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Materials and Tables

for the Course

European Competition Law

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- English Version -

For use of course participants only

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I. Introduction

1. Course Description: 5 Units on Competion Law

a) Course Description

Basic understanding of law of market structure and of unfair competition law; introduction into European and national competition procedure including the leniency programs.

b) Daily course outline

aa) Unit 1

Topic A: personal introduction, general introduction (intro on the course structure, the use of course materials, course content).
Topic B: European competition law as a part of European law; European and national competition law – centralization and de-centralisation. International competition law. TEU and TFEU, competence, conferral, subsidiarity, proportionality, and other principles of European law and its relationship to national law of EU member states; the basic liberties of the EU market, competition and economic policy
Topic C: Historical remarks and the sources of EU competition law.
Topic D: Economic and legal concepts of competition; market structure; competition theory; the challenges of new products or services on zero-price-markets. Relationship to the law of consumer protection, SME policy, and state aid.

Assigned reading: course script, introductory part, essay on the political content of competition law

bb) Unit 2

Topic A: Competition law and cartel law: horizontal trade restraints, concerted practices. The structure of a European statute (Art. 101 TFEU) under the Lisbon Treaty. Leading cases. New challenges by joint ventures and ppp.
Topic B: Legal consequences of Art. 101 in administrative cartel law, criminal law, and private law (some basics in competition procedure).
Topic C: European cartel law: vertical trade restraints, distribution systems, licensing.
Topic D: Exemptions and block exemptions of Art. 101 (1) in European and national cartel law.

Assigned reading: course script, provisions of the Lisbon Treaty (TEU, TFEU), provisions of Reg. 1/2003, more cases on cartels, cases on vertical trade restraints *cc) Unit 3*

Topic A: The structure of general and specific exemptions of European cartel law.
Topic B: Examples on supply and distribution systems, licensing, franchising. Commission Regulation No. 330/2010. Car distribution and Reg. 461/2010.
Topic C: challenges of technical developments on internet markets and automated driving assistance.
Topic D: EU competition law and EU market law; basic liberties of the European market; the European jurisdiction on the prohibition of measures having equivalent effect (Cassis / Keck); case studies. Again: the manifold role of state power; state aid, state enterprises, ppp.

Assigned reading: course script, Reg. 330/2010, more cases on vertical trade restraints, cases on the Cassis jurisdiction

dd) Unit 4

Topic A: Antitrust law; merger and acquisition control in European competition law. History, systematics, principles. The SIEC test. Relationship to national law of concentration. Again joint ventures. Other details. Music marketing and navigation systems for examples.
Topic B: Introduction on Art. 102 and the concepts of market dominance. General clause and qualification.
Topic C: Leading cases on abuse market dominance. Finding a path through the case law.

Assigned reading: course script, Reg. 139/2004, cases on concentration control

ee) Unit 5

Topic A: More details on market dominance case law; basic concepts; predatory pricing, rebates, market squeeze, the rise and fall of the “doctrine of essential facilities”, and other examples of case law under Art. 102.
Topic B: Conceptual differences between Art. 102 and national law of EU member states. Market behaviour under cartel law and unfair competition law. More examples on recent developments by Microsoft, Google, and Facebook cases.
Topic C: Fundamental procedural rights and substantial competition law.
Topic D: Outlook on competition procedure.

Assigned reading: course script, provisions of the Lisbon Treaty (TEU, TFEU), cases on Art. 102 and anti-discrimination clauses

More precise references will be given in the classes
Final examination as assigned by the Faculty

2. Remarks: Method

a) Lecture (30 %)
b) Lecture and Discussion (30 %)
c) Brainstorming and discussion of case studies (30 %)
d) Making summary of a) – c) (10 %)
Remarks: Media
    aa) Board
    bb) Course script
    cc) Powerpoint media
Remarks: Evaluation
    aa) Assessment of academic knowledge (25 %)
    bb) Assessment of work or classroom activities (25 %)
c) Assessment of the assigned task (25 %)
d) Others: structural abilities and reasoning (25 %)

3. Further reading (selection)

Almasan, A. / Whelan, P.	The consistent Application of EU Competition Law, Heidelberg, 2017
Bavasso, A. (Ed.)	Butterworths Competition Law Handbook, 20th ed., London 2017
Bechtold, R. / Bosch, W./Brinker, I.	Kommentar zum EU-Kartellrecht, 3. Auflage, München, 2014
Blanko, L.O.	EC Competition Procedure, 3nd. ed. 2013
Craig/DeBurca	EU Law (case book), 6th ed. Oxford 2015
Emmerich, V. / Lange, K. W.	Kartellrecht, 14. Auflage, München, 2018
Goyder, D.G.	EC Competition Law, 5th ed. Oxford 2009
Henning-Bodewig, F.	Unfair Competition Law. European Union and Member States, 1st ed. 2006
Immenga, U./Mestmäcker, E. J.	Wettbewerbsrecht, Band 1. EG/Teil 1, Band 2. GWB 5. Aufl. München 2014 (demnächst: 6. Aufl.)
Jones, A./Sufrin B.	EU Competition Law, 6th ed. Oxford 2016
Khan, N.	EU Antitrust Procedure, 7th ed. London 2014
Lettl, T.	Kartellrecht, 4. Auflage, München 2017
Micklitz/Reich/Rott	European Consumer Law, Antwerp/Oxford/Portland 2014
Singh, A.	Consumer Protection Law, 5 th ed. Lucklow 2015
Whish, R./Bailey, D.	Competition Law, 9th ed. Oxford, 2018

II. European Legislation

1. Treaty on European Union (excerpt)

TITLE I
COMMON PROVISIONS

Article 1
By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union", on which the Member States confer competences to attain objectives they have in common.
This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.
The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties"). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

Article 2
The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3
1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
   It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
   It shall promote economic, social and territorial cohesion, and solidarity among Member States.
   It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
4. The Union shall establish an economic and monetary union whose currency is the euro.
5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual

respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4
1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.
3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
   The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
   The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 5
1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
   The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
   The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
   The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
   The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Article 7
1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
   The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.
   The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.
4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Article 8

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

2. Treaty on the functioning of the European Union (excerpt)

PART ONE
PRINCIPLES

Article 1
1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.
2. This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as ‘the Treaties’.

TITLE I
CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2
1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.
3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.
4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.
   Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 3

1. The Union shall have exclusive competence in the following areas:
   (a) customs union;
   (b) the establishing of the competition rules necessary for the functioning of the internal market;
   (c) monetary policy for the Member States whose currency is the euro;
   (d) the conservation of marine biological resources under the common fisheries policy;
   (e) common commercial policy.
2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
   (a) internal market;
   (b) social policy, for the aspects defined in this Treaty;
   (c) economic, social and territorial cohesion;
   (d) agriculture and fisheries, excluding the conservation of marine biological resources;
   (e) environment;
   (f) consumer protection;
   (g) transport;
   (h) trans-European networks;
   (i) energy;
   (j) area of freedom, security and justice;
   (k) common safety concerns in public health matters, for the aspects defined in this Treaty.
3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.
   Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.
3. The Union may take initiatives to ensure coordination of Member States' social policies.

Article 6
The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

(a) protection and improvement of human health;
(b) industry;
(c) culture;
(d) tourism;
(e) education, vocational training, youth and sport;
(f) civil protection;
(g) administrative cooperation.

PART THREE
UNION POLICIES AND INTERNAL ACTIONS
TITLE I
THE INTERNAL MARKET

Article 26
1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.
3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Article 27
When drawing up its proposals with a view to achieving the objectives set out in Article 26, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain for the establishment of the internal market and it may propose appropriate provisions.
If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the internal market.

TITLE II
FREE MOVEMENT OF GOODS

Article 28
1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on

imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.EN 26.10.2012 Official Journal of the European Union C 326/59

2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

Article 29
Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

CHAPTER 1
THE CUSTOMS UNION

Article 30
Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

Article 31
Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

Article 32
In carrying out the tasks entrusted to it under this Chapter the Commission shall be guided by:

(a) the need to promote trade between Member States and third countries;
(b) developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings;
(c) the requirements of the Union as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods;
(d) the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production and an expansion of consumption within the Union.EN C 326/60 Official Journal of the European Union 26.10.2012

CHAPTER 2
CUSTOMS COOPERATION

Article 33
Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.

CHAPTER 3
PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 34
Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35
Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 36
The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 37
1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.EN 26.10.2012 Official Journal of the European Union C 326/61
   The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.
2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.
3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

TITLE VII
COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS
CHAPTER 1
RULES ON COMPETITION
SECTION 1
RULES APPLYING TO UNDERTAKINGS

Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   — any agreement or category of agreements between undertakings,
   — any decision or category of decisions by associations of undertakings,EN C 326/88 Official Journal of the European Union 26.10.2012
   — any concerted practice or category of concerted practices,

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

Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 103

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
   (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;EN 26.10.2012 Official Journal of the European Union C 326/89
   (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
   (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;
   (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;
   (e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

Article 104
Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105
1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.
2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.
3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

Article 106
1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.EN C 326/90 Official Journal of the European Union 26.10.2012
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

SECTION 2
AIDS GRANTED BY STATES

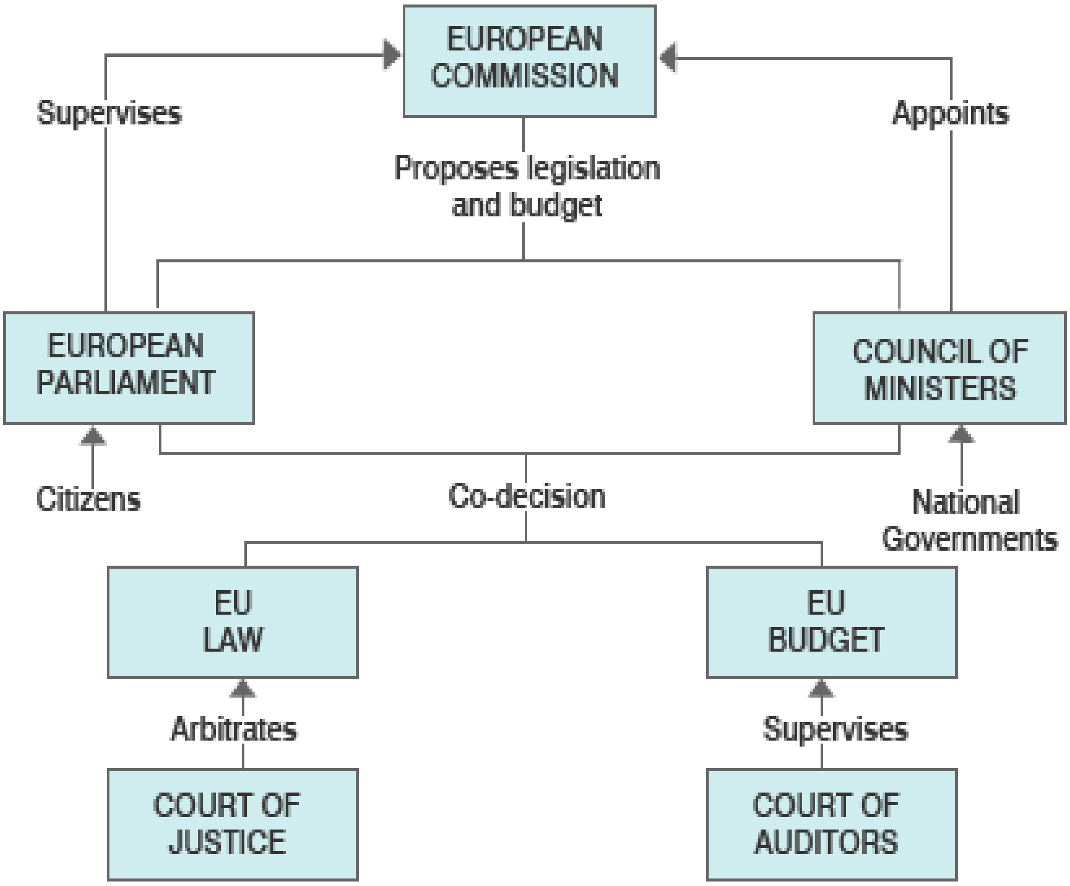
Article 107
1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
2. The following shall be compatible with the internal market:
   (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
   (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
   (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
3. The following may be considered to be compatible with the internal market:
   (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
   (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;EN 26.10.2012 Official Journal of the European Union C 326/91
   (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
   (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
   (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108
1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.
2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is

being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.
If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.
On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.
If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.
3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.EN C 326/92 Official Journal of the European Union 26.10.2012
4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Article 109
The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

3. Functioning of the European legislation (schematic)



4. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (excerpt)

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Whereas:

(1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82(4) of the Treaty(5), has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market 20and a future enlargement of the Community.

(2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.

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(5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

(6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.

(7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.

(8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the

Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

(9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

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(12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

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(15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.

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(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.

(18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.

CHAPTER I
PRINCIPLES

Article 1: Application of Articles 81 and 82 of the Treaty

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.
2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.
3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

Article 2: Burden of proof

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3: Relationship between Articles 81 and 82 of the Treaty and national competition laws

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may

affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.
2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.
3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

CHAPTER II
POWERS

Article 4: Powers of the Commission
For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

Article 5: Powers of the competition authorities of the Member States
The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:
- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6: Powers of the national courts
National courts shall have the power to apply Articles 81 and 82 of the Treaty.

CHAPTER III
COMMISSION DECISIONS

Article 7: Finding and termination of infringement
1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision

require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.
2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

Article 8: Interim measures
1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.
2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

Article 9: Commitments
1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.
2. The Commission may, upon request or on its own initiative, reopen the proceedings:
   (a) where there has been a material change in any of the facts on which the decision was based;
   (b) where the undertakings concerned act contrary to their commitments; or
   (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 10: Finding of inapplicability
Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.
The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

CHAPTER IV
COOPERATION

Article 11: Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.
2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.
3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.
4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.
5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.
6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Article 12
Exchange of information

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.
3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,
- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13: Suspension or termination of proceedings

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.
2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 14: Advisory Committee

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).
2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.
3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.
4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8,

the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.
6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.
7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.
   A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).
   The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.

Article 15: Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.
2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.
3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.
   For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.
4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

Article 16: Uniform application of Community competition law

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.
2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V
POWERS OF INVESTIGATION

Article 17: Investigations into sectors of the economy and into types of agreements
1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.
   The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.
   The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.
2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply mutatis mutandis.

Article 18: Requests for information
1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.
2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.
3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.
6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

Article 19: Power to take statements

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.
2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.

Article 20: The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.
2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:
   (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
   (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
   (c) to take or obtain in any form copies of or extracts from such books or records;
   (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
   (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.
3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading.

In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.
5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.
6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.
7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.
8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

Article 21: Inspection of other premises

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.
2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The

Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.
   However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.
4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20(2)(a), (b) and (c). Article 20(5) and (6) shall apply mutatis mutandis.

Article 22: Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.
2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.
   If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

CHAPTER VI
PENALTIES

Article 2: Fines

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

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);
(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;
(c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);
(d) in response to a question asked in accordance with Article 20(2)(e),
- they give an incorrect or misleading answer,
- they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
- they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);

(e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:
(a) they infringe Article 81 or Article 82 of the Treaty; or
(b) they contravene a decision ordering interim measures under Article 8; or
(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.
For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.
Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.
3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.
4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.
Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.
After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.
However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.
The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 24: Periodic penalty payments

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:
   (a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;
   (b) to comply with a decision ordering interim measures taken pursuant to Article 8;
   (c) to comply with a commitment made binding by a decision pursuant to Article 9;
   (d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);
   (e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).
2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

CHAPTER VII
LIMITATION PERIODS

Article 25: Limitation periods for the imposition of penalties

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:
   (a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;
   (b) five years in the case of all other infringements.
2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.
3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission or by the competition authority of a Member State;
(b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;
(c) the initiation of proceedings by the Commission or by the competition authority of a Member State;
(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.
5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.
6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 26: Limitation period for the enforcement of penalties

1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.
2. Time shall begin to run on the day on which the decision becomes final.
3. The limitation period for the enforcement of penalties shall be interrupted:
   (a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;
   (b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.
4. Each interruption shall start time running afresh.
5. The limitation period for the enforcement of penalties shall be suspended for so long as:
   (a) time to pay is allowed;
   (b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

CHAPTER VIII
HEARINGS AND PROFESSIONAL SECRECY

Article 27: Hearing of the parties, complainants and others

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.
2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject

to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.
4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 28: Professional secrecy

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.
2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER IX
EXEMPTION REGULATIONS

Article 29: Withdrawal in individual cases

1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81(3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty.

2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

CHAPTER X
GENERAL PROVISIONS

Article 30: Publication of decisions

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.
2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 31: Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 32: Exclusions

This Regulation shall not apply to:

(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;
(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;
(c) air transport between Community airports and third countries.

Article 33: Implementing provisions

……..

Article 45 Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.
It shall apply from 1 May 2004.
This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Brussels, 16 December 2002

5. Commission Regulation (EC) No 773/2004 of 7 April 2004 Relating to the conduct of proceedings by the Commission pursuant to Articles 81 ans 82 of the EC Treaty

CHAPTER I SCOPE

Article 1: Subject-matter and scope
This regulation applies to proceedings conducted by the Commission for the application of Articles 81 and 82 of the Treaty.

CHAPTER II INITIATION OF PROCEEDINGS

Article 2: Initiation of proceedings
1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation or a statement of objections or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.
2. The Commission may make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.
3. The Commission may exercise its powers of investigation pursuant to Chapter V of Regulation (EC) No 1/2003 before initiating proceedings.
4. The Commission may reject a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 without initiating proceedings.

CHAPTER III INVESTIGATIONS BY THE COMMISSION

Article 3: Power to take statements
1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.
2. The interview may be conducted by any means including by telephone or electronic means.
3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.

Article 4: Oral questions during inspections
1. When, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003, officials or other accompanying persons authorised by the Commission ask representatives or members of staff of an undertaking or of an association of undertakings for explanations, the explanations given may be recorded in any form.
2. A copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection.
3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph 1.

CHAPTER IV HANDLING OF COMPLAINTS

Article 5: Admissibility of complaints

1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation (EC) No 1/2003. Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C.
2. Three paper copies as well as, if possible, an electronic copy of the complaint shall be submitted to the Commission. The complainant shall also submit a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint.
3. Complaints shall be submitted in one of the official languages of the Community.

Article 6: Participation of complainants in proceedings

1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its views in writing.
2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.

Article 7: Rejection of complaints

1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.
2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.
3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.

Article 8: Access to information

1. Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.
2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.

Article 9: Rejections of complaints pursuant to Article 13 of Regulation (EC) No 1/2003

Where the Commission rejects a complaint pursuant to Article 13 of Regulation (EC) No 1/2003, it shall inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

CHAPTER V EXERCISE OF THE RIGHT TO BE HEARD

Article 10: Statement of objections and reply

1. The Commission shall inform the parties concerned in writing of the objections raised against them. The statement of objections shall be notified to each of them.
2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.
3. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the Commission. They shall attach any relevant documents as proof of the facts set out. They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, 28 paper copies of their submission and of the documents attached to it. They may propose that the Commission hear persons who may corroborate the facts set out in their submission.

Article 11: Right to be heard

1. The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.
2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

Article 12: Right to an oral hearing

The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.

Article 13: Hearing of other persons

1. If natural or legal persons other than those referred to in Articles 5 and 11 apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time-limit within which they may make known their views in writing.
2. The Commission may, where appropriate, invite persons referred to in paragraph 1 to develop their arguments at the oral hearing of the parties to whom a statement of objections has been addressed, if the persons referred to in paragraph 1 so request in their written comments.
3. The Commission may invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. The Commission may also invite such persons to express their views at that oral hearing.

Article 14: Conduct of oral hearings

1. Hearings shall be conducted by a Hearing Officer in full independence.

2. The Commission shall invite the persons to be heard to attend the oral hearing on such date as it shall determine.
3. The Commission shall invite the competition authorities of the Member States to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the Member States.
4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.
5. Persons heard by the Commission may be assisted by their lawyers or other qualified persons admitted by the Hearing Officer.
6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.
7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.
8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.

