Introduction

The purpose of this chapter is to provide a general introduction to the rules relating to agreements which are considered, or alleged to be, anti-competitive. As such, it will not say anything in detail about more specific rules relating to horizontal agreements, cartels and distribution agreements which will be dealt with in Chapters 9 and 10. Instead, this chapter discusses general issues relating to what types of agreement fall to be controlled by competition law. Three inter-related themes underpin this discussion and it will be seen that the development of the law relating to anti-competitive agreements has been heavily influenced by procedural concerns. The first is a debate over what constitutes a restriction of competition. This will be discussed in more detail shortly. The second theme has been a concern for ensuring that the European Commission is able to enforce the rules effectively and that undertakings engaged in anti-competitive activities are unable to rely on what are perceived as ‘technical’ defences. The third theme relates to the major procedural changes that have taken place since 1999 and which culminated in the implementation of Regulation 1/2003.
In May 2004. In its early days, European Community competition law was based on a system which required undertakings operating agreements which fell within Article 81(1) to notify them to the Commission, who would make a decision as to whether or not they did fall within Article 81(1) and, if they did, whether or not they could benefit from the exemption in Article 81(3). The Commission took a broad interpretation of Article 81(1) but it soon became apparent that this broad interpretation encouraged a mass of notifications, which the Commission was unable to process. It responded to this problem by setting up informal procedures to dispose of cases and creating block exemptions, that is, general rules which exempted certain categories of agreements from breach of the prohibition in Article 81(1). Under this system, the interpretation of the scope of Article 81(1) became crucial, particularly because the coverage of the block exemptions was patchy and they were rather rigid. In the light of considerable criticism, the system has now been changed to one where notification is no longer required, indeed is generally discouraged, and a decision on Article 81(3) exemption can now be made by national competition authorities and national courts and this is accompanied by a set of broader block exemptions. The Commission has accompanied this change with a different approach to the interpretation of Article 81(1) and, in practical terms, most undertakings will be concerned with whether or not they can benefit from a block exemption. So one of the most critical and difficult questions is to what extent decisions by the courts and the Commission prior to this new approach are useful guides, or precedents, for decisions which have to be taken today. This adds an important element of uncertainty to the entire area.

This chapter is structured around an account of Article 81 EC because, as explained in the previous chapter, the UK’s Competition Act 1998 is modelled on Article 81 and s. 60 of that Act provides that questions arising in relation to competition are to be dealt with in a manner which is consistent with the treatment of corresponding questions in Community law. Furthermore, Regulation 1/2003 provides that, when a national competition authority applies its competition law to agreements which affect trade between Member States, it is also obliged to apply EC law. Therefore, in order to understand how UK law operates a sound understanding of how Article 81 EC functions is necessary. For the purposes of this chapter, it will be assumed that the EC and UK law on anti-competitive agreements is the same, unless specific differences are noted. The enforcement procedures are different, but this is dealt with in Chapter 6.

This chapter has the following structure: first, we discuss the concept of an undertaking because this determines what types of organisation are subject to competition law. Secondly, we discuss the meaning of ‘agreement’, ‘concerted practice’ and ‘decisions by associations of undertakings’ because Article 81 can apply to only these sorts of arrangements. Thirdly, we look at the key issue of what it means for an agreement or concerted practice or decision by an association of undertakings to have as its object or effect the prevention, restriction or distortion of competition in the common market. Having done this, we then look at when the prohibition may be considered inapplicable to either categories of agreements or an individual agreement: in other words, the criteria in Article 81(3).

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1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 04.01.2003 (hereafter ‘Regulation 1/2003’). It is sometimes referred to in the literature as the Modernisation Regulation.

2 Only the Commission could make a decision on Article 81(3).
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Article 81: preliminary issues

Article 81 EC, in outline (see Box 2.1 for text), prohibits agreements between undertakings which may affect inter-state trade and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Agreements which are in breach of this prohibition are declared automatically void under Article 81(2) but the prohibition may be declared inapplicable under Article 81(3) if certain conditions are met. Regulation 1/2003 provides that so long as these conditions are met, no prior decision of a competition authority is needed.\(^\text{3}\) National competition authorities and national courts have been given the power to make decisions on whether the prohibition is to be declared inapplicable because it meets the conditions in Article 81(3) and the European Commission retains this power in exceptional circumstances where there is a Community public interest in making such a decision: for example, in relation to a novel form of agreement.\(^\text{4}\)

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**KEY LEGAL PROVISION**

**Box 2.1**

**Article 81 EC Treaty**

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.

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\(^\text{3}\) Regulation 1/2003 (n. 1), Art. 1(2).

\(^\text{4}\) Ibid., Arts 3 and 10. No decisions have been taken under Art. 10 in the first five years of operation: see European Commission, ‘Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003’ (SEC (2009) 574 final at paras 112–14.)
As can be seen in Box 2.2, ss. 2 and 9 of the Competition Act 1998 are very similar to Article 81, with the main difference being that they apply to only agreements which affect trade within the United Kingdom and are intended to be implemented within the United Kingdom, whereas Article 81 applies to agreements which affect trade between Member States.

Questions: What requirements have to be met before an arrangement falls within Article 81? How do Article 81(1) and (3) relate to each other? How should an inquiry under this Article be structured?

As can be seen in Box 2.2, ss. 2 and 9 of the Competition Act 1998 are very similar to Article 81, with the main difference being that they apply to only agreements which affect trade within the United Kingdom and are intended to be implemented within the United Kingdom, whereas Article 81 applies to agreements which affect trade between Member States.
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9. Exempt agreements

(1) An agreement is exempt from the Chapter I prohibition if it –

(a) contributes to –

(i) improving production or distribution, or

(ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and

(b) does not –

(i) impose on the undertaking concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Question: Can you find any significant differences with Article 81? Could there be any justifiable reasons for interpreting these provisions differently from Article 81 in a UK context?

In order for an agreement to fall within EC competition law, it must meet a number of criteria, all of which need discussion:

● There must be an agreement or a decision by an association of undertakings or a concerted practice.

● The agreement, decision or concerted practice must be between undertakings.

● The agreement, decision or concerted practice must affect trade between Member States.

● The agreement, decision or concerted practice must have as its object or effect the prevention, restriction or distortion of competition, in an appreciable manner, within the common market.

Before reaching the substantive question of whether the agreement\(^6\) has the object or effect of restricting\(^7\) competition there are a number of preliminary issues which have to be considered. One of them – what is meant by inter-state trade – we have considered in Chapter 1, because it draws the line between EC and domestic competition law. The others will be discussed in turn through this chapter. Before doing this, it is worth reflecting on the key substantive issue: what is meant by an agreement having the object or effect of preventing, restricting or distorting competition?

The problem is sometimes said to arise because all agreements between contracting parties restrict their freedom of action (see Box 2.3).

So, for example, if a farmer sells a crop to a supermarket, he cannot sell that crop to another supermarket or a producer of processed food. Although the farmer’s freedom of action is limited by the agreement, this is not a competition problem for the other supermarkets if there are other farmers who produce the same or substitute crops. The farmer is not faced with a competition problem if there are other buyers for the crop than that one supermarket. By contrast, assume that all the farmers who produce a particular crop agree between themselves that they will sell only at a particular price. Or, alternatively, that all the

\(^5\) Alert readers will note that this phrase does not appear in the text of Article 81.

\(^6\) From now on, “agreement” will be used as shorthand for “agreement, decision by an association of undertakings or concerted practice” unless otherwise specified.

\(^7\) Similarly, “restricting” or “restriction” will be used as shorthand for “prevention, restriction or distortion” of competition unless otherwise noted.
buyers agree amongst themselves to purchase at a particular price. In both cases, this would be regarded as a competition problem, because the farmers and the buyers have substituted the market power given to them by their agreement for the workings of a competitive market. So the issue is not whether or not the agreement restrains the freedom of action of the participants, but whether or not the agreement has an effect which is detrimental to competition or competitive markets.

Modern commercial arrangements do not make it easy to answer this question. Although an agreement to fix prices and output between competitors is clearly an example of substituting an agreement for the working of a competitive market, other arrangements raise more difficult questions for competition policy. How should we react to an agreement between the two biggest producers in a market to pool their research efforts to produce a new product? Is this an exercise of market power, or an efficient use of resources? What about the various arrangements where a manufacturer gives exclusive distribution rights to one company for a period of time? Is this an exercise of market power or simply a sensible commercial arrangement?

The starting point for most economists is to distinguish horizontal and vertical agreements (see Box 2.4). The former are agreements between undertakings which operate at the same level of production, such as manufacturers of the same good. Vertical agreements are agreements between undertakings which operate at different levels of production: for example, an agreement by a clothes manufacturer to supply a retail store with its clothes.

**KEY CASE EXTRACT**

*Box 2.3*


> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

**Question:** To what extent is it accurate to describe an agreement freely entered into as a restraint?

**KEY DEFINITION**

*Box 2.4*

**Horizontal and vertical agreements**

**Horizontal agreement:** an agreement between two or more undertakings that operate at the same level of production or distribution in the market.

**Vertical agreement:** an agreement between two or more undertakings that operate, for the purposes of the agreement, at different levels of the production or distribution chain.


**Question:** Will commercial arrangements always fall neatly into either of these two categories?
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Economists take differing approaches to the competitive effects of these agreements. Horizontal agreements are viewed with much more suspicion, as these may obviously be attempts to create market power, for example, through price-fixing, although there may be horizontal agreements which are efficiency enhancing (see Chapter 9). Although views have evolved over time, today vertical agreements are, however, viewed more favourably or neutrally, as agreements which are less likely to create or exploit market power. Indeed, some economists would go further than this and view all vertical agreements as pro-competitive or efficiency enhancing, although this is perhaps a view at one extreme end of the spectrum. The text of Article 81 EC does not draw such a distinction and it has been confirmed by the European Court of Justice that the Article applies equally to horizontal and vertical agreements, provided they meet the criteria within the Article.

From an economist’s point of view, the distinction between horizontal and vertical agreements does not take us very far, as it is important to examine the effects of an agreement on the competitive process and to see whether or not it is damaging to total societal welfare, or consumer welfare, depending on the standard adopted, or not. In the context of EC competition law such an approach would create at least two important problems. First, as we have seen in Chapter 1, one of the key objectives of the European Community has been the creation of a single internal market. Much of European Community law is about preventing the Member States from erecting barriers to trade between them and an important objective of EC competition law has been to prevent private undertakings from erecting equivalent barriers: that is, dividing markets along national lines. Thus EC competition law is concerned to regulate or prohibit agreements which divide up markets on national lines even though, on an economic analysis, such agreements would have no detrimental effect on societal welfare; they might even be positive. So, historically, EC competition law has taken a much stricter approach to, especially, vertical agreements than economic analysis would suggest, even though the attitude has begun to change in recent years.

The second problem for a ‘pure’ economics approach is a procedural one, because an administrative agency, such as the European Commission, does not have the resources to examine the actual effects of every commercial agreement. As we have seen, Article 81 makes provision for a procedure whereby the prohibition can be declared inapplicable in certain circumstances, and therefore any undertaking(s) which had doubts about their agreement could apply to the Commission for a decision on the matter. In practice, from the beginning of the EC system of competition law, this proved impossible to work effectively because the Commission was swamped with notifications from undertakings seeking guidance on the legality of their agreements, not least because this gave the notifying undertakings immunity from being fined for breach of the prohibition from the date of notification. It is therefore necessary to develop some general rules, which are reasonably predictable, which will allow the administrative agency to focus its efforts on those agreements which are most damaging to the competitive process, whilst ignoring those which are neutral or even beneficial. Given the structure of Article 81, a prohibition followed by an exemption, this could be done either by focusing on the definition of what constitutes a restriction on competition, the

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8 For example, R. Bork, The Antitrust Paradox (2nd edn, Free Press, New York, 1993) at p. 288: ‘every vertical restraint should be completely lawful’.
9 Cases 56 and 58/64 Consten & Grundig [1966] ECR 429.
10 This is not a concern for UK competition law because we already have a single, domestic market.
Article 81(1) phase, or by focusing on what criteria constitute an exemption, the Article 81(3) phase. It is, however, important to see that the two phases of Article 81 are related; if an expansive interpretation of Article 81(1) is taken and many agreements fall within it, then there is a greater need for general rules under Article 81(3) allowing exemptions. If a narrower interpretation of Article 81(1) is taken, then there is less work to be done under Article 81(3). Whichever approach is taken has important consequences for the competition authorities and businesses concerning who has the power to make decisions. If an expansive approach to Article 81(1) is taken, then the rules on exemptions become more important and these rules are decided by the European Commission, with less scrutiny by the European Courts, and so the Commission is able to have a greater influence on the content of commercial agreements. If a narrower interpretation of Article 81(1) is taken, then the European Commission has less influence over commercial agreements and its decisions are likely to be subjected to greater scrutiny in the European Courts. Historically, the European Commission has taken an expansive view of the scope of Article 81(1), although it has pulled back somewhat more recently, while its critics have argued that a narrower approach to Article 81(1) should be taken.

It is worthwhile explaining, very briefly, how this problem has been dealt with in the United States, because this has influenced critics of the Commission’s policy and the terminology has been imported into European debates. Section 1 of the Sherman Act 1898 provides that ‘every contract, combination . . . or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal’ and, unlike EC competition law, there is no provision for an exemption. Enforcement of American antitrust law is done through the ordinary courts either by public agencies or by third parties bringing a case against those involved in the allegedly anti-competitive cartel or agreement. Within the American system a fundamental problem has been to define what is meant by the words ‘restraint of trade’ and how the courts should approach agreements. This was solved initially by deciding that the Sherman Act applied to unreasonable restraints of trade only, which was the foundation for the rule of reason approach. Exactly what this meant and how it should be applied has always been a matter of some controversy within US law: indeed, one commentator said, ‘No one knows what the Rule of Reason means.’ For our purposes, we can think of the rule of reason as Whish and Sufrin, two of the leading academic commentators in the UK on competition law, have described it, as a wide-ranging inquiry, which includes analysis of the product market and sensitivity to economic theory and where the pro- and anti-competitive effects of an agreement are weighed against one another and, if the former outweigh the latter, no infringement is found. Within the American system there is also a category of agreements which are considered per se, that is, conclusively presumed to be, in breach of the Sherman Act and where no elaborate inquiry into the context of the agreement is required. Which agreements should fall within this category, how it relates to the rule of reason approach and whether this is such a sharp division between the approaches have all been matters of great controversy but are not issues that should concern us in detail.

