GOALS OF COMPETITION LAW:

C-501/06 P, C-513/06P, C-515/06P and C-519/06 P Glaxo/SmithKline

" 58 According to settled case-law, in order to assess the anti-competitive nature of an agreement, regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraph 25, and Case C-209/07 Beef Industry Development Society and Barry Brothers [2008] ECR I-0000, paragraphs 16 and 21). In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the Community judicature from taking that aspect into account (see, to that effect, IAZ International Belgium and Others v Commission, cited above, paragraphs 23 to 25).

59 With respect to parallel trade, the Court has already held that, in principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition (see, to that effect, Case 19/77 Miller International Schallplaten v Commission [1978] ECR 131, paragraphs 7 and 18, and Joined Cases 32/78, 36/78 to 82/78 BMW Belgium and Others v Commission [1979] ECR 2435, paragraphs 20 to 28 and 31).

60 As observed by the Advocate General in point 155 of her Opinion, that principle, according to which an agreement aimed at limiting parallel trade is a 'restriction of competition by object', applies to the pharmaceuticals sector.

61 The Court has, moreover, held in that regard, in relation to the application of Article 81 EC and in a case involving the pharmaceuticals sector, that an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that article of the Treaty (Joined Cases C-468/06 to C-478/06 Sot.Lélos kai Sia and Others [2008] ECR I-7139, paragraph 65 and case-law cited).

62 With respect to the Court of First Instance's statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the

Court notes that neither the wording of Article 81(1) EC nor the case-law lend support to such a position.

63 First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price (see, by analogy, T-Mobile Netherlands and Others, cited above, paragraphs 38 and 39)."

C-8/08 T-Mobile Netherlands and others v Commission

" 38 In any event, as the Advocate General pointed out at point 58 of her Opinion, Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."

T-201/04 Microsoft v COM

" 664 Last, it must be borne in mind that it is settled case-law that Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure (Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, paragraph 125, and Irish Sugar v Commission, paragraph 229 above, paragraph 232). In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market. "

C-280/08 P - Deutsche Telekom v Commission [2010] ECR I-9555

" 230 (…) it should be noted that the Court of Justice has consistently held that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators (see, in particular, Case C-18/88 GB-Inno-BM [1991] ECR I-5941, paragraph 25; Case C-462/99 Connect Austria [2003] ECR I-5197, paragraph 83; Joined Cases C-327/03 and C-328/03 ISIS Multimedia Net and Firma O2 [2005] ECR I-8877, paragraph 39; and Case C-49/07 MOTOE [2008] ECR I-4863, paragraph 51). "

C-52/09 - TeliaSonera Sverige [2011] ECR I-527

" 21 Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market.

22 The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union (see, to that effect, Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 42)."

MARKET DEFINITION

27/76 United Brands v Commission [1978] ECR 207

" 12 As far as the product market is concerned it is first of all necessary to ascertain whether , as the applicant maintains , bananas are an integral part of the fresh fruit market , because they are reasonably interchangeable by consumers with other kinds of fresh fruit such as apples , oranges , grapes , peaches , strawberries , etc . Or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabelled bananas and is a market sufficiently homogeneous and distinct from the market of other fresh fruit .

22 For the banana to be regarded as forming a market which is sufficiently differentiated from other fruit markets it must be possible for it to be singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible .

23 The ripening of bananas takes place the whole year round without any season having to be taken into account .

24 Throughout the year production exceeds demand and can satisfy it at any time .

25 Owing to this particular feature the banana is a privileged fruit and its production and marketing can be adapted to the seasonal fluctuations of other fresh fruit which are known and can be computed .

26 There is no unavoidable seasonal substitution since the consumer can obtain this fruit all the year round .

27 Since the banana is a fruit which is always available in sufficient quantities the question whether it can be replaced by other fruits must be determined over the whole of the year for the purpose of ascertaining the degree of competition between it and other fresh fruit .

28 The studies of the banana market on the court ' s file show that on the latter market there is no significant long term cross-elasticity any more than - as has been mentioned - there is any seasonal substitutability in general between the banana and all the seasonal fruits , as this only exists between the banana and two fruits (peaches and table grapes) in one of the countries (west Germany) of the relevant geographic market .

29 As far as concerns the two fruits available throughout the year (oranges and apples) the first are not interchangeable and in the case of the second there is only a relative degree of substitutability .

30 This small degree of substitutability is accounted for by the specific features of the banana and all the factors which influence consumer choice .

31 The banana has certain characteristics , appearance , taste , softness , seedlessness , easy handling , a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young , the old and the sick .

32 As far as prices are concerned two fao studies show that the banana is only affected by the prices - falling prices - of other fruits (and only of peaches and table grapes) during the summer months and mainly in july and then by an amount not exceeding 20% .

33 Although it cannot be denied that during these months and some weeks at the end of the year this product is exposed to competition from other fruits , the flexible way in which the volume of imports and their marketing on the relevant geographic market is adjusted means that the conditions of competition are extremely limited and that its price adapts without any serious difficulties to this situation where supplies of fruit are plentiful .

34 It follows from all these considerations that a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from the consumption of this product by the arrival of other fresh fruit on the market and that even the personal peak periods only affect it for a limited period of time and to a very limited extent from the point of view of substitutability .

35 Consequently the banana market is a market which is sufficiently distinct from the other fresh fruit markets ."

C-85/76 - Hoffmann-La Roche v Commission [1979] ECR 461

" 23the contested decision refers to bulk vitamins belonging to 13 groups , of which roche manufactures and markets eight (a , b1 , b2 , b3 (pantothenic acid), b6 , c , e and h (biotin) and five purchased by roche from the producers and resold by it , b12 , d , pp , k and m).

The Commission found that there was a dominant position in the case of seven of the eight groups of vitamins manufactured by roche , namely a , b2 , b3 , b6 , c , e and h .

The parties are agreed , on the one hand , that each of these groups has specific metabolizing functions and for this reason is not interchangeable with the others and , on the other hand , that in the case of the possible uses which these three groups have in common , namely for food , animal feed and for pharmaceutical purposes , the vitamins in question do not encounter the competition of other products .

24the Commission after taking these factors into acount considered (recital 20 to the contested decision) that each group of vitamins constitutes a separate market and roche , after having first of all suggested that several groups might together form a single market , accepted this point of view with the reservation that in its opinion the c and e groups of vitamins , as far as each of them is concerned , together with other products form part of a wider market .

Therefore the question whether the Commission has correctly delimited the markets to which the c and e groups of vitamins belong must be examined .

25it is an established fact that vitamins c and e apart from their uses in the pharmaceutical industry and in food and animal feed - called bio-nutritive uses - are also sold , inter alia , as antioxidants , fermentation agents and additives - uses covered by the word ' ' technological ' ' and , to the extent to which there is any demand for these vitamins for the purpose of the said technological uses , they are exposed to the competition of other products suitable for the same uses .

26according to roche the conclusion to be drawn from this is that the c and e groups of vitamins are part of a much larger market comprising these other products and that the Commission has exaggerated roche ' s share of the said markets , by failing to include the latter .

27the Commission on the other hand takes the view that the products which can be substituted for vitamins c and e for technological uses cannot be included in the same markets as these vitamins because the two possible uses of the latter mean that the degree of interchangeability of the said products with the vitamins in question is not sufficient .

Neither can the vitamins used in the end for bio-nutritive purposes and those used for technological purposes be divided into two separate markets , because , by reason of the two uses to which these products lend themselves , the manufacturers and purchasers are entirely free , especially on an expanding market , to use them for the purpose which they regard as the most profitable .

However assuming that the vitamins sold by roche for technological purposes had to be excluded from the markets in question the same would have to be done in the case of its competitors with the result that the market shares would remain unchanged .

28if a product could be used for different purposes and if these different uses are in accordance with economic needs , which are themselves also different , there are good grounds for accepting that this product may , according to the circumstances , belong to separate markets which may present specific features which differ from the standpoint both of the structure and of the conditions of competition .

However this finding does not justify the conclusion that such a product together with all the other products which can replace it as far as concerns the various uses to which it may be put and with which it may compete , forms one single market .

The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned .

There was no such interchangeability , at any rate during the period under consideration , between all the vitamins of each of the groups c and e and all the products which , according to the circumstances , may be substituted for one or other of these groups of vitamins for technological uses which are themselves extremely varied .

29on the other hand there may be some doubt whether , for the purpose of delimiting the respective markets of the c and e groups of vitamins , it is necessary to include all the vitamins of each of these groups in a market corresponding to that group , or whether , on the contrary , each of these groups must be placed in a separate market , one comprising vitamins for bio-nutritive use and the other vitamins for technological purposes .

T-340/03 - France Télécom v Commission [2007] ECR II-107

" 78 According to settled case-law (Case 322/81 Michelin v Commission [1983] ECR 3461, paragraph 37; Case T-65/96 Kish Glass v Commission [2000] ECR II-1885, paragraph 62; and Case T-219/99 British Airways v Commission [2003] ECR II-5917, paragraph 91), for the purposes of investigating the possibly dominant position of an undertaking on a given product market, the possibilities of competition must be judged in the context of the market comprising the totality of the products or services which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products or services. Moreover, since the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and to behave to an appreciable extent independently of its competitors and, in this case, of its service providers, an examination to that end cannot be limited solely to the objective characteristics of the relevant services, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.

79 If a product could be used for different purposes and if these different uses are in accordance with economic needs, which are themselves also different, there are good grounds for accepting that this product may, according to the circumstances, belong to separate markets which may present specific features which differ from the standpoint both of the structure and of the conditions of competition. However, this finding does not justify the conclusion that such a product, together with all the other products which can replace it

as far as concerns the various uses to which it may be put and with which it may compete, forms one single market.

80 The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned (Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, paragraph 28).

81 It is also apparent from the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, paragraph 7) that '[a] relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

82 It must be stated that there is not a mere difference in comfort or quality between high- and low-speed access. It is clear from the evidence provided by the Commission (recital 175 of the decision), which was not contradicted by WIN, that some applications available with high-speed access are simply not feasible with low-speed access, including, for example, the downloading of very voluminous video files or interactive network games. WIN also confirmed, in its reply of 4 March 2002 to the first statement of objections, that there are 'audiovisual/multimedia activities … more specific to ADSL'. In addition, the study undertaken by the Centre de recherche pour l'étude et l'observation des conditions de vie (Research Centre for the Study and Monitoring of Living Standards) (Crédoc) on behalf of WIN which it presented in an annex to its application also describes new uses developed on the internet by the eXtense service and which are specific to high-speed access, that is, playing network games, listening to radio online, watching a video online and shopping online. According to that study, moreover, the subscriber with high-speed access goes online far more often and, on average, for considerably longer than the low-speed access user.

83 As regards the differences in technical features and performances, it is clear from the Commission's contentions (recitals 181 to 187 of the decision), which have not been denied by the applicant, that an important technical feature of high-speed internet access is the specific nature of the modems used. A high-speed internet access modem cannot be used for low-speed internet access and vice versa (recital 181 of the decision). In addition, in the case of high-speed access, the connection is always on and the telephone line always available for making calls.

84 In addition, in the case of the French market, it should be pointed out that, for the period investigated, the offers of high-speed access involved download speeds in the region of 512 kbits/s (recital 185 of the decision). The offers of traditional low-speed access (limited to 56 kbits/s) and of ISDN (integrated services digital network) (64 or 128 kbits/s) only

allowed speeds of 4 to 10 times less. The ADSL offers with download speeds of 128 kbits/s, which, according to the applicant, bear witness to the continuity between low-speed and high-speed, only became available at the end of the period covered by the decision. In addition, even in the case of an offer of 128 kbits/s, the difference between low-speed and high-speed access is considerable. The difference in performance was therefore considerable during the period investigated.

85 In addition to the differences in use, features and performances, there is a significant price differential between low-speed and high-speed access (recitals 188 to 192 of the decision).

86 As regards the degree of substitutability, it is appropriate to recall, in addition to the case-law cited in paragraph 78 above, the criteria laid down by the Commission in its Notice on the definition of the relevant market for the purposes of Community competition law (see paragraph 81 above).

87 According to that notice, the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small but lasting change in relative prices and evaluating the likely reactions of customers to that increase. In paragraph 17 of the notice, the Commission states '[t]he question to be answered is whether the parties' customers would switch to readily available substitutes … in response to a hypothetical small (in the range 5 to 10%) but permanent relative price increase in the products and areas being considered'.

88 In recital 193 of the decision, the Commission admits that low-speed and high-speed access indeed present some degree of substitutability. It adds in recital 194, however, that the operation of such substitutability is extremely asymmetrical, the migrations of customers from offers of high-speed to low-speed access being negligible compared with the migrations in the other direction. However, according to the Commission, if the products were perfectly substitutable from the point of view of demand, the rates of migration should be identical or at least comparable.

89 It should be pointed out, in this respect, that, first of all, it is clear from the information gathered by WIN and reproduced in Table 7 of the decision that the migration rates of high-speed subscribers to integral low-speed offers were very low during the period covered, in spite of the difference in price between those services, which should have prompted numerous internet users to turn to low-speed access. This large discrepancy in the rates of migration between low-speed and high-speed access and between high-speed and low-speed access does not lend credence to the argument that those services are interchangeable in the eyes of consumers. In the application, WIN also failed to adduce any evidence to cast doubt on that analysis.

90 Secondly, it transpires that, according to a survey carried out on behalf of the Commission and presented by WIN in an annex to its application, 80% of subscribers would maintain their subscription in response to a price increase in the range 5 to 10%. According to paragraph 17 of the Notice on the definition of the relevant market for the purposes of Community competition law (see paragraph 87 above), this high percentage of subscribers who would not abandon high-speed access in response to a price increase of 5 to 10% provides a strong indication of the absence of demand-side substitution.

91 Consequently, on the basis of all the foregoing, it should be held that the Commission was right to find that a sufficient degree of substitutability between high-speed and low-speed access did not exist and to define the market in question as that of high-speed internet access for residential customers. "

EFFECT ON THE TRADE BETWEEN THE MEMBER STATES

C-56, 58/64 - Consten and Grundig v Commission [1966] ECR 429

"p.341-342: 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 85(1) is fulfilled once trade between Member States 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 85; 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 ensue for third parties from the registration in France by consten of the gint trade mark, which grundig places on all its products, are enought to satisfy the requirement in question .

P.342

Consequently, the complaints raised in this respect must be dismissed ."

C-56/65 - Société Technique Minière v Maschinenbau Ulm [1966] ECR 337

7 . In order that an agreement may affect 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 . The influence thus foreseeable must give rise to a fear that the realization of a single market between Member States might be impeded . In this respect, it is necessary to consider in particular whether the agreement is capable of bringing about a partitioning of the market in certain products between Member States .

5/69 Voelk v Vervaecke [1996] ECR 295

"2/4 although the court is not entitled within the framework of sub-paragraph (a) of the first paragraph of article 177 to apply the Treaty to a particular case, it may nevertheless derive from the wording of the decision referring the matter the questions which relate exclusively to the interpretation of the Treaty . The question raised relates to agreements which are characterized by the fact that a producer who has granted a distributor the exclusive right of sale of his products for certain countries in the common market has undertaken to protect the distributor against deliveries which might be made in those countries by third parties and has obtained from the distributor an undertaking not to sell competing products . The question is thus reduced to whether, in deciding whether such agreements fall within the prohibition set out in article 85(1) of the Treaty, regard must be had to the proportion of the market which the grantor controls or endeavours to obtain in the territory ceded .

5/7 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 85(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 85 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question . Thus an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in article 85(1)."

C- 309/99 Wouters [2002] ECR I-1577

" 95 As regards the question whether intra-Community trade is affected, it is sufficient to observe that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (Case 8/72 Vereeniging van Cementhandelaren v Commission [1972] ECR 977, paragraph 29; Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 22; and CNSD, paragraph 48).

96 That effect is all the more appreciable in the present case because the 1993 Regulation applies equally to visiting lawyers who are registered members of the Bar of another Member State, because economic and commercial law more and more frequently regulates transnational transactions and, lastly, because the firms of accountants looking for lawyers as partners are generally international groups present in several Member States."

C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P Erste Group Bank and others v Commission [2009] ECR I-8681

" 36 First, it must be borne in mind, on the one hand, that the Court of Justice has held that, if an agreement, decision or practice 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 it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (Case C-238/05 Asnef-Equifaxand Administración del Estado [2006] ECR I-11125, paragraph 34 and the case-law there cited).

37 Thus, an effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. In order to assess whether a cartel has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (Asnef-Equifaxand Administración del Estado, paragraph 35 and the case-law there cited).

38 On the other hand, the Court of Justice has already held that the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected. A cartel extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about (Asnef-Equifaxand Administración del Estado, paragraph 37 and the case-law there cited)."

C-238/05 Asnef-Equifax and Administración del Estado [2006] ECR I-11125

" 33 The interpretation and application of the condition contained in Article 81(1) EC relating to the effect of agreements on trade between Member States must take as its starting-point the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus, Community law covers any agreement or any practice which is capable of affecting trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off national markets or by affecting the structure of competition within the common market (see Manfredi and Others, paragraph 41).

34 For an agreement, decision or practice 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 they have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States (see Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 22, and Case C-475/99 Ambulanz Glöckner [2001] ECR I-8089, paragraph 48). Moreover, that influence must not be insignificant (Case 22/71 Béguelin Import [1971] ECR 949, paragraph 16; Case C-306/96 Javico [1998] ECR I-1983, paragraph 16; and Manfredi and Others, paragraph 42).

35 Thus, an effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive (Joined Cases C-215/96 and C-216/96 Bagnasco and Others [1999] ECR I-135, paragraph 47, and Case C-359/01 P British Sugar v Commission [2004] ECR I-4933, paragraph 27). In order to assess whether an

arrangement has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (see, to that effect, Case C-393/92 Almelo [1994] ECR I-1477, paragraph 37).

36 In that regard, the mere fact that the participants in a national arrangement include undertakings from other Member States is an important element in the assessment, but, taken alone, it is not so decisive as to permit the conclusion that the criterion of trade between Member States being affected has been satisfied (see Manfredi and Others, paragraph 44).

37 On the other hand, the Court has already held that the fact that an arrangement relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected (see Case 246/86 Belasco and Others v Commission [1989] ECR 2117, paragraph 33). An arrangement extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about (Case 8/72 Vereeniging van Cementhandelaren v Commission [1972] ECR 977, paragraph 29, and Manfredi and Others, paragraph 45).

38 Furthermore, the fact that an agreement or practice encourages an increase in the volume of trade between Member States does not preclude the possibility that that agreement or practice may affect trade in the sense described at paragraph 34 of this judgment (see, to that effect, Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 341).

39 It is for the national court to determine whether, in the light of the characteristics of the market at issue, there is a sufficient degree of probability that the implementation of the register may have an influence, direct or indirect, actual or potential, on the supply of credit in Spain by operators from other Member States and that that influence is not insignificant. "

C-226/11 – Expedia

"20 It follows that the competition authorities of the Member States can apply the provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 101 TFEU only where that agreement perceptibly restricts competition within the common market.

21 The Court has held that the existence of such a restriction must be assessed by reference to the actual circumstances of such an agreement (Case 1/71 Cadillon [1971] ECR 351, paragraph 8). Regard must be had, inter alia, to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (Joined Cases C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P GlaxoSmithKline Services

and Others v Commission and Others [2009] ECR I-9291, paragraph 58). It is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (see, to that effect, Asnef-Equifax and Administración del Estado, paragraph 49).

[…]

38 In light of the above, the answer to the question referred is that Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the Commission in its de minimis notice, provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision."

NOTION OF UNDERTAKING:

C-41/90 Hoefner & Elsner [1991] ECR I-1979

"20. Having regard to the foregoing considerations, it is necessary to establish whether a public employment agency such as the Bundesanstalt may be regarded as an undertaking within the meaning of Articles 85 and 86 of the Treaty.

21 It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.

22 The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive rECRuitment.

23. It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules."

C-159, 160/91 Poucet Pistre [1993] ECR I-637

" 13 It follows that the social security schemes, as described, are based on a system of compulsory contribution, which is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes.

14 It is apparent from the documents that the management of the schemes at issue in the main proceedings was entrusted by statute to social security funds whose activities are

subject to control by the State, acting through, in particular, the Minister for Social Security, the Minister for the Budget and public bodies such as the Inspectorate General of Finance and the Inspectorate General for Social Security.

15 In the discharge of their duties, the funds apply the law and thus cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits. For management of the sickness and maternity scheme, the regional sickness funds may entrust to certain organizations, such as those that are governed in France by the Code de la Mutualité (Code governing mutual societies) or the Code des Assurances (Insurance Code), the task of collecting contributions and paying out benefits. However, it does not appear that those organizations, which, in the performance of that task, act only as agents of the sickness funds, are referred to by the judgments of the national court.

16 The foregoing considerations must be taken into account in examining whether the term "undertaking", within the meaning of Articles 85 and 86 of the Treaty, includes organizations charged with managing a social security scheme of the kind referred to by the national court.

17 The Court has held (in particular in Case C-41/90 Hoefner v Elser [1991] ECR I-1979, paragraph 21) that in the context of competition law the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.

18 Sickness funds, and the organizations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions.

19 Accordingly, that activity is not an economic activity and, therefore, the organizations to which it is entrusted are not undertakings within the meaning of Articles 85 and 96 of the Treaty.

20 The answer to be given to the national court must therefore be that the concept of an undertaking within the meaning of Articles 85 and 86 of the Treaty does not encompass organizations charged with the management of social security schemes of the kind referred to in the judgments of the national court. "

C-67/96 Albany [1999] ECR I-5751

" 72 According to the Fund and the governments which have intervened, such a fund does not constitute an undertaking within the meaning of Article 85 et seq. of the Treaty. They describe the various characteristics of the sectoral pension fund and of the supplementary pension scheme which it manages.

73 First, compulsory affiliation of all workers in a given sector to a supplementary pension scheme pursues an essential social function within the pension system applicable in the Netherlands because of the extremely limited amount of the statutory pension calculated on the basis of the minimum statutory wage. Provided that a supplementary pension scheme has been established by a collective agreement within a framework laid down by law and affiliation to that scheme has been made compulsory by the public authorities, it constitutes an element of the Netherlands system of social protection and the sectoral pension fund responsible for management of it must be regarded as contributing to the management of the public social security service.

74 Second, the sectoral pension fund is non-profit-making. It is managed jointly by both sides of the industry, who are equally represented on its management committee. The sectoral pension fund collects an average contribution fixed by that committee which strikes a balance, collectively, between the amount of the premiums, the value of the benefits and the extent of the risks. Moreover, the contributions may not fall below a certain level, so as to establish adequate reserves, and may not, in order to preserve its non-profit-making status, exceed an upper limit, observance of which is ensured by management and labour and by the Insurance Board. Even though the contributions levied are invested on a capitalisation basis, the investments are made under the supervision of the Insurance Board and in accordance with the provisions of the PSW and the statutes of the sectoral pension fund.

75 Third, operation of the sectoral pension fund is based on the principle of solidarity. Such solidarity is reflected by the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from contributions in the event of incapacity for work, the discharge by the fund of arrears of contributions due from an employer in the event of the latter's insolvency and by the indexing of the amount of the pensions in order to maintain their value. The principle of solidarity is also apparent from the absence of any equivalence, for individuals, between the contribution paid, which is an average contribution not linked to risks, and pension rights, which are determined by reference to an average salary. Such solidarity makes compulsory affiliation to the supplementary pension scheme essential. Otherwise, if `good' risks left the scheme, the ensuing downward spiral would jeopardise its financial equilibrium.

76 On that basis, the Fund and the intervening governments consider that the sectoral pension fund is an organisation charged with the management of social security schemes of the kind referred to in the judgment in Joined Cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637, and is unlike the organisation at issue in Case C-244/94 Fédération Française des Sociétés d'Assurance and Others v Ministère de l'Agriculture et de la Pêche [1995] ECR I-4013, which was regarded as an undertaking within the meaning of Article 85 et seq. of the Treaty.

77 It should be borne in mind that, in the context of competition law, the Court has held that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (see, in particular, Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21; Poucet and Pistre, cited above, paragraph 17; and Fédération Française des Sociétés d'Assurance, cited above, paragraph 14).

78 Moreover, in Poucet and Pistre, cited above, the Court held that that concept did not encompass organisations charged with the management of certain compulsory social security schemes, based on the principle of solidarity. Under the sickness and maternity scheme forming part of the system in question, the benefits were the same for all beneficiaries, even though contributions were proportional to income; under the pension scheme, retirement pensions were funded by workers in employment; furthermore, the statutory pension entitlements were not proportional to the contributions paid into the pension scheme; finally, schemes with a surplus contributed to the financing of those with structural financial difficulties. That solidarity made it necessary for the various schemes to be managed by a single organisation and for affiliation to the schemes to be compulsory.

79 In contrast, in Fédération Française des Sociétés d'Assurance, cited above, the Court held that a non-profit-making organisation which managed a pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Article 85 et seq. of the Treaty. Optional affiliation, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid by the beneficiaries and on the financial results of the investments made by the managing organisation implied that that organisation carried on an economic activity in competition with life assurance companies. Neither the social objective pursued, nor the fact that it was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which the managing organisation was subject in making investments altered the fact that the managing organisation was carrying on an economic activity.

80 The question whether the concept of an undertaking, within the meaning of Article 85 et seq. of the Treaty, extends to a body such as the sectoral pension fund at issue in the main proceedings must be considered in the light of those considerations.

81 The sectoral pension fund itself determines the amount of the contributions and benefits and the Fund operates in accordance with the principle of capitalisation.

82 Accordingly, by contrast with the benefits provided by organisations charged with the management of compulsory social security schemes of the kind referred to in Poucet and Pistre, cited above, the amount of the benefits provided by the Fund depends on the

financial results of the investments made by it, in respect of which it is subject, like an insurance company, to supervision by the Insurance Board.

83 In addition, as is apparent from Article 5 of the BPW and Articles 1 and 5 of the Guidelines for exemption from affiliation, a sectoral pension fund is required to grant exemption to an undertaking where the latter has already made available to its workers for at least six months before the request was lodged on the basis of which affiliation to the fund was made compulsory, a pension scheme granting them rights at least equivalent to those which they would acquire if affiliated to the fund. Moreover, under Article 1 of the abovementioned Guidelines, that fund is also entitled to grant exemption to an undertaking which provides its workers with a pension scheme granting them rights at least equivalent to those deriving from the fund, provided that, in the event of withdrawal from the fund, compensation considered reasonable by the Insurance Board is offered for any damage suffered by the fund, from the actuarial point of view, as a result of the withdrawal.

84 It follows that a sectoral pension fund of the kind at issue in the main proceedings engages in an economic activity in competition with insurance companies.

85 In those circumstances, the fact that the fund is non-profit-making and the manifestations of solidarity referred to by it and the intervening governments are not sufficient to deprive the sectoral pension fund of its status as an undertaking within the meaning of the competition rules of the Treaty.

86 Undoubtedly, the pursuit of a social objective, the abovementioned manifestations of solidarity and restrictions or controls on investments made by the sectoral pension fund may render the service provided by the fund less competitive than comparable services rendered by insurance companies. Although such constraints do not prevent the activity engaged in by the fund from being regarded as an economic activity, they might justify the exclusive right of such a body to manage a supplementary pension scheme.

87 The answer to the first question must therefore be that a pension fund charged with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, to which affiliation has been made compulsory by the public authorities for all workers in that sector, is an undertaking within the meaning of Article 85 et seq. of the Treaty. "

C-343/95 Diego Calì & Figli Srl v Servizi ecologici porto di Genova [1997] ECR I-1547

" 14 In order to answer the first question, concerning the existence of a dominant position, it must be established whether an activity of the kind carried on by SEPG in this case falls within the scope of Article 86 of the Treaty.

15 Such activities are carried on under an exclusive concession granted to SEPG by a public body.

16 As regards the possible application of the competition rules of the Treaty, a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market (Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7).

17 In that connection, it is of no importance that the State is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights (Case 118/85 Commission v Italy, cited above, paragraph 8).

18 In order to make the distinction between the two situations referred to in paragraph 16 above, it is necessary to consider the nature of the activities carried on by the public undertaking or body on which the State has conferred special or exclusive rights (Case 118/85 Commission v Italy, cited above, paragraph 7).

19 On this point, it is clear from the order for reference and the wording of the first question that the main proceedings concern the payment to be made by Calì for anti-pollution surveillance exercised by SEPG in relation to the loading and unloading of acetone products transported by Calì in the oil port of Genoa.

20 Furthermore, it is common ground that the dispute in the main proceedings does not concern the invoicing of any action by SEPG necessitated by pollution actually produced during loading or unloading operations.

21 Article 1 of Order No 32 of the President of CAP referred to above expressly distinguishes, moreover, between surveillance intended to prevent pollution and intervention in a case where pollution has occurred and it provides (Article 1(b)(2)) that those responsible for the pollution are to bear the costs arising from any action deemed necessary or advisable.

22 The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in maritime areas.

23 Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition (Case C-364/92 SAT Fluggesellschaft v Eurocontrol [1994] ECR I-43, paragraph 30).

24 The levying of a charge by SEPG for preventive anti-pollution surveillance is an integral part of its surveillance activity in the maritime area of the port and cannot affect the legal

status of that activity (Case C-364/92 SAT Fluggesellschaft v Eurocontrol, cited above, paragraph 28). Moreover, as stated in paragraph 8 of this judgment, the tariffs applied by SEPG have been approved by the public authorities.

25 In the light of the foregoing considerations, the answer to Question 1 must be that Article 86 of the EC Treaty is to be interpreted as not being applicable to anti-pollution surveillance with which a body governed by private law has been entrusted by the public authorities in an oil port of a Member State, even where port users must pay dues to finance that activity.
"

T-319/99 FENIN v Commission [2003] ECR II-357

"35. It is appropriate to begin by observing that, according to settled case-law, in Community competition law the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Höfner and Elser, cited in paragraph 17 above, paragraph 21, Poucet and Pistre, cited in paragraph 14 above, paragraph 17, Fédération française des sociétés d'assurances and Others, cited in paragraph 26 above, paragraph 14, Case C-55/96 Job Centre [1997] ECR I-7119, paragraph 21, Albany, cited in paragraph 27 above, paragraph 77, Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR II-1931, paragraph 50, and Case T-513/93 Consiglio Nazionale degli Spdizionieri Doganali v Commission [2000] ECR II-1807, paragraph 36).

36 In this connection, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity (see, to that effect, Case C-35/96 Commission v Italy [1998] ECR I-3851, paragraph 36, and Consiglio Nazionale degli Spedizionieri Doganali v Commission, cited in the preceding paragraph, paragraph 36), not the business of purchasing, as such. Thus, as the Commission has argued, it would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.

37 Consequently, an organisation which purchases goods – even in great quantity – not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC.

38 Next, it is appropriate to point out that, in Poucet and Pistre, cited in paragraph 14 above (paragraphs 18 and 19), in reaching the conclusion that the organisations managing the health funds in question in that case were not carrying on an economic activity and were not, therefore, undertakings for the purposes of Articles 81 EC and 82 EC, the Court relied on the fact that they were fulfilling an exclusively social function, that their activity was based on the principle of national solidarity and, lastly, that they were non-profit-making, the benefits paid out being statutory benefits that bore no relation to the level of contributions. As regards the judgments in Fédération française des sociétés d'assurance and Others and Albany, cited in paragraphs 26 and 27 above respectively, it should be observed that, in those judgments, the Court confirmed the approach adopted in Poucet and Pistre (Fédération française des sociétés d'assurance and Others, paragraphs 15 and 16, and Albany, paragraph 78), albeit that a lesser degree of solidarity in the operation of those schemes persuaded it that the organisations concerned were in fact undertakings. Those cases thus leave the principle posited in Poucet and Pistre intact.

39 It is not disputed in the present case that the SNS, managed by the ministries and other organisations cited in the applicant's complaint, operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provides services free of charge to its members on the basis of universal cover. In managing the SNS, these organisations do not, therefore, act as undertakings.

40 It follows that, in accordance with the rule set out in paragraphs 37 and 38 above, the organisations in question also do not act as undertakings when purchasing from the members of the applicant association the medical goods and equipment which they require in order to provide free services to SNS members.

41 However, the applicant submitted in its reply that SNS hospitals in Spain do, at least on occasion, provide private care for which patients not covered by the SNS, such as foreign visitors, are charged. According to the applicant, the organisations in question therefore necessarily act as undertakings at least in so far as they provide such services and in so far as they purchase medical goods and equipment in connection therewith.

42 In this connection, it should be borne in mind that, where a complaint has been submitted to the Commission under Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1963-1964, p. 47), it is required to examine carefully the facts and points of law brought to its notice by the complainant in order to decide whether they disclose an infringement of Articles 81 EC and 82 EC (see, to that effect, the judgment of the Court of First Instance in Case T-24/90 Automec v Commission [1992] ECR II-2223 (Automec II), paragraph 79, and Case T-575/93 Koelman v Commission [1996] ECR II-1, paragraph 39, confirmed on appeal by order of the Court of Justice of 16 September 1997 (Case C-59/96 P Koelman v Commission [1997] ECR I-4809)).

43 On the other hand, the Commission is not required, when considering a complaint, to examine facts which have not been brought to its notice by the complainant before rejecting a complaint on the ground that the practices complained of do not infringe Community competition rules or do not fall within the scope of the Community competition rules (see, by analogy, paragraph 40 of the judgment of the Court of First Instance in Koelman v Commission, cited in paragraph 42 above). An applicant bringing an action against a decision of the Commission rejecting its complaint in a competition matter cannot, therefore, criticise the Commission for failing to take account of facts which it has not brought to the Commission's attention and which the Commission could only have discovered by investigation.

44 In this case it must be observed, as indeed the Commission does in its rejoinder, that the applicant made no reference in its original complaint to the services which it alleges are provided for consideration. It mentioned them for the first time before the Court and then only in its reply. Therefore, in its review of the legality of the decision contested in the present action, the Court cannot take the existence of those services into account and it is not necessary in this case for the Court to rule on their potential relevance to the question whether the purchasing operations of those organisations amount to an economic activity. "

Association of undertakings and decision of association of undertakings

C- 309/99 Wouters [2002] ECR I-1577

" 45 In order to establish whether a regulation such as the 1993 Regulation is to be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the Treaty, the first matter to be considered is whether members of the Bar are undertakings for the purposes of Community competition law.

46 According to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21; Case C-244/94 Fédération française des sociétés d'assurances and Others [1995] ECR I-4013, paragraph 14; and Case C-55/96 Job Centre [1997] ECR I-7119, Job Centre II, paragraph 21).

47 It is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity (Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7; Case C-35/96 Commission v Italy [1998] ECR I-3851, CNSD, paragraph 36).

48 Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of

those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.

49 That being so, registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, to that effect, with regard to medical practitioners, Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 77).

50 The second point to be considered is the extent to which a professional body such as the Bar of the Netherlands is to be regarded as an association of undertakings, within the meaning of Article 85(1) of the Treaty, where it adopts a regulation such as the 1993 Regulation (see, to that effect, with regard to a professional body of customs agents, CNSD, paragraph 39).

51 The respondent in the main proceedings claims that, inasmuch as the Netherlands legislature created the Bar of the Netherlands as a body governed by public law and gave it regulatory powers in order to perform a task in the public interest, the Bar cannot be regarded as an association of undertakings within the meaning of Article 85 of the Treaty, particularly in connection with the exercise of its regulatory powers.

52 The intervener in the main proceedings and the German, Austrian and Portuguese Governments add that a body such as the Bar of the Netherlands exercises public authority and cannot, in consequence, fall within the scope of Article 85(1) of the Treaty.

53 According to the intervener in the main proceedings, a body may be treated as comparable to a public authority where the activity which it carries on constitutes a task in the public interest forming part of the essential functions of the State. The Netherlands have made the Bar of the Netherlands responsible for ensuring that individuals have proper access to the law and to justice, which is indeed one of the essential functions of the State.

54 The German Government, for its part, points out that it is for the competent legislative bodies of a Member State to decide, within the framework of national sovereignty, how they organise the exercise of their rights and powers. Delegation of the power to adopt universally binding rules to a body possessing democratic legitimacy, such as a professional body, falls within the limits of that principle of institutional autonomy.

55 According to the German Government, were bodies entrusted with such regulatory duties to be treated as associations of undertakings within the meaning of Article 85 of the Treaty, this would frustrate the operation of that principle. The idea that national legislation is valid only if it is exempted by the Commission pursuant to Article 85(3) of the Treaty is a

contradiction in terms. The consequence would be that the whole corpus of professional regulations would be called in question.

56 The question to be determined is whether, when it adopts a regulation such as the 1993 Regulation, a professional body is to be treated as an association of undertakings or, on the contrary, as a public authority.

57 According to the case-law of the Court, the Treaty rules on 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 (see, to that effect, Joined Cases C-159/91, C-160/91 Poucet and Pistre [1993] ECR I-637, paragraphs 18 and 19, concerning the management of the public social security system), or which is connected with the exercise of the powers of a public authority (see, to that effect, Case C-364/92 Sat Fluggesellschaft [1994] ECR I-43, paragraph 30, concerning the control and supervision of air space, and Case C-343/95 Diego Calì & Figli [1997] ECR I-1547, paragraphs 22 and 23, concerning anti-pollution surveillance of the maritime environment).

58 When it adopts a regulation such as the 1993 Regulation, a professional body such as the Bar of the Netherlands is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies (Poucet and Pistre, cited above, paragraph 18), nor exercising powers which are typically those of a public authority (Sat Fluggesellschaft, cited above, paragraph 30). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

59 In that respect, the fact that Article 26 of the Advocatenwet also entrusts the General Council with the task of protecting the rights and interests of members of the Bar cannot a priori exclude that professional organisation from the scope of application of Article 85 of the Treaty, even where it performs its role of regulating the practice of the profession of the Bar (see, to that effect, with regard to medical practitioners, Pavlov, cited above, paragraph 86).

60 Next, other indications support the conclusion that a professional organisation with regulatory powers, such as the Bar of the Netherlands, cannot escape the application of Article 85 of the Treaty.

61 First, it is clear from the Advocatenwet that the governing bodies of the Bar are composed exclusively of members of the Bar elected solely by members of the profession. The national authorities may not intervene in the appointment of the members of the Supervisory Boards, College of Delegates or the General Council (see, as regards a professional organisation of customs agents, CNSD, cited above, paragraph 42, and as regards a professional organisation of medical practitioners, Pavlov, paragraph 88).

62 Second, when it adopts measures such as the 1993 Regulation, the Bar of the Netherlands is not required to do so by reference to specified public-interest criteria. Article 28 of the Advocatenwet, which authorises it to adopt regulations, does no more than require that they should be in the interest of the proper practice of the profession (see, as regards a professional organisation of customs agents, CNSD, paragraph 43).

63 Lastly, having regard to its influence on the conduct of the members of the Bar of the Netherlands on the market in legal services, as a result of its prohibition of certain multi-disciplinary partnerships, the 1993 Regulation does not fall outside the sphere of economic activity.

64 In light of the foregoing considerations, it appears that a professional organisation such as the Bar of the Netherlands must be regarded as an **association of undertakings** within the meaning of Article 85(1) of the Treaty where it adopts a regulation such as the 1993 Regulation. 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.

65 It is, moreover, immaterial that the constitution of the Bar of the Netherlands is regulated by public law.

66 According to its very wording, Article 85 of the Treaty applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned (Case 123/83 BNIC v Clair [1985] ECR 391, paragraph 17, and CNSD, paragraph 40).

67 That interpretation of Article 85(1) of the Treaty does not entail any breach of the principle of institutional autonomy as argued by the German Government (see paragraphs 54 and 55 above). On this point a distinction must be drawn between two approaches.

68 The first is that a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.

69 The second approach is that the rules adopted by the professional association are attributable to it alone. Certainly, in so far as Article 85(1) of the Treaty applies, the association must notify those rules to the Commission. That obligation is not, however, such as unduly to paralyse the regulatory activity of professional associations, as the German

Government submits, since it is always open to the Commission inter alia to issue a block exemption regulation pursuant to Article 85(3) of the Treaty.

70 The fact that the two systems described in paragraphs 68 and 69 above produce different results with respect to Community law in no way circumscribes the freedom of the Member States to choose one in preference to the other.

71 In light of the foregoing considerations, the answer to be given to Question 1(a) must be that a regulation concerning partnerships between members of the Bar and other members of liberal professions, such as the 1993 Regulation, adopted by a body such as the Bar of the Netherlands, must be regarded as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty."

T-217/03 and T-245/03 FNCBV and others v Commission [2006] ECR II-4987

" 52 It has consistently been held that, in the context of competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (Case C-55/96 Job Centre [1997] ECR I-7119, paragraph 21). Any activity consisting in offering goods and services on a given market is an economic activity (Case T-513/93 Consiglio Nazionale degli Spedizionieri Doganali v Commission [2000] ECR II-1807, paragraph 36).

53 The activity of farmers, whether arable or stock farmers, is certainly of an economic nature. Their activity is indeed the production of goods which they offer for sale in return for payment. Consequently, farmers constitute undertakings within the meaning of Article 81(1) EC.

54 Therefore the unions which bring them together and represent them, and the federations which bring the unions together, may be described as associations of undertakings for the purpose of applying that provision.

55 This conclusion cannot be undermined by the fact that local unions may also bring together farmers' spouses. First, the spouses of arable or stock farmers who are themselves members of a local farmers' union probably share in the tasks of the family farm. Second, in any case the mere fact that an association of undertakings may also bring together persons or entities that cannot be described as undertakings is not sufficient to affect its status as an association within the meaning of Article 81(1) EC. Likewise, the applicants' argument that, where a farm takes the form of a partnership, it is not the partnership that, through its representative, joins the union, but each of the partners, must be dismissed. As stated above (see paragraph 52), what is important for the purpose of classifying an undertaking is not its legal status or the form of farm in question, but the activity of the farm and those who share in it. "

C-1/12 - Ordem dos Técnicos Oficiais de Contas, not yet published

"34 In order to ascertain whether a regulation such as the contested regulation must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU, it is appropriate to examine, firstly, whether chartered accountants are undertakings within the meaning of European Union competition law.

35 In accordance with settled case-law, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, inter alia, Wouters and Others, paragraph 46, and the case-law cited).

36 In that regard, in accordance with settled case-law, any activity consisting in offering goods and services on a given market is an economic activity (see, inter alia, Wouters and Others, paragraph 47, and the case-law cited).

37 In the present case, it is apparent from the file before the Court that the chartered accountants offer, for remuneration, accounting services consisting in particular, pursuant to Article 6 of the Statute of the OTOC, of planning, organising and coordinating the accounts of entities, signing their financial statements and tax declarations, acting as consultants in the fields of accounting, taxation and social security and representing the taxpayers whose accounting they perform at the administrative stage of the taxation procedure. In addition, it is common ground that chartered accountants assume, as members of a liberal profession, the financial risks related to the exercise of those activities, since, where there is an imbalance between outgoings and revenue, a chartered accountant is required to bear the deficit personally.

38 That being so, chartered accountants, having regard to the manner in which their profession is regulated in Portugal, carry on an economic activity and are, therefore, undertakings for the purposes of Article 101 TFEU. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, by analogy, Wouters and Others, paragraph 49).

39 Secondly, it is appropriate to examine whether a professional association such as the OTOC must be regarded as an association of undertakings within the meaning of Article 101(1) TFEU when it adopts a regulation such as the contested regulation or, on the contrary, as a public authority.

40 In accordance with the case-law of the Court, the FEU Treaty rules on competition do not apply to an 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 (see, inter alia, Wouters and Others, paragraph 57, and the case-law cited).

41 Firstly, rules such as those at issue in the main proceedings cannot be regarded as not belonging to the sphere of economic activity.

42 It is common ground in that regard, on the one hand, that the OTOC itself provides training for chartered accountants and, on the other, that the access of other providers wishing to offer such training is subject to the standards set out in the contested regulation. Consequently, such a regulation has a direct impact on economic activity on the market of compulsory training for chartered accountants.

43 In addition, the obligation on chartered accountants to undertake training in accordance with the rules laid down by that regulation is closely linked to the practice of their profession, as the Polish Government and the European Commission point out. Failure to comply with that obligation can therefore lead to disciplinary sanctions under Articles 57(1)(a), 59(2), 63 and 64 of the Statute of the OTOC, such as suspension for a maximum period of three years or expulsion from that professional association.

44 Even if that regulation did not directly affect the economic activity of the chartered accountants themselves, as the referring court appears to suggest in its third question, that fact cannot, of itself, remove a decision of an association of undertakings from the scope of Article 101 TFEU.

