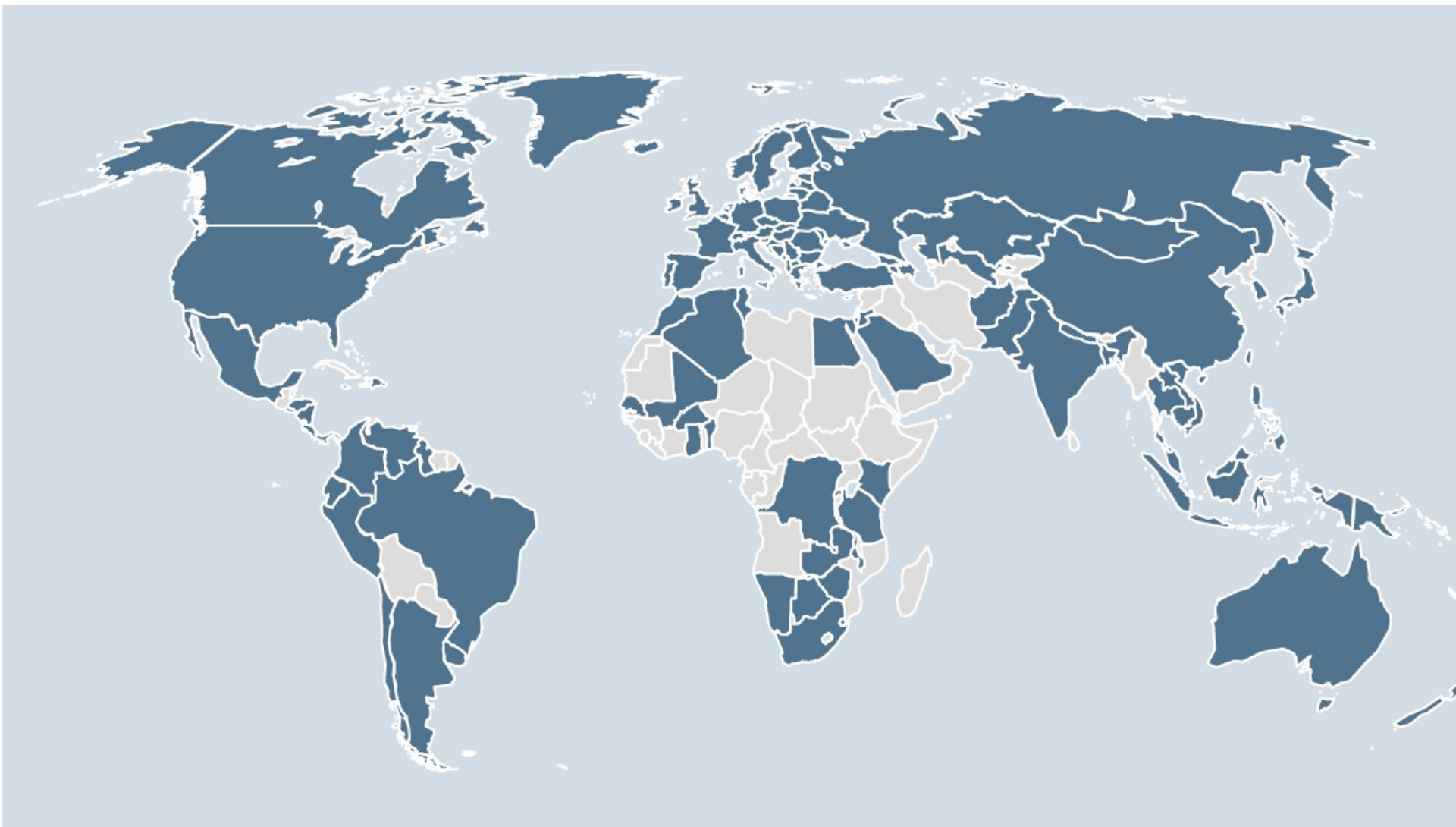
1.1 Billion €

Gas cartel

Source: European Commission

**How
important is
antitrust/
competition?**





**What does
antitrust/
competition
counsel do?**



From the **business perspective** it is an

ADDITIONAL TOOL,

which may be really powerful, as it may force to change strategies, production, sale, marketing and advertising decisions, and always

conditioning business activities

As a SHIELD v. gr.1, alleging the anticompetitive character and voidness of an agreement when performance of an agreed contract is claimed.

v.gr.2, alleging that a rival's decision or conduct is unlawful and should be sanctioned or compensation could be claimed (because it has abused of its dominant position in market).