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So, in American practice, there are agreements which are *per se* unlawful, that is conclusively presumed to be unlawful, where no major inquiry is needed by the courts, and agreements which are subject to some form of rule of reason approach, which may involve balancing the pro- and anti-competitive effects of the agreement or, in other words, engaging in some form of economic analysis of the agreement. Often, under the rule of reason approach, the agreement will be found not to violate the Sherman Act. EC competition law does not, however, operate this way. According to Article 81(1) there are agreements, or, more precisely, clauses within agreements, which have the ‘object’ of restricting competition and these fall foul of the prohibition in Article 81(1) without much inquiry being needed.\(^\text{14}\)

There are also agreements which have the ‘effect’ of restricting competition and here there needs to be greater inquiry into the economic context of the agreement but, and this is the crucial point, it is not a full-scale economic analysis but concentrates on whether or not there are negative effects on competition. If there are, that agreement falls within the prohibition in Article 81(1) and the inquiry then moves to whether it can benefit from the exemption in Article 81(3), which is where the balancing of the pro- and anti-competitive effects will take place. The result of this approach, when combined with the objective of market integration and perhaps the Ordo-Liberal philosophy behind some of EC competition law, means that a wide range of commercial agreements fall to be regulated by EC competition law, even though, on a pure economic analysis, they do not cause competition problems. Much of the history of recent EC competition law involves an attempt, as we shall see, to focus enforcement activity on agreements which are of concern to the competition authorities while providing clear rules to ensure that neutral or beneficial agreements are not prevented.

**The concept of an undertaking**

European Community competition law only applies to ‘undertakings’, a word used not only in Article 81 but also in Articles 82 and 86, although there is no definition of the term in the Treaties. This is therefore a question relating to the scope of competition law, that is, to what extent are particular activities to be regulated by the rules on competition as opposed to other considerations? The question of whether or not an entity is or is not an undertaking is therefore an absolutely critical one for deciding whether or not there is a competition issue to discuss. Underlying this technical question is a much wider policy issue about how far we are prepared to see decisions in particular areas of social life determined by market forces and how far we want other considerations to predominate. For example, how far should arrangements relating to health care, welfare benefits, the regulation of professions and the regulation of sport be subject to the rules on competition law and how far should they be decided on other grounds? This is an issue that the European Courts have struggled with.

The basic definition of an undertaking was given by the European Court of Justice in the *Höfner* case (see Box 2.5).

The first point to notice about this definition is that the legal status of the entity is not relevant. Thus individuals may be undertakings,15 as may partnerships, cooperatives and other forms of private sector business organisations. The entity does not have to be profit-making and nor does it have to be part of the private sector: entities which are part of the state may be undertakings, provided that they engage in economic activity.16 The case-law is also clear that an entity does not have to be an undertaking for all of its activities; it may be subject to competition law in relation to some of its activities but not in relation to others.17 This is typically an issue in relation to public sector organisations and may not always be a straightforward question to answer. Thus, for example, Eurocontrol, a body which carries out a variety of services in relation to air traffic control, was held by the CFI to be an undertaking in relation to its provision of assistance to national administrations, but not in relation to its activities relating to technical standardisation. The ruling on the provision of assistance to national administrations was reversed by the ECJ.18

So the critical question is whether or not an entity is engaged in economic activity. Economic activity would seem to mean engaging in transactions on a market, that is, buying and selling goods and services, where the price is determined by the market.19 We should note first that simply paying money is not an indicator of a market transaction. When we pay taxes, we are paying money to an organisation but it is not a market transaction: there is no choice about whether or not to pay the tax and there is no direct reciprocity – we do not receive anything directly once the tax has been paid (although we do receive public services that have been financed out of taxation). Having made this point, it is clear that public bodies quite often finance their activities by levying charges on the consumers of their goods or services. Thus when we go to a local authority leisure centre to use the swimming pool we pay money; when local authority pest control officers are called in, they charge for their services. In the same way, charges may be made for the issue of licences and for the grant of planning permission. Intuitively, some of these charges look more like market transactions than others do.

19 See, for example, Case C-35/96 Commission v Italy [1998] ECR I-3851 at para. 36.
A charge for a licence or planning permission is determined by the public authority, on a variety of possible bases, but is not determined by the market, by the play of supply and demand. A charge for entry to a swimming pool or museum looks closer to a price: the local authority may have considered competing attractions and set the price to maximise income, although it may also have taken other matters into account – for example, the social effects of its charges. So we can see that, although the distinction in principle between market and non-market transactions can be clearly stated, in practice it might be difficult to assign a charge to one side of the line or another.

The problem has been exacerbated by the growing move towards liberalisation, privatisation and generally market oriented means of governance that have grown up in Western Europe since around the late 1970s. For our purposes, two trends can be discerned. The first is the growing tendency for states to entrust the provision of public services to private sector organisations, whether for profit or not for profit. Thus, for example, in the United Kingdom there are now a number of private providers of prisons and there have been plans for the private provision of probation services. Secondly, there has also been a tendency to introduce market mechanisms into the provision of public services and a reluctance to finance these services out of direct taxation but rather through contributions from users or beneficiaries. This has created a number of problems in relation to the application of competition law in what might loosely be called the social services area.

The exercise of public powers or official authority

Before looking at those cases, there is a general principle to be outlined: that the competition rules are not applicable to activities in the exercise of official authority, whether or not these are carried out by public bodies. Such an activity is:

'a task in the public interest which forms part of the essential functions of the State' and where that activity 'is connected by its nature, its aim and the rules to which it is subject with the exercise of powers . . . which are typically those of a public authority'.

This principle can be illustrated by two cases. In \textit{SAT v Eurocontrol},\footnote{AG Jacobs in Case C-67/96 \textit{Albany International v Stichting Bedrijfspensioenfonds textielindustrie} [1999] ECR 1-5751 at para. 314, quoting \textit{SAT Fluggesellschaft v Eurocontrol} at para. 30.} Eurocontrol, an international organisation, was responsible for air traffic control in Northern Europe and levied route charges on its users. SAT challenged the scale of those route charges under Article 82 and the question arose as to whether or not Eurocontrol was an undertaking. The ECJ held that Eurocontrol’s activities were connected to the exercise of powers relating to the control and supervision of air space which were typically those of a public authority and were not of an economic nature justifying control by competition law.\footnote{Ibid. at para. 30.} It is worth noting that in a subsequent case in relation to Eurocontrol there was a dispute as to whether all of its activities fell within the category of the exercise of public powers, although it was ultimately held that they all did.\footnote{Case T-155/04 \textit{SELEX Sistemi Integrati} v Commission [2006] ECR II-4797 (CFI), Case C-113/07P \textit{SELEX Sistemi Integrati} v Commission [2009] 4 CMLR 24 at paras 66–85.} In the \textit{Diego Cali} case,\footnote{Case C-343/95 \textit{Diego Cali} v SEPG [1997] ECR I-1547.} a private limited company (SEPG) carried out anti-pollution
surveillance activities for which it charged the users of the port. The charges levied by it were
challenged by one of the users as an abuse of a dominant position. The ECJ decided that the
tasks that SEPG was responsible for were tasks of the public interest which formed one of the
essential functions of the state. The point, which comes out clearly in the Advocate General’s
opinion, was that such surveillance activities could not be undertaken by private companies
on a market basis. The charges in this case were not levied as a result of SEPG clearing up any
pollution caused, which might well have been seen differently, but simply for the monitor-
ing function that it was carrying out.  

Health and social services

More problematic over recent years has been a number of cases arising in the area of social
security schemes and the provision of health care and associated activities. In relation to the
first two categories, the European Courts have developed the notion of ‘solidarity’ in order
to indicate what sort of operations should be excluded from the rules on competition. The
starting point for discussion is the case of Poucet and Pistre,26 where two people challenged
the requirement to make compulsory payments to a sickness and maternity scheme and an
old-age pension scheme. The question in the case was whether or not these schemes were
undertakings, that is, engaged in an economic activity. The ECJ held that they were not, as
they fulfilled an exclusively social function and were based on the principle of solidarity. The
indicators of solidarity were that, in the sickness and maternity scheme, the scheme was
financed by contributions proportional to the income of the persons making them, and there
was some provision for exemption from payments, whereas the benefits were identical to
all those who received them. In other words, there was an element of redistribution in the
scheme. In the old age scheme, the indicator of solidarity was that the contributions paid by
active workers financed the pensions of the retired workers. Finally, those social security
schemes with a surplus contributed to financing those with structural financial difficulties.
This can usefully be contrasted with another French case, FFSA,27 which involved a challenge
by insurance companies to the working of an optional insurance scheme for farmers. On a
preliminary reference from the French Conseil d’État, the ECJ held that this was an under-
taking. First, the scheme was financed on the basis of capitalisation, that is, the payments
made were collected together (capitalised) and invested in financial products and therefore
the amount of benefits paid out depended on both the contributions which were made and
the success or otherwise of the investments. The fund therefore carried out an economic activ-
ity in competition with life assurance companies. 28 Secondly, although there were elements
of solidarity and social purpose in this fund, they were limited and did not prevent the fund
from being an undertaking for the purposes of Article 81.

How difficult it is to decide whether an operation is characterised by solidarity or not,
can be seen by looking at the Albany case,29 which involved the question of the status of

25 Ibid. at para. 20 of the judgment and para. 43 of the AG’s opinion.
28 Ibid., para. 17.
29 Case C-67/96 Albany International v Stichting Bedrijfspensioenfonds textielindustrie [1999] ECR I-5751. See also
Cases C-180–184/98 Pavel Pavlev v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-6451 for a sim-
ilar decision in relation to supplementary funds organised on a professional basis.
supplementary Dutch pension funds, which had been set up by collective bargaining between the employers and the trade unions and affiliation to them was made compulsory by a decision of the Minister of State. Here it was argued that the compulsory affiliation to the scheme for particular sectors rendered it a public social security service, that it was non-profit-making and that it was based on solidarity, as all workers had to be accepted, pension rights could accrue even if workers were incapacitated and there was no link between the level of contributions and the benefits which would be received. The ECJ rejected this argument, pointing out that the funds worked on the basis of capitalisation and therefore the benefits depended on the financial results of investments. In addition, there were various possibilities for exempting undertakings that had provided equivalent pension schemes for their employees. So again, although there were elements of solidarity in the running of the scheme, this did not take it entirely outside Article 81, although the elements of solidarity were relevant to the question of whether or not they might justify the exclusive right to manage supplementary pension schemes: that is, could they benefit from the derogation in Article 86(2), a point which is discussed later in Chapter 8.

Controversy in this area came about in the United Kingdom through the judgment of the Competition Appeal Tribunal (CAT) in the Bettercare case. In this case the appellant provided nursing home and residential care in Northern Ireland under contract to the North and West Belfast Health and Social Service Trust and the Trust also provided its own residential care through directly owned care homes. The appellant complained to the Office of Fair Trading that the Trust had been in breach of the Chapter II prohibition in the Competition Act 1998, the equivalent to Article 82, basically through favouring its own operations. The initial question was whether or not the Trust was an undertaking for the purposes of competition law and the Director General of Fair Trading decided that it was not. Bettercare then appealed to the CAT, trying to get this decision reversed. The CAT held that the Trust was an undertaking because it was engaged in an economic activity on a market. First, there was a market for contracting out of residential provision; secondly the Trust was also active itself in providing residential accommodation through its own homes; and, thirdly, it received remuneration for the provision of its services. As a ‘cross-check’ on its approach, the CAT took the view that the allegations of anti-competitive conduct were the sorts of things that competition law was trying to prevent. The decision was thus remitted to the OFT for a second decision. The OFT subsequently decided that the Trust had not engaged in any abuse and that it did not have the jurisdiction to investigate the other public authorities engaged in the running of the NHS in Northern Ireland, which were responsible for the pricing policy of the Trust, as they were not undertakings.

What this case did do, however, was to suggest that a broader approach to the concept of an undertaking than had previously been applied in ECJ cases might be possible. Subsequently, the ECJ appears to have taken a different direction to the CAT and it would seem to be the case that Bettercare should not be regarded as an accurate statement of the law.

31 Ibid. at paras 196–201.
33 OFT, ‘BetterCare Group Ltd/North & West Belfast Health & Social Services Trust (Remitted case)’ (2003).
This comes out clearly in the FENIN case. Here an association which marketed medical equipment complained to the Commission that the Spanish Health Service had abused their dominant position by delaying payment for the medical goods. The Commission rejected the complaint on the grounds that the body running the Spanish health system was not acting as an undertaking. FENIN appealed this decision unsuccessfully to the CFI and from there onto the ECJ. The CFI took the view that purchasing goods, even in great quantities, did not, in itself, constitute activity on the market. In order to determine this, one had to look at the use to which the goods were put. In this case, the operation of the Spanish health service was operated on the principle of solidarity because it was funded by social security contributions and provided free of charge. Despite the fact that such an entity could wield considerable economic power, even resulting in a monopsony, it could not be categorised as an undertaking. The ECJ supported the CFI’s view that the activity of purchasing could not be disassociated from the use to which the goods were put.

A similar approach can be seen in a slightly earlier case which involved the question of whether German sickness funds which, under German legislation, determined the maximum amount payable by those funds for the costs of certain medicines constituted undertakings. The ECJ took the view that such funds fulfilled a purely social function and operated on the basis of solidarity. In particular, they were obliged to offer essentially identical benefits which did not depend on contributions from members, there was an equalisation of costs and risks between them and they were not in competition with private sector entities. Although there was some limited competition between them, this did not change the nature of their activities. However, the ECJ accepted that in principle the funds could also engage in economic activities and looked to see if this was the case in setting the maximum amounts but decided that this was not an economic activity.

Conclusions on the concept of an undertaking

What conclusions can we draw on the basis of this case-law? The test is whether or not an entity is engaged in an economic activity. In many cases, the answer to this question will be straightforward but the difficult cases involved those areas where the provision of public services is done using a mixture of public and private sector techniques, not falling clearly within the scope of official authority. The question to ask is whether the effects of the activity are those that competition law is meant to protect against, as this was effectively rejected in FENIN and AOK, nor whether in principle the activity could be carried out by private bodies, as almost any activity could be carried out by private bodies. The question is whether or not the activity is dominated by concerns of solidarity and, in deciding this, there are a number of indicators of solidarity. The question of whether or not a scheme is compulsory is important, but perhaps most important is the issue of capitalisation and the relationship of benefits to contributions. If there is an arrangement whereby contributions

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36 Although there was a question about charging non-Spanish nationals for services.
37 Ibid. at paras 37–40.
38 Ibid. at para. 26.
40 Ibid. at paras 51–65. And compare the Advocate General’s opinion.
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are invested and this funds the benefits received, this looks much more like an economic activity than one relying on solidarity because of the competition on the financial markets with other insurance companies. Conversely, if the benefits received are not tied to contribution rates – in other words, if those who are better off in some sense subsidise the worse off – this is an indicator of solidarity. Thirdly, if schemes with a surplus transfer resources to schemes in deficit, this is also an indicator of solidarity. Finally, the case-law indicates an unwillingness of the European Courts to extend the boundaries of competition law too widely and to allow other considerations to predominate in the area of health care, social provision and collective agreements between unions and employers.41

Undertakings as separate entities

We have seen how the definition of an undertaking is a difficult matter. In this section we examine the issue of when undertakings can be considered to be separate entities for the purposes of Article 81, which applies to only agreements between undertakings. Why this needs some discussion can be illustrated as follows. Companies these days organise themselves as corporate groups; there will be a parent company and the parent will have various subsidiaries. Company law within the United Kingdom says that each company is a separate legal entity from every other company in the group. Could agreements between them, therefore, be caught under Article 81 if all the other requirements were met?

