7. The EC Commission enforces the EC competition rules through DG Comp, the Competition Directorate General. However, the modernization embodied in Regulation 1/2003 decentralized enforcement to the national competition authorities (NCAs) of the Member States which form, together with the Commission, the European Competition Network (ECN).

8. The competition rules are directly applicable and can be enforced in national courts.

9. The enforcement and application of the competition rules must be seen in the context of the EC legal order as whole.

8. FURTHER READING

BOOKS

ARNULL, A., *The European Union and its Court of Justice* (2nd edn., Oxford University Press, 2006)

——, DASHWOOD, A., DOUGAN, M., ROSS, M., SPAVENTA, E., and WYATT, D., *Wyatt and Dashwood's European Union Law* (5th edn., Sweet & Maxwell, 2006)

CHALMERS, D., HADJIEMMANUIL, C., MONTI, G., and TOMKINS A, *European Union Law* (Cambridge University Press, 2006)

CRAIG, P., and DE BÚRCA, G., *EU Law: Text, Cases and Materials* (4th edn., Oxford University Press, 2007)

HARTLEY, T. C., *The Foundations of European Community Law* (5th edn., Oxford University Press, 2003)

3

ARTICLE 81: THE ELEMENTS

1. CENTRAL ISSUES

1. Chapters 3 and 4 set out and discuss the elements of Article 81.

2. The way that this provision applies to specific types of potentially anticompetitive business agreements (e.g. cartels, joint venture agreements, distribution agreements and, intellectual property licensing agreements) is discussed in greater detail in later chapters.

3. Article 81(1) prohibits collusion between two or more independent undertakings which has as its object or effect the prevention, restriction, or distortion of competition and which affects trade between Member States.

4. It applies only to agreements which appreciably affect competition and trade.

5. Article 81(3) provides that the prohibition may be declared inapplicable to agreements which fulfil its four criteria (two positive and two negative), broadly where beneficial aspects of the agreement outweigh its restrictive effect.

6. Chapter 3 focuses on the following issues:

   (a) *Who* Article 81 applies to, i.e. which entities constitute an 'undertaking' and are consequently bound to comply with the competition rules;

   (b) What constitutes *joint* conduct caught by Article 81(1) and how this is distinguished from unilateral conduct falling outside of its scope;

   (c) When an agreement appreciably *affects trade* between Member States and so falls within the jurisdictional scope of Article 81(1).

7. Chapter 4 focuses on the question of *which* agreements are prohibited by Article 81 and the relationship between Article 81(1) and Article 81(3). In particular, it considers when:

   (a) An agreement 'restricts' competition for the purposes of Article 81(1); and

   (b) When the procompetitive aspects of the agreement enable it to satisfy the conditions of Article 81(3) and to 'trump' the anticompetitive effects identified under Article 81(1).

8. The question of what constitutes an appreciable restriction on competition is also considered in Chapter 3. Community law is not concerned with agreements that do not impact significantly on competition and trade.

2. INTRODUCTION

Article 81 (ex Article 85) precludes restrictive agreements between independent market operators, whether 'horizontal' (between parties operating at the same level of the economy, often actual or potential competitors) or 'vertical'[1] (between parties operating at different levels, for example, an agreement between a manufacturer and its distributor).

[1] See Cases 56 and 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH* v. *Commission* [1966] ECR 299, [1966] CMLR 418 and *infra* 150.

In this chapter the scheme of Article 81, the consequences of infringing it, and the key elements of Article 81(1) are considered. In Chapter 4 we focus on the relationship between Article 81(1) and Article 81(3) and consider when agreements will be considered to be so 'anti-competitive' that they contravene the Article. How the provisions are interpreted will depend, of course, upon the policy objectives being pursued in enforcement. As has already been seen, these objectives have evolved over time in Europe and the rules have been used to serve objectives which go beyond the simple maximization of consumer welfare and economic efficiency.[2] Although, therefore, in many cases Article 81 has been used to prohibit agreements which adversely affect the competition process, in others, it appears that the Community authorities have relied, not on economic analysis and the economic view of the impact of the agreement on competition but on the formal provisions of the agreement and the impact the agreement will have on other relevant objectives. In particular, the Commission, supported by the Court has, in the context of Article 81, been eager to prevent agreements which might be used to divide up the common market and thwart the single market project.[3]

It has also been seen, however, that the Commission has over the years shown a growing commitment to effective competition and has increasingly sought to focus the goal of Article 81 on consumer welfare. Indeed, in its 2004 Guidelines on the application of Article 81(3) of the Treaty ('the Article 81(3) Guidelines') it is stated:[4]

> The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.[5]

This statement indicates that as far as the Commission is concerned the goal of Article 81 should be consumer welfare and that *both* competition *and* market integration will serve this end. It does not acknowledge, however, that pursuit of a consumer welfare and a market integration goal may not always pull in the same direction, although the statement may suggest that the single market goal should be pursued only where it enhances consumer welfare.[6] In addition, it should be noted that although the statement does not explicitly clarify whether this is the *sole* goal of competition law, the guidelines later suggest that these goals cannot be trumped by other public policy objectives.[7]

[2] *Supra* Chap 1.

[3] See, e.g., Cases 56 and 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH* v. *Commission* [1966] ECR 299, [1966] CMLR 418.

[4] [2004] OJ C101/97, para. 13.

[5] See Guidelines on the application of Articles 81(3) ('Article 81(3) Guidelines') [2004] OJ C101/97, para. 42. 'Effective competition brings benefits to consumers, such as low prices high quality products, a wide selection of goods and services, and innovation. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers'. See also DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, para. 4.

[6] But see e.g. discussion of Cases 56 and 58/64 *Etablissements Consten SA & Grundig-Verkaufs-GmbH* v. *Commission* [1966] ECR 299, [1966] CMLR 418 *infra* Chap. 4 and Case C-53/03, *Syfait* v. *Glaxosmithkline AEVE* [2005] ECR I-4609, [2005] 5 CMLR 1, Opinion of Jacobs AG. It appears that the single market goal may still influence the interpretation of Article 81, see especially Chaps. 4 and 9.

[7] Article 81(3) Guidelines, para. 42. As will be seen in Chap. 4 this latter point is critical to the scope of Article 81(3).

The Commission's view on objectives now gains support from the judgments of the CFI in *Österreichische Postsparkasse* v. *Commission*[8] and *GlaxoSmithKline Services Unlimited* v. *Commission*.[9] In the latter case the court stated that

> the objective assigned to Article 81(1) EC, which constitutes a fundamental provision indispensable for the achievement of the missions entrusted to the Community, in particular for the functioning of the internal market . . . , is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question . . . .[10]

3. THE TEXT OF ARTICLE 81

Article 81 provides:

> (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 cases of:
>
> — any agreement or category of agreements between undertakings;
>
> — any decision or category of decisions by associations of undertakings;
>
> — any concerted practice or category of concerted practices,
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[8] Case T-213/01, [2006] ECR II-1601, para. 115, see *supra* Chap. 1. In this case the CFI held that 'the ultimate purpose of the rules . . . is to increase the well-being of consumers'.

[9] Case T-168/01, 27 Sept. 2006, [2006] 5 CMLR 1623, Cases C-501, 513, 515 and 519/06 P (judgment pending).

[10] Case T-168/01, 27 Sept. 2006, [2006] 5 CMLR 1623, para. 118, Cases C-501, 513, 515 and 519/06 P (judgment pending).

4. THE SCHEME OF ARTICLE 81

A. THE THREE PARAGRAPHS

It can be seen from the text that Article 81 is in three parts.

(i) The Prohibition

Article 81(1) sets out the prohibition. It prohibits collusion between undertakings which has as its object or effect the prevention, restriction, or distortion of competition within the common market and which may affect trade between Member States. It sets out examples of such preventions, restrictions, or distortions. The list is illustrative, not exhaustive. For the prohibition in Article 81(1) to apply the following must be established:

(i) The existence of undertakings (or an association of undertakings);

(ii) Collusion (an agreement between undertakings, a decision by an association of undertakings or a concerted practice);

(iii) Collusion which has as its object or effect the prevention, restriction, or distortion of competition;

(iv) An appreciable effect on competition,[11] and

(v) An appreciable effect on trade between Member States.[12]

(ii) Nullity

Although Article 81(2) specifically states that an agreement, decision, or concerted practice prohibited by Article 81(1) is automatically void, the ECJ has held that the nullity affects *only* the clauses in the agreement prohibited by the provision.[13] The agreement as a whole is void only if the prohibited clauses cannot be severed from the remaining terms of the agreement. The nullity is automatic and is not dependent upon any prior decision to that effect.[14]

(iii) Legal Exception—Declaration of Inapplicability

The Article 81(1) prohibition may be declared inapplicable to an agreement, etc.[15] which fulfils the four criteria (two positive and two negative) set out in Article 81(3) (broadly where the beneficial aspects of the agreement outweigh its restrictive effect). Initially, agreements could benefit from Article 81(3) only if they were specifically 'exempted' from the Article 81(1) prohibition by virtue of either an *individual exemption*, granted by the Commission following notification of the agreement to it, or a *block exemption*, granted by Community regulation to

[11] Article 81 does not provide that the effect on competition and trade must be an appreciable one. The Court of Justice (ECJ) has, however, held that an agreement falls outside the prohibition if its effect on the market is insignificant, see *infra* 182 ff.

[12] *Ibid.*

[13] Case 56/65, *Société La Technique Minière* v. *Maschinebau Ulm GmbH* [1966] ECR 234, [1966] CMLR 357. See *infra* 201 and Chap. 15.

[14] See Reg. 1/2003, Art. 1.

[15] In this chapter unless the context otherwise requires or the discussion is specifically about one or other category of collusion the word 'agreement' is used as shorthand to cover agreements, decisions, and concerted practices.

certain categories of agreement. The Commission had *sole* power to declare Article 81(1) inapplicable to individual agreements pursuant to Article 81(3).[16] From 1 May 2004, however, it has not been possible to gain an individual exemption for an agreement (although block exemptions remain) and the Commission's exclusive competence to apply Article 81(3) has been removed.[17] The Commission, the national competition authorities (NCAs), or national courts may now apply Article 81(3) individually to agreements (no prior notification being possible) whenever an agreement's compatibility with the provision is raised.

B. THE CONSEQUENCES OF INFRINGEMENT

Severe consequences may result for parties to an agreement that contravenes Article 81(1) but which does not meet the four criteria set out in Article 81(3).

(i) Nullity and Private Proceedings between the Parties to a Contract

Provisions in an agreement that contravene Article 81(1) are automatically void where the agreement does not meet the conditions of Article 81(3). Article 81(2) may, therefore, render carefully negotiated clauses in an agreement void and unenforceable.[18]

(ii) Investigation, Detection, and Penalties—the Commission

The sanction of nullity will not be much of a threat to some parties to a prohibited agreement. Members of a cartel, for example, are unlikely to be concerned about their inability to enforce the agreement in court.[19] Cartels may, however, be deterred by the risk of investigation by the Commission and the likelihood of a fine if a breach is detected. The Commission has power to investigate suspected infringements of Article 81, to order those found to have violated the provision to put an end to the breach, and to impose fines on undertakings that have committed a breach of the competition rules.[20]

(iii) Investigation, Detection, and Penalties—the National Competition Authorities

Until 1 May 2004, it was principally the Commission that enforced Article 81. The NCAs and national courts played a relatively minor role in the enforcement process, partly at least, in

[16] This monopoly was conferred on the Commission by the Council in Reg. 17 [1959–62] OJ Spec. Ed. 87, Art. 9(1), see *infra* Chaps. 4 and 14.

[17] See Reg. 1/2003 and *infra* Chap. 14.

[18] See *infra* 201 and Chap. 15.

[19] They are likely to have their own mechanisms in place for the enforcement of the cartel, *infra* Chap. 11.

[20] Although breach of Article 81 is not a criminal offence, fines may be imposed of up to 10% of an undertaking's turnover in the preceding year of business, and in cases of serious violations of the rules have tended to be large, Reg. 1/2003, Art. 23, see *infra* Chap. 14. Changes introduced by Regulation 1/2003 are designed to facilitate the detection and prevention of severely anti-competitive practices. For example, the Regulation confers broader powers of investigation on the Commission. Further, the abolition of the notification system means that the Commission can refocus its resources on more seriously anti-competitive practices, see *infra* Chap. 14.

consequence of their inability to apply Article 81(3).[21] Regulation 1/2003, however, enables and in some circumstances requires the NCAs, and the national courts, to share in the enforcement of Article 81 and to apply it in its entirety.[22] NCAs may be able to impose fines, and/or other more severe sanctions, on undertakings or individuals found to have been involved in a breach of the rules. In the UK, for example, in addition to corporate fines, sanctions against *individuals* are available (imprisonment, fines, or disqualification from acting as a director) in certain circumstances.[23]

(iv) Damages and Other Private Proceedings

In addition, or alternatively, a claimant injured by the operation of a cartel or any other prohibited agreement may bring tortious or other proceedings before a national court. For example, an injunction and/or damages in respect of any loss suffered in consequence of the prohibited contract might be sought. Although there has been relatively little antitrust litigation in Europe to date, the Commission is taking steps to encourage 'private' enforcement of the rules and such claims are increasingly becoming a reality.[24] In *Courage Ltd* v. *Crehan*[25] the ECJ made it clear that an individual that has suffered loss due to another's breach of the competition rules must, in principle, be able to recover damages.[26]

C. BURDEN AND STANDARD OF PROOF

The ECJ has confirmed that 'the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which... are protected in the Community legal order... It must also be accepted that... the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalties payments'.[27] The burden is therefore clearly on the person or authority alleging an infringement of Article 81(1) to prove the same.

[21] Since the exclusive right to apply Article 81(3) was reserved to the Commission, see *supra* n. 17.

[22] Reg. 1/2003 provides that NCAs applying Articles 81 and 82 may adopt decisions ordering an infringement to be brought to an end, ordering interim measures, accepting commitments and imposing fines, periodic penalty payments, or imposing any other penalty provided for in their national law.

[23] Individuals who have caused their firm to make or to implement certain horizontal 'cartel' agreements may commit a criminal offence and be potentially liable to imprisonment for a period of up to five years and/or an unlimited fine, Enterprise Act 2002, Part 6. Even prior to the Enterprise Act 2002 it is possible that conclusion of a cartel constituted a conspiracy to defraud, see *infra* Chaps. 11 and 14. Further, directors of companies that have breached Article 81 (or Article 82) may be disqualified from acting in that capacity for up to 15 years Enterprise Act 2002, s. 204.

[24] See Chap. 15.

[25] Case C-453/99 *Courage Ltd* v. *Crehan* [2001] ECR I-6297, [2001] 5 CMLR 28. See also Cases 295–298/04 *Manfredi* v. *Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619. When the *Crehan* case reverted to the English courts, however, it was eventually decided by the House of Lords *Inntrepreneur Pub Company* v. *Crehan* [2006] UKHL 38 that no breach of Article 81(1) had in fact been committed, see *infra* Chap. 15.

[26] See Chap. 15. In the UK, contractual and tortious claims have arisen before the High Court. Further, the UK's Enterprise Act 2002 introduced measures into the Competition Act 1998 designed to encourage private action (in particular, by allowing certain damages claims to be brought before a specialist Competition Appeal Tribunal. Such claims may be brought by individuals or consumer bodies on behalf of consumers where a breach of the competition rules has been established by the OFT or the European Commission and, essentially, where the avenues of appeal exhausted, see Competition Act 1998, ss. 47A and B).

[27] Case C-199/92 P, *Hüls AG* v. *Commission* [1999] ECR I-4287, [1999] 5 CMLR 1016, paras. 45, 149–50.

Once this is established, the burden shifts on to the undertakings claiming the benefit of Article 81(3) to establish that the agreement meets its criteria.[28]

The ECJ has held that for the Commission to establish a breach, 'sufficiently precise and coherent proof' must be produced.[29] It appears, therefore, that the Commission must establish breach of the competition rules only on the balance of probabilities and not more conclusively. The question of standard of proof applicable in competition proceedings brought by a regulator has been dealt with more comprehensively by the UK's Competition Appeal Tribunal ('CAT') when applying the UK Competition Act prohibitions (which are modelled on Articles 81 and 82). In its cases, the CAT has held that although Office of Fair Trading ('OFT') proceedings under the UK may lead to the imposition of a penalty (involving a 'criminal charge' for the purposes of Article 6 of the European Convention on Hunan Rights and Fundamental Freedoms) this does not mean that the standard of proof is proof beyond reasonable doubt (the criminal standard established in domestic cases). Rather, it has held that the standard of proof to be applied is the civil standard—the preponderance or balance of probabilities applied taking account of the gravity of the offence.[30]

5. THE INTERPRETATION AND APPLICATION OF ARTICLE 81(1)

A. GENERAL

In Chapter 2 it was explained that the Court's method of statutory interpretation, although drawing on those of the national courts, is an individual one. In particular, it adopts a 'teleological' approach construing Community acts in accordance with the broad system of Treaty aims and objectives set out in Articles 2 and 3. When construing the elements of Article 81 the ECJ has, therefore, tended to adopt an interpretation which best reflects the Treaty's aims and principles.[31]

[28] This position is specifically set out in Reg. 1/2003, Art. 2. In Cases C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland A/S* v. *Commission (Cement)* [2004] ECR I-123, [2005] 4 CMLR 251the ECJ stated: 'As the Council very recently stated in the fifth recital of Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([2003] OJ L1/1), it should be for the party or the authority alleging an infringement of the competition rules to prove the existence thereof and it should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence', para. 78.