CHAPTER VI ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION

Article 15: Access to the file and use of documents

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.
2. The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States. The right of access to the file shall also not extend to correspondence between the Commission and the competition authorities of the Member States or between the latter where such correspondence is contained in the file of the Commission.
3. Nothing in this Regulation prevents the Commission from disclosing and using information necessary to prove an infringement of Articles 81 or 82 of the Treaty.
4. Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty.

Article 16: Identification and protection of confidential information

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.
2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any

material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known.

3. Without prejudice to paragraph 2 of this Article, the Commission may require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets.
   The Commission may set a time-limit within which the undertakings and associations of undertakings are to:
   (a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;
   (b) provide the Commission with a non-confidential version of the documents or statements, in which the confidential passages are deleted;
   (c) provide a concise description of each piece of deleted information.
4. If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

CHAPTER VII GENERAL AND FINAL PROVISIONS

Article 17 – 20
....
This Regulation shall be binding in its entirety and directly applicable in all Member States.

6. Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [1], and in particular Article 1 thereof,
….
Whereas:
(1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union [**] by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty.
(2) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [3] defines a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 May 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.
(3) The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term "vertical agreements" should include the corresponding concerted practices.
(4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the supply and purchase side.
(5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.
(6) Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.
(7) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use.
(8) It can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30 %, vertical agreements which do not contain certain types of severe restrictions of competition

generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

(9) Above the market share threshold of 30 %, there can be no presumption that vertical agreements falling within the scope of Article 101(1) of the Treaty will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition. At the same time, there is no presumption that those vertical agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty.

(10) This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.

(11) In order to ensure access to or to prevent collusion on the relevant market, certain conditions should be attached to the block exemption. To this end, the exemption of non-compete obligations should be limited to obligations which do not exceed a defined duration. For the same reasons, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers should be excluded from the benefit of this Regulation.

(12) The market-share limitation, the non-exemption of certain vertical agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.

(13) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [4], where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.

(14) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.

(15) In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects which significantly restrict access to a relevant market or competition therein are of particular importance. Such cumulative effects may for example arise in the case of selective distribution or non compete obligations.

(16) In order to strengthen supervision of parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50 % of a

given market, the Commission may by regulation declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements,

HAS ADOPTED THIS REGULATION:

Article 1
Definitions

1. For the purposes of this Regulation, the following definitions shall apply:
   (a) "vertical agreement" means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;
   (b) "vertical restraint" means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty;
   (c) "competing undertaking" means an actual or potential competitor; "actual competitor" means an undertaking that is active on the same relevant market; "potential competitor" means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market;
   (d) "non-compete obligation" means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year;
   (e) "selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;
   (f) "intellectual property rights" includes industrial property rights, know how, copyright and neighbouring rights;
   (g) "know-how" means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, "secret" means that the know-how is not generally known or easily accessible; "substantial" means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
   (h) "buyer" includes an undertaking which, under an agreement falling within Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking;

(i) "customer of the buyer" means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement.

2. For the purposes of this Regulation, the terms "undertaking", "supplier" and "buyer" shall include their respective connected undertakings.
   "Connected undertakings" means:
   (a) undertakings in which a party to the agreement, directly or indirectly:
      (i) has the power to exercise more than half the voting rights, or
      (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
      (iii) has the right to manage the undertaking's affairs;
   (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in point (a);
   (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
   (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
   (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
      (i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d), or
      (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

Article 2: Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.
   This exemption shall apply to the extent that such agreements contain vertical restraints.
2. The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million. Vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 101 of the Treaty to horizontal agreements concluded between the members of the association or decisions adopted by the association.
3. The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints which are not exempted under this Regulation.

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:
   (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
   (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.
5. This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation.

Article 3: Market share threshold
1. The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.
2. For the purposes of paragraph 1, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for the exemption provided for in Article 2 to apply.

Article 4: Restrictions that remove the benefit of the block exemption — hardcore restrictions
The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
   (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
   (b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:
      (i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
      (ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,
      (iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and
      (iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;
(e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Article 5: Excluded restrictions

1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:
   (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
   (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
   (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.
   For the purposes of point (a) of the first subparagraph, a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.
2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.
3. By way of derogation from paragraph 1(b), the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:
   (a) the obligation relates to goods or services which compete with the contract goods or services;
   (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;
   (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;
   (d) the duration of the obligation is limited to a period of one year after termination of the agreement.
   Paragraph 1(b) is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

Article 6: Non-application of this Regulation

Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than

50 % of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

Article 7: Application of the market share threshold
For the purposes of applying the market share thresholds provided for in Article 3 the following rules shall apply:

(a) the market share of the supplier shall be calculated on the basis of market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;
(b) the market shares shall be calculated on the basis of data relating to the preceding calendar year;
(c) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale;
(d) if a market share is initially not more than 30 % but subsequently rises above that level without exceeding 35 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30 % market share threshold was first exceeded;
(e) if a market share is initially not more than 30 % but subsequently rises above 35 %, the exemption provided for in Article 2 shall continue to apply for one calendar year following the year in which the level of 35 % was first exceeded;
(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years;
(g) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

Article 8: Application of the turnover threshold

1. For the purpose of calculating total annual turnover within the meaning of Article 2(2), the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.
2. The exemption provided for in Article 2 shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10 %.

Article 9: Transitional period
The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 June 2010 to 31 May 2011 in respect of agreements already in force on 31 May 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 31 May 2010, satisfied the conditions for exemption provided for in Regulation (EC) No 2790/1999.

Article 10: Period of validity

This Regulation shall enter into force on 1 June 2010.
It shall expire on 31 May 2022.
This Regulation shall be binding in its entirety and directly applicable in all Member States.

7. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regukation)

THE COUNCIL OF THE EUROPEAN UNION,
….
Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings(4) has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.
(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.
(3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.
(4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.
(5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.
(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation

designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

(9) The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article 202 of the Treaty, is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained; this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission's reports and proposals should be based on relevant information regularly provided by the Member States.

(10) A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.

(11) The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the "one-stop shop" principle.

(12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed.

(13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

(15) The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.

(16) The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. In such situations, the Commission and national competition authorities should decide within short, clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to the Commission. Such requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a

concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.

(17) The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.

(18) The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. The relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation. The Member States concerned must act promptly in such cases; this Regulation cannot, because of the diversity of national law, fix a single time limit for the adoption of final decisions under national law.

(19) Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

(21) This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.

(22) The arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors. In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.

(23) It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.

(24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

(25) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

(26) A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market.

(27) In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent.

(28) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.

(29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.

(30) Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure.

(31) The Commission should have at its disposal appropriate instruments to ensure the enforcement of commitments and to deal with situations where they are not fulfilled. In cases of failure to fulfil a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation. Furthermore, where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration, so as to restore the situation prevailing prior to the implementation of the concentration. Where an obligation attached to a decision declaring the concentration compatible with the common market is not fulfilled, the Commission should be able to revoke its decision. Moreover, the Commission should be able to impose appropriate financial sanctions where conditions or obligations are not fulfilled.

(32) Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be

compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.

(33) The Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.

(34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.

(35) A period within which the Commission must initiate proceedings in respect of a notified concentration and a period within which it must take a final decision on the compatibility or incompatibility with the common market of that concentration should be laid down. These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.

(36) The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union(5). Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(37) The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and interested third parties, must also be given the opportunity to be heard.

(38) In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right to interview any persons who may be in possession of useful information and to record the statements made.

(39) In the course of an inspection, officials authorised by the Commission should have the right to ask for any information relevant to the subject matter and purpose of the inspection; they should also have the right to affix seals during inspections, particularly in circumstances where there are reasonable grounds to suspect that a concentration has been implemented without being notified; that incorrect, incomplete or misleading information has been supplied to the Commission; or that the undertakings or persons concerned have failed to comply with a condition or obligation imposed by decision of the Commission. In any event, seals should only be used in exceptional circumstances, for the period of time strictly necessary for the inspection, normally not for more than 48 hours.

(40) Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection, including the affixing of seals, ordered by Commission decision. It results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.

(41) When complying with decisions of the Commission, the undertakings and persons concerned cannot be forced to admit that they have committed infringements, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against themselves or against others the existence of such infringements.

(42) For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicised. While ensuring preservation of the rights of defence of the undertakings concerned, in particular the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network and with the competent authorities of third countries should likewise be safeguarded.

(43) Compliance with this Regulation should be enforceable, as appropriate, by means of fines and periodic penalty payments. The Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 229 of the Treaty.

(44) The conditions in which concentrations, involving undertakings having their seat or their principal fields of activity in the Community, are carried out in third countries should be observed, and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for such undertakings.

(45) This Regulation in no way detracts from the collective rights of employees, as recognised in the undertakings concerned, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law.

(46) The Commission should be able to lay down detailed rules concerning the implementation of this Regulation in accordance with the procedures for the exercise of implementing powers conferred on the Commission. For the adoption of such implementing provisions, the Commission should be assisted by an Advisory Committee composed of the representatives of the Member States as specified in Article 23,

HAS ADOPTED THIS REGULATION:

Article 1: Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.
2. A concentration has a Community dimension where:
   (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and
   (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:
   (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
   (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
   (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
   (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.
5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

Article 2: Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.
   In making this appraisal, the Commission shall take into account:
   (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;
   (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.
2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.
3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.
4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.
5. In making this appraisal, the Commission shall take into account in particular:
   - whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,
   - whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Article 3: Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:
   (a) the merger of two or more previously independent undertakings or parts of undertakings, or
   (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.
2. 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 organs of an undertaking.

3. 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.

4. 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).

5. A concentration shall not be deemed to arise where:

   (a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

   (b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

   (c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies(6) provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4: Prior notification of concentrations and pre-notification referral at the request of the notifying parties

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

   Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term "notified concentration" shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term "concentration" includes intended concentrations within the meaning of the second subparagraph.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.
3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.
4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.
   The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.
   Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law.
   The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.
   If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply mutatis mutandis.
5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.
   The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.
Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.
Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

6. The Commission shall report to the Council on the operation of paragraphs 4 and 5 by 1 July 2009. Following this report and on a proposal from the Commission, the Council, acting by a qualified majority, may revise paragraphs 4 and 5.

Article 5: Calculation of turnover

1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.
   Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.
2. By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers.
   However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.
3. In place of turnover the following shall be used:
   (a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC(7), after deduction of value added tax and other taxes directly related to those items, where appropriate:
      (i) interest income and similar income;
      (ii) income from securities:
         - income from shares and other variable yield securities,
         - income from participating interests,
         - income from shares in affiliated undertakings;
      (iii) commissions receivable;
      (iv) net profit on financial operations;
      (v) other operating income.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:
   (a) the undertaking concerned;
   (b) those undertakings in which the undertaking concerned, directly or indirectly:
      (i) owns more than half the capital or business assets, or
      (ii) has the power to exercise more than half the voting rights, or
      (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
      (iv) has the right to manage the undertakings' affairs;
   (c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);
   (d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
   (e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).
5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of this Regulation:
   (a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);
   (b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6: Examination of the notification and initiation of proceedings
1. The Commission shall examine the notification as soon as it is received.
   (a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.
   (b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b).
The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

3. The Commission may revoke the decision it took pursuant to paragraph 1(a) or (b) where:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,
or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

4. In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).
5. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7: Suspension of concentrations

1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).
2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or

on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.

4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).
   This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

Article 8: Powers of decision of the Commission

1. Where the Commission finds that a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.
   A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.
2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.
   The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
   A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.
3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.
4. Where the Commission finds that a concentration:
   (a) has already been implemented and that concentration has been declared incompatible with the common market, or
   (b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

   the Commission may:
   - require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the imple-

mentation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,
- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:
   (a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;
   (b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;
   (c) has already been implemented and is declared incompatible with the common market.
6. The Commission may revoke the decision it has taken pursuant to paragraphs 1 or 2 where:
   (a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or
   (b) the undertakings concerned commit a breach of an obligation attached to the decision.
7. The Commission may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:
   (a) it finds that a concentration has been implemented
      (i) in contravention of a condition attached to a decision under Article 6(1)(b), or
      (ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the common market; or
   (b) a decision has been revoked pursuant to paragraph 6.
8. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 9: Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.
2. Within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:
   (a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:
   (a) it shall itself deal with the case in accordance with this Regulation; or
   (b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

   If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

   In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.
4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:
   (a) as a general rule within the period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or
   (b) within 65 working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned.
5. If within the 65 working days referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).
6. The competent authority of the Member State concerned shall decide upon the case without undue delay.

   Within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The Member State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

   Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that Member State.
7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services

concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.
9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 243 of the Treaty, for the purpose of applying its national competition law.

Article 10: Time limits for initiating proceedings and for decisions

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.
   That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2)or where, the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.
2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.
3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.
   The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.
4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13.
   The first subparagraph shall also apply to the period referred to in Article 9(4)(b).
5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).
   The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.
The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.
The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11: Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.
2. When sending a simple request for information to a person, an undertaking or an association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.
3. Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court of Justice.
4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
5. The Commission shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authorities of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected. At the specific request of the competent authority of a Member State, the Commission shall also forward to that authority copies of simple requests for information relating to a notified concentration.
6. At the request of the Commission, the governments and competent authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.
7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.

At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview.
Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall inform in advance the competent authority of the Member State in whose territory the interview takes place. If the competent authority of that Member State so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview.

Article 12: Inspections by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.
2. If so requested by the Commission or by the competent authority of the Member State within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

Article 13: The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.
2. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall have the power:
   (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
   (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
   (c) to take or obtain in any form copies of or extracts from such books or records;
   (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
   (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.
3. Officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the Member State in whose territory the inspection is to be conducted.
4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and

indicate the penalties provided for in Articles 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.
5. Officials of, and those authorised or appointed by, the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.
6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection, including the sealing of business premises, books or records, ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.
7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.
8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission's decision shall be subject to review only by the Court of Justice.

Article 14: Fines
1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:
   (a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3);
   (b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2);
   (c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;
   (d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);
   (e) in response to a question asked in accordance with Article 13(2)(e),
      - they give an incorrect or misleading answer,
      - they fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or

- they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);

(f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:
   (a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);
   (b) implement a concentration in breach of Article 7;
   (c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);
   (d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.
3. In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.

4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.

Article 15: Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:
   (a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);
   (b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);
   (c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;
   (d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).
2. Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

Article 16: Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17: Professional secrecy
1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.
2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.
3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18: Hearing of the parties and of third persons
1. Before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.
2. By way of derogation from paragraph 1, a decision pursuant to Articles 7(3) and 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.
3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.
4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.

Article 19: Liaison with the authorities of the Member States
1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. Such documents shall include commitments offered by the undertakings concerned vis-à-vis the Commission with a view to rendering the concentration compatible with the common market pursuant to Article 6(2) or Article 8(2), second subparagraph.
2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it

shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.
3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Article 8(1) to (6), Articles 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2).
4. The Advisory Committee shall consist of representatives of the competent authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.
5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.
6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.
7. The Commission shall communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It shall make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20: Publication of decisions
1. The Commission shall publish the decisions which it takes pursuant to Article 8(1) to (6), Articles 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2) together with the opinion of the Advisory Committee in the Official Journal of the European Union.
2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21: Application of the Regulation and jurisdiction
1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003(8), (EEC) No 1017/68(9), (EEC) No 4056/86(10) and (EEC) No 3975/87(11) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.
2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.
   The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).
4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.
   Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.
   Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

Article 22: Referral to the Commission

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.
   Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.
2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.
   Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.
   All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.
3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.
   The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.
   The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.
4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to

the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made.
Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.
5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

Article 23
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Article 24: Relations with third countries
1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a third country.
2. Initially not more than one year after the entry into force of this Regulation and, thereafter periodically, the Commission shall draw up a report examining the treatment accorded to undertakings having their seat or their principal fields of activity in the Community, in the terms referred to in paragraphs 3 and 4, as regards concentrations in third countries. The Commission shall submit those reports to the Council, together with any recommendations.
3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country does not grant undertakings having their seat or their principal fields of activity in the Community, treatment comparable to that granted by the Community to undertakings from that country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for undertakings having their seat or their principal fields of activity in the Community.
4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 307 of the Treaty, under international agreements, whether bilateral or multilateral.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

8. WHITE PAPER towards more effective EU merger control COM/2014/0449

Introduction

1. In this White Paper, the Commission, ten years after the major overhaul of the EU Merger Regulation[1] in 2004, takes stock of how the substantive test of "significant impediment of effective competition" (SIEC) has been applied and provides an outlook on how to further foster convergence and cooperation between and amongst the Commission and the Member States. It also puts forward proposals for specific amendments aimed at making EU merger control more effective.
2. The proposals relate to two areas in particular:
   - ensuring that the Merger Regulation addresses all sources of possible harm to competition, and thus consumers, caused by concentrations or corporate restructuring, including those stemming from acquisitions of non-controlling minority shareholdings; and
   - how to best ensure close cooperation between the Commission and national competition authorities ("NCAs") and an appropriate division of tasks in the field of merger control, in particular, by streamlining the rules for transferring merger cases from Member States to the Commission and vice versa.
3. This White Paper is accompanied by a Commission Staff Working Document, which analyses in more detail the considerations underlying the White Paper and its policy proposals. It is accompanied by an Impact Assessment, which analyses the potential benefits and costs of various policy options, as well as an executive summary of that Impact Assessment. The views of stakeholders have been sought through a public consultation[2] and are reflected in this White Paper and the Staff Working Document.

2. Substantive review of mergers after the 2004 reform of the Merger Regulation

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1). The current Merger Regulation is the result of a re-cast of the original Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1).

[2] See Commission Staff Working Document "Towards more effective EU merger control", SWD (2013) 239 final (hereafter "the Consultation Paper") and the comments received, available at: http://ec.europa.eu/competition/consultations/2013_merger_control.

4. After the adoption of the first Merger Regulation in 1989, EU merger control has become one of the main pillars of EU competition law and its basic features are now well established. The re-cast Merger Regulation, which was adopted in 2004, has further strengthened the functioning of merger control at the EU level in many ways, particularly by introducing the SIEC test as a relevant criterion for examining mergers and by enhancing the possibilities for referring merger cases from Member States to the Commission and vice versa.

5. EU merger control makes an important contribution to the functioning of the internal market, both by providing a harmonised set of rules for concentrations and corporate restructuring and by ensuring that competition and thus consumers are not harmed by economic concentration in the marketplace. Judging from recent experience, increasing globalisation of business activity and the deepening of the internal market have caused EU merger control to focus even more on cross-border cases and those which have an impact on the European economy.

6. The large majority of mergers investigated by the Commission do not raise competition concerns and are cleared following an initial "Phase I" investigation. In less than 5% of cases, an in-depth "Phase II" investigation is launched based on initial concerns raised in Phase I. In about 5-8% of all notified mergers, the Commission identifies concerns that the merger may impede effective competition. In most cases, such concerns are alleviated through remedies offered by the parties (either at Phase I or Phase II). The Commission has only prohibited 24 mergers since 1990 and 6 since 2004, which is significantly less than 1% of more than 5,000 mergers notified.

2.1. Substantive assessment

7. The most important change in the 2004 Merger Regulation reform was the introduction of the SIEC test.[3] The SIEC test maintained that SIECs most prominently arise through the creation or strengthening of a dominant position. The test thereby allowed continued building upon the precedents of the Commission and the case law of the European Courts.

8. As before, when assessing the impact of a notified merger on competition, the Commission continues to examine whether or not the merger would significantly impede effective competition in the internal market or a substantial part of it. In particular, the Commission seeks to determine whether the merger would create or strengthen a dominant position.

9. In addition, the SIEC test's objective was the elimination of a possible enforcement "gap", because the previous test was not believed to clearly capture likely anti-competitive effects resulting from a merger of two firms in an oligopolistic market, where the merged entity would not have become dominant.[4] The introduction of the SIEC test eliminated this uncertainty and al-

[3] See Article 2(2) and 2(3) of the Merger Regulation.
[4] See Recital 25 of the Merger Regulation.

lowed the Commission to strengthen its economic analysis of complex mergers. The assessment uses a combination of qualitative and, where available, quantitative/empirical evidence.[5]

10. In the majority of cases, the Commission has looked at possible anti-competitive effects resulting from the merger of two undertakings active in the same market absent any coordination with other competitors ("non-coordinated effects"). Commission investigations that look at whether a merger would enhance the risk of coordination between the merged entity and other firms ("coordinated effects")[6] or whether a merger between firms active in vertically[7] or closely related markets[8] would lead to the foreclosure of competitors ("vertical effects" and "conglomerate effects", respectively) have been much more rare.