As a WEAPON [even, strategic se to get what market competition by itself does not provide]

Rules, institutions, enforcement and remedies



Prof. Dr. Francisco Marcos
Professor of Law, IE Law School
Moena, 17 June 2019

Topics

1. Design of antitrust/competition legal mandates
2. Antitrust/competition remedies and sanctions
3. Alternative enforcement systems
4. Public and Private Enforcement
5. Multi-level enforcement systems

*“Much advance has been making of late in the **art of drafting legislation and in the study of comparative legislation**. But in an age of legislative law-making much more is required. The life of law is in its enforcement. The common-law rule came into being through enforcement and application and the situations that brought about its existence determine its life. The statutory rule, on the other hand, is made a priori. It is not necessarily a living rule when it is put upon the books. Occasion to apply it judicially may not arise till long afterward*

*Moreover it is an **abstract rule** and the situation that led to its existence goes rather to its interpretation than to its validity as a rule. Hence it is not enough for the law-maker to study the form of the rule and the abstract justice of its content. He must study how far cases under the rule are susceptible of proof. He must study how far by means of his rule he may set up a tangible legal duty capable of enforcement objectively by legal sanctions...*

*...He must consider how far infringements of this rule will take on a palpable shape with which the law may **deal effectively**. He must consider how far the **legal machinery of rule and remedy** is adapted to effect what he desires. Last and most of all he must study how to insure that someone will have a **motive** for invoking the machinery of the law to enforce his rule in the face of the opposing interests of others in infringing it.”*

In order to prevent people from making the markets fail through their behavior competition/antitrust legal rules are enacted to prohibit certain conducts

Competition/antitrust rules are mainly **prohibitions** and they are embodied through **standards**



Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, 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
(Section 1, Sherman Act).

579 characters/96 words

Article 101 TFEU

- 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
- 2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.*

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

***any agreement or category of agreements between undertakings,
any decision or category of decisions by associations of
undertakings,***

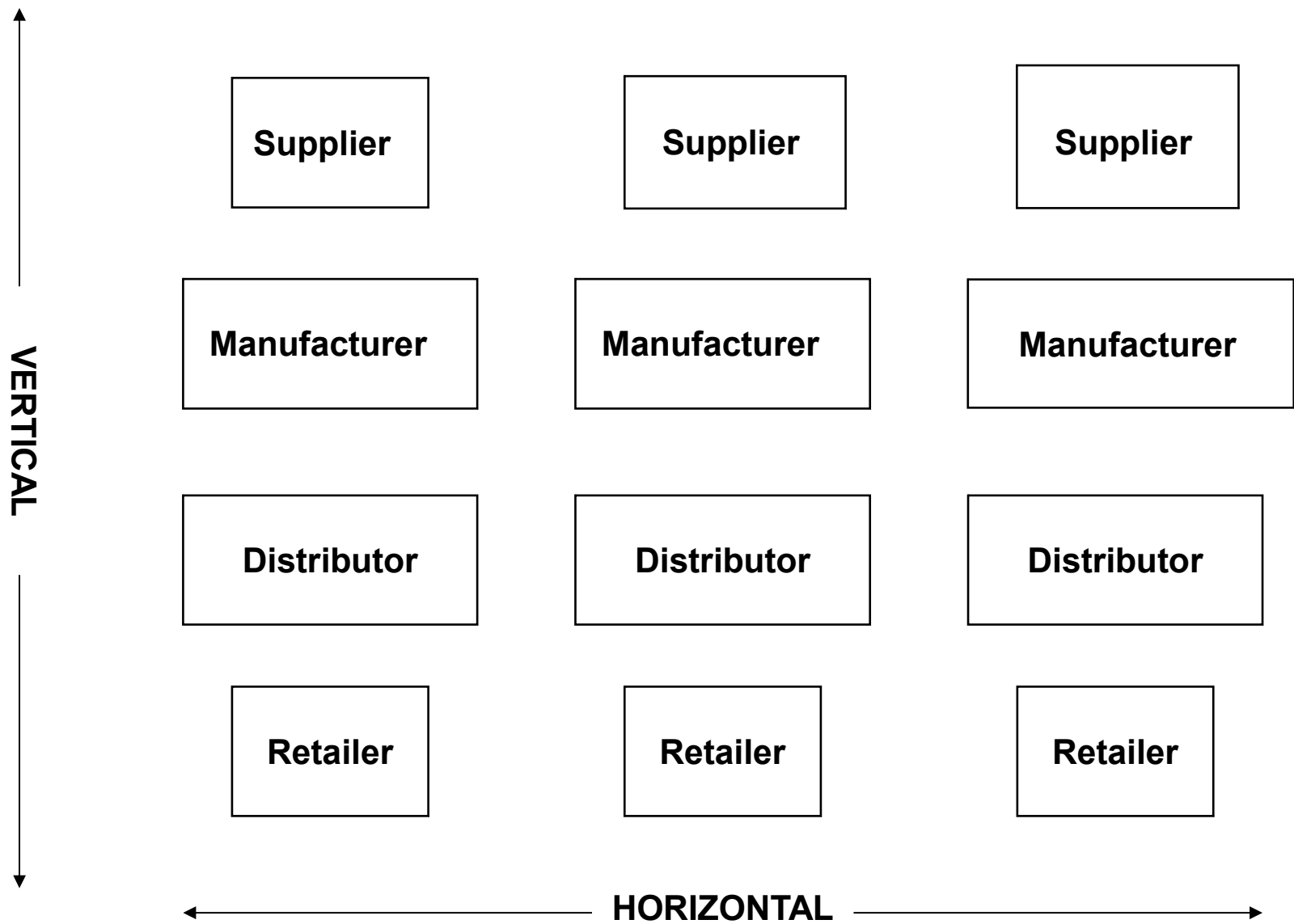
***any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods
or to promoting technical or economic progress, while allowing
consumers a fair share of the resulting benefit, and which does not:***