[29] Cases 29 and 30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH* v. *Commission* [1984] ECR 1679, [1985] 1 CMLR 688. The standard of proof in civil litigation will be a matter for the national courts of the relevant Member State, see *infra* Chap. 15.

[30] See, e.g. Case 1022/1/1/03, *JJB Sports plc* v. *Office of Fair Trading* [2004] CAT 17, *aff'd* [2006] EWCA Civ 1318.

[31] See, in particular, Case 56/65, *Société La Technique Minière* v. *Maschinebau Ulm GmbH* [1966] ECR 235, [1966] 1 CMLR 357 (*supra* n. 13 and accompanying text), and Cases 56 and 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH* v. *Commission* [1966] ECR 299, [1966] CMLR 418, *infra* 193–4.

B. 'UNDERTAKING' AND 'ASSOCIATIONS OF UNDERTAKING'

(i) Every Entity Engaged in an Economic Activity: the Constituent Elements

Article 81 applies to agreements and concerted practices between *undertakings* and decisions by *associations of undertakings*. Undertaking has the same meaning for the purposes of both Article 81 and Article 82[32] so the concept determines 'the categories of actors to which the competition rules apply'.[33] The term 'undertaking' is not defined in the Treaty but has been widely construed by the European Court. In *Höfner and Elser* v. *Macrotron*[34] the ECJ held that 'the concept of an undertaking, encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed'.[35] Entities engaged in economic activity must respect the principles of competition, whilst entities performing tasks in the public interest fall outside the scope of the rules.[36] The critical question is, therefore, what constitutes 'economic activity'. This question is explored in the series of cases discussed below. The fine distinctions that have been drawn have turned on the *functions* performed by the particular bodies involved in the case. The cases seem to establish, however, that the characteristic feature of an 'economic activity' is (1) the offering of goods or services on the market,[37] (2) where that activity 'could, at least in principle, be carried on by a private undertaking in order to make profits'.[38] If these requirements are satisfied it is irrelevant that the body is not in fact profit making[39] or that it is not set up for an economic purpose.[40]

[32] See Cases T-68, 77 and 78/89, *Società Italiana Vetro* v. *Commission* [1992] ECR II-1403, [1992] 5 CMLR 302. Many of the cases discussed below concerned Article 82, not Article 81, which prohibits any abuse by one or more undertakings of a dominant position.

[33] Case C-67/96, *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, [2000] 4 CMLR 446, Jacobs AG, para. 206.

[34] See Case C-41/90, *Höfner and Elser* v. *Macroton GmbH* [1991] ECR I-1979, [1993] 4 CMLR 306. In *Polypropylene* [1986] OJ L230/1, [1988] 4 CMLR 347, para. 99 the Commission stated that '[t]he subjects of [EC] competition rules are undertakings, a concept which is not identical to the question of legal personality for the purposes of company law and fiscal law…It may, however, refer to any entity engaged in commercial activities'. For a helpful review of the Community case law in this area up to 2002, see the judgment of the UK's Competition Appeal Tribunal ('CAT') in *Bettercare Group Limited* v. *DGFT* [2002] CAT 7, [2002] CompAR 299.

[35] See Case C-41/90, *Höfner and Elser* v. *Macroton* GmbH [1991] ECR I-1979, [1993] 4 CMLR 306, para. 21. This definition has been consistently repeated by the Court, see, for example, Cases C-159–160/91, *Poucet and Pistre* v. *Assurances Générales de France* [1993] ECR I-637, para. 17; Case 364/92, *SAT Fluggesellschaft* v. *Eurocontrol* [1994] ECR I-43, [1994] 5 CMLR 208, para. 18, Cases C-180–184/98, *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 30, para. 74, Case C-218/00, *Cisal di Battistello Venanzio & Co* v. *Istituto Nazionale per L'Assicurazione Contro Gli fortuni Sul Lavoro (INAIL)* [2002] ECR I-691, [2002] 4 CMLR 24, para. 22.

[36] For the view that the Treaty contains a public/ private divide and that the different treatment of these entities is 'justified by a presumption underlying the rules of the private sphere that its occupants are self-interested and the presumption underlying rules of the public sphere that its occupants operate in pursuit of the public interest', see O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press, 2006), 45–56.

[37] See, for example, Case C-475/99, *Ambulanz Glöckner* v. *Landkreis Südwestpflaz* [2001] ECR I-8089, [2002] 4 CMLR 726, para. 19. See also, See also, Case C-35/96 *Commission* v. *Italy* [1998] ECR I-3851, [1998] 5 CMLR. 889, para. 36 and Case C-205/03 P, *FENIN* v. *Commission*, [2006] ECR I-6295, [2006] 5 CMLR 7, para. 25.

(ii) The Notion of an Undertaking is a Relative Concept

The notion of undertaking focuses on the nature of the activity carried out by the entity concerned (a functional approach is adopted).[41] It is therefore 'a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules'.[42] In each case therefore it is necessary to identify the particular 'activity' carried out by the entity in question, since it may be an undertaking when carrying out some of its activities (which are economic) but not others. The case of *SELEX Sistemi Integrati SpA* v. *Commission*,[43] provides a good illustration of this point. In this case the Commission argued that Eurocontrol, (European Organisation for the Safety of Air Navigation) was not an undertaking, relying on a previous finding of the ECJ that '[t]aken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority.'[44] The CFI stressed, however, that, in arriving at this finding, the court had based its reasoning exclusively on a review of Eurocontrol's activities at issue, namely the creation and collection of route charges on behalf of the Contracting States from users of air navigation services. Since the Treaty provisions on competition applied to activities of an entity which could be severed from those in which it engages as a public authority, the various activities of Eurocontrol at issue in that case had to be considered individually to determine whether they were economic in nature. On the facts, the CFI considered that in exercising some of the relevant activities Eurocontrol was acting as an undertaking.[45]

[38] Case C-67/96, *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751, [2000] 4 CMLR 446, Jacobs AG, para. 311. Cases C-180–184/98, *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 30, para. 201. In his book, O. Odudu argues that the three positive requirements of economic activity are that the entity must: 'offer goods or services to the market; bear the economic or financial risk of the enterprise; and have the potential to make profit from the activity', see O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press, 2006) 26–45.

[39] Case 96/82, *IAZ International Belgium SA* v. *Commission* [1983] ECR 3369, [1984] 3 CMLR 276; Case C-67/96, *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, [2000] 4 CMLR 446 discussed *infra* 136. In the UK the OFT investigated price fixing by private schools, many of which are non-profit making charitable organizations. Interestingly, the OFT in the end entered into a settlement with the schools in which each school admitted that their information exchange had distorted competition in the market, agreed to pay a nominal penalty and to pay a £12,000 sum for five years into an independent charitable trust fund for the benefit of the pupils in the Schools in the relevant years of the infringement. Information on this case is available on the OFT's website, www.oft.gov.uk

[40] Case 155/73, *Italy* v. *Sacchi* [1974] ECR 409, [1974] 2 CMLR 177.

[41] For the view that an institutional, not a functional approach should be adopted, see A. Deringer, *The Competition Law of the European Economic Community: A Commentary on the EEC Rules of Competition (Articles 85 to 90) Including the Implementing Regulations and Directives* (New York: Commerce Clearing House, 1968), 5.

[42] Case C-475/99, *Ambulanz Glöckner* v. *Landkreis Südwestpflaz* [2001] ECR I-8089, [2002] 4 CMLR 726, Jacobs AG, para. 72. Some of the activities carried out by medical aid organizations in this case were economic in character and others were not (e.g., the power to grant or refuse authority for the provision of independent ambulance services).

[43] Case T-155/04 12 Dec. 2006, [2007] 4 CMLR 372, Case C-113/07 (judgment pending).

[44] Case C-364/92, *SAT Fluggesellschaft* v. *Eurocontrol* [1994] ECR I-43, [1994] 5 CMLR 208, para. 30, see *infra* 133.

[45] Case T-155/04 *SELEX Sistemi Integrati SpA* v. *Commission* 12 Dec. 2006, [2007] 4 CMLR 372, paras 50–94, Case C-113/07 (judgment pending).

212. One could argue that it is an economic activity similar to the sale of goods or the provision of services. From an economic point of view, that may—arguably—be true. However, I do not think that, from a legal perspective, the assertion is correct.

213. First, it is difficult to see how the term 'undertaking' could be understood in the sense of 'employee'. To interpret the Treaty in a manner that would include the latter term in the former would, in my view, exceed the limits which its wording imposes.

214. Secondly, the functional interpretation of the term 'undertaking' which the Court has adopted in its case-law leads to the same result. With respect to public bodies the Court examines whether the activity in question is—at least potentially—performed by private entities engaged in the supply of goods or services . . . Individuals, too, may be classified as undertakings . . . if they are independent economic actors on the markets for goods or services. The rationale underlying those cases is that the entities under scrutiny are fulfilling the 'function' of an undertaking. The application of Articles [81] and [82] is justified by the fact that those public bodies or individuals are operating on the same or similar markets and according to similar principles as 'normal' undertakings . . .

215. Dependent labour is by its very nature the opposite of the independent exercise of an economic or commercial activity. Employees normally do not bear the direct commercial risk of a given transaction. They are subject to the orders of their employer. They do not offer services to different clients, but work for a single employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services. That difference is reflected in their distinct legal status in various areas of Community . . . or national law.

216. Thirdly, the system of Community competition law is not tailored to be applicable to employees. The examples of anti-competitive practices in Articles [81(1)] and [82] or the conditions for exemption in Article [81(3)] are clearly drafted with regard to economic actors engaged in the supply of goods or services. Article [81(1)(a)] for example refers to 'purchase or selling prices' and to 'other trading conditions'. Employees, on the contrary, are concerned with 'wages' and 'working conditions'. To apply Article [81(1)] to employees would therefore necessitate the use of uneasy analogies between the markets for goods and services and labour markets.

217. Accordingly, in my view, employees in principle fall outside the personal scope of the prohibition of Article [81(1)]. The future will probably show whether that principle applies also in certain borderline areas such as for example professional sport.

(b) Trade unions

218. Since employees cannot be qualified as undertakings for the purposes of Article [81], trade unions, or other associations representing employees, are not 'associations of undertakings'.

219. However, are trade unions themselves 'undertakings'?

220. The mere fact that a trade union is a non-profit-making body does not automatically deprive the activities which it carries on of their economic character . . .

221. A trade union is an association of employees. It is established that associations may also be regarded as 'undertakings' in so far as they themselves engage in an economic activity . . .

222. It must be borne in mind that an association can act either in its own right, independent to a certain extent of the will of its members, or merely as an executive organ of an agreement between its members. In the former case its behaviour is attributable to the association itself, in the latter case the members are responsible for the activity.

223. With regard to ordinary trade associations, the result of that delimitation is often not important, since Article [81] applies in the same way to agreements between undertakings and to decisions by associations of undertakings . . . It may be relevant when the Commission has to decide to whom to address its decision and whom to fine. . . .

224. However, in the case of trade unions that delimitation becomes decisive, since, if the trade union is merely acting as agent, it is solely an executive organ of an agreement between its members, who themselves—as seen above—are not addressees of the prohibition of Article [81(1)].

225. With regard to trade union activities one has therefore to proceed in two steps: first, one has to ask whether a certain activity is attributable to the trade union itself and if so, secondly, whether that activity is of an economic nature.

226. There are certainly circumstances where activities of trade unions fulfil both conditions. Some trade unions may for example run in their own right supermarkets, savings banks, travel agencies or other businesses. When they are acting in that capacity the competition rules apply.

227. However in the present cases the trade unions are engaged in collective bargaining with employers on pensions for employees of the sector. In that respect the trade unions are acting merely as agent for employees belonging to a certain sector and not in their own right. That alone suffices to show that in the present cases they are not acting as undertakings for the purposes of competition law.

(vi) Single Economic Entity

a. What is a Single Economic Entity?

Companies belonging to the same group and having the status of parent and subsidiary may have distinct legal personalities. In *Consten and Grundig*, however, the ECJ held that Article 81 intended to leave untouched the internal organization of an undertaking.[115] Thus, it has been held that if a subsidiary 'enjoys no economic independence'[116] or if the undertakings 'belong to the same concern' or have 'the status of parent company and subsidiary' and 'form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market'[117] they are treated, for the purpose of Article 81, as a single economic entity. '[T]he unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities'.[118] The relevant question is not therefore whether two given companies are separate legal persons but, rather, whether they behave together as a single unit on the market.[119] The doctrine also applies to relations between a company/principal and its commercial agent where the agent is an auxiliary organ which is integrated into the principal.[120]

In *Viho Europe BV v. Commission*,[121] the ECJ confirmed that the Commission had correctly found that a parent company and its 100 per cent owned subsidiaries were a single economic

[115] Cases 56 and 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299, [1966] CMLR 418, set out *infra* 152.

[116] Case 22/71, *Béguelin Import v. GL Import-Export* [1971] ECR 949, [1972] CMLR 81, para. 8.

[117] Case 15/74, *Centrafarm BV and Adnaan De Peijper v. Sterling Drug Inc* [1974] ECR 1183, [1974] 2 CMLR 480, para. 41. See also Case 170/83, *Hydrotherm Gerätebau GmbH v. Compact de Dott Ing Mario Adredi & CSAS* [1984] ECR 2999, [1985] 3 CMLR 224, para. 11, Case T-11/89, *Shell v. Commission* [1992] ECR II-884, para. 311 and generally W. P. J. Wils, 'The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons' (2000) 25 *ELRev* 99.

[118] Case T-102/92, *Viho Europe BV v. Commission* [1995] ECR II-117, [1997] 4 CMLR 469, para. 50. See also Case T-9/99, *HFB Holdings*, paras. 54–68.

[119] Case T-325/01, *Daimler Chrysler AG v. Commission* [2005] ECR II-3319, para. 85.

[120] Case C-217/05, *Confederación Espanola de Empresarios de Estaciones de Servicio v. Compania Espanola de Petróleos* 14 Dec. 2006, [2007] 4 CMLR 8661 and Case T-325/01, *Daimler Chrysler AG v. Commission* [2005] ECR II-3319, para. 86, see Chap. 9.

[121] Case C-73/95 P, *Viho Europe BV v. Commission* [1996] ECR I-5457, [1997] 4 CMLR 419.

unit. Consequently, agreements between these companies were not caught by Article 81(1): the activity was of a single enterprise and not the collusive action required to trigger Article 81.[122]

Case C-73/95 P, *Viho Europe BV* v. *Commission* [1996] ECR I-5457, [1997] 4 CMLR 419

Parker Pen Ltd is a company incorporated under English law which produces writing utensils. This case concerned a complaint made by a Dutch company, Viho, which marketed office equipment on a wholesale basis. Viho had been unable to obtain Parker products on conditions equivalent to those granted to Parker's subsidiaries and independent distributions. It complained to the Commission that Parker's distribution system (which prohibited exports between Member States, divided the common market into national markets, and maintained artificially high prices on those national markets) was in breach of Article 81(1). Parker sold its products in Europe through subsidiary companies in Germany, Belgium, France, Spain and the Netherlands of which it owned 100 per cent of the shares. Sales and marketing of the products through the subsidiaries were controlled by an area team of three directors.

After an investigation the Commission informed Viho that it was rejecting the complaint. Parker's subsidiary companies were wholly dependent on it, enjoyed no real autonomy, and the distribution system did not go beyond the normal allocation of tasks within a group of undertakings. Viho appealed against the Commission's rejection of the complaint to the Court of First Instance which upheld the decision (Case T-102/92 [1995] ECR II-17, [1995] 4 CMLR 299). Article 81(1) referred only to relations between economic entities which were capable of competing with one another. It did not cover agreements or concerted practices between entities belonging to the same group if they formed an economic unit. Viho appealed to the Court of Justice. The ECJ confirmed that the Commission and the CFI had correctly classified the Parker Group as one economic unit within which the subsidiaries did not enjoy real autonomy in determining their course of action in the market.

Court of Justice

13. The appellant claims that the fact that the conduct in question occurs within a group of companies does not preclude the application of Article [81(1)], since the division of responsibilities between the companies in the Parker group aims to maintain and partition national markets by means of absolute territorial protection. The evaluation of such conduct, which has harmful effects on competition, should not therefore depend on whether it takes place within a group or between Parker and its independent distributors. The appellant points out that such territorial protection prevents third parties such as itself from obtaining supplies freely within the Community from the subsidiary which offers the best commercial terms, so as to be able to pass such benefits on to the customer.

14. Consequently, the appellant considers that Article [81(1)], interpreted in the light of Articles 2 and [3(1)(c) and (g)] ... of the E.C. Treaty must apply, since the referral policy in question goes far beyond a mere internal allocation of tasks within the Parker group.

[122] The US Supreme Court in *Copperweld Corp* v. *Independence Tube Corp.* 467 US 36, has held that since a parent and a wholly owned subsidiary have a complete unity of interest and because a parent can assert full control at any moment if a subsidiary fails to act in a parent's interest, the parent and subsidiary have a unity of purpose or common design that belies a section 1 Sherman Act of 1890 agreement.