Within Community competition law, the answer that has been given is that it depends on whether or not the companies concerned form one economic entity or two, or more, separate economic entities. This was established in the Viho case.42 This involved Parker Pens, an English company, which made writing equipment which it distributed throughout Europe through a mixture of independent distributors and its own, wholly owned subsidiaries. Parker’s distribution system prohibited exports between Member States and also did not allow the sale of Parker products to people outside the distribution system on the same terms as Parker’s subsidiaries and independent distributors. Viho was a Dutch firm that marketed office equipment and complained to the Commission that it was unable to receive the same terms as Parker’s subsidiaries and that it was forced to deal with the subsidiary established in the Netherlands, rather than being able to deal with the one that offered the best terms. Viho brought two complaints: one aimed at the independent distributors, the other at Parker’s subsidiaries, and it is only the second that we are concerned with here. The Commission rejected the complaint on the grounds that Parker and its subsidiaries formed one economic entity and that the subsidiaries had no freedom of action; not only were they wholly owned, but their marketing decisions were controlled by an area team of directors. Viho appealed to the CFI and then to the ECJ, both courts rejecting the appeal. The ECJ pointed out that Parker owned 100% of its subsidiaries and controlled their marketing and sales activities tightly. In those circumstances, the ECJ concluded that Parker and its subsidiaries formed ‘a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the

41 For trade unions and employees, see: Case C-22/98 Jean Claude Becu [1999] ECR I-5665 (employees are part of an undertaking); Case C-67/96 Albany International v Stichting Bedrijfspensioenfonds textielindustrie [1999] ECR I-5751 (collective employment agreements fall outside Article 81).

parent company controlling them.43 This was the case even though Parker’s policy, which consisted in dividing national markets between its subsidiaries, was capable of affecting the competitive position of third parties. The CFI made this point more clearly, saying that although the division of national markets might thwart the fundamental objective of the Common Market,44 nevertheless, this did not fall within the scope of Article 81.

Several comments can be made about this case. First, in principle, it is a correct decision as a parent company and a wholly owned subsidiary would not be competing against each other on the market so, in the absence of this arrangement, the market would not be more competitive. If there is a competition problem here, it should be addressed under Article 82. Insofar as these arrangements involved the independent distributors, the Commission decided that these did, indeed, breach Article 81 and led to the parties being fined.45 Secondly, this was an easy case because the subsidiaries were wholly owned, as have been other cases where this issue was raised, and tightly controlled. Indeed, the most recent decision of the ECJ has said that in the case of wholly owned subsidiaries there is a rebuttable presumption that the parent company exercises decisive influence over the subsidiary.46 What is not clear is at what point a subsidiary, which is not wholly owned, becomes an independent entity. The key question is whether or not it has real autonomy in its decision-making and this would seem to depend on the factual circumstances of the case. As Whish points out,47 the European Merger Control Regulation recognises the possibility in Article 3(2) that a minority shareholder may have the possibility of exercising decisive influence over the affairs of another undertaking, such as to constitute a concentration. It is, however, not clear that this is the same concept as the single economic entity idea. The CFI has, however, held that a shareholding of just over 25% did not justify the conclusion that the two undertakings formed one economic unit;48 and the Commission has held in two cases that holdings of around 50% in a joint venture meant that the two undertakings were separate from each other.49

Thirdly, the single economic entity doctrine is not confined to groups of companies. It may encompass the relationship between an individual and the companies he or she controls;50 this may also cover relationships between a principal and an agent51 and between a contractor and a sub-contractor.52 Fourthly, this doctrine has an important effect as regards enforcement because the behaviour of subsidiary companies may be imputed to their parent company for the purposes of determining liability and calculating fines under Article 81.53

43 Ibid. at para. 16.
44 Ibid. at para. 52.
46 Case C-97/08P Akzo Nobel v Commission, judgment of 10 September 2009, at para. 60.
52 This will depend on whether the agreement is vertical, in which case it falls under the block exemption for vertical restraints or horizontal, in which case see European Commission, ‘Guidelines on the applicability of Article 81 to horizontal cooperation agreements’ [2001] OJ C32/2 at paras 80, 81, 89 and 100. In addition, also see the European Commission, ‘Notice concerning its assessment of certain subcontracting agreements in relation to Article 81[1](1) of the EEC Treaty’ [1979] OJ C1/2.
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Agreements, decisions by associations of undertakings and concerted practices

Article 81 applies to only agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings. Each of these concepts requires some explanation and, in particular, the relationship between agreements and concerted practices needs exploration.

The idea of an ‘agreement’ is central to the enforcement of Article 81. At the beginning of any enforcement proceedings, the burden of proof is on the Commission to show that the undertakings accused have done particular actions.\(^5^4\) Given that undertakings will dispute findings of anti-competitive behaviour vigorously, it is important that the notion of an agreement is defined in a broad manner, which does not allow for technical defences to succeed. This is indeed the way that the case-law has developed. There is thus no need for the agreement to be legally binding, nor for it to be in written form; it can be a verbal agreement between the parties.\(^5^5\) The point has been put in general terms by the CFI (Box 2.6).

Nor does it matter if one of the parties has entered into the agreement reluctantly or with reservations. The case-law makes it clear that an undertaking may escape liability only if it makes it publicly clear that it is not taking part in an anti-competitive agreement.\(^5^6\) The undertaking cannot argue that although it participated in the meeting it did not give its express approval because failure to publicly distance itself constitutes tacit approval. Nor is it an excuse if the undertaking does not act on the agreement or has not taken part in all aspects of the agreement, or only a relatively minor part of it. Although this might affect the level of the penalty imposed, it does not affect liability.\(^5^7\)

The second issue arises from the fact that cartels may be complex arrangements, existing over a number of years, where the participants have had to make a number of decisions about how the cartel will be run, and the identity of the participants may fluctuate. Undertakings have argued that such arrangements should be considered as a series of agreements and that

\(^{5^4}\) Regulation 1/2003, Art. 2.
\(^{5^7}\) This sentence, and the preceding two, summarises Cases C-204–205, 211, 213, 217 and 219/00P Aalborg Portland A/s v Commission [2004] ECR I-123 at paras 81–6.

KEY DEFINITION

Box 2.6

Agreement

The concept of an agreement within the meaning of Article 81(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention.

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the Commission should therefore be obliged to prove the existence of each one, a formidable practical obstacle. The Commission’s response has been to refuse to draw a clear dividing line between the notion of an agreement and that of a concerted practice (discussed below) and to talk in terms of a continuing infringement, that is, interpreting the cartel as one overarching set of agreements or concerted practices for the period of its continuation (see Box 2.7). This approach has been endorsed by the European Courts, where it has been said:

in the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event, both those forms of infringements are covered by Article [81] of the Treaty.58


**KEY CASE EXTRACT**

**Box 2.7**

**Relationship between agreement and concerted practice**

Source: Electrical and Mechanical Graphite Products, Commission decision of 3 December 2003, Case C.38.359, para. 221:

However, it is not necessary for the Commission, particularly in the case of a complex infringement of long duration, to characterise conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement.

**Concerted practices**

Whereas the central idea behind an agreement is of a mutual concurrence of wills, the idea of a concerted practice goes wider. It is convenient to start with the ECJ’s definition in Box 2.8.

**KEY DEFINITION**

**Box 2.8**

**Concerted practice**

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

Source: Cases 48, 49 and 51–57/69 ICI v Commission (Dyestuffs) [1972] ECR 619 at para. 64.

Questions: What does practical cooperation mean? How do you prove it?
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One way of looking at this idea is that it aims to catch those situations where undertakings have been in contact with each other but there is insufficient evidence to prove the existence of an agreement. In other words, the idea is to catch a situation, for example, where undertakings signalled their future prices to each other and depended on their competitors to react to this information. This type of situation is more likely to arise in certain types of markets than others and can be labelled the ‘oligopoly problem’ (see Box 2.9). This is confirmed by the case-law of the courts which, whilst accepting that economic undertakers have the right to react intelligently to market conditions, this right of independent action:

does, however, strictly preclude any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.59

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**EXAMPLE**

**Box 2.9**

The oligopoly problem

Imagine a market where there are three manufacturers who produce homogeneous goods, using the same technology, the market is not expanding and there is no possibility of entry. Assume that consumers have perfect information about the price of the goods and that there are no costs to switch from one producer to another. Assume as our starting point that each good is priced at 1.0 and that the total market of 300 is divided equally amongst the three manufacturers (i.e. 100 each), producing a profit of 50, that is, 0.5 per sale. If one of the manufacturers reduces the price to 0.5, thus only making 0.25 profit per sale, they will gain all the market and boost their profit. However, we can also assume that the other manufacturers will match this price cut and the market will return to an equal distribution of market shares but with everyone having a lower profit level. (This is illustrated in the tables below.) From the point of view of the manufacturers, there is no incentive in this market to compete, as it just leads to lower profits. Agreeing to divide the market is, of course, contrary to competition law, but reacting intelligently to what your competitors do is not. A key issue therefore become transparency of pricing; if you know what your competitors are going to charge, you can align your prices on them. In some markets transparent pricing may be the norm – for example, supermarket shelf prices – in others it is not. The idea of concerted practices is to catch those situations where competitors are signalling or communicating their intentions to each other short of reaching an agreement but in a way that is not just normal commercial practice.

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We will see in Chapter 9, which also discusses the case-law in more detail, that the oligopoly problem is a very difficult one for competition policy to deal with, but we should note here that most of the concerted practices cases involve situations where there has been contact between undertakings and the issue for the Commission has been one of proof, rather than the question of how to deal with an oligopolistic market. For example, in the Dyestuffs case\(^60\) there were three price increases in 1964, 1965 and 1967 by the producers. The 1964 increase took place in January 1964 in Italy, the Netherlands, Belgium and Luxembourg and was extended to Germany on 1 January 1965, whilst on the same day an additional 10% increase was introduced on dyes and pigments in those countries not covered by the first increase. On 16 October 1967 there was an increase of 8% announced on all dyes by almost all the producers in Germany, the Netherlands, Belgium and Luxembourg. The French increase was 12%, but there was no increase in Italy. In its appeal against the Commission decision, ICI argued, in effect, that this was simply the behaviour that could be expected in an oligopolistic market. The ECJ rejected this argument, saying that the three price increases revealed progressive cooperation and that the behaviour of two undertakings which announced their intention to execute a price rise in advance allowed the other undertakings to observe the various responses and adapt themselves accordingly and these advance announcements allowed them to eliminate uncertainty.\(^61\) In this context, it is worth noting that the undertakings had met in Switzerland in 1967 in August and then announced a price rise in September, taking effect in October. The Advocate General’s opinion contains suggestions, notably in relation to the 1964 price increase, that there must have been contact before the increase was announced due to the similarity of instructions and the rapidity of action.\(^62\) The decision in the case has been criticised for too easily finding that there was cooperation between the parties and not studying the market sufficiently but this seems to ignore or play down the evidence of contact between the undertakings concerned.\(^63\)


\(^{61}\) Ibid. at paras 99–101.

\(^{62}\) Ibid. at p. 681.


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There is a useful contrast with a case that was decided almost 20 years later, known familiarly as Wood Pulp II. In this case the Commission had levied fines on 43 wood pulp producers, alleging breaches of Article 81. The Commission objected to a system of quarterly price announcements made to consumers which, it argued, was evidence of concertedation that had taken place at an earlier stage. Although the Commission had evidence of meetings and contacts between the parties, this evidence was excluded from consideration by the ECJ as the Commission was unable to specify which undertakings were affected by this evidence. So, insofar as the ECJ was concerned, the issue came down to whether the system of pre-announced quarterly prices was sufficient to constitute a concerted practice. The ECJ, on the basis of a specially commissioned experts’ report, took the opposite view to the Commission, finding that the parallelism of prices and the simultaneous announcements of prices were due to the market conditions, rather than coordination between the producers. The ECJ made the point that ‘parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct’. And in this case the market conditions provided such a plausible explanation.

The two cases can usefully be contrasted because in both of them are found parallel price announcements, an argument that the behaviour of the producers is due to the market condition, rather than coordination, and yet contrasting decisions of the ECJ. In part this is because of contrasting views of the market: in the Dyestuffs case the ECJ rejected the argument that the market was an oligopoly, whereas they accepted this, on the basis of independent reports, in the Wood Pulp cases. The other significant differences were that the Commission had evidence of contact in Dyestuffs but not in Wood Pulp and the differences in the price announcement procedures in the two cases, the latter coming down to the differences in the markets as in Wood Pulp the system of price announcements had grown up at the request of the purchasers, which tended to be large undertakings in contact with a number of producers and had long-term contracts. The upshot of this case-law is that it is very hard for the Commission to tackle oligopolistic markets via Article 81, although not in theory impossible.

We should note another aspect of the inter-relationship between the idea of an agreement and that of concerted practices. Once an agreement has been proved, there is no need for the Commission to show that any undertaking which is party to the agreement has taken any action in consequence of the agreement. As regards a concerted practice, logically it might be suggested that, since there is no agreement, it would be necessary for the Commission to show that the undertakings concerned have changed their behaviour in the light of the concerted practice. This would add another hurdle to the Commission’s task and, therefore, the European Courts have avoided the logical outcome by stating that, although in principle there should be subsequent conduct on the market caused by the concerted practice, once the Commission has produced the evidence of concertation it is for the undertaking to establish that this did not cause it to behave in the particular way in question.

The effect of the case-law is that what becomes important is not distinguishing between an agreement and a concerted practice but in trying to distinguish between collusive behaviour and parallel independent behaviour which can be explained by market conditions. The difficulty raised by the oligopoly problem, as discussed in Box 2.9 above, is that, in theory,
the outcomes of collusive behaviour and oligopolistic behaviour may be similar. Although
the theory of an oligopolistic market suggests this type of behaviour, in practice it would be
in undertakings’ interests to put in place mechanisms to ensure that they behaved in a non-
competitive way, if they felt that they could escape detection and sanction. There is thus an
incentive in these situations to, for example, share information or arrange meetings.