11. Since 2004, the Commission has investigated a significant number of cases using the new SIEC test. For instance, in *Western Digital/Hitachi*, the Commission looked at a proposed acquisition in the market for hard disk drives ("HDDs"). The transaction would have reduced the number of competitors active in the HDD industry from 4 to 3 and from 3 to 2 in the market for 3.5-inch hard disk drives. By analysing the combined quantitative and qualitative evidence, the Commission concluded that, under the circumstances, removing Hitachi from the market would likely have significantly impeded effective competition.[9]

12. In order to improve the transparency and predictability of the Commission's merger analysis under the new test, the Commission published two sets of guidelines providing a sound economic framework for the assessment of both horizontal[10] and non-horizontal (i.e. vertical or conglomerate) mergers[11] ("Guidelines").[12]

13. The Guidelines also explain, in line with Recital 29 of the Merger Regulation, that mergers may lead to efficiencies which counteract the merger's harm to competition and, in turn, consumers. If the merging parties claim such efficiencies, the Commission will consider them provided they are verifiable, merger-specific and likely to be passed on to consumers. For example, in *UPS/TNT Express*, competition concerns were alleviated for a number of

[5] There are several recent examples of cases where a range of sophisticated economic analysis was used to assess the existence of SIEC like in: COMP/M.6570 – *UPS/TNT Express*, decision of 30 January 2013; COMP/M.6458 – *Universal Music Group/EMI Music,* decision of 21 September 2012; COMP/M.6471 – *Outokumpu/Inoxum,* decision of 7 November 2012; or COMP/M.6663 – *Ryanair/Aer Lingus,* decision of 27 February 2013.
[6] For example COMP/M.4980 – *ABF/GBI Business*, Commission decision of 23 September 2008.
[7] Such as in COMP/M.4942 – *Nokia/NAVTEQ*, Commission decision of 2 July 2008, or COMP/M.4854 – *Tom Tom/TeleAtlas*, decision of 14 May 2008.
[8] For instance in COMP/M.5984 – *Intel/McAfee*, Commission decision of 26 January 2011.
[9] COMP/M.6203 – *Western Digital/Hitachi*, Commission decision of 23 November 2011, recital 1038.
[10] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p. 5).
[11] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.20087, p. 6).
[12] The Guidelines have also been referred to by the EU Courts as benchmarks for reviewing the substantive legality of the Commission's analysis of mergers, see for instance Case T-282/06 *Sun Chemical e.a. v Commission* [2007] ECR II-2149.

(though not all) Member States based on, *inter alia*, efficiency considerations.[13] In *Nynas/Harburg*, the merger's efficiencies supported the conclusion that it was beneficial for consumers given the likely alternative scenario that the acquired plant would be closed.[14]

14. The past ten years have also shown that merger review can foster innovation, as competition leads to better market outcomes. It does so not only by lowering prices or increasing output, but also by improving product quality, variety, and innovation. In *Intel/McAfee*[15], for example, the remedies helped preserve innovation in security software and ensure that competitors were not foreclosed.

15. In 2008, the Commission further developed its practice in the field of remedies with a revised Remedies Notice.[16] The Remedies Notice gives clear guidance on the design and implementation of divestiture remedies (such as the sale of a subsidiary or a production facility to a competitor), focussing on the effectiveness of the remedy.

2.2. Further fostering cooperation and convergence

16. The Merger Regulation has been a veritable success in terms of introducing one-stop-shop scrutiny for mergers with an EU dimension. However, Member States also play an important role in merger enforcement in the EU. A truly functional system for the scrutiny of mergers throughout the EU requires efficient work-sharing, cooperation and convergence between the Commission and the 27 Member States that exercise merger control.

17. In 2009, following a public consultation, the Commission submitted a report to the Council containing a limited stocktaking exercise which concerned the allocation of cases between the Commission and Member States ("the 2009 Report").[17] In the public consultation, stakeholders stated that diverging merger rules and practices within the European Union may add to the administrative burden on business and lead to ineffective merger control enforcement, inconsistent outcomes, and an adverse impact on the internal market.

18. Although NCAs ordinarily apply Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") in conjunction with their national laws, merger control at the national level is exclusively a matter of national law. The EU Merger Regulation has been a model for many national legal systems in this area, which has led to basic legislative convergence across jurisdictions, particularly regarding the substantive test to apply.[18] In addition,

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[13] COMP/M.6570 – *UPS/TNT Express*, Commission decision of 30 January 2013.
[14] COMP/M.6360 – *Nynas/Harburg*, Commission decision of 2 September 2013.
[15] COMP/M.5984 – *Intel/McAfee*, decision of 26 January 2011.
[16] Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267, 22.10.2008, p. 1).
[17] Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004, 18 June 2009, COM (200) 281 final, accompanied by Staff Working Paper SEC (200) 808 final/2.
[18] For instance, in 2013 Germany replaced the previous dominance test with the SIEC test as laid down in Article 2(2) and 2(3) of the Merger Regulation.

further convergence has been achieved on substantive and jurisdictional issues through increased cooperation between NCAs and the Commission, both in individual cases and through the Merger Working Group established in 2010.[19]

19. Despite this progress, there remains room for further cooperation and convergence, especially on the development of substantive tests for guidance documents (such as the Commission's Horizontal and Non-Horizontal Merger Guidelines) and their applications and interpretations by competition authorities and courts exercising judicial review. Among the notable points of divergence are national laws that still allow a government to overrule an NCA's competition-based decision and authorise an anti-competitive merger on the basis of other public-interest considerations.[20] Remedies and procedures, such as timeframes for merger review and stand-still rules, also frequently differ.

20. Greater convergence between the Commission and NCAs and among the NCAs is important to create a truly level playing field and to avoid inconsistent outcomes.[21] In line with suggestions from some NCAs, this can be achieved by increasing cooperation and sharing experience, using all available tools and forums such as the Merger Working Group, and by intensifying cooperation between NCAs in individual cases.

21. NCAs can avoid inconsistent outcomes in any event by referring cases to the Commission. The proposals to reform post-notification referrals to the Commission according to Article 22 of the Merger Regulation, discussed below in Section 4.2.2, suggest setting up a system based on an early information notice. Such a system should also facilitate practical cooperation among the NCAs in cross-border and multi-jurisdictional cases.

22. Beyond the successful "soft convergence" already achieved, which should be maintained and strengthened as outlined above, the Commission and the NCAs should consider moving towards a system where each applies the same substantive EU law, similar to the current framework for antitrust enforcement.[22] This would, however, require a more ambitious overhaul of the current system of merger control law within the European Union.

2.3. Conclusion

23. The above overview shows how merger control at the EU level was strengthened by the 2004 Merger Regulation reforms, particularly the introduction of the SIEC test. In the long run, the Merger Regulation system should be further developed into a true "European Merger Area", in which a single set of

[19] See EU Merger Working Group, Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 8 November 2011.

[20] Although such interventions are rare in general, examples of Member States in which such a regime exists are France, Germany, Italy, Spain and the United Kingdom.

[21] See Recital 14 of the EUMR that emphasizes cooperation and deals with referral and competence.

[22] Mario Monti, A New Strategy for the Single Market at the Service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso, 9 May 2010. See also more recently Autorité de la concurrence, Rapport au Ministre de l'Économie et des Finances. Pour un contrôle plus simple, cohérent et stratégique en Europe, 16 December 2013.

rules applies to mergers examined by the Commission and NCAs. More immediately, however, there are two main ways to improve the Merger Regulation through more limited amendments. First, the Commission considers bringing acquisitions of non-controlling minority shareholdings into the scope of EU merger control. Second, there is room to further streamline case referrals in the light of the Commission's experience with the 2004 reform.[23]

3. Acquisition of non-controlling minority shareholdings

3.1. Why does the Commission want to have jurisdiction to review non-controlling minority shareholdings?

24. Effective and efficient competition policy requires appropriate and well-designed means to tackle all sources of harm to competition and thus consumers. As it currently stands, the Merger Regulation only applies to "concentrations". These are defined as acquisitions of control by one or more person(s) or undertaking(s) over one or more other undertakings or parts of undertakings.

25. Now, when the acquisition of a minority shareholding is unrelated to an acquisition of control, the Commission cannot investigate or intervene against it. The Commission can only intervene against a pre-existing minority shareholding held by one of the merging parties when control is specifically acquired. For example, the Commission can intervene if the undertaking in which one party has a minority stake is a competitor of the other merging undertaking. If the minority shareholding is acquired subsequent to the Commission's investigation, however, the Commission has no competence to deal with possible competition concerns arising from it despite the fact that the competition concerns arising from the minority shareholding may be similar to those that arise when control is acquired.

26. The experience of the Commission, Member States' and third countries' authorities, as well as economic research, show that the acquisition of a non-controlling minority shareholding may harm competition, and thus consumers, in some instances.

27. In the European Union, Austria, Germany and the United Kingdom currently have competence to review acquisitions of minority shareholdings.[24] In all three Member States, the NCAs have intervened against such acquisitions where they raised competition concerns. Many jurisdictions outside the EU, such as Canada, the United States and Japan, are also competent to review similar structural links under their respective merger control rules.

3.1.1. Theories of harm

28. Several types of competition concerns can arise when a minority shareholding is acquired. These concerns are based on similar theories of harm to those relevant for acquisitions of control and, in general, require that the transaction significantly increase market power.[25]

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[23] The present review is without prejudice to any further improvements of the Merger Regulation.
[24] See Annex I to the Consultation Paper.
[25] See para. 8 of the Horizontal Merger Guidelines and para. 10 of the Non-horizontal Merger Guidelines.

29. Acquiring a minority shareholding in a competitor may lead to non-coordinated anti-competitive effects because such a shareholding may increase the acquirer's incentive and ability to unilaterally raise prices or restrict output. If a firm has a financial interest in its competitor's profits, it may decide to 'internalise' the increase in those profits, resulting from a reduction in its own output or an increase in its own prices. This anti-competitive effect may materialize whether the minority shareholding is passive (giving it no influence in the target's decisions) or active (giving it some influence over the target's decisions).

30. The acquisition of a minority shareholding may also raise competition concerns when the acquirer uses its position to limit the competitive strategies available to the target, thereby weakening it as a competitive force. The Commission and Member States have found that competition concerns are more likely to be serious when a minority shareholding possesses some degree of influence over the target firm's decisions, as in the case studies below.

31. *Siemens/VA Tech* demonstrated both the "financial incentive" theory of harm and risk created when an undertaking holds influence and voting rights in a competitor.[26] In that case, Siemens held a pre-existing minority shareholding in SMS Demag, a competitor of one of VA Tech's subsidiaries. The Commission determined that the merger would lead to a reduction of competition in the metal plant-building market due to a combination of financial incentives and information rights stemming from the minority shareholding in SMS Demag.[27]

32. Another example of a minority shareholding granting the acquirer influence over the target is when the acquirer is able to exercise influence over the outcome of special resolutions. Such resolutions may be required for approving significant investments, raising capital, changing the product or geographic scope of the business, and engaging in mergers and acquisitions.

33. This theory of harm was at the core of the UK authorities' inquiry into the *Ryanair/Aer Lingus* case. In *Ryanair/Aer Lingus I*, Ryanair had already acquired a significant minority shareholding in its competitor, Aer Lingus, when it notified the Commission of its proposal to acquire control in 2006. The Commission prohibited the acquisition due to serious concerns that it would hurt competition by creating or strengthening Ryanair's dominant position on a number of routes.[28] However, it had no jurisdiction to review Ryanair's minority shareholding in Aer Lingus, which the UK Competition Commission proceeded to do.[29]

[26] COMP/M.3653 – *Siemens/VA Tech*, Commission decision of 13 July 2005.
[27] http://ec.europa.eu/competition/mergers/cases/decisions/m3653_20050713_20600_en.pdf.
[28] Case COMP/M.4439 – *Ryanair/Aer Lingus I,* Commission decision of 27 June 2007, confirmed by the General Court in Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457. See also case COMP/M.6663 – *Ryanair/Aer Lingus III*, Commission decision of 27 February 2013, where the Commission declared another project of acquisition of control by Ryanair over Aer Lingus incompatible with the internal market.
[29] Final report of 28 August 2013, http://www.competition-commission.org.uk/assets/competition commission/docs/2012/ryanair-aer-lingus/130828_ryanair_final_report.pdf. Ryanair has appealed the decision but the Competition Appeal Tribunal rejected the appeal on 7 March 2014.

34. This theory of harm was also the focus in *Toshiba/Westinghouse*[30], where the Commission found that the transaction could lead to a possible elimination of competition in the market for nuclear fuel assemblies. In reaching its decision, the Commission considered that Toshiba could use its minority shareholding and veto rights in GNF, a competitor of Westinghouse, to prevent it from expanding into fields in which it would compete with Toshiba/Westinghouse.

35. Minority shareholdings in competitors may also lead to coordinated anti-competitive effects by impacting a market participant's ability and incentive to tacitly or explicitly coordinate in order to achieve supra-competitive profits.[31] The acquisition of a minority shareholding may enhance transparency due to the privileged view it offers the acquirer into the commercial activities of the target. In this way, it may also increase the credibility and effectiveness of any threat of retaliation in the event that the target deviates from the collusive behaviour.[32]

36. Finally, non-horizontal acquisitions of minority shareholdings that also provide material influence may raise competitive concerns of input foreclosure. For some minority shareholdings, foreclosure may even be more likely than when control is acquired because the acquirer of the minority shareholding only internalises a part, rather than all, of the target's profits the target lost as a consequence of the foreclosure strategy.

37. Input foreclosure was a concern in *IPIC/MAN Ferrostaal*.[33] The acquisition of MAN Ferrostaal by International Petroleum Investment Company ("IPIC") was approved by the Commission in 2009 subject to conditions. The Commission found that the transaction gave rise to a foreclosure risk regarding the only existing non-proprietary technology for melamine production in the world. The technology was owned by Eurotecnica, a company in which MAN Ferrostaal had a 30% stake. Given that IPIC already controlled AMI, one of two major melamine producers world-wide, it agreed to divest its minority shareholding in Eurotecnica in order to minimize any risk of foreclosing AMI's competitors.

38. In addition, in the public consultation and recent media reports, other acquisitions of minority shareholdings on both the EU and Member State levels have emerged where the shareholding was acquired in a competitor or a vertically related company.[34]

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[30] COMP/M.4153 – *Toshiba/Westinghouse*, Commission decision of 19 September 2006.
[31] See for example case COMP. M.1673 - *VEBA/VIAG,* Commission decision of 13 June 2000.
[32] See also Annex 1 of the Consultation Paper.
[33] COMP/M.5406 – *IPIC/MAN Ferrostaal*, Commission decision of 13 March 2009.
[34] See for example the minority stakes recently acquired by Telefónica in Telecom Italia, by Air France in Alitalia, by Intel in ASML, a manufacturer of lithography systems for the semiconductor industry, by Marine Harvest in Grieg Seafood or by VW in Suzuki. Regarding minority shareholdings in vertical relationships, examples include the 10% minority shareholdings of Nestlé in Givaudan (which was recently sold) or the 15% shareholding of BMW in SGL Carbon (in addition to the 29% shareholding of the Quandt/Klatten family who holds a large stake in car manufacturer BMW). Obviously, these examples only show that minority shareholdings between competitors and vertically related companies do occur, but they are mentioned here without prejudice as to whether they would have raised any competition concerns.

3.1.2. Articles 101 and 102 TFEU may not be suitable for dealing with anti-competitive minority shareholdings

39. The Commission has considered whether the competition rules on restrictive agreements and the abuse of a dominant position, laid down in Articles 101 and 102 TFEU respectively, could be used to intervene against anti-competitive acquisitions of minority shareholdings. However, the uses of Article 101 and Article 102 in this regard are limited.

40. Regarding Article 101 TFEU, it is not clear whether acquiring a minority shareholding would constitute an “agreement” having the object or effect of restricting competition in all cases. For example, in the case of a series of acquisitions of shares via the stock exchange, it may be difficult to argue that the different purchase agreements meet the criteria of Article 101 TFEU. The same is probably true for the articles of association of a company, the purpose of which is generally to determine the corporate governance of the company and the relationship between it and its shareholders. In order for the Commission to intervene using Article 102 TFEU, the acquirer of the minority shareholding would need to hold a dominant position, and the acquisition would need to constitute an abuse. The circumstances under which the Commission can intervene against competitive harm arising from acquisitions of minority shareholdings are therefore quite narrow.[35]

41. Furthermore, as explained above, the theories of harm arising from acquisitions of minority shareholdings are similar to those arising from acquisitions of control, i.e. horizontal, non-coordinated and vertical effects.

3.2. Policy choices and proposed measures for reviewing acquisitions of minority shareholdings

3.2.1. Design and options – what principles should apply to the system for the control of minority shareholdings at the EU level?

42. A system for controlling acquisitions of non-controlling minority shareholdings should take into account the following three principles:

- it should capture the potentially anti-competitive acquisitions of non-controlling minority shareholdings;
- it should avoid any unnecessary and disproportionate administrative burden on companies, the Commission and NCAs; and
- it should fit with the merger control regimes currently in place at both the EU and national level.[36]

43. The Consultation Paper put forward three procedural options for the control of minority shareholdings:

[35] See also Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691, in particular para. 104, and Case 6/72 *Continental Can v Commission* [1973] ECR 216.

[36] See Article 1(2), (3) of the Merger Regulation. It is proposed that the same turnover thresholds which currently apply to acquisitions of control would also apply to the acquisition of non-controlling minority shareholdings. The referral system would also equally apply to the acquisitions of minority shareholdings to allow for allocation of cases to the more appropriate authority.

- A notification system, which would extend the current system of ex-ante merger control to acquisitions of non-controlling minority shareholdings under certain conditions.
- A transparency system, which would require parties to submit an information notice informing the Commission of acquisitions of non-controlling minority shareholdings. The information notice would enable the Commission to decide whether to further investigate the transaction, enable the Member States to consider a referral request, and enable potential complainants to come forward.
- A self-assessment system, which would not require parties to notify acquisitions of non-controlling minority shareholdings in advance of completion. The Commission could, however, initiate an investigation of potentially problematic minority shareholding acquisitions on the basis of its own market intelligence or complaints.

44. The scope of the Commission's jurisdiction relates directly to what procedure is appropriate and adequate. For example, if the Commission has jurisdiction over all acquisitions of minority shareholdings above a certain threshold, a pre-merger notification system would create a heavy burden on businesses because unproblematic transactions would also be covered. Giving the Commission jurisdiction over all acquisitions of minority shareholdings above a certain threshold might therefore be more appropriate under a self-assessment system, where the Commission is free to investigate transactions on its own initiative. On the other hand, the administrative burden imposed by a notification or transparency system would be much lower if the Commission's jurisdiction were limited to only potentially problematic transactions. The relationship between the design of the procedural system and the scope of jurisdiction arose frequently in responses to the public consultation.

3.2.2. The proposed system: a "targeted" transparency system

45. In light of the above, an alternative "targeted" transparency system may be most appropriate for dealing with acquisitions of minority shareholdings. The Commission believes that such a system would be in line with the three principles set out above. It would allow potentially problematic transactions to be targeted from the outset, namely through the identification of transactions which create a "competitively significant link", and it would ensure that the transactions thus identified can be effectively controlled by the Commission, even without the need for a full notification obligation.

46. In view of the theories of harm discussed above, a "competitively significant link" would arise where there is a *prima facie* competitive relationship between the acquirer's and the target's activities, either because they are active in the same markets or sectors or they are active in vertically related markets. In principle, the system would only be triggered when the minority shareholdings and the rights attached to it enable the acquirer to influence materially the commercial policy of the target and therefore its behaviour in the marketplace or grant it access to commercially sensitive information. However, above a certain level the shareholding itself might result in a change in acquirer's financial incentives in a way that the acquirer would adjust its own

behaviour in the market place, irrespective of whether it gains material influence over the target. Only acquisitions of a "competitively significant link" would require the submission of an information notice to the Commission.