45 Such a decision can be such as to prevent, restrict or distort competition within the meaning of Article 101(1) TFEU, not only on the market on which the members of a professional association practice their profession, but also on another market on which that professional association itself has an economic activity.

46 Secondly, when it adopts rules such as the contested regulation, a professional association such as the OTOC does not exercise powers which are typically those of a public authority but appears rather as a regulatory body of a profession the practice of which constitutes, moreover, an economic activity.

47 On the one hand, it is not in dispute that the managing bodies of the OTOC are exclusively composed of members of that association. In addition, the national authorities play no part in the nomination of the members of those bodies.

48 It is immaterial in that regard that the OTOC is regulated by public law. According to its very wording, Article 101 TFEU applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the European Union rules on competition, and in particular Article 101 TFEU, are concerned (Wouters and Others, paragraph 66, and the case-law cited).

49 On the other, the regulatory power invested in the OTOC is not subject to any conditions or criteria which that professional association is required to meet when adopting measures such as the contested regulation. In that regard, Article 3(1)(c) and (s) of the Statute of the OTOC merely allocates to the OTOC the tasks of '[promoting] its members' continued training and professional training and [contributing] thereto, in particular by the organisation of professional training sessions and programmes, courses and conferences' and '[planning, organising and providing] compulsory training schemes for its members'.

50 Those provisions therefore allow the OTOC a wide discretion as to the principles, the conditions and methods which the compulsory training scheme for chartered accountants must follow.

51 In particular, the Statute of the OTOC does not give it the exclusive right to provide training for chartered accountants and does not lay down the conditions for access by training bodies to the market of compulsory training for chartered accountants. The rules concerning those questions appear, however, in the contested regulation.

52 Furthermore, it is not in dispute that that regulation was adopted by the OTOC without any input from the State.

53 The fact, referred to by the referring court in its second question, that the OTOC is legally required to put into place a system of compulsory training for its members does not call into question the foregoing considerations.

54 It is true that, when a Member State grants regulatory powers to a professional association, whilst defining the public-interest criteria and the essential principles with which its rules must comply and retaining its power to adopt decisions in the last resort, the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings (see, to that effect, Wouters and Others, paragraph 68).

55 However, that does not appear to be the case in the main proceedings, as is apparent from paragraphs 49 to 52 of the present judgment.

56 In such circumstances, the rules governing the earning of training credits drawn up by the professional association at issue in the main proceedings are a matter for it alone.

57 As regards the effect on the application of Article 101 TFEU of the fact that the OTOC does not seek to make a profit, it should be noted that that does not prevent an entity which carries out operations on the market from being considered an undertaking, where the corresponding offer of services exists in competition with that of other operators which do seek to make a profit (see, to that effect, Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraphs 122 and 123, and Case C-49/07 MOTOE [2008] ECR I-4863, paragraph 27).

58 This is exactly the case in the main proceedings. It is clear from the file before the Court that the OTOC offers professional training for chartered accountants in competition with other training bodies which seek to make a profit.

59 In the light of the foregoing considerations, the answer to the first to third questions is:

– A regulation such as that at issue in the main proceedings, adopted by a professional association such as the OTOC, must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU.

– The fact that a professional association, such as the OTOC, is legally required to put into place a system of compulsory training for its members cannot remove from the scope of Article 101 TFEU the rules drawn up by that professional association, insofar as those rules are a matter for it alone.

– The fact that those rules do not have any direct effect on the economic activity of the members of that professional association does not affect the application of Article 101 TFEU, where the infringement of which that professional association is accused concerns a market on which it itself carries on an economic activity.

T-99/04 AG Treuhand [2008] ECR II-1501

" 151 Next, it must be determined whether, in the present case, the objective and subjective conditions for establishing that the applicant shares liability, in that the anti-competitive conduct of the other participating undertakings can be attributed to it, are satisfied. In that regard, it should be pointed out, first of all, that in order to be able to attribute the whole of an infringement to an undertaking, that undertaking must have contributed, even in a subordinate manner, to the restriction of competition at issue, and the subjective condition relating to the manifestation of that undertaking's intention in that regard must be met.

152 Independently of the question whether the applicant was a 'contracting' party to the 1971 and 1975 agreements and whether the agency agreements concluded with the three organic peroxide producers were an integral part of the cartel in the wider sense, the Court notes that it has become apparent that the applicant actively contributed to the implementation of that cartel between 1993 and 1999.

153 First, it is common ground that the applicant stored and concealed on its premises the originals of the 1971 and 1975 agreements of Atochem/Atofina and PC/Degussa, and in the latter case, until as late as 2001 or 2002 (recitals 63 and 83 of the contested decision). Second, the applicant admits to having calculated and communicated to the members of the cartel the deviations of the respective market shares from the agreed quotas, until 1995 or 1996 at the very least, an activity which was expressly provided for in the 1971 and 1975 agreements, and to having stored sECRet documents on its premises, pursuant thereto.

Third, as regards the meetings between the organic peroxide producers which had some anti-competitive content, the applicant admitted to having organised and partly attended five of those meetings, as well as the meeting held in Amersfoort on 19 October 1998 to prepare a proposal regarding the allocation of quotas among the producers. Fourth, it is common ground that the applicant regularly reimbursed the travel expenses which the representatives of the organic peroxide producers incurred in attending meetings with an anti-competitive purpose, and it did so with the manifest intention of covering up any traces of the implementation of the cartel in the books of those producers, or of not leaving any such traces (see paragraphs 63 and 102 above).

154 Without there being any need to assess in detail the points of dispute between the parties regarding the actual extent of the applicant's participation in the cartel, the Court concludes from the information set out in paragraph 153 above that the applicant actively contributed to the implementation of the cartel and that, contrary to its submissions, there was a sufficiently definite and decisive causal link between that activity and the restriction of competition on the organic peroxide market. At the hearing, the applicant did not dispute the existence of that causal link but merely challenged the legal classification of its contribution as an act of a perpetrator of the infringement, maintaining that its contribution could be classed only as an act of complicity which could have been carried out by any consultancy firm.

155 Accordingly, it is not relevant that the applicant was not formally and directly a contracting party to the 1971 and 1975 agreements. First, for the purposes of applying Article 81(1) EC, the question whether or not there is an agreement which is in writing, or otherwise explicit, between the participating undertakings is not decisive so long as they act in collusion (see paragraphs 115 to 123 above). Second, the applicant itself acknowledges that, by tacit agreement with the organic peroxide producers, it undertook – in its own name and on its own account – some of Fides' activities as specifically provided for under those agreements, such as the calculation and communication of the deviations from the agreed quotas. It should be added that, given that the Commission merely imposed on the applicant a fine of a minimal amount of EUR 1 000 and that that amount as such has not been called into question by the applicant, the Court is not required to give a ruling on the exact extent of the applicant's participation for the purposes of its effect on the lawfulness of the level of the fine imposed.

156 Moreover, in the light of all the objective circumstances characterising the applicant's participation, the Court finds that the applicant acted in full knowledge of the facts and intentionally when it made its professional expertise and infrastructure available to the cartel, in order to benefit from it, at least indirectly, in the course of implementing the individual agency agreements which linked it to the three organic peroxide producers. Quite apart from the question whether the applicant thus also knowingly infringed the rules of

professional ethics by which it is bound as a commercial consultant, it clearly could not have been unaware, or indeed it knew, that the objective of the cartel to which it contributed was anti-competitive and unlawful, that objective having become apparent, inter alia, in the context of the 1971 and 1975 agreements which the applicant stored on its premises, from the meetings which were held with an anti-competitive aim and from the exchange of sensitive information in which the applicant actively participated, at least until 1995 or 1996.

157 In the light of all of the above considerations, the Court finds that, in so far as the contested decision establishes that the applicant shares liability for the infringement committed primarily by AKZO, Atochem/Atofina and PC/Degussa, that decision does not exceed the limits of the prohibition laid down in Article 81(1) EC and that, consequently, by imposing on the applicant a fine of EUR 1 000, the Commission did not exceed the powers conferred on it under Article 15(2) of Regulation No 17. "

Attribution of subsidiaries' conduct to mother company

C-189/02 P - Dansk Rørindustri and Others v Commission

" 117 In that regard, it is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (see, in particular, Case C-294/98 P Metsä-Serla and Others v Commission [2000] ECR I-10065, paragraph 27)."

T-301/04 Clearstrem AG v Commission [2009] ECR II-3155

" 198 It should be recalled that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (Case C-294/98 P Metsä-Serla and Others v Commission [2000] ECR I-10065, paragraph 27). Thus, the conduct of a subsidiary may be attributed to the parent company where the subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company (Case 48/69 Imperial Chemical Industries v Commission [1972] ECR 619, paragraphs 132 and 133).

199 In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a rebuttable presumption that the parent company exercises decisive influence over the conduct of its subsidiary (see, to that effect, Case 107/82 AEG-Telefunken v Commission [1983] ECR 3151, paragraph 50) and that they therefore constitute a single undertaking for the purposes of competition law (judgment of

15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 Tokai Carbon and Others v Commission (not published in the ECR), paragraph 59). It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (Case T-314/01 Avebe v Commission [2006] ECR II-3085, paragraph 136; see also, to that effect, Case C-286/98 P Stora Kopparbergs Bergslags v Commission [2000] ECR I-9925 ('Stora'), paragraph 29).

200 In that regard, it must be noted that, while it is true that at paragraphs 28 and 29 of Stora, paragraph 199 above, the Court of Justice referred not only to the fact that the parent company owned 100% of the capital of the subsidiary but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. The Court of Justice expressly stated, in paragraph 29 of Stora, paragraph 199 above, that 'as that subsidiary was wholly owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary's conduct', and that, in those circumstances, it was for the appellant to rebut that 'presumption' by adducing sufficient evidence.

201 In the present case, since CI holds 100% of the capital of CBF, it is for it to adduce evidence of independent behaviour by CBF such as to rebut that presumption, and it has failed to do so. The applicants do not in fact deal in their written pleadings with whether the subsidiary CBF had decided and/or decided independently upon its own conduct on the market rather than carrying out the instructions given to it by the parent company.

202 Nor did the applicants dispute the Commission's statement, in the defence, referring to recitals 235 and 271 et seq. of the contested decision, first, that in its business publications Clearstream presents itself as a single entity and, second, that the facts set out in the contested decision show that CI influenced the behaviour of CBF, which did not therefore act independently, and even that CI occasionally acted on behalf of its German subsidiary.

203 With regard to the applicants' argument that the Commission never found that CI was an undertaking occupying a dominant position on the relevant market, it suffices to hold that that is based on the false assumption that CI has not been held to have committed any infringement. According to recital 224 et seq. and Article 1 of the contested decision, CI itself was found to have committed an infringement, by virtue of the economic and legal ties

linking it to CBF which enabled it to determine CBF's conduct on the market (see, to that effect, Metsä-Serla and Others v Commission, paragraph 198 above, paragraph 34). "

C-97/08 Akzo Nobel [2009] ECR I-8237

" 54 It must be observed, as a preliminary point, that Community competition law refers to the activities of undertakings (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 59), and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, in particular, Dansk Rørindustri and Others v Commission, paragraph 112; Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraph 107; and Case C-205/03 P FENIN v Commission, [2006] ECR I-6295, paragraph 25).

55 The Court has also stated that the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio [2006] ECR I-11987, paragraph 40).

56 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see, to that effect, Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, paragraph 145; Case C-279/98 P Cascades v Commission [2000] ECR I-9693, paragraph 78; and Case C-280/06 ETI and Others [2007] ECR I-10893, paragraph 39).

57 The infringement of Community competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person (see, to that effect, Aalborg Portland and Others v Commission, paragraph 60, and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P August Koehler and Others v Commission [2009] ECR I-0000, paragraph 38). It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations.

58 It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, to that effect, Imperial Chemical Industries v Commission, paragraphs 132 and 133; Geigy v Commission, paragraph 44; Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraph 15; and Stora, paragraph 26), having regard in particular to the economic, organisational and legal links between those two legal entities (see, by analogy, Dansk Rørindustri and Others v Commission, paragraph 117, and ETI and Others, paragraph 49).

59 That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned in paragraphs 54 and 55 of this judgment. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.

60 In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary (see, to that effect, Imperial Chemical Industries v Commission, paragraphs 136 and 137) and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see, to that effect, AEG-Telefunken v Commission, paragraph 50, and Stora, paragraph 29).

61 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, Stora, paragraph 29).

62 As the Court of First Instance rightly held in paragraph 61 of the judgment under appeal, while it is true that at paragraphs 28 and 29 of Stora the Court of Justice referred, not only to the fact that the parent company owned 100% of the capital of the subsidiary, but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption mentioned in paragraph 60 of this judgment subject to the production of additional indicia relating to the actual exercise of influence by the parent company.

63 It is clear from all those considerations that the Court of First Instance did not commit any error of law in holding that where a parent company has a 100% shareholding in its subsidiary there is a rebuttable presumption that that parent company exercises a decisive influence over the conduct of its subsidiary.

64 Accordingly, since the Commission is not required, as regards the imputability of the infringement, to submit, at the stage of the statement of objections, evidence other than

proof relating to the shareholding of the parent company in its subsidiaries, the appellants' argument relating to the infringement of the rights of defence cannot be accepted. "

T-102/92 VIHO Europe BV v Commission [1995] ECR II-17

" 47 As regards the appraisal under Article 85(1) of the Treaty of agreements concluded within a group of companies, the Court of Justice has held that "where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 85(1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit" (judgment in Case 48/69 ICI v Commission [1972] ECR 619, paragraph 134). Similarly, in its judgment in Ahmed Saeed Flugreisen and Others, cited above, paragraph 35, the Court of Justice held that "Article 85 does not apply where the concerted practice in question is between undertakings belonging to a single group as parent company and subsidiary if those undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market" and added that "[h]owever, the conduct of such a unit on the market is liable to come within the ambit of Article 86". It also follows from the case-law of the Court of First Instance that Article 85(1) of the Treaty refers only to relations between economic entities which are capable of competing with one another and does not cover agreements or concerted practices between undertakings belonging to the same group if the undertakings form an economic unit (judgment in Joined Cases T-68/89, T-77/89 and T-78/89 SIV and Others v Commission [1992] ECR II-1403, paragraph 357).

48 It is not disputed in this case that Parker owns 100% of the capital of its subsidiaries established in Germany, France, Belgium and the Netherlands. It is also apparent from the description given by Parker of the operation of its subsidiary companies, which the applicant has not disputed, that the sales and marketing activities of the subsidiaries are directed by an area team which is appointed by the parent company and which controls, in particular, sales targets, gross margins, sales costs, cash flow and stocks. That area team also lays down the range of products to be sold, monitors advertising and issues directives concerning prices and discounts.

49 Consequently, the Court concludes that, in point 2 of its decision, the Commission correctly classifies the Parker group as "one economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market".

50 The Court of Justice has also held that "in competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal" (judgment in Case 170/83 Hydrotherm v Compact [1984] ECR 2999, paragraph 11). Similarly, the Court of First Instance has held that "Article 85(1) of the EEC Treaty is aimed at economic units which consist of a unitary organization of personal, tangible and intangible

elements which pursues a specific economic aim on a long-term basis and can contribute to the Commission of an infringement of the kind referred to in that provision" (judgment in Case T-11/89 Shell v Commission [1992] ECR II-757, paragraph 311). Therefore, for the purposes of the application of the competition rules, the 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.

51 It follows that, where there is no agreement between economically independent entities, relations within an economic unit cannot amount to an agreement or concerted practice between undertakings which restricts competition within the meaning of Article 85(1) of the Treaty. Where, as in this case, the subsidiary, although having a separate legal personality, does not freely determine its conduct on the market but carries out the instructions given to it directly or indirectly by the parent company by which it is wholly controlled, Article 85(1) does not apply to the relationship between the subsidiary and the parent company with which it forms an economic unit. "

STATE ACTION DEFENCE

T-271/03 - Deutsche Telekom v Commission [2008] ECR II-477

85 It follows from the case-law that Articles 81 EC and 82 EC apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (see Joined Cases C-359/95 P and C-379/95 P Commission and France v LadbrokeRacing [1997] ECR I-6265, paragraph 33, and the case-law cited).

86 In that regard it must nevertheless be observed that the possibility of excluding particular anti-competitive conduct from the scope of Articles 81 EC and 82 EC, on the ground that it has been required of the undertakings in question by existing national legislation or that the legislation has eliminated any possibility of competitive conduct on their part, has been only partially accepted by the Court of Justice (Joined Cases 209/78 to 215/78 and 218/78 van Landewyck and Others v Commission [1980] ECR 3125, paragraphs 130 to 134; Case 41/83 Italy v Commission [1985] ECR 873, paragraph 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 Stichting Sigarettenindustrie and Others v Commission [1985] ECR 3831, paragraphs 27 to 29; and Case C-198/01 CIF [2003] ECR I-8055, paragraph 67).

87 For the national legal framework to have the effect of making Articles 81 EC and 82 EC inapplicable to the anti-competitive activities of undertakings, the restrictive effects on

competition must originate solely in the national law (Case T-513/93 Consiglio nazionale degli spedizionieri doganali v Commission [2000] ECR II-1807, paragraph 61).

88 Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings (van Landewyck and Others v Commission, cited in paragraph 86 above, paragraphs 126 and 130 to 134; Stichting Sigarettenindustrie and Others v Commission, cited in paragraph 86 above, paragraphs 12 to 37; Case C-219/95 P Ferriere Nord v Commission [1997] ECR I-4411, paragraphs 23 to 25; and Commission and France v Ladbroke Racing, cited in paragraph 85 above, paragraph 34).

89 Thus, if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraphs 36 to 73, and CIF, cited in paragraph 86 above, paragraph 56; see, to that effect, Case T-387/94 Asia Motor France and Others v Commission [1996] ECR II-961, paragraph 60).

C-280/08 P - Deutsche Telekom v Commission [2010] ECR I-9555

"80 According to the case-law of the Court of Justice, it is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings (Joined Cases C-359/95 P and C-379/95 P Commission and France v Ladbroke Racing [1997] ECR I-6265, paragraphs 33 and 34 and the case-law cited).

81 The possibility of excluding anti-competitive conduct from the scope of Articles 81 EC and 82 EC on the ground that it has been required of the undertakings in question by existing national legislation or that the legislation has precluded all scope for any competitive conduct on their part has thus been accepted only to a limited extent by the Court of Justice (see Case 41/83 Italy v Commission [1985] ECR 873, paragraph 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 Stichting Sigarettenindustrie and Others v Commission [1985] ECR 3831, paragraphs 27 to 29; and Case C-198/01 CIF [2003] ECR I-8055, paragraph 67).

82 Thus, the Court has held that if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73,

111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraphs 36 to 73, and CIF, paragraph 56)."

AGREEMENTS, DECIONS AND CONCERTED PRACTICES– Art 101 TFUE

T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94- LVM v Commission [1999] ECR II-931

"696 In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article 85 of the Treaty.

697 The Commission is therefore entitled to classify that type of complex infringement as an agreement `and/or' concerted practice, inasmuch as the infringement includes elements which are to be classified as an `agreement' and elements which are to be classifed as a `concerted practice'.

698 In such a situation, the dual classification must be understood not as requiring simultaneous and cumulative proof that every one of those factual elements reveals the factors constituting an agreement and a concerted practice, but rather as designating a complex whole that includes factual elements of which some have been classified as an agreement and others as a concerted practice within the meaning on Article 85(1) of the Treaty, which does not provide for any specific classification in respect of that type of complex infringement."

T-1/89 - Rhône-Poulenc v Commission [1991] ECR II-867

" 118 It must be stated first of all that the question whether the Commission was obliged to characterize each factual element found against the applicant either as an agreement or a concerted practice within the meaning of Article 85(1) of the EEC Treaty is irrelevant. It is apparent from the second paragraph of point 80, the third paragraph of point 81 and the first paragraph of point 82 of the Decision, read together, that the Commission characterized each of those different elements primarily as an "agreement".

119 It is likewise apparent from the second and third paragraphs of point 86, the third paragraph of point 87 and point 88 of the Decision, read together, that the Commission in the alternative characterized the elements of the infringement as "concerted practices" where those elements either did not enable the conclusion to be drawn that the parties had reached agreement in advance on a common plan defining their action on the market but had adopted or adhered to collusive devices which facilitated the coordination of their

commercial behaviour, or did not, owing to the complexity of the cartel, make it possible to establish that some producers had expressed their definite assent to a particular course of action agreed by the others, although they had indicated their general support for the scheme in question and conducted themselves accordingly. The Decision thus concludes that in certain respects the continuing cooperation and collusion of the producers in the implementation of an overall agreement may display the characteristics of a concerted practice.

120 Since it is clear from the case-law of the Court of Justice that in order for there to be an agreement within the meaning of Article 85(1) of the EEC 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 (see the judgment in Case 41/69 ACF Chemiefarma N.V. v Commission [1970] ECR 661, paragraph 112, and the judgment in Joined Cases 209 to 215 and 218/78 Heintz van Landewyck Sàrl v Commission [1980] ECR 3125, paragraph 86), this Court holds that the Commission was entitled to treat the common intentions existing between the applicant and other polypropylene producers, which the Commission has proved to the requisite legal standard and which related to target prices for the period from July to December 1979 and sales volume targets for 1979 and 1980, as agreements within the meaning of Article 85(1) of the EEC Treaty.

121 For a definition of the concept of concerted practice, reference must be made to the case-law of the Court of Justice, which shows that the criteria of coordination and cooperation previously laid down by that Court must be understood in the light of the concept inherent in the competition provisions of the EEC Treaty according to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 Suiker Unie and Others v Commission, cited above, paragraphs 173 and 174).

122 In the present case, the applicant participated in meetings concerning the fixing of price and sales volume targets during which information was exchanged between competitors about the prices they wished to see charged on the market, the prices they intended to charge, their profitability thresholds, the sales volume restrictions they judged to be necessary, their sales figures or the identity of their customers. Through its participation in those meetings, it took part, together with its competitors, in concerted action the purpose

of which was to influence their conduct on the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market.

123 Accordingly, not only did the applicant pursue the aim of eliminating in advance uncertainty about the future conduct of its competitors but also, in determining the policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by the applicant about the course of conduct which the applicant itself had decided upon or which it contemplated adopting on the market.

124 The Commission was therefore justified, in the alternative, having regard to their purpose, in categorizing the EATP meeting of 22 November 1977 in which the applicant participated and the regular meetings of polypropylene producers in which the applicant participated between the end of 1978 or the beginning of 1979 and the end of 1980 as concerted practices within the meaning of Article 85(1) of the EEC Treaty."

T-9/99 HFB and others v Commission [2002] ECR II-1487, paras 1999-201, 206

199 It is settled case-law that in order for there to be an agreement within the meaning of Article 85(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 v Commission [1980] ECR 3125, paragraph 86, and Case T-1/89 Rhône-Poulenc v Commission [1991] ECR II-867, paragraph 120).

200 That is the case where there is a gentlemen's agreement between a number of undertakings representing the faithful expression of such a joint intention concerning a restriction of competition (ACF Chemiefarma v Commission, cited above, paragraph 112, and Case T-141/89 Tréfileurope v Commission [1995] ECR II-791, paragraph 96). In those circumstances, the question whether the undertakings in question considered themselves bound - in law, in fact or morally - to adopt the agreed conduct is therefore irrelevant (Case T-347/94 Mayr-Melnhof v Commission [1998] ECR II-1751, paragraph 65).

201 Contrary to what the applicants allege, the opposite conclusion cannot be inferred from the provision in Article 85(2) of the Treaty that any agreement referred to in Article 85(1) is automatically void, which is intended for cases where a legal obligation is actually in issue. The fact that only binding agreements can, by their nature, be rendered void does not mean that non-binding agreements must escape the prohibition laid down in Article 85(1) of the Treaty.

202 In the present case, the Commission considered in point 137 of the Decision that, as regards the arrangements outside the Danish market before 1994, express agreement was reached at the latest, on the price increase for Germany, on 1 January 1992, and, for pricing and project sharing in Italy and the market-quota scheme, in August 1993. As regards the applicants' participation in the cartel before October 1994, it is common ground that the Commission found that there was an agreement, first, as to the price increase for the German market for 1992, decided in October and December 1991, second, as to the quota scheme adopted in August or September 1993 and, third, as to the price list adopted in May and August 1994.

[…]

206 Contrary to what the applicants claim, the facts relied on by the Commission cannot be characterised as merely an attempted agreement. It is apparent from the series of meetings at which market-sharing was discussed that, at least at a certain time, the undertakings in question expressed their joint intention to conduct themselves on the market in a specific manner. As observed in paragraphs 151 to 157 above, it must be held that, even if there was not an agreement on all the matters forming the subject-matter of the negotiations, a joint intention to restrict competition on the German market by means of fixed market shares for each operator governed the negotiations during a certain period in 1993.

207 In that context, the Commission's assertion in point 137 of the Decision that it may well be true that [the arrangements] were inchoate, loose and often fragmentary cannot be taken to mean that, in respect of the facts characterised as an agreement by the Commission, there was not yet a joint intention on the part of the undertakings concerned to conduct themselves on the market in a specific way. The Commission's assertion, although it states that the arrangements were not always concluded for all the matters forming the subject-matter of the negotiations or for all the foreseeable details and that they were sporadic and non-continuous, does not in any way mean that the undertakings concerned did not reach agreement on one or more matters intended to restrict competition on the market in question.

Case T-56/99 Marlines v Commission [2003] ECR II-5225, paras 20-21

"20 According to consistent case-law, in order for there to be an agreement within the meaning of Article 85(1) of the Treaty, it is sufficient for the undertakings in question to have expressed their joint intention to conduct themselves in the market in a particular way (Case 41/69 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 C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, paragraph 130, Tréfileurope v Commission, cited above, paragraph 95, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-

68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR and Others v Commission [2000] ECR II-491, paragraph 958).

21 The agreement need be in no particular form, whether written or verbal; nor need it be governed by any particular rules. Communication of an agreement to the parties and its tacit acceptance suffice to prove the existence of an agreement contrary to Article 85 of the EC Treaty (see, to that effect, Sandoz prodotti farmaceutici v Commission, cited above, paragraph 11). Even tacit acceptance may, where the person concerned does not distance itself, be treated as acceptance of and participation in a prohibited agreement (see, to that effect, Tréfileurope v Commission, cited above, paragraph 85). "

Decision by association of undertakings see above cases Wouters and Ordem dos Tecnicos Oficiais de Contas,

Recommendation by and association of undertakings

T-325/01 - DaimlerChrysler v Commission [2005] ECR II-3319

" 210 As regards the applicant's argument that the dealers' association did not have the authority to take decisions binding its members, but only to formulate recommendations, it is settled case-law that a measure may be categorised as a decision of an association of undertakings for the purposes of Article 81(1) EC even if it is not binding on the members concerned, at least to the extent that the members to whom the decision applies comply with its terms (see, by way of analogy, Joined Cases 96/82 to102/82, 104/82, 105/82, 108/82 and 110/82 IAZ and Others v Commission [1983] ECR 3369, paragraph 20; Van Landewyck and Others v Commission, cited in paragraph 199 above, at paragraphs 88 and 89; and Case T-136/94 Eurofer v Commission [1999] ECR II-263, paragraph 15). That requirement is sufficiently established in this case by the fact that the members of the dealers' association in Belgium and MBBel decided at the meeting of 20 April 2005 to monitor, using ghost purchasing by members of an outside agency, the level of discounts given for the W 210 vehicle model and that ghost shoppers did indeed make visits to dealers. That information shows that the course of action decided upon at the meeting of 20 April 1995 was implemented. "

Concerted practice

C-48/69 ICI v Commission [1972] ECR 619

"The concept of a concerted practice

64 article 85 draws a distinction between the concept of " concerted practices " and that of " agreements between undertakings " or of " decisions by associations of undertakings "; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-

called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition .

65 by its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants .

66 although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market .

67 this is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers .

68 therefore the question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question .

The characteristic features of the market in dyestuffs

69 the market in dyestuffs is characterized by the fact that 80 per cent of the market is supplied by about ten producers, very large ones in the main, which often manufacture these products together with other chemical products or pharmaceutical specialities .

70 the production patterns and therefore the cost structures of these manufacturers are very different and this makes it difficult to ascertain competing manufacturers' costs .

71 the total number of dyestuffs is very high, each undertaking producing more than a thousand .

72 the average extent to which these products can be replaced by others is considered relatively good for standard dyes, but it can be very low or even non-existent for speciality dyes .

73 as regards speciality products, the market tends in certain cases towards an oligopolistic situation .

74 since the price of dyestuffs forms a relatively small part of the price of the final product of the user undertaking, there is little elasticity of demand for dyestuffs on the market as a whole and this encourages price increases in the short term .

75 another factor is that the total demand for dyestuffs is constantly increasing, and this tends to induce producers to adopt a policy enabling them to take advantage of this increase .

76 in the territory of the community, the market in dyestuffs in fact consists of five separate national markets with different price levels which cannot be explained by differences in costs and charges affecting producers in those countries .

77 thus the establishment of the common market would not appear to have had any effect on this situation, since the differences between national price levels have scarcely dECReased .

78 on the contrary, it is clear that each of the national markets has the characteristics of an oligopoly and that in most of them price levels are established under the influence of a " priceleader ", who in some cases is the largest producer in the country concerned, and in other cases is a producer in another Member State or a third state, acting through a subsidiary .

79 according to the experts this dividing-up of the market is due to the need to supply local technical assistance to users and to ensure immediate delivery, generally in small quantities, since, apart from exceptional cases, producers supply their subsidiaries established in the different Member States and maintain a network of agents and depots to ensure that user undertakings receive specific assistance and supplies .

80 it appears from the data produced during the course of the proceedings that even in cases where a producer establishes direct contact with an important user in another Member State, prices are usually fixed in relation to the place where the user is established and tend to follow the level of prices on the national market.

81 although the foremost reason why producers have acted in this way is in order to adapt themselves to the special features of the market in dyestuffs and to the needs of their customers, the fact remains that the dividing-up of the market which results tends, by fragmenting the effects of competition, to isolate users in their national market, and to prevent a general confrontation between producers throughout the common market .

82 it is in this context, which is peculiar to way in which the dyestuffs market works, that the facts of the case should be considered .

The increases of 1964, 1965 and 1967

83 the increases of 1964, 1965 and 1967 covered by the contested decision are interconnected .

84 the increase of 15 per cent in the prices of most aniline dyes in Germany on 1 January 1965 was in reality nothing more than the extension to another national market of the increase applied in January 1964 in Italy, the Netherlands, Belgium and Luxembourg .

85 the increase in the prices of certain dyes and pigments introduced on 1 January 1965 in all the Member States, except France, applied to all the products which had been excluded from the first increase .

86 the reason why the price increase of 8 per cent introduced in the autumn of 1967 was raised to 12 per cent for France was that there was a wish to make up for the increases of 1964 and 1965 in which that market had not taken part because of the price control system .

87 therefore the three increases cannot be isolated one from another, even though they did not take place under identical conditions .

88 in 1964 all the undertakings in question announced their increases and immediately put them into effect, the initiative coming from ciba-Italy which, on 7 January 1964, following instructions from Ciba-switzerland, announced and immediately introduced an increase of 15 per cent . This initiative was followed by the other producers on the Italian market within two or three days .

89 on 9 January ici Holland took the initiative in introducing the same increase in the Netherlands, whilst on the same day Bayer took the same initiative on the Belgo-Luxembourg market .

90 with minor differences, particularly between the price increases by the German undertakings on the one hand and the Swiss and united kingdom undertakings on the other, these increases concerned the same range of products for the various producers and markets, namely, most aniline dyes other than pigments, food colourings and cosmetics .

91 as regards the increase of 1965 certain undertakings announced in advance price increases amounting, for the German market, to an increase of 15 per cent for products whose prices had already been similarly increased on the other markets, and to 10 per cent for products whose prices had not yet been increased . These announcements were spread over the period between 14 October and 28 December 1964 .

92 the first announcement was made by basf, on 14 october 1964, followed by an announcement by Bayer on 30 october and by castella on 5 November .

93 these increases were simultaneously applied on 1 January 1965 on all the markets except for the French market because of the price freeze in that state, and the Italian market

where, as a result of the refusal by the principal Italian producer, acna, to increase its prices on the said market, the other producers also decided not to increase theirs .

94 acna also refrained from putting its prices up by 10 per cent on the German market .

95 otherwise the increase was general, was simultaneously introduced by all the producers mentioned in the contested decision, and was applied without any differences concerning the range of products .

96 as regards the increase of 1967, during a meeting held at Basel on 19 august 1967, which was attended by all the producers mentioned in the contested decision except acna, the geigy undertaking announced its intention to increase its selling prices by 8 per cent with effect from 16 october 1967 .

97 on that same occasion the representatives of bayer and francolor stated that their undertakings were also considering an increase .

98 from mid-september all the undertakings mentioned in the contested decision announced a price increase of 8 per cent, raised to 12 per cent for France, to take effect on 16 october in all the countries except Italy, where acna again refused to increase its prices, although it was willing to follow the movement in prices on two other markets, albeit on dates other than 16 october .

99 viewed as a whole, the three consecutive increases reveal progressive cooperation between the undertakings concerned .

100 in fact, after the experience of 1964, when the announcement of the increases and their application coincided, although with minor differences as regards the range of products affected, the increases of 1965 and 1967 indicate a different mode of operation .

Here, the undertakings taking the initiative, basf and geigy respectively, announced their intentions of making an increase some time in advance, which allowed the undertakings to observe each other' s reactions on the different markets, and to adapt themselves accordingly .

101 by means of these advance announcements the various undertakings eliminated all uncertainty between them as to their future conduct and, in doing so, also eliminated a large part of the risk usually inherent in any independent change of conduct on one or several markets .

102 this was all the more the case since these announcements, which led to the fixing of general and equal increases in prices for the markets in dyestuffs, rendered the market transparent as regard the percentage rates of increase .

103 therefore, by the way in which they acted, the undertakings in question temporarily eliminated with respect to prices some of the preconditions for competition on the market which stood in the way of the achievement of parallel uniformity of conduct .

104 the fact that this conduct was not spontaneous is corroborated by an examination of other aspects of the market .

105 in fact, from the number of producers concerned it is not possible to say that the european market in dyestuffs is, in the strict sense, an oligopoly in which price competition could no longer play a substantial role .

106 these producers are sufficiently powerful and numerous to create a considerable risk that in times of rising prices some of them might not follow the general movement but might instead try to increase their share of the market by behaving in an individual way .

107 furthermore, the dividing-up of the common market into five national markets with different price levels and structures makes it improbable that a spontaneous and equal price increase would occur on all the national markets .

108 although a general, spontaneous increase on each of the national markets is just conceivable, these increases might be expected to differ according to the particular characteristics of the different national markets .

109 therefore, although parallel conduct in respect of prices may well have been an attractive and risk-free objective for the undertakings concerned, it is hardly conceivable that the same action could be taken spontaneously at the same time, on the same national markets and for the same range of products .

110 nor is it any more plausible that the increases of January 1964, introduced on the Italian market and copied on the Netherlands and Belgo-Luxembourg markets which have little in common with each other either as regards the level of prices or the pattern of competition, could have been brought into effect within a period of two or three days without prior concertation .

111 as regards the increases of 1965 and 1967 concertation took place openly, since all the announcements of the intention to increase prices with effect from a certain date and for a certain range of products made it possible for producers to decide on their conduct regarding the special cases of France and Italy .

112 in proceeding in this way, the undertakings mutually eliminated in advance any uncertainties concerning their reciprocal behaviour on the different markets and thereby also eliminated a large part of the risk inherent in any independent change of conduct on those markets .

113 the general and uniform increase on those different markets can only be explained by a common intention on the part of those undertakings, first, to adjust the level of prices and the situation resulting from competition in the form of discounts, and secondly, to avoid the risk, which is inherent in any price increase, of changing the conditions of competition ."

T-9/99 HFB and others v Commission [2002] ECR II-1487

"211 According to settled case-law, a concerted practice refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (see Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraph 26, and Hüls v Commission, cited above, paragraph 158).

212 It follows from that case-law that the criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which he intends to follow in the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators capable of influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (Suiker Unie and Others v Commission, cited above, paragraphs 173 and 174, Hüls v Commission, cited above, paragraphs 159 and 160, and Rhône-Poulenc v Commission, cited above, paragraph 121).

213 Furthermore, it follows from the actual terms of Article 85(1) of the Treaty, that a concerted practice implies, besides undertakings concerting with each other, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two (see Commission v Anic, cited above, paragraph 118, and Hüls v Commission, cited above, paragraph 161).

214 In that context, it is necessary to assess the Commission's observations, in the second paragraph of point 138 of the Decision, that even if the concept of "agreement" does not apply to steps in the bargaining process leading up to comprehensive agreement, the conduct in question still falls under the prohibition of Article 85 as a concerted practice. On that point, the Commission described the regular meetings as a forum for ... the exchange of normally sensitive commercial information ... [which] must have meant reaching a certain

level of understanding, reciprocity and conditional or partial agreement as to [the] conduct [of the participants] and stated that the participants could not, in any event, have failed to take into account, directly or indirectly, the information obtained in the course of those regular meetings.

215 In that regard, it should be observed that, for the period before October 1994, a number of documents show that, in 1992 and 1993, the Henss/Isoplus group participated, on numerous occasions, in an exchange of information on market share. As stated in paragraphs 146, 148 and 149 above, that applies to the documents in annexes 37, 44, 49 and 53 to the statement of objections.

216 However, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market (Commission v Anic, cited above, paragraph 121, and Hüls v Commission, cited above, paragraph 162). That is all the more true where the undertakings concert together on a regular basis over a long period, as was the case here (Commission v Anic, cited above, paragraph 121, and Hüls v Commission, cited above, paragraph 162).

217 Furthermore, it follows from the case-law that a concerted practice is caught by Article 85(1) of the Treaty, even in the absence of anti-competitive effects on the market. First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily imply that that conduct should produce the specific effect of restricting, preventing or distorting competition (see Commission v Anic, paragraphs 122 to 124, and Hüls v Commission, paragraphs 123 to 125).

218 It follows from the foregoing that, as regards the period before October 1994, in so far as the Commission complained that the Henss/Isoplus group participated in a complex of agreements and concerted practices, it did not err in law when, in the alternative, it characterised an exchange of commercial information as a concerted practice."

40 to 48, 50, 54 to 56, 111, 113 and 114/73 Coöperatieve Vereniging "Suiker Unie" UA and others v Commission [1975] ECR 1663

" 172. Su and csm submit that since the concept of 'concerted practices' presupposes a plan and the aim of removing in advance any doubt as to the future conduct of competitors, the reciprocal knowledge which the parties concerned could have of the parallel or complementary nature of their respective decisions cannot in itself be sufficient to establish

a concerted practice; otherwise every attempt by an undertaking to react as intelligently as possible to the acts of its competitors would be an offence .

173 the criteria of coordination and cooperation laid down by the case-law of the court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells .

174 although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market .

175 the documents quoted show that the applicants contacted each other and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors ."

C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85 Ahlström Osakeyhtiö and Others v Commission ("Wood Pulp") [1994] ECR I-99

" 70 Since the Commission has no documents which directly establish the existence of concertation between the producers concerned, it is necessary to ascertain whether the system of quarterly price announcements, the simultaneity or near-simultaneity of the price announcements and the parallelism of price announcements as found during the period from 1975 to 1981 constitute a firm, precise and consistent body of evidence of prior concertation.

71 In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (see the judgment in Suiker Unie, cited above, paragraph 174).

72 Accordingly, it is necessary in this case to ascertain whether the parallel conduct alleged by the Commission cannot, taking account of the nature of the products, the size and the

number of the undertakings and the volume of the market in question, be explained otherwise than by concertation.

(a) The system of price announcements

73 As stated above, the Commission regards the system of quarterly price announcements as evidence of concertation at an earlier stage.

74 In their pleadings, on the other hand, the applicants maintain that the system is ascribable to the particular commercial requirements of the pulp market.

75 By orders of 25 October 1990 and 14 March 1991, the Court requested two experts to examine the characteristics of the market for bleached sulphate pulp during the period covered by the contested decision. Their report sets out the following considerations.

76 The experts observe first that the system of announcements at issue must be viewed in the context of the long-term relationships which existed between producers and their customers and which were a result both of the method of manufacturing the pulp and of the cyclical nature of the market. In view of the fact that each type of paper was the result of a particular mixture of pulps having their own characteristics and that the mixture was difficult to change, a relationship based on close cooperation was established between the pulp producers and the paper manufacturers. Such relations were all the closer since they also had the advantage of protecting both sides against the uncertainties inherent in the cyclical nature of the market: they guaranteed security of supply to buyers and at the same time security of demand to producers.

77 The experts point out that it is in the context of those long-term relationships that, after the Second World War, purchasers demanded the introduction of that system of announcements. Since pulp accounts for between 50% and 75% of the cost of paper, those purchasers wished to ascertain as soon as possible the prices which they might be charged in order to estimate their costs and to fix the prices of their own products. However, as those purchasers did not wish to be bound by a high fixed price in the event of the market weakening, the announced price was regarded as a ceiling price below which the transaction price could always be renegotiated.

78 The explanation given for the use of a quarterly cycle is that it is the result of a compromise between the paper manufacturers' desire for a degree of foreseeability as regards the price of pulp and the producers' desire not to miss any opportunities to make a profit in the event of a strengthening of the market.

79 The US dollar was, according to the experts, introduced on the market by the North American producers during the 1960s. That development was generally welcomed by purchasers who regarded it as a means of ensuring that they did not pay a higher price than their competitors.

(b) The simultaneity or near-simultaneity of announcements

80 In paragraph 107 of its decision, the Commission claims that the close succession or even simultaneity of price announcements would not have been possible without a constant flow of information between the undertakings concerned.

81 According to the applicants, the simultaneity or near-simultaneity of the announcements ° even if it were established ° must instead be regarded as a direct result of the very high degree of transparency of the market. Such transparency, far from being artificial, can be explained by the extremely well-developed network of relations which, in view of the nature and the structure of the market, have been established between the various traders.

82 The experts have confirmed that analysis in their report and at the hearing which followed.

83 First, they pointed out, a buyer was always in contact with several pulp producers. One reason for that was connected with the paper-making process, but another was that, in order to avoid becoming overdependent on one producer, pulp buyers took the precaution of diversifying their sources of supply. With a view to obtaining the lowest possible prices, they were in the habit, especially in times of falling prices, of disclosing to their suppliers the prices announced by their competitors.

84 Secondly, it should be noted that most of the pulp was sold to a relatively small number of large paper manufacturers. Those few buyers maintained very close links with each other and exchanged information on changes in prices of which they were aware.

85 Thirdly, several producers who made paper themselves purchased pulp from other producers and were thus informed, in times of both rising prices and falling prices, of the prices charged by their competitors. That information was also accessible to producers who did not themselves manufacture paper but were linked to groups that did.

86 Fourthly, that high degree of transparency in the pulp market resulting from the links between traders or groups of traders was further reinforced by the existence of agents established in the Community who worked for several producers and by the existence of a very dynamic trade press.

87 In connection with the latter point, it should be noted that most of the applicants deny having communicated to the trade press any information on their prices and that the few producers who acknowledged having done so point out that such communications were sporadic and were made at the request of the press itself.

88 Finally, it is necessary to add that the use of rapid means of communication, such as the telephone and telex, and the very frequent recourse by the paper manufacturers to very well-informed trade buyers meant that, notwithstanding the number of stages involved °

producer, agent, buyer, agent, producer ° information on the level of the announced prices spreads within a matter of days, if not within a matter of hours on the pulp market.

(c) Parallelism of announced prices

89 The parallelism of announced prices on which the Commission relies as evidence of concertation is described in paragraph 22 of its decision. In that paragraph, the Commission, relying on Table 6 annexed to the decision, finds that the prices announced by the Canadian and United States producers were the same from the first quarter of 1975 to the third quarter of 1977 and from the first quarter of 1978 to the third quarter of 1981, that the prices announced by the Swedish and Finnish producers were the same from the first quarter of 1975 to the second quarter of 1977 and from the third quarter of 1978 to the third quarter of 1981 and, finally, that the prices of all the producers were the same from the first quarter of 1976 to the second quarter of 1977 and from the third quarter of 1979 to the third quarter of 1981.

90 According to the Commission, the only explanation for such parallelism of prices is concertation between the producers. That contention is essentially based on the considerations that follow.

91 In the first place, the single price charged by the producers during the period at issue cannot be regarded as an equilibrium price, that is to say a price resulting from the natural operation of the law of supply and demand. The Commission emphasizes that there was no testing of the market "by trial and error", as evidenced by the stability of prices established between the first quarter of 1975 and the fourth quarter of 1976, and the fact that, generally in the case of softwood from the third quarter of 1979 to the second quarter of 1980, the first higher price demanded was always followed by the other producers.