15. It should be noted, first of all, that it is established that Parker holds 100 per cent of the shares of its subsidiaries in Germany, Belgium, Spain, France and the Netherlands and that the sales and marketing activities of its subsidiaries are directed by an area team appointed by the parent company and which controls, in particular, sales targets, gross margins, sales costs, cash flow and stocks. The area team also lays down the range of products to be sold, monitors advertising and issues directives concerning prices and discounts.

16. Parker and its subsidiaries thus form 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 parent company controlling them (Case 48/69, *ICI* v. *E.C. Commission* ...; Case 15/74, *Centrafarm* v. *Sterling Drug* ...; Case 16/74, *Centrafarm* v. *Winthrop* ...; Case 30/87, *Bodson* v. *Pompes Funebres* ...; and Case 66/86, *Ahmed Saeed Flugreisen and Others* v. *Zentrale zur Bekämpfung Unlauteren Wettbewerbs* ...).

17. In those circumstances, the fact that Parker's policy of referral, which consists essentially in dividing various national markets between its subsidiaries, might produce effects outside the ambit of the Parker group which are capable of affecting the competitive position of third parties cannot make Article [81(1)] applicable, even when it is read in conjunction with Article 2 and Article [3(1)(c)] and (g) of the Treaty. On the other hand, such unilateral conduct could fall under Article [82] of the Treaty if the conditions for its application, as laid down in that article were fulfilled.

18. The Court of First Instance was therefore fully entitled to base its decision solely on the existence of a single economic unit in order to rule out the application of Article [81(1)] to the Parker group.

This case establishes that truly unilateral behaviour of an undertaking, even if within a group of connected companies, will escape the ambit of the competition rules unless that undertaking holds a dominant position and commits an infringement of Article 82.[123] In contrast, distribution arrangements concluded between independent undertakings will be caught by Article 81(1) if they restrict or distort competition. The complaints lodged by Viho about the arrangements between Parker and its *independent distributors*, i.e., firms which were not connected to Parker by any type of ownership or control, culminated with a Commission decision finding that the distribution arrangements were in breach of Article 81(1) and with the parties being fined.[124]

A difficulty is to determine the boundaries of the doctrine. The cases indicate that whether or not the entities constitute an economic unit or whether one has sufficient freedom of action to be considered a separate entity is a question of degree and will depend on a number of factors, for example, whether the parent has control of the board of directors, the amount of profit taken by the parent, and whether the subsidiary complies with directions given by the parent on matters such as marketing and investment. It appears therefore to boil down to the question of control. Where a parent has a majority shareholding, as in *Viho*, there is a presumption that the subsidiary is not independent and that the parent exercises decisive influence over it.[125] In contrast, where a subsidiary is not wholly owned it seems that the parent company must be able to influence the subsidiary's policy.[126] Thus in *Gosmé/Martell-DMP*,[127] the Commission found

[123] See Chap. 5, but see *infra* 155 ff.

[124] See the appeals to the CFI in Case T-66/92, *Herlitz AG* v. *Commission* [1994] ECR II-531, [1995] 5 CMLR 458 and Case T-77/92, *Parker Pen Ltd* v. *Commission* [1994] ECR II-549, [1995] 5 CMLR 435.

[125] See e.g. Case C-286/98 P, *Stora Kopparbergs Bergslags AB* v. *Commission* [2000] ECR I-9925, para. 29. See also the Opinion of Warner AG in Cases 6 and 7/73, *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp* v. *EC Commission* [1974] ECR 223, [1974] 1 CMLR 309.

[126] See, e.g. Case 107/82, *AEG-Telefunken AG* v. *Commission* [1983] ECR 3151, [1984] 3 CMLR 325, para. 52.

[127] [1991] OJ L185/23, [1992] 5 CMLR 586.

that an agreement between a parent and its 50 per cent owned joint venture company fell within the scope of Article 81(1). The parent only jointly owned the company which was able to operate to a large extent autonomously of it.

There is not much decisional-practice or case law which sheds light on the question of when entities will be considered to form part of the same economic unit. It has been suggested, however, that Article 81 should not apply to agreements between entities which are linked in such a way that the creation of these links would amount to a merger or acquisition of sole control within the meaning of the EC Merger Regulation.[128] Aid in this respect may, therefore, possibly be derived from the EC Merger Regulation.

R. Whish, *Competition Law* (5th edn., Butterworths, 2003), 88–9

The crucial question, therefore, is whether parties to an agreement are independent in their decision-making or whether one has sufficient control over the affairs of the other that the latter does not enjoy 'real autonomy' in determining its course of action on the market. For these purposes it is necessary to examine various factors such as the shareholding that a parent company has in its subsidiary, the composition of the board of directors, the extent to which the parent influences the policy of or issues instructions to the subsidiary and similar matters. Where a parent has a majority shareholding, the presumption will be that it controls the subsidiary's affairs; the *Viho* case was a simple one, since Parker Pen held all the shares in the subsidiaries. What is less clear is whether a minority shareholder might be held to have sufficient control to negate autonomy on the part of the subsidiary. Under Article 3(3) of the EC Merger Regulation (hereafter 'the ECMR'), a minority shareholder which has the 'possibility of exercising decisive influence' over the affairs of another undertaking has sufficient control for there to be a concentration. The case law has yet to explain whether the notion of control in the ECMR should be applied to the 'single economic entity' doctrine under Article 81(1), or whether the notions of control differ as between those two provisions. There would seem to be much to be said for the adoption of a consistent approach.

b. Consequences of the Single Economic Entity Doctrine

It was seen from the case of *Viho Europe BV* v. *Commission* that one important consequence of the doctrine is that an arrangement between entities within an economic unit cannot amount to an agreement or concerted practice between undertakings[129] (although it is of course possible that the conduct of the undertakings is incompatible with Article 82).[130] Further, other consequences may flow from a finding that entities form a single economic unit.

[128] See W. P. J. Wils, 'The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons' (2000) 25 *ELRev* 99, 106–8 and R. Whish, *Competition Law* (5th edn., Butterworths, 2003), 88–9. See *infra* Chap. 12.

[129] Although Article 81(1) does not catch agreements between a parent and a wholly owned subsidiary, it is unclear whether the single economic entity doctrine would exclude an agreement between two sister companies (both controlled by the same parent) from the ambit of Article 81(1). It would seem logical that such agreements should be excluded, as if the parent company controls both sister companies, it can ensure that they enter the agreement. In the US, although the Supreme Court has not ruled on the matter, most circuits are agreed that the *Copperweld* doctrine (*supra* n. 122) excludes agreements between sister corporations from the scope of section 1 of the Sherman Act of 1890, see e.g. *Eichorn* v. *AT&T Corp.* 248 F.3d 131 (3d Cir. 2001).

[130] See generally *infra* Chap. 5.

First, such entities are counted as only one party to an agreement. This can be relevant to the application of the technology transfer block exemption which permits only 'bilateral' agreements.[131]

Secondly, although Article 81 applies to undertakings, liability for its breach has to be imputed to a natural or legal person. The single economic entity suggests that companies can be held responsible for the acts of other entities, within the economic unit, such as subsidiaries found to be in breach of a Treaty provision even if they have not participated in the infringement. Where a subsidiary has infringed Article 81, therefore, it appears that liability may be imputed to, and a fine imposed upon, the subsidiary and/or the parent especially where the subsidiary does not decide independently its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. A competition authority may be particularly keen to attribute responsibility to a parent company where, for example, the subsidiary may be unable to pay any fine imposed. In *ICI* v. *Commission (Dyestuffs)*,[132] the Commission used the doctrine to impose liability on a parent company which operated the agreement, and concocted the breach, outside of the European Union. The ECJ rejected the applicant's argument that the Commission was not empowered to impose fines on it in respect of actions taken outside the Community. By the use of its power to control its subsidiaries established in the Community, the applicant had been able to ensure that its decisions were implemented on that market. The subsidiary did not enjoy autonomy and its actions could be attributed to the parent. In this way the single economic entity doctrine avoids the need for the extraterritorial application of EC competition law. The doctrine enables the competition rules to be applied to companies outside the jurisdiction without recourse to the more controversial 'implementation' or 'effects' doctrines.[133] It appears, however, that liability cannot be imputed to a parent which was able to exercise decisive influence over the policy of a subsidiary in breach but which did not in fact use this power i.e. imputation is dependent on a finding that management power was actually exercised.[134] Arguably, it would be reasonable to impose liability on a parent in this situation on the basis that it could have exercised control over the company and could perhaps have prevented the infringement from happening.[135]

Thirdly, in determining the appropriate level of the fine the Commission may impose fines 'from €1,000 to 1,000,000 ... or a sum in excess thereof but not exceeding 10 per cent of the turnover in the preceding business year of each of the undertakings participating in the infringement'. The reference to the total worldwide turnover of each undertaking thus includes turnover of all the entities within the corporate group and is not restricted to the entity in

[131] See Reg. 772/2004 [2004] OJ L123/11, Art. 2 (replacing Reg. 240/96 [1996] OJ L31/2) and Case 170/83, *Hydrotherm Gerätebau GmbH* v. *Compact de Dott Ing Mario Adredi & CSAS* [1984] ECR 2999, [1985] 3 CMLR 224. The 2004 technology transfer block exemption, however, specifically provides that the term undertaking includes 'connected undertakings' as defined therein, see *infra* Chap. 10, 809. See also Reg. 1983/83 [1993] OJ L173/1 and Reg. 1984/83 [1983] OJ L173/7, which were replaced on 1 June 2000 by the new verticals block exemption, Reg. 2790/1999, [1999] OJ L336/1, [2000] 4 CMLR 398, *infra* Chap. 9.

[132] Cases 48, 49, and 51–7/69 [1972] ECR 619, [1972] CMLR 557, paras. 125–46. See also, e.g. *Spanish Raw Tobacco* IP/04/1256, [2007] OJ L102/14 paras. 371 *et seq.* In Case T-24/05 *Standard Commercial* v. *Commission* (pending) one of the applicant's grounds of appeal is that the Commission had misapplied Article 81(1) in holding the applicant responsible for the conduct of its subsidiary.

[133] The extraterritorial application of the competition rules is discussed *infra* Chap. 16.

[134] See, e.g. Cases 48, 49, 51–7/69, *ICI* v. *Commission* [1972] ECR 619, [1972] CMLR 557, para. 137, Case 107/82, *AEG-Telefunken AG* v. *Commission* [1983] ECR 3151, [1984] 3 CMLR 325, para. 50, Case C-286/98 *Stora Kopparbergs Bergslags AB* v. *Commission* [2000] ECR I-9925, paras. 21–30 and Case T-109/02 *Bolloré SA* v. *Commission*, 26 April 2007, paras. 129–150, Cases C-322 and 327/07 (judgment pending).

[135] See W. P. J. Wils, 'The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons' (2000) 25 *ELRev* 99. See also for a discussion of this issue, A. Montesa and A. Giraja, 'When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent Subsidiary Scenarios' [2006] 29(4) *World Competition* 555.

breach or to the turnover earned in the market in which the infringement was committed.[136] In some cases both the parent company and the subsidiary may be liable for the breach of the competition rules. Where both are liable each can be fined under Council Regulation 1/2003, Article 23, and they will be jointly and severally liable.

Fourthly, Community secondary legislation and Commission Notices recognize a similar doctrine providing that the existence of entities within the same economic unit may affect their application. For example, most of the block exemptions[137] and the Commission's Notice on agreements of minor importance[138] apply only to firms which do not exceed specified market shares. These provisions require that, when calculating market shares, the shares of all entities closely 'connected' (as defined therein) to the body that actually entered into the agreement must be taken into account.[139] Similarly, the activities of the whole group must be considered when determining whether or not the parties to the agreement are competing undertakings.[140]

(vii) Associations of Undertakings

It has been seen that Article 81(1) applies not only to agreements and concerted practices between undertakings, but to decisions by associations of undertakings. It seems that the principle reason for such a reference is to enable 'those applying Article 81(1) to hold associations liable for the anti-competitive behaviour of their members'.[141] In *Wouters* v. *Alegemene Raad van de Nederlandse Order van Advocaten*,[142] Advocate General Léger stated the concept 'seeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article [81(1)] covers not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body'.[143]

It appears that the concept of an association 'consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests *vis-à-vis* other economic operators, government bodies and the public in general'.[144] Thus it applies to trade associations which may provide a forum for competitors in a particular industry to get together and to discuss matters which may be to their mutual interest and a perfect vehicle through which undertakings in a specific industry coordinate action, agricultural cooperatives,[145] a body set up by statute and with public functions if they represent the trading interests of the members, even if there are some members appointed by the government or another public authority[146] and professional associations, even if governed by a public law statute.[147] Recommendations and other unilateral acts of such associations of undertakings designed to coordinate the behaviour of members are therefore brought within Article 81 without proof of a concerted practice or agreement between the individual members of the association.[148]

A further question arising is whether an association carrying out non-economic activity may be subject to the competition rules. After all if it were engaged in economic activity it would in any event be an undertaking and so subject to Article 81(1).[149] Case law appeared to establish that for an entity to be classified as an association of undertakings, it is not necessary that it should itself carry on any economic activity.[150] Rather, Article 81(1) applies in so far as their activities or those of the undertakings affiliated to them are calculated to produce the results which it aims to suppress. In *Wouters* v. *Alegemene Raad van de Nederlandse Order van Advocaten*,[151] however, the ECJ suggests that a functional approach should be adopted to the concept of an association of undertakings in the same way as it applies to the concept of an undertaking. In that case it was argued that the Bar of the Netherlands, a body governed by public law, should not constitute an association of undertakings when exercising regulatory powers in order to perform a task of public interest. The ECJ held that 'the rules of competition do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity . . . or which is connected with the exercise of the powers of a public authority . . .'.[152] It held, however, that in adopting the regulatory rules the association was neither fulfilling a social function based on the principle of solidarity nor exercising powers which are typically those of a public authority. Rather, it was acting as the regulatory body of a profession, the practice of which constitutes an economic activity. It thus concluded that the Bar of the Netherlands must be regarded as an association of undertakings within the meaning of Article 81(1) when adopting a regulation such as one which prohibited certain multi-disciplinary partnerships. 'Such a regulation constitutes the expression of the intention of the delegates of the members of a profession that they should act in a particular manner in carrying on their economic activity.'[153]

[136] See Reg. 1/2003, Art. 23(2) and discussion of fines and fining policy *infra* in Chap. 14.

[137] See, e.g., Reg. 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements or concerted practices, [1999] OJ L336/1, [2000] 4 CMLR 398, Art. 11.

[138] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [2001] OJ C368/13, [2002] 4 CMLR 699, para. 12.

[139] The term 'participating' or 'connected' undertaking are defined in the relevant provisions: see e.g. the Notice on agreements of minor importance [2001] OJ C368/13, [2002] 4 CMLR 699, para. 12, *infra* n. 288 and Reg. 2790/1999, [1999] OJ L336/1, [2000] 4 CMLR 398, Art. 11.

[140] See Reg. 2790/1999, [1999] OJ L336/1, [2000] 4 CMLR 398, Arts. 2(4) and 11.

[141] J. Faull and A. Nikpay (eds.), *The EC Law of Competition* (2nd edn., Oxford University Press, 2007), para. 3.102.

[142] Case C-309/99, [2002]ECR I-1577, [2002] 4 CMLR 913.

[143] Case C-309/99, *Wouters* v. *Alegemene Raad van de Nederlandse Order van Advocaten* [2002] ECR I-577, [2002] 4 CMLR 913, Léger AG, para. 62. Relying on M. Waelbroek and A. Frignani, *Commentaire J. Megret, Le Droit de la CE, Vol 4, Concurrence*, (Éditions de l'Université de Bruxelles, Bruxelles, 2nd edn., 1997), para. 128.

[144] Case C-309/99, *Wouters v. Alegemene Raad van de Nederlandse Order van Advocaten* [2002] ECR I-577, [2002] 4 CMLR 913, Léger AG, para. 61

[145] Case C-250/92, *Gøttrup-Klim Grovvareforening and Others* v. *Dansk Landbrugs Grovvaresel-skab AmbA* [1994] ECR I-5641, [1996] 4 CMLR 191.

[146] Case 123/83, *BNIC* v. *Clair* [1985] ECR 391, [1985] 2 CMLR 430.

[147] See Case C-35/96 *Commission* v. *Italy* [1998] ECR I-3851, paras. 36–8 (CNSD); (dealing with a professional association of custom agents), *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 30, paras. 73–7 and Case C-309/99, *Wouters* v. *Alegemene Raad van de Nederlandse Order van Advocaten* [2002] ECR I-577, [2002] 4 CMLR 913, para. 65.

[148] See *infra* 147.

[149] 'If the functional definition of undertaking given in *Höfner* captures all economic activity then associations of undertakings must be addressed when engaged in non-economic activity, otherwise the association would be an undertaking in its own right and 'associations of undertakings' otiose, O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press, 2006), 52–3.

[150] Cases 209–215 and 218/78 *Van Landewyck and Others* v. *Commission* [1980] ECR 3125, paras. 87–8; Cases 96–102, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v. *Commission* [1983] ECR 3369, paras. 19–20 and Cases T-25, 26, 30–2, 34–9, 42–6, 48, 50–71, 87, 88, 103, and 104/95 *Cimenteries CBR SA* v. *Commission* [2000] ECR II-491, [2000] 5 CMLR 204, para. 1320.