**Unilateral agreements**

It is worth explaining the so-called concept of unilateral agreements. Obviously, this concept
is a contradiction in terms, as we have seen that an agreement requires a mutual concurrence
of wills, that is, it cannot be unilateral (see Box 2.6 above). Nevertheless, this concept has
been used to refer to a particular policy issue, which has been worked out in the context of
the definition of an agreement. The issue has arisen in the context of a manufacturer’s
arrangements with its distributors, which may take the form of a distribution agreement
(as, for example, with new motor cars) or may be a series of individual contracts, although
the relationship may last over a number of years. These are, of course, vertical agreements. In
the context of a European-wide market, where the conditions of trading are different between
Member States, it is possible that the manufacturer may be able to charge different prices for
its goods in different Member States or ensure that its distributors charge different prices.
This, however, provides an incentive for those distributors in the cheaper Member States to
resell the manufacturer’s goods in the more expensive states because they will be able to make
an additional profit. From the manufacturer’s point of view this is undesirable, because it
reduces their profit overall and the distributors in the more expensive states will complain at
being undercut by other distributors. Economic analysis tells us that, as long as the market
for the manufacturer’s goods in each Member State is competitive, that is, there is sufficient
inter-brand competition, we should not be concerned about the manufacturer’s effort to
divide the market up along national lines; indeed, there may be good commercial reasons
for doing this. EC competition law tells us the opposite, however, as one of the overriding
policy objectives is to bring about the creation of a single market, which means that trading
conditions should be the same across Europe. It has been established, therefore, that agree-
ments which provide for absolute territorial protection are unlawful under EC competition
law.\(^{68}\) Manufacturers have sought to prevent parallel trading through means which do not fall
within the prohibitions of competition law, while the Commission has sought to prevent
them pushing this too far.

A good example of the issue came in the *Ford* case.\(^ {69}\) Here Ford had an agreement with its
distributors of new cars in Germany and the United Kingdom, amongst other countries. At
the time, prices for British cars were cheaper in Germany than in Britain and so a growing
number of British buyers bought their cars in Germany. Being concerned about the effect on
its British sales and distributors, Ford notified its German dealers by a circular that it would
no longer accept orders for right hand drive cars from them. The Commission took the view
that Ford’s decision was a breach of Article 81 because it reduced intra-brand competition and
erected barriers between national markets. Ford argued that this was a unilateral act on its
behalf, which therefore did not fall within Article 81. The ECJ did not accept this argument.

\(^{68}\) Cases 56 and 58/64 *Consten & Grundig* [1966] ECR 429.

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noting that these sorts of distribution agreements were normally concluded in order to govern their distribution over a number of years and, because not all technological developments are foreseeable, the agreements necessarily had to leave certain matters to be decided later by the manufacturers, which included the models to be delivered. Such a decision on the part of the manufacturer did not constitute a unilateral act; on the contrary, it was part of the contractual relations between the manufacturer and its dealers and therefore a breach of Article 81.70

This decision led to further court cases, and a line of Commission decisions, which were aimed at stopping manufacturers from erecting barriers to parallel trade, even though it was argued that the decisions were unilateral.71 A change in this area seems to have been brought about, however, starting with a relatively recent decision in the **Bayer** case.72 Bayer manufactured a drug, Adalat, used for the treatment of certain heart diseases, which it exported to France, Spain and the United Kingdom, among other countries. As a result of the particular policies adopted by the NHS, prices for Adalat were some 40% higher in the UK than in France and Spain, and so the French and Spanish distributors73 took advantage of this by reselling Adalat in the UK. Bayer wished to stop or discourage this practice, so it instituted a system whereby it accepted orders from the distributors only on the basis of their orders in the previous year, plus a 10% margin of increase. The Commission took the view that this action constituted an export ban and that it had been put into effect with the tacit acquiescence of the distributors, who aligned their purchasing practices to comply with Bayer’s ban. The Commission had no documentary evidence of an agreement and based its findings on the conduct of the distributors. The CFI disagreed with this analysis, and could not find any evidence of tacit acquiescence by the distributors and therefore was able to distinguish previous case-law. The Commission appealed this decision to the ECJ, which upheld the CFI’s ruling, stating as follows:

> it is true that the existence of an agreement within the meaning of [Article 81] can be deduced from the conduct of the parties concerned. However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by Article 8[1](1) of the Treaty may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of Article 8[2] of the Treaty. For an agreement within the meaning of Article 8[1](1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers.74

This case represents an important change in attitude by the European Courts, which was confirmed in the later **Volkswagen** decision.75 In this case, the motor car manufacturer had

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70 Ibid. at paras 20–1.
73 Referred to as wholesalers in the judgments and decisions.
74 Cases C-2 and 3/01 Bundesverband der Arzneimittel-Importeure v Bayer [2004] ECR I-23 at paras 100–2.
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issued a set of circulars exhorting its dealers in Germany to maintain price discipline, that is, not to advertise or sell them below the recommended retail price, over the price of Passats. The Commission took the view that these circulars should be read within the context of the distribution agreements and were therefore to be taken as an agreement, rather than a unilateral action. The problem here was not so much market partitioning, but resale price maintenance, which would also clearly be a breach of competition law. The CFI rejected the Commission’s argument, pointing out that the distribution agreement was a lawful agreement, whereas, in principle, the circulars were unlawful. It could not therefore be assumed, without more, that the distributors had agreed with an unlawful change in the contract. Since the Commission had no evidence as to whether or not the distributors had changed their conduct, this could not be considered to be an unlawful agreement. The ECJ did not agree with the CFI that the distribution agreement could not, in principle, allow action contrary to competition law. It did accept, however, that because the CFI had found that the distribution agreement only provided for non-binding price recommendations, and that there was no evidence of acquiescence by the distributors, the Commission had not established that there was an agreement.

What we can see in these recent cases is the European Courts limiting the Commission’s ability to use Article 81 to deal with issues relating to parallel trading in particular. This seems partly driven by a concern to protect the integrity of Article 81 and to suggest that parallel trading should be dealt with by other routes.

Decisions by associations of undertakings

It is quite common for undertakings to come together in trade associations for a variety of legitimate reasons, such as presenting the industry case to government, establishing common standards, discussing specialist issues, promulgating best practice, etc. Some of these issues may have nothing to do with competition in the market, but others may have such an effect. For example, establishing common standards in an industry can be seen as a means of equalising the quality of goods or services amongst competing undertakings and thus possibly limiting competition. Alternatively, it has been the case that certain trade associations have served as covers for price-fixing cartels. There is, therefore, a need for competition law to cover these sorts of arrangements, which are pretty common throughout the developed world.

There are two issues to discuss in this context: first, to what extent does the status of the trade association matter; and, secondly, what constitutes a decision for these purposes? As regards the first issue, the association does not itself have to carry out an economic activity, that is, it does not have to be an undertaking. It is sufficient that its membership is composed of undertakings. Nor is it relevant that the association may have a public law status of some sort, provided that it is the undertakings that are in control of the activities of the association, rather than the state. The borderline between whether a decision of an association is required by the state, and so outside Article 81(1), and whether the state simply allows such decisions, albeit subject to a measure of supervision, can produce some difficult problems in practice. In particular, professional associations, such as the Council of the Bar or the Law Society may

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26 H. Mercer, *Constructing a Competitive Order* (Cambridge University Press, 1995) in ch. 2 explains their working in Britain in the 1930s.

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be associations of undertakings for the purposes of the competition rules and therefore

decisions taken by them may be subject to competition law scrutiny.78

As regards what constitutes a decision for these purposes, it has been clearly established

by the courts that the decision does not have to be binding according to the rules of the

association; a non-binding recommendation can fall within Article 81(1), provided that it is

implemented by members of the association.79 Other expressions of policy by associations

may also fall under Article 81(1). Thus, the Commission has held that the rules of an associ-

ation may constitute a decision and that a certification scheme for cranes in the Netherlands

equally constituted a decision by an association of undertakings.80

An appreciable effect on competition

Although Article 81(1) simply talks about a ‘restriction on competition’, it has become clear

from the case-law that this restriction must have an appreciable effect on competition. The

point is made clearly in Völk v Vervaecke81 which involved an exclusive distribution agreement

between a German manufacturer of washing machines and a distributor in Belgium and

Luxembourg. The German company had less than 0.1% of the Community market and under

1% of the market in Germany, Belgium and Luxembourg. On a preliminary reference, the

Court held that an exclusive dealing agreement, even with absolute territorial protection,
could fall outside Article 81 for the following reason:

An agreement falls outside the prohibition in Article [81] 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.82

Having established the principle, the problem arises as to where one can draw the line and

how can this be done in a clear manner? The Commission has dealt with this through a series

of Notices on minor agreements, generally called the de minimis notices. The most recent

Notice is summarised in Box 2.10.

The Commission does, however, say that if agreements contain certain restraints, such as

price-fixing, limiting output or sales or allocating markets or customers, then it will not take

the view that these agreements escape Article 81(1).83 This does seem contrary to the view

taken by the Court in Völk but the best explanation seems to be that the Commission takes

the view that the Court’s decisions allow for a sliding-scale approach, that is, the more

serious the restriction of competition, the lower the market share the undertakings have

to have.84 Although this is potentially a sensible approach, it is not clear that it is one the

Courts have taken, preferring to see the question as a binary one: either the agreement has an


where the ECJ held that the General Council of the Dutch bar was an association of undertakings.


82 Ibid., para. 5/7.

83 Ibid., para. 11, which is more detailed than the text.

84 See A. Jones and B. Sufrin, EC Competition Law (3rd edn, Oxford University Press, 2008) at p. 188.
Agreements with no appreciable effect on competition

No appreciable restriction for:
- *Horizontal agreements*: if the combined market share of the parties does not exceed 10%.
- *Vertical agreements*: if the combined market share of the parties does not exceed 15%.
- *Networks of agreements*: if the combined market share is less than 5% and the networks cover less than 30% of the relevant market.

This does not apply:
- in the case of an agreement between competing undertakings if there is a provision which:
  - directly or indirectly fixes prices, shares markets or limits production, or
- in the case of an agreement between non-competing undertakings containing a provision which:
  - limits a buyer’s ability to determine its resale price, or
  - restricts a buyer operating at a retail level from selling to any end user in response to an unsolicited order (passive selling), or
  - restricts active or passive selling by the authorised distributors to end-users or other authorised distributors in a selective distribution network, or
  - restricts, by agreement between a supplier of components and a buyer who incorporates those components in its products, the supplier’s ability to sell the components as spare parts to end users or independent repairers not entrusted by the buyer with the repair or servicing of its products.


It is important to note as well that, even if the aggregate market shares exceed those stated in the Notice, this does not automatically imply an appreciable restriction on competition, as the Commission acknowledges in para. 2 of the Notice and has been decided in case-law.65

Perhaps the best way to view the Notice is as a statement of the enforcement priorities of the Commission and to see it within the new context of enforcement post Regulation 1/2003. The Commission’s view is that it should concentrate on the most serious offences or matters of general policy. Agreements which are around the thresholds of the *de minimis* Notice would not seem to fall into either of these categories and should be left to enforcement by national authorities.

competition authorities, which will have their own enforcement priorities. For example, the OFT’s administrative priorities suggest that before taking action the relevant potential consumer benefit needs to be assessed, the deterrent effect, the use of resources and the likelihood of success.\textsuperscript{87} One of the mitigating factors is whether or not an SME is involved. It is worth discussing, in this context, a series of decisions that the OFT took in relation to collusive tendering for flat roofs in 2004 to 2006. Although not strictly Article 81 cases, as they were decided under the Chapter I prohibition of the Competition Act 1998, they provide a useful indication of the OFT’s approach. Here there was a relatively large market for contract roofing, of which flat felt roofing was a subsection, but the market was very fragmented, being composed of numerous small firms. The OFT took action against a number of regionally based collusive tendering arrangements, even though they fell below the 10% threshold in the \textit{de minimis} Notice. Given the type of practices, collusive tendering, they were considered to have an appreciable effect on competition, whether or not they fell below the 10% threshold.\textsuperscript{88}

\section*{Restrictions on competition}

This is really the core question as regards the application of Article 81 – what constitutes a restriction on competition? The text of Article 81(1) does not give many signposts; it talks simply about agreements, draws a distinction between those with the object of restricting competition and those that have the effect of restricting competition and gives five examples of agreements which it sees as restricting competition. Agreements which restrict competition under Article 81(1) are prohibited and void under Article 81(2) unless they qualify for an exemption under Article 81(3) which involves, roughly, a weighing of the pro- and anti-competitive effects of the agreement. Therefore the interpretation given to Article 81(1) affects the operation of the entire Article. If Article 81(1) is interpreted widely and catches many agreements, then there must be a high amount of decisions taken under Article 81(3). If it is interpreted narrowly, so few agreements are caught, then there will be correspondingly less activity under Article 81(3). What is felt to be the correct answer depends on one’s judgement of two, related, matters. The first is whether the danger is in catching too many agreements that are either neutral or pro-competitive (a false positive or Type 1 error) and hence discouraging their formation, or in missing out too many agreements that are anti-competitive (a false negative or Type 2 error) (see Box 2.11 for a definition). The second issue is whether or not the person or body making decision under Article 81(3) can take those decisions efficiently and accurately. If the problem is false negatives, then a wide interpretation of Article 81(1) will be preferred but if the problem is seen as one of false positives, then a narrow interpretation will be preferred, particularly if there are worries about the Article 81(3) decision-maker.

\textsuperscript{87} OFT, ‘Competition prioritisation framework’ (2006).
Historically, what happened is that the European Commission took a broad view of the notion of restriction of competition, harking back to the Ordo-Liberal influences in European Community competition law (discussed in Chapter 1) and a concern with market integration, and started from the assumption that any restriction on the commercial freedom of an undertaking was a restriction on competition. If an agreement was considered to restrict competition this was not the end of the matter, as it would be finding that an agreement is anti-competitive when it is not.

In the context of a primary concern with the creation of a common market and the beginnings of a European competition policy, this approach made some sense, because it gave the Commission jurisdiction over a wide range of agreements and, under the original procedural framework, required undertakings to notify agreements to the Commission, so that it could scrutinise them for compatibility with Article 81.

Although on a policy basis this approach made some sense, it also created immense practical difficulties because the Commission was unable to process the number of notifications received and take Decisions on them (that is, legally binding Decisions under Article 230 EC). In order to try and deal with this problem, as well as trying to dispose of cases informally, general rules were created for categories of agreements, what are known as block exemptions, but these were in turn criticised for being too formalistic and ineffective. In the face of this mounting criticism the Commission has, since the late 1990s, revised its approach to competition policy culminating, in procedural terms, in Regulation 1/2003. The Commission has, however, also altered its approach to the assessment of a restriction of competition, moving away from a jurisdictional approach, to one which examines the agreement in its economic context (Box 2.12):

Box 2.11

**Type 1 and Type 2 errors**

These terms derive from statistics and are commonly used in the competition law world.