92 Nor can the argument concerning "price leadership" be accepted: the similarity of announced prices, and that of transaction prices moreover, cannot be explained by the existence of a market leader whose prices were adopted by its competitors. The order in which the announcements were made continued to change from quarter to quarter and no one producer held a strong enough position to act as leader.

93 Secondly, the Commission considers that, since economic conditions varied from one producer to another or from one group of producers to another, they should have charged different prices. Pulp manufacturers with low costs should have lowered their prices in order to increase their market shares to the detriment of their least efficient competitors. According to the Commission, the divergences in question related to production and transport costs, the relationship between those costs (determined in the national currencies: Canadian dollar, Swedish krona or Finnish mark) and selling prices (fixed in US dollars), size of orders, variations in demand for pulp in the various importing countries, the relative importance of the European market, which was greater for Scandinavian producers than for

United States and Canadian producers, and the production capacity utilization ratios which, generally speaking, were higher in the United States and Canada than in Sweden and Finland.

94 So far as the size of orders is concerned, the Commission considers that since the sale of large quantities enabled producers to cut their costs substantially, the price records should have shown significant price differences between purchasers of large quantities and purchasers of small quantities. In practice, those differences rarely amounted to more than 3%.

95 Thirdly, the Commission claims that, at any rate for a time in 1976, 1977 and 1981, announced prices for pulp stood at an artificially high level which differed widely from that which might have been expected under normal competitive conditions. For example, it is inconceivable, without concertation, for a single unchanged price of US(15) to have been announced for northern softwood from the first quarter of 1975 to the third quarter of 1977 and, especially during the second and third quarters of 1977, for the announced price to have stood at US(p00) above the selling price actually obtainable on the market. The contention that prices stood at an abnormally high level is borne out by the fact that in 1977 and 1982 the fall in prices was particularly abrupt.

96 Finally, the Commission relies on the grant of sECRet rebates and on changes in market shares.

97 So far as concerns the grant of sECRet rebates, it should be noted that there is a contradiction between the decision and what has been said subsequently. In paragraph 112 of its decision, the Commission refers to the exclusion of sECRet competition but then states in its pleadings that, if the rebates were sECRet, it was because they undermined concertation and therefore had to remain concealed from the other producers.

98 So far as concerns the shifts in market shares established between 1975 and 1981, the Commission considers that they do not justify the finding that there was no concertation. Those shifts were much less marked between 1975 and 1976 and between 1980 and 1981 than the shifts between 1978 and 1979 and between 1979 and 1980.

99 The applicants disputed the view that parallelism of prices was attributable to concertation.

100 In Commissioning the second expert' s report, the Court requested the experts to specify whether, in their opinion, the natural operation of the wood pulp market should lead to a differential price structure or to a uniform price structure.

101 It is apparent from the expert' s report, together with the ensuing discussion, that the experts regard the normal operation of the market as a more plausible explanation for the

uniformity of prices than concertation. The main thrust of their analysis may be summarized as follows:

(i) Description of the market

102 The experts describe the market as a group of oligopolies-oligopsonies consisting of certain producers and of certain buyers and each corresponding to a given kind of pulp. That market structure results largely from the method of manufacturing paper pulp: since paper is the result of a characteristic mixture of pulps, each paper manufacturer can deal only with a limited number of pulp producers and, conversely, each pulp producer can supply only a limited number of customers. Within the groupings so constituted, cooperation was further consolidated by the finding that it offered both buyers and sellers of pulp security against the uncertainties of the market.

103 That organization of the market, in conjunction with its very high degree of transparency, leads in the short-term to a situation where prices are slow to react. The producers know that, if they were to increase their prices, their competitors would no doubt refrain from following suit and thus lure their customers away. Similarly, they would be reluctant to reduce their prices in the knowledge that, if they did so, the other producers would follow suit, assuming that they had spare production capacity. Such a fall in prices would be all the less desirable in that it would be detrimental to the sector as a whole: since overall demand for pulp is inelastic, the loss of revenue resulting from the reduction in prices could not be offset by the profits made as a result of the increased sales and there would be a decline in the producers' overall profits.

104 In the long-term, the possibility for buyers to turn, at the price of some investment, to other types of pulp and the existence of substitute products, such as Brazilian pulp or pulp from recycled paper, have the effect of mitigating oligopolistic trends on the market. That explains why, over a period of several years, fluctuations in prices have been relatively contained.

105 Finally, the transparency of the market could be responsible for certain overall price increases recorded in the short-term: when demand exceeds supply, producers who are aware ° as was the case on the pulp market ° that the level of their competitors' stocks is low and that their production capacity utilization rate is high would not be afraid to increase their prices. There would then be a serious likelihood of their being followed by their competitors.

[…]

3. Conclusions

126 Following that analysis, it must be stated that, in this case, **concertation is not the only plausible explanation for the parallel conduct**. To begin with, the system of price

announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.

127 In the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the Commission. Article 1(1) of the contested decision must therefore be annulled. "

Unilateral conduct

107/82 AEG –Telefunken v Commission [1983] ECR 3151

" A - the unilateral nature of the acts attributed to aeg and its subsidiaries

31 aeg contends that the acts complained of in the contested decision , namely the failure to admit certain traders and steps taken to exert an influence on prices , are unilateral acts and do not therefore , as such , fall within article 85 (1), which relates only to agreements between undertakings , decisions by associations of undertakings and concerted practices .

32 in order properly to appreciate that argument it is appropriate to consider the legal significance of selective distribution systems .

33 it is common ground that agreements constituting a selective system necessarily affect competition in the common market . However , it has always been recognized in the case-law of the court that there are legitimate requirements , such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products , which may justify a reduction of price competition in favour of competition relating to factors other than price . Systems of selective distribution , in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price , therefore constitute an element of competition which is in conformity with article 85 (1).

34 the limitations inherent in a selective distribution system are however acceptable only on condition that their aim is in fact an improvement in competition in the sense above mentioned . Otherwise they would have no justification inasmuch as their sole effect would be to reduce price competition .

35 so as to guarantee that selective distribution systems may be based on that aim alone and cannot be set up and used with a view to the attainment of objectives which are not in conformity with community law , the court specified in its judgment of 25 october 1977 (metro v Commission , (1977) ECR 1875) that such systems are permissible , provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion .

36 it follows that the operation of a selective distribution system based on criteria other than those mentioned above constitutes an infringement of article 85 (1). The position is the same where a system which is in principle in conformity with community law is applied in practice in a manner incompatible therewith .

37 such a practice must be considered unlawful where the manufacturer , with a view to maintaining a high level of prices or to excluding certain modern channels of distribution , refuses to approve distributors who satisfy the qualitative criteria of the system .

38 such an attitude on the part of the manufacturer does not constitute , on the part of the undertaking , unilateral conduct which , as aeg claims , would be exempt from the prohibition contained in article 85 (1) of the Treaty . On the contrary , it forms part of the contractual relations between the undertaking and resellers . 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 .

39 the view must therefore be taken that even refusals of approval are acts performed in the context of the contractual relations with authorized distributors inasmuch as their purpose is to guarantee observance of the agreements in restraint of competition which form the basis of contracts between manufacturers and approved distributors . Refusals to approve distributors who satisfy the qualitative criteria mentioned above therefore supply proof of an unlawful application of the system if their number is sufficient to preclude the possibility that they are isolated cases not forming part of systematic conduct .

T-41/96 Bayer v Commission [2000] ECR II-3383,

" 65 In this case, it is found in the Decision that there is an agreement between undertakings within the meaning of that article. The applicant maintains, however, that the Decision penalises unilateral conduct on its part that falls outside the scope of the article. It claims that the Commission has given the concept of an agreement within the meaning of Article 85(1) of the Treaty an interpretation which goes beyond the precedents in the case-law and that its application to the present case infringes that provision of the Treaty. The

Commission contends that it has fully followed the case-law in its evaluation of that concept and has applied it in a wholly appropriate manner to the facts of this case. It therefore needs to be determined whether, having regard to the definition of that concept in the case-law, the Commission was entitled to perceive in the conduct established in the Decision the factors constituting an agreement between undertakings within the meaning of Article 85(1) of the Treaty.

B. The concept of an agreement within the meaning of Article 85(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 85(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 85(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 85(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 85(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 85(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.

Single and continuous infringement

C-49/92 Commission /Anic [1999] ECR I-4125

"79 Secondly, the agreements and concerted practices referred to in Article 85(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged.

80 However, the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect.

81 Thirdly, it must be remembered that Article 85 of the Treaty prohibits agreements between undertakings and decisions by associations of undertakings, including conduct which constitutes the implementation of those agreements or decisions, and concerted practices when they may affect intra-Community trade and have an anti-competitive object or effect. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 85 of the Treaty.

82 In the present case the Court of First Instance held, at paragraph 204 of the judgment, that, because of their identical object, the agreements and concerted practices found to exist, formed part of systems of regular meetings, target-price fixing and quota-fixing, and that those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices. It considered that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was

involved was a single infringement which progressively manifested itself in both agreements and concerted practices.

83 In such circumstances, the Court of First Instance was entitled to consider that an undertaking that had taken part in such an infringement through conduct of its own which formed an agreement or concerted practice having an anti-competitive object for the purposes of Article 85(1) of the Treaty and which was intended to help bring about the infringement as a whole was also responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement. That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk.

84 Contrary to Anic's submission, such a conclusion is not contrary to the principle that responsibility for such infringements is personal in nature. It fits in with widespread conception in the legal orders of the Member State concerning the attribution of responsibility for infringements committed by several perpetrators according to their participation in the infringement as a whole, which is not regarded in those legal systems as contrary to the personal nature of responsibility.

85 Nor does such an interpretation neglect individual analysis of the evidence adduced against an undertaking, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.

86 Where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraph 58). In doing this, the Commission must establish in particular all the facts enabling the conclusion to be drawn that an undertaking participated in such an infringement and that it was responsible for the various aspects of it.

87 When, as in the present case, the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, 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.

88 The Court of First Instance found, at paragraph 204, cited above, that all the efforts of the participating undertakings were in pursuit of a common anti-competitive aim. It is clear from all the findings of fact made by the Court of First Instance, at paragraphs 63 to 178 of the contested judgment, with regard to the various aspects of the infringement, that it reached

the finding that Anic had participated in each of those aspects only on the basis of Anic's own conduct, the contribution it thus intended to make towards those aspects and of its knowledge of the conduct planned or put into effect by other undertakings gained through its participation in the regular meetings of polypropylene producers. In those circumstances, the Court of First Instance was entitled to consider that Anic's participation, through its own conduct, in the infringement rendered it co-responsible for the entire infringement committed during its participation.

89 Secondly, the undertakings concerned are able to exercise their rights of defence both in regard to the charge that they actually participated in the infringement and in regard to the actual conduct of which other undertakings are accused but which relates to the same infringement. In the case of agreements or concerted practices having anti-competitive object, they will also be able to exercise those rights in respect of the existence of a common objective, their intention to contribute to the infringement as a whole by their own conduct and their knowledge of the conduct of other participants or its foreseeability and the acceptance of the related risk.

90 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 must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine. "

T-101 and 111/05, BASF v Commission [2007] ECR II-4949

"159 The concept of single infringement can be applied to the legal characterisation of anti-competitive conduct consisting of agreements, of concerted practices and of decisions of associations of undertakings (Commission v Anic Partecipazioni, paragraph 150 above, paragraphs 112 to 114; Case T-1/89 Rhône-Poulenc v Commission [1991] ECR II-867, paragraphs 125 to 127; Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 Limburgse Maatschappij and Others v Commission ('PVC II') [1999] ECR II-931, paragraphs 696 to 698; and HFB and Others v Commission, paragraph 150 above, paragraph 186).

160 The concept of single infringement can also be applied to the personal nature of liability for the infringements of the competition rules. An undertaking which has participated in an infringement by virtue of its own conduct, which met the definition of an agreement or a concerted practice within the meaning of Article 81(1) EC and which was intended to help to bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement. That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or that it could reasonably have foreseen that conduct, and that it was prepared to accept the risk.

That conclusion has its origin in a widespread conception in the legal orders of the Member States concerning the attribution of responsibility for infringements committed by several perpetrators according to their participation in the infringement as a whole. It is not therefore contrary to the principle that responsibility for such infringements is personal in nature, it does not ignore the individual analysis of the incriminating evidence and it does not breach the rights of defence of the undertakings involved (Commission v Anic Partecipazioni, paragraph 150 above, paragraphs 83, 84 and 203, and HFB and Others v Commission, paragraph 150 above, paragraph 231).

161 Thus, it has been held that a case of infringement of Article 81(1) EC could result from a series of acts or from continuous conduct which formed part of an 'overall plan' because they had the same object of distorting competition within the common market. In such a case, the Commission is entitled to attribute liability for those actions on the basis of participation in the infringement considered as a whole (Aalborg Portland and Others v Commission, paragraph 66 above, paragraph 258), even if it is established that the undertaking concerned directly participated in only one or some of the constituent elements of the infringement (PVC II, paragraph 159 above, paragraph 773). Likewise, the fact that different undertakings played different roles in the pursuit of a common objective does not mean that there was no identity of anti-competitive object and, accordingly, of infringement, provided that each undertaking contributed, at its own level, to the pursuit of the common objective (Cement, paragraph 157 above, paragraph 4123, and JFE Engineering and Others v Commission, paragraph 139 above, paragraph 370).

[…]

The characterisation of the offending conduct

177 In accordance with the case-law cited at paragraph 159 above, the anti-competitive activities at the global level described at recital 69 to the Decision constitute in themselves a single infringement. That infringement consists of agreements (on fixing and increasing worldwide prices, on the withdrawal of the North American producers from the European market and on the control of distributors and converters) and concerted practices (the exchange of sensitive information with a view to mutually influencing the business conduct of the participants).

178 The same applies to the anti-competitive activities at the European level which in themselves constitute a single and continuous infringement consisting of agreements (on fixing and increasing prices for the EEA, for home markets and also for individual customers, on the allocation of customers, on the allocation of market shares and on the control of distributors and converters) and also of concerted practices (the exchange of sensitive information for the purpose of mutually influencing the participants' business conduct).

179 However, it does not automatically follow from the application of that case-law to the present case that the arrangements at the global and European levels, taken together, form a single and continuous infringement. It appears that, in the cases which the case-law envisages, the existence of a common objective consisting in distorting the normal development of prices provides a ground for characterising the various agreements and concerted practices as the constituent elements of a single infringement. In that regard, it cannot be overlooked that those actions were complementary in nature, since each of them was intended to deal with one or more consequences of the normal pattern of competition and, by interacting, contributed to the realisation of the set of anti-competitive effects intended by those responsible, within the framework of a global plan having a single objective.

180 In that connection, it must be made clear that the concept of single objective cannot be determined by a general reference to the distortion of competition in the choline chloride market, since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes a consubstantial element of any conduct covered by Article 81(1) EC. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of a part of its meaning, since it would have the consequence that different types of conduct which relate to a particular economic sector and are prohibited by Article 81(1) EC would have to be systematically characterised as constituent elements of a single infringement.

181 The Court must therefore ascertain whether the two sets of agreements and concerted practices penalised by the Commission in the Decision as a single and continuous infringement are complementary in the way described at paragraph 179 above. The Commission itself bases its theory on the fact that the global and European arrangements were ‘closely linked’ (see paragraphs 4, 142 and 169 above). In that regard, it will be necessary to take into account any circumstance capable of establishing or casting doubt on that link, such as the period of application, the content (including the methods used) and, correlatively, the objective of the various agreements and concerted practices in question. "

T-439/07 - Coats Holdings v Commission

"141 The concept of a single infringement covers a situation in which a number of undertakings have participated in an infringement consisting in continuous conduct in pursuit of a single economic aim designed to distort competition or in individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, who are aware that they are participating in the common object) (BPB v Commission, paragraph 41 above, paragraph 257).

142 Next, it should be pointed out that an infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or more elements of that series of acts or continuous conduct could also constitute, in themselves and in isolation, an infringement of that provision. Where the various actions form part of an **'overall plan'** because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (Aalborg Portland and Others v Commission, paragraph 42 above, paragraph 258).

143 In addition, according to settled case-law, the concept of a single infringement can be applied to the legal characterisation of anti-competitive conduct as consisting in agreements, concerted practices and decisions of associations of undertakings (see, to that effect, Limburgse Vinyl Maatschappij and Others v Commission, paragraph 67 above, paragraphs 696 to 698; Case T-9/99 HFB and Others v Commission [2002] ECR II-1487, paragraph 186; and Joined Cases T-101/05 and T-111/05 BASF and UCB v Commission [2007] ECR II-4949, paragraph 159).

144 It must also be noted that the concept of a single objective cannot be determined by a general reference to the distortion of competition on the market concerned by the infringement, since an impact on competition, as object or effect, constitutes an essential element of any conduct covered by Article 81(1) EC. Such a definition of the concept of a single objective would deprive the concept of a single and continuous infringement of part of its meaning, since it would mean that different instances of conduct relating to a particular economic sector and prohibited by Article 81(1) EC would have to be systematically characterised as constituent elements of a single infringement. Thus, for the purposes of characterising various unlawful actions as a single and continuous infringement, it is necessary to establish whether they display a link of complementarity in that each of them is intended to deal with one or more consequences of the normal pattern of competition and, through interaction, contribute to the attainment of the set of anti-competitive effects desired by those responsible, within the framework of a global plan having a single objective. In that regard, it will be necessary to take into account any circumstance capable of establishing or of casting doubt on that link, such as the period of implementation, the content (including the methods used) and, correlatively, the objective of the various unlawful actions in question (see, to that effect, BASF and UCB v Commission, paragraph 143 above, paragraphs 179 to 181).

145 For objective reasons, therefore, the Commission may initiate separate procedures, find a number of separate infringements and impose a number of separate fines (see, to that effect, the judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 Tokai Carbon and Others v Commission ('Tokai II'), not published in the ECR, paragraph 124).

146 Lastly, it should also be pointed out that, as a general rule, the characterisation of certain unlawful actions as constituting one and the same infringement affects, in principle, the penalty that may be imposed. A finding that multiple infringements exist may entail the imposition of a number of separate fines, each time within the limits laid down in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 (BASF and UCB v Commission, paragraph 143 above, paragraph 158).

T-53/06, UPM-Kymmene

"51 The applicant denies that it participated in a single and continuous infringement and argues in particular that the fact that it participated in the 'France' sub-group does not mean that it participated in the infringement penalised by the Commission in the contested decision.

52 In that regard, the Court recalls, first of all, that an undertaking that has participated in a single complex infringement through conduct of its own which constitutes an agreement or concerted practice having an anti-competitive object for the purposes of Article 81(1) EC and which is intended to help bring about the infringement as a whole may also be liable for conduct put into effect by other undertakings in the context of the same infringement throughout the entire period of its participation in the infringement. That is the case where it is proved that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk (Commission v Anic Partecipazioni, paragraph 28 above, paragraphs 83 and 203).

53 The agreements and concerted practices referred to in Article 81(1) EC are necessarily the result of collusion on the part of several undertakings, all of whom are co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. However, the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its liability for the entire infringement, including its liability for conduct which, in practical terms, is put into effect by other participating undertakings but which has the same anti-competitive object or effect (Commission v Anic Partecipazioni, paragraph 28 above, paragraphs 79 and 80).

54 <u>However, the existence of a single and continuous infringement does not necessarily mean that an undertaking participating in one or more manifestations of that infringement may be held liable for the infringement as a whole.</u> <u>The Commission still has to establish that that undertaking was aware of the anti-competitive activities at European level of the other undertakings or that it could reasonably have foreseen them. The mere fact that there is identity of object between an agreement in which an undertaking participated and an</u>

overall cartel does not suffice to render that undertaking liable for the overall cartel. It is only if the undertaking knew or should have known when it participated in the agreement that in doing so it was joining in the overall cartel that its participation in the agreement concerned can constitute the expression of its accession to that cartel (Case T-28/99 Sigma Tecnologie v Commission [2002] ECR II-1845, paragraphs 44 and 45).

[…]

62 It should be noted that the finding that RSFE participated in a single and continuous infringement does not require it to be shown that it participated, within the various geographic or functional groups of the cartel, in identical or similar collusive arrangements covering the same products. As has been recalled in paragraphs 52 to 54 above, it is sufficient that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk. The mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its liability for the entire infringement, including its liability for conduct which, in practical terms, is put into effect by other participating undertakings but which has the same anti-competitive object or effect."

C-411/11 P Coppmans

"42 An undertaking which has participated in such a single and complex infringement through its own conduct, which fell within the definition of an agreement or a concerted practice having an anti-competitive object for the purposes of Article 81(1) EC and was intended to help bring about the infringement as a whole, may accordingly be liable also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (Commission v Anic Partecipazioni, paragraphs 87 and 203, and Aalborg Portland and Others v Commission, paragraph 83).

43 An undertaking may thus have participated directly in all the forms of anti-competitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the forms of anti-competitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In

such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anti-competitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole.

44 On the other hand, if an undertaking has directly taken part in one or more of the forms of anti-competitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk.

45 That cannot, however, relieve the undertaking of liability for conduct in which it has undeniably taken part or for conduct for which it can undeniably be held responsible. Nor is the fact that an undertaking did not take part in all aspects of an anti-competitive arrangement or that it played only a minor role in the aspects in which it did participate material for the purposes of establishing the existence of an infringement on its part, given that those factors need to be taken into consideration only when the gravity of the infringement is assessed and only if and when it comes to determining the fine (Commission v Anic Partecipazioni, paragraph 90, and Aalborg Portland and Others v Commission, paragraph 86).

46 However, a Commission decision categorising a global cartel as a single and continuous infringement can be divided in that manner only if the undertaking in question has been put in a position, during the administrative procedure, to understand that it is also alleged to have engaged in each of the forms of conduct comprising that infringement, hence to defend itself on that point, and only if the decision is sufficiently clear in that regard.

OBJECT OR EFFECT:

C-105/04 P DEP Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I-8725, paras 136-137

" 135 It is settled case-law that the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in

the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Aalborg Portland and Others v Commission, paragraph 57).

136 Furthermore, for the purposes of the application of Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition within the common market (Aalborg Portland and Others v Commission, paragraph 261).

137 Likewise, a concerted practice falls within Article 81(1) EC even where there are no anti-competitive effects on the market.

138 First of all, it follows from the very wording of that provision that, as in the case of agreements between undertakings and decisions of associations of undertakings, concerted practices are prohibited, independently of any effect, where they have an anti-competitive object.

139 Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition (Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraph 165). "

C-56/65 - Société Technique Minière v Maschinenbau Ulm [1966] ECR 337

"p. 249

The effects of the agreement on competition

Finally, for the agreement at issue to be caught by the prohibition contained in article 85(1) it must have as its ' object or effect the prevention, restriction or distortion of competition within the common market '.

The fact that these are not cumulative but alternative requirements, indicated by the conjunction ' or ', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied . This interference with competition referred to in article 85(1) must result from all or some of the clauses of the agreement itself . Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent .

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The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute . In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking . Therefore, in order to decide whether an agreement containing a clause ' granting an exclusive right of sale ' is to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionnaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation .

C-209/07 - Beef Industry Development and Barry Brothers [2008] ECR I-8637

"21 In fact, to determine whether an agreement comes within the prohibition laid down in Article 81(1) EC, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain. In that regard, even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. Indeed, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives (General Motors v Commission, paragraph 64 and the case-law cited). It is only in connection with Article 81(3) EC that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article 81(1) EC.

22 BIDS argues, in addition, that the concept of infringement by object should be interpreted narrowly. Only agreements as to horizontal price-fixing, or to limit output or share markets, agreements whose anti-competitive effects are so obvious as not to require an economic analysis come within that category. The BIDS arrangements cannot be assimilated to that type of agreement or to other forms of complex cartels. BIDS maintains that an agreement on the reduction of excess capacity in a sector cannot be assimilated to an agreement to ‘limit production’ within the meaning of Article 81(1)(b) EC. That concept must be understood as referring to a limitation of total market output rather than a limitation of the output of certain operators who voluntarily withdraw from the market, without causing a lowering of output.

23 However, as the Advocate General pointed out in point 48 of her Opinion, the types of agreements covered by Article 81(1)(a) to (e) EC do not constitute an exhaustive list of prohibited collusion.

24 Therefore, it must be examined whether agreements with features such as those described by the national court have as their object the restriction of competition. "

C-23/67 - Brasserie De Haecht [1967] ECR 525

"P.415

The prohibition in article 85(1) of the Treaty rests on three factors essential for a reply to the question referred . After stating the limits within which the prohibition is to apply, article 85(1) mentions agreements, decisions and practices . By referring in the same sentence to agreements between undertakings, decisions by associations of undertakings and concerted practices, which may involve many parties, article 85(1) implies that the constituent elements of those agreements, decisions and practices may be considered together as a whole .

Furthermore, by basing its application to agreements, decisions or practices not only on their subject-matter but also on their effects in relation to competition, article 85(1) implies that regard must be had to such effects in the context in which they occur, that is to say, in the economic and legal context of such agreements, decisions or practices and where they might combine with others to have a cumulative effect on competition . In fact, it would be pointless to consider an agreement, decision or practice by reason of its effects if those effects were to be taken distinct from the market in which they are seen to operate and could only be examined apart from the body of effects, whether convergent or not, surrounding their implementation . Thus in order to examine whether it is caught by article 85(1) an agreement cannot be examined in isolation from the above context, that is, from the factual or legal circumstances causing it to prevent, restrict or distort competition . The existence of similar contracts may be taken into consideration for this objective to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade .

Lastly, it is only to the extent to which agreements, decisions or practices are capable of affecting trade between Member States that the alteration of competition comes under community prohibitions . In order to satisfy this condition, it must be possible for the agreement, decision or practice, when viewed in the light of a combination of the objective, factual or legal circumstances, to appear to be capable of having some influence, direct or indirect, on trade between Member States, of being conducive to a partitioning of the market and of hampering the economic interpenetration sought by the Treaty . When this point is considered the agreement, decision or practice cannot therefore be isolated from all the others of which it is one .

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The existence of similar contracts is a circumstance which, together with others, is capable of being a factor in the economic and legal context within which the contract must be judged . Accordingly, whilst such a situation must be taken into account it should not be considered as decisive by itself, but merely as one among others in judging whether trade between Member States is capable of being affected through any alteration in competition . "

C-8/08 - T-Mobile Netherlands and Others [2009] ECR I-4529

"23. As a preliminary point, the definitions of 'agreement', 'decisions by associations of undertakings' and 'concerted practice' are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see, to that effect, Commission v Anic Partecipazioni , paragraph 131).

24. It follows, as the Advocate General stated in essence at point 38 of her Opinion, that the criteria laid down in the Court's case-law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice.

25. In that regard, it should be noted that the Court has already provided a number of criteria on the basis of which it is possible to ascertain whether an agreement, decision or concerted practice is anti-competitive.

26. With regard to the definition of a concerted practice, the Court has held that such a practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition (see Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraph 26, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeyhtiö and Others v Commission [1993] ECR I-1307, paragraph 63).

27. With regard to the assessment as to whether a concerted practice is anti-competitive, close regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraph 25, and Case C-209/07 Beef Industry Development Society and Barry Brothers [2008] ECR I-0000, paragraphs 16 and 21). Moreover, while the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive, there is nothing to prevent the Commission of the European Communities or the competent

Community judicature from taking it into account (see, to that effect, IAZ International Belgium and Others v Commission , paragraphs 23 to 25).

28. As regards the distinction to be drawn between concerted practices having an anti-competitive object and those with anti-competitive effects, it must be borne in mind that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions in determining whether a practice falls within the prohibition in Article 81(1) EC. It has, since the judgment in Case 56/65 LTM [1966] ECR 235, 249, been settled case-law that the alternative nature of that requirement, indicated by the conjunction 'or', means that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued. Where, however, an analysis of the terms of the concerted practice does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which establish that competition has in fact been prevented or restricted or distorted to an appreciable extent (see, to that effect, Beef Industry Development Society and Barry Brothers , paragraph 15).

29. Moreover, in deciding whether a concerted practice is prohibited by Article 81(1) EC, there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market (see, to that effect, Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 342; Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I-8725, paragraph 125; and Beef Industry Development Society and Barry Brothers , paragraph 16). The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (Beef Industry Development Society and Barry Brothers , paragraph 17).

30. Accordingly, contrary to what the referring court claims, there is no need to consider the effects of a concerted practice where its anti-competitive object is established.

31. With regard to the assessment as to whether a concerted practice, such as that at issue in the main proceedings, pursues an anti-competitive object, it should be noted, first, as pointed out by the Advocate General at point 46 of her Opinion, that in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages.

32. Second, with regard to the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market (see Suiker Unie and Others v Commission , paragraph 173; Case 172/80 Züchner [1981] ECR 2021, paragraph 13; Ahlström Osakeyhtiö and Others v Commission , paragraph 63; and Case C-7/95 P Deere v Commission [1998] ECR I-3111, paragraph 86).

33. While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, Suiker Unie and Others v Commission , paragraph 174; Züchner , paragraph 14; and Deere v Commission , paragraph 87).

34. At paragraphs 88 et seq. of Deere v Commission , the Court therefore held that on a highly concentrated oligopolistic market, such as the market in the main proceedings, the exchange of information was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders.

35. It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (see Deere v Commission , paragraph 90, and Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, paragraph 81).

36. Third, as to whether a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices, it is not possible on the basis of the wording of Article 81(1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited.

37. On the contrary, it is apparent from Article 81(1)(a) EC that concerted practices may have an anti-competitive object if they ‘directly or indirectly fix purchase or selling prices or any other trading conditions’. In the present case, as the Netherlands Government submitted in

its written observations, as far as concerns postpaid subscriptions, the remuneration paid to dealers is evidently a decisive factor in fixing the price to be paid by the end user.

38. In any event, as the Advocate General pointed out at point 58 of her Opinion, Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.

39. Therefore, contrary to what the referring court would appear to believe, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.

40. Fourth, as regards Vodafone's argument that the object of the concerted practice at issue in the main proceedings cannot be to restrict competition because standard dealer remunerations should, in any event, have been reduced as a result of market conditions, it is, admittedly, clear from paragraph 33 above that the requirement that economic operators should be free to act independently does not deprive them of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors.

41. However, as the Advocate General observed at points 66 to 68 of her Opinion, while not all parallel conduct of competitors on the market can be traced to the fact that they have adopted a concerted action with an anti-competitive object, an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object, and that extends to situations, such as that in the present case, in which the modification relates to the reduction in the standard Commission paid to dealers.

42. It is for the referring court to determine whether, in the dispute in the main proceedings, the information exchanged at the meeting held on 13 June 2001 was capable of removing such uncertainties.

43. In the light of all the foregoing considerations, the answer to the first question must be that a concerted practice pursues an anti-competitive object for the purpose of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

The second question

44. By its second question, the referring court asks essentially whether, in examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is a concerted practice within the meaning of Article 81(1) EC – the national court is required to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on the market, such undertakings are presumed to take account of the information exchanged with their competitors, or whether that court can apply the rules of national law pertaining to the burden of proof.

45. As the Advocate General pointed out at point 76 of her Opinion, that question seeks to clarify whether national authorities and courts are also obliged to base their application of Article 81(1) EC on the presumption which operates at Community level.

46. According to the referring court, if that presumption is intrinsic to the concept of concerted practice in Article 81(1) EC, the national court is obliged to apply it. It maintains, on the other hand, that if that presumption must be regarded as a procedural rule, it would be permissible for the national court not to apply it, in accordance with the principle of procedural autonomy of the Member States.

47. Vodafone, T-Mobile and KPN observe that there is nothing in Article 81 EC or in the Court's case-law to support the conclusion that the presumption of a causal connection forms an intrinsic part of the concept of concerted practice in Article 81(1) EC. They therefore take the view that, in accordance with established case-law, in the absence of relevant Community rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are no less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).

48. On the other hand, the Netherlands Government and the Commission are of the view that the presumption of a causal connection was intended to form a constituent element of the concept of concerted practice within the meaning of Article 81(1) EC and not a procedural rule that is independent of that concept, so that the national courts and tribunals are obliged to apply it.

49. It should be borne in mind at the outset that Article 81 EC, first, produces direct effects in relations between individuals, creating rights for the persons concerned which the national courts must safeguard and, second, is a matter of public policy, essential for the accomplishment of the tasks entrusted to the Community, which must be automatically

applied by national courts (see, to that effect, Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraphs 36 and 39, and Joined Cases C-295/04 to C-298/04 Manfredi and Others [2006] ECR I-6619, paragraphs 31 and 39).

50. In applying Article 81 EC, any interpretation that is provided by the Court is therefore binding on all the national courts and tribunals of the Member States.

51. As regards the presumption of a causal connection formulated by the Court in connection with the interpretation of Article 81(1) EC, it should be pointed out, first, that the Court has held that the concept of a concerted practice, as it derives from the actual terms of that provision, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. However, the Court went on to consider that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period. Lastly, the Court concluded that such a concerted practice is caught by Article 81(1) EC, even in the absence of anti-competitive effects on the market (see Hüls , paragraphs 161 to 163).

52. In those circumstances, it must be held that the presumption of a causal connection stems from Article 81(1) EC, as interpreted by the Court, and it consequently forms an integral part of applicable Community law.

53. In the light of the foregoing considerations, the answer to the second question must be that, in examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is concerted practice within the meaning of Article 81(1) EC – the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.

INHERENT RESTRICTIONS / CONTRACTUAL RESTRICTIONS

C-234/89 - Delimitis v Henninger Bräu [1991] ECR I-935

"The compatibility of beer supply agreements with Article 85(1) of the Treaty

10 Under the terms of beer supply agreements, the supplier generally affords the reseller certain economic and financial benefits, such as the grant of loans on favourable terms, the

letting of premises for the operation of a public house and the provision of technical installations, furniture and other equipment necessary for its operation. In consideration for those benefits, the reseller normally undertakes, for a predetermined period, to obtain supplies of the products covered by the contract only from the supplier. That exclusive purchasing obligation is generally backed by a prohibition on selling competing products in the public house let by the supplier.

11 Such contracts entail for the supplier the advantage of guaranteed outlets, since, as a result of his exclusive purchasing obligation and the prohibition on competition, the reseller concentrates his sales efforts on the distribution of the contract goods. The supply agreements, moreover, lead to cooperation with the reseller, allowing the supplier to plan his sales over the duration of the agreement and to organize production and distribution effectively.

12 Beer supply agreements also have advantages for the reseller, inasmuch as they enable him to gain access under favourable conditions and with the guarantee of supplies to the beer distribution market. The reseller's and supplier's shared interest in promoting sales of the contract goods likewise secures for the reseller the benefit of the supplier's assistance in guaranteeing product quality and customer service.

13 If such agreements do not have the object of restricting competition within the meaning of Article 85(1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition.

14 In its judgment in Case 23/67 Brasserie De Haecht v Wilkin [1967] ECR 407, the Court held that the effects of such an agreement had to be assessed in the context in which they occur and where they might combine with others to have a cumulative effect on competition. It also follows from that judgment that the cumulative effect of several similar agreements constitutes one factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between Member States is capable of being affected.

15 Consequently, in the present case it is necessary to analyse the effects of a beer supply agreement, taken together with other contracts of the same type, on the opportunities of national competitors or those from other Member States, to gain access to the market for beer consumption or to increase their market share and, accordingly, the effects on the range of products offered to consumers.

16 In making that analysis, the relevant market must first be determined. The relevant market is primarily defined on the basis of the nature of the economic activity in question, in this case the sale of beer. Beer is sold through both retail channels and premises for the sale and consumption of drinks. From the consumer's point of view, the latter sector, comprising in particular public houses and restaurants, may be distinguished from the retail sector on the grounds that the sale of beer in public houses does not solely consist of the purchase of

a product but is also linked with the provision of services, and that beer consumption in public houses is not essentially dependent on economic considerations. The specific nature of the public house trade is borne out by the fact that the breweries organize specific distribution systems for this sector which require special installations, and that the prices charged in that sector are generally higher than retail prices.

17 It follows that in the present case the reference market is that for the distribution of beer in premises for the sale and consumption of drinks. That finding is not affected by the fact that there is a certain overlap between the two distribution networks, namely inasmuch as retail sales allow new competitors to make their brands known and to use their reputation in order to gain access to the market constituted by premises for the sale and consumption of drinks.

18 Secondly, the relevant market is delimited from a geographical point of view. It should be noted that most beer supply agreements are still entered into at a national level. It follows that, in applying the Community competition rules, account is to be taken of the national market for beer distribution in premises for the sale and consumption of drinks.

19 In order to assess whether the existence of several beer supply agreements impedes access to the market as so defined, it is further necessary to examine the nature and extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale to several national producers (judgment in Case 43/69 Bilger v Jehle [1970] ECR 127). The effect of those networks of contracts on access to the market depends specifically on the number of outlets thus tied to national producers in relation to the number of public houses which are not so tied, the duration of the commitments entered into, the quantities of beer to which those commitments relate, and on the proportion between those quantities and the quantities sold by free distributors.

20 The existence of a bundle of similar contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however, sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised (Case 23/67 Brasserie De Haecht, cited above). The other factors to be taken into account are, in the first instance, those also relating to opportunities for access.

21 In that connection it is necessary to examine whether there are real concrete possibilities for a new competitor to penetrate the bundle of contracts by acquiring a brewery already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new public houses. For that purpose it is necessary to have regard to the legal rules and agreements on the acquisition of companies and the establishment of outlets, and to the minimum number of outlets necessary for the economic operation of a distribution system. The presence of beer wholesalers not tied to producers

who are active on the market is also a factor capable of facilitating a new producer's access to that market since he can make use of those wholesalers' sales networks to distribute his own beer.

22 Secondly, account must be taken of the conditions under which competitive forces operate on the relevant market. In that connection it is necessary to know not only the number and the size of producers present on the market, but also the degree of saturation of that market and customer fidelity to existing brands, for it is generally more difficult to penetrate a saturated market in which customers are loyal to a small number of large producers than a market in full expansion in which a large number of small producers are operating without any strong brand names. The trend in beer sales in the retail trade provides useful information on the development of demand and thus an indication of the degree of saturation of the beer market as a whole. The analysis of that trend is, moreover, of interest in evaluating brand loyalty. A steady increase in sales of beer under new brand names may confer on the owners of those brand names a reputation which they may turn to account in gaining access to the public-house market.

23 If an examination of all similar contracts entered into on the relevant market and the other factors relevant to the economic and legal context in which the contract must be examined shows that those agreements do not have the cumulative effect of denying access to that market to new national and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to restrict competition within the meaning of Article 85(1) of the Treaty. They do not, therefore, fall under the prohibition laid down in that provision.

24 If, on the other hand, such examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the brewery in question contribute to the cumulative effect produced in that respect by the totality of the similar contracts found on that market. Under the Community rules on competition, responsibility for such an effect of closing off the market must be attributed to the breweries which make an appreciable contribution thereto. Beer supply agreements entered into by breweries whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition under Article 85(1).

25 In order to assess the extent of the contribution of the beer supply agreements entered into by a brewery to the cumulative sealing-off effect mentioned above, the market position of the contracting parties must be taken into consideration. That position is not determined solely by the market share held by the brewery and any group to which it may belong, but also by the number of outlets tied to it or to its group, in relation to the total number of premises for the sale and consumption of drinks found in the relevant market.

26 The contribution of the individual contracts entered into by a brewery to the sealing-off of that market also depends on their duration. If the duration is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1). A brewery with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a brewery in a relatively strong market position which regularly releases sales outlets at shorter intervals.

27 The reply to be given to the first three questions is therefore that a beer supply agreement is prohibited by Article 85(1) of the EEC Treaty, if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement. "

56, 58/64 - Grundig v Commission [1966] ECR 429

"the complaints concerning the applicability of article 85(1) to sole distributorship contracts

The applicants submit that the prohibition in article 85(1) applies only to so-called horizontal agreements . The Italian government submits furthermore that sole distributorship contracts do not constitute ' agreements between undertakings ' within the meaning of that provision, since the parties are not on a footing of equality . With regard to these contracts, freedom of competition may only be protected by virtue of article 86 of the Treaty.

Neither the wording of article 85 nor that of article 86 gives any ground for holding that distinct areas of application are to be assigned to each of the two articles according to the level in the economy at which the contracting parties operate . Article 85 refers in a general way to all agreements which distort competition within the common market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels . In principle, no distinction can be made where the Treaty does not make any distinction .

Furthermore, the possible application of article 85 to a sole distributorship contract cannot be excluded merely because the grantor and the concessionnaire are not competitors inter se and not on a footing of equality . Competition may be distorted within the meaning of article 85(1) not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties . For this purpose, it is irrelevant whether the parties to the agreement are or are not on a footing of equality as regards their position and function in the economy . This applies all the more, since, by such an agreement, the parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an unjustified advantage at the expense of the consumer or user, contrary to the general aims of article 85 .

It is thus possible that, without involving an abuse of a dominant position, an agreement between economic operators at different levels may affect trade between Member States and at the same time have as its object or effect the prevention, restriction or distortion of competition, thus falling under the prohibition of article 85(1).

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In addition, it is pointless to compare on the one hand the situation, to which article 85 applies, of a producer bound by a sole distributorship agreement to the distributor of his products with on the other hand that of a producer who includes within his undertaking the distribution of his own products by some means, for example, by commercial representatives, to which article 85 does not apply . These situations are distinct in law and, moreover, need to be assessed differently, since two marketing organizations, one of which is untegrated into the manufacturer's undertaking whilst the other is not, may not necessarily have the same efficiency . The wording of article 85 causes the prohibition to apply, provided that the other conditions are met, to an agreement between several undertakings . Thus it does not apply where a sole undertaking integrates its own distribution network into its business organization . It does not thereby follow, however, that the contractual situation based on an agreement between a manufacturing and a distributing undertaking is rendered legally acceptable by a simple process of economic analogy - which is in any case incomplete and in contradiction with the said article . Furthermore, although in the first case the Treaty intended in article 85 to leave untouched the internal organization of an undertaking and to render it liable to be called in question, by means of article 86, only in cases where it reaches such a degree of seriousness as to amount to an abuse of a dominant position, the same reservation could not apply when the impediments to competition result from agreement between two different undertakings which then as a general rule simply require to be prohibited .

Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most

fundamental objections of the community . The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers . Article 85(1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process .

The submissions set out above are consequently unfounded ."

C-258/78 - Nungesser v Commission [1982] ECR 2015

"- The application of article 85 of the EEC Treaty to exclusive licences

44 by this submission the applicants criticize the Commission for wrongly taking the view that an exclusive licence of breeders ' rights must by its very nature be treated as an agreement prohibited by article 85 (1) of the Treaty . They submit that the Commission ' s opinion in that respect is unfounded in so far as the exclusive licence constitutes the sole means , as regards seeds which have been recently developed in a Member State and which have not yet penetrated the market of another Member State , of promoting competition between the new product and comparable products in that other Member State ; indeed , no grower or trader would take the risk of launching the new product on a new market if he were not protected against direct competition from the holder of the breeders ' rights and from his other licensees .

45 this contention is supported by the German and British governments and by the caisse de gestion des licences vegetales . In particular , the two governments claim that the general character of the reasons given for the contested decision is incompatible with the terms of article 85 of the Treaty and conflicts with a sensible competition policy . The reasons given for the decision are said to be based on the ill-conceived premise that every exclusive licence of an industrial or commercial property right , whatever its nature , must be regarded as an agreement prohibited by article 85 (1) and that it is therefore for the Commission to judge whether , in a given case , the conditions for the grant of an exemption under article 85 (3) are satisfied .

[…]

53 it should be observed that those two sets of considerations relate to two legal situations which are not necessarily identical . The first case concerns a so-called open exclusive licence or assignment and the exclusivitiy of the licence relates solely to the contractual relationship between the owner of the right and the licensee , whereby the owner merely undertakes not to grant other licences in respect of the same territory and not to compete himself with the licensee on that territory . On the other hand , the second case involves an exclusive licence or assignment with absolute territorial protection , under which the parties to the

contract propose , as regards the products and the territory in question , to eliminate all competition from third parties , such as parallel importers or licensees for other territories .

54 that point having been clarified , it is necessary to examine whether , in the present case , the exclusive nature of the licence , in so far as it is an open licence , has the effect of preventing or distorting competition within the meaning of article 85 (1) of the Treaty .