[151] Case C-309/99, [2002] ECR I-1577, [2002] 4 CMLR 913.

[152] Case C-309/99, *Wouters* v. *Alegemene Raad van de Nederlandse Order van Advocaten* [2002] ECR I-577, [2002] 4 CMLR 913, para. 57.

[153] Case C-309/99, *Wouters* v. *Alegemene Raad van de Nederlandse Order van Advocaten* [2002] ECR I-577, [2002] 4 CMLR 913 para. 64. The Court found this view to be supported by the fact: that the governing bodies of the Bar was composed exclusively of members of the Bar elected solely by members of the profession; that when adopting regulatory measures it was not required to do so by reference to specified public-interest criteria (it was authorized to act where to do so would be in the interest of the proper practice of the profession); and given the influence the regulation had on the conduct of the members of the Bar of the Netherlands on the market in legal services (which indicated it did not fall outside the sphere of economic activity).

designed to prevent or limit exports of Adalat had not been established. A distinction had to be drawn between cases in which a genuinely unilateral measure had been adopted (without express or implied participation of another) and those in which the unilateral character of the measure was merely apparent, receiving at least the tacit acquiescence of the dealers.[200] It also held that Bayer could not rely on case-law precedents, in which a concurrence of wills had been found, to call into question its conclusion that neither agreement nor acquiescence in Bayer's policy had been established. In distinguishing *AEG* and *Ford* the CFI stressed that the practices of the manufacturers in those cases, refusing to approve distributors who satisfied the qualitative criteria, were not unilateral but part of the contractual relations between the manufacturers and resellers since *admission* to the selective distribution networks[201] was based on the acceptance, tacit or express, by the contracting parties of the policy pursued by supplier.[202]

Case T-41/96, *Bayer AG* v. *Commission* [2000] ECR II-3383, [2001] 4 CMLR 126

Court of First Instance

B. The concept of an agreement within the meaning of Article [81(1)] of the Treaty

66. The case-law shows that, where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article [81(1)] of the Treaty (Case 107/82 *AEG* v. *Commission* [1983] ECR 3151, paragraph 38; Joined Cases 25/84 and 26/84 *Ford and Ford Europe* v. *Commission* [1985] ECR 2725, paragraph 21; Case T-43/92 *Dunlop Slazenger* v. *Commission* [1994] ECR II-441, paragraph 56).

67. It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article [81(1)] of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 *ACF Chemiefarma* v. *Commission* [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v. *Commission* [1980] ECR 3125, paragraph 86; Case T-7/89 *Hercules Chemicals* v. *Commission* [1991] ECR II-1711, paragraph 256).

68. As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, *ACF Chemiefarma*, paragraph 112, and *Van Landewyck*, paragraph 86), without its having to constitute a valid and binding contract under national law (*Sandoz*, paragraph 13).

69. It follows that 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.

70. In certain circumstances, measures adopted or imposed in an apparently unilateral manner by a manufacturer in the context of his continuing relations with his distributors have been regarded as constituting an agreement within the meaning of Article [81(1)] of the Treaty (Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium and Others* v. *Commission* [1979] ECR 2435, paragraphs 28 to 30; *AEG*, paragraph 38; *Ford and Ford Europe*, paragraph 21; Case 75/84 *Metro* v. *Commission* ('*Metro II*') [1986] ECR 3021, paragraphs 72 and 73; *Sandoz*, paragraphs 7 to 12; Case C-70/93 *BMW* v. *ALD* [1995] ECR I-3439, paragraphs 16 and 17).

71. That case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article [81(1)] of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.

72. It is also clear from that case-law that the Commission cannot hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which he maintains with his dealers, in reality forms the basis of an agreement between undertakings within the meaning of Article [81(1)] of the Treaty if it does not establish the existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer (*BMW Belgium*, paragraphs 28 to 30; *AEG*, paragraph 38; *Ford and Ford Europe*, paragraph 21; *Metro II*, paragraphs 72 and 73; *Sandoz*, paragraphs 7 to 12; *BMW* v. *ALD*, paragraphs 16 and 17).

[200] Case T-41/96, [2000] ECR II-3383, [2001] 4 CMLR 126, paras, 66–71, *aff'd* Cases C-2 and 3/01 P, [2004] ECR I-23, [2004] 4 CMLR 653.

[201] A selective distribution system is one where the supplier limits the number or, more usually, the type of outlet that sells its products. They are discussed in greater detail, *infra* Chap. 9.

[202] Case 107/82, *AEG-Telefunken AG* v. *Commission* [1983] ECR 3151, [1984] 3 CMLR 325, para. 38.

The CFI held that the Commission had *not* shown that Bayer had sought to obtain agreement or acquiescence from its wholesalers to adhere to its policy or that the wholesalers had acquiesced explicitly or implicitly, in the policy.[203]

Case T-41/96, *Bayer AG* v. *Commission* [2000] ECR II-3383, [2001] 4 CMLR 126

The Court of First Instance

151. Examination of the attitude and actual conduct of the wholesalers shows that the Commission has no foundation for claiming that they aligned themselves on the applicant's policy designed to reduce parallel imports.

152. The argument based on the fact that the wholesalers concerned had reduced their orders to a given level in order to give Bayer the impression that they were complying with its declared intention thereby to cover only the needs of their traditional market, and that they acted in that way in order to avoid penalties, must be rejected, because the Commission has failed to prove that the applicant demanded or negotiated the adoption of any particular line of conduct on the part of the wholesalers concerning the destination for export of the packets of Adalat which it had supplied, and that it penalised the exporting wholesalers or threatened to do so.

153. For the same reasons, the Commission cannot claim that the reduction in orders could be understood by Bayer only as a sign that the wholesalers had accepted its requirements, or

[203] *Ibid*, paras. 66–185. In the context of a selective distribution system admission to the network may be based on acceptance by the distributors of the policy pursued by the producers, para. 170.

maintain that it is because they satisfied Bayer's requirements that they had to procure extra quantities destined for export from wholesalers who were not suspect' in Bayer's eyes and whose higher orders were therefore fulfilled without difficulty.

154. Moreover, it is obvious from the recitals of the Decision examined above that the wholesalers continued to try to obtain packets of Adalat for export and persisted in that line of activity, even if, for that purpose, they considered it more productive to use different systems to obtain supplies, namely the system of distributing orders intended for export among the various agencies on the one hand, and that of placing orders indirectly through small wholesalers on the other. In those circumstances, the fact that the wholesalers changed their policy on orders and established various systems for breaking them down or diversifying them, by placing them through indirect means, cannot be construed as evidence of their intention to satisfy Bayer or as a response to any request from Bayer. On the contrary, that fact could be regarded as demonstrating the firm intention on the part of the wholesalers to continue carrying on parallel exports of Adalat.

155. In the absence of evidence of any requirement on the part of the applicant as to the conduct of the wholesalers concerning exports of the packets of Adalat supplied, the fact that they adopted measures to obtain extra quantities can be construed only as a negation of their alleged acquiescence. For the same reasons, the Court must also reject the Commission's argument that, in the circumstances of the case, it is normal that certain wholesalers should have tried to obtain extra supplies by circuitous means since they had to undertake to Bayer not to export and thus to order reduced quantities, not capable of being exported.

156. Nor, finally, has the Commission proved that the wholesalers wished to pursue Bayer's objectives or wished to make Bayer believe that they did. On the contrary, the documents examined above demonstrate that the wholesalers adopted a line of conduct designed to circumvent Bayer's new policy of restricting supplies to the level of traditional orders.

157. The Commission was therefore wrong in holding that the actual conduct of the wholesalers constitutes sufficient proof in law of their acquiescence in the applicant's policy designed to prevent parallel imports.

3. The case-law precedents cited by the Commission

158. The Commission contends that the Decision entirely corresponds to its decision-making practice and to the case-law of the Court of Justice on the concept of an agreement, and maintains that in this case, as in a number of previous cases, there was an export ban inserted into a series of continuous commercial relations between the supplier and its customers, as witnessed by the fact that the wholesalers placed orders, were regularly supplied and received corresponding invoices, and that there was tacit consent on the part of the wholesalers, which the Commission maintains is established by the reduction in orders.

159. However, it cannot effectively rely on the case-law precedents referred to in order to call into question the analysis, which has led the Court to conclude that in this case acquiescence of the wholesalers in Bayer's new policy has not been established and that the Commission has therefore failed to prove the existence of an agreement.

160. The Commission relies first on *Sandoz*, in which it maintains that, as in this case, the distributors on the one hand tacitly consented to the export ban in order to maintain their commercial relations (paragraph 11 of the judgment) and, on the other hand, although they had no interest in abandoning exports, accepted the manufacturer's export ban because they wished to continue obtaining the goods.

161. That case concerned the penalty imposed by the Commission on a subsidiary of a multinational pharmaceutical company, Sandoz, which was guilty of inserting into invoices which it sent to customers (wholesalers, pharmacies and hospitals) the express words 'export

prohibited. Sandoz had not denied the presence of those words in its invoices, but had disputed that there was an agreement within the meaning of Article [81(1)] of the Treaty. The Court of Justice dismissed the action after replying to each of the applicant's arguments. It considered that the sending of invoices with those words did not constitute unilateral conduct, but, on the contrary, formed part of the general framework of commercial relations which the undertaking maintained with its customers. It reached that conclusion after examining the way in which the undertaking proceeded before authorising a new customer to market its products and taking into account the practices repeated and applied uniformly and systematically at each sales operation (paragraph 10 of the judgment). It was at that stage in its reasoning that the Court of Justice dealt with the question of the acquiescence of the commercial partners in the export ban, mentioned in the invoice, in the following terms:

> It should also be noted that the customers of Sandoz PF were sent the same standard invoice after each individual order or, as the case may be, after the delivery of the products. The repeated orders of the products and the successive payments without protest by the customer of the prices indicated on the invoices, bearing the words export prohibited, constituted a tacit acquiescence on the part of the latter in the clauses stipulated in the invoice and the type of commercial relations underlying the business relations between Sandoz PF and its clientele. The approval initially given by Sandoz PF was thus based on the tacit acceptance on the part of the customers of the line of conduct adopted by Sandoz PF towards them.

162. It was only after those findings that the Court of Justice concluded that the Commission was entitled to take the view that 'the whole of the continuous commercial relations, of which the export prohibited clause formed an integral part, established between Sandoz PF and its customers, were governed by a pre-established general agreement applicable to the innumerable individual orders for Sandoz products. Such an agreement is covered by the provisions of Article [81(1)] of the Treaty.

163. Although the two cases resemble each other in that they concern attitudes of pharmaceutical groups designed to prevent parallel imports of medicinal products, the concrete circumstances characterising them are very different. In the first place, unlike the situation in the present case, the manufacturer in *Sandoz* had expressly introduced into all its invoices a clause restraining competition, which, by appearing repeatedly in documents concerning all transactions, formed an integral part of the contractual relations between Sandoz and its wholesalers. Second, the actual conduct of the wholesalers in relation to the clause, which they complied with *de facto* and without discussion, demonstrated their tacit acquiescence in that clause and the type of commercial relations underlying it. On the facts of the present case, however, neither of the two principal features of *Sandoz* is to be found; there is no formal clause prohibiting export and no conduct of non-contention or acquiescence, either in form or in reality.

164. Second, the Commission relies on the judgment in *Tipp-Ex* v. *Commission*, cited above, in which the Court of Justice confirmed its decision penalising an agreement designed to prevent exports and in which, unlike the situation in *Sandoz*, there had not been a written stipulation concerning the export ban. It claims that Tipp-Ex, like the applicant in this case, had also argued before the Court of Justice that this was a unilateral measure that did not fall within the scope of Article [81(1)] of the Treaty, and that, since the supplies from the distributor to the parallel exporter had actually taken place, there was no common interest in parallel exports being terminated.

165. That case concerned an exclusive distribution agreement between Tipp-Ex and its French distributor, DMI, which had complied with the manufacturer's demand that the prices charged to a customer should be raised so far as was necessary to eliminate any economic interest on his part in parallel imports. Moreover, it had been established that the manufacturer carried out subsequent checks so as to give the exclusive distributor an incentive actually to adopt that conduct (recital 58 of Commission Decision 87/406/EEC of 10 July 1987 relating to a proceeding under

Article 85 of the EEC Treaty (OJ 1987 L 222, p. 1). Paragraphs 18 to 21 of the judgment show the reasoning followed by the Court of Justice, which, after finding the existence of a verbal exclusive distribution agreement for France between Tipp-Ex and DMI and recalling the principal facts, wished to examine the reaction of and, therefore, the conduct adopted by the distributor following the penalising conduct adopted by the manufacturer. The Court of Justice then found that the distributor 'reacted by raising by between 10 and 20 per cent the prices charged only to the undertaking ISA France. After the interruption of ISA France's purchases from DMI during the whole of 1980, DMI refused at the beginning of 1981 itself to supply Tipp-Ex products to ISA France. It was only after those findings with regard to the conduct of the manufacturer and the distributor that the Court of Justice arrived at its conclusion as to the existence of an agreement within the meaning of Article [81(1)] of the Treaty: 'It is therefore established that DMI acted upon the request of Tipp-Ex not to sell to customers who resell Tipp-Ex products in other Member States (paragraph 21 of the judgment).

166. In *Tipp-Ex*, therefore, unlike the situation in the present case, there was no doubt as to the fact that the policy of preventing parallel exports was established by the manufacturer with the cooperation of the distributors. As indicated in that judgment, that intention was already manifest in the oral and written contracts existing between the two parties (see paragraphs 19 and 20 concerning the distributor DMI and 22 and 23 concerning the distributor Beiersdorf) and, if there were any remaining doubt, analysis of the behaviour of the distributors, pressed by the manufacturer, showed very clearly their acquiescence in the intentions of Tipp-Ex in restriction of competition. The Commission had proved not only that the distributors had reacted to threats and pressure on the part of the manufacturer, but also the fact that at least one of them had sent the manufacturer proof of its cooperation. Finally, the Commission itself observes in this case that, in *Tipp-Ex*, in order to determine whether an agreement existed, the Court of Justice took the approach of analysing the reaction of the distributors to the conduct of the manufacturer running counter to parallel exports and that it was in assessing that reaction of the distributor that it concluded that there must be an agreement in existence between it and Tipp-Ex designed to prevent parallel exports.

167. It follows that that judgment, like *Sandoz*, merely confirms the case-law to the effect that, although apparently unilateral conduct by a manufacturer may lie at the root of an agreement between undertakings within the meaning of Article [81(1)] of the Treaty, this is on condition that the subsequent conduct of the wholesalers or customers may be interpreted as *de facto* acquiescence. As that condition is not fulfilled in this case, the Commission cannot rely on the alleged similarity between these two cases in support of its argument that acquiescence existed in this case.

168. For the same reasons, neither the Commission nor BAI may validly rely on the assessments carried out by the Court of Justice in *BMW Belgium*, *AEG* and *Ford and Ford Europe* in support of their argument that acquiescence by the wholesalers exists in this case.

169. In *BMW Belgium*, in order to determine whether there was an agreement within the meaning of Article [81(1)] of the Treaty between BMW and its Belgian dealers, the Court of Justice examined the measures capable of demonstrating the existence of an agreement, in that case circulars sent to BMW dealers, 'according to their tenor and in relation to the legal and factual context in which they [were] set, and concluded that the circulars in question 'indicate[d] an intention to put an end to all exports of new BMW vehicles from Belgium (paragraph 28). It added that 'in sending those circulars to all the Belgian dealers, BMW Belgium played the leading role in the conclusion with those dealers of an agreement designed to halt such exports completely (paragraph 29). Paragraph 30 of that judgment shows that the Court of Justice intended to confirm the existence of acquiescence by the dealers.

170. In *AEG*, in which the respective intentions of the manufacturer and the distributors do not appear clearly and in which the applicant expressly relied on the unilateral nature of its conduct, the Court of Justice considered that, in the context of a selective distribution system, a practice whereby the manufacturer, with a view to maintaining a high level of prices or to excluding certain modern channels of distribution, refused to approve distributors who satisfied the qualitative criteria of the system did 'not constitute, on the part of the undertaking, unilateral conduct which, as AEG claims, would be exempt from the prohibition contained in Article [81(1)] of the Treaty. On the contrary, it forms part of the contractual relations between the undertaking and resellers (paragraph 38). The Court of Justice then sought to determine the existence of acquiescence by the distributors by stating: 'Indeed, in the case of the admission of a distributor, approval is based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG which requires *inter alia* the exclusion from the network of all distributors who are qualified for admission but are not prepared to adhere to that policy (paragraph 38). That approach has been confirmed in the other selective-distribution cases decided by the Court of Justice (*Ford and Ford Europe*, paragraph 21; *Metro II*, paragraphs 72 and 73; *BMW* v. *ALD*, paragraphs 16 and 17).

171. It follows that the Commission cannot rely on the case-law precedents which it has cited in order to establish the existence of an agreement in this case.