47. In order to provide parties with legal certainty, only a transaction which meets the following cumulative criteria would fall within the definition of a "competitively significant link":

- acquisitions of a minority shareholding in a competitor or vertically related company (i.e. there needs to be a competitive relationship between acquirer and target); and
- the competitive link would be considered significant if the acquired shareholding is (1) around 20%[37] or (2) between 5% and around 20%, but accompanied by additional factors such as rights which give the acquirer a "de-facto" blocking minority[38], a seat on the board of directors, or access to commercially sensitive information of the target.

48. The parties would be required to self-assess whether a transaction creates a "competitively significant link" and, if so, submit an information notice. In the event that an information notice is submitted, the Commission would then decide whether to investigate the transaction and the Member States would decide whether to make a referral request.

3.2.3. Details of the procedure

49. Under the targeted transparency system, an undertaking would be required to submit an information notice to the Commission if it proposes to acquire a minority shareholding that qualifies as a "competitively significant link". The information notice would contain information relating to the parties, their turnover, a description of the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding and some limited market share information. As set out above, the Commission will decide whether further investigation of the transaction is warranted and Member States would consider whether to request a referral on the basis of this information notice. The parties would only be required to submit a full notification if the Commission decided to initiate an investigation and the Commission would only issue a decision if it had initiated an investigation. In order to provide parties with legal certainty, they should also be able to voluntarily submit a full notification.

50. The Commission could also consider proposing a waiting period once an information notice has been submitted, during which the parties would not be able to close the transaction and during which the Member States have to decide whether to request a referral. Such a waiting period could last 15

[37] The OFT has set a threshold at 15% above which it may examine any case (see OFT, "Mergers-Jurisdictional and procedural guidance", para. 3.20). This might also serve as a clear-cut threshold above which a shareholding would be considered a "competitively significant link".

[38] The UK case, *BSkyB/ITV* (2007), provides a good example of a *de facto* blocking minority shareholding (which is not enough to qualify as *de facto* control). A shareholding of 17.9% was found to be sufficient to give BSkyB material influence over ITV on the basis that it enabled it to influence ITV's strategic decision-making. The case was cleared subject to a divestiture of the shareholding down to 7.5%.

working days, for example. This would also align it with the deadline under Article 9 for a Member State referral request following a full notification. Such a system would ensure that transactions which are referred to Member States are not yet implemented and can be handled by the Member States under their normal procedure, as they might foresee a stand-still obligation and not be equipped to deal with consummated transactions. More generally, the referral system should ensure that the existing level of protection provided by the national merger regimes already capturing non-controlling minority shareholdings will be maintained and that enforcement gaps will be avoided.

51. The Commission would also be free to investigate a transaction, whether or not it has already been implemented, within a limited period of time following the information notice. Such a period could be 4 to 6 months, and would allow the business community to come forward with complaints. It would also reduce the risk of the Commission initiating an investigation on a precautionary basis during the initial waiting period.

52. In the event that the Commission initiates an investigation of a transaction which was already (fully or partially) implemented, it should have the power to issue interim measures in order to ensure the effectiveness of a decision under Articles 6 and 8 Merger Regulation. Such power could take the form of a hold separate order, for example.[39]

3.2.4. Scope of the assessment under the Merger Regulation and relationship with Article 101 TFEU

53. Any agreements entered into between the acquirer of the minority shareholding and the target remain subject to assessment under Articles 101 and 102 TFEU unless they constitute "ancillary restraints". Only ancillary restraints, i.e. "*restrictions directly related and necessary to the implementation”* of the acquisition of the shareholding,[40] are deemed to be covered by the clearance decision and are therefore not caught by Article 101 and Article 102 TFEU.

54. However, as is currently the practice for acquisitions of control, the agreements between the acquirer of the minority shareholding and the target would be taken into account during the substantive assessment of a transaction under the merger control rules. This is because they are relevant to the current and future market conditions (for example, the existence of long-term contracts) which the Commission takes into account as part of its substantive assessment.[41]

3.3. Conclusion on the review of minority shareholdings

55. The Commission does not currently have adequate tools for dealing with anti-competitive acquisitions of minority shareholdings. A targeted transparency system appears to be well suited to capture such transactions and to prevent

[39] The "hold separate" obligation would require the assets to be ring-fenced, a hold separate manager to be appointed, etc. It would follow a similar practice as that which currently occurs for divestiture commitments during the divestiture periods or the conditions and obligations under Article 7(3) of the Merger Regulation.
[40] By extension to minority shareholdings of Article 6(1)(b) subparagraph 2, Article 8(1) subparagraph 2 and Article 8(2) subparagraph 3 of the Merger Regulation.
[41] See for instance, case COMP/M.6541 - *Glencore/Xstrata*, para. 26.

consumer harm arising from them and would be in line with the three principles outlined in paragraph 42.

56. First, potentially harmful transactions would likely come to the attention of the Commission and Member States while innocuous transactions, such as those entered into for investment purposes only, would not.

57. Second, the targeted transparency system would limit the administrative burden on businesses, because the Commission would only need to be informed of a limited number of cases, namely those which create a "competitively significant link". Parties would only be required to provide the Commission with a limited amount of information regarding such transactions by way of an information notice, after which the Commission could decide whether to request a full notification.

58. Finally, the targeted transparency system would fit with the merger control regimes currently in place at the EU and national level. The information notice would be sent on to Member States to inform them of acquisitions of minority shareholdings, enabling them to request a referral at that stage. In contrast, a self-assessment system would be more difficult to reconcile with the Member State regimes, as there would be uncertainty as to whether the Commission would investigate a transaction.

4. Case referrals

4.1. Objectives and guiding principles for case referrals

59. The Merger Regulation has established a "one-stop-shop" system, whereby concentrations with a European Union dimension (as defined by the turnover thresholds laid down in Article 1) are reviewed exclusively by the Commission, thus avoiding multiple review procedures at the Member State level. While the turnover thresholds serve as a "bright-line test" for whether or not a merger is likely to have a European or cross-border dimension, the Merger Regulation also allows for cases to be referred from the Commission to one or more Member States and vice versa. This mechanism, which was made more effective by the 2004 reform, allows a case to be reviewed by the more appropriate authority if it is not already allocated to that authority by applying the turnover thresholds both before and after notifying a competent authority of the transaction.

60. The 2009 Report to the Council described above concluded that, overall, the turnover thresholds and rules on case referrals laid down in the Merger Regulation worked well. There was, however, room for improvement, given that a significant number of cases were still subject to reviews in three or more Member States (240 cases in 2007).

61. The case referral system could be enhanced to better serve the purpose of departing from the results of the turnover tests when necessary. There is especially room for improvement with respect to referrals from Member States to the Commission, both before and after notification.

62. Indeed, experience has shown that the current process for pre-notification referrals from Member States to the Commission under Article 4(5) by notifying parties tends to be cumbersome and time-consuming.[42] This is because it involves first the filing of a "reasoned submission" to request a referral in the first instance, and a subsequent notification once a referral has been approved. For this reason, parties may have chosen not to make a referral request in some cases that might have been good candidates for referral to the Commission. The Commission therefore suggests simplifying Article 4(5) referrals by abolishing the current two-step procedure.

63. Furthermore, the current rules for post-notification referrals from Member States to the Commission under Article 22 only grant the Commission jurisdiction for the Member States which have made or joined a referral request. In some cases, this has led to parallel investigations by the Commission and NCAs contrary to the one-stop-shop principle.[43] The Commission therefore proposes streamlining Article 22 referrals so as to give the Commission EEA-wide jurisdictions in cases referred to it and better implement the one-stop-shop principle.

4.2. The proposed measures for case referrals

64. The aim of the proposed modifications to the case referral system is to facilitate referrals in order to make the system more effective on an overall basis without fundamentally reforming the features of the system.

4.2.1. Article 4(5) of the Merger Regulation: pre-notification referral from Member States to the Commission

65. Given the low number of Article 4(5) requests that were vetoed by a Member State since 2004[44], the Commission proposes abolishing the current two-step procedure (a reasoned submission followed by a notification). This change would speed up Article 4(5) referrals and make them more efficient while maintaining the ability of Member States to veto a request in the rare event that they consider it necessary.

66. Accordingly, parties would notify a transaction directly to the Commission. The Commission would then forward the notification to the Member States immediately, giving those Member States that are *prima facie* competent to review the transaction under national law the opportunity to oppose the referral request within 15 working days. Unless a competent Member State opposes the request, the Commission would have jurisdiction to review the whole transaction.

67. In the event that at least one competent Member State opposes the jurisdiction of the Commission, the Commission would renounce jurisdiction entirely and Member States would retain jurisdiction. In such circumstances, the

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[42] See e.g. paragraph 19 of the 2009 Report.
[43] For instance in COMP/M.5828 – *Procter & Gamble/Sara Lee*, Commission decision of 17 June 2010.
[44] Only 6 of the 261 Article 4(5) requests made since 2004 were vetoed by a Member State.

Commission would not have any discretion, and would adopt a decision stating that it is no longer competent. It would then be up to the parties to determine in which Member States they must notify.

68. In order to facilitate the information exchange between the Member States and the Commission, the Commission proposes sending the parties' initial briefing paper or the case allocation request to the Member States to alert them about the transaction during the pre-notification contacts.

4.2.2. Article 22 of the Merger Regulation: post-notification referrals from Member States to the Commission

1. The procedure under Article 22 is proposed to be amended as follows:

   - One or more Member State(s) that are competent to review a transaction under their national law could request a referral to the Commission within 15 working days of the date it was notified to them (or made known to them).[45]
   - The Commission would be able to decide whether or not to accept a referral request. For example, the Commission may decide not to accept the request if the transaction has no cross-border effects, in line with Art. 22(1) first subparagraph EUMR. If the Commission decided to accept a referral request, it would have jurisdiction for the whole of the EEA.
   - However, if one (or more) competent Member State(s) opposed the referral, the Commission would renounce jurisdiction for the whole of the EEA, and the Member States would retain their jurisdiction. The Member State would not need to give reasons for opposing the referral.

70. In order to make the above proposal work, two issues need to be addressed. First, a timing problem could arise if the referral request is made after another Member State has already cleared the transaction in its territory. In this case the Commission would no longer be able to take EEA-wide jurisdiction. Second, other Member States might not have enough information to ascertain whether they are competent and would have the right to oppose the referral, or if they were competent, to make an informed choice whether or not to veto the referral as they may not yet have received a notification.

71. In order to address these issues to the fullest extent possible, the Commission suggests that the NCAs circulate early information notices for multi-jurisdictional or cross-border cases or cases concerning markets that are *prima facie* wider than national as soon as possible after a Member State receives the notification or otherwise learns of the transaction. The NCA would indicate in this notice if it is considering making a referral request. In that case, the notice would trigger the suspension of the national deadlines of all Member States which are also investigating the case. Alternatively, if the Commission itself believes that it could be the more appropriate authority it would

[45] In contrast to the current system, only Member States which are competent to review the transaction under their national law could request a referral.

invite the Member State to request a referral under Article 22(5) and such an invitation would equally suspend all national deadlines.

72. Such a procedural solution should reduce the risk that an NCA makes a referral request to the Commission when another NCA has already issued a decision clearing the transaction. However, in the unlikely event that a Member State has adopted a clearance decision before a referral request occurs, the clearance decision would remain in force and the case would be referred by the remaining Member States only.

73. The circulation of such an information notice would also facilitate cooperation and coordination between all the agencies involved in the review process and foster convergence, even if a referral to the Commission does not take place.

4.2.3. Article 4(4) of the Merger Regulation: pre-notification referrals from the Commission to a Member State

74. The Commission proposes clarifying the substantive thresholds for pre-notification referrals from the Commission to a Member State under Article 4(4).

75. In order to encourage the use of that provision, the Commission proposes adapting the substantive test in Article 4(4) so that parties are no longer required to claim that the transaction may "*significantly affect competition in a market*" in order for a case to qualify for a referral. Show that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice. Removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

5. Miscellaneous

76. Finally, the Commission believes that there is room to improve and streamline some further provisions of the Merger Regulation, particularly with a view towards simplifying procedures. In the context of merger control, the Commission has always sought to limit the administrative burden on undertakings to a minimum. In December 2013, it took a major step towards making EU merger control more efficient without amending the Merger Regulation itself through the adoption of a Simplification Package.[46] This package of measures brought significantly more merger cases under the so-called simplified procedure for unproblematic mergers and streamlined all the forms prescribed for notifying mergers to the Commission, leading to a substantial net reduction in information requirements.

77. Further streamlining and simplification of EU merger procedures, beyond the achievements of the 2013 Simplification Package, and improvement to certain provisions of the Merger Regulation require amending the Merger Regulation itself. The Staff Working Document accompanying this White Paper discusses these proposals in detail, but two points are worth highlighting here:

[46] Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 (OJ L 336, 14.12.2013, p. 1) and Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (OJ C 366, 14.12.2013, p. 5, corrigendum: OJ C 11, 15.01.2014, p.6).

- The Merger Regulation could be amended so that the creation of a full-function joint venture located and operating totally outside the EEA (and which would not have any impact on markets within the EEA) would fall outside its scope. Thus, such joint ventures would not have to be notified to the Commission, even if the turnover thresholds of Article 1 are met.
- In order to further simplify merger procedures, the Commission could be empowered to exempt from notification certain categories of transactions that normally do not raise any competition concerns (such as those transactions which do not involve any horizontal or vertical relationships between the merging undertakings and are currently dealt with under a simplified procedure) from mandatory prior notification. Such cases might be subject to a procedure similar to the "targeted transparency system" envisaged above for dealing with acquisitions of non-controlling minority shareholdings.
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6. Conclusion

78. Overall, the revised Merger Regulation adopted in 2004 provides a good framework for effectively protecting competition and thus consumers from anti-competitive effects of mergers and acquisitions in the internal market. The framework provides for such protection whilst allowing the large majority of unproblematic transactions to be cleared quickly. The introduction of the SIEC test in 2004 also enabled the Commission to review non-coordinated effects of transactions where the merged entity would not acquire a dominant position. Finally, improvements to the case referral system have significantly contributed to allocating cases to the more appropriate authority.

79. However, as set out above, there is room to further improve EU merger control.[47] In particular, this White Paper proposes expanding the Commission's jurisdiction to include review of potential anti-competitive effects resulting from acquisitions of non-controlling minority shareholdings using a targeted and non-intrusive transparency system, and making the case referral system more efficient and effective by streamlining the Article 4(5) procedure and amending Article 22 so that it enhances adherence to the one stop shop principle

[47] The scope chosen for this White Paper is without prejudice to additional evaluations of other important aspects of EU merger control by the Commission. The Commission will consider appropriate topics for an ex-post evaluation of some of its practices in merger control.

III. Cases on Cartels, Horizontal and Vertical Trade Restraints (Art 101 TFEU)

1. Imperial Chemical Industries case (ECJ)
Judgment of the Court of 14 July 1972. - Imperial Chemical Industries Ltd. v Commission of the European Communities. Case 48-69.

Summary

1. The delegation of authority to sign constitutes a measure relating to the internal organization of the departments of the community administration, in accordance with article 27 of the provisional rules of procedure adopted under article 16 of the treaty of 8 april 1965 establishing a single council and a single commission.

2. The notice of objections is the measure stating the final attitude of the commission concerning undertakings against which proceedings for infringement of the rules on competition have been commenced.

Accordingly, facts occurring subsequent to the decision to commence proceedings may be taken into consideration in the notice of objections when those facts consist of a continuation of earlier actions, and this does not prejudice the rights of the defence.

3. In order to protect the rights of the defence during the course of the administrative procedure, it is sufficient that undertakings should be informed of the essential elements of fact on which the objections are based. This requirement is met even if the contested decision contains amendments made pursuant to information furnished by the interested parties during the course of the procedure.

4. The intention of article 9 (4) of regulation no 99/63 is to assure the persons heard that the minutes contain a true record of what they said.

Delay in sending the minutes of a hearing to the undertakings whose conduct has been called in question can affect the legality of the decision taken only if the statements made are inaccurately recorded.

5. Irregularity of notification does not invalidate the measure notified. It may in certain circumstances prevent the period within which an application must be lodged from starting to run.

Such is not the case when the applicant has had full knowledge of the text of the decision.

6. In order to fulfil their function, limitation periods must be fixed in advance.

7. Although the provisions governing the commission's power to impose fines in cases where community rules have been infringed do not lay down any period of limitation, the fundamental requirement of legal certainty has the effect of preventing the commission from indefinitely delaying the exercise of its power to impose fines.

8. By its very nature, 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.

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.

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.

9. The function of price competition is to keep prices down to the lowest possible level, and to encourage the movement of goods between the member states, thereby permitting the most efficient possible distribution of activities in the matter of productivity and the capacity of undertakings to adapt themselves to change.

Independent and non-uniform conduct by undertakings in the common market encourages the pursuit of one of the basic objectives of the treaty, namely the interpenetration of national markets and, as a result, direct access by consumers to the sources of production of the whole community.

10. Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a change of prices and to ensure its success by prior elimination of all uncertainty as to each other' s conduct regarding the essential elements of that action, such as the amount, subject-matter, date, and place of such changes.

11. Where an undertaking established in a third country, in the exercise of its power to control its subsidiaries established within the community, orders them to carry out a decision to raise prices, the uniform implementation of which together with other undertakings constitutes a practice prohibited under article 85 (1) of the eec treaty, the conduct of the subsidiaries must be imputed to the parent company.

For the purpose of applying the rules on competition, unity of conduct on the market as between a parent company and its subsidiaries overrides the formal separation between those companies resulting from their separate legal personality.

12. The fact that no statement is included showing why the community administration has jurisdiction does not stand in the way of a review of the legality of its measures.

The community administration is not bound to include in its decisions all the arguments which it might later use in response to submissions of illegality which might be raised against its measures.

Parties

In case 48/69

Imperial chemical industries ltd. (hereinafter referred to as " ici "), having registered offices in london and manchester, assisted and represented by c . R. C. Wijckerheld bisdom and b. H. Ter kuile, advocates at the hoge raad of the netherlands, with an address for service in luxembourg at the chambers of j . Loesch, advocate, 2 rue goethe, applicant,

Vs

Commission of the european communities, represented by its legal advisers, j. Thiesing, g. Marchesini and j. Griesmar, acting as agents, assisted by professor w. Van gerven, with an address for service in luxembourg at the chambers of its legal adviser, e. Reuter, 4 boulevard royal, defendant,

Subject of the case

Application for the annulment of the commission decision of 24 july 1969 published in the journal officiel no l 195 of 7 august 1969, p. 11 et seq., relating to proceedings under article 85 of the eec treaty (iv/26.267 - dyestuffs)

Grounds

1. The delegation of authority to sign constitutes a measure relating to the internal organization of the departments of the community administration, in accordance with article 27 of the provisional rules of procedure adopted under article 16 of the treaty of 8 april 1965 establishing a single council and a single commission.
2. The notice of objections is the measure stating the final attitude of the commission concerning undertakings against which proceedings for infringement of the rules on competition have been commenced.

Accordingly, facts occurring subsequent to the decision to commence proceedings may be taken into consideration in the notice of objections when those facts consist of a continuation of earlier actions, and this does not prejudice the rights of the defence.

3. In order to protect the rights of the defence during the course of the administrative procedure, it is sufficient that undertakings should be informed of the essential elements of fact on which the objections are based. This requirement is met even if the contested decision contains amendments made pursuant to information furnished by the interested parties during the course of the procedure.
4. The intention of article 9 (4) of regulation no 99/63 is to assure the persons heard that the minutes contain a true record of what they said.
   Delay in sending the minutes of a hearing to the undertakings whose conduct has been called in question can affect the legality of the decision taken only if the statements made are inaccurately recorded.
5. Irregularity of notification does not invalidate the measure notified. It may in certain circumstances prevent the period within which an application must be lodged from starting to run.
   Such is not the case when the applicant has had full knowledge of the text of the decision.
6. In order to fulfil their function, limitation periods must be fixed in advance.
7. Although the provisions governing the commission's power to impose fines in cases where community rules have been infringed do not lay down any period of limitation, the fundamental requirement of legal certainty has the effect of preventing the commission from indefinitely delaying the exercise of its power to impose fines.
8. By its very nature, 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.
   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.
   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.
9. The function of price competition is to keep prices down to the lowest possible level, and to encourage the movement of goods between the member states, thereby permitting the most efficient possible distribution of activities in the matter of productivity and the capacity of undertakings to adapt themselves to change.
   Independent and non-uniform conduct by undertakings in the common market encourages the pursuit of one of the basic objectives of the treaty, namely the interpenetration of national markets and, as a result, direct access by consumers to the sources of production of the whole community.
10. Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is

contrary to the rules on competition contained in the treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a change of prices and to ensure its success by prior elimination of all uncertainty as to each other' s conduct regarding the essential elements of that action, such as the amount, subject-matter, date, and place of such changes.