55 in that respect the government of the federal republic of Germany emphasized that the protection of agricultural innovations by means of breeders ' rights constitutes a means of encouraging such innovations and the grant of exlusive rights for a limited period , is capable of providing a further incentive to innovative efforts .

From that it infers that a total prohibition of every exclusive licence , even an open one , would cause the interest of undertakings in licences to fall away , which would be prejudicial to the dissemination of knowledge and techniques in the community .

56 the exclusive licence which forms the subject-matter of the contested decision concerns the cultivation and marketing of hybrid maize seeds which were developed by inra after years of research and experimentation and were unknown to German farmers at the time when the cooperation between inra and the applicants was taking shape . For that reason the concern shown by the interveners as regards the protection of new technology is justified .

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

58 having regard to the specific nature of the products in question , the court concludes that , in a case such as the present , the grant of an open exclusive licence , that is to say a licence which does not affect the position of third parties such as parallel importers and licensees for other territories , is not in itself incompatible with article 85 (1) of the Treaty .

59 part b of the third submission is thus justified to the extent to which it concerns that aspect of the exclusive nature of the licence .

60 as regard to the position of third parties , the Commission in essence criticizes the parties to the contract for having extended the definition of exclusivity to importers who are not bound to the contract , in particular parallel importers . Parallel importers or exporters , such as louis david kg in Germany and robert bomberault in France who offered inra seed for sale to German buyers , had found themselves subjected to pressure and legal proceedings by

inra , frasema and the applicants , the purpose of which was to maintain the exclusive position of the applicants on the German market .

61 the court has consistently held (cf . Joined cases 56 and 58/64 Consten and Grundig v Commission (1966) ECR 299) that absolute territorial protection granted to a licensee in order to enable parallel imports to be controlled and prevented results in the artificial maintenance of separate national markets , contrary to the Treaty ."

C-26/76 - Metro v Commission [1977] ECR 1875

" 20 the requirement contained in articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition , that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty , in particular the creation of a single market achieving conditions similar to those of a domestic market .

In accordance with this requirement the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors .

In the sector covering the production of high quality and technically advanced consumer durables , where a relatively small number of large- and medium-scale producers offer a varied range of items which , or so consumers may consider , are readily interchangeable , the structure of the market does not preclude the existence of a variety of channels of distribution adapted to the peculiar characteristics of the various producers and to the requirements of the various categories of consumers .

On this view the Commission was justified in recognizing that selective distribution systems constituted , together with others , an aspect of competition which accords with article 85 (1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion .

21 it is true that in such systems of distribution price competition is not generally emphasized either as an exclusive or indeed as a principal factor .

This is particularly so when , as in the present case , access to the distribution network is subject to conditions exceeding the requirements of an appropriate distribution of the products .

However , although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded .

The powers conferred upon the Commission under article 85 (3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible , provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market .

For specialist wholesalers and retailers the desire to maintain a certain price level , which corresponds to the desire to preserve , in the interests of consumers , the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy , forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in article 85 (1), and , if it does fall thereunder , either wholly or in part , coming within the framework of article 85 (3).

This argument is strengthened if , in addition , such conditions promote improved competition inasmuch as it relates to factors other than prices ."

C-250/92 - Gøttrup-Klim [1994] ECR I-5641

" 30 A cooperative purchasing association is a voluntary association of persons established in order to pursue common commercial objectives.

31 The compatibility of the statutes of such an association with the Community rules on competition cannot be assessed in the abstract. It will depend on the particular clauses in the statutes and the economic conditions prevailing on the markets concerned.

32 In a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.

33 Where some members of two competing cooperative purchasing associations belong to both at the same time, the result is to make each association less capable of pursuing its objectives for the benefit of the rest of its members, especially where the members concerned, as in the case in point, are themselves cooperative associations with a large number of individual members.

34 It follows that such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 85(1) of the Treaty and may even have beneficial effects on competition.

35 Nevertheless, a provision in the statutes of a cooperative purchasing association, restricting the opportunity for members to join other types of competing cooperatives and thus discouraging them from obtaining supplies elsewhere, may have adverse effects on competition. So, in order to escape the prohibition laid down in Article 85(1) of the Treaty, the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers. "

C-115-117/97 - Brentjens' [1999] ECR I-6025

" 51 Next, it is important to bear in mind that, under Article 3(g) and (i) of the EC Treaty (now, after amendment, Article 3(1)(g) and (j) EC), the activities of the Community are to include not only a `system ensuring that competition in the internal market is not distorted' but also `a policy in the social sphere'. Article 2 of the EC Treaty (now, after amendment, Article 2 EC) provides that a particular task of the Community is `to promote throughout the Community a harmonious and balanced development of economic activities' and `a high level of employment and of social protection'.

52 In that connection, Article 118 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) provides that the Commission is to promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers.

53 Article 118b of the EC Treaty (Articles 117 to 120 of the EC Treaty having been replaced by Articles 136 EC to 143 EC) adds that the Commission is to endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

54 Moreover, Article 1 of the Agreement on social policy (OJ 1992 C 191, p. 91) states that the objectives to be pursued by the Community and the Member States include improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion.

55 Under Article 4(1) and (2) of the Agreement, the dialogue between management and labour at Community level may lead, if they so desire, to contractual relations, including agreements, which will be implemented either in accordance with the procedures and practices specific to management and labour and the Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

56 It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if

management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

57 It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

58 The next question is therefore whether the nature and purpose of the agreement at issue in the main proceedings justify its exclusion from the scope of Article 85(1) of the Treaty.

59 First, like the category of agreements referred to above which derive from social dialogue, the agreement at issue in the main proceedings was concluded in the form of a collective agreement and is the outcome of collective negotiations between organisations representing employers and workers.

60 Second, as far as its purpose is concerned, that agreement establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.

61 Consequently, the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty.

62 The answer to be given to the first question must therefore be that a decision taken by organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector does not fall within the scope of Article 85 of the Treaty. "

C-161/84 – Pronuptia [1986] ECR 353

" 27 in view of the foregoing , the answer to the first question must be that :

(1) the compatibility of franchise agreements for the distribution of goods with article 85 (1) depends on the provisions contained therein and on their economic context .

(2)provisions which are strictly necessary in order to ensure that the know-how and assistance provided by the franchisor do not benefit competitors do not constitute restrictions of competition for the purposes of article 85 (1).

(3)provisions which establish the control strictly necessary for maintaining the identity and reputation of the network identified by the common name or symbol do not constitute restrictions of competition for the purposes of article 85 (1).

(4)provisions which share markets between the franchisor and the franchisees or between franchisees constitute restrictions of competition for the purposes of article 85 (1).

(5)the fact that the franchisor makes price recommendations to the franchisee does not constitute a restriction of competition , so long as there is no concerted practice between the franchisor and the franchisees or between the franchisees themselves for the actual application of such prices .

(6)franchise agreements for the distribution of goods which contain provisions sharing markets between the franchisor and the franchisees or between franchisees are capable of affecting trade between Member States .

Case C‑230/16 Coty Germany GmbH

22 Under Article 101(1) TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with that market and are prohibited.

23 With regard to agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the internal market.

24 However, the Court has ruled that the organisation of a selective distribution network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique, C‑439/09, EU:C:2011:649, paragraph 41 and the case-law cited).

25 With particular regard to the question whether selective distribution may be considered necessary in respect of luxury goods, it must be recalled that the Court has already held that the quality of such goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect the

actual quality of those goods (see, to that effect, judgment of 23 April 2009, Copad, C‑59/08, EU:C:2009:260, paragraphs 24 to 26 and the case-law cited).

26 In that regard, the Court has considered that the characteristics and conditions of a selective distribution system may, in themselves, preserve the quality and ensure the proper use of such goods (judgment of 23 April 2009, Copad, C‑59/08, EU:C:2009:260, paragraph 28 and the case-law cited).

27 In that context, the Court has in particular taken the view that the establishment of a selective distribution system which seeks to ensure that the goods are displayed in sales outlets in a manner that enhances their value contributes to the reputation of the goods at issue and therefore contributes to sustaining the aura of luxury surrounding them (see, to that effect, judgment of 23 April 2009, Copad, C‑59/08, EU:C:2009:260, paragraph 29).

28 It thus follows from that case-law that, having regard to their characteristics and their nature, luxury goods may require the implementation of a selective distribution system in order to preserve the quality of those goods and to ensure that they are used properly.

29 A selective distribution system designed, primarily, to preserve the luxury image of those goods is therefore compatible with Article 101(1) TFEU on condition that the criteria mentioned in paragraph 24 of the present judgment are met.

30 Contrary to the claims of Parfümerie Akzente and the German and Luxembourg Governments, that conclusion is not invalidated by the assertion contained in paragraph 46 of the judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C‑439/09, EU:C:2011:649).

31 That assertion must be read and interpreted in the light of the context of that judgment.

32 In that regard, it must be recalled that, in the case which gave rise to that judgment, the referring court was unsure as to whether a specific contractual clause imposing on authorised distributors, in the context of a selective distribution system, a comprehensive prohibition on the online sale of the contract goods complied with Article 101(1) TFEU, rather than whether such a system in its entirety was compliant. It must also be stated that the goods covered by the selective distribution system at issue in that case were not luxury goods, but cosmetic and body hygiene goods.

33 The assertion in paragraph 46 of the judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C‑439/09, EU:C:2011:649) forms part of the Court’s statements made for the purpose of providing the referring court in that case with the interpretative elements necessary to enable it to rule on the issue of whether the restriction of competition resulting

from that contractual clause was justified by a legitimate objective and whether it pursued that objective in a proportionate way.

34 In that context, the Court took the view that the need to preserve the prestigious image of cosmetic and body hygiene goods was not a legitimate requirement for the purpose of justifying a comprehensive prohibition of the internet sale of those goods. The assertion in paragraph 46 of that judgment related, therefore, solely to the goods at issue in the case that gave rise to that judgment and to the contractual clause in question in that case.

35 By contrast, it cannot be inferred from the judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C‑439/09, EU:C:2011:649) that paragraph 46 thereof sought to establish a statement of principle according to which the preservation of a luxury image can no longer be such as to justify a restriction of competition, such as that which stems from the existence of a selective distribution network, in regard to all goods, including in particular luxury goods, and consequently alter the settled case-law of the Court, as set out in paragraphs 25 to 27 of the present judgment.

36 In view of the foregoing considerations, the answer to the first question is that Article 101(1) TFEU must be interpreted as meaning that a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods complies with that provision to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion and that the criteria laid down do not go beyond what is necessary.

The second question

37 By its second question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as precluding a contractual clause, such as that at issue in the main proceedings, which prohibits authorised distributors in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the online sale of the contract goods.

38 This question concerns the lawfulness, under Article 101(1) TFEU, of a specific clause in a selective distribution system for luxury and prestige goods.

39 As a preliminary point, it must be recalled that, as is apparent from the assessment carried out in the context of the first question, having regard to the nature and the specific characteristics of those goods, the objective consisting of the preservation of their luxury image is such as to justify the establishment of a selective distribution system for those goods.

40 In the context of such a system, a specific contractual clause designed to preserve the luxury image of the goods at issue is lawful under Article 101(1) TFEU provided that the criteria mentioned in paragraph 36 of the present judgment are met.

41 While it is for the referring court to determine whether a contractual clause, such as that at issue in the main proceedings, which prohibits the use of third-party platforms for the online sale of the contract goods, meets those criteria, it is nevertheless for the Court of Justice to provide the referring court for this purpose with all the points of interpretation of EU law which will enable it to reach a decision (see, to that effect, judgment of 11 December 1980, L'Oréal, 31/80, EU:C:1980:289, paragraph 14).

42 In that regard, it is common ground that the contractual clause at issue in the main proceedings has the objective of preserving the image of luxury and prestige of the goods at issue. Furthermore, it follows from the documents submitted to the Court that the referring court considers that that clause is objective and uniform and that it applies without discrimination to all authorised distributors.

43 It is therefore necessary to ascertain whether, in circumstances such as those at issue in the main proceedings, the prohibition imposed by a supplier on its authorised distributors of the use, in a discernible manner, of third-party platforms for the internet sale of the luxury goods at issue is proportionate in the light of the objective pursued, that is to say, whether such a prohibition is appropriate for preserving the luxury image of those goods and whether or not it goes beyond what is necessary to achieve that objective.

44 With regard, in the first place, to the appropriateness of the prohibition at issue in the main proceedings in the light of the objective pursued, it must be observed, first, that the obligation imposed on authorised distributors to sell the contract goods online solely through their own online shops and the prohibition on those distributors of using a different business name, as well as the use of third-party platforms in a discernible manner, provide the supplier with a guarantee, from the outset, in the context of electronic commerce, that those goods will be exclusively associated with the authorised distributors.

45 Since such an association is precisely one of the objectives sought when recourse is had to such a system, it appears that the prohibition at issue in the main proceedings includes a limitation which is coherent in the light of the specific characteristics of the selective distribution system.

46 Consequently, if, as is apparent from the case-law of the Court, those characteristics make the selective distribution system an appropriate means by which to preserve the luxury image of luxury goods and therefore contribute to sustaining the quality of those goods (see, to that effect, judgment of 23 April 2009, Copad, C‑59/08, EU:C:2009:260, paragraphs 28 and 29 as well as the case-law cited), a limitation such as that stemming from the prohibition at issue in the main proceedings, the effect of which is inherent in those

characteristics, must also be regarded as being such as to preserve the quality and luxury image of those goods.

47 Second, the prohibition at issue in the main proceedings enables the supplier of luxury goods to check that the goods will be sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorised distributors.

48 Non-compliance by a distributor with the quality conditions set by the supplier allows that supplier to take action against that distributor, on the basis of the contractual link existing between those two parties. The absence of a contractual relationship between the supplier and third-party platforms is, however, an obstacle which prevents that supplier from being able to require, from those third-party platforms, compliance with the quality conditionsthat it has imposed on its authorised distributors.

49 The internet sale of luxury goods via platforms which do not belong to the selective distribution system for those goods, in the context of which the supplier is unable to check the conditions in which those goods are sold, involves a risk of deterioration of the online presentation of those goods which is liableto harm their luxury image and thus their very character.

50 Third, given that those platforms constitute a sales channel for goods of all kinds, the fact that luxury goods are not sold via such platforms and that their sale online is carried out solely in the online shops of authorised distributors contributes to that luxury image among consumers and thus to the preservation of one of the main characteristics of the goods sought by consumers.

51 Consequently, the prohibition imposed by a supplier of luxury goods on its authorised distributors to use, in a discernible manner, third-party platforms for the internet sale of those goods is appropriate to preserve the luxury image of those goods.

52 With regard, in the second place, to the question of whether the prohibition at issue in the main proceedings goes beyond what is necessary for the attainment of the objective pursued, it must be noted, first, that, in contrast to the clause referred to in the case which gave rise to the judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C‑439/09, EU:C:2011:649), the clause here at issue in the main proceedings does not contain an absolute prohibition imposed on authorised distributors to sell the contract goods online. Indeed, under that clause, the prohibition applies solely to the internet sale of the contract goods via third-party platforms which operate in a discernible manner towards consumers.

53 Consequently, authorised distributors are permitted to sell the contract goods online both via their own websites, as long as they have an electronic shop window for the authorised store and the luxury character of the goods is preserved, and via unauthorised third-party platforms when the use of such platforms is not discernible to the consumer.

54 Second, it must be noted that, as is apparent from the provisional results of the Preliminary Report on the E-commerce Sector Inquiry carried out by the Commission pursuant to Article 17 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), adopted on 15 September 2016, despite the increasing importance of third-party platforms in the marketing of distributors' goods, the main distribution channel, in the context of online distribution, is nevertheless constituted by distributors' own online shops, which are operated by over 90% of the distributors surveyed. That fact was confirmed in the final report relating to that inquiry, dated 10 May 2017.

55 Those factors support the view that it may be inferred that a prohibition, such as the prohibition which the applicant in the main proceedings imposed on its authorised distributors, on using, in a discernible manner, third-party platformsfor the internet sale of luxury goods does not go beyond what is necessary in order to preserve the luxury image of those goods.

56 In particular, given the absence of any contractual relationship between the supplier and the third-party platforms enabling that supplier to require those platforms to comply with the quality criteria which it has imposed on its authorised distributors, the authorisation given to those distributors to use such platforms subject to their compliance with pre-defined quality conditions cannot be regarded as being as effective as the prohibition at issue in the main proceedings.

57 It follows that, subject to inquiries which it is for the referring court to make, such a prohibition appears to be lawful in relation to Article 101(1) TFEU.

58 Having regard to the foregoing considerations, the answer to the second question is that Article 101(1) TFEU must be interpreted as not precluding a contractual clause, such as that at issue in the main proceedings, which prohibits authorised distributors in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the internet sale of the contract goods, on condition that that clause has the objective of preserving the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued, these being matters to be determined by the referring court.

Ancillary restraints

T-112/99 - M6 (Métropole télévision) and Others v Commission [2001] ECR II-2459

" 103 It is necessary, first of all, to define what constitutes an `ancillary restriction' in Community competition law and point out the consequences which follow from

classification of a restriction as `ancillary'. It is then necessary to apply the principles thereby established to the exclusivity clause and to the clause relating to the special-interest channels in order to determine whether, as the applicants' assert, the Commission committed an error of appraisal in not classifying those commitments as ancillary restrictions.

The concept of `ancillary restriction'

104 In Community competition law the concept of an `ancillary restriction' covers any restriction which is directly related and necessary to the implementation of a main operation (see, to that effect, the Commission Notice of 14 August 1990 regarding restrictions ancillary to concentrations (OJ 1990 C 203, p. 5, hereinafter `the notice on ancillary restrictions', point I.1), the notice on cooperative joint ventures (point 65), and Articles 6(1)(b) and 8(2), second paragraph, of Regulation No 4064/89).

105 In its notice on ancillary restrictions the Commission rightly stated that a restriction `directly related' to implementation of a main operation must be understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it (point II.4).

106 The condition that a restriction be necessary implies a two-fold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it (see, to that effect, Remia v Commission, cited in paragraph 87 above, paragraph 20; see also points II.5 and II.6 of the notice regarding ancillary restrictions).

107 As regards the objective necessity of a restriction, it must be observed that inasmuch as, as has been shown in paragraph 72 et seq. above, the existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article 85(3) of the Treaty.

108 That approach is justified not merely so as to preserve the effectiveness of Article 85(3) of the Treaty, but also on grounds of consistency. As Article 85(1) of the Treaty does not require an analysis of the positive and negative effects on competition of a principal restriction, the same finding is necessary with regard to the analysis of accompanying restrictions.

109 Consequently, as the Commission has correctly asserted, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main

operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation.

110 Thus, in the judgment in Remia v Commission, cited in paragraph 87 above (paragraph 19), the Court of Justice held that a non-competition clause was objectively necessary for a successful transfer of undertakings, inasmuch as, without such a clause, `and should the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. The vendor, with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business.'

111 Similarly, in its decisions, the Commission has found that a number of restrictions were objectively necessary to implementing certain operations. Failing such restrictions, the operation in question `could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success' (point II.5 of the notice regarding ancillary restrictions; see also, for example, Decision 90/410, point 22 et seq.)

112 Contrary to the applicants' claim, none of the various decisions to which they refer show that the Commission carried out an analysis of competition in classifying the relevant clauses as ancillary restrictions. On the contrary, those decisions show that the Commission's analysis was relatively abstract. Thus point 77 of Decision 1999/329 states as follows:

`Actually, a claim-sharing arrangement cannot function properly without at least one level of cover to be offered being agreed by all its members. The reason is that no member would be willing to share claims brought to the pool by other clubs of a higher amount than the ones it can bring to the pool.'

113 Where a restriction is objectively necessary to implement a main operation, it is still necessary to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement that operation. If the duration or the scope of the restriction exceed what is necessary in order to implement the operation, it must be assessed separately under Article 85(3) of the Treaty (see, to that effect, Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR II-1931, paragraph 78).

114 Lastly, it must be observed that, inasmuch as the assessment of the ancillary nature of a particular agreement in relation to a main operation entails complex economic assessments by the Commission, judicial review of that assessment is limited to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether

there has been a manifest error of appraisal or misuse of powers (see, to that effect, with regard to assessing the permissible duration of a non-competition clause, Remia v Commission, cited in paragraph 87 above, paragraph 34).

Consequences of classification as an ancillary restriction

115 If it is established that a restriction is directly related and necessary to achieving a main operation, the compatibility of that restriction with the competition rules must be examined with that of the main operation.

116 Thus, if the main operation does not fall within the scope of the prohibition laid down in Article 85(1) of the Treaty, the same holds for the restrictions directly related and necessary for that operation (see, to that effect, Remia v Commission, cited in paragraph 87 above, paragraph 20). If, on the other hand, the main operation is a restriction within the meaning of Article 85(1) but benefits from an exemption under Article 85(3) of the Treaty, that exemption also covers those ancillary restrictions.

117 Moreover, where the restrictions are directly related and necessary to a concentration within the meaning of Regulation No 4064/89, it follows from both Article 6(1)(b) and Article 8(2), second subparagraph, of that regulation that those restrictions are covered by the Commission's decision declaring the operation compatible with the common market. "

C-309/99 - Wouters and Others [2002] ECR I-1577

" 84 The prohibition at issue in the main proceedings prohibits all contractual arrangements between members of the Bar and accountants which provide in any way for shared decision-making, profit-sharing or for the use of a common name, and this makes any form of effective partnership difficult.

85 By contrast, the Luxembourg Government claimed at the hearing that a prohibition of multi-disciplinary partnerships such as that laid down in the 1993 Regulation had a positive effect on competition. It pointed out that, by forbidding members of the Bar to enter into partnership with accountants, the national rules in issue in the main proceedings made it possible to prevent the legal services offered by members of the Bar from being concentrated in the hands of a few large international firms and, consequently, to maintain a large number of operators on the market.

86 It appears to the Court that the national legislation in issue in the main proceedings has an adverse effect on competition and may affect trade between Member States.

87 As regards the adverse effect on competition, the areas of expertise of members of the Bar and of accountants may be complementary. Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider

range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organization, management and operation of their business (the one-stop shop advantage).

88 Furthermore, a multi-disciplinary partnership of members of the Bar and accountants would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation.

89 Nor, finally, is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services.

90 A prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the 1993 Regulation, is therefore liable to limit production and technical development within the meaning of Article 85(1)(b) of the Treaty.

91 It is true that the accountancy market is highly concentrated, to the extent that the firms dominating it are at present known as the big five and the proposed merger between two of them, Price Waterhouse and Coopers & Lybrand, gave rise to Commission Decision 1999/152/EC of 20 May 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case IV/M.1016 - Price Waterhouse/Coopers & Lybrand) (OJ 1999 L 50, p. 27), adopted pursuant to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

92 On the other hand, the prohibition of conflicts of interest with which members of the Bar in all Member States are required to comply may constitute a structural limit to extensive concentration of law-firms and so reduce their opportunities of benefiting from economies of scale or of entering into structural associations with practitioners of highly concentrated professions.

93 In those circumstances, unreserved and unlimited authorisation of multi-disciplinary partnerships between the legal profession, the generally decentralised nature of which is closely linked to some of its fundamental features, and a profession as concentrated as accountancy, could lead to an overall dECRease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market.

94 Nevertheless, in so far as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than national rules such as the 1993 Regulation, which prohibits absolutely any form of multi-disciplinary

partnership, whatever the respective sizes of the firms of lawyers and accountants concerned, those rules restrict competition.

95 As regards the question whether intra-Community trade is affected, it is sufficient to observe that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (Case 8/72 Vereeniging van Cementhandelaren v Commission [1972] ECR 977, paragraph 29; Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 22; and CNSD, paragraph 48).

96 That effect is all the more appreciable in the present case because the 1993 Regulation applies equally to visiting lawyers who are registered members of the Bar of another Member State, because economic and commercial law more and more frequently regulates transnational transactions and, lastly, because the firms of accountants looking for lawyers as partners are generally international groups present in several Member States.

97 However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

98 Account must be taken of the legal framework applicable in the Netherlands, on the one hand, to members of the Bar and to the Bar of the Netherlands, which comprises all the registered members of the Bar in that Member State, and on the other hand, to accountants.

99 As regards members of the Bar, it has consistently been held that, in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory (Case 107/83 Klopp [1984] ECR 2971, paragraph 17, and Reisebüro, paragraph 37). For that reason, the rules applicable to that profession may differ greatly from one Member State to another.

100 The current approach of the Netherlands, where Article 28 of the Advocatenwet entrusts the Bar of the Netherlands with responsibility for adopting regulations designed to ensure the proper practice of the profession, is that the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty, mentioned above, to avoid all risk of conflict of interest and the duty to observe strict professional sECRecy.

101 Those obligations of professional conduct have not inconsiderable implications for the structure of the market in legal services, and more particularly for the possibilities for the practice of law jointly with other liberal professions which are active on that market.

102 Thus, they require of members of the Bar that they should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client.

103 By contrast, the profession of accountant is not subject, in general, and more particularly, in the Netherlands, to comparable requirements of professional conduct.

104 As the Advocate General has rightly pointed out in paragraphs 185 and 186 of his Opinion, there may be a degree of incompatibility between the advisory activities carried out by a member of the Bar and the supervisory activities carried out by an accountant. The written observations submitted by the respondent in the main proceedings show that accountants in the Netherlands perform a task of certification of accounts. They undertake an objective examination and audit of their clients' accounts, so as to be able to impart to interested third parties their personal opinion concerning the reliability of those accounts. It follows that in the Member State concerned accountants are not bound by a rule of professional sECRecy comparable to that of members of the Bar, unlike the position under German law, for example.

105 The aim of the 1993 Regulation is therefore to ensure that, in the Member State concerned, the rules of professional conduct for members of the Bar are complied with, having regard to the prevailing perceptions of the profession in that State. The Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional sECRecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts."

C-519/04 P - Meca-Medina and Majcen v Commission [2006] ECR I-6991

"42 Next, the compatibility of rules with the Community rules on competition cannot be assessed in the abstract (see, to this effect, Case C-250/92 DLG [1994] ECR I-5641, paragraph

31). Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (Wouters and Others, paragraph 97) and are proportionate to them.

43 As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.

44 In addition, given that penalties are necessary to ensure enforcement of the doping ban, their effect on athletes' freedom of action must be considered to be, in principle, inherent itself in the anti-doping rules.

45 Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.

46 While the appellants do not dispute the truth of this objective, they nevertheless contend that the anti-doping rules at issue are also intended to protect the IOC's own economic interests and that it is in order to safeguard this objective that excessive rules, such as those contested in the present case, are adopted. The latter cannot therefore, in their submission, be regarded as inherent in the proper conduct of competitive sport and fall outside the prohibitions in Article 81 EC.

47 It must be acknowledged that the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in. It follows that, in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport (see, to this effect, DLG, paragraph 35).

48 Rules of that kind could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of those penalties.

49 Here, that dividing line is determined in the anti-doping rules at issue by the threshold of 2 ng/ml of urine above which the presence of Nandrolone in an athlete's body constitutes doping. The appellants contest that rule, asserting that the threshold adopted is set at an excessively low level which is not founded on any scientifically safe criterion"

No per se rule/ no rule of reason

C-56/65 - Société Technique Minière v Maschinenbau Ulm [1966] ECR 337

"in order to be prohibited as being incompatible with the common market under article 85(1) of the Treaty, an agreement between undertakings must fulfill certain conditions depending less on the legal nature of the agreement than on its effects on ' trade between Member States ' and its effects on ' competition '.

Thus as article 85(1) is based on an assessment of the effects of an agreement from two angles of economic evaluation, it cannot be interpreted as introducing any kind of advance judgment with regard to a category of agreements determined by their legal nature . Therefore an agreement whereby a producer entrusts the sale of his products in a given area to a sole distributor cannot automatically fall under the prohibition in article 85(1). But such an agreement may contain the elements set out in that provision, by reason of a particular factual situation or of the severity of the clauses protecting the exclusive dealership ."

T-17/93 - Matra Hachette v Commission [1994] ECR II-595

" 48 […]However, the assessment of the extent of the anti-competitive effect of an agreement for which an exemption is requested is entirely unconnected with the assessment of the substantive scope of Article 85(1) of the Treaty and must be carried out by the Commission not under Article 85(1) but under Article 85(3), in relation, in particular, to the indispensability of the restrictions of competition (see below, paragraphs 135 to 140)."

T-112/99 - M6 (Métropole télévision) and Others v Commission [2001] ECR II-2459

"72 According to the applicants, as a consequence of the existence of a rule of reason in Community competition law, when Article 85(1) of the Treaty is applied it is necessary to weigh the pro and anti-competitive effects of an agreement in order to determine whether it

is caught by the prohibition laid down in that article. It should, however, be observed, first of all, that contrary to the applicants' assertions the existence of such a rule has not, as such, been confirmed by the Community courts. Quite to the contrary, in various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful (see Case C-235/92 P Montecatini v Commission [1999] ECR I-4539, paragraph 133 (`... even if the rule of reason did have a place in the context of Article 85(1) of the Treaty'), and Case T-14/89 Montedipe v Commission [1992] ECR II-1155, paragraph 265, and in Case T-148/89 Tréfilunion v Commission [1995] ECR II-1063, paragraph 109).

73 Next, it must be observed that an interpretation of Article 85(1) of the Treaty, in the form suggested by the applicants, is difficult to reconcile with the rules prescribed by that provision.

74 Article 85 of the Treaty expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, Case 161/84 Pronuptia [1986] ECR 353, paragraph 24, and Case T-17/93 Matra Hachette v Commission [1994] ECR II-595, paragraph 48, and European Night Services and Others v Commission, cited in paragraph 34 above, paragraph 136). Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article 85(1) of the Treaty.

75 It is true that in a number of judgments the Court of Justice and the Court of First Instance have favoured a more flexible interpretation of the prohibition laid down in Article 85(1) of the Treaty (see, in particular, Société technique minière and Oude Luttikhuis and Others, cited in paragraph 70 above, Nungesser and Eisele v Commission and Coditel and Others, cited in paragraph 68 above, Pronuptia, cited in paragraph 74 above, and European Night Services and Others v Commission, cited in paragraph 34 above, as well as the judgment in Case C-250/92 DLG [1994] ECR I-5641, paragraphs 31 to 35).

76 Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law acording to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) of the Treaty. In assessing the applicability of Article 85(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual

structure of the market concerned (see, in particular, European Night Services and Others v Commission, cited in paragraph 34 above, paragraph 136, Oude Luttikhuis, cited in paragraph 70 above, paragraph 10, and VGB and Others v Commission, cited in paragraph 70 above, paragraph 140, as well as the judgment in Case C-234/89 Delimitis [1991] ECR I-935, paragraph 31).

77 That interpretation, while observing the substantive scheme of Article 85 of the Treaty and, in particular, preserving the effectiveness of Article 85(3), makes it possible to prevent the prohibition in Article 85(1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties. It must, however, be emphasised that such an approach does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement when determining whether the prohibition laid down in Article 85(1) of the Treaty applies."

T-328/03 O2 v Commission [2006] ECR II-1231

"68 Moreover, in a case such as this, where it is accepted that the agreement does not have as its object a restriction of competition, the effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking (Société minière et technique at 249-250).

69 Such a method of analysis, as regards in particular the taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason, which the Community judicature has not deemed to have its place under Article 81(1) EC (Case C-235/92 P Montecatini v Commission [1999] ECR I-4539, paragraph 133; M6 and Others v Commission, paragraphs 72 to 77; and Case T-65/98 Van den Bergh Foods v Commission [2002] ECR II-4653, paragraphs 106 and 107). "

CONSEQUENCES Art. 101 (2) TFEU

C-453/99 - Courage and Crehan [2001] ECR I-6297

" 21 Indeed, the importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void (judgment in Eco Swiss, cited above, paragraph 36).

22 That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 85(1) are met and so long as the agreement concerned does not justify the grant of an exemption under Article 85(3) of the Treaty (on the latter point, see inter alia Case 10/69 Portelange [1969] ECR 309, paragraph 10). Since the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties (see the judgment in Case 22/71 Béguelin [1971] ECR 949, paragraph 29). Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned (see the judgment in Case 48/72 Brasserie de Haecht II [1973] ECR 77, paragraph 26).

23 Thirdly, it should be borne in mind that the Court has held that Article 85(1) of the Treaty and Article 86 of the EC Treaty (now Article 82 EC) produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard (judgments in Case 127/73 BRT and SABAM [1974] ECR 51, paragraph 16, (BRT I) and Case C-282/95 P Guérin Automobiles v Commission [1997] ECR I-1503, paragraph 39).

56, 58/64 - Grundig v Commission [1966] ECR 429

" p. 344

It is apparent from the statement of the reasons for the contested decision, as well as from article 3 thereof, that the infringement declared to exist by article 1 of the operative part is not to be found in the undertaking by grundig not to make direct deliveries in France except to consten . That infringement arises from the clauses which, added to this grant of exclusive rights, are intended to impede, relying upon national law, parallel imports of grundig products into France by establishing absolute territorial protection in favour of the sole concessionnaire .

The provision in article 85(2) that agreements prohibited pursuant to article 85 shall be automatically void applies only to those parts of the agreement which are subject to the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the agreement itself . The Commission should, therefore, either have confined itself in the operative part of the contested decision to declaring that an infringement lay in those parts only of the agreement which came within the prohibition, or else it should have set out in the preamble to the decision the reasons why those parts did not appear to it to be severable from the whole agreement .

It follows, however, from article 1 of the decision that the infringement was found to lie in the agreement as a whole, although the Commission did not adequately state the reasons why it was necessary to render the whole of the agreement void when it is not established that all the clauses infringed the provisions of article 85(1). The state of affairs found to be

incompatible with article 85(1) stems from certain specific clauses of the contract of 1 April 1957 concerning absolute territorial protection and from the additional agreement on the gint trade mark rather than from the combined operation of all clauses of the agreement, that is to say, from the aggregate of its effects .

Article 1 of the contested decision must therefore be annulled in so far as it renders void, without any valid reason, all the clauses of the agreement by virtue of article 85(2)."

56/65 - Société Technique Minière v Maschinenbau Ulm [1966] ECR 337

"9 . The automatic nullity of an agreement within the meaning of article 85(2) of the EEC Treaty only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself . Any other contractual provisions which are not affected by the prohibition fall outside community law .

10 . An exclusive dealing agreement may fall under the prohibition in article 85(1) by reason of a particular factual situation or of the severity of the clauses protecting the exclusive dealership . "

ART. 101 (3)

56, 58/64 - Grundig v Commission [1966] ECR 559

"p.347 For this purpose the Commission may not confine itself to requiring from undertakings proof of the fulfilment of the requirements for the grant of the exemption but must, as a matter of good administration, play its part, using the means available to it, in ascertaining the relevant facts and circumstances .

Furthermore, the exercise of the Commission's powers necessarily implies complex evaluations on economic matters . A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom . This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based .

The contested decision states that the principal reason for the refusal of exemption lies in the fact that the requirement contained in article 85(3)(a) is not satisfied .

The German government complains that the said decision does not answer the question whether certain factors, especially the advance orders and the guarantee and after-sales services, the favourable effects of which were recognized by the Commission, could be maintained intact in the absence of absolute territorial protection .

The contested decision admits only by way of assumption that the sole distributorship contract in question contributes to an improvement in production and distribution . Then the contested decision examines the question ' whether an improvement in the distribution of goods by virtue of the sole distribution agreement could no longer be achieved if parallel imports were admitted '. After examining the arguments concerning advance orders, the observation of the markets and the guarantee and after-sales services, the decision concluded that ' no other reason which militates in favour of the necessity for absolute territorial protection has been put forward or hinted at '.

P.348

The question whether there is an improvement in the production of distribution of the goods in question, which is required for the grant of exemption, is to be answered in accordance with the spirit of article 85 . First, this improvement cannot be identified with all the advantages which the parties to the agreement obtain from it in their production or distribution activities . These advantages are generally indisputable and show the agreement as in all respects indispensable to an improvement as understood in this sense . This subjective method, which makes the content of the concept of ' improvement ' depend upon the special features of the contractual relationships in question, is not consistent with the aims of article 85 . Furthermore, the very fact that the Treaty provides that the restriction of competition must be ' indispensable ' to the improvement in question clearly indicates the importance which the latter must have . This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition .

The argument of the German government, based on the premise that all those features of the agreement which favour the improvement as conceived by the parties to the agreement must be maintained intact, presupposes that the question whether all these features are not only favourable but also indispensable to the improvement of the production or distribution of the goods in question has already been settled affirmatively . Because of this the argument not only tends to weaken the requirement of indispensability but also among other consequences to confuse solicitude for the specific interests of the parties with the objective improvements contemplated by the Treaty .

In its evaluation of the relative importance of the various factors submitted for its consideration, the Commission on the other hand had to judge their effectiveness by reference to an objectively ascertainable improvement in the production and distribution of the goods, and to decide whether the resulting benefit would suffice to support the conclusion that the consequent restrictions upon competition were indispensable. The argument based on the necessity to maintain intact all arrangements of the parties in so far as they are capable of contributing to the improvement sought cannot be reconciled with the view propounded in the last sentence . Therefore, the complaint of the federal

government, based on faulty premises, is not such as can invalidate the Commission's assessment .

The applicants maintain that the admission of parallel imports would mean that the sole representative would no longer be in a position to engage in advance planning .

A certain degree of uncertainty is inherent in all forecasts of future sales possibilities . Such forecasting must in fact be based on a series of variable and uncertain factors . The admission of parallel imports may indeed involve increased risks for the concessionnaire who gives firm orders in advance for the quantities of goods which he considers he will be able to sell . However, such a risk is inherent in all commercial activity and thus cannot justify special protection on this point ."

T-17/93 - Matra Hachette v Commission [1994] ECR II-595

" 104 It must first be borne in mind that the Commission may only grant an individual exemption decision if, in particular, the four conditions laid down by Article 85(3) of the Treaty are all met by the agreement, with the result that an exemption must be refused if any of the four conditions is not met (judgment of the Court of Justice in Joined Cases 43/82 and 63/82 VBVB and VBBB v Commission [1984] ECR 19; judgment of the Court of First Instance in Case T-66/89 Publishers Association v Commission [1992] ECR II-1995); secondly, it is incumbent upon notifying undertakings to provide the Commission with evidence that the conditions laid down by Article 85(3) are met (judgment in VBVB and VBBB v Commission, cited above), an obligation which, in the proceedings before the Court, must be assessed in the light of the onus which falls on the applicant to provide information to challenge the Commission' s appraisal; thirdly, where complex economic facts are involved, judicial review of the legal characterization of the facts is limited to the possibility of the Commission having committed a manifest error of assessment (judgment of the Court of Justice in Case 42/84 Remia and Others v Commission [1985] ECR 2545).

105 With regard more particularly to the first of the four conditions laid down by Article 85(3), it should be borne in mind that, by virtue of that provision, the agreements which may qualify for an exemption are those which contribute "to improving the production or distribution of goods or to promoting technical or economic progress".

106 The Court notes that in the present case the examination of this first condition is dealt with in paragraphs 24 to 26 of the Decision. Paragraph 24 is limited to considerations concerning the adaptation of the product to suit the requirements of European consumers and the differentiation of the product by each of the two founders. Paragraph 25 deals more particularly with an examination of the contribution to technical progress deriving from the know-how and capacity of the founders and from the manufacturing process, whereas paragraph 26 is devoted to the improvement made by the vehicle itself, described as "a continuous development of technical progress of production in the Community".

107 It follows that it is only in relation to paragraphs 24 to 26 of the Decision that the merits of the applicant' s arguments should be considered. Consequently, certain arguments put forward by Matra, which do not relate to the Commission' s appraisal at that stage of the examination of the application made to it, are irrelevant. That is true, in particular, of the argument concerning the contribution to "social" progress and the contribution to regional progress (matters not dealt with in the Decision) as part of the analysis of the project' s contribution to technical or economic progress, regardless of the arguments put forward, by the defendant or the interveners, in the written procedure before this Court.

108 The Court therefore considers that, having regard to paragraph 24 of the Decision, as analysed above, the discussion of the appraisal in this case of the first of the four conditions is limited to the question whether, as maintained by the Commission and contrary to the arguments put forward by the applicant, the manufacturing process for the "VX62" vehicle, as described in paragraph 25 of the Decision, together with the improvements to the product referred to in paragraph 26, are such as to justify the application of the provisions in question to the present case.

109 As regards, first, the manufacturing process, it is clear from the unambiguous statements from the intervener, Ford, which have not been seriously challenged by the applicant, that the manufacturing process to be used at Setúbal constitutes the first application by a European car manufacturer of the enhanced form of the manufacturing process recommended in 1990 by the most authoritative researchers in the field of technological development, such as the Massachusetts Institute of Technology (MIT). The Court considers, despite the applicant' s assertions to the contrary, that an optimization of the manufacturing process of that kind is in conformity with the meaning and purpose of the first of the four conditions laid down by Article 85(3) of the Treaty.

110 As regards, secondly, the technical improvements made to the product, described as "cosmetic" by the applicant, they must be assessed in relation to the state of development of car construction techniques in Europe when the Decision was adopted. Adopting that approach, the Court considers that, as maintained by the Commission, the technical improvements made to the vehicle fall within the scope of Article 85(3), since they bring together in a single product techniques which, where they exist, are at present used in isolation, on different models.

111 It follows that the Commission' s assessment, according to which the manufacturing process for the vehicle and the technical improvements made to the product are conducive to improvement of the production or distribution of products or to the promotion of technical or economic progress, does not contain any manifest error.

° Whether the agreement provides consumers with a fair share of the resulting benefit

[…]

(ii) Findings of the Court

120 The Court would point out in the first place that, according to the second of the four conditions laid down by Article 85(3) of the Treaty, agreements qualifying for exemption are those which allow consumers "a fair share of the resulting benefit". The question whether the project in question satisfies that condition is examined in paragraph 27 of the Decision, according to which the exempted project will enable economies of scale to be achieved and promote intensified competition in the market, to the benefit of the European consumer.

121 Examination of the applicant' s criticisms on this point shows that they raise two main questions.

122 The first question is whether, as contended, the advantage given to the consumer must be assessed by reference to the present state of the market or by reference to the advantage that might have been afforded to the consumer in the event of the founders having chosen to penetrate the market individually. The Court considers that, as rightly maintained by the Commission, the applicant' s reasoning is based on false premises. At that stage of the examination of the application for exemption, it is incumbent upon the Commission to appraise the project submitted to it as objectively as possible, without in any way considering the appropriateness of the project by reference to other technically possible or economically viable choices, since it is common ground that it is when considering the third of the four conditions laid down by Article 85(3) of the Treaty that the Commission may, in order to appraise the indispensability of the restrictions on competition resulting from the project in question, take account of other possible choices. The applicant' s view that the advantage made available to the consumer by the project in question should be assessed by reference to the advantage accruing to the consumer from other technologically possible or economically viable choices is therefore, to that extent, unfounded.

123 The applicant' s argument then raises the question whether the project at issue is capable of affording the founders a collective dominant position. In that regard, the applicant' s reasoning is based on the idea that the existence of considerable excess production capacity, linked with substantial State aid, enables the founders to engage in unfair practices, ousting the competition and, in the longer term, giving the founders a collective dominant position, which they will abuse to the detriment of the consumer (see below, paragraph 153).

124 The Court considers that the applicant' s reasoning takes for granted, successively, the acquisition by the founders of a collective dominant position, then the abuse by those undertakings of that position. Such reasoning is purely hypothetical and can only be rejected, without its being necessary for the Court to say whether, in the presence of an

adequately substantiated infringement of Article 86 of the Treaty, the Commission is required to reject a request for an exemption (see below, paragraph 154).

125 In short, the Court considers that the statements contained in paragraph 27 of the Decision have not been seriously contested by the applicant, and therefore the Decision cannot be regarded as vitiated by a manifest error of assessment on that point.

° Whether the restrictions on competition deriving from the agreement are indispensable

[…]

(ii) Findings of the Court

135 According to the terms of the third and fourth conditions laid down by Article 85(3) of the Treaty, exemption is available for agreements which do not "impose on the undertakings concerned restrictions (of competition) which are not indispensable to the attainment of (the) objectives" of improving the production or distribution of products and promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. It follows that the Decision must establish that any adverse effects on competition resulting from the project are proportionate to the contribution made by it to economic or technical progress. As stated in the judgment of the Court of Justice in Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, "this improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition". It is therefore for the Court to verify whether, as contended by the founders, any adverse affects on competition deriving from the project in question are indispensable in order to attain the objectives of achieving economic and technical progress.