The CFI thus dismissed the Commission's conclusion that by not interrupting their business relations with Bayer, the wholesalers had agreed to its policy. Rather, proof of an agreement had to be based on a finding (direct or indirect) of a meeting of minds between the operators. The CFI stressed that the Commission was not at liberty to widen the scope of the rules in this way. It was not entitled to prohibit truly unilateral behaviour which did not abuse a dominant position, even if the aim of this conduct was to hinder parallel imports, to restrict competition, and affect trade between Member States. It was not 'open to the Commission to achieve a result, such as the harmonization of prices in the medicinal products markets, by enlarging or straining the scope' of the Treaty rules.[204]

The CFI's judgment was upheld by the ECJ. The ECJ started by stating that its judgment was confined to the question of whether there was an agreement within the meaning of Article 81. 'It should be made clear, therefore, that neither the possible application of other aspects of Article [81], nor Article [82] of the EC Treaty..., nor any other possible definitions of the relevant market are at issue in these proceedings'. The ECJ did not therefore deny that Article 82 proceedings might have been possible, if a position of dominance had been established. Like the CFI, the ECJ stressed that it was not open for the Commission automatically to assume that the expression of a unilateral policy by one of the parties established an agreement. Such a broad approach would confuse Article 81 with Article 82. It also considered that the CFI had been correct to find that the Commission could not rely on the case law precedents to call into question the analysis leading the CFI to conclude that, in this case, acquiescence by the wholesalers in Bayer's policy was not established. Again the Court distinguishes cases such as *AEG* and *Ford* on the basis that admission to the network in those cases was based on adherence to the manufacturer's policy.

[204] Case T-41/96, [2000] ECR II-3383, [2001] 4 CMLR 126, para. 179, *aff'd* Cases C-2 and 3/01 P, [2004] ECR I-23, [2004] 4 CMLR 653.

Cases C-2 and 3/01 P, *Bundesverband der Arzneimittel-Importeure EV and Commission* v. *Bayer AG* [2004] ECR I-23 [2004] 4 CMLR 653

Court of Justice

102. For an agreement within the meaning of Article [81(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.

103. Therefore, the Court of First Instance was right to examine whether Bayer's conduct supported the conclusion that the latter had required of the wholesalers, as a condition of their future contractual relations, that they should comply with its new commercial policy.

...

141. ... [I]t is important to note that this case raises the question of the existence of an agreement prohibited by Article [81(1)] of the Treaty. The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists.

142. The case of *Sandoz* concerned an export ban imposed by a manufacturer in the context of continuous business relations with wholesalers. The Court of Justice held that there was an agreement prohibited by Article [81(1)] of the Treaty. However, as the Court of First Instance points out in paragraphs 161 and 162 of the judgment under appeal, that conclusion was based upon the existence of an export ban imposed by the manufacturer which had been tacitly accepted by the wholesalers. In that regard, at paragraph 11 of the *Sandoz* judgment, the Court of Justice held that [t]he repeated orders of the products and the successive payments without protest by the customer of the prices indicated on the invoices, bearing the words export prohibited, constituted a tacit acquiescence on the part of the latter in the clauses stipulated in the invoice and the type of commercial relations underlying the business relations between Sandoz PF and its clientele. The existence of a prohibited agreement in that case therefore rested not on the simple fact that the wholesalers continued to obtain supplies from a manufacturer which had shown its intention to prevent exports, but on the fact that an export ban had been imposed by the manufacturer and tacitly accepted by the wholesalers. Therefore, the appellants cannot usefully rely on the *Sandoz* judgment in support of their plea that the Court of First Instance erred in law by requiring acquiescence of the wholesalers in the measures imposed by the manufacturer.

143. Nor can the appellants rely on *AEG*, *Ford* and *BMW Belgium*, arguing that business relations in the wholesale trade in pharmaceutical products are comparable to a selective distribution system such as that which was at issue in those cases. As has been stated in paragraph 141 of this judgment, the relevant question is that of the existence of an agreement within the meaning of Article [81(1)] of the Treaty.

144. As has been stated in paragraph 106 of this judgment, in the *AEG* and *Ford* judgments the need to demonstrate the existence of an agreement within the meaning of Article [81(1)] of the Treaty was not at issue. The existence of an agreement capable of infringing that provision having already been established, the question raised was whether the measures adopted by the manufacturer formed part of that agreement and therefore had to be taken into account when examining the compatibility of that agreement with Article [81(1)]. In that regard, the Court of First Instance rightly pointed out that, in those judgments, the Court of Justice had held that, at the time of a distributor's admission, its authorisation was based on its adherence to the policy pursued by the manufacturer...

145. A similar analysis must be drawn from the judgment in *BMW Belgium*, in which the question was whether Article [81(1)] of the [EC] Treaty must be interpreted as [prohibiting] a motor vehicle manufacturer which sells its vehicles through a selective distribution system from agreeing with its authorised dealers that they are not to supply vehicles to independent leasing companies where, without granting an option to purchase, those companies make them available to lessees residing or having their seat outside the contract territory of the authorised dealer in question, or from calling on such dealers to act in such a way (paragraph 14).

In *Volkswagen* v. *Commission*[205] the CFI also annulled a Commission decision. In this case the Commission had found that VW had set the selling price of the VW Passat in Germany.[206] The CFI reiterated the critical distinction between agreements (based on the concurrence of wills) and unilateral measures taken without the participation (explicit, tacit or implied) of the undertakings to which they were addressed.[207] It was not sufficient for the Commission to conclude that unilateral calls by the manufacturer, intended to influence the dealer,[208] provided sufficient evidence of an agreement between them. 'In doing so, the Commission is seeking to impose a new legal approach which not only enlarges the meaning of agreement, but also changes the rules on the burden of proof in its favour'.[209] Further, the CFI held that the Commission was wrong to conclude that acquiescence in the supplier's policy could be inferred simply from the dealer being part of a selective distribution network and that signature of an agreement which complies with competition law implied tacit acceptance of *future* unlawful variations of the agreement.[210] Rather, acquiescence and the existence of an agreement had to be established and the Commission had not done this in this case. In contrast: in *AEG*[211] such acquiescence had been established since admission to the network was on the basis of acceptance of AEG's policy; in *Ford*[212] the dealers had clearly implemented the terms of the circular sent by Ford and which

[205] Case T-208/01, [2003] ECR II-5141, [2004] 4 CMLR 14, *aff'd* Case C-74/04 P, [2006] ECR I-6585.

[206] [2001] OJ L 262/14, [2001] 5 CMLR 1309. It imposed a fine of €30.96 million on Volkswagen in respect of the infringement.

[207] Case T-208/01, [2003] ECR II-5141, [2004] 4 CMLR 14, paras. 30–5, *aff'd* Case C-74/04 P [2006] ECR I-6585.

[208] By definition the calls were intended to influence the dealer in the performance of the contract, *Ibid.*, para. 57.

[209] *Ibid.*, para. 19 *aff'd* on appeal Case C-74/04 [2006] ECR I-6585, para. 38. In Case T-67/01, *JCB Service* v. *Commission* [2004] ECR II-49, [2004] 4 CMLR 24 the CFI also annulled a Commission finding that a supplier's policy of drawing up lists of recommended retail prices amounted to resale price maintenance. The CFI considered that these prices scales were not binding and that there was nothing to indicate that JCB's efforts to influence dealers and discourage them from agreeing lower sales prices involved coercion, see especially paras. 121–33. This finding of the CFI was not challenged before the ECJ which broadly upheld the judgment of the CFI, Case C-167/04 *JCB Service* v. Commission [2006] ECR I-8935. In allowing the cross-appeal, however, the ECJ considered that the CFI had been wrong to cut the level of the fine imposed. Fining policy is discussed, *infra* Chap. 14. Note that the agreement in JCB was originally notified to the Commission in June 1973.

[210] The Commission's case amounted to a claim that a dealer who signed a dealership which complies with competition law is deemed to have accepted in advance a later unlawful variation of the contract.

[211] Case 107/82, *AEG-Telefunken AG* v. *Commission* [1983] ECR 3151, [1984] 3 CMLR 325.

[212] Cases 228–229/82, *Ford Werke AG and Ford of Europe Inc* v. *Commission* [1984] ECR 1129, [1984] CMLR 649.

was linked to the dealership agreement; and in *Volkswagen*[213] the Italian dealers had accepted the anti-competitive initiative and refused to sell to foreign customers and the dealership agreement provided for the possibility of limiting deliveries. On appeal, the Commission argued that it was 'settled' law that a call by a manufacturer to authorized dealers did not constitute a unilateral act but an agreement if it formed part of a set of continuous business relations governed by a general agreement drawn up in advance.[214] However, the ECJ[215] upheld the conclusion of the CFI (and the annulment of the Commission's decision), ruling that a call by manufacturer did not relieve the Commission of its obligation to prove that there was a concurrence of wills on the part of the parties to the dealership agreement (established either from the clauses of the dealership agreement or the conduct of the parties, in particular from tacit acquiescence by the dealers in the manufacturer's call).[216] Although the ECJ held that the CFI had erred in the law in making an assumption that contractual clauses complying with the competition rules could not regarded as authorising calls which are contrary to those rules,[217] it concluded that this error had not affected the soundness of the conclusion reached by the CFI.

Both the *Bayer* and *Volkswagen* judgments thus admonish the Commission for too easily finding an agreement where none exists and for so enlarging the scope of its jurisdiction. In the future clear evidence will be necessary to establish that a dealer has agreed or acquiesced, explicitly or tacitly, in any unilateral policy declared by a supplier. It is now apparent that simply continuing to participate in a selective distribution system or accepting supplies under the terms of a distribution agreement will not be sufficient to establish liability. A dealer that signs up to a distribution agreement or selective distribution network in no way binds itself to accept future variations in the way the agreement is operated. In such cases something more will have to be established, such as acceptance of the policy or adherence to the policy, before an agreement can be proved. Where, however, the dealer knows of the supplier's policy at the time it enters contractual relations, it may then be concluded that the contract was dependent upon the dealer accepting that policy.

f. Participation in Meetings

Any regular participant at a meeting at which an anti-competitive agreement is concluded will be taken to have participated in that agreement, unless it can establish that the undertaking did not have any anti-competitive intention when it attended the meeting, and that the other participants were aware of this.[218] It appears, therefore, that the participant tacitly accepts an offer to collude by not publicly distancing itself. Further from the agreement. It is no defence that the participant did not put the initiatives into effect and evidence of prices or other behaviour not reflecting those discussed at the meeting would not be sufficient to prove that it had not participated in the scheme.[219] The ECJ set this position out clearly in *Cement*.[220]

[213] This was a different Volkswagen case involving export bans, *Volkswagen* [1998] OJ L124/60, [1998] 5 CMLR 33, on appeal Case T-62/98, *Volkswagen AG* v. *Commission* [2000] ECR II-2707, [2000] 5 CMLR 853, the appeal to the ECJ was dismissed, Case C-338/00 P, *Volkswagen AG* v. *Commission* [2003] ECR I-9189, [2004] 4 CMLR 7. The case is discussed *infra* Chap. 9.

[214] It had been thought by many commentators that, at least as far as selective distribution systems were concerned, dealers involved in ongoing business relationships would be found to have agreed to whatever sale policies the manufacture had chosen to adopt by the very fact of agreeing to become part of a network, see J. Faull and A. Nikpay (eds.), *The EC Law of Competition* (2nd edn., Oxford University Press, 2007), para. 3.68.

[215] Case C-74/04 P, [2006] ECR I-6585.

[216] Case C-74/04 P, [2006] ECR I-6585, paras. 39–56. In this case the Commission had not attempted to show that the dealers had tacitly acquiesced in the manufacturer's call but had found that the concurrence was part of the dealership agreement.

[217] Rather, clauses had to be examined individually to determine whether the calls at issue were part of the overall commercial relationship between VW and its dealers.

[218] Case T-3/89, *Atochem* v. *Commission* [1991] ECR II-867, paras. 53–4. See also, e.g., *Steel Beams* (proceedings under Article 65 of the ECSC Treaty), Case T-141/94, *Thyssen Stahl AG* v. *Commission* [1999] ECR II-347, [1999] 4 CMLR 810, para. 177 *aff'd* Case C-194/99 P, [2003] ECR I-1082 and Case T-142/89 *Böel* v. *Commission* [1995] ECR II-867.

Cases C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland AS* v. *Commission* [2004] ECR I-123, [2005] 4 CMLR 251

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81. According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see Case C-199/92 P, *Hüls* v. *Commission* [1999] ECR I-4287, paragraph 155, and Case C-49/92 P, *Commission* v. *Anic* [1999] ECR I-4125, paragraph 96).

82. The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.

83. The principles established in the case-law cited at paragraph 81 of this judgment also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (*Commission* v. *Anic*, paragraph 87).

84. In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.

85. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting (see Case C-291/98 P, *Sarrió* v. *Commission* [2000] ECR I-9991, paragraph 50).

86. Neither is the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate material to the establishment of the existence of an infringement on its part. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (see, to that effect, *Commission* v. *Anic*, paragraph 90).

[219] Case T-3/89, *Atochem* v. *Commission* [1991] ECR II-867, para. 100.

[220] Cases C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland AS* v. *Commission* [2004] I-123, [2005] 4 CMLR 251.

agreement but which is distinguishable by virtue of the intensity and the form in which it manifests itself (i.e. is it just a mechanism by which a broader, looser range conduct can be relied upon to *infer* a concurrence of wills) or does it catch a different, broader spectrum of conduct? In his book, *The Boundaries of EC Competition Law*, Odudu explores this question. He considers two concepts of concerted practice:

> The first requires common intention,[269] but relies on different evidence than that used to show agreement. The second does not require common intention, but instead focuses on whether conduct reduces uncertainty as to the future conduct of others."

Odudu rejects the first interpretation, which would be based on a finding that the less probative the evidence is in showing common intention, the more likely that a concerted practice will be found,[270] on the grounds that the ECJ has clearly held that it does not require a working out of an actual plan and that this interpretation would render the concept of a concerted practice otiose. He thus concludes that the concept of concerted practice must be broader, and must also capture conduct which reduces the position of uncertainty of competitors' future conduct that exists on a competitive market and so enables the firms to act with greater knowledge and more or less justified expectations about other undertakings.

This latter interpretation of a concerted practice is extremely broad and potentially incorporates the situation where information is proffered by one undertaking to another without any commitment from the other as to how that information will be used. It thus requires a very expansive interpretation of reciprocal cooperation. This view is supported, however, by the cases on participation in meetings where concertation may be found even though only one firm has disclosed its future course of conduct to competitors. Others will be implicated unless they publicly distance themselves from the policy. The mere receipt of information may therefore in some circumstances provide the requisite reciprocal direct or indirect conduct.[271] Further, it seems that a concerted practice may be found where players on a market seek to ensure a division of markets by 'indirect' communication through an intermediary (e.g. where a distributor complains to supplier about other distributors selling into its territory and where that information is passed on by the supplier to the offending distributors).[272] The potential depths to which this concept could be stretched is illustrated by a judgment of the UK's Competition Appeal Tribunal (CAT) in *JJB Sports plc* v. *Office of Fair Trading*.[273] In this case, the appellant sought to challenge the Office of Fair Trading's finding that it unlawfully participated in various price fixing arrangements. In relation to an allegation that it had participated in indirect exchanges of price information with competing retailers through the intermediary of Umbro, the CAT held relying on *Cimenteries* and *Tate and Lyle* that:

> 642. The fact that only one participant reveals his future intentions or other competitive information does not exclude the possibility of a concerted practice, since the recipient of the information in question cannot morally fail to take that information into account when formulating its policy on the market.

[269] Odudu takes the view that the core of an agreement is 'common intention' and that it is both sufficient and necessary to establish an agreement within the meaning of Article 81. He thus equates it with a concurrence of wills.

[270] Written and parol evidence of common intention could establish agreement; and evidence of common intention inferred from conduct could establish concerted practice.

[271] See *supra* n. 263 and accompanying text.

[272] See *supra* n. 266 and accompanying text.

[273] Case 1022/1/1/03 [2004] CAT 17 (Judgment on Liability).

Building on this, the CAT later indicated that a concerted practice might be found where a retailer disclosed its pricing intentions to a supplier in circumstances where it was reasonably foreseeable that that information might be used to influence market conditions:

> 659. If one retailer A privately discloses to a supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The prohibition on direct *or indirect* contact between competitors on prices has been infringed.
>
> 660. As regards A, the position might in our view be different only if it could be shown that retailer A revealed its future pricing intentions to its supplier B for some legitimate purpose not related in any way to competition, and could not reasonably have foreseen that such information would be used by B in a way capable of affecting market conditions. It seems to us that such disclosure by a retailer to a supplier will rarely be legitimate, otherwise resale price maintenance could be reintroduced by the back door.