11. Where an undertaking established in a third country, in the exercise of its power to control its subsidiaries established within the community, orders them to carry out a decision to raise prices, the uniform implementation of which together with other undertakings constitutes a practice prohibited under article 85 (1) of the eec treaty, the conduct of the subsidiaries must be imputed to the parent company.
For the purpose of applying the rules on competition, unity of conduct on the market as between a parent company and its subsidiaries overrides the formal separation between those companies resulting from their separate legal personality.

12 . The fact that no statement is included showing why the community administration has jurisdiction does not stand in the way of a review of the legality of its measures.
The community administration is not bound to include in its decisions all the arguments which it might later use in response to submissions of illegality which might be raised against its measures.

Parties

In case 48/69

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V commission of the european communities, represented by its legal advisers, j. Thiesing, g. Marchesini and j. Griesmar, acting as agents, assisted by professor w. Van gerven, with an address for service in luxembourg at the chambers of its legal adviser, e. Reuter, 4 boulevard royal, defendant,
Subject of the case

Application for the annulment of the commission decision of 24 july 1969 published in the journal officiel no l 195 of 7 august 1969, p. 11 et seq., relating to proceedings under article 85 of the eec treaty (iv/26.267 - dyestuffs),

Grounds

1 it is common ground that from january 1964 to october 1967 three general and uniform increases in the prices of dyestuffs took place in the community.

2 between 7 and 20 january 1964, a uniform increase of 15 per cent in the prices of most dyes based on aniline, with the exception of certain categories, took place in italy, the netherlands, belgium and luxembourg and in certain third countries .

3 on 1 january 1965 an identical increase took place in germany.
4 on the same day almost all producers in all the countries of the common market except france introduced a uniform increase of 10 per cent on the prices of dyes and pigments excluded from the increase of 1964.
5 since the acna undertaking did not take part in the increase of 1965 on the italian market, the other undertakings did not maintain the announced increase of their prices on that market.
6 towards mid-october 1967, an increase for all dyes was introduced, except in italy, by almost all producers, amounting to 8 per cent in germany, the netherlands, belgium and luxembourg, and 12 per cent in france .
7 by a decision of 31 may 1967 the commission commenced proceedings under article 3 of regulation no 17/62 on its own initiative concerning these increases for presumed infringement of article 85 (1) of the eec treaty against seventeen producers of dyestuffs established within and outside the common market, and against numerous subsidiaries and representatives of those undertakings .
8 by a decision of 24 july 1969, the commission found that the increases were the result of concerted practices, which infringed article 85 (1) of the treaty, between the undertakings

- badische anilin - und soda-fabrik ag (basf), ludwigshafen,
- cassella farbwerke mainkur ag, frankfurt am main,
- farbenfabriken bayer ag, leverkusen,
- farbwerke hoechst ag, frankfurt am main,
- societe francaise des matieres colorantes sa, paris,
- azienda colori nazionali affini s . P . A . (acna), milan,
- ciba sa, basel,
- j . R . Geigy sa, basel,
- sandoz sa, basel, and
- imperial chemical industries ltd ., (ici), manchester .

9 it therefore imposed a fine of 50 000 u . A . On each of these undertakings, with the exception of acna, for which the fine was fixed at 40 000 u . A .

[…]

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 dye .

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.

[…]

120 the applicant argues that the uniform price increases were not capable of affecting trade between member states because notwithstanding the noticeable differences existing between prices charged in the different states consumers have always preferred to make their purchases of dyestuffs in their own country.
121 however, it appears from what has already been said that the concerted practices, by seeking to keep the market in a fragmented state, were liable to affect the circumstances in which trade in the products in question takes place between the member states .
122 the parties who put these practices into effect sought, on the occasion of each price increase, to reduce to a minimum the risks of changing the conditions of competition.
123 the fact that the increases were uniform and simultaneous has in particular served to maintain the status quo, ensuring that the undertakings would not lose custom, and has thus helped to keep the traditional national markets in those goods " cemented " to the detriment of any real freedom of movement of the products in question in the common market .
124 therefore this submission is unfounded.

The jurisdiction of the commission

[…]

The court hereby:
1. Dismisses the application;
2. Orders the applicant to bear the costs.

2. Metro I case

Metro SB-Großmärkte GmbH & Co. KG v Commission, Case 26-76 R. (1976)m (excerpt)

Parties
Firma metro sb-grossmarkte gmbh & co. Kg …. Applicant, v commission of the european communities … defendant , supported by : firma saba schwarzwalder apparate-bau-anstalt august schwer sohne … intervener ,

Grounds

1 the application for the adoption of interim measures is, first, for the suspension , until the decision of the court giving judgment in the main action, of the operation of the decision of the commission of 15 december 1975 by which the latter declares that there are no grounds under article 85 (1) of the eec treaty for action on its part in respect of the conditions of resale for the domestic market applied by saba and declares moreover that, pursuant to article 85 (3) of the same treaty, article 85 (1) is temporarily inapplicable to various agreements relating to the distribution of electronic equipment for leisure purposes by which that same undertaking binds the wholesalers , sole distributors and specialist retailers which it appoints for the sale or resale of its products . That application is, alternatively, for the adoption of measures to enable the applicant to obtain provisionally supplies of saba equipment and to resell it in its capacity as a wholesale supermarket.

2 the decision, the suspension of the operation of which is requested, does not only concern the relationship of saba to the applicant but that of saba to all distributors of the equipment which it places on the community market. Since a measure, which would have the effect of suspending all those relationships, would be outside the scope of an urgent interim measure intended to safeguard temporarily the interests of the applicant the principal application should therefore be dismissed.

3 with regard to the alternative application, it has not been established that it would be impossible for the applicant to comply, even temporarily, with the conditions imposed by saba for the purposes of recognition as a saba wholesaler or that compliance with those conditions until the decision of the court giving judgment in the main action would cause it irreparable damage.

4 as soon as the applicant agreed to comply with those conditions, saba would be in breach of its obligations under the decision of 15 december 1975 by refusing to deliver supplies or by prohibiting other distributors in its network from so doing and it would be for the commission to take action, subject however, to metro' s having recourse, if necessary, to the legal remedies afforded by national legislations .

5 the application must therefore be dismissed.

3. Metro II case

Judgment of the Court (Fourth Chamber) of 22 October 1986. - Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities. - Competition - Selective distribution system. - Case 75/84.

……..

Summary

1…

2. The renewal of a decision granting exemption under article 85 (3) of the treaty in respect of a selective distribution system which has been modified in order to render the system less restrictive than before does not pre-suppose fresh formal notification of the modified system but only an application for renewal and communication of the modifications made to the system, so as to enable the commission to adopt a decision pursuant to article 8 (2) of regulation no 17.
3. Although 'simple' selective distribution systems are capable of constituting an aspect of competition compatible with article 85 (1) of the treaty, there may nevertheless be a restriction or elimination of competition where the existence of a certain number of such systems does not leave any room for other forms of distribution based on a different type of competition policy or results in a rigidity in price structure which is not counterbalanced by other aspects of competition between products of the same brand and by the existence of effective competition between different brands. Consequently, the existence of a large number of selective distribution systems for a particular product does not in itself permit the conclusion that competition is restricted or distorted. Nor is the existence of such systems decisive as regards the granting or refusal of an exemption under article 85 (3), since the only factor to be taken into consideration in that regard is the effect which such systems actually have on the competitive situation.
4. Some limitation of price competition must be regarded as inherent in any selective distribution system, because the prices applied by specialist dealers necessarily remain within a much narrower margin than would be expected if there were competition between specialist dealers and non-specialist dealers. That limitation is counterbalanced by competition as regards the quality of the services supplied to customers, which is not normally possible in the absence of an adequate profit margin covering the higher costs entailed by such services.
5. 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 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. Competition could not be eliminated if the channel of distribution in question continues to exist in conjunction with methods of distribution based on a different type of competition policy.
6. In the context of a selective distribution system, a manufacturer' s refusal to approve distributors who satisfy the qualitative criteria of the system must be considered unlawful. The existence of isolated cases of refusal, not forming part of a systematic unlawful application of the system, is not sufficient to compel the commission to withdraw an exemption which has already been granted or to refuse to renew such an exemption.
7. Although the share of the market held by an undertaking does not necessarily constitute the sole criterion for the existence of a dominant position, it may, however, be considered that in a market in highly technical products which nevertheless appear to the majority of consumers to be readily interchangeable, market shares of less than 10% preclude the existence of a dominant position save in exceptional circumstances.

8. In examining an application for the renewal of an exemption under article 85 (3) of the treaty in respect of a selective distribution system, the increase in the degree of concentration on the market is a factor to be taken into consideration if such an increase affects the structure of competition on the relevant market. Such an effect does not always occur where, as in the present case, the trend towards concentration is at the level of production and the agreements to be examined by the commission concern the distribution of products. However, such an effect may arise, in particular if the trend towards concentration helps to eliminate price competition or to oust other channels of distribution.

….

6. The abuse of a dominant position by a group of undertakings (fifth submission)

79. In support of this submission, metro alleges that the undertakings in the thomson-brandt group , of which saba is a member, constitute a single economic unit which has a dominant position on the market in consumer electronics in general, and colour television sets and video recorders in particular, in a substantial part of the common market . It claims that in setting up its distribution system and in refusing to supply metro, saba has abused that position.

80. In connection with this submission, it is also necessary to examine metro' s complaint to the effect that there has been a substantial increase in concentration on the relevant market since 1975 . It claims that that increased degree of concentration has been caused in particular by the growth of the thomson-brandt group on the german market. The german undertakings within the group, namely saba, telefunken, nordmende and dual, can in its contention no longer be regarded as competitors inter se, in view of their collaboration at the level of production and the centralization of their management and administration. Metro claims that as a result of its acquisitions thomson-brandt is now the market leader on the german market in colour television sets (with a market share of about 27% in 1983) and also on the french and italian markets in that sector (with market shares of 34% and 27% respectively). The trend towards concentration in this sector has thus resulted in the domination of two big groups, thomson-brandt and philips-grundig.

81. The united kingdom supports that line of argument. It states that the effects of the operation of the saba system on the structure of competition are not the same as they were in 1975, owing to the growth of the thomson-brandt group.

82. The commission contends that the various undertakings in the thomson-brandt group have separate networks for the distribution of their products and are independent so far as their commercial strategy is concerned. Consequently, it is only saba's position on the market that should be taken into account in order to examine whether a dominant position exists. So far as colour television sets are concerned, saba's share of the community market is only 3% and of the german market only 7.5%. Thus it does not, in the commission's view, have a dominant position.

83 While the commission recognizes that horizontal concentration in the relevant market has increased recently, it denies that this has affected the structure of competition. It claims that the relationship between the individual undertakings in the thomson-brandt group has remained a competitive one, at least as regards the distribution of their products. In its submission, neither saba nor the

thomson-brandt group holds a position on any of the markets in consumer electronics which enables it to eliminate competition.

84 In the first place, it must be remarked that, as against the clear and precise information supplied to the court by the commission, metro has not adduced any evidence which would enable the court to find that the undertakings in the thomson-brandt group are not only linked at the level of capital but also pursue a coordinated marketing strategy in accordance with the directions of their parent company or with a plan agreed between themselves. In the absence of such evidence, the court must proceed on the basis that so far as the distribution of its products are concerned saba is independent of the parent company and of the other undertakings in the group.

85 As regards saba's position on the german market, it should firstly be noted, on the basis of the information supplied by the parties in the course of the proceedings, that there are at least 18 producers on the market in colour television sets, which is the principal product concerned in this case, and that saba's share of the market is below 10%. Therefore even if it is accepted that saba has the largest market share, that is to say on the assumption that the relevant market is the german market in colour television sets, that market share is too small to be regarded as evidence of a dominant position on the market.

86 The court has already held in its judgment in metro i that, whilst the share of the market held by an undertaking does not necessarily constitute the sole criterion for the existence of a dominant positio , it is, however, proper to conclude that in a market in highly technical products which nevertheless appear to the majority of consumers to be readily interchangeable, shares of the market as insignificant as that held by saba preclude the existence of a dominant position save in exceptional circumstances. However, in the present case no such exceptional circumstances have been shown to exist.

87 It remains to examine whether, as metro and the united kingdom maintain, the growth of the thomson-brandt group has resulted in such a high degree of concentration on the market in consumer electronics that the conditions for the grant of an exemption under article 85 (3) to one of the undertakings in the group, namely saba, are not fulfilled.

88 In that regard, it must be stated in the first place that the increase in the degree of concentration on the market is a factor to be taken into consideration in examining an application for the renewal of an exemption under article 85 (3) of the treaty, if such an increase affects the structure of competition on the relevant market. Such an effect does not always occur where, as in the present case, the trend towards concentration is at the level of production and the agreements to be examined by the commission concern the distribution of products. However, such an effect may arise, in particular if the trend towards concentration helps to eliminate price competition or to oust other channels of distribution.

89 It was for metro to adduce facts capable of establishing the existence of such a situatio. It must, however, be stated that, in the light of the information supplied by the commission and saba, from which it is clear that the distribution systems of the individual undertakings in the thomson-brandt group operate separately and that there are substantial differences between the essential features of those systems, metro has not succeeded in establishing the existence of parallel conduct in the operation of those systems which has an impact on the structure of competition on the market.

90 Furthermore, the commission was entitled to take into consideration the fact that on the market in consumer electronics the undertakings in the thomson-brandt group must face competition not only from the philips-grundig group but also from other manufacturers such as itt, blaupunkt, loewe, opta, sony and others.

91 Therefore metro has not succeeded in showing that the increase in concentration since 1975 to which it refers has affected competition at the level of the distribution of consumer electronics equipment.

92 It follows from all the foregoing considerations that the application must be dismissed in its entirety.

4. Exclusive Supply (CEPSA) case

(Case C-279/06) CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL (excerpt)

11 September 2008 in Case C 279/06,
(Reference for a preliminary ruling from the Audiencia Provincial de Madrid)

(Competition – Agreements, decisions and concerted practices – Agreements between undertakings – Article 81 EC – Regulation (EEC) No 1984/83 – Articles 10 to 13 – Regulation No 2790/1999 – Article 4(a) – Exclusive supply contract for petroleum products between a service station operator and an oil company – Exemption)

Summary

....
(Art. 81(1) and (2) EC)

1. An exclusive supply contract for petroleum products between a service station operator and a supplier is capable of falling within the scope of Article 81(1) EC where, first, it constitutes an agreement between undertakings because the service station operator assumes, in a non negligible proportion, one or more financial and commercial risks linked to the sale of those products to third parties, so that he is regarded as an independent economic operator and where, second, that contract contains clauses capable of infringing competition, such as that relating to the fixing of the retail price, which is explicitly prohibited by Article 81(1)(a) EC, to the extent to which all the other conditions for the application of that provision are satisfied.
   If the service station operator does not assume such risks or assumes only a negligible share of them, he does not become an independent economic operator when selling fuel to third parties, since the relationship between the operator and the supplier is then identical to that between an agent and his principal. In that hypothesis, only the obligations imposed on the service-station operator concerning the sale of the goods to third parties on behalf of the supplier, including the fixing of the retail price, fall outside the scope of Article 81(1) EC. By contrast, the obligations imposed on the operator in the context of services as an intermediary offered by the operator to the supplier, which concern their relationship as independent economic operators, are capable of falling within the scope of that provision. That is the case with exclusivity and non competition clauses, which are capable of infringing the competition rules in so far as they entail locking up the market concerned.
   (see paras 35, 40-42, 44, operative part 1)
2. An exclusive supply contract for petroleum products between a service station operator and a supplier is capable of benefiting from a block exemption provided for in Regulation No 1984/83 on the application of Article 85(3) of the Treaty (now Article 81(1) EC) to categories of exclusive purchasing agreements, as amended by Regulation No 1582/97, if it complies with the maximum duration of 10 years referred to in Article 12(1)(c) and if the supplier grants the service station operator, in return for exclusivity, substantial commercial advantages which contribute to an improvement in distribution, facilitate the establishment or modernisation of the service station and lower the distribution costs.

(see paras 49, 54, 60, operative part 2)

3. If the period of performance of an exclusive purchasing agreement concluded under Regulation No 1984/83 extends beyond the expiry date of that regulation, on 31 December 1999, the exemption provided for in that regulation continues to apply until 31 May 2000 pursuant to Regulation No 2790/1999 on the application of Article 81(3) EC to categories of vertical agreements and concerted practices. Such an agreement then benefits from the exemption provided for in Regulation No 2790/1999 from its date of application, on 1 June 2000, on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and that the duration of the direct or indirect non-compete obligations is not indefinite or does not exceed five years, since a non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration. However, a transitional period, during which the prohibition laid down in Article 81(1) EC does not apply, runs until 31 December 2001 in respect of agreements in force on 31 May 2000 which satisfied the conditions for exemption provided for in Regulation No 1984/83, but not those provided for in Regulation No 2790/1999.
(see paras 56-60)

4. Articles 10 to 13 of Regulation No 1984/83 on the application of Article 85(3) of the Treaty (now Article 81(1) EC) to categories of exclusive purchasing agreements, as amended by Regulation No 1582/97, must be interpreted as precluding the application of the block exemption to an exclusive supply contract which provides for the fixing of the retail price by the supplier, since such an obligation is not amongst those listed exhaustively in Article 11 of Regulation No 1984/83 and which, in addition to an exclusivity clause, can be imposed on the reseller.
The questions whether, first, it is possible for the supplier to amend unilaterally the clause governing the fixing of the price in order to bring it into line with the competition rules and, second, whether, in that case, the contract may become valid, are matters to be decided under the national law applicable to such a contract. If a unilateral amendment is permissible, the conditions for exemption must be examined in the light of the legislation in force at the time of such an amendment.
(see paras 63, 65, 67-68, 75-76, operative part 3)

5. The exemption provided for in Article 2 of Regulation No 2790/1999 on the application of Article 81(3) EC to categories of vertical agreements and concerted practices is not to apply, according to Article 4(a) of that regulation, to vertical agreements which have as their object the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.
As regards the fixing of a maximum sale price, it is for the referring court to examine whether it is genuinely possible for the reseller to lower that sale price, taking account of all the contractual obligations in their economic and legal context, and the conduct of the parties to the main proceedings. In particular, it is necessary to ascertain whether the retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the reseller, threats, intimidation, warnings, penalties or incentives.

(see paras 69-71)

6. The automatic nullity provided for in Article 81(2) EC affects a contract in its entirety only if the clauses which are incompatible with Article 81(1) EC are not severable from the contract itself. Otherwise, the consequences of the nullity, in respect of all the other parts of the contract, are not a matter for Community law.
(see paras 78-80, operative part 4)

Judgment

1. This reference for a preliminary ruling relates to the interpretation of Article 81 EC and Articles 10 to 13 of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81](3) of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5), as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997 (OJ 1997 L 214, p. 27) ('Regulation No 1984/83').
2. The reference has been made in the course of proceedings between CEPSA Estaciones de Servicio SA ('CEPSA'), appellant in the main proceedings, and LV Tobar e Hijos SL ('Tobar'), respondent in the main proceedings, regarding the non performance by Tobar of the exclusive purchasing agreement concluded between those two companies.

....