136 The Court observes that that question is analysed in paragraphs 28 to 36 of the Decision. In those paragraphs, the Commission states in turn that:

° the joint venture may be regarded as necessary, in the light of the exceptional circumstances of the case and the conditions the Commission considers necessary for an exemption to be granted (paragraph 28);

° the founders, each acting alone, could not offer the product under the same conditions (paragraphs 29 and 31) ° the latter assessment not being in itself undermined by the fact that other manufacturers, in non-comparable situations, were themselves able individually to penetrate the market (paragraph 33) and that, on the contrary, the joint venture is efficient (paragraph 30);

° it is not possible to penetrate the market by a simple adaptation for the European market of existing vehicles, which means that a new type of vehicle must be developed (paragraph 32);

° the restrictions on competition between the two founders are limited to what is indispensable (paragraph 34);

° the cooperation agreements existing between Ford and Nissan, on the one hand, and Ford and Mazda, on the other, do not exclude competition in the sector in question (paragraph 35);

° the project represents the largest foreign investment ever made in Portugal, thus contributing to harmonious development of the Community and to the reduction of regional disparities; at the same time the Commission states that "this would not be enough to make an exemption possible unless the conditions of Article 85(3) were fulfilled, but it is an element which the Commission has taken into account" (paragraph 36).

137 The argument put forward by Matra to counter that analysis consists essentially in the contention that, in view of the alternative solutions available, the Commission did not establish that the choices made by the founders were indispensable, with the result that the restrictions of competition deriving from them are not in themselves justified, and merely resorted to the theory of "exceptional circumstances", which finds no basis in the text of Article 85(3) of the Treaty.

138 The Court considers that, as the Commission maintains, the central question to be answered, in assessing the legality of the Decision in relation to the third of the four conditions laid down in Article 85(3) of the Treaty, is whether the joint venture is strictly indispensable to enable the founders to penetrate the market in question. If that question is answered in the affirmative, it will ipso facto be established that the restrictions of competition deriving from the agreement are indispensable in order to attain the objectives pursued by the two conditions examined above, in particular the first one. The answer is indeed affirmative, since the Commission maintains, without being contradicted in any serious way by the applicant, whose reasoning is based on non-comparable situations, that, if each of the founders actually was technically and financially capable of penetrating the market individually, such penetration could be achieved only at a loss, in view of the particularly high level of the joint venture' s "break-even point" and of the information available concerning forecasts of sales and market shares.

139 As regards the argument based on the reference to "exceptional circumstances", the Court observes that, although the Commission refers to them, in particular in paragraphs 23 and 28, and in paragraph 36, in which the Decision concludes its examination of the condition under review and considers the project' s impact on public infrastructures and on employment, and its impact on European integration, the latter paragraph ends with the following sentence: "This would not be enough to make an exemption possible unless the conditions of Article 85(3) were fulfilled, but it is an element which the Commission has taken into account". The Court considers that it is clear from the latter sentence that the

"exceptional circumstances" thus referred to in the Decision were taken into consideration by the Commission only supererogatorily. In other words, it is sufficiently established that, if those circumstances had not been referred to, the operative part of the decision adopted would have been exactly the same as that of the contested Decision. It follows that the applicant' s argument that, on the contrary, the individual exemption decision granted for the project in question was adopted only on the basis of the "exceptional circumstances" surrounding the project must be rejected.

140 Accordingly, the applicant has not established that the Commission' s assessment, according to which the restrictions on competition deriving from the joint venture project notified to it are indispensable, is manifestly incorrect.

° Whether the implementation of the agreement is liable to eliminate competition for a substantial part of the products in question

[…]

(ii) Findings of the Court

150 The Court would point out, first, that, by virtue of the last of the four conditions imposed by Article 85(3) of the Treaty, an individual exemption decision may be available for agreements which do not "afford ... undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

151 In the present case, that point is covered by paragraphs 37 and 38 of the Decision. According to paragraph 37, cooperation between Ford and VW, far from eliminating competition in the multi-purpose vehicle segment, will on the contrary stimulate it, in view of the important position occupied by the "Espace". In paragraph 38, the Decision states that the differentiation of the products offered by each of the two founders will have a positive effect on competition between car manufacturers in Europe at the distribution stage.

152 In challenging those two paragraphs of the Decision, the applicant argues, first, that the Setúbal plant will give rise to excess production capacity in the market concerned. However, the Court notes that the applicant has not established that the Decision is incorrect in that respect, in particular paragraphs 6 and 14 thereof, which are confirmed by Ford' s statements. Moreover, in its judgment in Matra v Commission, cited above, the Court of Justice held that "as regards the evaluation of the risk of excess production capacity, ... the Commission carried out a comprehensive and detailed examination of this question before concluding that no such risk exists ... . In those circumstances, the arguments put forward by Matra ... are not such as to establish that the Commission based its decision on a manifestly incorrect assessment of the economic data" (paragraphs 26 and 28). The applicant' s argument must therefore be rejected, without its being necessary for the Court to consider whether, as contended by the applicant, which relies in particular on an expert' s report

from Professor Encaoua, the existence of excess production capacity will necessarily have the effect of ousting competitors.

153 The applicant claims, secondly, that the existence of excess production capacity will, in time, enable the founders to achieve a collective dominant position. However, the Court considers that, as stated by the Commission, the achievement or strengthening of a dominant position, whether individual or collective, is not as such prohibited by Articles 85 and 86 of the Treaty. Article 86 merely prohibits the abuse of a dominant position by one or more undertakings. Accordingly, an alleged risk that the founders might in time collectively achieve a dominant position cannot in any event constitute legal justification for withholding an exemption, the likelihood of that risk materializing during the period of validity of the Decision not having been established by the applicant.

154 Accordingly, the Court considers that, as already stated in paragraph 124 above, the argument based on the risk of the achievement and abuse of a collective dominant position must be rejected in any event, without its being necessary for the Court to decide whether ° as the applicant necessarily implies ° the Commission should, in the presence of a sufficiently clear infringement of Article 86 of the Treaty, reject an application for an individual exemption.

155 The applicant considers, thirdly, that the differentiation of the products will not have any positive impact on competition between the founders at the stage of distribution of the products. The Court observes, first, that the applicant' s statement that paragraph 38 of the Decision conflicts at least partially with the analysis of agreement between the founders set out in paragraphs 5 and 8 of the Decision is in no way substantiated since, in particular, paragraph 8 expressly states that "The partners are entirely free as to the distribution of the vehicles. They will independently distribute their respective MPVs through their own networks and under their own brand names". Since the agreement at issue is limited to the production of vehicles and since there is no agreement between the founders concerning the marketing of the vehicles produced by the joint venture and purchased from the latter by the founders, the applicant has not established, as it purports to have done, either that the agreement will have the effect of limiting, to a sufficiently substantial extent, competition between the founders, at the stage of product distribution, or, in any event, that the measures imposed by the Decision, in the form of obligations and requirements to which the founders are subject, are not adequate.

156 It follows that the applicant has not shown that the Commission' s appraisal, according to which the project satisfies the last of the four conditions laid down by Article 85(3) of the Treaty, is vitiated by a manifest error.

157 Accordingly, the Court considers that the allegation of a manifest error on the part of the Commission in its appraisal of the facts, in relation to each of the four conditions laid down by Article 85(3) of the Treaty, must be rejected.

158 It follows that the first plea of substantive illegality put forward by the applicant must be rejected. "

ART 102 TFEU

DOMINANCE

C-27/76 - United Brands v Commission [1978] ECR 207

" 63 Article 86 is an application of the general objective of the activities of the community laid down by article 3 (f) of the Treaty : the institution of a system ensuring that competition in the common market is not distorted .

64this article prohibits any abuse by an undertaking of a dominant position in a substantial part of the common market in so far as it may affect trade between Member States .

65the dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors , customers and ultimately of its consumers .

66in general a dominant position derives from a combination of several factors which , taken separately , are not necessarily determinative .

67in order to find out whether ubc is an undertaking in a dominant position on the relevant market it is necessary first of all to examine its structure and then the situation on the said market as far as competition is concerned .

68in doing so it may be advisable to take account if need be of the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses ."

85/76 - Hoffmann-La Roche v Commission [1979] ECR 461

"38 Article 86 is an application of the general objective of the activities of the community laid down by article 3 (f) of the Treaty namely , the institution of a system ensuring that competition in the common market is not distorted .

Article 86 prohibits any abuse by an undertaking of a dominant position in a substantial part of the common market in so far as it may affect trade between Member States .

The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors , its customers and ultimately of the consumers .

39such a position does not preclude some competition , which it does where there is a monopoly or a quasi-monopoly , but enables the undertaking which profits by it , if not to

determine , at least to have an appreciable influence on the conditions under which that competition will develop , and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment .

A dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact , while in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally .

The existence of a dominant position may derive from several factors which , taken separately , are not necessarily determinative but among these factors a highly important one is the existence of very large market shares .

40a substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets , especially as far as production , supply and demand are concerned .

Even though each group of vitamins constitutes a separate market , these different markets , as has emerged from the examination of their structure , nevertheless have a sufficient number of features in common to make it possible for the same criteria to be applied to them as far as concerns the importance of the market shares for the purpose of determining whether there is a dominant position or not .

41furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves , and save in exceptional circumstances , evidence of the existence of a dominant position .

An undertaking which has a very large market share and holds it for some time , by means of the volume of production and the scale of the supply which it stands for - without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share - is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which , already because of this secures for it , at the very least during relatively long periods , that freedom of action which is the special feature of a dominant position .

42the contested decision has mentioned besides the market shares a number of other factors which together with roche ' s market shares would secure for it in certain circumstances , a dominant position .

These factors which the decision classifies as additional criteria are as follows :

(a) roche ' s market shares are not only large but there is also a big disparity between its shares and those of its next largest competitors (recitals 5 and 21 to the decision);

(b) roche produces a far wider range of vitamins than its competitors (recital 21 to the decision);

(c) roche is the world ' s largest vitamin manufacturer whose turnover exceeds that of all the other producers and is at the head of a multinational group which in terms of sales is the world ' s leading pharmaceuticals producer (recitals 5 , 6 and 21 to the decision);

(d) although roche ' s patents for the manufacture of vitamins have expired roche , since it has played a leading role in this field , still enjoys technological advantages over its competitors of which the highly developed customer information and assistance service which it has is evidence (recitals 7 and 8 to the decision);

(e) roche has a very extensive and highly specialized sales network (recital 21 to the decision);

(f) there is no potential competition (recital 21 to the decision).

Furthermore during the proceedings before the court the Commission adduced as a factor establishing roche ' s dominant position the latter ' s ability , notwithstanding lively competition , to maintain its market shares substantially intact .

T-340/03 - France Télécom v Commission [2007] ECR II-107

" 99 As a preliminary point, it is appropriate to observe that, by virtue of settled case-law, a dominant position exists where the undertaking concerned is in a position of economic strength which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (Michelin v Commission, paragraph 78 above, paragraph 30, and Case T-65/98 Van den Bergh Foods v Commission [2003] ECR II-4653, paragraph 154). It should be noted at the outset that, in order to establish that a dominant position exists, the Commission does not need to demonstrate that an undertaking’s competitors will be foreclosed from the market, even in the longer term.

100 Furthermore, although the importance of market shares may vary from one market to another, very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (Hoffmann-La Roche v Commission, paragraph 80 above, paragraph 41, and Case T-221/95 Endemol v Commission [1999] ECR II-1299, paragraph 134). The Court of Justice held in Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 60, that this was so in the case of a 50% market share.

101 Even the existence of lively competition on a particular market does not rule out the possibility that there is a dominant position on that market, since the predominant feature of such a position is the ability of the undertaking concerned to act without having to take account of this competition in its market strategy and without for that reason suffering

detrimental effects from such behaviour (Hoffmann-La Roche v Commission, paragraph 80 above, paragraph 70; see also, to that effect, Case 27/76 United Brands v Commission [1978] ECR 207, paragraphs 108 to 129). Thus, the fact that there may be competition on the market is a relevant factor for the purposes of ascertaining whether a dominant position exists, but it is not in itself a decisive factor in that regard."

322/81 - Michelin v Commission [1983] ECR 3461

" 56 that situation ensures that on the Netherlands market a large number of users of heavy-vehicle tyres have a strong preference for Michelin tyres . As the purchase of tyres represents a considerable investment for a transport undertaking and since much time is required in order to ascertain in practice the cost-effectiveness of a type or brand of tyre , Michelin nv therefore enjoys a position which renders it largely immune to competition . As a result , a dealer established in the Netherlands normally cannot afford not to sell Michelin tyres .

57 it is not possible to uphold the objections made against those arguments by Michelin nv , supported on this point by the french government , that Michelin nv is thus penalized for the quality of its products and services . A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position , the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market .

58 due weight must also be attached to the importance of Michelin nv ' s network of commercial representatives , which gives it direct access to tyre users at all times . Michelin nv has not disputed the fact that in absolute terms its network is considerably larger than those of its competitors or challenged the description , in the decision at issue , of the services performed by its network whose efficiency and quality of service are unquestioned . The direct access to users and the standard of service which the network can give them enables Michelin nv to maintain and strengthen its position on the market and to protect itself more effectively against competition .

59 as regards the additional criteria and evidence to which Michelin nv refers in order to disprove the existence of a dominant position , it must be observed that temporary unprofitability or even losses are not inconsistent with the existence of a dominant position . By the same token , the fact that the prices charged by Michelin nv do not constitute an abuse and are not even particularly high does not justify the conclusion that a dominant position does not exist . Finally , neither the size , financial strength and degree of diversification of Michelin nv ' s competitors at the world level nor the counter poise arising from the fact that buyers of heavy-vehicle tyres are experienced trade users are such as to deprive Michelin nv of its privileged position on the netherlands market ."

T-30/89 - Hilti v Commission [1991] ECR II-1439

" 89 The Commission has proved that Hilti holds a market share of around 70% to 80% in the relevant market for nails. That figure was supplied to the Commission by Hilti following a request by the Commission for information pursuant to Article 11 of Regulation No 17. As the Commission has rightly emphasized, Hilti was therefore obliged to supply information which, to the best of its knowledge, was as accurate as possible. Hilti' s subsequent assertion that the figures were unsound is not corroborated by any evidence or by any examples showing them to be unreliable. Moreover, Hilti has supplied no other figures to substantiate its assertion. This argument of the applicant must therefore be rejected.

90 The Court of Justice has held (Case 27/76 United Brands v Commission [1978] ECR 207 and Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461) that the dominant position referred to in Article 86 of the Treaty relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers; the existence of a dominant position may derive from a combination of several factors which, taken separately, are not necessarily determinative but among which a highly important one is the existence of very large market shares.

91 With particular reference to market shares, the Court of Justice has held (Hoffmann-La Roche judgment, cited above, paragraph 41) that very large shares are in themselves, and save in exceptional circumstances, evidence of a dominant position.

92 In this case it is established that Hilti holds a share of between 70% and 80% in the relevant market. Such a share is, in itself, a clear indication of the existence of a dominant position in the relevant market (see the judgment of the Court of Justice in Case 62/86 AKZO Chemie BV v Commission [1991] ECR I-3359, paragraph 60).

93 Furthermore, as regards the other factors noted by the Commission as helping to maintain and reinforce Hilti' s position in the market, it must be pointed out that the very fact that Hilti holds a patent and, in the United Kingdom, invokes copyright protection in relation to the cartridge strips designed for use in its own tools strengthens its position in the markets for Hilti-compatible consumables. Hilti' s strong position in those markets was enhanced by the patents which it held at the time on certain elements of its DX 450 nail gun. It should be added that, as the Commission rightly contended, it is highly improbable in practice that a non-dominant supplier will act as Hilti did, since effective competition will normally ensure that the adverse consequences of such behaviour outweigh any benefits.

94 On the basis of all those considerations, the Court holds that the Commission was entitled to take the view that Hilti held a dominant position in the market in nails for the nail guns which it manufactures. "

C-62/86 - AKZO v Commission [1991] ECR I-3359

" 59 It should be further observed that according to its own internal documents AKZO had a stable market share of about 50% from 1979 to 1982 (Annexes 2 and 4 to the statement of objections and Table A annexed to that statement). Furthermore, AKZO has not adduced any evidence to show that its share dECReased during subsequent years.

60 With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (judgment in Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 41). That is the situation where there is a market share of 50% such as that found to exist in this case.

61 Moreover, the Commission rightly pointed out that other factors confirmed AKZO's predominance in the market. In addition to the fact that AKZO regards itself as the world leader in the peroxides market, it should be observed that, as AKZO itself admits, it has the most highly developed marketing organization, both commercially and technically, and wider knowledge than that of their competitors with regard to safety and toxicology (Annexes 2 and 4 to the statement of objections)."

C-52/09 - TeliaSonera Sverige [2011] ECR I-527

"23 In that context, the dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers (Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, paragraph 38, and Case C-280/08 P Deutsche Telekom v Commission [2010] ECR I-0000, paragraph 170).

24 Accordingly, Article 102 TFEU must be interpreted as referring not only to practices which may cause damage to consumers directly (see, to that effect, Joined Cases C-468/06 to C-478/06 Sot. Lélos kai Sia and Others [2008] ECR I-7139, paragraph 68, and Deutsche Telekom v Commission, paragraph 176), but also to those which are detrimental to them through their impact on competition. Whilst Article 102 TFEU does not prohibit an undertaking from acquiring, on its own merits, the dominant position in a market, and while, a fortiori, a finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking concerned (see, to that effect, Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, paragraph 57, and Joined Cases C-395/96 P and C-396/96 P Compagnie maritime belge transports and Others v Commission [2000] ECR I-1365, paragraph 37), it remains the case that, in accordance with settled case-law, an undertaking which holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the internal market (see, to that

effect, Case C-202/07 P France Télécom v Commission [2009] ECR I-2369, paragraph 105 and case-law cited).

(…)

79 As stated in paragraph 23 of this judgment, the dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.

80 Accordingly, that provision, as stated by the Advocate General in point 41 of his Opinion, does not envisage any variation in form or degree in the concept of a dominant position. Where an undertaking has an economic strength such as that required by Article 102 TFEU to establish that it holds a dominant position in a particular market, its conduct must be assessed in the light of that provision.

81 Of course, that does not mean that an undertaking's strength is not relevant to the assessment of the lawfulness of the conduct in the market of such an undertaking in the light of Article 102 TFEU. The Court itself has based its analyses on the fact that an undertaking enjoyed a position of super-dominance or a quasi-monopoly (see, to that effect, Case C-333/94 P Tetra Pak v Commission [1996] ECR I-5951, paragraph 31, and Compagnie maritime belge transports and Others v Commission, paragraph 119). Nonetheless the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists.

[…]

83 The referring court seeks to ascertain, fifthly, whether the fact that the undertaking concerned has a dominant position solely in the wholesale market for ADSL input services is sufficient for the practice in question to be considered abusive, or whether, rather, it is necessary, for that purpose, that that undertaking also has such a position in the retail market for broadband connection services to end users.

84 It must be stressed, in that regard, that Article 102 TFEU gives no explicit guidance as to what is required in relation to where on the product markets the abuse took place. Accordingly, the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened (Tetra Pak v Commission, paragraph 24).

85 It follows that certain conduct on markets other than the dominated markets and having effects either on the dominated markets or on the non-dominated markets

themselves can be categorised as abusive (see, to that effect, Tetra Pak v Commission, paragraph 25).

86 While the application of Article 102 TFEU presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market, the fact remains that in the case of distinct, but associated, markets, the application of Article 102 TFEU to conduct found on the associated, non-dominated, market and having effects on that associated market can be justified by special circumstances (see, to that effect, Case 311/84 CBEM [1985] ECR 3261, paragraph 26, and Tetra Pak v Commission, paragraph 27).

87 Such circumstances can arise where the conduct of a vertically integrated dominant undertaking on an upstream market consists in attempting to drive out at least equally efficient competitors in the downstream market, in particular by applying margin squeeze to them. Such conduct is likely, not least because of the close links between the markets concerned, to have the effect of weakening competition in the downstream market.

88 Further, in such a situation, in the absence of any other economic and objective justification, such conduct can be explained only by the dominant undertaking's intention to prevent the development of competition in the downstream market and to strengthen its position, or even to acquire a dominant position, in that market by using means other than reliance on its own merits.

89 Consequently, the question whether a pricing practice introduced by a vertically integrated dominant undertaking in the wholesale market for ADSL input services and resulting in the margin squeeze of competitors of that undertaking in the retail market for broadband connection services to end users is abusive does not depend on whether that undertaking is dominant in that retail market."

311/84 - CBEM v CLT and IPB [1985] ECR 3261

" 11 in substance the first question asks whether article 86 of the Treaty applies to an undertaking holding a dominant position on a particular market where that position is due not to the activities of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on the market .

12 The centre belge proposes that the court should answer that question in the affirmative . It maintains that , according to the case-law of the court , an undertaking holding a monopoly in a particular service has a dominant position on the market in that service within the meaning of article 86 and that that article applies to the conduct of broadcasting organizations . Compagnie Luxembourgeoise cannot rely on the proviso in article 90 (2),

since it is not an undertaking ' entrusted with the operation of services of general economic interest ' for the purposes thereof .

13 Compagnie Luxembourgeoise states that the court held , in its judgment of 30 April 1974 in case 155/73 (Sacchi (1974) ECR 409), that a state may , for reasons of public interest of a non-economic nature , remove radio and television broadcasting from competition by conferring a monopoly on an undertaking . Extending the scope of the question put to the court , Compagnie Luxembourgeoise proposes , therefore , that the court should reply that it is not as such incompatible with article 86 of the Treaty for an undertaking to which a state has granted exclusive rights within the meaning of article 90 to enjoy a monopoly .

14 information publicite does not agree with the abstract definition of a dominant position which in its opinion is suggested by the question . It maintains that it is not possible to disregard the product or service at issue or the extent of the relevant market . Further , to fall within the provisions of article 86 the dominant position must affect trade between Member States and exist within a substantial part of the common market . Information publicite therefore proposes that the court should reply that the existence of a legal monopoly does not in itself entail a dominant position within the meaning of article 86 .

15 In the Commission ' s view , the notion of a dominant position , as defined by the court , refers to a factual situation independent of the reasons giving rise to that situation . The question must therefore be answered in the affirmative .

16 With regard to the first question , it must first of all be remembered that , according to the established case-law of the court , most recently confirmed by the judgment of 9 November 1983 in case 322/81 (Michelin v Commission (1983) ECR 3461), an undertaking occupies a dominant position for the purposes of article 86 where it enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers . The fact that the absence of competition or its restriction on the relevant market is brought about or encouraged by provisions laid down by law in no way precludes the application of article 86 , as the court has held , inter alia , in its judgments of 13 November 1975 in case 26/75 (General Motors v Commission (1975) ECR 1367), 16 November 1977 in case 13/77 (INNO v atab (1977) ECR 2115) and most recently in its judgment of 20 March 1985 in case 41/83 (Italy v Commission (1985) ECR 880).

17 although it is true , as Compagnie Luxembourgeoise has pointed out , that it is not incompatible with article 86 for an undertaking to which a Member State has granted exclusive rights within the meaning of article 90 of the Treaty to enjoy a monopoly , it is none the less apparent from the same article that such undertakings remain subject to the Treaty rules on competition and in particular those contained in article 86 . In its aforesaid

judgment of 30 April 1974 in the Sacchi case , the Court also stressed that , if certain Member States treat undertakings entrusted with the operation of television , even as regards their commercial activities and in particular advertising , as undertakings entrusted with the operation of services of general economic interest , the prohibitions of article 86 apply , as regards their behaviour within the market , by reason of article 90 (2), so long as it is not shown that the said prohibitions are incompatible with the performance of their tasks .

18 the reply to the first question must therefore be that article 86 of the EEC Treaty must be interpreted as applying to an undertaking holding a dominant position on a particular market , even where that position is due not to the activities of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market ."

ABUSE

C-85/76 - Hoffmann-La Roche v Commission [1979] ECR 461

" 91 (…)

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where , as a result of the very presence of the undertaking in question , the degree of competition is weakened and which , through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators , has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition ."

T-271/03 - Deutsche Telekom v Commission [2008] ECR II-477

"233 It must be borne in mind that an 'abuse' is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Hoffmann-La Roche v Commission, cited in paragraph 226 above, paragraph 91; AKZO v Commission, cited in paragraph 189 above, paragraph 69; order of the Court of 23 February 2006 in Case C-171/05 P Piau v Commission, not published in the ECR, paragraph 37; Irish Sugar v Commission, cited in paragraph 122 above, paragraph 111). "

C-549/10 P - Tomra and Others v Commission, Not yet published

" 17 In order to assess whether this ground of appeal is well founded, it must be recalled that the concept of abuse of a dominant position prohibited by Article 102 TFEU is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see Case C-52/09 TeliaSonera [2011] ECR I-0000, paragraph 27 and case-law cited).

18 None the less, the Commission, as part of its examination of the conduct of a dominant undertaking and for the purposes of identifying any abuse of a dominant position, is obliged to consider all of the relevant facts surrounding that conduct (see, to that effect, C-95/04 P British Airways v Commission [2007] ECR I-2331, paragraph 67).

19 It must be observed in that regard that where the Commission undertakes an assessment of the conduct of an undertaking in a dominant position, that assessment being an essential prerequisite of a finding that there is an abuse of such a position, the Commission is necessarily required to assess the business strategy pursued by that undertaking. For that purpose, it is clearly legitimate for the Commission to refer to subjective factors, namely the motives underlying the business strategy in question.

20 Accordingly, the existence of any anti-competitive intent constitutes only one of a number of facts which may be taken into account in order to determine that a dominant position has been abused.

21 However, the Commission is under no obligation to establish the existence of such intent on the part of the dominant undertaking in order to render Article 82 EC applicable."

Exploitative abuse

Excessive prices

C-26/75 - General Motors v Commission [1975] ECR 1367

"11 it is possible that the holder of the exclusive position referred to above may abuse the market by fixing a price - for a service which it is alone in a position to provide - which is to the detriment of any person acquiring a motor vehicle imported from another member state and subject to the approval procedure .

12 such an abuse might lie, inter alia, in the imposition of a price which is excessive in relation to the economic value of the service provided, and which has the effect of curbing

parallel imports by neutralizing the possibly more favourable level of prices applying in other sales areas in the community, or by leading to unfair trade in the sense of article 86 (2) (a).

[…]

16 it is not disputed that in the five cases to which the commission refers, and which arose between 15 march and 31 july 1973, the applicant imposed a charge which was excessive in relation to the economic value of the service provided by way of the approval procedure .

17 however, the applicant maintains on this point that the inspections which it carried out during this period represented an unusual activity on its part, in that it had only been made to assume responsibility for them as from 15 march 1973 when the state testing-stations were discharged from undertaking these same inspections .

18 as these inspections only constituted an occasional activity on the part of the applicant and one of minute importance in relation to the inspections which it normally carries out on the vehicles which it puts directly on the market and which are, therefore, manufactured in accordance with the standards imposed by belgian legislation, the departments responsible applied the charge which was until then normal for the inspection of the vehicles which it imported .

19 the applicant again draws attention to the fact that following the complaints made by the parties concerned it very quickly reduced the charge for the inspection of imported vehicles of european manufacture to a level which was more in line with the real cost of the operation and refunded the excess to the parties concerned, and that this took place before the commission began its investigations .

20 this conduct on the part of the applicant, the truth of which is not contested by the commission, cannot be regarded as an 'abuse' within the meaning of article 86 .

21 the applicant has given an adequate explanation of the circumstances in which, in order to meet a new responsibility transferred from the state testing-stations to the manufacturers or authorized agents of the different makes of motor car in belgium, it applied, for an initial period, to european cars a rate which was normally applied to vehicles imported from america .

22 the absence of any abuse is also shown by the fact that very soon afterwards the applicant brought its rates into line with the real economic cost of the operation, that it bore the consequences of doing so by reimbursing those persons who had made complaints to it and that it did so before any intervention on the part of the commission ."

C-27/76 - United Brands v Commission [1978] ECR 207

" 248 the imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under article 86 of the treaty .

249it is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition .

250in this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse .

251this excess could , inter alia , be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production , which whould disclose the amount of the profit margin ; however the commission has not done this since it has not analysed ubc ' s costs structure .

252the questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive , and , it the answer to this question is in the affirmative , whether a price has been imposed which is either unfair in itself or when compared to competing products .

253other ways may be devised - and economic theorists have not failed to think up several - of selecting the rules for determining whether the price of a product is unfair .

254while appreciating the considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking , its object , the complex nature of its set up , its territorial area of operations , whether it manufactures one or several products , the number of its subsidiaries and their relationship with each other , the production costs of the banana do not seem to present any insuperable problems .

[…]

258the commission bases its view that prices are excessive on an analysis of the differences - in its view excessive - between the prices charged in the different member states and on the policy of discriminatory prices which has been considered above .

C-395/87 – Tournier [1989] ECR 2521

" 38 When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a

comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position . In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States .

C-30/87 - Bodson v Pompes funèbres des régions libérées [1988] ECR 2479

"[…] That argument cannot be accepted . It is clear from the documents before the Court that the grant of the concession for the "external services" for funerals is regarded in France as a contract concluded between the commune and the concession holder, which, moreover, corresponds to the view taken by the national court . It follows from that finding that the level of prices is indeed attributable to the undertaking, since the latter assumes full responsibility for the contracts which it has concluded ."

In that regard, the questions to be determined are whether the difference between the cost actually incurred and the price actually charged is excessive, and, if the answer to that question is in the affirmative, whether a price has been imposed which is either unfair in itself or unfair when compared with competing products (judgment of 14 February 1978, United Brands and United Brands Continentaal v Commission, 27/76, EU:C:1978:22, paragraph 252).

Case C‑177/16 Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība

37 Nonetheless, as observed in essence by the Advocate General in point 36 of his Opinion, and as the Court has also recognised (see, to that effect, judgment of 14 February 1978, United Brands and United Brands Continentaal v Commission, 27/76, EU:C:1978:22, paragraph 253), there are other methods by which it can be determined whether a price may be excessive.

38 Thus, according to the case-law of the Court, a method based on a comparison of prices applied in the Member State concerned with those applied in other Member States must be considered valid. It is apparent from that case-law that, when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States, and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position (judgments of 13 July 1989, Tournier, 395/87, EU:C:1989:319, paragraph 38, and of 13 July 1989, Lucazeau and Others, 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 25).

39 However, having regard to the fact that, in the cases that led to the judgments referred to in the previous paragraph, the rates charged by a copyright management organisation of a Member State had been compared with those in force in all other Member States at that time, the referring court is unsure whether a comparison, such as that made by the Competition Council in the main proceedings between the rates applied by the AKKA/LAA in Latvia and those charged in Lithuania and Estonia, supported by a comparison with the rates charged in other Member States adjusted in accordance with the PPP index, is sufficiently representative.

40 In that regard, it should first be noted that a comparison cannot be considered to be insufficiently representative merely because it takes a limited number of Member States into account.

41 On the contrary, such a comparison may prove relevant, on condition, as observed by the Advocate General in point 61 of his Opinion, that the reference Member States are selected in accordance with objective, appropriate and verifiable criteria. Therefore, there can be no minimum number of markets to compare and the choice of appropriate analogue markets depends on the circumstances specific to each case.

42 Those criteria may include, inter alia, consumption habits and other economic and sociocultural factors, such as gross domestic product per capita and cultural and historical heritage. It will be for the referring court to assess the relevance of the criteria applied in the case in the main proceedings, while taking into account all the circumstances of the case.

43 So far as concerns the comparison of the rates applied by the copyright management organisation at issue in the main proceedings with those applied by organisations in the approximately twenty Member States other than Estonia and Lithuania, such a comparison may serve to verify the results already obtained by means of a comparison including a more limited number of Member States.

44 Next, it should be borne in mind that a comparison between the prices applied in the Member State concerned and those applied in other Member States must be made on a consistent basis (judgments of 13 July 1989, Tournier, 395/87, EU:C:1989:319, paragraph 38, and of 13 July 1989, Lucazeau and Others, 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 25).

45 In the present case, it is for the referring court to verify whether, in the reference Member States selected, the method of calculating rates, based on the surface area of the shop or service centre concerned, is analogous to the method of calculation applicable in Latvia. If this were the case, it would be permissible for that court to conclude that the basis for the comparison was consistent, on condition, however, that the PPP index had been taken into account in the comparison with the rates charged in Member States in which the economic conditions differ from those in Latvia.

46 In that last regard, it should be noted, as pointed out by the Advocate General in point 85 of his Opinion, that there are, as a general rule, significant differences in price levels between Member States for identical services, those differences being closely linked with the differences in citizens' purchasing power, as expressed by the PPP index. The ability of shop or service centre operators to pay for the services of the copyright management organisation is influenced by living standards and purchasing power. Thus the comparison, for an identical service, of the rates in force in several Member States in which living standards differ necessarily implies that the PPP index must be taken into account.

47 Finally, the referring court is uncertain as to whether it is appropriate to compare different user segments or, on the contrary, the average rate for all segments.

48 As was confirmed during the hearing, the term 'user segments' refers to shops and service centres of a specific surface area. In that regard, the case-file before the Court and the submissions made during the hearing show that there may be a difference in rates, inter alia, within the same specific segment.

49 It falls to the competition authority concerned to make the comparison and to define its framework, although it should be borne in mind that that authority has a certain margin of manoeuvre and that there is no single adequate method. For example, it should be noted that, in the cases which led to the judgments of 13 July 1989, Tournier (395/87, EU:C:1989:319), and of 13 July 1989, Lucazeau and Others, (110/88, 241/88 and 242/88, EU:C:1989:326), the comparison related to fees collected in several Member States from discothèques with certain specific features, one of which was the surface area.

50 Thus, it is permissible to make a comparison within one or several specific segments if there are indications that the possibly excessive nature of the fees affects those segments, this being a matter for the referring court to verify.

51 In the light of all of the foregoing, the answer to the second, third and fourth questions is that, for the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of point (a) of the second paragraph of Article 102 TFEU, it is appropriate to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the PPP index, provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments.

Exclusionary abuse

Predatory pricing

C-62/86 - AKZO v Commission [1991] ECR I-3359

" 70 It follows that Article 86 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, however, not all competition by means of price can be regarded as legitimate.

71 Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.

72 Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.

[…]

75 The abusive conduct alleged relates to threats said to have been made by AKZO against ECS in late 1979 and also to the prices offered or granted in respect of three flour additives between December 1980, the date of the first of the offers at issue, and July 1983, the date of the decision ordering interim measures, mentioned above, which required AKZO to comply with a system of minimum prices."

C-333/94 P - Tetra Pak v Commission [1996] ECR I-5951

" 41 In AKZO this Court did indeed sanction the existence of two different methods of analysis for determining whether an undertaking has practised predatory pricing. First, prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown.

42 At paragraph 150 of the judgment under appeal, the Court of First Instance carried out the same examination as did this Court in AKZO. For sales of non-aseptic cartons in Italy between 1976 and 1981, it found that prices were considerably lower than average variable costs. Proof of intention to eliminate competitors was therefore not necessary. In 1982, prices for those cartons lay between average variable costs and average total costs. For that reason, in paragraph 151 of its judgment, the Court of First Instance was at pains to establish ° and the appellant has not criticized it in that regard ° that Tetra Pak intended to eliminate a competitor.

[…]

44 Furthermore, it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated. The Court of First Instance found, at paragraphs 151 and 191 of its judgment, that there was such a risk in this case. The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors."

T-340/03 - France Télécom v Commission [2007] ECR II-107

" 130 It is clear from the case-law on predatory pricing that, first, prices below average variable costs give grounds for assuming that a pricing practice is eliminatory and that, if the prices are below average total costs but above average variable costs, those prices must be regarded as abusive if they are determined as part of a plan for eliminating a competitor (AKZO v Commission, paragraph 100 above, paragraphs 71 and 72; Case T-83/91 Tetra Pak v Commission [1994] ECR II-755, paragraphs 148 and 149, upheld by the Court of Justice in Case C-333/94 P Tetra Pak v Commission [1996] ECR I-5951, paragraph 41 (together, 'the Tetra Pak cases').

131 In the decision, the Commission presented three different analyses in order to clarify its approach. The first, set out in recitals 73 to 75 of the decision, is an analysis made on a simple accounting basis, integrating instantaneous costs and revenues. According to WIN itself, this analysis is a crude measure of receipts and expenses recorded in its accounts. Both parties agree that this method is inappropriate. Although WIN denies that this first analysis is in any way significant, it does not dispute the figures which were used. Generally, it recognises that 'almost all the data relating to costs comes from [WIN], a limited amount of data comes from France Télécom'.

132 The second analysis, described in recitals 76 to 86 of the decision, concerns the actual recovery of adjusted costs. According to the principle of depreciation of assets, the Commission spread the costs of acquiring customers over 48 months. On that basis, it made a separate assessment of adjusted variable costs and adjusted full costs, stating that the

Court of Justice lays down two tests for cost recovery, depending on whether or not the actions of the dominant firm form part of a plan to eliminate competitors. It is on this analysis that the Commission decision is based.

133 The Commission also made a third supplementary analysis, in recitals 97 to 106 of the decision, as to the recovery of the adjusted costs foreseeable ex ante. Admittedly, as WIN submits in its reply to the questions put by the Court, the third analysis reflects a very different approach, since the Commission does not seek to retrace the costs and actual revenues. However, according to the decision, that analysis only seeks to 'throw further light on the matter and no more'. In fact, the Commission expressly states in recital 72 of the decision that 'only the adjusted costs approach allows any valid conclusions to be drawn'. The Commission therefore used the second method, that of adjusted costs, in finding that the costs were not covered. It is therefore appropriate to verify the lawfulness of this method, but not necessary to rule on the lawfulness of the supplementary analysis as to the recovery of the adjusted costs foreseeable ex ante.

[…]

195 As regards the conditions for the application of Article 82 EC and the distinction between the object and effect of the abuse, it should be pointed out that, for the purposes of applying that article, showing an anti-competitive object and an anti-competitive effect may, in some cases, be one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect. Thus, with regard to the practices concerning prices, the Court of Justice held in AKZO v Commission, paragraph 100 above, that prices below average variable costs applied by an undertaking in a dominant position are regarded as abusive in themselves because the only interest which the undertaking may have in applying such prices is that of eliminating competitors, and that prices below average total costs but above average variable costs are abusive if they are determined as part of a plan for eliminating a competitor. In that case, the Court did not require any demonstration of the actual effects of the practices in question (see, to that effect, Case T-203/01 Michelin v Commission [2003] ECR II-4071, paragraphs 241 and 242).

196 Furthermore, it should be added that, where an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position within the meaning of Article 82 EC (Compagnie maritime belge transports and Others v Commission, paragraph 104 above, paragraph 149, and Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969, paragraph 191).

197 It is clear therefore that, in the case of predatory pricing, the first element of the abuse applied by the dominant undertaking comprises non-recovery of costs. In the case of non-

recovery of variable costs, the second element, that is, predatory intent, is presumed, whereas, in relation to prices below average full costs, the existence of a plan to eliminate competition must be proved. According to Case T-83/91 Tetra Pak v Commission, paragraph 130 above, paragraph 151, that intention to eliminate competition must be established on the basis of sound and consistent evidence.

[…]

227 In line with Community case-law, the Commission was therefore able to regard as abusive prices below average variable costs. In that case, the eliminatory nature of such pricing is presumed (see, to that effect, Case T-83/91 Tetra Pak v Commission, paragraph 130 above, paragraph 148). In relation to full costs, the Commission had also to provide evidence that WIN's predatory pricing formed part of a plan to 'pre-empt' the market. In the two situations, it was not necessary to establish in addition proof that WIN had a realistic chance of recouping its losses.

228 The Commission was therefore right to take the view that proof of recoupment of losses was not a precondition to making a finding of predatory pricing.

229 On the other hand, according to the Tetra Pak cases, paragraph 130 above, and AKZO v Commission, paragraph 100 above, it must be examined whether, where prices are lower than full costs but higher than variable costs, they form part of a plan to eliminate competition. However, in paragraph 215 above, the Court of First Instance came to the conclusion that the Commission furnished solid and consistent evidence as to the existence of a plan of predation for the entire infringement period."

C-202/07 P - France Télécom v Commission [2009] ECR I-2369

" 37 In those circumstances, it must be held that the judgment under appeal sets out sufficiently clearly the reasons which led the Court of First Instance to find that the circumstances giving rise to the present case, in particular the relationship between the level of prices applied by WIN and the average variable costs and average total costs borne by WIN, were analogous to those in Tetra Pak v Commission, and to find, accordingly, that proof of recoupment of losses does not constitute a necessary precondition to a finding of predatory pricing.

Margin Squeeze

T-271/03 - Deutsche Telekom v Commission [2008] ECR II-477

" '102 A margin squeeze exists if the charges to be paid to [the applicant] for wholesale [local loop] access [services], taking monthly charges and one-off charges together, are so expensive that competitors are forced to charge their end-users prices higher than the prices [the applicant] charges its own end-users for similar services. If wholesale charges [for local

loop access services] are higher than retail charges [for end-user access services], [the applicant's] competitors, even if they are at least as efficient as [the applicant], can never make a profit, because on top of the wholesale charges [for local loop access services] they pay to [the applicant] they also have other costs such as marketing, billing, debt collection …

103 If [the applicant] charges its competitors [wholesale] prices for [local loop] access [services] that are higher than its own prices for retail local network access, [the applicant] prevents its competitors from offering access via the local loop in addition to call services. …

104 [The applicant] takes the view that there cannot be abusive pricing in the form of a margin squeeze in the present case, because wholesale charges [for local loop access services] are imposed by [RegTP]. …

105 Contrary to [the applicant's] view, however, the margin squeeze is a form of abuse that is relevant to this case. On related markets on which competitors buy wholesale [local loop access] services from the established operator, and depend on the established operator in order to compete on a [retail] product or service market, there can very well be a margin squeeze between regulated wholesale [prices for local loop access services] and retail prices [for end-user access services]. To show that there is a margin squeeze it is sufficient that there should be a disproportion between the two charges such that competition is restricted. …'

[…]

166 In the present case, according to the contested decision (recital 201), '[t]he abuse committed by [the applicant] consists in the imposition of unfair prices in the form of a margin squeeze to the detriment of [the applicant's] competitors'. The Commission takes the view that there is 'an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision).

167 It is true that, in the contested decision, the Commission establishes only that the applicant has scope to adjust its retail prices. However, the abusive nature of the applicant's conduct is connected with the unfairness of the spread between its prices for wholesale access and its retail prices, which takes the form of a margin squeeze. Therefore, in view of the abuse found in the contested decision, the Commission was not required to demonstrate in that decision that the applicant's retail prices were, as such, abusive.

168 The applicant's argument that the abusive nature of a margin squeeze can arise only from the abusive nature of its retail prices must therefore be rejected.

[…]

169 In recitals 106 to 139 to the contested decision, the Commission sets out the method which it used to calculate the margin squeeze.

170 It submits first of all that the basis for establishing an abusive margin squeeze is the comparison between 'the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services' (recital 107 to the contested decision).

171 The Commission adds that '[i]n order to establish the existence of a margin squeeze it is essential that the wholesale and retail access services be comparable' (recital 109 to the contested decision). According to the Commission, '[the] established operator and its competitors as a rule provide retail services of all kinds. It has therefore to be considered whether the established operator's retail and wholesale services are comparable, in the sense that their technical features are the same or at least similar and that they allow the same or at least similar services to be provided' (recital 109 to the contested decision).

172 The Commission finds that the wholesale charges for unbundled access to local loops can indeed be compared with retail access charges, and that wholesale access enables the applicant's competitors to offer their end-users a range of different retail access services, namely analogue narrowband access, digital narrowband access (ISDN) and broadband access in the form of ADSL services (recitals 110 and 112 to the contested decision).

173 According to the Commission, there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services 'is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision). The Commission therefore relies on the applicant's charges and costs as a basis for assessing whether the applicant's pricing practices are abusive.

174 In order to determine whether the difference between the applicant's retail prices and the prices of its wholesale access leads to an abusive margin squeeze, the Commission compares the price of a single wholesale service (local loop access) with the price of a plurality of retail services (access to analogue, ISDN and ADSL connections) (recital 113 to the contested decision).

175 The Commission does not take revenues from telephone calls into account at the retail price level. It only examines the charges for access to the network, which it compares to the charges of wholesale access (recital 119 to the contested decision).

[…]

186 It must be observed first of all that the Commission considered in the contested decision whether the pricing practices of the dominant undertaking could have the effect of

removing from the market an economic operator that was just as efficient as the dominant undertaking. The Commission therefore relied exclusively on the applicant's charges and costs, instead of on the particular situation of the applicant's actual or potential competitors, in order to assess whether the applicant's pricing practices were abusive.