**Type 1 error**: a false positive, that is, assuming that there is a significant difference in a sample or population when this is not the case. In competition law, it would be finding that an agreement is anti-competitive when it is not.

**Type 2 error**: a false negative, that is, assuming that there is no significant difference in a sample or population when this is the case. In competition law, it would be finding that an agreement is not anti-competitive when it was.

**Questions**: What type of error do you think is more damaging for competition law enforcement? Why? What implications does this have for the design of the rules?

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It is important to note the first stage of this assessment: the effect of an agreement must be compared to the context within which competition would occur in the absence of the agreement (sometimes referred to as the counter-factual). From a student’s perspective, a second important point is that Commission decisions prior to around 1999 may be an unreliable guide to how they will approach decisions at the moment. We should also note that the attitude of the European Courts seems to have shifted over time, although it was never entirely clear that they took the same approach to the interpretation of Article 81(1) as did the Commission; indeed, this was the basis of much of the criticism of Commission practice.

Having said all this, it is worth considering what would be the best approach to interpreting a ‘restriction of competition’? There is a tension between the need for legal certainty and the requirements of economic analysis. If one values legal certainty, one wants clear rules, which state whether or not an agreement is caught by Article 81 and, if it is, how it will be treated. If concerned with accurate economic analysis, one will want to examine agreements on a case-by-case basis in their economic context and make an assessment that way. Economic analysis also tells us that, in general, horizontal agreements are likely to be more damaging to competition than vertical agreements and therefore the latter should be treated more sympathetically. This is not, however, a distinction which can be found within Article 81(1) and the suggestion that it should be read in was rejected by the ECJ at an early stage.\textsuperscript{90} Nor indeed would a rigid categorisation be helpful as it is possible to accomplish the same commercial ends through a variety of means and the choice adopted by undertakings should not be determined by the legal treatment on the basis of a formal classification. This was one of the criticisms of the block exemption system, which was originally based on setting up exemptions for categories of agreements. What this suggests is that the best approach will be a compromise: there should be clear rules identifying agreements that are obviously anti-competitive, some clear rules for excluding agreements that do not raise competition concerns, such as the \textit{de minimis} rules, and then a middle ground, preferably with some sort of filtering system so that not all cases are subjected to an intensive and time-consuming scrutiny. There needs to be

\textsuperscript{90} Cases 56 and 58/64 Consten & Grundig [1966] ECR 429.
flexibility in the system, so that the substance of the rules can be reviewed periodically, in case it is felt that, for example, agreements which were once thought to be obviously anti-competitive might be treated more leniently.  

In US antitrust law, historically the solution was to distinguish between agreements which were considered *per se* unlawful, that is, requiring no inquiry into their anti-competitive effects (they were presumed to be harmful), and those which were subject to a rule of reason test, that is, balancing the pro- and anti-competitive effects of the agreement. Over the years, whether a particular type of agreement was *per se* illegal or not has been reviewed in cases and some have been moved from this category to a rule of reason inquiry. At the same time, there have been attempts to develop a structured rule of reason inquiry, that is, to find a somewhat less burdensome form of inquiry for the court to undertake. So US antitrust law has always had a clear category of agreements which are anti-competitive and not much inquiry is needed, legislative exemptions from the antitrust rules, but a continuing debate over how to deal with agreements which need deeper inquiry because a full rule of reason inquiry is a very unwieldy matter for a court.

Under current EC competition law, a similar structure can be discerned. There is a category of agreements which are held to be in breach of Article 81(1) without much inquiry being needed: those with the object of restricting competition, which are discussed below. Having said this, recent case-law creates some uncertainty and there is no obvious means of reviewing the content of this category. As can be seen from the discussion of appreciability above, there are some reasonably clear exclusions from the ambit of Article 81(1) and, as will be seen in Chapter 10, some reasonably clear general exemptions for, in particular, vertical agreements. The greatest controversy arises in the middle ground over those agreements which have the effect of restricting competition, where it is clear that some form of inquiry into the effects of the agreement is needed, but it is not clear just what this entails. In particular, it is not clear to what extent, if at all, the decision-maker in an Article 81(1) case must balance the pro- and anti-competitive effects of an agreement before reaching a decision on whether or not the agreement restricts competition. An additional problem is that EC competition law has evolved from a model where almost all agreements were seen as, initially, being anti-competitive, there were few clear rules excluding agreements and the filtering and inquiry system did not work in procedural terms. This has left an awkward legacy of cases and decisional practice which are difficult to reconcile with the apparent aims of the system going forward.

### Agreements with the object of restricting competition

Article 81 draws a distinction between agreements with the object of restricting competition and those that have the effect of restricting competition. It is convenient to deal with agreements which have the ‘object’ of restricting competition first. Whether or not an agreement has the object of restricting competition is determined not by the intention of the parties, although the intention of the parties may be taken into account, but by examining the aims of the agreement in the light of the economic context of the agreement. The restriction of competition may be direct or indirect. In the *General Motors* case, in order to prevent the

91 For example, the current US Supreme Court case looking at whether the rules on retail price maintenance should be relaxed: *Leegin Creative Leather Products, Inc.* v *PSKS, Inc.* 551 US 877 (2007).
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Export of new cars from the Netherlands, General Motors instituted, among other measures, a bonus system which meant that sales bonuses were not applied to export sales. This was seen as having the object of restricting competition, albeit in an indirect manner because it did not prevent the transaction, simply made it less attractive. If it is found that the object of the agreement is to restrict competition, then there is no need to go further and show that there have been concrete effects in the market; the agreement is taken to be restrictive or distorting of competition by its very nature. Furthermore, the fact that the restriction of competition is not the sole objective is irrelevant; an additional legitimate objective will not save the agreement. As the CFI has put it:

Once it has been established that the object of an agreement constitutes, by its very nature, a restriction of competition, such as a sharing of clientele, that agreement cannot, by applying a rule of reason, be exempted from the requirements of Article 81(1) EC by virtue of the fact that it also pursued other objectives, . . .

The Commission’s view of the justification underlying this category is given in Box 2.13.

KEY LEGAL PROVISION

Object of restricting competition

Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in the light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purpose of applying Article 81(1) to demonstrate any actual effect on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules.


Question: Can you think of examples of restrictions that fit this description?

In order to determine whether or not an agreement has as its object the restriction of competition the Commission has said that one must consider the agreement’s content and its objective aims. In addition, it may be necessary to consider the context in which it is applied and the actual conduct and behaviour of the parties on the market. The Commission goes on to say that non-exhaustive guidance on what constitutes a restriction by object can be found in block exemption regulations, notices and guidelines and that anything identified as a hard-core restriction will generally be found to constitute a restriction by object. In terms of horizontal agreements, the Commission states that restrictions by object include price-fixing, output limitation or sharing of markets and customers. As regards vertical agreements,

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94 A recent example is Case C-209/07 Competition Authority v Beef Industry Development Society [2009] 4 CMLR 6 at para. 16.
restrictions by object include fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales. In principle, all such agreements are eligible for an individual exemption under Article 81(3) but the Commission is very unlikely to give such an exemption.

Case-law and Commission guidance on what sort of agreements have the object of restricting competition gives the list in Box 2.14. The list is interesting because it includes what are usually considered the hard-core cartel offences, such as price-fixing, market sharing and output limitations, as well as absolute territorial protection, which can be seen as an issue peculiar to European Community competition law. This is not, however, a fixed list as the ECJ has said that the examples in Article 81(1) do not constitute an exhaustive list.

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**EXAMPLES**

Box 2.14

**Provisions with the object of restricting competition**

**Horizontal agreements with the object of restricting competition**

- To fix prices [81(1)(a)]
- To share markets and customers [81(1)(c)]
- To limit output [81(1)(b)]
- To limit sales
- To exchange price information

**Vertical agreements with the object of restricting competition**

- To fix minimum resale prices
- To impose export bans/absolute territorial protection

**Questions:** To what extent do these provisions always have anti-competitive effects? Can you think of any legitimate reasons for engaging in these practices?

Most of these categories are relatively straightforward, although there have been instances where both the Commission and the Courts have been prepared to accept that certain restrictions are not restrictions by ‘object’. For example, in the Visa case, the European Commission considered that an agreement containing a clause to fix a multilateral interchange fee paid by banks within the Visa system did not have as its object the restriction of competition. By contrast, in its first effort at dealing with the same issue in relation to Mastercard, the OFT took the view that such a multilateral interchange fee could have been characterised as a

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97 Ibid., para. 23.
100 Adapted from Whish (n. 47) at p. 120.
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restriction by object, even though it dealt with it as a restriction by effect, although this
decision was subsequently abandoned by the OFT after challenge in the CAT.102 Equally, in
Erauw-Jacquery,103 the plaintiff, an owner of various intellectual property rights relating to cer-
tain seeds, authorised the defendant to propagate and sell those seeds in Belgium. In relation
to a certain class of seed, the contract provided that the defendant was prohibited from
exporting that seed, without the permission of the plaintiff – in other words, something that
looks like an export ban. The ECJ, recognising that there may have been considerable financial
investment in the development of the seed and that the breeder of the seed should be able to
protect themselves against improper handling of the varieties of seed and could therefore
place such restrictions in a contract, said that such a clause fell outside of the scope of the
prohibition in Article 81(1).104

More controversial has been the approach of the CFI in the GlaxoSmithKline case.105 Here
GlaxoSmithKline (GSK), a drugs manufacturer, had entered into contracts with its distribu-
tors which aimed to prevent parallel trade in its pharmaceutical products, essentially by fixing
different prices for the drugs, depending on whether or not they were going to be used in the
Spanish health system or not. In other words, drugs to be used only in the Spanish health
system would benefit from a lower price, while those which could be used elsewhere would
be charged at a higher price, thus discouraging parallel trading. The Commission took the
view in its decision that this was the equivalent of an export ban or a method of impeding
parallel trading and was therefore a restriction of competition by object. The CFI took the
view that, although in principle such agreements had the object of restricting competition,
there needed to be more analysis. According to the CFI, the purpose of Article 81(1) was to
prevent undertakings from reducing the welfare of the final consumer of the products in ques-
tion. Although the analysis could be abridged when the clauses of the agreement revealed an
alteration of the conditions of competition in themselves, that would need to be supple-
mented where this was not the case. In particular, the CFI interpreted Consten & Grundig106 as
a case where the ECJ had carried out an economic analysis of the effects of the agreement,
abridged but real, as they put it, during the course of which it became apparent that the pur-
pose of the agreement was to eliminate any possibility of competition at the wholesale level.
In the context of GSK’s case, the CFI came to the conclusion that the prices of drugs depended
on the national regulations relating to their prices which were controlled by the public
authorities and that it was not obvious that the attempts to restrict parallel trade damaged the
final welfare of consumers. To put it another way, although the clauses were intended to pre-
vent parallel trade, it was not obvious that they would do so. The CFI went on to consider
whether or not the clauses had the effect of restricting competition and held that they did.

The case is controversial because it takes an approach to agreements that are intended to
prevent parallel trade which is very different from that taken in previous court and Commis-
sion decisions and the Commission has appealed this part of the decision.107 Although this

102 Office of Fair Trading, ‘Investigation of the multilateral interchange fees provided for in the UK domestic
rules of Mastercard UK Members Forum Limited’ (2005) at paras 389–93; Mastercard UK Members Forum v
104 Ibid., paras 10–11.
106 Cases 56 and 58/64 Consten & Grundig [1966] ECR 429.
107 Cases C-501 and 513/06P.
case represents a departure from previous interpretations, it can perhaps be reconciled with previous case-law as an example of taking seriously the idea of examining the aims of the agreement in the light of its economic context and considering what the state of competition would have been like without the agreement. This does not require a detailed analysis because, even if the agreement does not have the object of restricting competition, it may have the effect of restricting competition, and this will require a detailed analysis, as will be seen below. However, the Advocate General, in her opinion on the appeal, took the view that the CFI’s approach was legally incorrect, in part because the wording of Article 81(1) did not mention detriment to the consumer and also because the assessment of consumer benefit was mainly due to be done under Article 81(3).

**Agreements which have the effect of restricting competition**

For many agreements, therefore, the critical question will be whether or not the agreement has the effect of restricting competition. The starting point for any such investigation is to compare the market with the agreement against the market without the agreement (the counter-factual). The issue of effects is not confined to actual effects of the agreement; potential effects of the agreement must also be taken into account. The approach that should be taken was summarised in the *European Night Services* case:

> ... in assessing an agreement ... account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned ...

What this does not tell us, however, is whether what should be assessed is the net effects of the agreement, that is, the pro-competitive effects netted off against the anti-competitive effects, or whether it is sufficient to find that the agreement has some, or any, anti-competitive effects and then to do any netting off in the context of an inquiry under Article 81(3). Very generally, this has been characterised as the question of whether or not there is a ‘rule of reason’ in the interpretation of Article 81(1) and it is possible to point to a number of cases where the European Courts seem to be balancing the pro- and anti-competitive effects of particular agreements.

The effect of adopting such an approach would be to exclude more agreements from the scope of Article 81(1) because, after analysis, it would be found that their overall effect was pro-competitive and, arguably, to give more power to the Courts to review the Commission’s characterisation of the agreement, as they operate some degree of judicial restraint when reviewing decisions under Article 81(3). It is not at all clear that the adoption of such an approach would improve the enforcement of EC competition law. American commentators

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109 See paras 102–18 of the opinion for the full discussion.


agree that, 'it has become something of a commonplace that rule of reason antitrust violations are almost impossible to prove'\(^{112}\) and that one of the major difficulties created by this approach is that it mandates a potentially huge, unfocused inquiry which would tend to end with the conclusion that the agreement is legal.\(^{113}\) Arguably, the deficiencies in the rule of reason approach led to American courts adopting an expanded view of *per se* violations, which, if it happened in the European context, would run against the objectives of rule of reason proponents. Finally, within modern American case-law the strict distinction between rule of reason analysis and *per se* violations has been blurred and the American courts appear to be applying more limited and structured approaches rather than the full-blown rule of reason inquiry as described by Whish and Sufrin.\(^{114}\)

Under the older approach of the Commission and the existing procedural arrangements, the issue of a rule of reason approach generated a large amount of controversy. Much of the heat and interest has been taken out of the debate for three reasons: first, the procedural changes under Regulation 1/2003, which mean notification is not compulsory and the Commission no longer has a monopoly over Article 81(3) decisions; secondly, the new block exemptions cover a wider range of agreements and, in practice, it is more important to decide if an agreement benefits from an exemption, rather than worry about the Article 81(1) issue; and, thirdly, the CFI has, when asked explicitly about the rule of reason approach, delivered a clear negative answer. This last point can be illustrated by the *Méropole* case.\(^{115}\) This case involved a joint venture set up by a number of French television companies and companies involved in telecommunications and cable networks with the object of broadcasting programmes by satellite or cable on a pay-per-view basis, primarily in competition with one major undertaking, Canal+. The agreement provided, among other things, that, for a period of ten years, the companies involved in the joint venture would not become involved in competing companies (a non-competition clause), that the joint venture would be given first refusal on any special interest programmes that the companies involved in the joint venture had control over (the special interest clause) and that certain general interest channels were to be broadcast exclusively by the joint venture (an exclusivity clause). This agreement was notified to the Commission, which decided that there were no grounds for action in relation to the non-competition clause for three years and that the other two clauses would be exempted under Article 85(3) for a period of three years. The parties challenged the decision in relation to the special interest clause and the exclusivity clause on the grounds that the Commission should have applied a rule of reason analysis and, if it had done so, it would have found that the clauses did not restrict competition but actually encouraged it, by allowing a new operator to gain access to a market which, until then, had been dominated by a single operator, Canal+. The CFI very clearly rejected this argument (see Box 2.15) and it can be seen that one of the main reasons for rejecting the rule of reason approach is because of the division in Article 81 between paras (1) and (3) and the CFI’s view that a comprehensive look at the pro- and anti-competitive effects of the agreement should take place only under Article 81(3).