15. On 7 February 1996, the parties to the main proceedings concluded a 'contract with a service station for use of brand name and image, technical and commercial assistance and supply on a commission agent basis' ('the contract at issue in the main proceedings').
16. Pursuant to that contract, Tobar undertook to purchase exclusively from CEPSA motor vehicle and other fuels, as well as lubricants and other related products ('petroleum products'), for resale in its service station in accordance with the retail prices, conditions and sales and business methods stipulated by that supplier. The contract was concluded for a period of 10 years, which could be extended for successive five year periods by express agreement in writing on notice of at least six months. The exclusive purchasing obligation in respect of those products was accompanied by a non competition clause which prohibited Tobar from selling or promoting competing products or from participating in such campaigns, both inside its service station and in the surrounding area.
17. Tobar was required to pay CEPSA the price of the petroleum products within nine days from the date of their delivery to the service station. Tobar was also required to take out and present, on the date of the first delivery, a bank guarantee for a total amount equivalent to 15 days' supply, which could be enforced by CEPSA if Tobar should fail to pay on time. If enforcement of that guarantee were necessary, Tobar would then be required to pay for supplies in advance. Tobar received, by way of remuneration, the market commission in force for each service station. The payments to CEPSA, determined on the basis of the number of litres delivered to the service station, were made by deducting from the retail price fixed by CEPSA, including value added tax ('VAT'), the amount of the commission, including VAT.
18. As regards the clauses relating to the allocation of costs and risks, it is apparent from the order for reference that Tobar was obliged to assume the risks

associated with the petroleum products as soon as they were received from the supplier in the storage tanks, including the risk of discrepancies in volume, and to keep them in the conditions necessary to ensure that they underwent no loss or deterioration. Tobar was liable, both to the supplier and to third parties, for any loss, contamination or adulteration which might affect the quality of those products and for any damage caused by them. Moreover, Tobar guaranteed and was responsible for customers who had signed up, through Tobar, for the use of the CEPSA CARD credit card or who had been allowed direct credit. It also contributed to the financing of a small proportion of the costs relating to use of the CEPSA loyalty card.

19. For its part, CEPSA bore the cost of transporting the petroleum products and the cost of installing and maintaining its brand image in the service station. It transferred to Tobar the fuel tanks and pumps which Tobar was obliged to use only to sell CEPSA's products and which it had to hand back to CEPSA at the end of the contract. However, Tobar was required to provide a 'guarantee on first demand' in favour of CEPSA to cover the value of the technical installations.

20. On 2 November 2001 CEPSA sent a letter to Tobar authorising it, henceforth, to lower the sale prices of the petroleum products but without reducing CEPSA's receipts.

21. In the course of 2003, after sending several letters to CEPSA, Tobar ceased obtaining supplies from CEPSA and concealed CEPSA's logo on the service station installations.

22. During the course of 2004, Tobar brought an action against CEPSA for annulment of the contract at issue in the main proceedings, claiming that it was incompatible with Article 81 EC, and that its purpose was unlawful by reason of the fact that the determination of the sale price of the petroleum products was left to the sole discretion of CEPSA. Tobar also applied for damages.

23. CEPSA contested the merits of that action and counterclaimed, demanding performance of that contract or its rescission if its performance was impossible, whilst demanding compensation for the loss suffered.

24. On 29 July 2005, the Juzgado de Primera Instancia No 3 de Madrid (Court of First Instance No 3, Madrid) (Spain) annulled that contract on the ground that it was not compatible with Article 81(1) EC or with Regulations No 1984/83 and No 2790/1999. CEPSA appealed against that judgment to the referring court.

25. In those circumstances, the Audiencia Provincial de Madrid (Provincial Court, Madrid) (Spain) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling: ....

On those grounds, the Court (Third Chamber) hereby rules:

1. An exclusive supply contract for motor vehicle and other fuels, as well as lubricants and other related products, is capable of falling within the scope of Article 81(1) EC where the service station operator assumes, in a non negligible proportion, one or more financial and commercial risks linked to the sale of those products to third parties and where that contract contains clauses capable of infringing competition, such as that relating to the fixing of the retail price. If the service station operator does not assume such risks or assumes only a negligible share of them, only the obligations imposed on the operator in the context of services as an intermediary offered by the operator to the principal, such as the exclusivity and non competition clauses, are capable of falling within the

scope of that provision. It is for the referring court to ascertain, moreover, whether the contract concluded on 7 February 1996 between CEPSA Estaciones de Servicio SA and LV Tobar e Hijos SL has the effect of preventing, restricting or distorting competition within the meaning of Article 81 EC.

2. An exclusive supply contract, such as that referred to in the preceding paragraph of this operative part, is capable of benefiting from a block exemption provided for in Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81](3) of the Treaty to categories of exclusive purchasing agreements, as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997, if it complies with the maximum duration of 10 years referred to in Article 12(1)(c) of that regulation and if the supplier grants the service station operator, in return for exclusivity, substantial commercial advantages which contribute to an improvement in distribution, facilitate the establishment or modernisation of the service station and lower the distribution costs. It is for the referring court to assess whether those conditions are satisfied in the case in the main proceedings.
3. Articles 10 to 13 of Regulation No 1984/83, as amended by Regulation No 1582/97, must be interpreted as precluding the application of the block exemption to an exclusive supply contract which provides for the fixing of the retail price by the supplier. It is for the referring court to ascertain whether, under national law, the contractual clause relating to that sale price can be amended by unilateral authorisation of the supplier, such as that at issue in the main proceedings, and whether a contract which is automatically void may become valid following an amendment of that contractual clause which has the effect of bringing that clause into line with Article 81(1) EC.
4. The automatic nullity provided for in Article 81(2) EC affects a contract in its entirety only if the clauses which are incompatible with Article 81(1) EC are not severable from the contract itself. Otherwise, the consequences of the nullity, in respect of all the other parts of the contract, are not a matter for Community law.

5. Visa case

JUDGMENT OF THE GENERAL COURT (Fifth Chamber) 14 April 2011(*) in Case T 461/07 (summary)

Visa Europe Ltd, established in London (United Kingdom), Visa International Service, established in Wilmington, Delaware (United States) v. European Commission
“visa”

1. Visa International Service (‘Visa International’) is a private commercial corporation which is registered in the United States of America and owned by the financial institutions which are its members. Visa International is responsible for the management and coordination of the international payment card network of the same name (‘the Visa system’), which includes in particular laying down the rules of the network and providing authorisation and clearing services to its member institutions. Responsibility for issuing Visa cards and contracting with merchants for Visa card acceptance lies with the member financial institutions.
2. Morgan Stanley, formerly Morgan Stanley Dean Witter & Co., (‘Morgan Stanley’) is a financial institution registered in the United States of America, where it owned throughout the administrative procedure the ‘Discover Card/Novus’ network, which operates ‘Discover’ cards (‘the Discover system’).
3. On 23 February 1999 Morgan Stanley set up in the United Kingdom a subsidiary named Morgan Stanley Bank International Ltd.
4. On 22 March 2000 Morgan Stanley was informed that it was not eligible for Visa International membership in the ‘European Union’ region.
5. On 12 April 2000 Morgan Stanley submitted a complaint, pursuant to Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), alleging that Visa International had infringed Articles 81 EC and 82 EC by refusing to admit it to Visa International membership in the ‘European Union’

region. Morgan Stanley brought an action before the High Court of Justice (England & Wales) relating to the same conduct. That action was stayed pending the outcome of the procedure before the European Commission.

6. Morgan Stanley's complaint related to the application to it of Rule 2.12(b) ('the Rule') of the Visa International By-Laws, various versions of which have been notified to the Commission. Since 4 December 1989 the Rule has been worded as follows: '[i]f permitted by applicable law, the Board (including Regional Boards and Group Members) shall not accept for membership any Applicant which is deemed by the Board of Directors to be a competitor of the corporation'.

……………..

14. On 22 September 2006 Morgan Stanley became a member of Visa Europe and withdrew the complaint it had lodged with the Commission. The Commission, however, took the view that it retained a legitimate interest in adopting a decision penalising the applicants' anti competitive practices. ……………..

15. On 3 October 2007 the Commission adopted Decision C (2007) 4471 final relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (COMP/D1/37860 – Morgan Stanley/Visa International and Visa Europe) ('the contested decision'), the main elements of which are set out below.

A – Definition of the relevant market

16. The Commission considered that the services provided in the context of a payment card network may be subdivided into three distinct groups:
– services provided by a payment card network to financial institutions, where competition between different payment card schemes takes place;
– services provided by the banks issuing payment cards to cardholders;
– services provided to merchants, enabling them to accept cards ('acquiring services').

17. The Commission inferred from this that three separate markets could be differentiated: an upstream market, consisting of network services, in which card networks provide services to various financial institutions; a first downstream market, in which payment card issuers compete with each other to issue cards and provide related services to individuals ('the issuing market'); a second downstream market, in which acquirers of card-based transactions compete to conclude contracts with merchants for all the services necessary for the merchants to accept cards ('the acquiring market').

18. While the Commission argued that the Rule could have effects restrictive of competition in both downstream markets, it stated that it was focussing solely on the acquiring market, where the restrictive effects of the Rule on competition were the most appreciable.

19. Accordingly, the Commission defined the relevant market as that for the provision of credit and deferred debit charge card acquiring services to merchants in the United Kingdom ('the relevant market' or 'the market in question').

20. In recital 25 of the contested decision, the Commission stated that the conduct of the applicants which was the subject of complaint was not the Rule in itself but its application to Morgan Stanley ('the conduct at issue').

C – Application of Article 81 EC

21. In reaching the conclusion that the conduct at issue fell within the scope of Article 81(1) EC, the Commission, first, took the view that the rules and regulations setting out the framework for the functioning of the Visa system (including the Visa International By-Laws and the Membership Regulations of Visa Europe which contain the Rule) and the decision to apply them to an undertaking could be regarded either as an agreement between undertakings or as a decision of an association of undertakings. The Commission took into account the fact that, on the one hand, the applicants and their respective members engage in economic activities and hence are undertakings within the meaning of Article 81(1) EC and, on the other hand, that the applicants are membership organisations.

22. Secondly, the Commission found that the conduct at issue had produced anti competitive effects in that the result of the refusal to accept Morgan Stanley as a member in the 'European Union' area of Visa International and thereafter within Visa Europe (taken together, within 'Visa') was to prevent a potential competitor from entering a market marked by a high degree of concentration and in which, despite competition not being ineffective, there was scope for further competition.

23. In that regard, the Commission noted that the refusal to admit Morgan Stanley to Visa not only prevented it from acquiring transactions effected with Visa cards but also, more generally, excluded it from the entire acquiring market, including that for transactions effected using MasterCard cards. The Commission took into account the fact that merchants seek to enter into contracts for acceptance of the most widely held cards in the United Kingdom, namely Visa and MasterCard, with one and the same acquirer.

24. The Commission analysed in the contested decision the possibility, raised by the applicants, of Morgan Stanley's entering the acquiring market by concluding a 'fronting arrangement' with a Visa member financial institution. The Commission defined a fronting arrangement, essentially, as referring to circumstances in which the Visa member, the fronting partner, has withdrawn from the merchant acquiring business and acts as a mere interface between Visa and a third-party acquirer, also described as the de facto acquirer, which takes responsibility for virtually all elements of an acquiring service and bears the risk with respect to the merchant's revenue stream. The Commission concluded that, for an international bank such as Morgan Stanley, entering into a fronting arrangement was not an efficient means of entering the relevant market.

25. In response to the various arguments advanced by the applicants in the course of the administrative procedure which sought to justify the conduct at issue, the Commission considered that it was not realistic to think that Morgan Stanley was in a position to extend its Discover system in the European Union and thus compete with Visa once it was active on that market. Similarly, in the Commission's view, the refusal to admit Morgan Stanley could not be justified by the concern to avoid 'free-riding' by one of Visa's direct competitors, which would thus be in a position to obtain confidential information. In that regard, the Commission noted that certain Visa members have a credit or deferred payment card system which competes directly with Visa and that the Rule was not applied to them.

26. The Commission found that Article 81(3) EC did not apply in the present case.

27. Finally, the Commission took the view that it retained a legitimate interest in adopting a decision penalising the applicants' anti competitive practices, despite the fact that the infringement ended when Morgan Stanley was admitted to Visa on 22 September 2006. ………………

256. It is therefore necessary to reject the third part and accordingly the plea i in its entirety.

6. Case Bayer/Adalat

Judgment of the Court of 6 January 2004

Summary:

Parties:
Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities –

two appeals against the judgment of the Court of First Instance of the European Communities of 26 October 2000 in Case T-41/96 Bayer v Commission [2000] ECR II-3383

The facts underlying the dispute are set out in the judgment under appeal as follows:

1. The applicant, Bayer AG (hereinafter Bayer or the Bayer Group), is the parent company of one of the main European chemical and pharmaceutical groups and has a presence through its national subsidiaries in all the Member States of the Community. For many years, it has manufactured and marketed under the trade name Adalat or Adalate a range of medicinal preparations whose active ingredient is nifedipine, designed to treat cardio-vascular disease.
2. In most Member States, the price of Adalat is directly or indirectly fixed by the national health authorities. Between 1989 and 1993, the prices fixed by the Spanish and French health services were, on average, 40% lower than prices in the United Kingdom.

3. Because of those price differences, wholesalers in Spain exported Adalat to the United Kingdom from 1989 onwards. French wholesalers followed suit as from 1991. According to Bayer, sales of Adalat by its British subsidiary, Bayer UK, fell by almost half between 1989 and 1993 on account of the parallel imports, entailing a loss in turnover of DEM 230 million for the British subsidiary, representing a loss of revenue to Bayer of DEM 100 million.
4. Faced with that situation, the Bayer Group changed its delivery policy, and began to cease fulfilling all of the increasingly large orders placed by wholesalers in Spain and France with its Spanish and French subsidiaries. That change took place in 1989 for orders received by Bayer Spain and in the fourth quarter of 1991 for those received by Bayer France.

The contested decision

3. Following complaints by some of the wholesalers concerned, the Commission started an administrative investigation procedure concerning alleged infringements of Article 85(1) of the EC Treaty (now Article 81(1) EC) by the subsidiaries of Bayer in France (Bayer France) and Spain (Bayer Spain). On 10 January 1996, the Commission adopted the contested decision.
4. According to the Commission, Bayer France and Bayer Spain infringed Article 85(1) of the Treaty by imposing an export ban as part of their commercial relations with their respective wholesalers. It maintains that such an agreement constituted an appreciable restriction of competition and had an equally appreciable effect on trade between Member States (points 155 to 199 of the contested decision).
13. By application lodged at the Registry of the Court of First Instance on 22 March 1996, Bayer brought an action for the annulment of the contested decision…
16. In the judgment now under appeal, the Court of First Instance annulled the contested decision and ordered the Commission to pay Bayer's costs on the ground that it had incorrectly assessed the facts of the case and made an error in the legal assessment of those facts by holding it to be established that there was a meeting of minds between Bayer and the wholesalers referred to in that decision, which justified the conclusion that there was an agreement within the meaning of Article 85(1) of the Treaty, designed to prevent or limit exports of Adalat from France and Spain to the United Kingdom.

The pleas in law concerning the concept of an“agreement“ within the meaning of Article 85(1) of the Treaty – Findings of the court

97. … the Court of First Instance set out from the principle that the concept of an agreement within the meaning of Article 85(1) of the Treaty ‚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‘. The Court further recalled, in paragraph 67 of the same judgment, that 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 common intention to conduct themselves on the market in a specific way.
98. …the question arising in this case is whether a measure adopted or imposed apparently unilaterally by a manufacturer in the context of the continuous relations which it maintains with its wholesalers constitutes an agreement within the meaning of Article 85(1) of the Treaty…

101. However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by Article 85(1) of the Treaty may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of Article 86 of the Treaty.
102. For an agreement within the meaning of Article 85(1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers.

But the available facts show that Bayer's commercial policy could be carried out without the cooperation of the wholesalers and that's why Bayer wasn't interested in any invitation to the wholesalers to fulfil that goal together. As a result there was no agreement within the meaning of Article 85(1) of the Treaty between Bayer France/Spain and their wholesalers.
On those grounds, the Court hereby: dismisses the appeals.

7. Case Nintendo

JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)
30 April 2009

(Competition – Agreements, decisions and concerted practices – Market for Nintendo video games consoles and games cartridges – Decision finding an infringement of Article 81 EC – Limitation of parallel exports – Proof of the existence of an agreement to limit parallel trade – Fines – Differential treatment – Attenuating circumstances)

In Case T 18/03, CD-Contact Data GmbH, established in Burglengenfeld (Germany), represented by J. de Pree and R. Wesseling, lawyers, applicant, v Commission of the European Communities, represented by P. Oliver, X. Lewis and O. Beynet, acting as Agents, defendant,
………

Judgment
Background to the dispute
(1) The undertakings involved
1. Nintendo Co., Ltd ('NCL' or 'Nintendo'), a publicly quoted company whose registered office is in Kyoto (Japan), is the head of the Nintendo group of companies, which specialise in the production and distribution of video game consoles and video game cartridges for use with those consoles.

2. Nintendo's business in the European Economic Area (EEA) is conducted, in certain territories, by wholly owned subsidiaries, of which the main one is Nintendo of Europe GmbH ('NOE' or 'Nintendo'). At the material time, NOE coordinated certain business activities of Nintendo in Europe and was its exclusive distributor for Germany.
3. In other sales territories, Nintendo had appointed exclusive independent distributors. Thus, The Games Ltd, a trading division of John Menzies Distribution Ltd, a wholly owned subsidiary of John Menzies plc, became Nintendo's exclusive distributor for the United Kingdom and Ireland in August 1995 and remained so until 31 December 1997 at least.
4. The applicant, CD-Contact Data GmbH, was, for its part, Nintendo's exclusive distributor for Belgium and Luxembourg from April to 31 December 1997 at least.

(2)Administrative procedure

Investigation into the video games sector (Case IV/35.587 PO Video Games)

5. In March 1995, the Commission opened an investigation into the video games industry (Case IV/35.587 PO Video Games). During that inquiry, on 26 June and 19 September 1995 the Commission sent requests for information to Nintendo under Article 11 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1971 (III), p. 1035) in order to obtain information relating in particular to its distributors and subsidiaries, the formal distribution agreements with those undertakings and its general sales conditions. NOE replied to those requests by letters dated 31 July and 26 September 1995.

Additional investigation relating specifically to Nintendo's distribution system (Case IV/35.706 PO Nintendo Distribution)

6. As a result of its preliminary findings, in September 1995 the Commission opened an additional investigation specifically into the distribution system of Nintendo (Case IV/35.706 PO Nintendo Distribution).
7. In the course of that investigation, on 9 October 1995 the Commission sent Nintendo a request for information. A number of meetings relating to Nintendo's distribution policy were held between Nintendo representatives and the Commission. Nintendo also provided various versions of the agreements concluded by it with certain of its distributors.

Inquiry following the complaint lodged by Omega Electro BV (Case IV/36.321 Omega – Nintendo)

8. On 26 November 1996, Omega Electro, a company active in the import and sale of electronic games, lodged a complaint under Article 3(2)(b) of Regulation No 17 that primarily concerned the distribution of Nintendo game cartridges and consoles, on the ground inter alia that Nintendo was hindering parallel trade and was operating a resale price maintenance policy in the Netherlands. Following that complaint, the Commission extended its investigation (Case IV/36.321 Omega – Nintendo). On 7 March 1997, it sent a request for

information to Nintendo and John Menzies. In its reply of 16 May 1997, Nintendo admitted that some of its distribution agreements and some of its general terms had contained certain restrictions on parallel trade within the EEA. In October 1997, the Commission sent John Menzies a fresh request for information, to which the latter replied on 1 December 1997, providing certain information on the restrictive agreements.

9. By letter of 23 December 1997, Nintendo indicated to the Commission that it had become aware of 'a serious issue in relation to parallel trade within the Community' and expressed the wish to cooperate with the Commission.

10. On 13 January 1998, John Menzies provided further information. On 21 January, 1 April and 15 May 1998, Nintendo forwarded several hundred documents to the Commission. On 15 December 1998, a meeting was held between the Commission and Nintendo representatives at which the question of possibly granting compensation to third parties injured by the restrictive agreements was discussed.

11. Following its admission, Nintendo also took measures designed to ensure future compliance with Community law and offered financial compensation to the third parties which had suffered financial harm as a result of its activities.