187 According to the Commission, 'there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision). In the present case, the margin squeeze is said to be abusive because the applicant itself 'would have been unable to offer its own retail services without incurring a loss if … it had had to pay the wholesale access price as an internal transfer price for its own retail operations' (recital 140 to the contested decision). In those circumstances, 'competitors [who] are just as efficient' as the applicant cannot 'offer retail access services at a competitive price unless they find additional efficiency gains' (recital 141 to the contested decision; see also recital 108 to the contested decision).

188 Next, it must be noted that, although the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze, it nevertheless follows clearly from the case-law that the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors.

189 Thus, in its judgment in Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 74, the Court of Justice took into consideration only the charges and costs of the dominant undertaking, AKZO, in order to assess whether AKZO's pricing practices were abusive. The approach suggested by Advocate General Lenz, according to which it was 'necessary to analyse the cost structure of all three oligopolists [namely AKZO and its two competitors], so that a reliable picture [could] be obtained of the price level that was in fact economically justified' (point 34 of his Opinion), was not therefore followed by the Court.

190 Similarly, the Court of First Instance held in Case T-5/97 Industrie des poudres sphériques v Commission [2000] ECR II-3755 that the fact that the applicant, which had complained of an alleged practice of margin squeezing, 'cannot, seemingly because of its higher processing costs, remain competitive in the sale of the derived product cannot justify characterising [the dominant undertaking's] pricing policy as abusive' (paragraph 179).

191 Finally, in its Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article [82 EC] (Case No IV/30.178 Napier Brown – British Sugar) (OJ 1988 L 284, p. 41; 'the Napier Brown/British Sugar decision'), the Commission also took the view that a margin

squeeze should be calculated on the basis of the charges and costs of the vertically integrated dominant operator (recital 66). It finds in that decision that '[t]he maintaining, by a dominant company, which is dominant in the markets for both a raw material and a corresponding derived product, of a margin between the price which it charges for a raw material to the companies which compete with the dominant company in the production of the derived product [on the one hand] and the price which it charges for the derived product [on the other], which is insufficient to reflect that dominant company's own costs of transformation (in this case the margin maintained by British Sugar between its industrial and retail sugar prices compared to its own repackaging costs) with the result that competition in the derived product is restricted, is an abuse of dominant position' (recital 66).

192 It must be added that any other approach could be contrary to the general principle of legal certainty. If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure – information which is generally not known to the dominant undertaking – the latter would not be in a position to assess the lawfulness of its own activities.

193 The Commission was therefore correct to analyse the abusive nature of the applicant's pricing practices solely on the basis of the applicant's particular situation and therefore on the basis of the applicant's charges and costs.

194 Since it is necessary to consider whether the applicant itself, or an undertaking just as efficient as the applicant, would have been in a position to offer retail services otherwise than at a loss if it had first been obliged to pay wholesale access charges as an internal transfer price, the applicant's argument that its competitors are not seeking to replicate its own customer pattern and can acquire additional revenue from innovative products which they alone supply on the market (as to which the applicant provides no details however) is ineffective. For the same reasons, the argument that competitors can exclude the possibility of (pre)selection cannot succeed.

C-280/08 P - Deutsche Telekom v Commission [2010] ECR I-9555

" 172 As regards the abusive nature of the appellant's pricing practices, it must be noted that subparagraph (a) of the second paragraph of Article 82 EC expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices.

173 Furthermore, the list of abusive practices contained in Article 82 EC is not exhaustive, so that the practices there mentioned are merely examples of abuses of a dominant position. The list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by the Treaty (see British Airways v Commission, paragraph 57 and the case-law cited).

174 In that regard, it must be borne in mind that, in prohibiting the abuse of a dominant position in so far as trade between Member States is capable of being affected, Article 82 EC refers to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see, to that effect, Hoffman-La Roche v Commission, paragraph 91; Nederlandsche Banden-Industrie-Michelin v Commission, paragraph 70; Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 69; British Airways v Commission, paragraph 66; and France Télécom v Commission, paragraph 104).

175 It is apparent from the case-law of the Court that, in order to determine whether the undertaking in a dominant position has abused such a position by its pricing practices, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition (see, to that effect, Nederlandsche Banden-Industrie-Michelin v Commission, paragraph 73, and British Airways v Commission, paragraph 67).

176 Since Article 82 EC thus refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition, a dominant undertaking, as has already been observed in paragraph 83 of the present judgment, has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (see, to that effect, France Télécom v Commission, paragraph 105 and the case-law cited).

177 It follows from this that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view, therefore, not all competition by means of price can be regarded as legitimate (see, to that effect, Nederlandsche Banden-Industrie-Michelin v Commission, paragraph 73; AKZO v Commission, paragraph 70; and British Airways v Commission, paragraph 68).

[…]

180 It is true, as paragraphs 175 to 177 of the present judgment have already shown, that Article 82 EC aims, in particular, to protect consumers by means of undistorted competition (see Joined Cases C-468/06 to C-478/06 Sot. Lélos kai Siaand Others [2008] ECR I-7139, paragraph 68).

181 However, the mere fact that the appellant would have to increase its retail prices for end-user access services in order to avoid the margin squeeze of its competitors who are as efficient as the appellant cannot in any way, in itself, render irrelevant the test which the General Court applied in the present case for the purpose of establishing an abuse under Article 82 EC.

182 By further reducing the degree of competition existing on a market – the end-user access services market – already weakened precisely because of the presence of the appellant, thereby strengthening its dominant position on that market, the margin squeeze also has the effect that consumers suffer detriment as a result of the limitation of the choices available to them and, therefore, of the prospect of a longer-term reduction of retail prices as a result of competition exerted by competitors who are at least as efficient in that market (see, to that effect, France Télécom v Commission, paragraph 112).

183 In those circumstances, in so far as the appellant has scope to reduce or end such a margin squeeze, as observed in paragraphs 77 to 86 of the present judgment, by increasing its retail prices for end-user access services, the General Court correctly held in paragraphs 166 to 168 of the judgment under appeal that that margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article 82 EC in view of the exclusionary effect that it can create for competitors who are at least as efficient as the appellant. The General Court was not, therefore, obliged to establish, additionally, that the wholesale prices for local loop access services or retail prices for end-user access services were in themselves abusive on account of their excessive or predatory nature, as the case may be.

[…]

198 In that regard, it must be borne in mind that the Court has already held that, in order to assess whether the pricing practices of a dominant undertaking are likely to eliminate a competitor contrary to Article 82 EC, it is necessary to adopt a test based on the costs and the strategy of the dominant undertaking itself (see AKZO v Commission, paragraph 74, and France Télécom v Commission, paragraph 108).

199 The Court pointed out, inter alia, in that regard that a dominant undertaking cannot drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them (see AKZO v Commission, paragraph 72).

200 In the present case, since, as is apparent from paragraphs 178 and 183 of the present judgment, the abusive nature of the pricing practices at issue in the judgment under appeal stems in the same way from their exclusionary effect on the appellant's competitors, the General Court did not err in law when it held, in paragraph 193 of the judgment under appeal, that the Commission had been correct to analyse the abusive nature of the appellant's pricing practices solely on the basis of the appellant's charges and costs.

201 As the General Court found, in essence, in paragraphs 187 and 194 of the judgment under appeal, since such a test can establish whether the appellant would itself have been able to offer its retail services to end-users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for local loop access services, it was suitable for determining whether the appellant's pricing practices had an exclusionary effect on competitors by squeezing their margins."

C-52/09 - TeliaSonera Sverige [2011] ECR I-527

" 32 In the present case, there would be such a margin squeeze if, inter alia, the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users.

33 In such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss or at artificially reduced levels of profitability.

34 It must moreover be made clear that since the unfairness, within the meaning of Article 102 TFEU, of such a pricing practice is linked to the very existence of the margin squeeze and not to its precise spread, it is in no way necessary to establish that the wholesale prices for ADSL input services to operators or the retail prices for broadband connection services to end users are in themselves abusive on account of their excessive or predatory nature, as the case may be (Deutsche Telekom v Commission, paragraphs 167 and 183).

35 In addition, as maintained by TeliaSonera, before the spread between the prices of those services can be regarded as squeezing the margins of competitors of the dominant undertaking, account must be taken not only of the prices of services supplied to competitors which are comparable to the services which TeliaSonera itself must obtain to have entry to the retail market, but also of the prices of comparable services supplied to end users on the retail market by TeliaSonera and its competitors. Similarly, a comparison must be made between the prices actually applied by TeliaSonera and its competitors over the same period of time.

36 Given the particular circumstances, described in paragraph 10 of this judgment, in which this reference for a preliminary ruling was submitted, it is not possible to provide the referring court with specific guidance in relation to the case in the main proceedings. Likewise, the markets described by that court must be regarded as the relevant markets, without prejudice, of course, to the correct definition of those markets, which it is for that court to provide.

37 However, as regards the criteria an interpretation of which is requested by that court to enable it correctly to assess whether TeliaSonera did infringe Article 102 TFEU by committing an abuse of a dominant position in the form of a margin squeeze, the following points can be made.

The prices to be taken into account

38 The Stockholms tingsrätt seeks to ascertain, first, whether, for that purpose, account should be taken not only of the retail prices applied by the dominant undertaking for services to end users, but also those applied by competitors for those services.

39 It must be recalled, in that regard, that the Court has already made clear that Article 102 TFEU prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors (see, to that effect, Deutsche Telekom v Commission, paragraph 177 and case-law cited).

40 Where an undertaking introduces a pricing policy intended to drive from the market competitors who are perhaps as efficient as that dominant undertaking but who, because of their smaller financial resources, are incapable of withstanding the competition waged against them, that undertaking is, accordingly, abusing its dominant position (see, to that effect, Deutsche Telekom v Commission, paragraph 199).

41 In order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy (see, to that effect, Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 74, and France Télécom v Commission, paragraph 108).

42 In particular, as regards a pricing practice which causes margin squeeze, the use of such analytical criteria can establish whether that undertaking would have been sufficiently efficient to offer its retail services to end users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for the intermediary services (see, to that effect, Deutsche Telekom v Commission, paragraph 201).

43 If that undertaking would have been unable to offer its retail services otherwise than at a loss, that would mean that competitors who might be excluded by the application of the pricing practice in question could not be considered to be less efficient than the dominant

undertaking and, consequently, that the risk of their exclusion was due to distorted competition. Such competition would not be based solely on the respective merits of the undertakings concerned.

44 Furthermore, the validity of such an approach is reinforced by the fact that it conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct, which is consistent with its special responsibility under Article 102 TFEU, as stated in paragraph 24 of this judgment. While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors (Deutsche Telekom v Commission, paragraph 202).

45 That said, it cannot be ruled out that the costs and prices of competitors may be relevant to the examination of the pricing practice at issue in the main proceedings. That might in particular be the case where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons, or where the service supplied to competitors consists in the mere use of an infrastructure the production cost of which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it, or again where the particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it.

46 It must therefore be concluded that, when assessing whether a pricing practice which causes a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the undertaking concerned on the retail services market. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined.

[…]

53 The special responsibility which a dominant undertaking has not to allow its conduct to impair genuine undistorted competition in the internal market concerns specifically the conduct, by commission or omission, which that undertaking decides on its own initiative to adopt (see, to that effect, the order in Case C-552/03 P Unilever Bestfoods v Commission [2006] ECR I-9091, paragraph 137).

54 TeliaSonera maintains, in that regard, that, in order specifically to protect the economic initiative of dominant undertakings, they should remain free to fix their terms of trade, unless those terms are so disadvantageous for those entering into contracts with them that those terms may be regarded, in the light of the relevant criteria set out in Case C-7/97 Bronner [1998] ECR I-7791, as entailing a refusal to supply.

55 Such an interpretation is based on a misunderstanding of that judgment. In particular, it cannot be inferred from paragraphs 48 and 49 of that judgment that the conditions to be met in order to establish that a refusal to supply is abusive must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser.

56 Such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to supply.

57 Moreover, it must be observed that since the Court was, in the said paragraphs of Bronner, called upon, in essence, only to interpret Article 86 of the EC Treaty (thereafter Article 82 EC, now Article 102 TFEU) with regard to the conditions under which a refusal to supply may be abusive, the Court did not make any ruling on whether the fact that an undertaking refuses access to its home-delivery scheme to the publisher of a rival newspaper where the latter does not at the same time entrust to it the carrying out of other services, such as sales in kiosks or printing, constitutes some other form of abuse of a dominant position, such as tied sales.

58 Moroever, if Bronner were to be interpreted otherwise, in the way advocated by TeliaSonera, that would, as submitted by the European Commission, amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 TFEU.

59 It follows that the absence of any regulatory obligation to supply the ADSL input services on the wholesale market has no effect on the question of whether the pricing practice at issue in the main proceedings is abusive. "

Tying/bundling

T-201/04 - Microsoft v Commission [2007] ECR II-3601

" 842 Microsoft refers to recital 794 to the contested decision and asserts that the Commission based its finding that there was abusive tying in the present case on the following factors:

– first, the tying and tied products are two separate products;

– second, the undertaking concerned is dominant in the market for the tying product;

– third, the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and

– fourth, the practice in question forecloses competition.

[…]

852 At recital 794 to the contested decision, the Commission states that tying prohibited under Article 82 EC requires the presence of the four factors set out at paragraph 842 above.

853 Next, it examines Microsoft's conduct in the light of those four factors (recitals 799 to 954 to the contested decision).

854 So, the Commission first observes that Microsoft has a dominant position on the client PC operating systems market (recital 799 to the contested decision). The Court notes that Microsoft does not dispute that fact.

855 Second, the Commission says that streaming media players and client PC operating systems are two separate products (recitals 800 to 825 to the contested decision).

856 Third, the Commission states that Microsoft does not give customers the choice of obtaining Windows without Windows Media Player (recitals 826 to 834 to the contested decision).

857 Fourth, the Commission claims that the tying of Windows Media Player forecloses competition in the media players market (recitals 835 to 954 to the contested decision). It observes, in particular, that in classical tying cases both it and the Community Courts 'considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product' (recital 841 to the contested decision). The Commission states, however, that in the present case there are good reasons not to assume without further analysis that tying Windows Media Player constitutes conduct which by its very nature is liable to foreclose competition (ibid.). The Commission considers, in essence, that 'tying [Windows Media Player] with the dominant Windows makes [Windows Media Player] the platform of choice for complementary content and applications which in turn [creates a risk of] foreclosing competition in the market for media players' (recital 842 to the contested decision). Furthermore, '[t]his has spillover effects on competition in related products such as media encoding and management software (often server-side), but also in client PC operating systems for which media players compatible with quality content are an important application' (ibid.).

858 Last, the Commission examines the basis on which Microsoft relies in its attempt to demonstrate that the abusive conduct imputed to it is objectively justified (recitals 955 to 970 to the contested decision).

859 The Court considers that the Commission's analysis of the constituent elements of bundling is correct and that it is consistent both with Article 82 EC and with the case-law. The Commission was correct to rely on the factors set out at recital 794 to the contested decision and on the fact that the tying was without objective justification in deciding whether Microsoft's conduct constituted abusive tying. Those factors can be deduced both

from the very concept of bundling and from the case-law (see, in particular, Case T-30/89 Hilti v Commission [1991] ECR II-1439, upheld in Case C-53/92 P Hilti v Commission [1994] ECR I-667 (both cases being referred to below as 'Hilti') and judgments of the Court of First Instance and the Court of Justice in Tetra Pak II, paragraph 293 above).

860 It must be borne in mind that the list of abusive practices set out in the second paragraph of Article 82 EC is not exhaustive and that the practices mentioned there are merely examples of abuse of a dominant position (see, to that effect, Case C-333/94 P Tetra Pak II, paragraph 293 above, paragraph 37). It is settled case-law that the list of practices contained in that provision is not an exhaustive enumeration of the abuses of a dominant position prohibited by the EC Treaty (Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraph 26, and Compagnie maritime belge transports and Others v Commission, paragraph 229 above, paragraph 112).

861 It follows that bundling by an undertaking in a dominant position may also infringe Article 82 EC where it does not correspond to the example given in Article 82(d) EC. Accordingly, in order to establish the existence of abusive bundling, the Commission was correct to rely in the contested decision on Article 82 EC in its entirety and not exclusively on Article 82(d) EC.

862 In any event, the Court holds that the constituent elements of abusive tying identified by the Commission at recital 794 to the contested decision coincide effectively with the conditions laid down in Article 82(d) EC.

[…]

917 First of all, it must be observed that, as the Commission correctly states at recital 803 to the contested decision, the distinctness of products for the purpose of an analysis under Article 82 EC has to be assessed by reference to customer demand. Furthermore, Microsoft clearly shares that opinion (see paragraph 890 above).

918 The Commission was also correct to state, at the same recital, that in the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abusive tying.

919 Microsoft's argument that the Commission thus applied the wrong test and that it ought in reality to have ascertained whether what was alleged to be the tying product was regularly offered without the tied product or whether customers 'want[ed] Windows without media functionality' cannot be accepted.

920 In the first place, the Commission's argument finds support in the case-law (see, to that effect, Case C-333/94 P Tetra Pak II, paragraph 293 above, paragraph 36; Case T-30/89 Hilti, paragraph 859 above, paragraph 67; and Case T-83/91 Tetra Pak II, paragraph 293 above, paragraph 82).

921 In the second place, as the Commission correctly observes in its pleadings, Microsoft's argument, based on the concept that there is no demand for a Windows client PC operating system without a streaming media player, amounts to contending that complementary products cannot constitute separate products for the purposes of Article 82 EC, which is contrary to the Community case-law on bundling. To take Hilti, for example, it may be assumed that there was no demand for a nail gun magazine without nails, since a magazine without nails is useless. However, that did not prevent the Community Courts from concluding that those two products belonged to separate markets.

922 In the case of complementary products, such as client PC operating systems and application software, it is quite possible that customers will wish to obtain the products together, but from different sources. For example, the fact that most client PC users want their client PC operating system to come with word-processing software does not transform those separate products into a single product for the purposes of Article 82 EC."

Selective price discrimination

C-209/10 - Post Danmark, Not yet published

" 19 By its questions, which may appropriately be examined together, the court making the reference asks, in essence, what the circumstances are in which a policy, pursued by a dominant undertaking, of charging low prices to certain former customers of a competitor must be considered to amount to an exclusionary abuse, contrary to Article 82 EC, and, in particular, whether the finding of such an abuse may be based on the mere fact that the price charged to a single customer by the dominant undertaking is lower than the average total costs attributed to the business activity concerned, but higher than the total incremental costs pertaining to the latter.

20 It is apparent from case-law that Article 82 EC covers not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition (see Case C-52/09 TeliaSonera Sverige [2011] ECR I-0000, paragraph 24 and case-law cited). It is in the latter sense that the expression 'exclusionary abuse' appearing in the questions referred is to be understood.

21 It is settled case-law that a finding that an undertaking has such a dominant position is not in itself a ground of criticism of the undertaking concerned (Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, paragraph 57, and Joined Cases C-395/96 P and C-396/96 P Compagnie maritime belge transports and Others v Commission [2000] ECR I-1365, paragraph 37). It is in no way the purpose of Article 82 EC to prevent an undertaking from acquiring, on its own merits, the dominant position on a market (see, inter alia, TeliaSonera Sverige, paragraph 24). Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.

22 Thus, not every exclusionary effect is necessarily detrimental to competition (see, by analogy, TeliaSonera Sverige, paragraph 43). Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.

23 According to equally settled case-law, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (Case C-202/07 P France Telecom v Commission [2009] ECR I-2369, paragraph 105 and case-law cited). When the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account.

24 In that regard, it is also to be borne in mind that Article 82 EC applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition (see, to that effect, AKZO v Commission, paragraph 69; France Télécom v Commission, paragraphs 104 and 105; and Case C-280/08 P Deutsche Telekom v Commission [2010] ECR I-0000, paragraphs 174, 176 and 180 and case-law cited).

25 Thus, Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, not all competition by means of price may be regarded as legitimate (see, to that effect, AKZO v Commission, paragraphs 70 and 72; France Télécom v Commission, paragraph 106; and Deutsche Telekom v Commission, paragraph 177).

26 In order to determine whether a dominant undertaking has abused its dominant position by its pricing practices, it is necessary to consider all the circumstances and to examine whether those practices tend to remove or restrict the buyer's freedom as regards choice of sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition (see, to that effect, Deutsche Telekom v Commission, paragraph 175 and case-law cited).

27 In AKZO v Commission, in which the issue was to determine whether an undertaking had practised predatory pricing, the Court held, in the first place, at paragraph 71, that prices below the average of 'variable' costs (those that vary depending on the quantities produced) must, in principle, be regarded as abusive, inasmuch as, in charging those prices, a dominant undertaking is deemed to pursue no economic purpose other than that of

driving out its competitors. In the second place, it held, at paragraph 72, that prices below average total costs, but above average variable costs, must be regarded as abusive if they are part of a plan for eliminating a competitor.

28 Thus, in order to assess the lawfulness of a low-price policy practised by a dominant undertaking, the Court has made use of criteria based on comparisons of the prices concerned and certain costs incurred by the dominant undertaking, as well as on the latter's strategy (AKZO v Commission, paragraph 74, and France Télécom v Commission, paragraph 108).

29 As to whether Post Danmark pursued an anti-competitive strategy, it can be seen from the documents before the Court that the complaint at the source of the main proceedings was based on the suggestion that Post Danmark, by a policy of low prices directed at certain of its competitor's major customers, might drive that competitor from the market in question. However, as is apparent from the order for reference, it could not be established that Post Danmark had deliberately sought to drive out that competitor.

30 Moreover, contrary to the line of argument put forward by the Danish Government, which has submitted observations in these proceedings in support of the Konkurrencerådet's position in the main proceedings, the fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as 'price discrimination', that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.

[…]

38 Indeed, to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term.

39 It is for the court making the reference to assess the relevant circumstances of the case in the main proceedings in the light of the finding made in the previous paragraph. In any event, it is worth noting that it appears from the documents before the Court that Forbruger-Kontakt managed to maintain its distribution network despite losing the volume of mail related to the three customers involved and managed, in 2007, to win back the Coop group's custom and, since then, that of the Spar group."

Rebates

C-549/10 P - Tomra and Others v Commission, Not yet published

" 69 As regards rebates granted by a dominant undertaking to its customers, the Court has stated that those may infringe Article 102 TFEU, even where they do not correspond to any of the examples mentioned in the second paragraph of that Article 102 (see, to that effect, British Airways v Commission, paragraph 58 and case-law cited).

70 In the event that an undertaking in a dominant position makes use of a system of rebates, the Court has ruled that that undertaking abuses that position where, without tying the purchasers by a formal obligation, it applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining – whether the quantity of its purchases is large or small – all or most of its requirements from the undertaking in a dominant position (see Case 85/76 Hoffman-La Roche [1979] ECR 461, paragraph 89, and Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, paragraph 71).

71 In that regard, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition (see Nederlandsche Banden-Industrie-Michelin v Commission, paragraph 73).

72 As regards the present case, it is clear from paragraph 213 of the judgment under appeal that a rebate system must be regarded as infringing Article 102 TFEU if it tends to prevent customers of the dominant undertaking from obtaining their supplies from competing producers. "

[…]

78 The General Court added, in that regard, in paragraph 267 of the judgment under appeal, that the exclusionary mechanism represented by retroactive rebates does not require the dominant undertaking to sacrifice profits, since the cost of the rebate is spread across a large number of units. If retroactive rebates are given, the average price obtained by the dominant undertaking may well be far above costs and ensure a high average profit margin. However, retroactive rebate schemes ensure that, from the point of view of the customer, the effective price for the last units is very low because of the 'suction effect'. The General Court therefore rejected as ineffective the claims made by Tomra that there were errors of fact in the analysis within the contested decision of the level of prices charged by them.

79 The General Court was therefore justified in ruling, in essence, in paragraphs 269 to 271 of the judgment under appeal, that the loyalty mechanism was inherent in the supplier's ability to drive out its competitors by means of the suction to itself of the contestable part of demand. When such a trading instrument exists, it is therefore unnecessary to undertake an analyse of the actual effects of the rebates on competition given that, for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to demonstrate that the conduct at issue is capable of having an effect on competition, as recalled in paragraph 68 of this judgment. "

T-155/06 - Tomra Systems and Others v Commission [2010] ECR II-4361

" 59 As to the applicants' claim that the Commission did not, in the contested decision, analyse the exclusivity of the agreements on the basis of the applicable national law, it should be recalled that there is no need for the practices of a dominant undertaking to tie purchasers by a formal undertaking in order for it to be found that those practices amount to an abuse of a dominant position within the meaning of Article 82 EC. It is enough that those practices give customers an incentive not to turn to competing suppliers and to obtain all or most of their requirements exclusively from the undertaking concerned (see, to that effect, Hoffmann-La Roche v Commission, paragraphs 89 and 90).

[…]

208 It should also be recalled that, according to case-law, an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position (Hoffmann-La Roche v Commission, paragraph 89).

209 Obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny producers access to the market (Hoffmann-La Roche v Commission, paragraph 90).

210 With more particular regard to the granting of rebates by an undertaking in a dominant position, it is apparent from a consistent line of decisions that a loyalty rebate, which is granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, is contrary to Article 82 EC. Such a rebate is designed through the grant of financial advantage, to prevent customers from obtaining their supplies from competing producers (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraph 518, and Michelin II, paragraph 56).

211 A rebate system which has a foreclosure effect on the market will be regarded as contrary to Article 82 EC if it is applied by an undertaking in a dominant position. For that reason, the Court has held that a rebate which depended on a purchasing target being achieved also infringed Article 82 EC (Michelin II, paragraph 57).

212 Quantity rebate systems linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff. Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position (Michelin II, paragraph 58).

213 It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article 82 EC unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of a loyalty and target rebate, to prevent customers from obtaining their supplies from competitors (see Hoffmann-La Roche v Commission, paragraph 90, and Michelin II, paragraph 59).

214 In determining whether a quantity rebate system is abusive, it will be necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (Michelin II, paragraph 60).

215 It may be concluded from that line of cases, as the applicants indeed maintain, that in order to determine whether exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes are compatible with Article 82 EC, it is necessary to ascertain whether, following an assessment of all the circumstances and, thus,

also of the context in which those agreements operate, those practices are intended to restrict or foreclose competition on the relevant market or are capable of doing so.

[…]

238 It should be stated, first of all, that, in essence, the question that arises is whether the Commission, in order to prove the foreclosure of competitors from the market as a whole, ought to have determined the minimum viability threshold necessary to operate on the relevant market and ought then to have determined whether the non-contestable portion of the market (that is to say, the part of demand tied by the applicants' practices) was sufficiently large to be capable of having an exclusionary effect vis-à-vis competitors.

239 In the present case, the Commission, in the contested decision, found that, in the countries and during the years in respect of which the finding of infringement was made, the part of demand foreclosed was 'substantial' or 'not insubstantial' and that, particularly during the 'key years' of growth on each of the relevant markets, it represented a very significant proportion' (see recital 392 to the contested decision). The contested decision did not, however, establish a precise threshold beyond which the applicants' practices would be capable of excluding competitors.

240 The Commission, rightly, held that by foreclosing a significant part of the market, as in the present case, the dominant undertaking restricted entry to one or a few competitors and thus limited the intensity of competition on the market as a whole.

241 In fact, the foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors. First, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. Second, it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.

242 In that connection, only an analysis of the circumstances of the case, such as the analysis carried out by the Commission in the contested decision, may make it possible to establish whether the practices of an undertaking in a dominant position are capable of excluding competition. It would, however, be artificial to establish without prior analysis the portion of the tied market beyond which the practices of a dominant undertaking may have an exclusionary effect on competitors.

[…]

269 As regards the applicants' argument that competitors were not restricted to selling a small number of units to each customer, it must be stated that it is inherent in a strong

dominant position, such as that occupied by the applicants, that, for a substantial part of the demand, there are no proper substitutes for the product supplied by the dominant undertaking. The dominant supplier is thus, to a large extent, an unavoidable trading partner (see, to that effect, Hoffmann-La Roche v Commission, paragraph 41). It follows that in those circumstances the contested decision was correct in stating that customers turned to alternative suppliers only for a limited portion of their purchases.

[…]

295 As has been recalled at paragraphs 208 and 209 above, according to well-established case-law, an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position (Hoffmann-La Roche v Commission, paragraph 89).

296 In fact, obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny producers access to the market (Hoffmann-La Roche v Commission, paragraph 90). "

T-286/09 Intel Corp v COM

II – The heads of claim for annulment of the contested decision

A – Horizontal questions concerning the legal assessments carried out by the Commission

1. The burden of proof and the standard of proof required

61 The applicant refers to the case-law of the European Union Courts and states, inter alia, that competition cases of the same nature as the present case are of a penal nature, which means that a high standard of proof and the presumption of innocence apply.

62 According to Article 2 of Regulation No 1/2003, in any proceedings for the application of Article 82 EC, the burden of proving an infringement of that article rests on the party or

the authority alleging the infringement, namely, in the present case, the Commission. Furthermore, according to well settled case-law, any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine (Joined Cases T‑67/00, T‑68/00, T‑71/00 and T‑78/00 JFE Engineering and Others v Commission [2004] ECR II‑2501, paragraph 177, and Case T‑112/07 Hitachi and Others v Commission [2011] ECR II‑3871, paragraph 58).

63 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, and from Article 47 of the Charter of Fundamental Rights of the European Union. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case C‑199/92 P Hüls v Commission [1999] ECR I‑4287, paragraphs 149 and 150; and Case C‑235/92 P Montecatini v Commission [1999] ECR I‑4539, paragraphs 175 and 176; JFE, paragraph 62 above, paragraph 178).

64 Although the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement, as held by the case-law concerning the implementation of Article 81 EC (see, to that effect Joined Cases C‑238/99 P, C‑244/99 P, C‑245/99 P, C‑247/99 P, C‑250/99 P to C‑252/99 P and C‑254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I‑8375, paragraphs 513 to 523). That principle applies also in cases concerning the implementation of Article 82 EC (Case T‑321/05 AstraZeneca v Commission [2010] ECR II‑2805 (‘AstraZeneca’), paragraph 477).

65 With respect to the probative force of the evidence used by the Commission, a distinction should be drawn between two situations.

66 First, where the Commission finds that there has been an infringement of the competition rules on the basis that the established facts cannot be explained other than by the existence of anti-competitive behaviour, the Courts of the European Union will find it necessary to annul the decision in question where those undertakings put forward

arguments which cast the facts established by the Commission in a different light and thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement occurred. In such a case, it cannot be considered that the Commission has adduced proof of an infringement of competition law (see, to that effect, Joined Cases 29/83 and 30/83 Compagnie royale asturienne des mines and Rheinzink v Commission [1984] ECR 1679, paragraph 16, and Joined Cases C‑89/95, C‑104/85, C‑114/85, C‑116/85, C‑117/85 and C‑125/85 to C‑129/85 Ahlström Osakeyhtiö and Others v Commission [1993] ECR I‑1307, paragraphs 126 and 127).

67 Second, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance was not capable of affecting the probative value of that evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance relied on by it and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission (see, to that effect, Case T‑141/08 E.ON Energie v Commission [2010] ECR II‑5761, paragraph 56 and the case-law cited).

68 It is in the light of the foregoing considerations that it is necessary to consider whether the Commission proved to the requisite legal standard the circumstances relied on in the contested decision in the light of the applicant’s pleas.

2. The legal characterisation of the rebates and payments in consideration of exclusive supply

69 At recital 924 of the contested decision, the Commission found that the level of the rebates granted to Dell, HP, NEC and Lenovo was de facto conditional upon those companies purchasing all or almost all of their x86 CPU requirements, at least in a certain segment, from Intel and that, consequently, those undertakings’ freedom to choose was restricted. As regards the payments granted to MSH, the Commission found, at the same recital, that those payments were conditional upon MSH selling only PCs based on Intel x86 CPUs and that they thereby restricted MSH’s freedom to choose. The Commission stated, at recital 925 of the contested decision that, in the absence of objective justification, those findings are sufficient to establish an infringement of Article 82 EC.

70 The applicant contests the Commission’s legal characterisation of the payments granted. The applicant maintains in essence that the Commission was required to carry out an assessment of all the surrounding circumstances to see whether the rebates and

payments complained of were capable of restricting competition. Before finding that the grant of a rebate is contrary to Article 82 EC, the Commission must prove that those rebates are actually capable of foreclosing competition to the detriment of consumers. Where the conduct is historic, the Commission must prove that the agreements complained of actually led to the foreclosure of competitors.

71 The Commission maintains that the rebates at issue amounted to 'fidelity rebates within the meaning of Hoffmann-La Roche' as resulting from Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461 ('Hoffmann-La Roche'). It contends that, for this type of practice, it is not necessary to establish actual or potential foreclosure effects on a case-by-case basis.

a) The rebates granted to the OEMs in consideration of exclusive or quasi-exclusive supply

1) Legal characterisation

72 According to settled case-law, an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate (Hoffmann-La Roche, paragraph 71 above, paragraph 89, and Case T‑155/06 Tomra Systems and Others v Commission [2010] ECR II‑4361 ('Case T‑155/06 Tomra'), paragraph 208).

73 The same applies where that undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining — whether the quantity of its purchases is large or small — all or most of its requirements from the undertaking in a dominant position (Hoffmann-La Roche, paragraph 71 above, paragraph 89, and Case C‑549/10 P Tomra Systems and Others v Commission [2012] ECR ('Case C‑549/10 P Tomra'), paragraph 70).

74 As regards in particular whether the grant of a rebate by an undertaking in a dominant position can be characterised as abusive, a distinction should be drawn between three categories of rebates (see, to that effect, Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461 ('Michelin I'), paragraphs 71 to 73, and Case C‑95/04 P British Airways v Commission [2007] ECR I‑2331 ('Case C‑95/04 P British Airways'), paragraphs 62, 63, 65, 67 and 68).

75 First, quantity rebate systems ('quantity rebates') linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC. If increasing the

quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff. Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position (see Case T‑203/01 Michelin v Commission [2003] ECR II‑4071 ('Michelin II'), paragraph 58 and the case-law cited).

76 Second, there are rebates the grant of which is conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position. That type of rebate, to which the Commission refers by the expression 'fidelity rebates within the meaning of Hoffmann-La Roche', will subsequently be referred to as 'exclusivity rebates'. It should be noted that that expression will also be used for rebates which are not conditional on exclusive supply but on the customer's obtaining most of its requirements from the undertaking in a dominant position.

77 Such exclusivity rebates, when applied by an undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based — save in exceptional circumstances — on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market (see, to that effect, Hoffmann-La Roche, paragraph 71 above, paragraph 90, and Case T‑155/06 Tomra, paragraph 72 above, paragraph 209). Such rebates are designed, through the grant of a financial advantage, to prevent customers from obtaining their supplies from competing producers (Hoffmann-La Roche, paragraph 71 above, paragraph 90, and Case T‑155/06 Tomra, paragraph 72 above, paragraph 210).

78 Third, there are other rebate systems where the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply from the undertaking in a dominant position, but where the mechanism for granting the rebate may also have a fidelity-building effect ('rebates falling within the third category'). That category of rebates includes inter alia rebate systems depending on the attainment of individual sales objectives which do not constitute exclusivity rebates, since those systems do not contain any obligation to obtain all or a given proportion of supplies from the dominant undertaking. In examining whether the application of such a rebate constitutes an abuse of dominant position, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition (see, to that effect, Michelin I, paragraph 74 above, paragraph 73; Case C‑95/04 P British Airways, paragraph 74 above, paragraphs 65 and 67; and Case C‑549/10 P Tomra, paragraph 73 above, paragraph 71).

79 The rebates granted to Dell, HP, NEC and Lenovo to which the Commission referred, in particular in Article 1(a) to (d) of the contested decision, are rebates falling within the second category, namely exclusivity rebates. According to the Commission's findings set out in the contested decision, those rebates were conditional upon customers' purchasing from Intel, at least in a certain segment, either all their x86 CPU requirements, in the case of Dell and Lenovo, or most of their requirements, namely 95% in the case of HP and 80% in the case of NEC.

80 The Court would point out that, contrary to the applicant's claim, the question whether an exclusivity rebate can be categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect.

81 It follows from Hoffmann-La Roche, paragraph 71 above (paragraphs 89 and 90), that that type of rebate constitutes an abuse of a dominant position if there is no objective justification for granting it. The Court of Justice did not require proof of a capacity to restrict competition depending on the circumstances of the case.

82 In addition, it follows from Michelin I, paragraph 74 above, and from Case C‑95/04 P British Airways, paragraph 74 above, that it is necessary to assess all the circumstances of the case only in the case of rebates falling within the third category. In paragraph 71 of Michelin I, paragraph 74 above, the Court of Justice drew attention to the case-law according to which a rebate, which by offering customers financial advantages tends to prevent them from obtaining their supplies from competing manufacturers, amounts to an abuse within the meaning of Article 82 EC. Next, the Court held, in paragraph 72 of that judgment, that the rebate system at issue in that case did not amount to a mere quantity discount or to a system containing an obligation to obtain all or a given proportion of supplies from the undertaking in a dominant position. The Court lastly observed, in paragraph 73 of that judgment, that it is 'therefore' necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate.

83 In Case C‑95/04 P British Airways, paragraph 74 above, the Court first of all recalled, in paragraph 62, the case-law resulting from Hoffmann-La Roche, paragraph 70 above, and then noted the difference between the facts forming the basis of the latter judgment and those underlying Michelin I, paragraph 74 above, stating, in paragraph 65, that Michelin I concerned discounts which did not contain any obligation on the part of the customers of the undertaking in a dominant position to obtain all or a given proportion of their supplies from that undertaking. Next, the Court held, in paragraph 67, that it followed from the case-law that it is necessary to consider all the circumstances in order to determine whether an undertaking in a dominant position has abused such a position by applying a system of discounts 'such as that described in paragraph 65 of this judgment'. Lastly, in paragraph 68, the Court held that the need to determine whether discounts can produce an exclusionary effect concerns a system of discounts or bonuses 'which constitute neither quantity

discounts or bonuses nor fidelity discounts or bonuses within the meaning of the judgment in Hoffmann-La Roche'.

84 It follows that, according to the case-law, it is only in the case of rebates falling within the third category that it is necessary to assess all the circumstances, and not in the case of exclusivity rebates falling within the second category.

85 That approach can be justified by the fact that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition.

86 The capability of tying customers to the undertaking in a dominant position is inherent in exclusivity rebates. The grant by an undertaking in a dominant position of a rebate in consideration of a customer's obtaining all or most of its requirements implies that the undertaking in a dominant position grants a financial advantage designed to prevent customers from obtaining their supplies from competing producers. It is therefore not necessary to examine the circumstances of the case in order to determine whether that rebate is designed to prevent customers from obtaining their supplies from competitors.

87 It should moreover be noted that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of foreclosing competitors. A financial advantage granted for the purpose of inducing a customer to obtain all or most of its requirements from the undertaking in a dominant position means that that customer has an incentive not to obtain, in respect of the part of its requirements concerned by the exclusivity condition, supplies from competitors of the undertaking in a dominant position.

88 In that context, it should be observed that a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that access is made more difficult (see, to that effect, Michelin I, paragraph 74 above, paragraph 85; Case C‑52/09 TeliaSonera Sverige [2011] ECR I‑527 ('TeliaSonera'), paragraph 63, and Michelin II, paragraph 75 above, paragraph 244). A financial incentive granted by an undertaking in a dominant position in order to induce a customer not to obtain, in respect of the part of its requirements concerned by the exclusivity condition, supplies from its competitors is by its very nature capable of making access to the market more difficult for those competitors.

89 Although exclusivity conditions may, in principle, have beneficial effects for competition, so that in a normal situation on a competitive market, it is necessary to assess their effects on the market in their specific context (see, to that effect, Case C‑234/89 Delimitis [1991] ECR I‑935, paragraphs 14 to 27), those considerations cannot be accepted in the case of a market where, precisely because of the dominant position of one of the economic operators, competition is already restricted (see, to that effect, Case C‑310/93 P BPB Industries and British Gypsum v Commission [1995] ECR I‑865 ('Case C‑310/93 P BPB

Industries and British Gypsum'), paragraph 11, and the Opinion of Advocate General Léger in that case, points 42 to 45).

90 That approach is justified by the special responsibility that an undertaking in a dominant position has not to allow its conduct to impair genuine undistorted competition in the common market and by the fact that, where an economic operator holds a strong position in the market, exclusive supply conditions in respect of a substantial proportion of purchases by a customer constitute an unacceptable obstacle to access to the market (see, to that effect, Case T‑65/89 BPB Industries and British Gypsum v Commission [1993] ECR II‑389 ('Case T‑65/89 BPB Industries and British Gypsum'), paragraphs 65 to 68). In that case, the exclusivity of supply causes additional interference with the structure of competition on the market. Thus, the concept of abuse in principle includes any obligation to obtain supplies exclusively from an undertaking in a dominant position which benefits that undertaking (see, to that effect, Hoffmann-La Roche, paragraph 71 above, paragraphs 120, 121 and 123, Case C‑310/93 P BPB Industries and British Gypsum, paragraph 89 above, paragraph 11, and the Opinion of Advocate General Léger in that case, paragraph 89 above, points 46 and 47).

91 Furthermore, it must also be stated that it is inherent in a strong dominant position, such as that occupied by the applicant, that, for a substantial part of the demand, there are no proper substitutes for the product supplied by the dominant undertaking. The supplier in a dominant position is thus, to a large extent, an unavoidable trading partner (see, to that effect, Hoffmann-La Roche, paragraph 71 above, paragraph 41; Case C‑95/04 P British Airways, paragraph 74 above, paragraph 75; and Case T‑155/06 Tomra, paragraph 72 above, paragraph 269). In the present case, the applicant does not contest the findings made in the contested decision that its position on the market during the period of the infringement found in this case was that of an unavoidable trading partner.

92 It follows from the position of unavoidable trading partner that customers will in any event obtain part of their requirements from the undertaking in a dominant position ('the non-contestable share'). The competitor of an undertaking in a dominant position is not therefore in a position to compete for the full supply of a customer, but only for the portion of the demand exceeding the non-contestable share ('the contestable share'). The contestable share is thus the portion of a customer's requirements which can realistically be switched to a competitor of the undertaking in a dominant position in any given period, as the Commission states at recital 1009 of the contested decision. The grant of exclusivity rebates by an undertaking in a dominant position makes it more difficult for a competitor to supply its own goods to customers of that dominant undertaking. If a customer of the undertaking in a dominant position obtains supplies from a competitor by failing to comply with the exclusivity or quasi-exclusivity condition, it risks losing not only the rebates for the units that it switched to that competitor, but the entire exclusivity rebate.

93 In order to submit an attractive offer, it is not therefore sufficient for the competitor of an undertaking in a dominant position to offer attractive conditions for the units that that competitor can itself supply to the customer; it must also offer that customer compensation for the loss of the exclusivity rebate. In order to submit an attractive offer, the competitor must therefore apportion the rebate that the undertaking in a dominant position grants in respect of all or almost all of the customer's requirements, including the non-contestable share, to the contestable share alone. Thus, the grant of an exclusivity rebate by an unavoidable trading partner makes it structurally more difficult for a competitor to submit an offer at an attractive price and thus gain access to the market. The grant of exclusivity rebates enables the undertaking in a dominant position to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor.

94 Lastly, it should be noted that it is open to the dominant undertaking to justify the use of an exclusivity rebate system, in particular by showing that its conduct is objectively necessary or that the potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers (see, to that effect, Hoffmann-La Roche, paragraph 71 above, paragraph 90; Case C‑95/04 P British Airways, paragraph 74 above, paragraphs 85 and 86; and Case C‑209/10 Post Danmark [2012] ECR ('Post Danmark'), paragraphs 40 and 41 and the case-law cited). However, in the case in point, the applicant has put forward no argument in that regard.

2) The applicant's arguments

2.1) The arguments that the Commission is required to carry out an analysis of the circumstances of the case in order to establish at least a potential foreclosure effect

95 The applicant claims that the Commission is required to carry out an analysis of the circumstances of the case in order to establish at least a potential foreclosure effect.

96 First, the applicant relies on paragraph 73 of Michelin I, paragraph 74 above, and on paragraph 67 of Case C‑95/04 P British Airways, paragraph 74 above. However, those paragraphs concern rebates falling within the third category and are therefore not relevant so far as concerns exclusivity rebates.