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RESTRICTIONS ON COMPETITION

How then, should this inquiry be conducted? As noted above, the first stage is the counter-factual: what would the competitive situation be without the agreement in question? As also noted above, the Commission draws a distinction between the effect of the agreement on inter-brand and intra-brand competition. In deciding whether or not the inter-brand competition is affected, it is necessary to see if the agreement would have restricted actual or potential competition that would have existed without it. Thus, the Commission gives the example of where two competing suppliers agree not to sell their products in each other’s home state. Here the agreement clearly has the effect of restricting actual or potential competition in the market. As regards intra-brand competition, the question is whether or not actual or potential competition would have existed in the absence of the restraints contained within the agreement? So, for example, where a supplier restricts its distributors from competing with each other, then this could lead to a restriction of actual or potential competition, for example, through resale price maintenance. However, in regard to intra-brand competition, the Commission points out that certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature.

116 In van den Bergh [n. 115] the phrase was ‘not accepted.’
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How this inquiry is structured was discussed in the Delimitis case, which involved beer supply agreements for pubs in Germany and can usefully be contrasted with the views of the European Commission (see Box 2.16) as expressed in their Guidelines on the application of Article 81(3) of the Treaty. There is a fair amount of common ground here; indeed, they look to be asking very similar questions, although the Commission makes it clear that what it is really looking for are some signs of market power, albeit less than might be found in an Article 82 case. As the Commission puts it, ‘[the agreement] must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability’.119 Furthermore, the Commission states: ‘Negative effects on competition within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.’120 What is important to remember is that this inquiry is not a case of balancing the anti-competitive effects of an agreement against its pro-competitive effects. All that the

KEY CASE EXTRACT

Determining the effect of an agreement: the ECJ and the European Commission

ECJ

Source: Case C-234/89 Stergi Delimitis v Henniger Brau [1991] ECR I-935, paras 16–26:

. . . the relevant market must first be determined:

What are the possibilities for entry into the market?
What are the conditions of competition on the market?
What is the effect of the individual agreement in issue?

European Commission

Source: Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/8 at para. 27:

Define the market and assess:

Nature of products
Market position of parties
Market position of competitors
Market position of buyers
Existence of potential competitors
Level of entry barriers
Effect of the agreement in issue.

Questions: What sort of inquiry is needed in this context? How easy is it to conduct this inquiry? Are you inevitably balancing the pro- and anti-competitive effects of an agreement in such an inquiry?

119 Ibid. at para. 24.
120 Ibid. at para. 25.
competition authorities should be concerned with in this phase of an investigation is whether or not the agreement may have negative effects on competition in the market. If that is found to be the case, then the question of whether or not there are any positive benefits from the agreement which outweigh the negative effects should be dealt with under Article 81(3) or via the route of a block exemption. If the agreement does not have any negative effects – in other words, is at least neutral – then it escapes the control of competition law entirely.

The difficulty with the analysis presented above is that, although arguably logical, it does not seem to be entirely consistent with practice of the European Courts, in particular the ECJ, something which was recognised in passing by the CAT. In a number of cases the Courts have decided that particular agreements, or restrictions within those agreements, do not fall within the prohibition contained in Article 81(1) and seemingly what has been done is some rough and ready balancing of the pro- and anti-competitive effects of the restriction.

This can be illustrated, first, by a series of cases where the European Courts have been prepared to hold that certain restrictions in an agreement were necessary in order for the undertakings concerned to be willing to enter the market. Or, to put it another way, in the absence of the agreement, there would have been less competition in the market for those particular goods or services. This point is best illustrated by the Nungesser case, where a French undertaking granted an open exclusive licence to a German undertaking to produce certain new seeds in Germany. The terms of licence included an obligation on the French undertaking and anyone deriving rights from it not to licence anyone else in Germany to produce the seeds and not to import seeds it, or anyone else it had licensed, had prodused into Germany. In other words, the idea behind these restrictions was to make the German undertaking the sole distributor of these new seeds in Germany. The ECJ concluded that this part of the licence was not in breach of Article 81(1):

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\ldots \text{in the case of a licence of breeders’ rights over hybrid maize seeds newly developed in one member state, an undertaking established in another member state which was not certain that it would not encounter competition from other licensees for the territory granted to it, or from the owner of the right himself, might be deterred from accepting the risk of cultivating and marketing that product; such a result would be damaging to the dissemination of a new technology and would prejudice competition in the community between the new product and similar existing products.}\]

Perhaps, to put it another way, these restrictions were necessary, otherwise there would have been no new entry into the market or, as was said in an earlier case, ‘it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking’. More recently something like this approach seems to have been applied in the O2 case. Here, in order to provide third generation (3G) mobile phone services, O2 had entered into an agreement with one of its competitors in Germany (T-Mobile) that it could have roaming rights on T-Mobile’s network. In other words,
it was able to introduce 3G services without having to construct its own network. The Commission examined the agreement and decided that, although Article 81(1) applied, it would grant an exemption for a limited period of time under Article 81(3). O2 challenged this decision, arguing that there was no restriction of competition and that the factual situation had been insufficiently analysed. The CFI made it clear that it was not engaged in balancing the pro- and anti-competitive effects of the agreement and that what was required was an examination of the effect of the agreement on existing and potential competition in the absence of the agreement. The CFI said that the examination of competition in the absence of an agreement appeared to be particularly necessary as regards markets undergoing liberalisation or emerging markets, as in the case of the 3G mobile communications market, where effective competition may be problematic owing, for example, to the presence of a dominant operator, the concentrated nature of the market structure or the existence of significant barriers to entry. The CFI concluded that the Commission had made an insufficient examination of the competitive situation without the agreement and had decided too readily that O2 would be able to enter the 3G market without the roaming agreement and therefore annulled major parts of the decision granting an exemption. The problem with this case, and the others that seem to fall into this category, is that they seem to involve some form of assessing the pro- and anti-competitive effects of an agreement, despite the protestations of the CFI. Having said that, it seems that Faull and Nikpay are correct in saying that this balancing approach is only likely to apply in clear-cut cases and also in highlighting that the level of analysis applied in these cases by the European Courts is rather superficial.

Ancillary restraints – the commercial context

The second area where there appears to have been some balancing going on is those cases where there are clauses which are restrictive of competition, but the courts have not been prepared to find a breach of Article 81 because they are necessary for the implementation of the agreement, often referred to as ancillary restraints. The Commission’s understanding of the doctrine is set out in Box 2.17.

**KEY DEFINITION**

**Box 2.17**

Ancillary restraints

In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it.


To what extent there is such a doctrine and how wide it is, is a matter of some controversy amongst the commentators. Whish sees the cases as falling within a concept of ‘commercial ancillarity’, which is wider than the ancillary restraints doctrine as defined by the

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127 Id. at para. 69.
128 Ibid. at para. 72.
RESTRICTIONS ON COMPETITION

Commission.130 Bellamy and Child seem, implicitly, to agree with Whish, listing a number of cases dealing with restrictions which fall outside Article 81(1) and having a separate discussion of ancillary restrictions, which they regard as a concept which is ‘not always easy to apply’.131 Faull and Nikpay reckon that the concept ‘raises more questions than it answers’ and is of limited practical use because of the paucity of case-law in this area.132 It is, nevertheless, worth presenting the cases under this heading in order both to illustrate the narrow version of the doctrine and to see the extent to which the Courts may have gone further.

The basic idea behind the ancillary restraints doctrine can be illustrated by looking at the Remia case.133 Here a subsidiary of a health and baby food manufacturer was sold to an individual and the sales agreements contained clauses which protected the purchaser against competition from the vendor on the same market for ten years after the transfer. There were further promises by the vendor to ensure that the purchasers of another subsidiary would not engage in competition in this market for a period of five years. The agreement was notified to the Commission who took the view that the non-compete obligations were excessive and not eligible for exemption. The applicants appealed to the ECJ arguing, among other things, that Article 81(1) did not apply to these clauses. The ECJ held that, if the clauses did not exist, then the agreement for the transfer of the undertaking could not be given effect because of the threat of the vendor winning back his former customers. Therefore, such clauses contributed to the promotion of competition by increasing the number of undertakings on the market in question. This comment by the ECJ depends on an assumption that the vendor would have exited the market in the absence of a sale. If an undertaking is sold the number of undertakings on the market does not increase if the vendor exits the market: it remains the same. The number has the potential to increase if, after the end of the non-compete clause, the vendor re-enters the market. The Court went on to say that such clauses must be necessary and strictly limited in their duration and scope and that, in this case, the four-year limitation placed by the Commission on the promises in the clauses was acceptable. In one sense, this is a relatively easy case, because without non-compete provisions the transfer of businesses could not take place and it would seem obvious that such a transfer does not restrict competition on the market, it merely changes the identity of the players.

A more difficult issue was raised in the context of franchising and dealt with in the Pronuptia case, which arose out of a contractual dispute between a franchisor and franchisee and resulted in a reference for a preliminary ruling to the ECJ.134 The contractual provisions in issue did four things, according to the Court: first, they placed restrictions on the franchisee’s use of know-how, information and assistance she had obtained from the franchisor; secondly, they also placed certain restrictions on the franchisee relating to the identity and reputation of the network, such as allowing advertising only with the franchisor’s consent; thirdly, there were territorial restrictions placed on the franchisee; and, finally, there were provisions relating to price recommendations. The Court took the view that, in general, franchising arrangements did not interfere with competition, although their compatibility with Article 81(1) would depend on the provisions within the agreement and the economic context. Having said that,

130 Whish (n. 47) at p. 126, note 405.
131 Bellamy and Child (n. 108) at para. 2.113; paras 2.088–2.093 contain the broader list.
132 Faull and Nikpay (n. 108) at para. 3.213.
it decided that provisions which were strictly necessary to ensure that the franchisor's know-how and assistance did not benefit competitors and were not a restriction of competition. Nor were provisions which were strictly necessary for maintaining the identity and reputation of the network identified by the common name or symbol. Provisions which, however, shared markets between the franchisor and franchisees or between franchisees did constitute restrictions on competition. Price recommendations were not a restriction of competition, so long as there was no concerted practice between the franchisor and the franchisee or between the franchisees for the actual application of such prices.135

One of the more controversial cases in this area is Gøttrup-Klim, a case involving a Danish agricultural purchasing cooperative.136 This cooperative (DLG) had an objective, among other things, to provide its members with farm supplies. A number of members were dissatisfied with the operation of the cooperative, so they set up a rival organisation which began to offer an alternative for the purchase of certain supplies. As a result DLG changed its membership rules essentially in order to ensure that its members could not continue to be members of the competing cooperative and obtain supplies from it in preference to those provided by DLG. In consequence, a number of members were expelled from DLG and challenged this expulsion in a Danish court, which referred the question, among others, as to whether or not these new rules were compatible with Article 81(1) to the ECJ. The ECJ took the view that assessment of the rules could not be conducted in the abstract; it would depend on the particular clauses and the economic conditions prevailing at the time. It pointed out that, in a market where prices varied according to the size of order, a purchasing cooperative might constitute a significant counterweight to the contractual powers of large producers and make way for more effective competition. Dual membership of competing cooperative associations could jeopardise the proper functioning of the cooperative and its contractual power in relation to large producers. A rule prohibiting dual membership was therefore not necessarily a restriction on competition and might even have beneficial effects on competition. Nevertheless, it was also possible that such a rule could have adverse effects on competition so, in order to escape the Article 81(1) prohibition, the rules must be limited to what was necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers. The ECJ went on to assess whether the rules in issue were necessary and reasonable and therefore not a restriction on competition. This assessment of the rules does seem to be some form of balancing the anti-competitive effects of the restrictions against pro-competitive effects (note the reference to beneficial effects on competition) in the context of the ECJ taking a favourable view of the operation of such cooperatives, by comparison with collective exclusive dealing. It is also possible to interpret the case as an application of the ancillary restraints doctrine, although the Court makes no reference to it.137

The clearest expression of the ancillary restraints doctrine issue came up in the Métropole case,138 the facts of which are described above, because the parties argued, in the alternative, that the exclusivity clauses and the clauses relating to special interest channels were ancillary restrictions. The CFI pointed out that for a restriction to be necessary two cumulative conditions had to be met: it had to be objectively necessary for the implementation of the main

135 Ibid., para. 27.
137 As Faull and Nikpay (n. 108) suggest at para. 3.258.
agreement and proportionate to it. The examination of objective necessity could be done only in a relatively abstract manner. The CFI went on to say:

It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation.139

This draws a problematic distinction between clauses which are needed for the commercial success of the operation and those which are necessary to implement the operation, particularly as the issues may be inter-related. In Remia, the non-compete clause could be seen as going to the commercial success of the sale of the business; if it did not exist, no doubt the purchaser would have negotiated a lower price. A similar argument was made in Métropole by the parties who claimed that the exclusivity clause was necessary for the establishment of the joint venture. The CFI agreed that the clause was directly related to the joint venture, but held that it was not necessary as a company in the pay TV sector in France could be launched without these rights, as had been the case for the two other operators on the market. Drawing this distinction looks to be difficult in practice. In addition, Métropole talks about the main operation being difficult to implement, which seems to undermine the notion of objectively necessary because in its usual dictionary meaning ‘necessary’ means essential in order to achieve something, which is different from the lack of such a clause making it difficult to implement an agreement. In addition, the restrictions must not be disproportionate and in Métropole the Court found that the ten-year period of exclusive rights was disproportionate. The answer is perhaps found in an English judgment where it was said: 140

In this context, the concept of ‘necessity’ could be satisfied by something which is not strictly essential. The concept of necessity has some flexibility and in an appropriate case can be satisfied by facts which show that it would be difficult to achieve the commercial objective without the presence of the restriction. The duration and scope of the restriction may be important. Faull and Nikpay claim that very little is required to take a clause outside the doctrine on this ground.141

Ancillary restraints – a wider context

Whatever the interpretation of the ancillary restraints cases, they all take place in a recognisable commercial context and the issue of substance is at least amenable to conventional economic analysis; the problem relates more to whether the analysis should be done under Article 81(1) or (3) and to what extent the Commission’s decision is reviewable. A more difficult problem has arisen in relation to the rules of professional bodies and how they relate to the competition law of the EC. In Wouters142 there was a rule of the Dutch bar which prevented members of the bar entering into full partnerships with accountants. The question

139 Ibid. at para. 109.
140 Bookmakers Afternoon Greyhound Services et al. v Amalgamated Racing Ltd et al. [2008] EWHC 1978 (Ch), per Mangan J at para. 452.
141 Faull and Nikpay (n. 108) at para. 3.211.
arose in national proceedings whether or not this was compatible with the Community rules on competition and this question was referred to the ECJ under Article 234. Having decided that the bar was an association of undertakings, the ECJ went on to consider the effect of the rule in issue. It took the view that the rule had an adverse effect on competition. It then went on to say that the rules had to be looked at in their context and that account had to be taken of the objectives of the rules, which were trying to ensure that the ultimate consumers of legal services and the administration of justice were provided with the necessary guarantees in relation to integrity and experience. It then had to be considered whether the consequential effects restrictive of competition were inherent in the pursuit of those objectives. In particular, the Court drew attention to the difference between advocates, who were required to act independently and only in the best interests of their client, and accountants, who were required to carry out certain supervisory activities, such as certifying accounts and were not bound by strict rules of professional secrecy. The Court concluded that the rule at issue did not infringe Article 81(1) because the Dutch bar:

... could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organized in the Member State concerned.