***(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, ECT)

1871 characters, 271 words



Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony
(Section 2, Sherman Act)

43 words, 252 characters

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

(Article 102, TFEU)

Exemptions to the prohibition of anti-competitive multilateral behavior (depending on the type of agreement, industry, etc).
Absolute/relative prohibitions

Exemptions

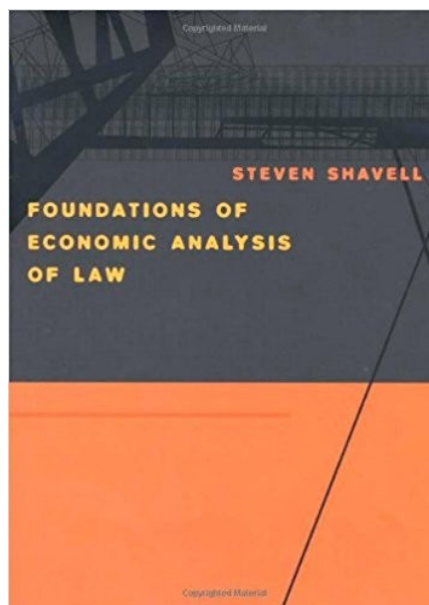
Control of exemptions?

Ex-ante/ Ex-post

How to enforce Competition/Antitrust prohibitions?

*The relevance of looking at the
enforcement of legal rules*

Method of Legal Intervention	Fundamental Dimensions of Legal Intervention		
	<i>Time of intervention</i>	<i>Form of intervention</i>	<i>Private versus public</i>
<i>tort law</i>	after harm	monetary sanctions	private
<i>safety regulation</i>	before and after acts	various	public
<i>injunction</i>	before and after acts	various	private
<i>contract law</i>	after harm	monetary sanctions; other	private
<i>criminal law</i>	before and after acts; after harm	various	public



The rules establishing the prohibitions introduce **legal consequences** for those infringing the rules

Antitrust remedies and sanctions

Deterrence

- (a) Structural/Behavioral remedies?
- (b) **Optimal design of sanctions?**
Criminal/administrative?

Anticompetitive behavior may also cause **harm**, competition/Antitrust law provides for that harm to be repaired

Compensation

Stand alone/follow-on (binding effect)

Treble damages?

Passing-on

Collective redress

How do you enforce the prohibitions of anti-competitive behavior?

Public or/and private enforcement?

Organs in charge of enforcement and their design
(administrative, judicial, juries, etc.)

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**NO
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**VIOLATORS
WILL BE PROSECUTED**

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**¿CÓMO CONDUZCO?
MARQUE GRATIS**



Opción 3





Bounty hunting Delivery men

Bounty-hunters are arguing about whether they should be regulated

Sep 3rd 2016 | COEUR D'ALENE, IDAHO | From the print edition

THE gigs are irregular but, thanks in part to mostly lax regulations, good money can still be made by bounty-hunting, says Rob "Daddy Rat" Hoyt, a trucker in Post Falls, Idaho with an "icing on the cake" sideline snatching fugitives. All but four states allow private citizens to bounty hunt. Nearly a third, Idaho included, don't bother licensing armed "fugitive-recovery agents", as they are also known. Bondsmen typically pay bounty-hunters expenses plus 10% to 20% of the value of a bond on someone who fails to appear in court. Some bonds run into six figures.