97 In that regard, it is necessary to reject the applicant's argument, raised at the hearing, that the Court of Justice abandoned the distinction between exclusivity rebates and rebates falling within the third category in Case C‑549/10 P Tomra, paragraph 73 above. It is true that, in paragraph 70 of that judgment, the Court initially recalled what was stated in paragraph 73 above, namely that the application of a system of loyalty rebates by an undertaking in a dominant position constitutes an abuse, then added, in paragraph 71, that,

‘[i]n that regard, it is necessary to consider all the circumstances …’. However, as the Commission rightly observed, it is apparent from the context of the judgment that, in so doing, the Court did not extend the scope of the analysis of the circumstances of the case to exclusivity rebates. The considerations set out in paragraphs 70 and 71 of that judgment in which the Court recalled the case-law are to be found in the examination of the third plea, which did not concern an exclusivity rebate system, but a rebate system falling within the third category, namely a system of individualised retroactive rebates (Case C‑549/10 P Tomra, paragraph 73 above, paragraphs 73, 74, 77 and 78, and the Opinion of Advocate General Mazák in that case, point 27).

98 Second, the applicant relies on Case C‑280/08 P Deutsche Telekom v Commission [2010] ECR I‑9555 (‘Case C‑280/08 P Deutsche Telekom’), paragraph 175, TeliaSonera, paragraph 88 above, paragraph 28, and Post Danmark, paragraph 94 above, paragraph 26. In those judgments, the Court of Justice held that, ‘in order to determine whether the undertaking in a dominant position has abused such a position by its pricing practices, it is necessary to consider all the circumstances …’.

99 However, the scope of that case-law is limited to pricing practices and does not affect the legal characterisation of exclusivity rebates. Case C‑280/08 P Deutsche Telekom, paragraph 98 above, and TeliaSonera, paragraph 88 above, concerned margin squeeze practices and Post Danmark, paragraph 94 above, concerned low price practices, so that those three cases concerned pricing practices. However, the present case does not relate to a pricing practice. As regards the rebates granted to the various OEMs, the complaint made against the applicant in the contested decision is not based on the exact amount of the rebates and thus on the prices charged by the applicant, but on the fact that the grant of those rebates was conditional on exclusive or quasi-exclusive supply. Different treatment of exclusivity rebates and pricing practices is justified by the fact that, unlike an exclusive supply incentive, the level of a price cannot be regarded as unlawful in itself.

100 In that regard, it is also necessary to reject the applicant’s argument, put forward at the hearing, that Post Danmark, paragraph 94 above, deals with loyalty rebates comparable to those of the case in point. In that case, the proceedings before the Court of Justice concerned the practice of Post Danmark of charging its main competitor’s former customers rates different from those that it charged its own pre-existing customers without being able to justify those significant differences in its rate and rebate conditions by considerations relating to its costs, a practice described by the Danish Competition Authority as ‘primary-line price discrimination’ (Post Danmark, paragraph 94 above, paragraph 8). That presentation of the anti-competitive practices contains no reference to an exclusivity rebate system. On the contrary, the proceedings which gave rise to the reference for a preliminary ruling concerned solely whether there was an abuse by means of selectively low prices (Post Danmark, paragraph 94 above, paragraphs 15 to 17). Thus, in reply to the question referred

to it for a preliminary ruling, the Court only replied to the question in which circumstances a policy of charging low prices had to be considered to amount to an exclusionary abuse, contrary to Article 82 EC (Post Danmark, paragraph 94 above, paragraph 19).

101 The applicant's arguments must therefore be rejected.

2.2) The argument that the Commission is required to prove actual foreclosure effects

102 The applicant submits that, where the conduct at issue is historic, the Commission is required to prove actual foreclosure effects. The Commission was wrong not to take into account the absence of actual anti-competitive effects of the applicant's practices. Moreover, the applicant maintains that the Commission must establish a causal link between the practices complained of and effects on the market.

103 First of all, it must be stated that, even in the context of an analysis of the circumstances of the case, the Commission must only show that a practice is capable of restricting competition (see, to that effect, Case C‑549/10 P Tomra, paragraph 73 above, paragraph 68, and TeliaSonera, paragraph 88 above, paragraph 64). The mechanism of an exclusivity rebate granted by an undertaking in a dominant position which is an unavoidable trading partner enables it to use the non-contestable share of the demand of the customer as leverage to secure also the contestable share (see paragraph 93 above). When such a trading instrument exists, it is unnecessary to undertake an analysis of the actual effects of the rebates on competition (see, to that effect, Case C‑549/10 P Tomra, paragraph 73 above, paragraph 79).

104 Next, given that it is not necessary to prove actual effects of the rebates, it follows necessarily from this that the Commission is also not required to prove a causal link between the practices complained of and actual effects on the market. Thus, the circumstance claimed by the applicant that customers bought exclusively from it for business reasons which were entirely independent of the rebates, assuming that it were proved, does not mean that those rebates were not capable of inducing customers to obtain their supplies exclusively from it.

105 Lastly, the Court would point out that, a fortiori, the Commission is not required to prove either direct damage to consumers or a causal link between such damage and the practices at issue in the contested decision. It is apparent from the case-law that Article 82 EC is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure (Case C‑95/04 P British Airways, paragraph 74 above, paragraph 106).

2.3) The argument alleging absence of formal obligations

106 The applicant maintains that the rebates at issue in the present case did not involve formal or binding exclusivity obligations. However, it follows from Hoffmann-La Roche, paragraph 71 above (paragraph 89), that an undertaking in a dominant position abuses that position if it applies an exclusivity rebate system even 'without tying the purchasers by a formal obligation'. In that regard, the Commission correctly states that the anti-competitive incentive of exclusivity rebates results not from the imposition of a formal obligation to buy exclusively or almost exclusively from the dominant company but from the financial advantages obtained or the financial disadvantages avoided by making such purchases. Thus, it is sufficient that the undertaking in a dominant position indicates in a credible manner to its customer that the grant of a financial advantage depends on exclusive or quasi-exclusive supply.

2.4) The argument alleging the relevance of the amount of the rebate

107 The applicant states that the Commission failed to take account of the level of the rebates granted by Intel to the OEMs in return for exclusive or quasi-exclusive supply and that it is illogical to censure very small rebates (USD 1 for example) that AMD would have been able to exceed.

108 However, as the Commission correctly observes, it is not the level of the rebates which is at issue in the contested decision but the exclusivity for which they were given. Thus, the rebate must only be capable of inducing the customer to purchase exclusively, irrespective whether the competing supplier could have compensated the customer for the loss of the rebate if that customer switched supplier.

109 It is not therefore necessary to consider the question whether, in the purely theoretical example of a rebate in an amount of USD 1 only as put forward by the applicant, such a minimum rebate is capable of constituting an incentive for the customer to comply with the exclusivity condition. In the case in point, the Commission proved to the requisite legal standard that the applicant had granted rebates to the OEMs amounting to millions of USD annually. The Commission moreover proved to the requisite legal standard that those rebates were granted, at least in part, in consideration of exclusivity (see paragraphs 444 to 584, 673 to 798, 900 to 1017, 1145 to 1208 and 1381 to 1502 below). Those matters suffice to show that the exclusivity rebates at issue in the contested decision were capable of inducing the OEMs to purchase exclusively.

2.5) The argument based on the relevance of the duration

110 In the applicant's submission, account must be taken of the short duration of its supply contracts and of the fact that some of those contracts could be terminated at 30 days' notice.

111 That argument must also be rejected. In that regard, it must be borne in mind that, in principle, any financial incentive to purchase exclusively constitutes additional interference with the structure of competition on a market and must therefore be regarded as abusive to the extent that it is implemented by an undertaking in a dominant position (see paragraph 90 above).

112 As regards the argument based on the possibility of terminating certain contracts at short notice, the Court would point out that the right to terminate a contract in no way prevents its actual application until such time as the right to terminate it has been exercised (Case T‑65/89 BPB Industries and British Gypsum, paragraph 90 above, paragraph 73).

113 Moreover, it should be noted that, in the present case, for all the OEMs and for MSH, the total period during which exclusivity rebates were applied was not short. That period lasted from approximately one year, in the case of Lenovo, to more than five years, in the case of MSH. In that context, it must be stated that the incentive for customers to purchase all or almost all of their requirements from the undertaking in a dominant position continues to exist for as long as the latter grants exclusivity rebates, irrespective of whether a long-term contract has been concluded or whether there is a succession of several short-term contracts (see, also, paragraph 195 below).

2.6) The argument based on the small part of the market concerned by the conduct complained of

114 The applicant claims that the Commission ought to have taken into consideration the fact that the practices at issue in the contested decision concerned only a small part of the x86 CPU market, namely between 0.3% and 2% per year.

115 It should be observed as a preliminary point that, for the reasons which will be set out in paragraphs 187 to 194 below, such an argument has no factual basis, since the calculation method used by the applicant to reach those figures is erroneous.

116 In addition, the possible smallness of the parts of the market which are concerned by the practices at issue is not a relevant argument. Where the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, any further weakening of the structure of competition may constitute an abuse of a dominant position (Hoffmann-La Roche, paragraph 71 above, paragraph 123). The Court of Justice has therefore rejected the application of an ‘appreciable effect’ criterion or a de minimis threshold for the purposes of applying Article 82 EC (Opinion of Advocate General Mazák in Case C‑549/10 P Tomra, paragraph 73 above, point 17).

117 Furthermore, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and

competitors should be able to compete on the merits for the entire market and not just for a part of it (Case C‑549/10 P Tomra, paragraph 73 above, paragraphs 42 and 46). A dominant undertaking may not therefore justify the grant of exclusivity rebates to certain customers by the fact that competitors remain free to supply other customers.

118 It follows that the applicant's line of argument must be rejected.

119 That conclusion is not undermined by the fact that, in Case C‑549/10 P Tomra, paragraph 73 above (paragraphs 41 to 45), the Court of Justice approved the General Court's reasoning that the part of the market which had been foreclosed in that case was 'significant'. That reasoning does not confirm the proposition that there can be no foreclosure effect where the foreclosed part of the market is not significant. In that regard, it should be noted that, according to Case T‑155/06 Tomra, paragraph 72 above (paragraph 243), the General Court found that 'even accepting the applicants' proposition that foreclosure of a small portion of demand does not matter, that portion was far from being small in the present case'. The General Court did not therefore adopt a position on whether that proposition was correct.

120 It was sufficient for the Court of Justice to approve the finding of the General Court that, in that case, a significant part of the market had been foreclosed, without that being understood as meaning that the Court of Justice took the view that the foreclosure of a significant part of the market was a necessary condition for the finding of an abuse. Moreover, the Court of Justice expressly held, in Case C‑549/10 P Tomra, paragraph 73 above (paragraph 46), that the determination of a precise threshold of foreclosure of the market beyond which the practices at issue had to be regarded as abusive was not required for the purposes of applying Article 82 EC and that, 'in any event', it had been proved to the requisite legal standard that the market had been closed to competition by the practices at issue.

121 That conclusion is also not undermined by Case T‑65/98 Van den Bergh Foods v Commission [2003] ECR II‑4653, paragraph 160, which is relied upon by the applicant and ACT. That judgment did not concern a practice by which a financial incentive was directly conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position. In that case, the undertaking in a dominant position had supplied Irish ice-cream retailers with freezer cabinets free of charge, provided that they be used exclusively to stock ice creams supplied by the undertaking in a dominant position. However, the retailers remained free to sell ice creams supplied by competitors if they stocked them in their own freezer cabinets or in freezer cabinets made available by other ice-cream manufacturers.

122 It was in those circumstances that the Commission took the view that it was an abuse of a dominant position for the undertaking in a dominant position to induce retailers in

Ireland not having a freezer cabinet either procured by themselves or provided by another ice-cream manufacturer to enter into freezer-cabinet agreements subject to a condition of exclusivity by offering to supply to them one or more freezer cabinets for the stocking of single-wrapped items of impulse ice-cream, and to maintain the cabinets, free of any direct charge (Van den Bergh Foods v Commission, paragraph 121 above, paragraph 23). The Commission also found, in that case, that in some 40% of all outlets in Ireland the only freezer cabinet/s for the storage of impulse ice-cream in place in the outlet was or were provided by the undertaking in a dominant position (Van den Bergh Foods v Commission, paragraph 121 above, paragraph 19).

123 It was in those circumstances that the General Court held, in Van den Bergh Foods v Commission, paragraph 121 above (paragraph 160), that '[t]he fact that an undertaking in a dominant position on a market ties de facto — even at their own request — 40% of outlets in the relevant market by an exclusivity clause which in reality creates outlet exclusivity constitutes an abuse of a dominant position'.

124 It should be observed that, in that case, it was only in respect of those 40% of outlets that the condition that only products supplied by the undertaking in a dominant position could be stocked operated de facto as an exclusivity condition, since the other outlets had at their disposal other freezer cabinets in which they could stock ice creams supplied by other manufacturers. It cannot therefore be inferred from that judgment that, for rebates which are directly linked to an exclusive or quasi-exclusive supply condition, it is necessary to determine the share of the market which is foreclosed."

C-23/14 Post Danmark A/S v Konkurrencerådet,

21 By the first and second subparagraphs of Question 1 and the first subparagraph of Question 3, which it is appropriate to examine together, the referring court asks, in essence, the Court to clarify the criteria that are to be applied in order to determine whether a rebate scheme, such as that at issue in the main proceedings, is liable to have an exclusionary effect on the market contrary to Article 82 EC. The referring court also asks what relevance is to be attached, in the context of that assessment, to the fact that the rebate scheme is applicable to the majority of customers on the market.

22 According to the file placed before the Court, the rebate scheme operated by Post Danmark in 2007 and 2008 had three main features.

23 First, the rebate scale, which included rates from 6% to 16%, was 'standardised', that is to say, all customers were entitled to receive the same rebate on the basis of their aggregate purchases over an annual reference period.

24 Secondly, the rebates were 'conditional', in the sense that Post Danmark and its customers concluded agreements, at the beginning of the year, in which estimated quantities of mailings for that year were set out. At the end of the year, Post Danmark made

an adjustment where the quantities presented were not the same as those that had been estimated initially.

25 Thirdly, the rebates were ‘retroactive’, in the sense that, where the threshold of mailings initially set was exceeded, the rebate rate applied at the end of the year applied to all mailings presented during the period concerned and not only to mailings exceeding the threshold initially estimated.

26 As regards the application of Article 82 EC to a rebate scheme, it should be recalled that, in prohibiting the abuse of a dominant market position in so far as trade between Member States could be affected, that article refers to conduct which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see, to that effect, judgments in Nederlandsche Banden-Industrie-Michelin v Commission, 322/81, EU:C:1983:313, paragraph 70, and British Airways v Commission, C-95/04 P, EU:C:2007:166, paragraph 66).

27 It is also settled case-law that, in contrast to a quantity discount linked solely to the volume of purchases from the manufacturer concerned, which is not, in principle, liable to infringe Article 82 EC, a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining all or most of their requirements from competing manufacturers, amounts to an abuse within the meaning of that provision (see judgments in Nederlandsche Banden-Industrie-Michelin v Commission, 322/81, EU:C:1983:313, paragraph 71, and Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221, paragraph 70).

28 So far as the rebate scheme at issue in the main proceedings is concerned, it must be observed that that scheme cannot be regarded as a simple quantity rebate linked solely to the volume of purchases, since the rebates at issue are not granted in respect of each individual order, thus corresponding to the cost savings made by the supplier, but on the basis of the aggregate orders placed over a given period. Moreover, it was not coupled with an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark, a point which served to distinguish it from loyalty rebates within the meaning of the case-law referred to in paragraph 27 above.

29 In those circumstances, in order to determine whether the undertaking in a dominant position has abused that position by applying a rebate scheme such as that at issue in the main proceedings, the Court has repeatedly held that it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebate tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (judgments in British Airways v Commission, C-95/04 P,

EU:C:2007:166, paragraph 67, and Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221, paragraph 71).

30 Having regard to the particularities of the present case, it is also necessary to take into account, in examining all the relevant circumstances, the extent of Post Danmark's dominant position and the particular conditions of competition prevailing on the relevant market.

31 In that regard, it first has to be determined whether those rebates can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for the co-contractors of that undertaking to choose between various sources of supply or commercial partners. It then has to be examined whether there is an objective economic justification for the discounts granted (judgment in British Airways v Commission, C-95/04 P, EU:C:2007:166, paragraphs 68 and 69).

32 As regards, in the first place, the criteria and rules governing the grant of the rebates, it must be recalled that the rebates at issue in the main proceedings were 'retroactive', in the sense that, if the threshold initially set at the beginning of the year in respect of the quantities of mail was exceeded, the rebate rate applied at the end of the year applied to all mailings presented over the reference period and not only to mailings exceeding the threshold initially estimated. On the other hand, a customer whose volume of mailings proved to be lower than the quantity estimated had to reimburse Post Danmark.

33 It is apparent from the case-law that the contractual obligations of co-contractors of the undertaking in a dominant position and the pressure exerted upon them may be particularly strong where a discount does not relate solely to the growth in purchases of products of that undertaking made by those co-contractors during the period under consideration, but extends also to those purchases in aggregate. In that way, relatively modest variations in sales of the products of the dominant undertaking have disproportionate effects on co-contractors (see, to that effect, judgment in British Airways v Commission, C-95/04 P, EU:C:2007:166, paragraph 73).

34 In addition, it must be pointed out that the rebate scheme at issue in the main proceedings was based on a reference period of one year. However, any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing the pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period (judgment in Nederlandsche Banden-Industrie-Michelin v Commission, 322/81, EU:C:1983:313, paragraph 81).

35 Consequently, as the Advocate General stated in points 37 and 38 of her Opinion, such a rebate scheme is capable of making it easier for the dominant undertaking to tie its own customers to itself and attract the customers of its competitors, and thus to secure the suction to itself of the part of demand subject to competition on the relevant market. That suction effect is further enhanced by the fact that, in the case in the main proceedings, the rebates applied without distinction both to the contestable part of demand and to the non-

contestable part of demand, that is to say, in the latter case, to addressed advertising mail weighing less than 50 grams covered by Post Danmark's statutory monopoly.

36 In the case in the main proceedings, according to the file placed before the Court, for 25 of Post Danmark's largest customers, representing approximately one-half of the volume of transactions on the relevant market during the period at issue, approximately two-thirds of mail sent in the form of direct advertising mail not covered by the monopoly could not be transferred from Post Danmark to Bring Citymail without an adverse impact on the scale of the rebates. If that were established, a matter which it is for the referring court to ascertain, the incentive to obtain all or a substantial proportion of their supplies from Post Danmark would be particularly strong, reducing significantly customers' freedom of choice as to their sources of supply.

37 Moreover, as regards the standardisation of the rebate scale, whereby all customers were entitled to receive the same rebate on the basis of their aggregate purchases over the reference period, such a characteristic admittedly supports the conclusion that, in principle, the rebate scheme implemented by Post Danmark did not result in the application of dissimilar conditions to equivalent transactions with other trading parties, within the meaning of Article 82(c) EC.

38 However, the mere fact that a rebate scheme is not discriminatory does not preclude its being regarded as capable of producing an exclusionary effect on the market, contrary to Article 82 EC. Indeed, in the judgment in Nederlandsche Banden-Industrie-Michelin v Commission (322/81, EU:C:1983:313, paragraphs 86 and 91), the Court, having rejected the Commission's complaint that the discount system applied by Michelin was discriminatory, nevertheless held that it infringed Article 82 EC since it made dealers dependent upon Michelin.

39 As regards, in the second place, the extent of Post Danmark's dominant position and the particular conditions of competition prevailing on the bulk mail market, the order for reference states that Post Danmark held 95% of that market, access to which was protected by high barriers and which market was characterised by the existence of significant economies of scale. Post Danmark also enjoyed structural advantages conferred, inter alia, by the statutory monopoly on the distribution of letters weighing up to 50 grams that concerned 70% of all bulk mail. In addition, Post Danmark enjoyed unique geographical coverage encompassing all of Denmark.

40 An undertaking which has a very large market share is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which secures for it freedom of action (judgment in Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 41). In those circumstances, it is particularly difficult for competitors of that undertaking to outbid it in the face of discounts based on overall sales volume. By reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market (see judgment in British Airways v Commission, C-95/04 P, EU:C:2007:166, paragraph 75).

41 That fact, together with the factors mentioned in paragraph 39 above which contribute to clarifying the competitive situation on the relevant market, supports the conclusion that competition on that market was already very limited.

42 In those circumstances, it must be held that a rebate scheme operated by an undertaking, such as the scheme at issue in the main proceedings, which, without tying customers to that undertaking by a formal obligation, nevertheless tends to make it more difficult for those customers to obtain supplies from competing undertakings, produces an anti-competitive exclusionary effect (see, to that effect, judgment in Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221, paragraph 72).

43 In addition, the referring court also wishes to know what relevance is to be attached, in the context of assessing the rebate scheme implemented by Post Danmark, to the fact that that scheme applies to the majority of customers on the market.

44 The fact that the rebates applied by Post Danmark concern a large proportion of customers on the market does not, in itself, constitute evidence of abusive conduct by that undertaking.

45 Indeed, in a case that concerned, inter alia, the assessment of the loyalty rebates applied by a dominant undertaking, the Court held that there was no need to ascertain the number of contracts which contained the clause at issue and the number which did not (judgment in Suiker Unie and Others v Commission, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 511).

46 However, the fact that a rebate scheme, such as that at issue in the main proceedings, covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect.

47 Lastly, should the referring court find that there are anti-competitive effects attributable to Post Danmark, it should be recalled that it is nevertheless open to a dominant undertaking to provide justification for behaviour liable to be caught by the prohibition set out in Article 82 EC.

48 In particular, a dominant undertaking may demonstrate that the exclusionary effect arising from its conduct may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer (see judgments in British Airways v Commission, C-95/04 P, EU:C:2007:166, paragraph 86, and TeliaSonera Sverige, C-52/09, EU:C:2011:83, paragraph 76).

49 In that last regard, it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective

competition, by removing all or most existing sources of actual or potential competition (judgment in Post Danmark, C-209/10, EU:C:2012:172, paragraph 42).

50 In the light of the foregoing considerations, the answer to the first and second subparagraphs of Question 1, and the first subparagraph of Question 3, is that in order to determine whether a rebate scheme, such as that at issue in the main proceedings, implemented by a dominant undertaking is capable of having an exclusionary effect on the market contrary to Article 82 EC, it is necessary to examine all the circumstances of the case, in particular, the criteria and rules governing the grant of the rebates, the extent of the dominant position of the undertaking concerned and the particular conditions of competition prevailing on the relevant market. The fact that the rebate scheme covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect.

The third and fourth subparagraphs of Question 1

51 By the third and fourth subparagraphs of Question 1, the referring court asks, in essence, the Court to clarify the relevance to be attached to the as-efficient-competitor test in assessing a rebate scheme under Article 82 EC.

52 Given that the referring court has mentioned, in the fourth subparagraph of Question 1, the communication from the Commission entitled “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, it must be observed, as a preliminary point, that that document merely sets out the Commission’s approach as to the choice of cases that it intends to pursue as a matter of priority; accordingly, the administrative practice followed by the Commission is not binding on national competition authorities and courts.

53 The application of the as-efficient-competitor test consists in examining whether the pricing practices of a dominant undertaking could drive an equally efficient competitor from the market.

54 That test is based on a comparison of the prices charged by a dominant undertaking and certain costs incurred by that undertakings as well as its strategy (see judgment in Post Danmark, C-209/10, EU:C:2012:172, paragraph 28).

55 The as-efficient-competitor test has been specifically applied by the Court to low-pricing practices in the form of selective prices or predatory prices (see, in respect of selective prices, judgment in Post Danmark, C-209/10, EU:C:2012:172, paragraphs 28 to 35, and in respect of predatory prices, judgments in AKZO v Commission, C-62/86, EU:C:1991:286, paragraphs 70 to 73, and France Télécom v Commission, C-202/07 P, EU:C:2009:214, paragraphs 107 and 108), and margin squeeze (judgment in TeliaSonera Sverige, C-52/09, EU:C:2011:83, paragraphs 40 to 46).

56 As regards the comparison of prices and costs in the context of applying Article 82 EC to a rebate scheme, the Court has held that the invoicing of ‘negative prices’, that is to say,

prices below cost prices, to customers is not a prerequisite of a finding that a retroactive rebate scheme operated by a dominant undertaking is abusive (judgment in Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221, paragraph 73). In that same case, the Court specified that the absence of a comparison of prices charged with costs did not constitute an error of law (judgment in Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221, paragraph 80).

57 It follows that, as the Advocate General stated in points 61 and 63 of her Opinion, it is not possible to infer from Article 82 EC or the case-law of the Court that there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the as-efficient-competitor test.

58 Nevertheless, that conclusion ought not to have the effect of excluding, on principle, recourse to the as-efficient-competitor test in cases involving a rebate scheme for the purposes of examining its compatibility with Article 82 EC.

59 On the other hand, in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.

60 Furthermore, in a market such as that at issue in the main proceedings, access to which is protected by high barriers, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking.

61 The as-efficient-competitor test must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme.

62 Consequently, the answer to the third and fourth subparagraphs of Question 1 is that the application of the as-efficient-competitor test does not constitute a necessary condition for a finding to the effect that a rebate scheme is abusive under Article 82 EC. In a situation such as that in the main proceedings, applying the as-efficient-competitor test is of no relevance.

Question 2 and the second subparagraph of Question 3

63 By Question 2 and the second subparagraph of Question 3, which should be answered together, the referring court asks, in essence, whether Article 82 EC must be interpreted as meaning that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme, such as that at issue in the main proceedings, must be, on the one hand, probable and, on the other, serious or appreciable.

64 As regards, in the first place, the likelihood of an anti-competitive effect, it is apparent from the case-law cited in paragraph 29 above that, in order to determine whether a dominant undertaking has abused its position by operating a rebate scheme, it is necessary, inter alia, to examine whether that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.

65 In that regard, and as the Advocate General stated in point 80 of her Opinion, the anti-competitive effect of a particular practice must not be of purely hypothetical.

66 The Court has also held that, in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking (judgment in TeliaSonera Sverige, C-52/09, EU:C:2011:83, paragraph 64).

67 It follows that only dominant undertakings whose conduct is likely to have an anti-competitive effect on the market fall within the scope of Article 82 EC.

68 In that regard, the assessment of whether a rebate scheme is capable of restricting competition must be carried out in the light of all relevant circumstances, including the rules and criteria governing the grant of the rebates, the number of customers concerned and the characteristics of the market on which the dominant undertaking operates.

69 Such an assessment seeks to determine whether the conduct of the dominant undertaking produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests (judgment in Post Danmark, C-209/10, EU:C:2012:172, paragraph 44).

70 As regards, in the second place, the serious or appreciable nature of an anti-competitive effect, although it is true that a finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking concerned (judgment in Post Danmark, C-209/10, EU:C:2012:172, paragraph 21), the conduct of such an undertaking may give rise to an abuse of its dominant position because the structure of competition on the market has already been weakened (see, to that effect, judgments in Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 123, and France Télécom v Commission, C-202/07 P, EU:C:2009:214, paragraph 107).

71 Consequently, the Court has repeatedly held that a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (see judgment in Post Danmark, C-209/10, EU:C:2012:172, paragraph 23 and the case-law cited).

72 In addition, since the structure of competition on the market has already been weakened by the presence of the dominant undertaking, any further weakening of the

structure of competition may constitute an abuse of a dominant position (judgment in Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 123).

73 It follows that fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anti-competitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates.

74 It follows from the foregoing considerations that Article 82 EC must be interpreted as meaning that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme operated by a dominant undertaking must be probable, there being no need to show that it is of a serious or appreciable nature.

Refusal to supply

6-7/73 - Commercial Solvents v Commission

" 23 the applicants state that they ought not to be held responsible for stopping supplies of aminobutanol to zoja for this was due to the fact that in the spring of 1970 zoja itself informed istituto that it was cancelling the purchase of large quantities of aminobutanol which had been provided for in a contract then in force between istituto and zoja . When at the end of 1970 zoja again contacted istituto to obtain this product, the latter was obliged to reply, after consulting csc, that in the meantime csc had changed its commercial policy and that the product was no longer available . The change of policy by csc was, they claim, inspired by a legitimate consideration of the advantage that would accrue to it of expanding its production to include the manufacture of finished products and not limiting itself to that of raw material or intermediate products . In pursuance of this policy it decided to improve its product and no longer to supply aminobutanol save in respect of commitments already entered into by its distributors .

24 it appears from the documents and from the hearing that the suppliers of raw material are limited, as regards the eec, to istituto, which, as stated in the claim by csc, started in 1968 to develop its own specialities based on ethambutol, and in november 1969 obtained the approval of the italian government necessary for the manufacture and in 1970 started manufacturing its own specialities . When zoja sought to obtain further supplies of aminobutanol, it received a negative reply . Csc had decided to limit, if not completely to cease, the supply of nitropropane and aminobutanol to certain parties in order to facilitate its own access to the market for the derivatives .

25 however, an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in

question, would amount to eliminating one of the principal manufacturers of ethambutol in the common market . Since such conduct is contrary to the objectives expressed in article 3 (f) of the treaty and set out in greater detail in articles 85 and 86, it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of article 86 . In this context it does not matter that the undertaking ceased to supply in the spring of 1970 because of the cancellation of the purchases by zoja, because it appears from the applicants' own statement that, when the supplies provided for in the contract had been completed, the sale of aminobutanol would have stopped in any case . "

C-241/91 P, C-242/91 P - ITP v Commission (Magill judgement)

" 48 With regard to the issue of abuse, the arguments of the appellants and IPO wrongly presuppose that where the conduct of an undertaking in a dominant position consists of the exercise of a right classified by national law as "copyright", such conduct can never be reviewed in relation to Article 86 of the Treaty.

49 Admittedly, in the absence of Community standardization or harmonization of laws, determination of the conditions and procedures for granting protection of an intellectual property right is a matter for national rules. Further, the exclusive right of reproduction forms part of the author' s rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position (judgment in Case 238/87 Volvo, cited above, paragraphs 7 and 8).

50 However, it is also clear from that judgment (paragraph 9) that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.

51 In the present case, the conduct objected to is the appellants' reliance on copyright conferred by national legislation so as to prevent Magill ° or any other undertaking having the same intention ° from publishing on a weekly basis information (channel, day, time and title of programmes) together with commentaries and pictures obtained independently of the appellants.

52 Among the circumstances taken into account by the Court of First Instance in concluding that such conduct was abusive was, first, the fact that there was, according to the findings of the Court of First Instance, no actual or potential substitute for a weekly television guide offering information on the programmes for the week ahead. On this point, the Court of First Instance confirmed the Commission' s finding that the complete lists of programmes for a 24-hour period ° and for a 48-hour period at weekends and before public holidays ° published in certain daily and Sunday newspapers, and the television sections of certain

magazines covering, in addition, "highlights" of the week' s programmes, were only to a limited extent substitutable for advance information to viewers on all the week' s programmes. Only weekly television guides containing comprehensive listings for the week ahead would enable users to decide in advance which programmes they wished to follow and arrange their leisure activities for the week accordingly. The Court of First Instance also established that there was a specific, constant and regular potential demand on the part of consumers (see the RTE judgment, paragraph 62, and the ITP judgment, paragraph 48).

53 Thus the appellants ° who were, by force of circumstance, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide ° gave viewers wishing to obtain information on the choice of programmes for the week ahead no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.

54 The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article 86 of the Treaty.

55 Second, there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines (RTE judgment, paragraph 73, and ITP judgment, paragraph 58).

56 Third, and finally, as the Court of First Instance also held, the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market (see the judgment in Joined Cases 6/73 and 7/73 Commercial Solvents v Commission [1974] ECR 223, paragraph 25) since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.

57 In the light of all those circumstances, the Court of First Instance did not err in law in holding that the appellants' conduct was an abuse of a dominant position within the meaning of Article 86 of the Treaty.

58 It follows that the plea in law alleging misapplication by the Court of First Instance of the concept of abuse of a dominant position must be dismissed as unfounded. It is therefore unnecessary to examine the reasoning of the contested judgments in so far as it is based on Article 36 of the Treaty. "

Effect necessary?

C-280/08 P - Deutsche Telekom v Commission

" 250 With regard to the third part of the second ground of appeal, it must be held at the outset that, in paragraphs 234 to 244 of the judgment under appeal, the General Court correctly rejected the Commission's arguments to the effect that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article 82 EC, and that it is not necessary for an anti-competitive effect to be demonstrated.

251 It should be borne in mind that, in accordance with the case-law cited in paragraph 174 of the present judgment, by prohibiting the abuse of a dominant position in so far as trade between Member States is capable of being affected, Article 82 EC refers to the conduct of a dominant undertaking which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

252 The General Court therefore held in paragraph 235 of the judgment under appeal, without any error of law, that the anti-competitive effect which the Commission is required to demonstrate, as regards pricing practices of a dominant undertaking resulting in a margin squeeze of its equally efficient competitors, relates to the possible barriers which the appellant's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market.

253 As is already apparent from paragraphs 177 and 178 of the present judgment, a pricing practice such as that at issue in the judgment under appeal that is adopted by a dominant undertaking such as the appellant constitutes an abuse within the meaning of Article 82 EC if it has an exclusionary effect on competitors who are at least as efficient as the dominant undertaking itself by squeezing their margins and is capable of making market entry more difficult or impossible for those competitors, and thus of strengthening its dominant position on that market to the detriment of consumers' interests.

254 Admittedly, where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze of its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 82 EC. However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary if it does not make their market penetration any more difficult.

255 In the present case, since, as has already been noted in paragraph 231 of the present judgment, the wholesale local loop access services provided by the appellant are indispensable to its competitors' effective penetration of the retail markets for the provision of services to end-users, the General Court was entitled to hold in paragraph 237 of the judgment under appeal, as paragraphs 233 to 236 of the present judgment have already shown, that a margin squeeze resulting from the spread between wholesale prices for local loop access services and retail prices for end-user access services, in principle, hinders the growth of competition in the retail markets in services to end-users, since a competitor who is as efficient as the appellant cannot carry on his business in the retail market for end-user access services without incurring losses. "

C-52/09 - TeliaSonera Sverige

" 61 It must be observed in that regard that, bearing in mind the concept of abuse of a dominant position explained in paragraph 27 of this judgment, the Court has ruled out the possibility that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors can constitute an abuse within the meaning of Article 102 TFEU without it being necessary to demonstrate an anti-competitive effect (see, to that effect, Deutsche Telekom v Commission, paragraphs 250 and 251).

62 The case-law has furthermore made clear that the anti-competitive effect must relate to the possible barriers which such a pricing practice may create to the growth on the retail market of the services offered to end users and, therefore, on the degree of competition in that market (Deutsche Telekom v Commission, paragraph 252).

63 Accordingly, the practice in question, adopted by a dominant undertaking, constitutes an abuse within the meaning of Article 102 TFEU, where, given its effect of excluding competitors who are at least as efficient as itself by squeezing their margins, it is capable of making more difficult, or impossible, the entry of those competitors onto the market concerned (see, to that effect, Deutsche Telekom v Commission, paragraph 253).

64 It follows that, in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking.

65 Where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze on its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102 TFEU.

66 However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue in the main proceedings cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice (see, to that effect, Deutsche Telekom v Commission, paragraph 254).

67 In the present case, it is for the referring court to examine whether the effect of TeliaSonera's pricing practice was likely to hinder the ability of competitors at least as efficient as itself to trade on the retail market for broadband connection services to end users.

68 In that examination that court must take into consideration all the specific circumstances of the case.

69 In particular, the first matter to be analysed must be the functional relationship of the wholesale products to the retail products. Accordingly, when assessing the effects of the margin squeeze, the question whether the wholesale product is indispensable may be relevant.

70 Where access to the supply of the wholesale product is indispensable for the sale of the retail product, competitors who are at least as efficient as the undertaking which dominates the wholesale market and who are unable to operate on the retail market other than at a loss or, in any event, with reduced profitability suffer a competitive disadvantage on that market which is such as to prevent or restrict their access to it or the growth of their activities on it (see, to that effect, Deutsche Telekom v Commission, paragraph 234).

71 In such circumstances, the at least potentially anti-competitive effect of a margin squeeze is probable.

72 However, taking into account the dominant position of the undertaking concerned in the wholesale market, the possibility cannot be ruled out that, by reason simply of the fact that the wholesale product is not indispensable for the supply of the retail product, a pricing practice which causes margin squeeze may not be able to produce any anti-competitive effect, even potentially. Accordingly, it is again for the referring court to satisfy itself that, even where the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned.

73 Secondly, it is necessary to determine the level of margin squeeze of competitors at least as efficient as the dominant undertaking. If the margin is negative, in other words if, in the present case, the wholesale price for the ADSL input services is higher than the retail price for services to end users, an effect which is at least potentially exclusionary is probable, taking into account the fact that, in such a situation, the competitors of the dominant

undertaking, even if they are as efficient, or even more efficient, compared with it, would be compelled to sell at a loss.

74 If, on the other hand, such a margin remains positive, it must then be demonstrated that the application of that pricing practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned.

75 That said, it must be borne in mind that an undertaking remains at liberty to demonstrate that its pricing practice, albeit producing an exclusionary effect, is economically justified (see, to that effect, Case C-95/04 P British Airways v Commission [2007] ECR I-2331, paragraph 69, and France Télécom v Commission, paragraph 111). "

Justifications

C-209/10 - Post Danmark

"40 If the court making the reference, after carrying out that assessment, should nevertheless make a finding of anti-competitive effects due to Post Danmark's actions, it should be recalled that it is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article 82 EC (see, to this effect, Case 27/76 United Brands and United Brands Continentaal v Commission [1978] ECR 207, paragraph 184; Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission [1995] ECR I-743, paragraphs 54 and 55; and TeliaSonera Sverige, paragraphs 31 and 75).

41 In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary (see, to that effect, Case 311/84 CBEM [1985] ECR 3261, paragraph 27), or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers (Case C-95/04 P British Airways v Commission [2007] ECR I-2331, paragraph 86, and TeliaSonera Sverige, paragraph 76).

42 In that last regard, it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

43 In the present case, it is enough to state, with regard to the considerations set out at paragraph 11 above, that the mere fact that a criterion explicitly based on gains in efficiency was not one of the factors appearing in the schedules of prices charged by Post Danmark

cannot justify a refusal to take into account, where necessary, such gains in efficiency, provided that that their actual existence and their extent have been established in accordance with the requirements set out in paragraph 42 above.

44 Having regard to all the foregoing considerations, the answer to be given to the questions referred is that Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests."

C-52/09 - TeliaSonera Sverige [2011] ECR I-527

" 76 The assessment of the economic justification for a pricing practice established by an undertaking in a dominant position which is capable of producing an exclusionary effect is to be made on the basis of all the circumstances of the case (see, to that effect, Nederlandsche Banden-Industrie-Michelin v Commission, paragraph 73). In that regard, it has to be determined whether the exclusionary effect arising from such a practice, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that practice bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that practice must be regarded as an abuse (British Airways v Commission, paragraph 86). "

MERGERS

Case T-102/96 Gencor v Commission [1999] ECR II-753

82. The legal bases for the Regulation, namely Articles 87 and 235 of the Treaty, and more particularly the provisions to which they are intended to give effect, that is to say Articles 3(g) and 85 and 86 of the Treaty, as well as the first to fifth, ninth and eleventh recitals in the preamble to the Regulation, merely point to the need to ensure that competition is not distorted in the common market, in particular by concentrations which result in the creation or strengthening of a dominant position. They in no way exclude from the Regulation's field of application concentrations which, while relating to mining and/or production activities outside the Community, have the effect of creating or strengthening a dominant position as a result of which effective competition in the common market is significantly impeded.

(…)

94. That dominant position would not be dependent, as the applicant asserts, on the future conduct of the undertaking arising from the concentration and of Amplats but would result, in particular, from the very characteristics of the market and the alteration of its structure. In referring to the future conduct of the parties to the duopoly, the applicant fails to distinguish between abuses of dominant position which those parties might commit in the near or more distant future, which might or might not be controlled by means of Articles 85 and/or 86 of the Treaty, and the alteration to the structure of the undertakings and of the market to which the concentration would give rise. It is true that the concentration would not necessarily lead to abuses immediately, since that depends on decisions which the parties to the duopoly may or may not take in the future. However, the concentration would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise to a lasting alteration to the structure of the markets concerned.

(…)

106. As regards the argument that the Community cannot claim to have jurisdiction in respect of a concentration on the basis of future and hypothetical behaviour, namely parallel conduct on the part of the undertakings operating in the relevant market where that conduct might or might not fall within the competence of the Community under the Treaty, it must be stated, as pointed out above in connection with the question whether the concentration has an immediate effect, that, while the elimination of the risk of future abuses may be a legitimate concern of any competent competition authority, the main objective in exercising control over concentrations at Community level is to ensure that the restructuring of undertakings does not result in the creation of positions of economic power which may significantly impede effective competition in the common market. Community jurisdiction is therefore founded, first and foremost, on the need to avoid the establishment of market structures which may create or strengthen a dominant position, and not on the need to control directly possible abuses of a dominant position.

(…)

199. The prohibition enacted in Article 2(3) of the Regulation reflects the general objective assigned by Article 3(g) of the Treaty, namely the establishment of a system ensuring that competition in the common market is not distorted (first and seventh recitals in the preamble to the Regulation). The prohibition relates to concentrations which create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

(…)

314. In the light of the seventh recital in its preamble, which states that 'a new legal instrument should therefore be created ... to permit effective monitoring of all

concentrations from the point of view of their effect on the structure of competition in the Community', the principal objective of the Regulation is to monitor market structures, and not the behaviour of undertakings which is essentially to be controlled only under Articles 85 and 86 of the Treaty.

315. Article 8(2) of the Regulation provides:
'Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2), it shall issue a decision declaring the concentration compatible with the common market.
It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan ...'

316. It follows from those provisions and from Article 2(3) of the Regulation that where the Commission concludes that the concentration is such as to create or strengthen a dominant position, it is required to prohibit it, even if the undertakings concerned by the proposed concentration pledge themselves *vis-à-vis* the Commission not to abuse that position.

317. Since the purpose of the Regulation is to prevent the creation or strengthening of market structures which are liable to impede significantly effective competition in the common market, situations of that kind cannot be allowed to come about on the basis that the undertakings concerned enter into a commitment not to abuse their dominant position, even where it is easy to check whether those commitments have been complied with.

Case T-158/00 ARD v Commission [2003] ECR II-3825

192. It is appropriate to recall, as a preliminary point, that under Article 6(2) of Regulation No 4064/89, where the Commission finds that, following commitments proposed by the parties, a notified concentration no longer raises serious doubts, it may decide to declare the concentration compatible with the common market pursuant to Article 6(1)(b). Since that regulation aims to prevent the emergence or strengthening of market structures likely significantly to impede effective competition in the common market, the commitments proposed must be capable of dispelling the serious doubts which the Commission believes are raised by the notified concentration in question.

Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987

79 With respect to the argument that the Court of First Instance departed from the approach taken by it in the *Gencor* judgment, it must be held that, contrary to what the Commission claims, the Court of First Instance did not depart from the position taken by it in paragraph 94 of that judgment, namely that there will be a significant impediment to effective competition if there is a lasting alteration of the structure of the relevant markets as a result of a concentration having the direct and immediate effect of creating conditions in which abusive conduct is possible and economically rational.

The notion of concentration

Acquisitions of control

Case T-282/02 Cementbouw Handel & Industrie v Commission [2006] ECR II-319

40 It should be recalled *in limine* that according to Article 3 of Regulation No 4064/89, entitled 'Definition of concentration',

1. 'A concentration shall be deemed to arise where:

(a) two or more previously independent undertakings merge,

or

(b) – one or more persons already controlling at least one undertaking,

or

– one or more undertakings

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

2. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the relevant bodies of an undertaking.

4. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned;

or

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

…'

41 It follows that a concentration is deemed to arise, in particular, where control of one or more undertakings is acquired either by an undertaking acting on its own or by two or more undertakings acting jointly, on the understanding that, no matter what form it assumes, the taking of control, having regard to the particular circumstances of fact and of law in each case, must confer the possibility of exercising decisive influence on the activity of the acquired undertaking as a consequence of rights, contracts or any other means.

(…)

58 In effect, while decisive influence, within the meaning of Article 3(3) of Regulation No 4064/89, need not necessarily be exercised in order to exist, the existence of control within the meaning of Article 3 of that regulation requires that the possibility of exercising that influence be effective. The mere fact that the proposed pooling agreement was notified to the NMa does not prove that, as a result of that notification, the three shareholders acquired the possibility of exercising decisive control over CVK before the second group of transactions was concluded.

Joint control

Case T-2/93 *Air France* v *Commission* [1994] ECR II-323

62 It should be recalled, as a preliminary point, that Article 3(3) of the Regulation provides as follows: "For the purposes of this Regulation, control shall be constituted by rights, contracts

or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking ...".