It is doubtful whether this broad interpretation of a concerted practice is consistent with the requirement set out in *Dyestuffs* that the parties to the concerted practice should *knowingly* substitute practical cooperation for the risks of competition and the requirement of reciprocal contact in concerted practices.[274] Indeed, on appeal, the Court of Appeal, although upholding the finding of liability, did indicate that this broad statement of the CAT, if taken out of context, went too far. The Court of Appeal considered that reasonable foresight was not enough to find a concerted practice. Rather, it favoured a more subjective test for the imposition of liability in which retailer A intended that the information be passed on by B and that retailer C knew that the information had been provided by A to B and used that information in setting its prices. 'The Tribunal may have gone too far if it intended that suggestion to extend to cases in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact, appreciate that the information was being passed to him with A's concurrence'.[275]

D. OBJECT OR EFFECT THE PREVENTION, RESTRICTION, OR DISTORTION OF COMPETITION

Whether or not an agreement has as its object or effect the prevention, restriction, or distortion of competition is the heart of Article 81(1). Agreements and other collusive practices are not prohibited unless they prevent, restrict, or distort competition within the meaning of Article 81(1). The way in which this phrase is interpreted determines the types of agreements which are prohibited and the scope of application of Article 81(1). Further, the way in which Article 81(1) is interpreted has a crucial impact on the role played and the interpretation of Article 81(3). Obviously there is only a need to consider Article 81(3) where an agreement is prohibited under Article 81(1). The relationship and interaction of these two paragraphs and the question of what issues should be considered under each Article has caused enormous controversy. The relationship of these two provisions is fully explored in Chapter 4 below.

[274] See generally A. Albors-Lorens 'Horizontal Agreements and Concerted Practices in EC Competition Law: Unalwful and Legitimate Contacts between Competitors' [2006] 51 *Ant Bull* 837.

[275] *Argos Limited and Littlewoods Ltd* v. *OFT, JJB Sports plc* v. *OFT* [2006] EWCA Civ 1318, para. 91. The Court of Appeal held, however, that the higher substantive test was satisfied on the facts.

As a preliminary issue, however, it should be stressed that Article 81(1) prohibits an agreement which has as its object *or* its effect the prevention, restriction, or distortion of competition.[276] The words 'object or effect' are read disjunctively. If, therefore, it is clear from the terms of the agreement that its object is to prevent, restrict, or distort competition there is no need to examine its effects.[277] Certain agreements containing hard-core restraints, for example, hard-core cartel agreements fixing prices, restricting output or sharing markets or vertical agreements fixing minimum resale prices or incorporating export bans, are considered to have as their object the restriction of competition and are prohibited unless they meet the Article 81(3) criteria. Where the object of the agreement cannot be said to restrict competition an analysis of the effect of the agreement on the market and in the context in which it occurs is necessary before it can be determined whether the agreement infringes Article 81(1).[278]

E. AN APPRECIABLE EFFECT ON COMPETITION

(i) *Völk* v. *Vervaecke*

The ECJ has held that 'in order to come within the prohibition imposed by Article [81], the agreement must affect trade between Member States and the free play of competition to an appreciable extent'.[279] The concept of appreciability was first accepted by the ECJ in *Völk* v. *Vervaecke*.

Case 5/69, *Völk* v. *Vervaecke* [1969] ECR 295, 302, [1969] CMLR 273, 282

The case concerned an exclusive distribution agreement concluded between Mr Völk, the owner of a company, Erd & Co, which manufactured washing machines, and Vervaecke, a Belgian company which distributed household electrical appliances. Under the agreement, Vervaecke had the exclusive right to sell Völk's products in Belgium and Luxembourg. According to the Commission, Erd & Co had only 0.08 per cent of the market for the production of washing machines Community wide, 0.2 per cent of the market in Germany and 0.6 per cent of the market in Belgium and Luxembourg. Following a dispute which raised the validity of the agreement before the German courts, the Oberlandesgericht in Munich made an Article 234 reference to the Community Court. In particular, it asked the Community Court whether, in considering if an agreement fell within Article 81(1), regard had to be had to the proportion of the market that the grantor had.

[276] Case 56/65, *Société Technique Minière* v. *Maschinebau Ulm GmbH* [1966] ECR 234, 249, [1966] CMLR 357. See also Case C-234/89, *Stergios Delimitis* v. *Henninger Bräu* [1991] ECR I-935, [1992] 5 CMLR 210, para. 13 and Cases T-374, 375, 384, and 388/94, *European Night Services* v. *Commission* [1998] ECR II-3141, [1998] 5 CMLR 718, para. 136, discussed *infra* Chap. 4.

[277] Cases 56 and 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH* v. *Commission* [1966] ECR 299, [1966] CMLR 418.

[278] Case C-234/89, *Stergios Delimitis* v. *Henninger Bräu* [1991] ECR I-935, [1992] 5 CMLR 210, para. 13 ff.

[279] Case 22/71, *Béguelin Import Company* v. *GL Import-Export SA* [1971] ECR 949, [1972] CMLR 81. The text of Article 81(1) does not require that the effect on competition or trade should be appreciable.

Court of Justice

If an agreement is to be capable of affecting trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States. Moreover the prohibition in Article [81(1)] is applicable only if the agreement in question also has as its object or effect the prevention, restriction or distortion of competition within the common market. Those conditions must be understood by reference to the actual circumstances of the agreement. Consequently 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. Thus an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article [81(1)].

This case makes it crystal clear that Community law is not concerned with agreements, even those containing hard-core restraints,[280] concluded between parties that hold a weak position on the market and which have an insignificant effect on intra-community trade and/or on competition. The insignificant position held by the undertakings causes the Community institutions to take the view that the agreement cannot possibly threaten the Community objectives.[281] The more serious the restraint, however, the more insignificant the position held by the undertakings must be.[282]

(ii) Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 81(1) (De minimis)

In *Völk v. Vervaecke* the undertakings involved had very small shares of the markets potentially affected by the agreement.[283] Although the ECJ, in the Article 234 reference, was not at liberty to apply Community law to the facts at issue in that case, in interpreting Article 81(1) it indicated that Article 81 would not in fact prohibit the agreement in question. In what other circumstances, however, might an agreement be considered to be insignificant on account of the weak position of the parties involved?

The concept of appreciability is obviously of huge practical importance to undertakings, particularly small and medium-sized ones. Because of this the Commission has, over the

[280] In *Völk* the distributor had been granted absolute territorial protection, which has as its object the restriction of competition, Case 5/69, *Völk v. Vervaecke* [1969] ECR 295, 302, [1969] CMLR 273, 282. See also Case C-306/96, *Javico International and Javico AG* v. *Yves Saint Laurent Parfums SA* [1998] ECR I-1983, [1998] 5 CMLR 172, para. 17. Similarly, it must be assumed that even horizontal price-fixing or market-sharing agreements concluded between undertakings with a weak market position may also be considered to be insignificant.

[281] Rather, it is more appropriate that they should be examined, if at all, within the framework of national competition legislation.

[282] See *infra* 186–9.

[283] *Supra* 182. The relevant geographical market in that case was not however actually defined. It was unclear whether the relevant product market was divided on national, Community, or some other line.

years, issued a series of notices indicating when, in its view, an agreement is likely to be considered to be of minor importance. Each notice has been intended to enable undertakings to be able to judge for themselves whether their agreements fall outside the Article 81(1) prohibition and to free up the Commission's resources to allow it to concentrate on serious infringement of the rules. The most recent notice was published in 2001 and replaces a notice published in 1997.[284] Unlike previous notices, the 2001 notice deals only with the question of whether the agreement appreciably restricts competition. It does not quantify what does not constitute an appreciable effect on trade (this is dealt with in the notice on the effect on trade concept).[285] The notice uses market share thresholds,[286] to quantify what is *not* likely to be an appreciable restriction of competition under Article 81 of the EC Treaty. In recognition of their differences, however, the notice makes a distinction between agreements between undertakings that are competitors (actual or potential) and agreements between undertakings that are not competitors.[287]

Paragraph 7 states that the Commission holds the view that agreements between competitors do not appreciably restrict competition where the aggregate market share held by the parties to the agreement does not exceed 10 per cent and that agreements between undertakings which are not competitors do not appreciably restrict competition if the market share held by each of the parties to the agreement does not exceed 15 per cent. Where it is difficult to classify the agreement as either an agreement between competitors or non-competitors the 10 per cent threshold applies. For the purposes of calculating market shares, the market shares of 'connected undertakings' are included.[288]

[284] Commission Notice on agreements of minor importance [2001] OJ C368/13, [2002] 4 CMLR 699. The first notice was published in 1970, [1970] OJ C64/1.

[285] See *infra* 197–9.

[286] One earlier notice (the 1986 Notice) was criticized as it indicated that an agreement would be of minor importance only if the parties satisfied two distinct criteria. The first was that the parties did not have more than 5% of the relevant market of the goods or services which were the subject of the agreement in the area of the common market affected by the agreement. The second was that the parties were required to show that the aggregate annual turnover of the participating undertakings did not exceed ECU 300 million. The necessity of satisfying the turnover criterion was argued to be irrelevant to the significance of the impact of the agreement on the market, see para. 7 of the 1986 Notice (the sum was increased from ECU 200 to 300 million by a Commission Notice of 23 December 1994). Taking heed of the criticism, the 2001 Notice (like the 1997 Notice) omits any reference to turnover thresholds and defines the term 'appreciable effect' on competition by using only quantative criteria. Appreciability (in the context of an appreciable effect on competition) is determined by reference to market shares thresholds alone (but see the notice dealing with an appreciable effect on trade *infra* 197–9).

[287] It does not distinguish between horizontal and vertical agreements like the 1997 Notice did.

[288] Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 81(1) [2001] OJ C368/13, para. 12. This is interpreted broadly to include (a) undertakings in which a party to the agreement directly or indirectly has the power to exercise more than half the voting rights; the power to appoint more than half the members of the board; or has the right to manage the undertaking's affairs; (b) undertakings which have such rights over a party to the agreement; (c) other undertakings in which an undertaking referred to in (b) has such rights over; (d) undertakings in which a party to the agreement together with any undertaking referred to in (a)–(c), or two of such undertakings, have such rights over; and (e) undertakings in which such rights are jointly held by parties to the agreement or their respective connected undertakings or one or more of the parties to the agreement or one or more of the connected undertakings and one or more third parties.

Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition Under Article 81(1) [2001] OJ C368/13, [2002] 4 CMLR 699

1. Article 81(1) prohibits agreements between undertakings 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. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable.

2. In this notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 of the EC Treaty. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 81(1)(2).

3. Agreements may in addition not fall under Article 81(1) because they are not capable of appreciably affecting trade between Member States. This notice does not deal with this issue. It does not quantify what does not constitute an appreciable effect on trade. It is however acknowledged that agreements between small and medium-sized undertakings, as defined in the Annex to Commission Recommendation 96/280/EC(3), are rarely capable of appreciably affecting trade between Member States. Small and medium-sized undertakings are currently defined in that recommendation as undertakings which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million.

4. In cases covered by this notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an agreement is covered by this notice, the Commission will not impose fines. Although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81.

5. This notice also applies to decisions by associations of undertakings and to concerted practices.

6. This notice is without prejudice to any interpretation of Article 81 which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II

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

(a) if the aggregate market share held by the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors); or

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

In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 per cent threshold is applicable.

(iii) Networks of Agreements

Paragraph 8 provides that where competition in a market is restricted by the cumulative effect of agreements entered into by different suppliers and distributors, the ordinary thresholds do not apply. Rather, a reduced threshold of 5 per cent applies (both for agreements between competitors and non-competitors). Access to a market is unlikely to be foreclosed by the cumulative effect of parallel networks of agreements where they cover less than 30 per cent of the market. This paragraph will be of particular importance in the context of distribution agreements for example, beer supply agreements, which operate in a similar way to other agreements on the market.[289] The notice improves on the position set out in the previous 1997 notice which did not apply at all where the relevant market was restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers.

Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition Under Article 81(1) [2001] OJ C368/13, [2002] 4 CMLR 6998

8. Where in a relevant market competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds under point 7 are reduced to 5 per cent, both for agreements between competitors and for agreements between non-competitors. Individual suppliers or distributors with a market share not exceeding 5 per cent are in general not considered to contribute significantly to a cumulative foreclosure effect. A cumulative foreclosure effect is unlikely to exist if less than 30 per cent of the relevant market is covered by parallel (networks of) agreements having similar effects.

(iv) Outgrowing the Notice

A possible difficulty is that parties may outgrow the notice by subsequently acquiring greater market shares or achieving increased turnovers. Paragraph 9 of the notice provides for some marginal relief.

9. The Commission also holds the view that agreements are not restrictive of competition if the market shares do not exceed the thresholds of respectively 10 per cent, 15 per cent and 5 per cent set out in point 7 and 8 during two successive calendar years by more than 2 percentage points.

(v) The Importance of Market Shares and Hard-core Restraints

The important part played by market shares means, of course, that the relevant product and geographic markets must be defined in each case.[290] This is an inherent (but inevitable) source of weakness of the notice. Although the notice (at paragraph 10) makes reference to the

[289] Beer supply agreements will not restrict competition at all if they do not significantly contribute to a cumulative effect caused by the network on the market, see Case 234/89, *Delimitis v. Henninger Bräu* [1991] ECR I-935, [1992] 5 CMLR 210, paras. 24–6. This aspect of the case is discussed *infra* Chap. 4.

[290] See Chap. 1.

Commission Notice on the definition of the relevant market for the purposes of Community competition law[291] the definition of the market is of course frequently uncertain.[292]

10. In order to calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market. When defining the relevant market, reference should be had to the notice on the definition of the relevant market for the purposes of Community competition law. The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.

In addition, the Commission further detracts from the utility of the notice by stating, in paragraph 11, that these thresholds do not apply to agreement containing specified hard-core restrictions, for example:

(i) agreements between competitors which fix prices, limit output or sales or allocate markets or customers; or
(ii) agreements between non-competitors which impose fixed or minimum sale prices on buyers or restrict the territory into which, or the customers to whom, the buyer may sell.

The list of hard-core restraints mirror those set out in the horizontal and vertical block exemptions (see Chapters 13 and 9 respectively).

11. Points 7, 8 and 9 do not apply to agreements containing any of the following hardcore restrictions:

(1) as regards agreements between competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
  (a) the fixing of prices when selling the products to third parties;
  (b) the limitation of output or sales;
  (c) the allocation of markets or customers;

(2) as regards agreements between non-competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
  (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
  (b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except the following restrictions which are not hardcore:
    — the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
    — the restriction of sales to end users by a buyer operating at the wholesale level of trade,
    — the restriction of sales to unauthorised distributors by the members of a selective distribution system, and

[291] [1997] OJ C372/5, [1998] 4 CMLR 177.

[292] For the problems involved in defining a market, see *supra* Chap. 1.

—the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;

(e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier's ability to sell the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods;

(3) as regards agreements between competitors as defined in point 7, where the competitors operate, for the purposes of the agreement, at a different level of the production or distribution chain, any of the hardcore restrictions listed in paragraph (1) and (2) above.

At first sight this paragraph seems to be contrary to the clear view expressed by the ECJ in *Völk* v. *Vervaeke* (where a restriction was imposed on the territory to which the buyer could sell).[293] It seems, however, that the exclusion of agreements containing hard-core restraints from the ambit of the notice does not mean that these agreements may never fall outside Article 81(1) on the ground that they do not appreciably restrict competition. Rather, this paragraph could reflect a view that where the agreement contains particularly serious restrictions of competition from a Community perspective the agreement will not be considered to be of minor importance unless the parties' market shares are considerably lower than that set out in the notice (the more serious the restraint the less likely it is to be insignificant). Although the approach taken in the notice is strict, conveying the seriousness with which the Commission views hardcore restraints, it seems unlikely that the Commission would allocate resources to cases in which market shares were small.[294]

J. Faull and A. Nikpay (eds.), *The EC Law of Competition* (2nd edn., Oxford University Press, 2007)

(b) Restriction by object and appreciability

3.158 An agreement which, *prima facie*, has as its object the restriction of competition can nevertheless escape the prohibition of Article 81(1) if it has only an insignificant effect on the market on or trade. Thus in *Società Italiana Vetro, Fabbrica Pisana and PPG Vernante Pennitalia* v. *Commission*, the CFI rejected the Commission's submission that the evidence of the agreements between the parties was so unambiguous and explicit that any investigation whatsoever into the structure of the market had been entirely superfluous. While acknowledging that the Commission was not required to discuss in its decisions all the arguments raised by undertakings, the CFI held that the Commission ought to have examined more fully the structure and the functioning of the market in order to show why the conclusions drawn by the applicants were groundless. In the ECJ affirmed this position in *Javico* where it held that: '...even an agreement imposing absolute territorial protection may escape the prohibition laid down in Article 85 [now Article 81] if it affects the market only insignificantly, regard being had to the weak position of the persons concerned on the market in the products in question.'

3.159 What is an '*insignificant effect*'? As a preliminary point it is worth noting that the Commission is not required to prove that an object restriction has or even could have the effect of raising prices or restricting output. European competition law assumes that object restrictions will potentially have this effect. Rather the issue is whether the effect is likely to be of sufficient magnitude to affect competition appreciably. For object restrictions this is largely assessed with reference to the market position of the parties. In its submissions in *Völk* v. *Vervaecke*, a case concerning absolute territorial protection, the Commission stated that the production of washing machines by Mr Völk's company represented 0.08 per cent of the total production of the common market and 0.2 per cent of production in the Federal Republic of Germany. Its market share of sales in Belgium and Luxembourg, the territory of its exclusive distributor Vervaecke, was approximately 0.6 per cent. On the basis of these small market shares the Commission accepted that the agreement did not appreciably restrict competition. On the other hand in *Miller*, which concerned a territorial restriction by object, the ECJ found that the company concerned, which had a market share of the German market in sound recordings which varied between 5 per cent and 6 per cent, could not be compared with the undertakings in the *Völk* case and that Article 81(1) was infringed.