This is difficult because, as Jones and Sufrin point out, the Court seems to be weighing the anti-competitive effects of the agreement against benefits which were not economic benefits. This raises two, related, conceptual difficulties for the case-law. First, it potentially opens up the entire rule of reason or balancing debate again in relation to Article 81(1). Secondly, although in principle there are methodologies for balancing the pro- and anti-competitive effects of agreements which can be employed by competition authorities and courts, there is no generally agreed way of balancing the effects of restrictions on competition with non-economic benefits.

The argument has surfaced again in the case of sporting bodies in *Meca-Medina*. Here the appellants had complained to the European Commission that certain rules and practices adopted by the International Olympic Committee and the International Swimming Federation were contrary to Community competition law and the Commission had rejected their complaint. They argued that the anti-doping rules were a restriction of competition, were in no way inherent to the objectives of the rules but were there solely to protect the IOC’s economic interests and that the actual limits did not correspond to any scientific evidence and were not necessary. The ECJ took the view that such rules could not be assessed in the abstract, they had to be looked at within their overall context. The Court took the view that the Commission could take the view that the general objective of the rules was to combat doping and to allow competitions to be conducted fairly. In addition, in order to ensure that the rules were effective, the Commission could take the view that penalties were needed. Therefore:

even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants’ freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning

143 Ibid. para. 86.
144 Ibid. para. 110.
147 In other words, the Court assumes this without deciding it.
of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.\(^{148}\)

Nevertheless, the Court went on to examine whether or not the rules were disproportionate, either in terms of their scope or in terms of the penalties imposed, and decided that they were not disproportionate.

Quite where this case-law will go in the future remains a matter of some contention.\(^{149}\) What it does seem to do is to authorise a more wide-ranging inquiry in cases involving the regulation of activities, so far confined to sport and the professions, as opposed to ordinary commercial activities. Within this area, the case-law seems to suggest greater respect for the decisions of national authorities and sporting associations based on balancing the public policy considerations against possible restrictions on competition. However, as has been said, in the context of balancing pro- and anti-competitive effects: 'Meaningful balancing, which involves placing cardinal values on both sides of a scale and determining which is heavier, is virtually never possible.'\(^{150}\) The problem is even greater when the values on both sides of the scale are not obviously of the same kind.

### Summary of Article 81(1): restriction of competition

A non-controversial and accurate summary of the case law is difficult. Nevertheless, the position appears to be:

- If an agreement, or a clause(s) within it, has the object of restricting competition, when looked at properly in its context, then this is a breach of Article 81(1), without the need for detailed economic analysis.
- If an agreement, or a clause(s) within it, is alleged to have the effect of restricting competition, then a detailed economic analysis, starting with establishing a counter-factual, must be done to see whether the agreement is likely to have negative effects on competition.
- There are, however, a number of cases where restrictions within agreements have been held to be outside Article 81(1) on grounds that:
  - they are necessary and proportionate for the penetration of new markets
  - they are necessary and proportionate for the proper functioning of a legitimate commercial or regulatory purpose
  - they are mere ancillary restraints.

### Individual exemptions

If an agreement is restrictive of competition under Article 81(1), the question then arises whether or not it may benefit from an exemption under Article 81(3) and, practically, given the uncertainty over the scope of Article 81(1) this may be the most important question.

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\(^{148}\) [Meca-Medina (n. 146) at para. 45.]


\(^{150}\) Hovenkamp (n. 112) at p. 108.
CHAPTER 2 THE PROHIBITION ON ANTI-COMPETITIVE AGREEMENTS

Under Article 81(3) there are two different types of exemptions: individual ones and what are called block exemptions. Individual exemptions are typically granted by the Commission, a national competition authority or a national court for a specific agreement, that is, they are individual to that agreement. Block exemptions are a set of general rules, embodied in Community legislation, which apply to categories of agreements. If an agreement meets the criteria embodied in those rules, then it benefits from an exemption, without the need of an explicit decision by a competition authority. Regulation 1/2003 does allow for the possibility of self-assessment of individual exemptions but this is a risky strategy for any undertaking, as will become clear once we discuss the conditions that have to be met for granting an individual exemption.

Under the new arrangements in Regulation 1/2003, the question of whether an agreement benefits from an individual exemption is most likely to arise in two circumstances. First, when the Commission or a national competition authority is taking enforcement proceedings for breach of Article 81(1), they will have to consider the question of whether or not the undertaking is entitled to rely on Article 81(3) as a defence. Similarly, in private actions against undertakings for breach of Article 81(1), the national courts will also have to consider whether Article 81(3) is available as a defence. It is only on rare occasions outside these contexts that the Commission will pronounce on whether or not the criteria in Article 81(3) are satisfied. This contrasts quite strongly with the previous system where agreements were required to be notified to the Commission, which took a broad view of Article 81(1), which meant that in principle decisions had to be taken under Article 81(3) by the Commission. The basic criteria are set out in Box 2.18.

KEY LEGAL PROVISION

Box 2.18

Conditions for an individual exemption

The agreement:
1. must contribute to improving the production or distribution of goods or to promoting technical or economic progress,
2. while allowing consumers a fair share of the resulting benefit, and which does not:
3. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
4. must afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Source: Article 81(3).

Questions: How easy is it to conduct this inquiry? What sort of considerations are relevant?

There are a number of general points to notice about Article 81(3). First, the four conditions are cumulative: an agreement has to meet all four of the conditions – if it fails on any one of them, it is not eligible for an exemption. Secondly, the burden of proof as regards
meeting the condition is on the undertaking(s) which seeks to rely on them rather than the Commission or the national competition authorities. This is in contrast to Article 81(1) where the burden of proof is on the European Commission or the national competition authority to show that there has been an infringement. Thirdly, the assessment of agreements is made within the actual context within which they occur and at the time that they are taking place, although there is some element of thinking about or predicting the effect of the agreement in future. Finally, case-law makes it clear that, in principle, all types of agreements are eligible to be considered under Article 81(3), although it is likely that some forms of agreement, for example, straightforward price-fixing or market sharing, will be unlikely to meet the criteria in Article 81(3).

The most controversial debate in relation to this Article has been about the breadth of interpretation that should be given to it. On a narrow view, the conditions set out above should be restricted to considering the economic benefits of an agreement against the economic disadvantages, that is, the restriction on competition given by the agreement. The alternative view is that a broader interpretation can be given to the conditions laid down to encompass non-economic matters which are prescribed as aims of the Community in the various Treaties. The justification for this is that the European Court of Justice takes a broad, teleological approach to the questions before it. Under the new system of Regulation 1/2003, the broad approach raises potential problems, as it opens the possibility that national courts could apply very wide considerations to criteria for exemption and this could cause some problems in the application of competition law. It is therefore better to take a narrower approach and this is what the European Commission has done in its Guidelines on the interpretation of Article 81(3).

Before discussing the current approach, it is worth looking at past practice because that does seem to show, arguably, a somewhat different approach. The case that is typically cited is the Commission decision in CE Ced. This involved an agreement between washing machine manufacturers not to, among other things, import or produce washing machines which had low energy efficiency ratings and this part of the agreement was held to have the object of restricting competition because it controlled one important product characteristic on which there was competition in the market. The Commission took the view that washing machines which consumed less energy were objectively more technically efficient and that, although prices might rise, individual consumers would benefit from the savings in electricity and, collectively, there would be a saving from the avoidance of carbon dioxide and sulphur dioxide emission and that these environmental benefits would allow consumers...
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a fair share of the benefits even if no benefits accrued to individual purchasers of machines.159 It is possible to see this decision as a straightforward application of economic analysis but it is also possible to see it as a case where other Community policies, such as the protection of the environment, were considered relevant and the press release subsequent to the decision encouraged this view by stating, 'This positive contribution to the European Union’s environmental objectives is central to the Commission’s favourable decision.'160

It is not only environmental objectives that have seemed to intrude on particular decisions. There have also been cases where employment issues have been seen to be important, where agreements between competitors to ensure an orderly reduction of capacity were reduced, helping the creation of stronger European firms in the face of competition from the United States and Japan.161 The Courts’ view was expressed in an appeal from a Commission decision in Ford/Volkswagen where the Commission approved the creation of a joint venture in Portugal for the creation of a factory which would produce people carriers (MPVs), in the course of which the Commission took into account the effects on employment, the promotion of the harmonious development of the Community and the reduction of regional disparities.162 The Commission’s decision was challenged by a competitor who claimed, among other things, that the Commission’s decision had been based on exceptional circumstances, that is, on the non-competition considerations. The CFI rejected this challenge, pointing out that, in its view, the decision to grant an exemption would still have been taken even if the other factors had not been present.163

These decisions, and the importance of non-economic considerations, may become more important if the changes envisaged in the Reform Treaty, discussed in Chapter 1, come about because there may be a greater emphasis, in the Commission as a whole, on a wider range of Community policies in particular cases. At the moment this is only a theoretical possibility, so in the following section we examine the current approach of the Commission to individual exemptions, as set out in its Guidelines.

**Improving efficiency**

In order to meet the first condition, any improvements are not looked at simply from the point of view of the parties concerned – they must be capable of benefiting a wider class of people, such as consumers. The Commission’s Notice makes it clear that improvements may be of broadly two types to qualify under this heading: cost improvements and quality improvements.164 Cost improvements can arise through new technology or methods, synergies through the integration of existing assets or economies of scale and scope. Improvements to the quality of a product or service are less easy to categorise but may be equally or more important. The Commission takes the view that, in order to substantiate an efficiency claim, the following must be verified:165

159 Ibid. at para. 56.
165 Ibid. at para. 51.
● the nature of the claimed efficiencies,
● the link between the agreement and the efficiencies,
● the likelihood and magnitude of each claimed efficiency, and
● how and when each claimed efficiency would be achieved.

It is important to stress that there must normally be a direct link between the agreement concerned and the efficiencies claimed. A direct link could be where two undertakings amalgamate their production capacity, thus allowing them to produce the goods for a cheaper cost or where a distribution agreement allows products to be distributed at a lower cost. In addition, the undertakings must also calculate or estimate, that is, quantify, the value of the cost or quality improvements. In the case of new and improved products, the undertakings must describe and explain what the nature of the efficiencies is and how and why they constitute an objective economic benefit.166

### Indispensability of the restrictions

Although this is the third condition, the European Commission’s Guidelines treat it as the second one, so we will follow that approach as well. The test applied by the Commission is contained in Box 2.19.

#### KEY LEGAL PROVISION

**Indispensability of restrictions**

First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.


*Question:* Consider the flexibility of the concept of ‘reasonable necessity’.

The question to be asked in relation to the first limb is whether or not the restrictions make it possible to perform the activity in question more efficiently than if they had not been in place. The European Commission considers it particularly important to consider whether or not there were less restrictive alternatives that the parties could have chosen or, in other words, that the restrictions are proportional in the context of the agreement. Once the European Commission has decided that the restrictive agreement is necessary in order to produce the efficiencies, it then goes on to assess the indispensability of each of the restrictions imposed in the agreement. ‘Indispensability’ in Article 81(3) is turned into ‘reasonably necessary’ in the *Guidelines*, which means that a restriction is indispensable if ‘its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise’.167

166 Ibid. at para. 57.
167 Ibid. at para. 79.
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**Fair share for consumers**

From an economist’s point of view, this condition is not actually needed because, if an agreement has both pro- and anti-competitive effects but, on balance, the pro-competitive effects or efficiency gains outweigh the anti-competitive effects, then society as a whole is better off. Who receives the benefits of this improvement is not a matter of concern for economists, as it is a distributional question, which cannot be answered through economic techniques. Here again, EC law differs from economics by imposing a standard which asks the competition authorities to consider the benefits to consumers, defined as all direct or indirect users of the product. In broad terms, the European Commission takes the view that this condition means that the net effect on consumers from the agreement must be neutral. If consumers are worse off following the agreement, then this condition is not fulfilled.\(^\text{168}\) What is critical is the overall impact on consumers; they do not have to have a share of every efficiency gain, nor do all individual consumers have to benefit. The European Commission also takes the view that this condition incorporates a sliding scale: the greater the restriction of competition, the greater must be the efficiencies and the pass on to consumers.\(^\text{169}\) As regards cost efficiencies, when assessing them the European Commission will look at the characteristics and structure of the market, the nature and magnitude of the efficiency gains, the elasticity of demand and the magnitude of the restriction of competition.\(^\text{170}\) The more competitive the market, the more likely cost efficiencies are to be passed on as undertakings try to increase their sales. Economic theory also tells us that consumers are more likely to receive a fair share of cost efficiencies when variable costs are reduced, rather than a reduction in fixed costs. When it comes to qualitative improvements, the European Commission simply says that these must be substantiated.