63 In view of the factual and legal aspects of this case, the Court considers that the Commission was correct in finding that there exists joint control by British Airways and TAT over the joint venture created by the transaction at issue.

64 In particular, it is apparent from the decision, first, that TAT now retains 50.1% of the shares in TAT E.A., and, secondly, that major decisions can only be taken by the board of TAT E.A. if at least one director nominated by TAT and one director nominated by British Airways vote in favour of the proposal.

65 In view of those findings, and even though British Airways exercises a substantial and growing influence, the Commission was correct in finding that there exists joint control. The business plan, containing the main aspects of the policy of the joint venture, was drawn up jointly by British Airways and TAT and cannot be changed without the agreement of TAT, which constitutes the majority shareholder in TAT E.A. and holds the majority of the voting rights on the board of that company, as well as the posts of president and director-general. In the light of the foregoing, the existence of an agreement as to representation and of a system of "code-sharing" between TAT E.A. and British Airways is not inconsistent with British Airways' controlling TAT E.A. jointly with TAT, since such agreements do not in any way alter the allocation of responsibilities in the management of TAT E.A., and thus the way in which control is exercised over that undertaking, nor its legal status. Such agreements are the result of negotiations between the parties and cannot be concluded without the consent of the directors of TAT E.A., in accordance with the rules contained in the statutes of that company, as analysed above.

Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137

156 As regards the complaint that the Decision does not contain any analysis of the effects of P&G's acquisition of the non-Camelia business of VPS, the Court observes that it follows from Article 2(2) of Regulation No 4064/89 that the Commission is required to declare a concentration compatible with the common market where two conditions are satisfied: first, that the concentration does not create or strengthen a dominant position and, second, that competition will not be significantly impeded by the creation or strengthening of such a position. If a dominant position will not be created or strengthened, the concentration must therefore be authorized, without its being necessary to examine the effects of the concentration on actual competition (judgment in TAT, cited above, paragraph 79).

Consequently, since in the present case the Commission gave a sufficient statement of the reasons for which it considered that P&G's acquisition of the non-Camelia business would not result in the creation of a dominant position in Germany or the strengthening of that position in Spain, the Court considers that no defect in the statement of reasons can be imputed to the Commission concerning its appraisal of the other effects of that acquisition on the relevant markets.

Substantive test

The cumulative nature of the substantive test under Regulation No 4064/89

Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381

120. It must also be recalled that under Article 2(3) of the Regulation a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market. Conversely, the Commission is bound to declare a concentration falling within the scope of application of the Regulation compatible with the common market where the two conditions laid down in that provision are not fulfilled (Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 79; see also, to this effect, *Gencor* v *Commission*, paragraph 170; and *Airtours* v *Commission*, paragraphs 58 and 82). If, therefore, a dominant position is not created or strengthened, the transaction must be authorised and there is no need to examine the effects of the transaction on effective competition (*Air France* v *Commission*, paragraph 79).

Case T-158/00 *ARD v Commission* [2003] ECR II-3825

130. In that regard, under Article 2(2) of Regulation No 4064/89, a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared compatible with the common market. It follows that, when a concentration creates or strengthens a dominant position, the Commission must none the less authorise the operation if it does not lead to effective competition being significantly impeded (see, to that effect, *Air France I*, paragraphs 78 and 79; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 170, 180 and 193; and Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 58).

Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575

84 It follows from well-established case-law of the Court of First Instance that Article 2(2) and (3) of Regulation No 4064/89 lays down two cumulative conditions, relating, first, to the creation or strengthening of a dominant position and, second, to the fact that competition will be significantly impeded in the common market as a result (see, to that effect, *Air France* v *Commission*, paragraph 77 above, paragraph 79; Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 156; and *Tetra Laval* v *Commission*, paragraph 58 above, paragraph 146). Accordingly, a concentration can be prohibited only if the two conditions laid down by Article 2(3) of the regulation are both met.

85 It is appropriate to bear in mind in that regard that the dominant position referred to in Article 2(2) and (3) of Regulation No 4064/89 concerns a situation where one or more undertakings have economic power which would enable them to prevent effective competition from being maintained in the relevant market, by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 200).

86 It must also be recalled that, in relation to abuse of a dominant position within the meaning of Article 82 EC, the Court of Justice has held that abuse of a dominant position may occur if an undertaking in a dominant position strengthens such a position in such a way that the degree of dominance reached substantially impedes competition, that is to say that only undertakings remain in the market whose behaviour depends on the dominant one (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26). It follows from that decision that the strengthening of a dominant position may in itself significantly impede competition and do so to such an extent that it amounts, on its own, to an abuse of that position.

87 It follows, a fortiori, that the strengthening or creation of a dominant position, within the meaning of Article 2(3) of Regulation No 4064/89, may amount, in particular cases, to proof of a significant impediment to effective competition. That finding does not mean that the second condition laid down in Article 2 of Regulation No 4064/89 is, from a legal perspective, subsumed within the first, but merely that it may be apparent from a single factual analysis of a given market that the two conditions are met.

88 The factors which may be invoked by the Commission in order to establish that an undertaking's competitors lack freedom of action to the degree necessary for a finding that a dominant position has been created or strengthened with regard to that undertaking are often the same as those which are relevant in an appraisal of whether, as a result of such creation or strengthening, competition will be significantly impeded in the common market.

Indeed, a factor which significantly affects the freedom of competitors to determine their commercial policy independently is also liable to result in effective competition being impeded.

89 It follows that, where it is apparent from the recitals to a decision finding a notified concentration to be incompatible with the common market – including those recitals dedicated to analysing whether a dominant position has been created or strengthened – that the transaction will produce significant anti-competitive effects, the decision should not be regarded as unlawful merely because the Commission has not expressly, and specifically, linked its description of those matters to the second condition in Article 2 of Regulation No 4064/89; and this is so irrespective of whether the lawfulness of the decision is being considered from the point of view of the requirement to state reasons laid down in Article 253 EC, or of the substance of the case. Indeed, any other approach would impose a purely formal obligation on the Commission, requiring it to repeat some of the same recitals, firstly in its analysis of whether a dominant position is created or strengthened in a given market and, a second time, in relation to the analysis of significant impairment of competition in the common market.

Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraphs 44-50, and

44 By this plea, the applicant claims, in substance, first, that Article 2(3) of the Merger Regulation contains two distinct criteria and, second, that in the contested decision the Commission has not determined whether the second of those criteria was satisfied.

45 The Court observes that Article 2(2) and (3) of the Merger Regulation lays down two cumulative criteria, the first of which relates to the creation or strengthening of a dominant position and the second to the fact that effective competition in the common market will be significantly impeded by the creation or strengthening of such a position (see, to that effect, Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 79; Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 156; and Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 146).

46 In certain cases, however, the creation or strengthening of a dominant position may in itself have the consequence that competition is significantly impeded.

47 Thus, the fact that an undertaking in a dominant position, by acquiring a competitor, strengthens that position to such an extent that the degree of dominance thus attained substantially impedes competition may constitute an abuse of a dominant position (Case 6/72 *Europemballage Corporation and Continental Can* v *Commission* [1973] ECR 215, paragraph 26). The relevance of that case-law is increased by the fact that the situation

examined by the Court of Justice in that judgment, at a time when the Merger Regulation did not exist, was very similar to the situation that could arise following a concentration within the meaning of that regulation.

48 Likewise, in relation to concentrations, a dominant position is characterised by a situation in which one or more undertakings wield economic power which would enable them to prevent effective competition from being maintained in the relevant market by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 200).

49 It follows that proof of the creation or strengthening of a dominant position within the meaning of Article 2(3) of the Merger Regulation may in certain cases constitute proof of a significant impediment to effective competition. That observation does not in any way mean that the second criterion is the same in law as the first, but only that it may follow from one and the same factual analysis of a specific market that both criteria are satisfied.

50 It follows that, in so far as it is clear from the grounds of a decision finding that a concentration is incompatible with the common market, including those formally devoted to an analysis of the creation or strengthening of a dominant position, that that transaction will produce significant anti-competitive effects, the decision cannot be held to be vitiated by illegality solely because the Commission did not expressly and specifically relate its description of those elements to the second criterion laid down in Article 2 of the Merger Regulation, whether from the viewpoint of the obligation to state reasons laid down in Article 253 EC or from a substantive viewpoint. To adopt the contrary approach would be to place the Commission under a purely formal obligation requiring it to invoke certain identical considerations twice, first in its analysis of the creation or strengthening of a dominant position on a given market and second by reference to the significant impediment to competition in the common market.

51 In the present case, the Commission's argument that this plea is based on a failure to state reasons must be rejected at the outset. Were it to appear from the contested decision that the Commission did not in fact consider whether the second criterion in Article 2(3) of the Merger Regulation was satisfied or did not demonstrate that it was, then it would be necessary to conclude that the decision was not consistent with that provision. Indeed, in the context of this regulation, an absence of reasoning in this regard could indicate only the absence or insufficiency of any examination of whether the second criterion was satisfied, and not that such an examination was in fact carried out but omitted from the decision.

52 As regards the applicant's main complaint, the Court finds that the Commission took care to conclude in the contested decision, in the case of each of the markets concerned, that both criteria laid down in Article 2(3) of the Merger Regulation were satisfied. Thus, the

Commission concluded that the concentration would strengthen EDP's and GDP's pre-existing dominant positions, with the consequence that effective competition would be significantly impeded in the wholesale electricity market (recitals 364, 379, 410, 428 and 429), the market for balancing power and ancillary services (recital 432), the retail electricity markets (recital 473), the market for the supply of gas to electricity producers (recital 528), to LDCs (recital 538), to large customers (recital 550), to small customers (recital 602) and in general (recital 609), even after it had examined all the commitments (recital 914).

53 Admittedly, it must also be noted that in the contested decision the Commission examined together, and without distinction, the elements leading it to conclude that EDP's and GDP's pre-existing dominant positions would be strengthened and the elements leading it to conclude that the concentration would also have the consequence that effective competition would be significantly impeded.

54 However, since the elements relied on in the contested decision to show that EDP's and GDP's dominant positions would be significantly strengthened and the elements showing that effective competition would be significantly impeded following the concentration are frequently identical, the mere fact that the Commission did not devote specific parts of the decision to examining the significant impediment to competition does not justify the conclusion that the Commission failed to have regard to the second criterion laid down in Article 2(3) of the Merger Regulation. Thus, in the present case, most, or indeed all, of the considerations which led the Commission to conclude that the pre-existing dominant positions would be strengthened are based on an effective restriction of the competition that could exist in the absence of the concentration and therefore also seek to demonstrate that the second criterion laid down in Article 2(3) of the Merger Regulation was satisfied. In particular, in so far as the concentration does not lead, or leads only incidentally, to an increase in the parties' market share on one of the markets concerned, the anti-competitive effects of the concentration result primarily, or indeed essentially, in the Commission's submission, from effective restrictions of competition on each of the markets concerned. For example, proof that EDP's and GDP's dominant positions would be strengthened owing to the disappearance of an important or significant potential competitor on most of the markets considered in the contested decision relies on proof that competition, which according to the Commission would have been effective, would be significantly impeded as a result of the concentration (see, for example, as regards the disappearance of GDP as the most likely important potential competitor on the wholesale electricity market, recitals 335 to 364; on the retail electricity markets, recitals 450 to 473; or, as regards the disappearance of EDP as the most significant potential competitor on the retail gas market, recitals 559 to 599).

55 It also follows that, contrary to the applicant's contention, the Commission, in the contested decision, did not treat the question as to whether the second criterion laid down

in Article 2(3) of the Merger Regulation was satisfied as an automatic consequence of the first criterion, but, on the contrary, based its reasoning on the fact that the significant impediments to competition strengthened EDP's or GDP's dominant positions.

56 Consequently, the analysis of the commitments which the Commission carried out on the basis of that reasoning is not affected either by the defect which the applicant alleges. Thus, when the Commission concluded that the commitments were insufficient to resolve the competition concerns previously identified, it considered that EDP's or GDP's dominant positions would continue to be strengthened because competition would still be significantly impeded (see, for example, as regards the disappearance of GDP as the most likely important potential competitor on the wholesale electricity market, recitals 650 to 675; on the retail electricity markets, recitals 708 to 714; or, as regards the disappearance of EDP as the most significant potential competitor on the retail gas market, recitals 735 to 738).

The Commission should assess the direct and immediate effects of the concentration and ascertain whether it significantly and lastingly impedes competition in the relevant market

Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753

94. That dominant position would not be dependent, as the applicant asserts, on the future conduct of the undertaking arising from the concentration and of Amplats but would result, in particular, from the very characteristics of the market and the alteration of its structure. In referring to the future conduct of the parties to the duopoly, the applicant fails to distinguish between abuses of dominant position which those parties might commit in the near or more distant future, which might or might not be controlled by means of Articles 85 and/or 86 of the Treaty, and the alteration to the structure of the undertakings and of the market to which the concentration would give rise. It is true that the concentration would not necessarily lead to abuses immediately, since that depends on decisions which the parties to the duopoly may or may not take in the future. However, the concentration would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise to a lasting alteration to the structure of the markets concerned.

(…)

169. In paragraphs 114 to 121 and 186 to 191 of the contested decision, the Commission analysed in detail the structural links existing between Implats and LPD before the concentration and the impact of the concentration on the structure of competition in the platinum market. According to the contested decision, the existence of those links did not prevent LPD from remaining an independent competitor of Implats, but that independence would have been lost after the concentration.

170. It is therefore necessary to examine whether the concentration was liable to alter significantly the degree of influence which the applicant could exercise over LPD, and thereby the conditions and structure of competition in the platinum and rhodium markets, or whether, since the concentration made no substantial alteration to the pre-existing market structure, the Commission should have approved it.

180. Accordingly, contrary to the applicant's submissions, the concentration was liable to alter significantly LPD's prospects of competing with regard to the marketing of PGMs.

(…)

193. In those circumstances, the Commission was justified, despite the structural links between the applicant and Lonrho under the Principals' Agreement, in considering that the proposed concentration would remove definitively the competitive threat posed by LPD to the high-cost operations of Implats and Amplats, as regards both marketing and production, and thus have a substantial effect on the pre-existing market structure.

Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585

58. Where, for the purposes of applying Regulation No 4064/89, the Commission examines a possible collective dominant position, it must ascertain whether the concentration would have the direct and immediate effect of creating or strengthening a position of that kind, which is such as significantly and lastingly to impede competition in the relevant market

(see, to that effect, *Gencor* v *Commission*, paragraph 94). If there is no substantial alteration to competition as it stands, the merger must be approved (see, to that effect, Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraphs 78 and 79, and *Gencor* v *Commission*, paragraph 170, 180 and 193).

The notion of collective dominance

Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* (*Kali & Salz*) [1998] ECR I-1375

220. As stated above, under Article 2(3) of the Regulation, concentrations which create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market.

221. In the case of an alleged collective dominant position, the Commission is therefore obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.

222. Such an approach warrants close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market.

223. In this respect, however, the basic provisions of the Regulation, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature.

224. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the

discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.

Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585

58. Where, for the purposes of applying Regulation No 4064/89, the Commission examines a possible collective dominant position, it must ascertain whether the concentration would have the direct and immediate effect of creating or strengthening a position of that kind, which is such as significantly and lastingly to impede competition in the relevant market (see, to that effect, *Gencor* v *Commission*, paragraph 94). If there is no substantial alteration to competition as it stands, the merger must be approved (see, to that effect, Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraphs 78 and 79, and *Gencor* v *Commission*, paragraph 170, 180 and 193).

59. It is apparent from the case law that in the case of an alleged collective dominant position, the Commission is ... obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers (*Kali & Salz*, cited above, paragraph 221, and *Gencor* v *Commission*, paragraph 163).

60. The Court of First Instance has held that: There is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels. (*Gencor* v *Commission*, paragraph 276).

61. A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC (see, to that effect, *Gencor* v *Commission*, paragraph 277) and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

62. As the applicant has argued and as the Commission has accepted in its pleadings, three conditions are necessary for a finding of collective dominance as defined:

- first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. As the Commission specifically acknowledges, it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;

- second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. As the Commission observes, it is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. In this instance, the parties concur that, for a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative (see, to that effect, *Gencor* v *Commission*, paragraph 276);

- third, to prove the existence of a collective dominant position to the requisite legal standard, the Commission must also establish that the foreseeable reaction of current and

future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.

63. The prospective analysis which the Commission has to carry out in its review of concentrations involving collective dominance calls for close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market (*Kali & Salz*, paragraph 222). As the Commission itself has emphasised, at paragraph 104 of its decision of 20 May 1998 *Price Waterhouse/Coopers & Lybrand* (Case IV/M.1016) (OJ 1999 L 50, p. 27), it is also apparent from the judgment in *Kali and Salz* that, where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof. The evidence must concern, in particular, factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators.

64. Furthermore, the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and, consequently, when the exercise of that discretion, which is essential for defining the rules on concentrations, is under review, the Community judicature must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (*Kali & Salz*, paragraphs 223 and 224, and *Gencor* v *Commission*, paragraphs 164 and 165).

65. Therefore, it is in the light of the foregoing considerations that it is necessary to examine the merits of the grounds relied on by the applicant to show that the Commission made an error of assessment in finding that the conditions for, or characteristics of, collective dominance would exist were the transaction to be approved.

(…)

76. It follows that in this instance the starting point for the Court's examination must be a situation in which - in the Commission's own view - the four major tour operators are not able to adopt a common policy on the market and hence do not face their competitors, their commercial associates and consumers as a single entity, and in which they thus do not enjoy the powers inherent in a collective dominant position.

Case T-464/04 *Impala* v *Commission* [2006] ECR II-2289

245 It follows from the case-law of the Court of Justice that in the case of an alleged collective dominant position, the Commission is obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* (known as '*Kali und Salz*') [1998] ECR I-1375, paragraph 221).

246 The Court of First Instance has held that a situation of collective dominance which significantly impedes effective competition in the common market or a substantial part thereof may therefore arise following a concentration where, taking into account the actual characteristics of the relevant market and of the change to its structure brought about by the completion of the transaction, the concentration would have the consequence that, being aware of the common interests, each member of the dominant oligopoly would consider it possible, economically rational and therefore preferable to adopt the same policy on a lasting basis on the market with the aim of selling at above competitive prices, without having to conclude an agreement or resort to a concerted practice within the meaning of Article 81 EC, without actual or potential competitors, or customers and consumers, being able to react effectively (see, to that effect, Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 276).

247 In *Airtours* v *Commission*, paragraph 45 above, paragraph 62, the Court of First Instance held, as stated at recital 68 to the Decision in the present case, that the three following conditions must be satisfied in order for collective dominance as defined to be created. First, the market must be sufficiently transparent for the undertakings which coordinate their conduct to be able to monitor sufficiently whether the rules of coordination are being

observed. Second, the discipline requires that there be a form of deterrent mechanism in the event of deviant conduct. Third, the reactions of undertakings which do not participate in the coordination, such as current or future competitors, and also the reactions of customers, should not be able to jeopardise the results expected from the coordination.

248 It follows from the case-law of the Court of Justice (*Kali und Salz*, paragraph 245 above, paragraph 222) and of the Court of First Instance (*Airtours* v *Commission*, paragraph 45 above, paragraph 63) that the prospective analysis which the Commission is required to carry out in the context of the control of concentrations, in the case of collective dominance, requires close examination of, in particular, the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market and that the Commission must provide solid evidence.

249 It must be observed that, as is apparent from the very wording of those judgments, that case-law was developed in the context of the assessment of the risk that a concentration would create a collective dominant position and not, as in the context of the first part of the present plea, of the determination of the existence of a collective dominant position.

250 However, although when assessing the risk that such a dominant position will be created the Commission is required, *ex hypothesi*, to carry out a delicate prognosis as regards the probable development of the market and of the conditions of competition on the basis of a prospective analysis, which entails complex economic assessments in respect of which the Commission has a wide discretion, the finding of the existence of a collective dominant position is itself supported by a concrete analysis of the situation existing at the time of adoption of the decision. The determination of the existence of a collective dominant position must be supported by a series of elements of established facts, past or present, which show that there is a significant impediment of competition on the market owing to the power acquired by certain undertakings to adopt together the same course of conduct on that market, to a significant extent, independently of their competitors, their customers and consumers.

251 It follows that, in the context of the assessment of the existence of a collective dominant position, although the three conditions defined by the Court of First Instance in *Airtours* v *Commission*, paragraph 45 above, which were inferred from a theoretical analysis of the concept of a collective dominant position, are indeed also necessary, they may, however, in the appropriate circumstances, be established indirectly on the basis of what may be a very

mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position.

252 Thus, in particular, close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances.

253 It follows that, in the present case, the alignment of prices, both gross and net, over the last six years, even though the products are not the same (each disc having a different content), and also the fact that they were maintained at such a stable level, and at a level seen as high in spite of a significant fall in demand, together with other factors (power of the undertakings in an oligopoly situation, stability of market shares, etc.), as established by the Commission in the Decision, might, in the absence of an alternative explanation, suggest, or constitute an indication, that the alignment of prices is not the result of the normal play of effective competition and that the market is sufficiently transparent in that it allowed tacit price coordination.

Case C-413/06 P Bertelsmann and Sony Corporation of America v Commission [2008] ECR I-4951

119 As regards the merits of this ground of appeal, it should be noted at the outset that the Court has already held, in substance, that the concept of a collective dominant position is included in that of ‘dominant position’ within the meaning of Article 2 of the Regulation (see, to that effect, *Kali & Salz*, paragraphs 166 and 178). In that regard, the existence of an agreement or of other links in law between the undertakings concerned is not essential to a finding of a collective dominant position. Such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question (see Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 45).

120 In the case of an alleged creation or strengthening of a collective dominant position, the Commission is obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it will lead to a situation in which effective competition in the relevant market is significantly impeded by the undertakings which are parties to the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market (see *Kali & Salz*, paragraph 221) in order to profit from a situation of collective economic strength, without actual or potential competitors, let alone customers or consumers, being able to react effectively.

121 Such correlative factors include, in particular, the relationship of interdependence existing between the parties to a tight oligopoly within which, on a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct on the market in such a way as to maximise their joint profits by increasing prices, reducing output, the choice or quality of goods and services, diminishing innovation or otherwise influencing parameters of competition. In such a context, each operator is aware that highly competitive action on its part would provoke a reaction on the part of the others, so that it would derive no benefit from its initiative.

122 A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration to those characteristics that the concentration would entail, the latter would make each member of the oligopoly in question, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

123 Such tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a

common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination.

124 The conditions laid down by the Court of First Instance in paragraph 62 of its judgment in *Airtours* v *Commission*, which that court concluded, in paragraph 254 of the judgment under appeal, should be applied in the dispute before it, are not incompatible with the criteria set out in the preceding paragraph of this judgment.

125 In applying those criteria, it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination.

126 In that regard, the assessment of, for example, the transparency of a particular market should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical tacit coordination as a basis. It is only if such a hypothesis is taken into account that it is possible to ascertain whether any elements of transparency that may exist on a market are, in fact, capable of facilitating the reaching of a common understanding on the terms of coordination and/or of allowing the competitors concerned to monitor sufficiently whether the terms of such a common policy are being adhered to. In that last respect, it is necessary, in order to analyse the sustainability of a purported tacit coordination, to take into account the monitoring mechanisms that may be available to the participants in the alleged tacit coordination in order to ascertain whether, as a result of those mechanisms, they are in a position to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in that coordination is evolving.

127 As regards the present case, the appellants submit that, even though the Court of First Instance stated in paragraph 254 of the judgment under appeal that it was following the approach adopted in its judgment in *Airtours* v *Commission*, in practice, it committed an error of law in inferring the existence of a sufficient degree of transparency from a number of factors which were not, however, relevant to a finding of an existing collective dominant position. In that context, the appellants object in particular to the fact that the Court of First Instance indicated in paragraph 251 of the judgment under appeal that the conditions laid down in paragraph 62 of the judgment in *Airtours* v *Commission* could 'in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position'.

128 In this regard, as the Commission observed at the hearing, objection cannot be taken to paragraph 251 of itself, since it constitutes a general statement which reflects the Court of First Instance's liberty of assessment of different items of evidence. It is settled case-law that it is, in principle, for the Court of First Instance alone to assess the value to be attached to the items of evidence adduced before it (see, inter alia, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66, and Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 50).

129 Similarly, the investigation of a pre-existing collective dominant position based on a series of elements normally considered to be indicative of the presence or the likelihood of tacit coordination between competitors cannot therefore be considered to be objectionable of itself. However, as is apparent from paragraph 125 of this judgment, it is essential that such an investigation be carried out with care and, above all, that it should adopt an approach based on the analysis of such plausible coordination strategies as may exist in the circumstances.

130 In the present case, the Court of First Instance, before which Impala raised arguments relating, in particular, to the parts of the contested decision relating to market transparency, did not carry out its analysis of those parts by having regard to a postulated monitoring mechanism forming part of a plausible theory of tacit coordination.

131 It is true that the Court of First Instance referred in paragraph 420 of the judgment under appeal to the possibility of a 'known set of rules' governing the grant of discounts by the majors. However – as the appellants rightly submit in the context of the second specific

criticism mentioned in paragraph 113 of this judgment, which relates to the question whether certain discount variations established by the Commission in the contested decision were liable to call into question the possibility of adequate monitoring of mutual compliance with the terms of any tacit coordination there may have been – the Court of First Instance was content to rely, in paragraphs 427 to 429 of the judgment under appeal, on unsupported assertions relating to a hypothetical industry professional. In paragraph 428 of the judgment, the Court of First Instance itself acknowledged that Impala, the applicant before that court, 'admittedly did not explain precisely what those various rules governing the grant of campaign discounts are'.

132 It must be pointed out in that regard that Impala represents undertakings which, even if they are not members of the oligopoly formed by the majors, are active on the same markets. In those circumstances, it is clear that the Court of First Instance disregarded the fact that the burden of proof was on Impala in relation to the purported qualities of such a hypothetical 'industry professional'.

133 In the light of the above and without there being any need to adopt a position on the third specific criticism mentioned in paragraph 113 of this judgment, it must be held that, in misconstruing the principles which should have guided its analysis of the arguments raised before it concerning market transparency in the context of an allegation of a collective dominant position, the Court of First Instance committed an error of law.

Reaching terms of coordination

Case T-282/06 Sun Chemical Group and Others v Commission [2007] ECR II-2149

117 First, paragraphs 45 and 48 of the Guidelines state that firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetric, especially in terms of cost structures, market shares, capacity levels and levels of vertical integration. It is also clear that the less complex and the more stable the economic environment, the easier it is for firms to reach a common understanding on the terms of coordination. Therefore, it is easier, for instance to coordinate among a few players than among many. It is also easier to coordinate on a price for a single, homogeneous product, than on hundreds of prices in a market with many differentiated products.

118 It follows that the absence of homogeneity of the products sold, the high number of producers in the market and the asymmetry of market shares indicate that it is not easy for firms to reach a common understanding on the terms of any coordination. It that regard, it should be recalled that the Commission stated in recital 60 of the contested decision that the market in question was not characterised by the homogeneity of the product sold, that there were a number of producers and that their market shares were very different. It follows that the Commission focussed its analysis on whether the undertakings could reach a common understanding on the terms of coordination and that it considered, without however saying so explicitly, that for those reasons it was unlikely that the undertakings would reach a common understanding on the terms of coordination.

Deterrent mechanism

Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585

192. The Court observes, *in limine*, that, as it has already pointed out (see paragraphs 61 and 62 above), the prospective analysis of the market necessary in any assessment of an alleged collective dominant position must not only view that position statically at a fixed point in time - the point when the transaction takes place and the structure of competition is altered - but must also assess it dynamically, with regard in particular to its internal equilibrium, stability, and the question as to whether any parallel anti-competitive conduct to which it might give rise is sustainable over time.

193. It is thus important to ascertain whether the individual interests of each major tour operator (maximising profits while competing with the whole range of operators) outweigh the common interests of the members of the alleged dominant oligopoly (restricting capacity in order to increase prices and make supra-competitive profits). That would be the case if the absence of deterrents induced an operator to depart from the common policy, taking advantage of the absence of competition essential to that policy, so as to take competitive initiatives and derive benefit from the advantages inherent therein (see, to that effect, *Gencor* v *Commission*, cited above, paragraph 227 regarding market transparency, and paragraphs 276 and 281 concerning structural links).

194. The fact that there is scope for retaliation goes some way to ensuring that the members of the oligopoly do not in the long run break ranks by deterring each of them from departing from the common course of conduct.

195. In that context, the Commission must not necessarily prove that there is a specific retaliation mechanism involving a degree of severity, but it must none the less establish that deterrents exist, which are such that it is not worth the while of any member of the dominant oligopoly to depart from the common course of conduct to the detriment of the other oligopolists.

196. In this instance the following deterrents are identified in the Decision:

- the deterrent effect of the mere threat of returning to a situation of oversupply, the 1995 experience showing what could happen if a capacity war broke out (Decision, paragraph 151; see also paragraph 170);

- the scope for increasing capacity by up to 10% during the selling season, at least until February (Decision, paragraph 152);

- the scope for a tour operator to add capacity between seasons and indicate that its conduct is retaliation for a particular action so as to make clear the link between the deviation and the punishment (Decision, paragraph 152);

- the scope for de-racking or directional selling during the selling season to the detriment of an operator who has broken ranks in order to force it to sell a larger share of its holidays at discount prices (Decision, paragraph 152; see also paragraph 170).

197. It must first be observed that the characteristics of the relevant market and the way that it functions make it difficult for retaliatory measures to be implemented quickly and effectively enough for them to act as adequate deterrents.

198. Thus, in a case of deviation or, in other words, cheating, (where, for example, during the planning period one of the main tour operators attempted to turn to its advantage the overall capacity restriction resulting from parallel anti-competitive conduct), the other members of the oligopoly would find it difficult to detect the deviation because the market is not sufficiently transparent, as the Court has already held. It is difficult to detect any

deviation at the planning stage, given the difficulties that a large tour operator has in anticipating the capacity decisions of its main competitors with any precision.

199. In that context, the deterrents identified by the Commission do not appear to be capable of coming into play.

200. In the first place, the Court finds that the Commission was wrong in concluding that the mere threat of reverting to a situation of oversupply acts as a deterrent. The Commission refers to the 1995 crisis to illustrate the effects of oversupply on the market. However, it should be made clear that the events of 1995 took place in a context different from that of the present case: then, all operators - regardless of whether they were large or small - boosted their capacity during the 1994 planning period in order to meet the increase in overall demand, which sectoral indicators and the preceding two years' growth suggested would occur. However, in this case the Commission anticipates that there will be a situation in which the three major tour operators, acting appreciably more cautiously than normal, will have reduced capacity below forecast demand and in which cheating has occurred. It is against that background, which differs markedly from the 1995 capacity surplus, that the Court must examine whether a possible return to oversupply acts as a deterrent. Oversupply could occur only one season later and only if the other members of the oligopoly decided to increase capacity above estimates of demand growth, that is very significantly in comparison with the level of under-supply that would exist in the context of tacit coordination envisaged by the Commission.

201. In the second place, the scope for increasing capacity in the selling season cannot act as a deterrent for the following reasons.

202. First, as the Decision itself emphasises, the market is distinguished by an innate tendency to caution as regards capacity decisions (see paragraphs 60 to 66, 97 and 136 of the Decision), given that matching capacity to demand is critical to profitability, since package holidays are perishable goods (Decision, paragraph 60).

203. Second, in this market a decision to depart from the common policy by increasing capacity in the selling season would be taken at a stage when it would be difficult to detect it in sufficient time. Furthermore, even if the other members of the oligopoly managed to

expose the deviating conduct, any reaction on their part involving a retaliatory capacity increase could not be sufficiently rapid or effective, inasmuch as it could be implemented only to a very limited extent in the same season - as is implicity accepted in the Decision - and only subject to restrictions, which would become increasingly acute as the selling season progressed (in the best-case scenario, capacity for the forthcoming summer season could be increased by only 10% up until February) (see paragraphs 152 and 162 of the Decision).

204. Lastly, it may be assumed that, since they know that the perpetrators of any retaliatory measures are likely to find it difficult to sell late-added package holidays because of the low quality of such products (inconvenient flight times, poor-quality accommodation), the other members of the dominant oligopoly would be cautious about increasing capacity by way of retaliation. Capacity created in that way does not appear capable of competing effectively with capacity added by the operator which has broken ranks in the planning period, since it is both late and of lower quality. The deviating operator thereby benefits from the advantages associated with having acted first.

205. In the third place, as regards the possibility of increasing capacity in the following season and the fact that capacity can be added between seasons (final part of paragraph 152 of the Decision), it is appropriate to observe that increasing capacity in that way is unlikely to be effective as a retaliatory measure, given the unpredictable way in which demand evolves from one year to the next and the time needed to implement such a measure.

206. In the fourth place, retaliatory action by the other members of the oligopoly at the distribution level (by de-racking or directional selling) would - if Airtours were targeted - affect only 16% of its sales (of which less than 10% are made through Lunn Poly (Thomson) and only 6% through Thomas Cook). As the applicant points out, responses at secondary sources of supply do not represent countervailing forces of significance. Moreover, such retaliation would entail economic loss for its perpetrators, who would have to give up the commission paid by Airtours in respect of sales made in its main competitors' networks of travel agencies. Thus, the deterrent effect of such retaliatory action is not as significant as the Decision suggests.

207. It follows from the foregoing that the Commission erred in finding that the factors mentioned in paragraphs 151 and 152 of the Decision would, in the circumstances of the present case, be a sufficient incentive for a member of the dominant oligopoly not to depart from the common policy.

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119 Secondly, the Guidelines state in paragraph 49 that only the credible threat of timely and sufficient retaliation keeps firms coordinating their conduct from deviating. Markets therefore need to be sufficiently transparent to allow the coordinating firms to monitor to a sufficient degree whether other firms are deviating from the terms of coordination, and thus to know when to retaliate. The Commission considers, in paragraph 50 of the Guidelines, that transparency in the market is often higher, the lower the number of active participants in the market, and that the degree of transparency often depends on how market transactions take place in a particular market.

120 It follows that a high number of producers in the market and an absence of homogeneity of product sold, particularly where it is customised for the customer, indicates a low level of transparency and that, therefore, monitoring of deviating conduct is difficult. In that regard, it should be recalled that, in recital 60 of the contested decision, the Commission stated that the market in question was not characterised by the homogeneity of the product sold, explaining that the product was sometimes customised for the customer, and that there were many producers in the market. Consequently, the Commission also assessed the market players' ability to monitor compliance with the terms of coordination and considered, without saying so explicitly, however, that for those reasons monitoring of non-compliance was difficult in the present case.

121 In addition, the Commission stated, in recital 60 of the contested decision, that around 30% of the producers which participated in the market investigation had expressed concerns about the increasing impact of producers from outside of the EEA, such as Arez. In that regard, their effect on the market can make both the achievement of the mutual understanding on the terms of coordination and the monitoring of non-compliance even more difficult.

122 In those circumstances, the Commission cannot be accused of failing to follow the Guidelines in considering, first, that coordinated anti-competitive behaviour had little chance of being adopted post-merger, and secondly, that an assessment of deterrent mechanisms and of reactions of third parties was not necessary.

Creation of a collective dominant position / prospective analysis

Case T-464/04 Impala v Commission [2006] ECR II-2289

522 It must be borne in mind that when the Commission examines the risk that a collective dominant position will be created, it must 'assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and [ultimately] of consumers' (Kali und Salz, paragraph 245 above, paragraph 221; Gencor v Commission, paragraph 246 above, paragraph 163; and Airtours v Commission, paragraph 45 above, paragraph 59). The prospective analysis which the Commission must carry out in the context of the control of concentrations, as it relates to a collective dominant position, 'calls for close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market' (Kali und Salz, paragraph 245 above, paragraph 222, and Airtours v Commission, paragraph 45 above, paragraph 63).

523 That is all the more true since the analysis 'does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted' (Commission v Tetra Laval, paragraph 232 above, paragraph 42). Thus, '[s]uch an analysis makes it necessary to envisage the various chains of cause and effect with a view to ascertaining which of them are the most likely' (Commission v Tetra Laval, paragraph 43).

524 It is in the light of those considerations that the Court must consider whether the Commission properly analysed the risk of the creation of a collective dominant position.

Deterrent mechanisms

465 It follows from the case-law (Airtours v Commission, paragraph 45 above, paragraph 62) that in order for a situation of collective dominant position to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative (see, to that effect, Gencor v Commission, paragraph 246 above, paragraph 276).

466 The mere existence of effective deterrent mechanisms is sufficient, in principle, since if the members of the oligopoly conform with the common policy, there is no need to resort to the exercise of a sanction. As the applicant observes, moreover, the most effective deterrent is that which has not been used.

467 (…)

468 However, as this plea relates to the finding of the existence of a collective dominant position, and not to its creation, it might be considered that the condition relating to retaliation may consist, not, as was the case in Airtours v Commission, paragraph 45 above, in ascertaining the mere existence of retaliatory measures, but in examining whether there have been any breaches of the common course of conduct which have not been followed by retaliatory measures. Although the Decision does not indicate that the test for establishing the existence of a collective dominant position must be different, and although the Commission did not so contend in its pleadings either, the Court will none the less examine whether the findings made in the Decision satisfy that test.

469 Two cumulative elements must be satisfied in order for the fact that no retaliatory measures have been employed to be taken to mean that the condition relating to retaliation is not satisfied, namely proof of deviation from the common course of conduct, without which there is no need to consider the use of retaliatory measures, and then actual proof of the absence of retaliatory measures. However, it must be stated that on neither of these aspects is the necessary proof set out in the Decision.

Commitments

Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575

52 The Commission clearly set out, in its SO of 8 May 2001 in the present case, the objections pertaining to all the anti-competitive consequences of the merger, particularly those concerning horizontal and vertical effects deriving from the merger which were subsequently included in the contested decision (see, in particular, points 118 to 122, 124 to 126, 459 to 468, 469 to 471, 473, 474, 578 to 586 and 612 to 633 of the SO). In order to address the objections raised by the Commission in the SO, the applicant proposed on 14 June 2001, among others, structural commitments which the Commission examined but rejected on the ground that practical considerations would have prevented their being put into effect. The applicant has put no evidence or arguments before the Court to explain in what specific regard the rejection of those commitments was illegal or unjustified (see, in particular, paragraphs 487, 555 et seq., 564 in fine and 610 below). The Commission is not responsible for technical or commercial gaps in the commitments in question (which led it to conclude that they were insufficient to permit it to approve the merger at issue); nor, more specifically, can those gaps be attributed to any unwillingness on its part to accept that other commitments, of a behavioural nature, might be effective. It was for the parties to the merger to put forward commitments which were comprehensive and effective from all points of view and to do so in principle before 14 June 2001.

Case T-209/01 *Honeywell* v *Commission* [2005] ECR II-5527

99 In any event, in its statement of objections of 8 May 2001 the Commission clearly set out the objections concerning all the anti-competitive consequences of the merger, in particular those in respect of the horizontal and vertical effects resulting from it that were subsequently included in the contested decision (see, in particular, paragraphs 118 to 122, 124 to 126, 459 to 471, 473, 474, 578 to 586 and 612 to 633 of the statement of objections). It must be held that in matters relating to merger control the Commission cannot be required, over and above the obligation to set out its objections in a statement of objections and to supplement that statement if it should then decide to adopt new objections, to indicate, after service of the statement of objections and before adoption of the final decision, its current thinking as to the possible means of resolving the problems it has identified (see, to that effect, Case 53/69 *Sandoz* v *Commission* [1972] ECR 845, paragraph 14; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 192 and 193; Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203).

Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745

105 Last, as regards the criticism that the Commission failed to take into account the possibility that the competent Portuguese authorities might carry out the monitoring necessary to ascertain whether the conditions for the early termination of the commitments in question were satisfied, it must be held, first, that, as regards the leasing of the TER, it was the parties themselves that expressly envisaged requesting the Commission to verify that those conditions were satisfied. The Commission was therefore not in a position, without itself modifying the proposed commitment, which it is not empowered to do, to entrust that monitoring to the national authorities. Likewise, as regards the other two commitments to which the applicant refers, the Commission had no obligation, even if had been able to do so in the discussions with the parties, to establish a particular method of monitoring, notably one delegated to the competent national authorities. It was for the parties, on the contrary, to propose commitments that were full and effective from all aspects, especially if those behavioural commitments had intrinsic weaknesses as regards their binding nature that justified ex-post monitoring.

Burden of proof

T-439/07 Coats v Commission, not yet published

" 37 In so far as the parties are at odds as regards the division of the burden of proof between them and, more generally, as to whether the rules applicable to proof of an infringement of Article 81 EC and of the applicant's participation in such an infringement have been complied with or not, it is first necessary to set out the law applicable in this area.

38 It is apparent from Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), and the settled case-law regarding the application of Articles 81 EC and 82 EC, that, in the area of competition law, where there is a dispute as to the existence of an infringement, it is incumbent on the Commission to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraph 58; Joined Cases C-2/01 P and C-3/01 P BAI and Commission v Bayer [2004] ECR I-23, paragraph 62; and Case T-201/04 Microsoft v Commission [2007] ECR II-3601, paragraph 688). In that regard, it must produce sufficiently precise and coherent proof to establish that the alleged infringement took place (see, to that effect, Joined Cases 29/83 and 30/83 CRAM and Rheinzink v Commission [1984] ECR 1679, paragraph 20; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeytiö and Others v Commission [1993] ECR I-1307, paragraph 127; and Joined Cases T-185/96, T-189/96 and T-190/96 Riviera Auto Service and Others v Commission [1999] ECR II-93, paragraph 47).

39 Where, in establishing an infringement of Articles 81 EC and 82 EC, the Commission relies on documentary evidence, the burden is on the undertakings concerned not merely to submit an alternative explanation for the facts found by the Commission, but to show that the evidence relied on in the contested decision is insufficient to establish the existence of an infringement (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR and Others v Commission (known as 'Cement') [2000] ECR II-491, paragraphs 725 to 728, and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 JFE Engineering and Others v Commission [2004] ECR II-2501, paragraph 187). It must be considered that, in a case such as the present one, where the Commission relies on direct evidence, the burden is on the undertakings concerned to show that the evidence adduced by the Commission is

insufficient. Such a reversal of the burden of proof does not infringe the principle of the presumption of innocence (see, to that effect, Case C-235/92 P Montecatini v Commission [1999] ECR I-4539, paragraph 181).

40 However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement (see JFE Engineering and Others v Commission, paragraph 39 above, paragraph 180 and the case-law cited).

41 The items of evidence on which the Commission relies in the decision in order to prove the existence of an infringement of Article 81(1) EC by an undertaking must not be assessed separately, but as a whole (see Case T-53/03 BPB v Commission [2008] ECR II-1333, paragraph 185 and the case-law cited).

42 It is also necessary to take account of the fact that anti-competitive activities take place clandestinely, and accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraphs 55 to 57).

43 Furthermore, the case-law shows that it is sufficient for the Commission to establish that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, in order to prove to the requisite legal standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for the undertaking concerned to put forward indicia 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 (Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraph 155; Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, paragraph 96; and Aalborg Portland and Others v Commission, paragraph 42 above, paragraph 81).

44 The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking gave the other participants reason to believe that it subscribed to what was decided there and would comply with it (Aalborg Portland and Others v Commission, paragraph 42 above, paragraph 82).

45 As regards the probative value which should be attached to the various pieces of evidence, it must be noted that the sole criterion relevant for evaluating freely adduced

evidence is the reliability of that evidence (see Case T-44/00 Mannesmannröhren-Werke v Commission [2004] ECR II-2223, paragraph 84 and the case-law cited; Case T-50/00 Dalmine v Commission [2004] ECR II-2395, paragraph 72, and JFE Engineering and Others v Commission, paragraph 39 above, paragraph 273). According to the generally applicable rules on evidence, the credibility and, therefore, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the soundness and reliable nature of its contents (Cement, paragraph 39 above, paragraph 1053; Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 Rhône-Poulenc v Commission [1991] ECR II-867, II-869, at II-956). In particular, great importance must be attached to the fact that a document has been drawn up in close connection with the events (Case T-157/94 Ensidesa v Commission [1999] ECR II-707, paragraph 312, and Joined Cases T-5/00 and T-6/00 Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission [2003] ECR II-5761, paragraph 181) or by a direct witness of those events (JFE Engineering and Others v Commission, paragraph 39 above, paragraph 207). Furthermore, it should be noted that the mere fact that the information has been provided by undertakings which sought to benefit from the 1996 or 2002 Leniency Notices does not call its probative value into question."