3.160 These cases suggest that for *vertical* restrictions, shares below 1 per cent are likely to be 'insignificant' while above 5 per cent, the effect is likely to be appreciable and Article 81(1) is likely to apply. Between 1 per cent and 5 per cent is best described as a grey area.

3.161 As for *horizontal* cases, it seems highly unlikely that, even if applicable, market shares in this region would ever be relevant from a practical perspective: it is difficult to conceive of price fixing of market sharing agreements between entities with combined market shares in single digits on a properly defined market. In any even, given the general tenor of the case law on cartels, it would seem implausible that the European Courts would permit cartels to escape the Article 81 on the basis of low market shares alone.

[293] Set out *supra* 182–3.

[294] See J. Faull and A. Nikpay (eds.), *The EC Law of Competition* (Oxford University Press, 2nd edn., 2007), para. 3.164.

The Commission is, however, more willing to accept that an agreement containing hard-core restraints may escape Article 81(1) on the ground that the agreement does not appreciably affect trade (see section F below).

(vi) Effect of the Notice

The Commission's notices are not legally binding on the ECJ or national courts. It seems however that they create legitimate expectations so that the Commission itself should not depart from them without reason.[295] Indeed, the Commission states at paragraph 4 of the notice that where an agreement falls within its ambit that it will not, generally, institute proceedings. Further, where undertakings assume in good faith that an agreement is covered by this notice, the Commission will not impose fines. The parties cannot, however, be saved from the consequence of nullity in the event of the agreement being found to contravene Article 81(1) although the notice is likely to guide the national courts in its application. Although, therefore, the market shares set out in the notice are useful in indicating the parties' position on the market they are not conclusive. Agreements between parties with smaller market shares may produce

[295] The ECJ has held that although Guidelines are not rules of law, 'they form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment' Case C-397/03 P, *Archer Daniels Midland Co* v. *Commission* [2006] ECR I-4429, [2006] 5 CMLR 4, para. 91 (see *supra* Chap. 2). In practice a national court would be likely to take it into account when assessing whether or not an agreement has an appreciable effect on competition and trade within the meaning of Article 81(1).

a significant impact. Conversely, agreements between undertakings with greater shares of the market may produce insignificant results.[296]

The Commission should, therefore, where it takes the view that an agreement infringes Article 81(1), take care to define the relevant markets and to set out the parties' share of that market. Where the parties to an agreement only slightly exceed the market shares set out in the notice the Commission must justify a finding that the agreement nonetheless has an appreciable effect on competition and trade. Where it fails to do so the Court may quash a decision holding that an agreement falls within Article 81(1).

Cases T-374, 375, 384 and 388/94, *European Night Services* v. *Commission* [1998] ECR II-3141, [1998] 5 CMLR 718

Court of First Instance

102. In any event, even if, as noted above, ENS's share of the tourist travel market was in fact likely to exceed 5 per cent on certain routes, attaining 7 per cent on the London–Amsterdam route and 6 per cent on the London–Frankfurt/Dortmund route, ... it must be borne in mind that, according to the case-law, an agreement may fall outside the prohibition in Article [81(1)] of the Treaty if it has only an insignificant effect on the market, taking into account the weak position which the parties concerned have on the product or service market in question (Case 5/69, *Völk* v. *Vervaecke* [1969] ECR 295 paragraph [7].). With regard to the quantitative effect on the market, the Commission has argued that, in accordance with its notice on agreements of minor importance, ... Article [81(1)] applies to an agreement when the market share of the parties to the agreement amounts to 5 per cent.[297] However, the mere fact that that threshold may be reached and even exceeded does not make it possible to conclude with certainty that an agreement is caught by Article [81(1)] of the Treaty. Point 3 of that notice itself states that 'the quantitative definition of "appreciable" given by the Commission is, however, no absolute yardstick and that "in individual cases ... agreements between undertakings which exceed these limits may ... have only a negligible effect on trade between Member States or on competition, and are therefore not caught by Article [81(1)]" (see also *Langnese-Iglo* ...). It is noteworthy, moreover, if only as an indication, that that analysis is corroborated by the Commission's 1997 notice on agreements of minor importance ([1997] OJ C372, p. 13.) replacing the notice of 3 September 1986, ... according to which even agreements which are not of minor importance can escape the prohibition on agreements on account of their exclusively favourable impact on competition.

103. That being so, where, as in the present case, horizontal agreements between undertakings reach or only very slightly exceed the 5 per cent threshold regarded by the Commission itself as critical and such as to justify application of Article [81(1)] of the Treaty, the Commission must provide an adequate statement of its reasons for considering such agreements to be caught by the prohibition in Article [81(1)] of the Treaty. Its obligation to do so is all the more imperative here, where, as the applicants stated in their notification, ENS has to operate on markets largely dominated by other modes of transport, such as air transport, and where, on the assumption of an increase in demand on the relevant markets and having regard to the limited possibilities for ENS to increase its capacity, its market shares will either fall or remain stable. In addition, such a statement of reasons is necessary in the present instance in view of the fact that, as the Court of Justice held at paragraph 86 of its judgment in *Musique Diffusion Française*, ... an agreement is capable of exercising an appreciable influence on the pattern of trade between Member States even where the market shares of the undertakings concerned do not exceed 3 per cent, provided that those market shares exceed those of most of their competitors.

104. There is, however, no such statement of reasons in the present case.

105. It must be concluded from the foregoing that the contested decision does not contain a sufficient statement of reasons to enable the Court to make a ruling on the shares held by ENS on the various relevant markets and, consequently, on whether the ENS agreements have an appreciable effect on trade between Member States, and the decision must therefore be annulled on that ground.

[296] See Article 2 of the notice and, e.g., Case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA* v. *Kerpen & Kerpen GmbH & Co KG* [1983] ECR 4173, [1985] 1 CMLR 511, para. 8.

[297] This was the threshold set out in the notice at the time.

F. AN APPRECIABLE EFFECT ON TRADE BETWEEN MEMBER STATES

(i) Jurisdictional Limit

The concept of an effect on trade between Member States sets out a jurisdictional limit to the prohibition laid down in Article 81 (it is also a requirement that any abuse of a dominant position should affect trade for the purposes of Article 82).[298] The criterion confines the scope of the application of Articles 81 and 82 to agreements having a minimum level of cross-border effects within the Community, hence the practices must *appreciably* affect trade between Member States.[299] Since the requirement is merely viewed as a jurisdictional matter, it has been interpreted broadly, although it is accepted that the Community has no jurisdiction over cases in which the effects of an agreement, or conduct, are confined to one Member State.[300] The meaning of an effect on trade has been clarified in the case law. The Commission has also prepared a notice on the concept of effect on trade between Member States[301] which seeks to set out the principles developed by the Court and to spell out when agreements and conduct may 'appreciably' affect trade between Member States.[302] It aims 'to set out the methodology for the application of the effect on trade concept and to provide guidance on its application in frequently occurring situations'.[303] In paragraphs 58–109 of the Guidelines it applies the general principles set out in the cases to common types of agreements and abuses, for example: different types of agreements and abuse covering or implemented in several Member States; agreements and abuses covering a single or only part of a Member State; and agreements and abuses involving imports and exports with undertakings located in third countries; and agreements and practices involving undertakings located in third countries. The guidelines are, of course, without prejudice to the interpretation given to the concept by the ECJ or CFI.[304]

[298] The application of Article 81 to an agreement does not preclude the simultaneous application of national competition rules. For the relationship between Community and national law see the discussion of Reg. 1/2003, art. 3, *infra* 199 and Chap. 14.

[299] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81, para. 13.

[300] Case 22/78, *Hugin* v. *Commission* [1979] ECR 1869, [1970] 3 CMLR 345, see also *infra* 196–7.

[301] [2004] OJL C101/81

[302] See *infra* 197–9.

[303] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81, para. 3.

[304] *Ibid.*, para. 5.

(ii) The Tests

The Commission's notice stresses, relying on case law of the Court,[305] that '[t]he concept of "trade" is not limited to traditional exchanges of goods and services across borders. It is a wider concept, covering all cross-border economic activity, including establishment. This interpretation, is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital'.[306] An agreement will be found to 'affect trade' if it interferes with the pattern of trade between Member States.[307] There must be an impact on the flow of goods and services or other relevant economic activities involving at least two Member States. An agreement or practice may also be found to affect trade if it is liable to interfere with the structure of competition in the common market, for example where it eliminates or threatens to eliminate a competitors operating within the Community. This latter structural test is more commonly used in the context of Article 82 than Article 81.[308]

(iii) Pattern of Trade Test

In *Société La Technique Minière* v. *Maschinenbau Ulm*, the ECJ set out a broad interpretation of the requirement that an agreement should affect trade so it is easily satisfied. All that is necessary is that 'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States . . .'.[309]

The test requires the following to be shown:

(a) A sufficient degree of probability on the basis of a set of objective factors of law of fact;[310]

(b) An influence on the pattern of trade between Member States;[311]

(c) A direct or indirect, actual or potential influence on the pattern of trade.[312]

An agreement will, therefore, be caught even if it is not established that the agreement will affect the pattern of trade if it can be shown that it is *capable* of having such an effect,[313] for example, if it is anticipated that they will affect the pattern of trade in the future. As it is only a jurisdictional criterion it is not necessary to establish that it actually has cross-border effects. Relevant factors

[305] See, e.g., Case 172/80, *Züchner* [1981] ECR 2021, [1982] 1 CMLR 313, para. 18, and Case C-309/99, *Wouters* v. *Alegemene Raad van de Nederlandse Order van Advocaten* [2002] ECR I-1577, [2002] 4 CMLR 913, Case C-41/90, *Höfner and Elser* v. *Macroton* [1991] ECR I-1979, [1993] 4 CMLR 306.

[306] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81, para. 19.

[307] Case 56/65, *Société La Technique Minière Ulm* v. *Maschinenbau* [1966] ECR 235, [1966] CMLR 357.

[308] See Case 6–7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp* v. *Commission* [1974] ECR 223, [1974] 1 CMLR 309, especially para. 5 and *infra* Chap. 5.

[309] Case 56/65, *Société La Technique Minière Ulm* v. *Maschinenbau* [1966] ECR 235, 249, [1966] CMLR 357, 375 and Case 5/69, *Völk* v. *Vervaecke* [1969] ECR 295, 302, [1969] CMLR 273, 282.

[310] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81, paras. 25–32.

[311] *Ibid.*, paras. 33–5.

[312] *Ibid.*, paras. 36–43.

[313] *Ibid.*, para. 26.

to the determination will be: the nature of the agreement and practice; the nature of the products; and the position and importance of the undertakings involved.

The fact that the influence on trade need only be direct, indirect, actual, or potential means that a broad range of agreements will be caught including for example: agreements affecting goods or services that are not traded, but which are used in the supply of a final product, which is traded;[314] agreements which do not actually affect trade but which, taking account of foreseeable market developments, may affect trade in the future. In *AEG* v. *Commission*,[315] the ECJ held that the fact that there was little inter-State trade did not mean that Article 81(1) was inapplicable if it could reasonably be expected that the patterns of trade in the future might change. The Commission states, however, that the inclusion of indirect and potential effects in the analysis of effects on trade between Member States, does not mean that the analysis can be based on remote, hypothetical or speculative effects. 'For instance, an agreement that raises the prices of a product which is not tradable reduces the disposable income of consumers. As consumers have less money to spend they may purchase fewer products imported from other Member States. However, the link between such income effects and trade between Member States is generally in itself too remote to establish Community law jurisdiction'.[316]

(iv) An Increase in Trade

In *Consten and Grundig*, the parties argued before the ECJ that their distribution agreement did not produce an effect on trade within the meaning of Article 81(1) since it increased trade between Member States (in the absence of the agreement, Grundig products might not have been sold in France at all). This argument was partially supported by a textual analysis of the Treaty since, in at least one language (Italian), the text suggested that the effect on trade should be a harmful or prejudicial one. The ECJ[317] rejected this argument, ruling that 'the fact that an agreement encourages an increase, even a large one, in the volume of trade between states is not sufficient to exclude the possibility that the agreement may "affect" such trade . . .'.[318] Rather, it examined the contract, which precluded anyone other than Consten from importing Grundig products into France, and prohibited Consten from re-exporting the products into other Member States, and concluded that it 'indisputably affects trade between Member States'. Instead of attempting to adopt a literal interpretation of the provision the ECJ adopted an interpretation which respected the aims and spirit of the Treaty. It was important that agreements such as the exclusive distribution agreement at issue in that case should be capable of being scrutinized under the provisions.[319] The aim of the Treaty was not to increase trade as an end in itself, but to create a system of undistorted competition. The ECJ concluded that Article 81

[314] Case 123/83, *BNIC* v. *Clair* [1985] ECR 391, [1985] 2 CMLR 430, para. 29.

[315] Case 107/82, [1983] ECR 3151, [1984] 3 CMLR 325, para. 60; see also *AEI/Reyrolle Parsons re Vacuum Interrupters* [1977] OJ L48/32, [1977] 1 CMLR D 67, discussed *infra* Chap. 13.

[316] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81, para. 43.

[317] The argument was, however, supported by Roemer AG. He took the view that the effect on trade would have to be an unfavourable one before the prohibition applied.

[318] Cases 56 and 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH* v. *Commission* [1966] ECR 299, 341, [1966] CMLR 418, 472.

[319] The agreement was capable of bringing about a partition of the market in certain products between Member States, rendering more difficult the interpenetration of trade which the Treaty was intended to create and impeding the goal of single market integration.

applied to any agreement which might threaten the freedom of trade between Member States in a manner which might harm the attainment of the single market. The term pattern of trade is neutral, it is not a condition that trade is restricted or reduced.

Cases 56 & 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH* v. *Commission* [1966] ECR 299, 341, [1966] CMLR 418, 471–2

Court of Justice

The complaints relating to the concept of 'agreements ... which may affect trade between Member States'.

The applicants and the German Government maintain that the Commission has relied on a mistaken interpretation of the concept of an agreement which may affect trade between Member States and has not shown that such trade would have been greater without the agreement in dispute.

The defendant replies that this requirement in Article [81(1)] is fulfilled once trade between Member State develops, as a result of the agreement, differently from the way in which it would have done without the restriction resulting from the agreement, and once the influence of the agreement on market conditions reaches a certain degree. Such is the case here, according to the defendant, particularly in view of the impediments resulting within the Common Market from the disputed agreement as regards the exporting and importing of Grundig products to and from France. The concept of an agreement 'which may affect trade between Member States' is intended to define, in the law governing cartels, the boundary between the areas respectively covered by Community law and national law. It is only to the extent to which the agreement may affect trade between Member States that the deterioration in competition caused by the agreement falls under the prohibition of Community law contained in Article [81]; otherwise it escapes the prohibition.

In this connexion, what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States. Thus the fact that an agreement encourages an increase, even a large one, in the volume of trade between States is not sufficient to exclude the possibility that the agreement may 'affect' such trade in the abovementioned manner. In the present case, the contract between Grundig and Consten, on the one hand by preventing undertakings other than Consten from importing Grundig products into France, and on the other hand by prohibiting Consten from re-exporting those products to other countries of the Common Market, indisputably affects trade between Member States. These limitations on the freedom of trade, as well as those which might ensure for third parties from the registration in France by Consten of the GINT trade mark, which Grundig places on all its products, are enough to satisfy the requirement in question.

(v) Partitioning of the Common Market

Many vertical agreements are capable of an effect on trade between Member States because of their tendency to incorporate territorial restrictions and their ability to partition the common

market. It was seen in the extract set out above that the ECJ in *Consten and Grundig* found that the nature of the territorial restrictions was to affect trade. Similarly, other agreements concerning imports or exports, containing provisions sharing markets between a manufacturer and its distributor or between distributors *inter se* are capable of affecting trade between Member States.[320]

Even an agreement covering third countries and undertakings located in third countries may appreciably affect trade between Member States where it is capable of affecting cross-border economic activity inside the Community, for example an agreement preventing a distributor appointed for a territory outside the EU from making sales outside its contractual territory (and, consequently, into the Community). If in the absence of the agreement, resale to the Community would be both possible and likely, it may be capable of affecting patterns of trade inside the Community.[321] Whether or not an agreement with an undertaking outside of the Community will affect trade will depend on factors such as the object of the agreement (is the object of the agreement to restrict competition within the Community), the prices for the contractual products charged in the Community and those charged outside the Community, the level of customs duties, and transport costs.[322] Further the product volumes exported compared to the total market for those products in the territory of the Common market must not be insignificant.[323]

It is also possible that an agreement may have an effect on trade even if it does not appear to at first sight. The impact on inter-State trade may be revealed on a closer examination of the agreement. In *Delimitis* v. *Henninger Bräu*,[324] for example, a beer-supply agreement between a German brewer and a German café proprietor imposed an obligation on the latter to purchase beer only from the brewer. In derogation from this obligation, however, it permitted the café proprietor to purchase competing beer from suppliers in other Member States. The ECJ ruled that the national court would have to examine the agreement in greater detail. It was critical to determine whether or not this 'access' clause was hypothetical or real. The contract obliged the café proprietor to purchase a specific quantity of the brewer's beer each year. It had to be determined, therefore, whether or not this clause stipulating the minimum quantity of the brewery's beer to be purchased in reality left the café proprietor with a real opportunity to purchase beer from brewers in other Member States. If it did not, the agreement would produce an effect on inter-State trade, despite the access clause. On the other hand, if the agreement left a real possibility for foreign brewers to supply the outlet, the agreement was not in principle capable of affecting trade between Member States.