12. By letter of 9 June 1999, the Commission asked the applicant to inform it whether the documents in the Commission files concerning it contained confidential data. In that letter, it was also stated that the Commission was considering opening formal proceedings against certain companies, including the applicant.

13. On 26 April 2000, the Commission sent a statement of objections to Nintendo and the other undertakings concerned, including the applicant, for infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement ('the EEA Agreement'). Nintendo and the other undertakings concerned submitted written observations in response to the Commission's statement of objections, in which Nintendo and a number of those undertakings requested the application of the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). None of the parties asked for a formal hearing to be held. Nintendo did not substantially contest the facts set out in the statement of objections.

14. As regards the applicant more particularly, the reply to the statement of objections was sent to the Commission on 13 July 2000. An informal meeting was held between the applicant and Commission staff on 16 October 2000. Following that meeting, on 6 November 2000 the applicant submitted an additional reply to the statement of objections.

(3) The contested decision

15. On 30 October 2002, the Commission adopted Decision 2003/675/EC relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega – Nintendo) (OJ 2003 L 255, p. 33) ('the Decision'). The Decision was notified to the applicant on 8 November 2002.

16 . The Decision includes in particular the following provisions:

'Article 1

The following undertakings have infringed Article 81(1) [EC] and Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices in the markets for game consoles and game cartridges compatible with Nintendo manufactured game consoles with the object and effect of restricting parallel exports in Nintendo game consoles and cartridges:

…– [the applicant], from 28 October 1997 to the end of December 1997.

…Article 3

The following fines are imposed on the undertakings listed in Article 1 in respect of the infringement referred to therein:

…– [the applicant], a fine of EUR 1 million.

…'

17. As regards the events in Belgium and Luxembourg, the Commission observes in particular that '[i]t was clear to [the applicant] that it was bound to ensure that its customers did not parallel export'. That is apparent from a fax sent by the applicant to NOE on 28 October 1997 by which it gave assurances that it did not want to have any exports (see recitals 195 and 196 of the Decision). In the Commission's submission, that fax, which was in reply to a letter from NOE asking whether one of the applicant's customers might have sold Nintendo products to customers of Nintendo France SARL, shows that the applicant and Nintendo 'had arrived at a "concurrence of wills" [that] no exports … were to occur and that [the applicant] would monitor supplies to customers … from whom exports could be expected' (see recital 317 of the Decision).

……………

Findings of the Court

The existence of an infringement of Article 81(1) EC

46. It is settled case-law that, in order for there to be an agreement within the meaning of Article 81(1) EC, it is necessary and sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-7/89 Hercules Chemicals v Commission [1991] ECR II 1711, paragraph 256, and Case T-41/96 Bayer v Commission [2000] ECR II-3383, paragraph 67; see also, to that effect, Case 41/69 ACF Chemiefarma v Commission [1970] ECR 661, paragraph 112; and Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck and Others v Commission [1980] ECR 3125, paragraph 86).

47. As regards the form in which that joint 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 (Bayer v Commission, paragraph 46 above, paragraph 68; see also, to that effect, ACF Chemiefarma v Commission, paragraph 46 above, paragraph 112, and Van Landewyck and Others v Commission, paragraph 46 above, paragraph 86).

48. The concept of an agreement within the meaning of Article 81(1) EC, as interpreted by the case-law, requires the existence of a concurrence of wills between at least two parties. The form of that concurrence of wills is unimportant so long as it constitutes the faithful expression of the parties' intention. That concurrence of wills may result from both the clauses of a contract, such as a distribution contract, and from the conduct of the undertakings concerned (see, to that effect, Case C 74/04 P Commission v Volkswagen [2006] ECR I 6585, paragraph 39).

49. In relation to adducing evidence of an infringement of Article 81(1) EC, it should be pointed out that 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, and Case C 49/92 P Commission v AnicPartecipazioni [1999] ECR I 4125, paragraph 86). In this respect, the Commission must produce sufficiently precise and consistent evidence to establish the existence of the infringement (see, to that effect, Case T 62/98 Volkswagen v Commission [2000] ECR II 2707, paragraph 43 and the case-law cited).
50. As regards, lastly, the scope of review by the Court, it should be recalled that according to settled case-law, where the Court is faced with an application for the annulment of a decision applying Article 81(1) EC, it undertakes a comprehensive review generally of the question whether or not the conditions for the application of Article 81(1) EC are met (Case T 325/01 DaimlerChrysler v Commission [2005] ECR II 3319, paragraph 81; see also, to that effect, Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 62).
51. Before the Court examines the material factors taken into account in the present case by the Commission, it points out that, contrary to what the Commission claims, an argument cannot be based on the fact that Nintendo, the other party to the agreement, expressly stated in its reply to the statement of objections that it accepted the way in which the Commission presented the facts in that statement and thus fully admitted the existence of an agreement and concerted practices with the applicant. Any recognition by Nintendo, the other party to the distribution agreement, of certain facts cannot in any event call in question the applicant's right to contest the facts before the Court. That consideration is all the more valid in this case, given that the applicant specifically contested in its replies to the statement of objections that it had committed any infringement whatsoever of Article 81(1) EC.
52. Further, it must be observed that, contrary to what the applicant appears to indicate in its written pleadings, the Commission did not refer to the terms of the distribution agreement between Nintendo and the applicant as such in order to find the existence of an agreement contrary to Article 81(1) EC. In that regard, the Commission stated, at recital 196 of the Decision, that '[t]he text of the distributor agreement between [the applicant] and Nintendo allowed [the applicant] to export passively'. Unlike what was found in respect of certain of the distributors to which the Decision relates, the distribution agreement, which was concluded between the applicant and Nintendo almost two years after the start of the Commission investigation concerning the distribution system in question, did not as such contain any clause prohibited by Article 81(1) EC.
53. It must also be stated that, contrary to the arguments put forward by the applicant, the Commission made no reference whatsoever, as regards the applicant, to the existence of a concerted practice between it and Nintendo, but only to the conclusion of an 'agreement' (see recital 196 of the Decision) contrary to Article 81(1) EC. Accordingly, the applicant's arguments regarding the absence of a concerted practice are ineffective.
54. In the absence of any direct documentary evidence that a written agreement was concluded between Nintendo and the applicant concerning the limitation

or reduction of passive exports, the Commission found that the applicant's participation in an agreement contrary to Article 81(1) EC was evidenced by its conduct, as expressed in its correspondence.

55. Accordingly, it is necessary to examine whether, in view of the wording of the letters exchanged, the Commission established to the requisite legal standard that there was a concurrence of wills between the applicant and Nintendo to limit parallel trade.

56. In that respect, it should be recalled that, in the Decision, the Commission referred to a body of written evidence, and more specifically to a fax sent by the applicant to NOE on 28 October 1997. It is common ground between the parties that that fax was prompted by a complaint of 24 October 1997 sent by Nintendo France to NOE regarding, in particular, exports of products from Belgium, for which the applicant was Nintendo's authorised distributor.

57. That complaint states in particular as follows:
'Even if such kind of grey import will always occur, we believe NOE has several ways to help [Nintendo France] to limit those problems. Most efficient will be:
1. …
2. Negotiate with distributors to avoid it.
Some (we know it is true for Belgium and Italy) almost organize it unofficially with some wholesalers or even some retailers. What happens if we do the same exporting one discounted hot item to their customers?'

58. In the fax of 28 October 1997 sent to NOE in response to that complaint, the applicant explains that it was not in a position to provide certain quantities of product to BEM, a wholesaler established in Belgium which might potentially engage in parallel trade. That fax, which is referred to in part in recital 195, is worded as follows:
'I have checked your information and do not find any correspondence with our information.
(1) [BEM]'s received until now in different deliveries 960 pieces of Lylat Wars. This is just enough to deliver his approximatively 100 customers in the French part of Belgium.
(2) Following the fact that in the start of Contact Data Belgium, [BEM] delivered some Hardware in France, we are very cautious with this customer and would never deliver him this big quantities.
(3) We only have received 7.000 pieces of Lylat Wars and are not in the possibility to deliver 5.000 pieces of Software to one customer. …
As we discussed last week with you, we are very cautious in our deliveries as we do not want to have any export, as we need these goods for our Belgian market.'

59. Contrary to what the Commission submits, it is not clear from the wording of that fax that the applicant was aware that it was supposed to prevent parallel exports and that it wished to defend itself against Nintendo France's allegations relating to such parallel exports from Belgium. In particular, it cannot be inferred with requisite certainty that the 'caution' to which the applicant refers in respect of its customers which engage generally in exports shows that the applicant had agreed to the policy of limiting the parallel trade in question. Thus, the applicant's interpretation that the reference to the limited quantities at its disposal must be analysed as information showing that it was materially impossible for it to engage in active selling through a wholesaler established in Belgium cannot be dismissed from the outset.

60. However, as was noted at paragraph 58 above, the fax of 28 October 1997 was a direct response to the letter of 24 October 1997 in which Nintendo France had complained about parallel exports from Belgium, for which the applicant was at the time the exclusive distributor of the products concerned, and had asked NOE to take the measures necessary to remedy the ‘problems’ that those exports were causing it. The applicant thus considered it necessary to justify itself in relation to the quantities at its disposal and the circumstances in which it exported the products in question in response to the complaint concerning parallel exports from Belgium.
61. As regards the documents relating to parallel imports into Belgium and Luxembourg, the Commission referred to the fact that a system of practical collaboration and information exchange on parallel trade had been developed between Nintendo and certain of its authorised distributors, including the applicant. The applicant’s participation in the information exchange system emerges from several letters cited in recital 197 of the Decision.
62. The wording of those various letters makes it possible, by a logical extension of the considerations set out above, to conclude that their object was to denounce parallel imports of Nintendo products into Belgium and that they were part of the information exchange system developed by Nintendo.
63. In the letter of 4 September 1997 sent to NOE before the relevant period, the applicant stated inter alia the following:
‘Our customers are cancelling their orders for the N64 console because they apparently can get them cheaper in France … This is definitely the main priority for our discussions in Monaco. Immediate action in this context is no doubt mandatory.’
64. The applicant’s letter to NOE of 3 November 1997, which is also referred to by the Commission in recital 197 of the Decision, states inter alia:
‘The following proposal is now on the Belgian market: 1420 pieces of N64 HW at … with German manual.’
65. In the fax sent on 12 November 1997 to Nintendo France, which had no power to set the purchase price of the products, the applicant makes the following comments:
‘We have just received a leaflet from Toys’R Us who is apparently proposing SNES Donkey Kong Country 3 at a Consumer price in Belgium of [BEF] 1.495,- (+- [FRF] 249) while it is proposed on your latest price list at [FRF] 372 [excluding tax]. Are these goods Grey import or do you have a special promotion on this article?’
66. The document of 4 December 1997 sent to the applicant by NOE consists of a request for information on the parallel imported goods.
67. The fact that the applicant had, in practice, participated in parallel trade by exporting goods to customers outside Belgium and Luxembourg is not capable of calling in question the conclusion set out in paragraph 62 above. The fact that an undertaking, whose participation in an unlawful concerted practice under Article 81(1) EC is established, did not conduct itself in the market in the manner agreed with its competitors does not necessarily have to be taken into account. An undertaking which, despite colluding with its competitors, follows a policy that departs from that agreed on may simply be trying to exploit the cartel for its own benefit (see, to that effect, Case T 62/02 Union Pigments v Commission [2005] ECR II 5057, paragraph 130).

68. Lastly, as regards proof of the prohibition of parallel imports into Belgium and Luxembourg, the applicant cannot claim that the letters cited by the Commission (see paragraphs 63 to 66 above) were misinterpreted, in so far as, in those letters, the applicant merely sought to ensure that the price that it was paying to Nintendo for the relevant products was not too high. It is clear from reading all those letters, in particular the fax of 12 November 1997 (see paragraph 65 above), that they dealt with the issue of the price of the relevant products in a more or less direct connection with the presence of parallel imports.

69. It follows from all those considerations that the Commission did not err in finding that the applicant participated in an agreement having as its object the limitation of parallel trade.

70. The complaint alleging infringement of Article 81(1) EC must therefore be rejected.

8. Case Pierre Fabre Dermo-Cosmétique

Judgment of the Court of 13 October 2011

Summary:

Parties:
Pierre Fabre Dermo-Cosmétique SAS
v
Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi,

The dispute in the main proceedings and the question referred for a preliminary ruling

9. Pierre Fabre Dermo-Cosmétique is one of the companies in the Pierre Fabre group. It manufactures and markets cosmetics and personal care products …
10. The products at issue are cosmetics and personal care products which are not classified as medicines and are, therefore, not covered by the pharmacists' monopoly laid down by the code de la santé publique (Public Health Code).
12. Distribution contracts for those products in respect of the Klorane, Ducray, Galénic and Avène brands stipulate that such sales must be made exclusively in a physical space, in which a qualified pharmacist must be present.
14. Those requirements exclude de facto all forms of selling by internet.
15. By decision of 27 June 2006, the Competition Authority opened an ex officio investigation of practices in the distribution sector for cosmetics and personal care products.
18. In view of the fact that there might be an effect on trade between the Member States, the Competition Authority analysed the practice in question in the light of the provisions of French competition law and European Union law.
27. The Competition Authority thus concluded that the ban imposed by Pierre Fabre Dermo Cosmétique on its authorised distributors on selling via the internet amounts to a restriction on competition contrary to Article 81 EC and Article L. 420-1 of the Commercial Code…
28. On 24 December 2008, Pierre Fabre Dermo Cosmétique brought an action for annulment and, in the alternative, for amendment of the contested decision before the cour d'appel de Paris. At the same time Pierre Fabre Dermo Cosmétique requested the first president of the court to stay execution of the contested decision. In support of its action, Pierre Fabre Dermo Cosmétique claimed, primarily, that the contested decision was vitiated by an error of law in that it denied the contested practice the benefit of both the block exemption provided for in Regulation No 2790/1999 and the individual exemption provided for in Article 81(3) EC.
31. In those circumstances, the cour d'appel de Paris decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:
    'Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a "hardcore" restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC [Article 101(3) TFEU][?]'

Consideration of the question referred
The classification of the restriction in the contested contractual clause as a restriction of competition by object

34. It must first of all be recalled that, to come within the prohibition laid down in Article 101(1) TFEU, an agreement must have 'as [its] object or effect the prevention, restriction or distortion of competition within the internal market'…
36. The selective distribution contracts at issue stipulate that sales of cosmetics and personal care products by the Avène, Klorane, Galénic and Ducray brands must be made in a physical space, the requirements for which are set out in detail, and that a qualified pharmacist must be present.
37. According to the referring court, the requirement that a qualified pharmacist must be present at a physical sales point de facto prohibits the authorised distributors from any form of internet selling.
38. As the Commission points out, by excluding de facto a method of marketing products that does not require the physical movement of the customer, the contractual clause considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.
39. As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market (Case 107/82 AEG Telefunken v Commission [1983] ECR 3151, paragraph 33). Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'.
40. However, it has always been recognised 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 101(1) TFEU (AEG Telefunken v Commission, paragraph 33).
41. In that regard, the Court has already pointed out that the organisation of such a 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 (Case 26/76 Metro SB Großmärkte v Commission [1977] ECR 1875, paragraph 20, and Case 31/80 L'Oréal [1980] ECR 3775, paragraphs 15 and 16).
43. It is undisputed that, under Pierre Fabre Dermo Cosmétique's selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers. However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment.

44. In that regard, it should be noted that the Court, in the light of the freedoms of movement, has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales (see, to that effect, Deutscher Apothekerverband, paragraphs 106, 107 and 112, and Case C 108/09 Ker Optika [2010] ECR I-0000, paragraph 76).

47. In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.

The possibility of a block exemption or an individual exemption

51. As regards the possibility that the selective distribution contract may benefit from the block exemption of Regulation No 2790/1999, it should be noted that the categories of vertical agreements that are eligible have been defined by the Commission in that regulation, on the basis of the Council's authorisation contained in Council Regulation No 19/65/EEC of 2 March 1965 on the application of [81(3)] of the Treaty to certain categories of agreements and concerted practices (OJ, English Special Edition 1965-1966, p. 35).

52. Under Articles 2 and 3 of Regulation No 2790/1999, a supplier, in the context of a selective distribution system, may, in principle, benefit from an exemption, where its market share does not exceed 30%. It is apparent from the documents before the Court that Pierre Fabre Dermo Cosmétique's market share does not exceed that threshold. However, that regulation, pursuant to Article 2 of Regulation No 19/65, has excluded certain types of restrictions that have severely anticompetitive effects, irrespective of the market share of the undertakings concerned.

53. Hence, it follows from Article 4(c) of Regulation No 2790/1999 that the exemption is not to apply to vertical agreements which directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

54. A contractual clause such as the one at issue in the main proceedings, prohibiting de facto the internet as a method of marketing, at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.

59. In the light of the foregoing considerations, the answer to the second and third parts of the question referred for a preliminary ruling is that Article 4(c) of Regulation No 2790/1999 must be interpreted as meaning that the block exemption

provided for in Article 2 of that regulation does not apply to a selective distribution contract which contains a clause prohibiting de facto the internet as a method of marketing the contractual products. However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met.

9. Case Expedia

Judgment of the Court of 13 December 2012

Summary:

Parties:
Expedia Inc.
v
Autorité de la concurrence and Others,

The dispute in the main proceedings and the questions referred for a preliminary ruling

7. In order to expand the sale of train tickets and travel over the internet, SNCF concluded, in September 2001, a number of agreements with Expedia, a company incorporated under US law and specialised in the sale of travel over the internet, and created with it a joint subsidiary called GL Expedia. The website voyages SNCF.com, which until then specialised in information on the reservation and sale of train tickets over the internet, hosted the activities of GL Expedia and expanded to offer, in addition to its initial services, the services of an online travel agency. In 2004, the joint subsidiary changed its name to Agence de voyages SNCF.com (‘Agence VSC’).
8. By decision of 5 February 2009, the French Competition Authority found that the partnership between SNCF and Expedia creating Agence VSC constituted an agreement contrary to Article 81 EC and Article L. 420-1 of the Commercial Code, the object and effect of which is to promote that joint subsidiary in the market for travel agency services provided for leisure travel to the detriment of competitors. It imposed financial penalties on Expedia and on SNCF.
9. The Competition Authority found, inter alia, that Expedia and SNCF were competitors in the market for on-line travel agency services, that their market shares were more than 10% and that, consequently, the ‘de minimis’ rule, as set out in paragraph 7 of the ‘de minimis’ notice and Article L. 464 2 1 of the Commercial Code, were not applicable.
10. Before the Cour d’appel, Paris, Expedia submitted that the Competition Authority had overestimated the market shares held by Agence VSC. That court did not rule directly on that plea. In its judgment of 23 February 2010, it held, inter alia, in the light of the wording of Article L. 464-6-1 of the Commercial Code and, in particular, the use of the word ‘may’, that it is possible for the Competition Authority, in any event, to bring proceedings against practices implemented by undertakings whose market share is below the thresholds specified by that article and by the de minimis notice.

13. In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
‘Must Article 101(1) TFEU and Article 3(2) of Regulation (EC) No 1/2003 be interpreted as precluding the bringing of proceedings and the imposition of penalties by a national competition authority, on the grounds of both Article 101(1) TFEU and the national law of competition, in respect of a practice under agreements, decisions of associations of undertakings or concerted action that may affect trade between Member States, but that does not reach the thresholds specified by the European Commission in its [de minimis] notice?’