Mrs 10%

It is not work for the faint of heart—plenty of fugitives try to fight off pursuers. So many bounty hunters lift weights and practise a martial art or wrestling, the better to snap on handcuffs and, on some fugitives, ankle cuffs, lest they try to kick out a backseat window on the drive to jail. Tools of the trade include ballistic vests, pepper spray, Tasers, handguns and, for some jobs, a shotgun loaded with a beanbag that "folds you up like a newspaper", says Mike "Animal" Zook, an affable bounty-hunter in Spirit Lake, Idaho. Though built like a bear, he has been clubbed and, on four jobs, stabbed. The pain didn't really kick in until the adrenalin wore off. It's "definitely not easy money", says Rex Taylor, a bounty-hunter in nearby Coeur d'Alene who also runs All Freedom Bail Bonds.

Bounty-hunting affords plenty of free time, and the mostly hands-off approach (especially in conservative Idaho and neighbouring Montana and Wyoming) has opened the profession to many, Mr Taylor says. To help them get a start, the National Association of Fugitive Recovery Agents (NAFRA) in Delaware refers rookies to old hands seeking an apprentice. Like many such groups, NAFRA favours more regulation. No capture means no pay, so some overzealous agents end up on the news, says Chuck Jordan, NAFRA's boss. Tired of managing the bad PR, he is pushing for federal rules on training and background checks to weed out current or hopeful bounty-hunters who, for example, "have perhaps murdered someone".

Apple Bug Bounty Program

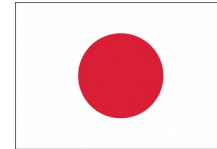


Hack & Get Paid Up to \$200,000

Why the enforcement of the prohibition of cartels (price-fixing) may be different from the rest (vertical restraints, abuse of dominance)?

Lack of information
Incentives
Costs

Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)



Article 25 (1) *An enterprise that has committed an act in violation of the [restraint of trade prohibitions] and any trade association that has committed an act in violation of [such prohibitions] is liable for damages suffered by another party.*

(2) *No enterprise or trade association may be exempted from the liability provided in the preceding paragraph by proving the non-existence of intention or negligence on its part.*

Article 26 (1) *The right to claim damages under to the provisions of the preceding Article may not be asserted in court until the Cease and Desist Order [by the JFTC] has become final and binding.*

(2) *The right set forth in the preceding paragraph expires by prescription after a lapse of three years from the date on which the Cease and Desist Order or the Payment Order set forth in the same paragraph became final and binding.*



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“Law Schools, Bar Exam Co. Want \$50M Antitrust Suit Tossed”, 16 Dec. 2016

LLM Bar Exam LLC filed the suit against BarBri and 10 law schools in May 2016, alleging they engaged in an unlawful conspiracy to muscle LBE out of the market. LBE alleges that BarBri signed agreements with the law schools to ban LBE from their campuses,

EU Competition System: coexistence of national and EU Law/institutions

- Spontaneous/voluntary harmonization of domestic laws to EU Law (*Europeanization*)
 - Criminal law sanctions in some Member States
 - Private enforcement (Directive 2014/104/EU)
- Strengthening NCAs (ECN+ Directive 2019/1/EU)

Specific rules after 2004:

- (1) **Double barrier:** simultaneous application of both EU and national law (not in MR)
- (2) **Supremacy** of articles 101 & 102
- (3) **Never laxer** outcomes in applying national law

Decentralized enforcement system

Even more complex in regulated sectors
Very dependent on national institutions/procedures

Mainly public enforcement/upsurge of private enforcement in last few years

Multiple players: Commission, 28NCAs & courts.

Key values of enforcement system:

- (1) Effectiveness
- (2) Uniformity/consistency

Features of enforcement model:

(A) Commission's primacy in EU Law enforcement

- i. Administrative preference to NCAs
- ii. Decisions binding on national courts.

(B) ECN- Cooperation network of NCAs & Commission.

Hierarchical structure (managerial position of Commission)

- Case allocation.
 - i. Better placer authority/Commission if +3 States
 - ii. Conflicts (+/-).
- Information Exchange

Now proposal for directive ECN+