[320] Case 161/86, *Pronuptia de Paris GmbH* v. *Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353, [1986] 1 CMLR 414, para. 27.

[321] Case C-306/96, *Javico International and Javico AF* v. *Yves Saint Laurent Parfums SA* [1998] ECR I-1983, [1998] 5 CMLR 172, paras. 15–29.

[322] *Ibid.* [1998] 5 CMLR 172.

[323] *Ibid.*, paras. 24–6.

[324] Case C-234/89, [1991] ECR I-935, [1992] 5 CMLR 210.

Case C-234/89, *Delimitis* v. *Henninger Bräu* [1991] ECR I-935, [1992] 5 CMLR 210

Court of Justice

The compatibility with Article [81(1)] of a beer supply agreement containing an access clause

28. A beer supply agreement containing an access clause differs from the other beer supply agreements normally entered into inasmuch as it authorizes the reseller to purchase beer from other Member States. Such access mitigates, in favour of the beers of other Member States, the scope of the prohibition on competition which in a classic beer supply agreement is coupled with the exclusive purchasing obligation. The scope of the access clause must be assessed in the light of its wording and its economic and legal context...

30. As far as its economic and legal context is concerned, it should be pointed out that where, as in this case, one of the other clauses stipulates that a minimum quantity of the beers envisaged in the agreement must be purchased, it is necessary to examine what that quantity represents in relation to the sales of beer normally achieved in the public house in question. If it appears that the stipulated quantity is relatively large, the access clause ceases to have any economic significance and the prohibition on selling competing beers regains its full force, particularly when under the agreement the obligation to purchase minimum quantities is backed by penalties.

31. If the interpretation of the wording of the access clause or an examination of the specific effect of the contractual clauses as a whole in their economic and legal context shows that the limitation on the scope of the prohibition on competition is merely hypothetical or without economic significance, the agreement in question must be treated in the same way as a classic beer supply agreement. Accordingly, it must be assessed under Article [81(1)] of the Treaty in the same way as beer supply agreements in general.

32. The position is different where the access clause gives a national or foreign supplier of beers from other Member States a real possibility of supplying the sales outlet in question. An agreement containing such a clause is not in principle capable of affecting trade between Member States within the meaning of Article [81(1)], with the result that it escapes the prohibition laid down in that provision.

(vi) Agreements Operating in One Member State

It tends to be assumed that an agreement between parties situated in different Member States affects trade between Member States.[325] It can be seen from *Delimitis* (an agreement between a German brewer and a German café proprietor) that an agreement which operates in only one Member State is also quite capable of affecting trade between Member States.

Similarly, national cartels, especially those dominating the whole or a large part of a market, tend to reinforce compartmentalization and make it more difficult for undertakings from other Member States to penetrate the market.[326] The ECJ has consistently held the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to exclude the possibility that trade between Member States might be affected.[327] Indeed, the cartel is likely to be successful only if the members can defend themselves against foreign competition. If they do not, and the product covered by the agreement is tradable, the cartel is likely to be undermined by competition from undertakings in other Member States. The agreement in *BELASCO*,[328] for example, specifically provided for protective and defensive measures to be taken against foreign undertakings. Where the relevant product or service affected by the cartel is easily transmissible across borders it is likely that an effect on trade will be found. A Dutch cartel agreement which operated in order to restrict competition in the market for mobile cranes was held to have an effect on intra-Community trade. Since the cranes could travel at speeds of between 63 and 78 kph, the agreement was likely to affect German and Belgian firms operating near the Dutch border.[329] The Commission reached a similar conclusion in *Luxembourg Brewers* in respect of a cartel designed to insulate the Luxembourg market against imports of beer from other Member States.[330]

In *Carlo Bagnasco* v. *BPN*[331] and *Dutch Banks*,[332] the ECJ and Commission respectively concluded that purely national banking agreements were not capable of affecting trade between Member States. Bagnasco, for example, concerned retail banking services (guarantees for current account credit facilities) and the ECJ considered that trade was not capable of being appreciably affected because the potential for trade in the products was very limited. The market was not particularly susceptible to imports and retail banking services were not an important factor affecting the choice made by undertakings from other Member States when determining whether or not to establish themselves in another Member State. Although somewhat out of line with other case law and decisions setting out extensive Community jurisdiction, the cases may be explicable by virtue of a reluctance to apply Community law to cases which essentially have a national impact and so can be dealt with at a national level. Post-modernization, of course, such cases may be appraised by the appropriate NCA under Article 81 (if an effect on trade is found) as well as domestic law.[333]

(vii) Restrictions on Competition and Restrictions on Trade

It is clear that so long as the agreement as a whole affects trade between Member States it is immaterial that the clause (or clauses) which restricts competition does not itself affect trade.[334]

(viii) Agreements which Appreciably Affect Trade between Member States

The Commission's notice dealing with the effect on trade concept also deals with the quantitative element of the criterion, the question of when an agreement will *appreciably* affect trade

[325] See, e.g., Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81, paras. 61–72.

[326] Case 8/72, *Vereeniging van Cementhandelaren* v. *Commission* [1972] ECR 997, [1973] CMLR 7. In Case C-N215/96, *Bagnasco* v. *Banca Popolare di Novarra (NPN) and Cassa di Risparmio di Genova e Imperia (Carige)* [1999] ECR I-135 [1999] 4 CMLR 624, paras. 38–53, however, the ECJ held that standard bank conditions relating to the provision of general guarantees required to secure the opening of current-account credit facilities in Italy did not have an appreciable effect on intra-Community trade within the meaning of Article 81(1), *infra* 197.

[327] Case 246/86, *BELASCO* v. *Commission* [1989] ECR 2117, [1991] 4 CMLR 96, para. 33.

[328] *Ibid.*, paras. 35–8.

[329] *Stichting Certificatie Kraanberhuurwedrijf and the Federatie van Nederlandse Kraanverhuurvedrijven* [1995] OJ L312/79.

[330] [2002] OJ L253/21, paras. 77–81.

[331] Case C-215/96, [1999] ECR I-135, [1999] 4 CMLR 624. See also Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81, para. 60.

[332] [1991] OJ L271/28, [2000] 4 CMLR 137.

[333] But see discussion of Reg. 1/2003, art. 3 *infra* 199 and Chap. 14.

[334] See Case 193/83, *Windsurfing International Inc* v. *Commission* [1986] ECR 611, [1986] 3 CMLR 489. This case is discussed *infra* Chap. 10.

between Member States.[335] It states that Community law limits jurisdiction to agreements and practices capable of having effects on trade of a certain magnitude. In particular, appreciability can be appraised by reference to the position and importance of the undertakings on the relevant market. The Commission considers that appreciability can be measured both in absolute terms (turnover) and in relative terms, comparing the position of the relevant undertakings with others on the market (market share).[336] In paragraphs 50–57 the Commission seeks to quantify appreciability, stressing however that the assessment depends on the circumstances of each individual case. It does, however, indicate when trade is normally not capable of being appreciably affected. It sets out a negative rebuttable presumption, defining the absence of an appreciable effect on trade between Member States (the NAAT-rule[337]). In contrast to its notice on agreements of minor importance, the Commission states that the rules applies to *all* agreements irrespective of the restrictions contained within it (i.e. applies even agreements containing hardcore restraints).[338] Agreements which do not fall within its negative definition of appreciability do not, however, necessarily appreciably affect trade.

At paragraph 52 the Commission states its view that 'in principle agreements are not capable of appreciably affecting trade between Member States when the following *cumulative* conditions are met' (emphasis added):[339]

> (a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 per cent, and
>
> (b) In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million Euro.[340] In case of agreements concerning joint buying of products the relevant turnover shall be the parties' combined purchases of the products covered by the agreement.
>
> In the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million Euro. In the case of licence agreements the relevant turnover shall be the aggregate turnover of the licensees in the products incorporating the licensed technology and the licensor's own turnover in such products. In cases involving agreements concluded between a buyer and several suppliers the relevant turnover shall be the buyer's combined purchase of the products covered by the agreement.

Paragraph 52 also provides marginal relief for those that outgrow the notice in two successive calendar years. In cases where the presumption applies the Commission will not normally institute proceedings. Further, where undertakings assumed in good faith that an agreement is covered by the negative presumption, the Commission will not impose fines.[341]

In contrast, paragraph 53 states that for agreements that, by their very nature, are capable of affecting trade between Member States, such as agreements concerning imports and exports or covering several Member States, the Commission states that there is a *rebuttable positive* presumption that the effects on trade are appreciable when the turnover of the parties exceeds €40 million. It may also often be presumed that effects are appreciable where the 5 per cent threshold is exceeded. These rebuttable presumptions will obviously be of central importance when these issues are litigated before national courts.

(ix) The Relationship between Community and National Law

The breadth of the effect on trade criterion determines the scope of Regulation 1/2003 Article 3, which determines the relationship between Articles 81 and 82 and national law. The affect on trade criterion can therefore have a substantive outcome. Essentially, Article 3 provides that whenever a NCA or national court applies national competition laws to an agreement or practice that affects trade between Member States it must also apply Articles 81 and 82. The application of national competition law may not, however, lead to the prohibition of agreements which affect trade between Member States but which do not restrict competition within the meaning of Article 81(1), or which fulfil the conditions of Article 81(3) of which are covered by a Community block exemption. Further, a national authority cannot authorize an agreement prohibited by Community law. The relationship between Community and national law is dealt with more fully *infra* Chapter 14.

G. AGREEMENTS REQUIRED BY NATIONAL LEGISLATION

Article 81 is concerned with the conduct of undertakings and not with laws or regulations of Member States.[342] Where national law requires an agreement or where national law creates a framework eliminating any possible competitive conduct there is no infringement of Article 81(1). In such a case the anti-competitive effect results from the national law and not the agreement.[343] A national authority is duty bound to disapply such national legislation.[344] Where, however, national law merely allows or even goes so far as to encourage an anti-competitive agreement, Article 81 applies. This position is clearly spelt out by the CFI in its judgment in *Atlantic Container Line*.

[335] Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81, paras. 44–57.

[336] *Ibid.*, para. 46.

[337] The Commission does not define more specifically what this means in the notice but presumably it stands for No Appreciable Affect on Trade).

[338] *Ibid.*, para. 50.

[339] The NAAT-rule does not apply in emerging markets. In such cases appreciability may have to be assessed on the basis of the position of the parties on related product market or their strength in technologies relating to the agreement.

[340] The turnover threshold is calculated on the basis of total Community sales excluding tax during the last financial year by the undertakings concerned. Sales between entities that form part of the same undertaking are excluded, Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/87, para. 54.

[341] *Ibid.*, para. 50.

[342] In Cases C-94 and 202/04 *Cipolla* v. *Fazari* [2006] ECR I-11421 the ECJ held that nonetheless, Articles 81 and 82, read in conjunction with Article 10 EC required Members States not to introduce or maintain in force measures which may render ineffective the competition rules applicable to undertakings. It held, however, that legislation which approves, on the basis of a draft produced by a professional body of lawyers, a scale fixing a minimum fee for members of the legal profession was not precluded by Articles 10, 81 and 82 of the Treaty.

[343] See, e.g. Cases C-94/04 and 202/04 *Cipolla* v. *Fazari* [2006] ECR I-1142. Articles 10 and 81 may be infringed 'where a Member State requires or encourages the adoption of agreements ... contrary to Article 81 or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere', para. 47.

[344] Case C-198/01, *Consorzio Industrie Fiammiferi (CIF)* v. *Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055, discussed *infra* Chap. 14.

Cases T-191 and 212–214/98, *Atlantic Container Line* v. *Commission* [2003] ECR II-3275, para. 1130

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1130. According to the case-law, Articles [81] and [82] of the Treaty apply only to anti-competitive conduct in which undertakings engage on their own initiative. If anti-competitive conduct is required of undertakings by national law or if the latter creates a legal framework eliminating any possibility of competitive conduct on their part, Articles [81] and [82] of the Treaty do not apply. In such a situation, the restriction of competition is not attributable, as is implied by those provisions, to the autonomous conduct of the undertakings. Articles [81] and [82] of the Treaty may apply, by contrast, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (Joined Cases C-359/95 P and C-379/95 P *Commission and France* v. *Ladbroke Racing* [1997] ECR I-6265, paragraph 33; ... In Case C-198/01 *Consorzia Industrie Fiammiferi*, paragraphs 52 to 55, and Case C-207/01 *Altair Chimica*, paragraphs 30, 35 and 36; Case T-111/96 *ITT Promédia* v. *Commission* [1998] ECR II-2937, paragraph 96; *Irish Sugar*, ..., paragraph 130; Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali* v. *Commission* [2000] ECR II-1807, paragraphs 58 and 59; and Case T-154/98 *Asia Motor France and Others* v. *Commission* [2000] ECR II-3453, paragraphs 78 to 91). Consequently, if a national law merely allows, encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to the Treaty competition rules (see *inter alia* Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström* v. *Commission* [1988] ECR 5193, paragraph 20, and *Consorzia Industrie Fiammiferi*, cited above, paragraph 56).

H. COMMISSION NOTICES

In addition to the Notice on agreements of minor importance and the Guidelines on the effect of trade concept, the Commission has issued other notices/guidelines which indicate that certain agreements may not infringe Article 81(1), in particular because they do not restrict competition. The Commission started issuing notices in 1962 in order to clarify specific matters arising under Article 81, including circumstances in which certain restrictive practices would fall outside Article 81(1). As in the case of the notices discussed above, these notices provide useful guidance for parties. Although they are not rules of law which the Commission (or a court) is always bound to observe, they nevertheless form rules of practice from which the administration itself may not depart without giving reasons that are compatible with the principle of equal treatment.[345] The following notices are of particular significance in determining the application of Article 81(1) to agreements:[346]

- Commission Notice concerning its assessment of certain subcontracting agreements;[347]
- Guidelines on Vertical Restraints;[348]

[345] See *supra* n. 295.

[346] See also, e.g., Notice on the application of the competition rules to the postal sector [1998] OJ C39/2, [1998] 5 CMLR 108 and the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 10 July 2007 (this notice explains when joint ventures are appraised under the ECMR and Article 81 respectively).

[347] [1979] OJ C1/2, [1979] 1 CMLR 819, see *infra* Chap. 9.

[348] The Guidelines on Vertical Restraints [2000] OJ C291/1, [2000] 5 CMLR 1074 also deal with agency agreements and replace the Notice on exclusive dealing contracts with commercial agents [1962] OJ L39/2921.

- Guidelines on the application of Article 81 to horizontal co-operation agreements;[349]
- Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements;[350]
- Commission Notice on restrictions directly related and necessary to the concentration;[351]
- Guidelines on the application of Article 81(3) of the Treaty.[352]

I. EXTRATERRITORIALITY

The question of when and in what circumstances the competition rules may be applied to the acts of overseas undertakings (which are not established in the EU) is controversial and politically sensitive. The answer to this question does, of course, have an impact on the scope of Article 81(1). The extraterritorial reach of Article 81(1) and the other EC competition rules is explored in Chapter 16.

6. ARTICLE 81(2)

It has already been seen[353] that despite the clear wording of Article 81(2), the nullity provided for in that provision applies only to individual *clauses* in the agreement affected by the Article 81(1) prohibition. In *Société La Technique Minière* v. *Maschinenbau Ulm GmbH*,[354] the ECJ held the agreement as a whole is void only where those clauses are not severable from the remaining terms of the agreement. It thus interpreted Article 81(2) with reference only to its purpose in Community law and to ensure compliance with the Treaty. The English Court of Appeal has taken the view that the nullity imposed by Article 81(2) is not absolute. Rather, it has only the same temporaneous or transient effect as the prohibition in Article 81(1) (an agreement will cease to be void if the agreement itself ceases to restrict competition or to affect trade within the meaning of Article 81(1)[355]).

The ECJ has held that the question whether any null clause or clauses in an agreement can be severed from the rest of the agreement must be decided by national, not Community, law.[356] Each national court will, therefore, have to apply its own national rules on severance to determine the impact of Article 81(2) on the agreement before it.

7. EXCLUSIONS

In the UK, the Competition Act 1998 provides that the Chapter I prohibition (modelled on Article 81(1)) does not apply to agreements 'excluded' by, or as a result of, other provisions of the

[349] [2001] OJ C3/2, [2001] 4 CMLR 819, see Chap. 13.

[350] [2004] OJ C101/2, see Chap. 10.

[351] [2005] OJ C56/24, Although this notice applies to merger cases, it provides guidance on the question of when contractual restraints fall outside Article 81(1) on the grounds that they are 'ancillary' to a pro-competitive merger or agreement, see *infra* Chap. 4.

[352] [2004] OJ C101/97, discussed *infra* Chap. 4.

[353] See *supra* 124.

[354] Case 56/65 [1966] ECR 234, 250, [1966] CMLR 357.

[355] *Passmore* v. *Morland plc* [1999] 3 All ER 1005.

[356] See also Case 319/82, *Société de Vente de Ciments et Bétons de l'Est* v. *Kerpen & Kerpen GmbH & Co KG* [1983] ECR 4173, [1985] 1 CMLR 511, para. 11. See *infra* Chap. 15.