**No elimination of competition**

This last condition is a recognition that the process of rivalry and the competitive process should be given priority over potentially pro-competitive efficiency gains which could be potentially reached from agreements. Although this is a concept peculiar to Article 81(3), there is a relationship with Article 82, on abuse of a dominant position, discussed in Chapter 4. The position taken by the European Commission in its guidance is that Article 81(3) must be interpreted in such a way that it cannot apply to restrictive agreements that constitute an abuse of a dominant position. However, in principle, not all agreements concluded by a dominant undertaking will constitute an abuse of a dominant position.\(^\text{171}\) Whether or not competition is being eliminated will depend on the degree of competition that existed prior to the agreement being brought about. This requires a realistic examination of the sources of competition in the market and looking at the actual market conduct of the parties concerned.

**Assessment**

One of the things that is most evident as regards the European Commission’s *Guidelines* is that they are based straightforwardly on an economic approach. The only recognition of

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\(^{168}\) Ibid. at para. 85.

\(^{169}\) Ibid. at para. 90.

\(^{170}\) Ibid. at para. 96.

other values comes in the statement that, ‘Goals pursued by other Treaty provisions can be
taken into account to the extent that they can be subsumed under the four conditions of
Article 81(3).’ Whether this represents an accurate picture of previous practice has been dis-
cussed above but it certainly lays down a marker for the future. It is worth remembering that
Article 81(3) questions will most likely be raised as a defence to enforcement proceedings or
to private actions and are likely to be dealt with by national courts or national competition
authorities. Hence the logic is to try and restrict the scope of their inquiry into economic
matters. It has, however, been argued that:

The proposed framework of analysis for Art. 81(3) goes significantly beyond the requirements
the Commission has imposed on itself in the past . . . Therefore, one is left with the impres-
sion that the Commission . . . has chosen to issue a gold-plate blueprint of how it considers
Art. 81(3) should ideally be applied by national competition agencies and courts. . . . In sum,
under the Notice the threshold under Art. 81(3) is raised significantly, making it questionable
whether in practice there is a realistic possibility for firms to establish that the cumulative con-
ditions for exemption under Art. 81(3) are met.

Even if one’s interpretation does not go this far, it should have become clear that there are
other avenues for businesses that offer greater degrees of legal certainty in relation to their
agreements, notably block exemptions.

**Block exemptions**

As described above, these are general rules which, if the conditions within them are met,
etitle the agreement to an exemption from Article 81(1). Currently there are block exemp-
tions in place for vertical agreements, licensing agreements for the transfer of technology,
specialisation agreements, and research and development agreements. There are also block
exemptions for specific industries or sectors: motor vehicles (a sector dominated by vertical
agreements), air and maritime transport. The detail of these block exemptions will be dis-
cussed in later chapters, whereas here the point is just to make some general observations.
The first is that the mere fact that an agreement falls within one of these categories of block
exemptions does not imply that it falls within the Article 81(1) prohibition. It will be caught
by the prohibition only if it satisfies the various conditions discussed above.

The previous versions of the block exemptions were heavily criticised for their incomplete
coverage of, in particular, vertical agreements, an undue emphasis on meeting formal tests
and being too restrictive, as they contained lists of clauses that were forbidden, as well as lists
of clauses that were approved. The current sets of block exemptions have been redesigned to
meet these problems and they all take, in broad outline, the same approach.

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at 419.
174 Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical
agreements and concerted practices; Commission Regulation 2658/2000 on the application of Article 81(3)
of the Treaty to categories of specialisation agreements; Commission Regulation 2659/2000 on the applica-
tion of Article 81(3) of the Treaty to categories of research and development agreements; Commission
Regulation 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer
agreements.
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First, all of the exemptions set what is called a ‘market share threshold’, that is, a percentage share of the market above which the parties to the agreement cannot receive the benefit of the block exemption. So, for example, the exemption for vertical agreements will apply only if the supplier does not have a market share of above 30% (see Box 2.20 for further details). What is being said here is that below certain thresholds there is a presumption that the undertakings do not have market power and therefore may be eligible for an automatic exemption, whereas, above those thresholds, a more detailed inquiry would be necessary, that is, it is a question as to whether an individual exemption could apply.

**KEY OFFICIAL GUIDANCE**

Box 2.20

**Market share thresholds**

Vertical agreements: 30% (supplier or buyer where exclusive supply)

Technology transfer: 20% (where competing undertakings)

Specialisation: 30% (where non-competing undertakings)

Research and development: 20% (combined market share)

Sources: Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, Art. 3; Commission Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, Art. 4; Commission Regulation 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, Art. 4; Commission Regulation 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, Art. 3.

**Question:** What do you think the justification for the differing thresholds is or could be?

Secondly, the Regulations all provide that agreements will not benefit from the exemption if they have as their object certain hard-core restrictions (see Box 2.21). These restrictions are aimed at what are considered to be the most damaging types of restriction under EC competition law, for example, price-fixing, allocation of sales or markets and territorial restrictions on sales. It is important to notice that Box 2.21 does not give a complete list of the hard-core restrictions and that for both allocation of customers and territorial restrictions there are important and detailed exceptions. Arguably some of these restrictions are not as damaging as this classification suggests, but listing them explicitly has the virtue of providing clear rules as to what is forbidden and the lists can be read as general statements about what sort of agreements will have the object of restricting competition. In the case of vertical agreements and technology transfer agreements certain obligations within agreements, such as non-compete obligations in relation to vertical agreements, do not benefit from the exemption but the agreement as a whole can remain in place if the obligations are severable (that is, the agreements can still be operated without them) from the agreement. Finally, the block exemptions make provision for the Commission to withdraw the benefits of the block exemption in relation to particular individual cases or particular markets (in the case of vertical agreements when the agreement, although meeting the terms of the block exemption, still has effects which are incompatible with Article 81(3)).
The block exemptions are very important in terms of the functioning of the system of EC competition law. From the point of view of an undertaking(s), if an agreement is caught by Article 81(1), which depends critically on how this is interpreted, the block exemptions offer a predictable, safe harbour, if the criteria within them can be met. Given the uncertainties over the scope of Article 81(1), the sensible pragmatic choice is to structure agreements in such a way as to meet the block exemption criteria. If this is the case, then it is important that the block exemptions do not artificially force commercial agreements into particular forms. Although it is clear that the new block exemptions are an improvement on the old approach, there are still a number of matters that are inconsistent with modern economic analysis, most notably the treatment of restrictions on selling territories.  


**KEY CASE EXTRACT**

Box 2.21

Basic hard-core restrictions

- Price-fixing
- Market sharing
- Control of outlets


*Question:* What other hard-core restrictions exist? To what extent must the context within which they operate be taken into account?

The block exemptions are very important in terms of the functioning of the system of EC competition law. From the point of view of an undertaking(s), if an agreement is caught by Article 81(1), which depends critically on how this is interpreted, the block exemptions offer a predictable, safe harbour, if the criteria within them can be met. Given the uncertainties over the scope of Article 81(1), the sensible pragmatic choice is to structure agreements in such a way as to meet the block exemption criteria. If this is the case, then it is important that the block exemptions do not artificially force commercial agreements into particular forms. Although it is clear that the new block exemptions are an improvement on the old approach, there are still a number of matters that are inconsistent with modern economic analysis, most notably the treatment of restrictions on selling territories.  

**COMPETITION LAW IN PRACTICE**

**Cases 56, 58/64 Etablissements Consten SARL and Grundig v Commission [1966] ECR 299**

This case, commonly known as *Consten and Grundig*, has a good claim to being the most important case in the history of EC competition law. It established a number of important principles which moulded the development of EC competition law but, ironically, recent developments have aimed at moving away from the approach in this case.

**The facts**

In 1957 Grundig, a German undertaking, entered into a contract with Consten, a French undertaking, which appointed Consten the ‘sole representative’ of Grundig in France for the sale of radios, televisions, tape recorders, dictating machines and their spare parts and their accessories. (This was a vertical agreement, between undertakings operating at different levels of production.) Consten undertook not to sell, either on its own account or on that of another, similar articles liable to compete with the goods which were the

subject of the contract and not to make delivery, either direct or indirect, for or to other countries from France. A similar prohibition had already been imposed by Grundig on all its sole concessionaires in other countries, as well as on the German wholesalers. Grundig undertook, for its part, to grant to Consten the retail sale rights and not to deliver, either directly or indirectly, to other persons in the area covered by the contract. For the distribution of the Grundig products, Consten was authorised to use the name and emblem of Grundig, which were registered in Germany and in other Member States. In addition, Consten registered in France, in its own name, the trade mark GINT (Grundig International) which was carried on all appliances manufactured by Grundig, including those sold on the German market.

From early 1961, the company UNEF bought Grundig appliances from German traders who delivered them in spite of the export prohibition imposed by Grundig. UNEF resold these goods to French retailers at more favourable prices than those asked by Consten. Subsequently, Consten brought two actions against UNEF, one for unfair competition and one for infringement of the GINT mark. In the first of these proceedings, Consten won at first instance. However, following an appeal brought by UNEF, the Cour d’Appel de Paris decided to stay proceedings until the decision of the Commission had been given on the claim which UNEF had made to it, on 5 March 1962, for a declaration that the companies Grundig and Consten had infringed the provisions of Article 8[1] through the stipulation in the contract of 1957 and the accessory agreement concerning the registration and use of the GINT mark in France.

In 1963, Grundig notified to the Commission the sole agency contracts concluded with Consten and with its concessionaires in the other Member States. The Commission gave its judgment on the contract concluded between Grundig and Consten. Article 1 of that decision held that the contract in question and the accessory agreement on the registration and use of the GINT mark constituted an infringement of the provisions of Article 8[1] of the EEC Treaty. Article 2 refused to grant the declaration of inapplicability provided for in Article 8[1](3). Finally, by Article 3, Grundig and Consten were ‘required to refrain from any measure tending to obstruct or impede the acquisition by third parties, at their wish, from wholesalers or retailers established in the European Economic Community of the products set out in the contract, with a view to their resale in the contract territory’.

Grundig and Consten brought an action before the ECJ to annul this decision of the European Commission. They argued, among other things, that:

1. Article 81(1) does not apply to vertical agreements;
2. the restrictions in the contract did not restrict competition;
3. the agreement did not affect inter-state trade.

The ECJ rejected the first argument, holding that there was no such distinction in the wording of Article 81(1). In addition, it was possible that such agreements could limit competition between the parties to the agreement and third parties. Finally, on this point, the ECJ said that such agreements between producers and distributors might tend to restore national divisions in trade which was contrary to the basic objects of the EC. As regards the second point, it had been argued that what the Commission needed to do
was examine the effect of the agreement on competition between different brands, rather than just its effect on the distribution of Grundig products. The ECJ responded by saying it is superfluous to take account of the concrete effects of an agreement once it appears that it has the object of restricting, preventing or distorting competition. Looking at the agreement in its context, what was intended was the absolute territorial protection for Consten in relation to the Grundig products and this was a restriction of competition contrary to Article 81(1). On the third point, the ECJ held that by reserving the market for Grundig products to Consten, the agreement undoubtedly affected trade between Member States, even if it increased the level of trade.

Analysis
The most controversial part of this decision is the approach taken by the ECJ concerning the question of whether or not the agreement restricted competition. It was argued strongly by the applicants, supported by the German government and accepted by the Advocate General in the case, that what the Commission ought to have done was to have assessed the effects of the agreement on competition on the markets in question. Although there is little hard economic data in the case, the Advocate General points out that Grundig had only a 17% market share in relation to tape recorders, which suggests that they did not have market power. The ECJ rejected this argument, holding that, as the object of the agreement was absolute territorial protection, there was no need to look at its effects. The Court added that the situation results in an insulation of the French market and allows for the products in question the imposition of prices from which is excluded all effective competition.

Questions: How plausible do you think that this analysis is? It is worth asking whether Grundig, a German company, could have entered the French market shortly after World War II without this arrangement?

The ruling that Article 81(1) covered vertical agreements, plus the harsh approach to agreements which looked like they were dividing up the market, were a strong influence on the development of EC competition law up until the late 1990s, when the Commission began to take a different approach to the assessment of vertical agreements, although not to the issue of absolute territorial protection in agreements.

Question: How different would EC competition law have looked if the ECJ had followed the Advocate General’s approach?
CHAPTER 2 THE PROHIBITION ON ANTI-COMPETITIVE AGREEMENTS

Summary

➤ In order for an agreement to fall within EC competition law, it must meet a number of criteria:
   ● there must be an agreement or a decision by an association of undertakings or a concerted practice;
   ● the agreement, decision or concerted practice must be between undertakings;
   ● the agreement, decision or concerted practice must affect trade between Member States;
   ● the agreement, decision or concerted practice must have as its object or effect the prevention, restriction or distortion of competition, in an appreciable manner, within the common market.

➤ An undertaking is defined as every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Economic activity means any activity which consists in offering goods and services on a given market.

➤ The concept of an agreement centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention.

➤ A concerted practice is a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes a practical cooperation between them for the risks of competition.

➤ It is unnecessary to distinguish precisely whether there is an agreement or a concerted practice. What is important is to distinguish collusive from non-collusive behaviour.

➤ To fall within the Article 81(1) prohibition, an agreement must have an appreciable effect on competition. The Commission’s view is that there is no appreciable effect on competition for horizontal agreements if the combined market share of the parties does not exceed 10%. For vertical agreements the combined market share of the parties must not exceed 15%. In addition, the agreements must not contain hard-core restraints.

➤ Agreements which have the object of restricting competition must be distinguished from those with the effect of restricting competition.

➤ Restrictions of competition by object are those that by their very nature have the potential of restricting competition and include price-fixing, limitations on output, allocation of customers and restriction of selling territories, although the list is not exhaustive.

➤ If an agreement, or a clause(s) within it, has the object of restricting competition, when looked at properly in its context, then this is a breach of Article 81(1), without the need for detailed economic analysis.

➤ If an agreement, or a clause(s) within it, is alleged to have the effect of restricting competition, then a detailed economic analysis, starting with establishing a counterfactual, must be done to see whether the agreement is likely to have negative effects on competition.
There are, however, a number of cases where restrictions within agreements have been held to be outside Article 81(1) on the grounds that:

- they are necessary and proportionate for the penetration of new markets;
- they are necessary and proportionate for the proper functioning of a legitimate commercial or regulatory purpose;
- they are mere ancillary restraints.

If an agreement falls within the prohibition in Article 81(1), it may benefit from the exemption in Article 81(3) provided four conditions are met. The agreement:

- must contribute 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,
- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- must afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The four conditions are cumulative: an agreement has to meet all four of the conditions – if it fails on any one of them, it is not eligible for an exemption.

In principle, all types of agreements are eligible to be considered under Article 81(3), although it is likely that some forms of agreement, for example, straightforward price-fixing or market sharing, will be unlikely to meet the criteria in Article 81(3).

A number of block exemptions have been created and, if an agreement meets the criteria in them, it is considered to meet the conditions laid down in Article 81(3).

Further reading


CHAPTER 2 THE PROHIBITION ON ANTI-COMPETITIVE AGREEMENTS


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