The question referred for a preliminary ruling

15. It should be noted that Article 101(1) TFEU prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.
16. It is settled case law that an agreement of undertakings falls outside the prohibition in that provision, however, if it has only an insignificant effect on the market (Case 5/69 Völk v Vervaecke [1969] ECR 295, paragraph 7; Case C 7/95 P John Deere v Commission [1998] ECR I 3111, paragraph 77; Joined Cases C 215/96 and C 216/96 Bagnasco and Others [1999] ECR I 135, paragraph 34; and Case C 238/05 Asnef-Equifax and Administración del Estado [2006] ECR I 11125, paragraph 50).
17. Accordingly, if it is to fall within the scope of the prohibition under Article 101(1) TFEU, an agreement of undertakings must have the object or effect of perceptibly restricting competition within the common market and be capable of affecting trade between Member States (Case C 70/93 BMW v ALD [1995] ECR I 3439, paragraph 18; Case C 306/96 Javico [1998] ECR I 1983, paragraph 12; and Case C 260/07 Pedro IV Servicios [2009] ECR I 2437, paragraph 68).
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).
23. It is apparent from paragraphs 1 and 2 of the de minimis notice that the Commission intends to quantify therein, with the help of market share thresholds, what is not an appreciable restriction of competition within the meaning of Article 101 TFEU and the case-law cited in paragraphs 16 and 17 of the present judgment.
24. With regard to the wording of the de minimis notice, its non-binding nature, for both the competition authorities and the courts of the Member States, is emphasised in the third sentence of paragraph 4 thereof.

27. It also follows from the objectives pursued by the de minimis notice, as mentioned in paragraph 4 thereof, that it is not intended to be binding on the competition authorities and the courts of the Member States.
29. Consequently, and as the Court has already had occasion to point out, a Commission notice, such as the de minimis notice, is not binding in relation to the Member States (see, to that effect, Case C 360/09 Pfleiderer [2011] ECR I 5161, paragraph 21).
31. Consequently, in order to determine whether or not a restriction of competition is appreciable, the competition authority of a Member State may take into account the thresholds established in paragraph 7 of the de minimis notice but is not required to do so. Such thresholds are no more than factors among others that may enable that authority to determine whether or not a restriction is appreciable by reference to the actual circumstances of the agreement.
expectations and legal certainty, having regard to the wording of paragraph 4 of that notice.
33. Furthermore, as the Advocate General pointed out in point 33 of her Opinion, the principle of the lawfulness of penalties does not require the de minimis notice to be regarded as a legal measure binding on the national authorities. Cartels are already prohibited by the primary law of the European Union, that is, by Article 101(1) TFEU.
35- Moreover, it should be noted that, according to settled case law, for the purpose of applying Article 101(1) TFEU, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (see, to that effect, Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299; Case C 272/09 P KME Germany and Others v Commission [2011] ECR I 12789, paragraph 65; and Case C 389/10 P KME Germany and Others v Commission [2011] ECR I 13125, paragraph 75).
37. It must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.
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.

10. Case LECLERC (The freedom of the EU market)

Judgment of the Court (Third Chamber) of 11 July 1985. - SA Saint-Herblain distribution, Centre distributeur Leclerc and others v Syndicat des libraires de Loire - Océan. - Reference for a preliminary ruling: Tribunal de grande instance de Nantes - France. - Fixed prices for books. - Case 299/83.

Keywords

1. Competition - community rules - national legislation on the price of books - compatibility - conditions
(eec treaty , art . 3 (f), art . 5 , second para . And art . 85)
2. Free movement of goods - quantitative restrictions - measures equivalent in effect - legislation on the price of books - prohibition - conditions
(eec treaty , art . 30)

Summary

1. As community law stands, the second paragraph of article 5 of the treaty , in conjunction with articles 3 (f) and 85, do not preclude member states from enacting legislation whereby the retail price of books must be fixed by the publisher or by the importer and is binding on all retailers, provided that such legislation is consonant with the other specific provisions of the treaty, in particular those relating to the free movement of goods.
2. In the context of national legislation on the price of books , the following constitute measures equivalent in effect to quantitative restrictions on imports , contrary to article 30 of the treaty: (a) provisions whereby the importer responsible for complying with the statutory requirement to deposit one copy of each imported book with the authorities, that is to say the principal distributor, is responsible for fixing the retail price, and (b) provisions requiring the retail price fixed by the publisher to be applied to books published in the member state concerned and re-imported following exportation to another member state, unless it is established that those books were exported for the sole purpose of re-importation in order to circumvent the legislation in question.

Parties

In case 299/83
Reference to the court under article 177 of the eec treaty by the tribunal de grande instance (regional court), nantes , for a preliminary ruling in the case pending before that court between
Sa saint herblain distribution , centre distributeur leclerc , saint herblain , and sa paris distribution , centre distributeur leclerc , nantes , and
Association des centres distributeurs edouard leclerc , paris ,
And
Syndicat des libraires de loire-ocean , angers ,
Subject of the case

On the interpretation of articles 3 (f) and 5 of the eec treaty ,

Grounds

1. By a judgment of 22 november 1983, which was received at the court on 29 december 1983, the tribunal de grande instance, nantes , referred a question to the court under article 177 of the eec treaty for a preliminary ruling on the interpretation of various rules of community law, in particular the provisions relating to free competition in the common market and articles 3 (f) and 5 of the eec treaty, so as to enable it to assess the compatibility with community law of national legislation requiring all retailers to abide by the selling prices for books fixed by the publisher or importer.
2. The question was raised in proceedings between, on the one hand, syndicat des libraires de loire-ocean and, on the other hand, the companies saint herblain distribution sa and paris distribution sa, which run shops under the name' centre distributeur leclerc', and association des centres distributeurs edouard leclerc, which has shops under the same name with a reputation for pursuing a policy of low prices. The dispute concerns the failure by the centres distributeurs leclerc to observe the retail prices fixed pursuant to law no. 81-766 of 10 august 1981 (journal officiel de la republique franssaise of 11 august 1981).
3 Under the law of 10 august 1981 all publishers or importers of books are required to fix retail prices for the books which they publish or import. Retailers must charge an effective price for sales to the public of between 95% and 100% of that price. The law exempts certain private and public entities, such as libraries and educational establishments, from having to pay that price and it authorizes clearance sales, subject to certain conditions. If the provisions of the law are contravened competitors and various types of association may seek an injunction or claim damages; criminal proceedings may also be brought.
4 As far as imported books are concerned, the last paragraph of article 1 of the law provides that ' where imported books were published in france the retail price fixed by the importer shall be no less than that fixed by the publisher'. Decree no. 81-1068 of 3 december 1981 (journal officiel de la republique francaise of 4 december 1981), issued pursuant to the law of 10 august 1981 ,

further provides that the principal distributor of imported books who must comply with the requirement laid down in article 8 of the law of 21 june 1943 - namely the requirement that a complete copy must be deposited with the ministry of the interior - is deemed to be the importer.

5 The syndicat des libraires de loire-ocean applied to the tribunal de grande instance, nantes, for an injunction against the companies saint herblain distribution and paris distribution - which issued a third-party notice against association des centres distributeurs edouard leclerc - to restrain the defendants from charging prices lower than those fixed pursuant to the above-mentioned legislation; the tribunal de grande instance thereupon referred the following question to the court for a preliminary ruling:

Must articles 3 (f) and 5 of the eec treaty be interpreted as prohibiting the setting up in a member state, by law or by regulation, in respect of books published in that member state and books imported into that state, in particular from other member states, of a system which compels retailers to sell the books at the price fixed by the publisher or the importer without being able to reduce that price by more than 5%?

6 It should be noted that a question for a preliminary ruling in identical terms was submitted by the cour d ' appel, poitiers, in similar proceedings and was the subject of the judgment of the court of 10 january 1985 (case 229/83 , association des centres distributeurs leclerc v au ble vert sarl and others (1985) ecr 17).

7 When it was informed of that judgment the tribunal de grande instance, nantes, notified the court that it did not wish to withdraw the request for a preliminary ruling.

8 Consideration of the present case has revealed nothing that was not already known to the court in case 229/83. In those circumstances it is sufficient to refer to the grounds of the judgment of 10 january 1985, a copy of which shall be annexed to the present judgment.

9 The questions submitted by the tribunal de grande instance, nantes, must be answered in the same terms as in the judgment of 10 january 1985:

As community law stands, the second paragraph of article 5 of the eec treaty , in conjunction with articles 3 (f) and 85, does not prohibit member states from enacting legislation whereby the retail price of books must be fixed by the publisher or by the importer and is binding on all retailers, provided that such legislation is consonant with the other specific provisions of the treaty, in particular those relating to the free movement of goods.

In the context of such national legislation, the following constitute measures equivalent in effect to quantitative restrictions on imports , contrary to article 30 of the eec treaty:

(a) provisions whereby the importer responsible for complying with the statutory requirement to deposit one copy of each imported book with the authorities, that is to say the principal distributor, is responsible for fixing the retail prices;

(b) provisions requiring the retail price fixed by the publisher to be applied to books published in the member state concerned and re-imported following exportation to another member state, unless it is established that those books were exported for the sole purpose of re-importation in order to circumvent the legislation in question.

Decision on costs

Costs

10 The costs incurred by the french government and the commission of the european communities, which have submitted observations to the court, are not recoverable . As these proceedings are, in so far as the parties to the main proceedings are concerned , in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds ,
The court (third chamber),
In answer to the question referred to it by the tribunal de grande instance , nantes , by judgment of 22 november 1983 , hereby rules :

(1) as community law stands , the second paragraph of article 5 of the eec treaty , in conjunction with articles 3 (f) and 85, does not prohibit member states from enacting legislation whereby the retail price of books must be fixed by the publisher or by the importer and is binding on all retailers, provided that such legislation is consonant with the other specific provisions of the treaty, in particular those relating to the free movement of goods.

(2) in the context of such national legislation, the following constitute measures equivalent in effect to quantitative restrictions on imports, contrary to article 30 of the eec treaty:

(a) provisions whereby the importer responsible for complying with the statutory requirement to deposit one copy of each imported book with the authorities, that is to say the principal distributor, is responsible for fixing the retail prices;

(b) provisions requiring the retail price fixed by the publisher to be applied to books published in the member state concerned and re-imported following exportation to another member state, unless it is established that those books were exported for the sole purpose of re-importation in order to circumvent the legislation in question.

IV. Cases on Concentration Control

1. ContiCan case

Judgment of the Court of 21 February 1973. - Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities. - Case 6-72.

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Summary

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10. The spirit, general scheme and wording of article 86 as well as the system and objectives of the treaty must all be taken into account. Problems of this kind cannot be solved by comparing this article with certain provisions of the ecsc treaty.
11. Articles 85 and 86 seek to achieve the same aim on different levels, viz. The maintenance of effective competition within the common market. The restraint of competition which is prohibited if it is the result of behaviour falling under article 85 cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned.
12. The list of abuses contained in article 86 of the treaty is not an exhaustive enumeration of the abuses of a dominant position prohibited by the treaty.

Article 86 is not only aimed 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 such as is mentioned in article 3 (f) of the treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i. E. That only undertakings remain in the market whose behaviour depends on the dominant one.
If it can, irrespective of any fault, be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the treaty are circumvented by an alteration to the supply structure which seriously endangers the consumer's freedom of action in the market, such a case necessarily exists if practically all competition is eliminated.

13. The question of the link of causality between the dominant position and its abuse is of no consequence for the strengthening of the position of an undertaking may be an abuse and prohibited under article 86 of the treaty regardless of the means and procedure by which it is achieved, if it has the effect of substantially fettering competition.
14. The definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products. In order to be regarded as constituting a distinct market, the products in question must be individualized not only by the mere fact that they are used for packing certain products, but by particular characteristics of production which make them specifically suitable for this purpose.
15. A dominant position on the market for light metal containers for meat and fish cannot be decisive as long as it has not been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market by a simple adaptation, with sufficient strength to create a serious counterweight.

………Judgement

2. Airtours v Commission (press release)

Judgment of the Court of First Instance in Case T-342/99

The court of first instance annuls the Commission decision declaring the merger between Airtours and first choice incompatible with the common market

press release no 50/02, 6 june 2002

Owing to a series of incorrect findings in the decision, the Court of First Instance holds that the Commission has failed to prove that the merger would have adverse effects on competition

Airtours is a British company which sells package holidays, inclusive of travel and accommodation, to short-haul destinations (Spain, Greece, Turkey ...) in the United Kingdom. Its main competitors are Thomson, Thomas Cook and First Choice.

On 29 April 1999, Airtours launched a takeover bid for First Choice. In accordance with the applicable Community legislation, Airtours notified the Commission of the proposed concentration.

By decision of 22 September 1999, the Commission declared that the operation was incompatible with the common market on the ground that it would give Airtours/First Choice and the other two large tour operators in the United Kingdom short-haul foreign package holiday market (Thomson and Thomas Cook) a collective dominant position, since there would be an incentive for those undertakings to restrict market capacity, leading to higher prices and increased profits.

The Commission maintained that Airtours' acquisition of First Choice would result in increased concentration, as the three abovementioned tour operators, which currently hold 68% of the market, would have a total market share of 79%.

The three operators would then be able to coordinate their conduct tacitly (without needing to enter into an agreement or a cartel) and to impose, by adopting a common policy, higher prices than those dictated by effective competition. Small independent tour operators would be further marginalised as a result of the new market structure.

Challenging the Commission's analysis, Airtours brought an action before the Court of First Instance for annulment of the Commission decision.

Airtours submitted that the Commission has made a number of incorrect findings and did not adequately show how the concentration would create a collective dominant position.

The Court recalls that if a concentration is to be prohibited it must have the direct and immediate effect of creating or strengthening a collective dominant position significantly and lastingly impeding effective competition in the market.

In the Court's view, the Commission has not proved that the concentration would have created a collective dominant position capable of restricting competition in the United Kingdom short- haul package holiday market.
The Court states that three conditions must be met if there is to be a finding of collective dominance.

First, given the characteristics of the relevant market, each member of the oligopoly must know how the other members are behaving in order to be able to adopt the same policy.

Second, members of the oligopoly must be deterred over time from departing from the policy thus adopted.

Third, that policy must be able to withstand challenge by other competitors ("small tour operators"), potential competitors (tour operators with a presence on other markets) or customers.
The Court finds that the Commission has not established, as it should have done, that if the transaction proceeded, the three leading tour operators would have an incentive to cease competing with each other. The three conditions for a finding of collective dominance are not met. First, the Commission was wrong to conclude that the merger would allow the large tour operators to interpret each other's business strategies more easily and to adopt those strategies themselves.

Second, the Commission has failed to identify or demonstrate clearly the retaliatory measures which could be directed against a member of the oligopoly if it departed from the common policy.
Third, the Court notes that the Commission erred in its assessment of the reaction of small tour operators, potential competitors and United Kingdom consumers. It underestimated their ability to compensate for the establishment of a collective dominant position. Competitors can increase supply in order to take advantage of the opportunities inevitably afforded by any attempted restriction of capacity. Furthermore, in such a situation, tour operators active in other geographical markets or in the United Kingdom long-haul package holiday market would have an incentive to enter the relevant market quickly.

The Commission submits that consumers do not have any significant buyer power. In the Court's view, it is above all necessary to ascertain whether consumers can react to the price rise which would result should the large tour operators restrict market capacity. Such a reaction seems possible, inasmuch as consumers compare prices and can turn to smaller operators or other destinations if prices of short-haul package holidays are set at an anti- competitive level.

On the basis of that analysis the Court concludes that the Commission's decision is vitiated by errors relating to factors fundamental to any determination of the question of the creation of a collective dominant position.

The Court finds that the Commission prohibited the transaction without proving that it would actually have an adverse effect on competition and it annuls the decision.

Reminder: an appeal, limited to points of law, may be brought before the Court of Justice of the European Communities against the decision of the Court of First Instance within two months of its notification.

3. Case Bertelsmann AG and Sony Corporation of America v European Commission –C- 413/06 P (ECR I-4951)

Summary:

Bertelsmann and Sony (B and S) proposed to merge their record businesses. Thiswas opposed by Impala, which argued that it would create a collective dominant position. The Commission found the concentration compatible with the common market, but this decision was annulled by the CFI. B and S appealed to the ECJ, which reaffirmed the decisions in France v Commission and Gencor.

THE ECJ

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 oft he acutal characteristics tot he relevant market and oft he 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 possbile, 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, withhout having to enter into an agreement or resort to a converted practice within the meaning of Art. 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 Art. 81 EC in rdert o 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 is 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 requieres 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 futute competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination.

[The ECJ held that these criteria where compatible with those laid down in Airtours, which should not be applied mechanistically.]

[...]

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 possbible 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 ....

V. The Abuse of Market Dominance under Art. 102

1. Case Hoffman La Roche

Judgment of the Court of 13 February 1979. - Hoffmann-La Roche & Co. AG v Commission of the European Communities. - Dominant position. - Case 85/76.

Summary

1. Observance of the right to be heard is in all proceedings in which sanctions , in particular fines or penalty payments, may be imposed a fundamental principle of community law which must be respected even if the proceedings in question are administrative proceedings.
   In the matter of competition and in the context of proceedings for a finding of infringements of articles 85 or 86 of the treaty, observance of the right to be heard requires that the undertakings concerned must have been afforded the opportunity to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the commission in support of its claim that there has been an infringement.
2. The obligation on the commission under article 20 (2) of regulation no 17 to observe professional secrecy must be reconciled with the right to be heard. By providing undertakings from whom information has been obtained with a guarantee that their interests, which are closely connected with observance of professional secrecy, are not jeopardized, that provision enables the commission to collect on the widest possible scale the requisite data for the fulfilment of its task of supervision without the undertakings being able to prevent it from doing so; the commission may not however use , to the detriment of an undertaking in proceedings for a finding of an infringement of the rules on competition, facts or documents which it cannot in its view disclose if such a refusal of disclosure adversely affects that undertaking's opportunity to make known effectively its views on the truth or implications of those facts or documents or again on the conclusions drawn by the commission from them.
3. 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. 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.
4. 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 affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such 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.

5. Very large market shares are highly significant evidence of the existence of a dominant position. Other relevant factors are the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest, the technological lead of the undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition.
6. 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.
7. 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 the said undertaking abuses its dominant position within the meaning of article 86 of the treaty, 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 said 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 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.
   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 deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.
   The abuse of a dominant position and the restriction of competition as attributes of the contracts in question are not avoided by the so-called "english" clause contained in them whereby the purchasers undertake to notify the undertaking in a dominant position of any more favourable offer made to them by competitors and are free, if that undertaking does not adjust its prices to the said offer, to obtain their supplies from competitors. In these circumstances a clause of this kind is such as to enable the undertaking in a dominant position to realize an abuse of that dominant position.
8. The effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply.

2. Case Tetra Pak I

Judgment of the Court of First Instance (Second Chamber) of 6 October 1994 "Tetra Pak International SA – Commission of the European Communities"

1. The drawing-up of exhaustive minutes of the hearing of an undertaking alleged to have infringed the competition rules is an essential procedural requirement when it proves necessary so as to enable the Ad-visory Committee on Restrictive Practices and Monopolies to deliver its opinion and the Commission to adopt its decision with full knowledge of the facts, that is without being misled on an essential point by errors or omissions. That would not be the case if the minutes simply fail to record certain statements by a representative of the undertaking in question, which contain nothing of importance that was not in other observations submitted by representatives of that undertaking during the hearing and recorded in the minutes. In such a case, the omission does not prejudice the right of the undertaking concerned to a fair hearing and cannot have any effect on the outcome of the consultation procedure or the content of the final decision. It accordingly cannot vitiate the administrative procedure as a whole and so call in question the lawfulness of the final decision.
2. An undertaking' s possibly dominant position on a given market may be examined only once it has been established that the market in the relevant products is distinct from other sectors of the general market. The definition of the product market must take account of the overall economic context, so as to be able to assess the actual economic power of the undertaking in question. In order to assess whether an undertaking is in a position to behave to an appreciable extent independently of its competitors and customers and consumers, it is necessary first to define the products which, although not capable of being substituted for other products, are sufficiently interchangeable with its products, not only in terms of the objective characteristics of those products, by virtue of which they are particularly suitable for satisfying constant needs, but also in terms of the competitive conditions and the structure of supply and demand on the market.
3. In the scheme of Article 86 of the Treaty the geographical market must be defined so as to determine whether the undertaking concerned is in a dominant position in the Community or a substantial part of it. The definition of the geographical market accordingly calls for an economic assessment. That market can thus be defined as the territory in which all traders operate in the same or sufficiently homogeneous condi-tions of competition in so far as concerns specifically the relevant products, without its being necessary for those conditions to be perfectly homogeneous.
4. Holding approximately 90% of the market is in itself, in the absence of exceptional circumstances, evi-dence of the existence of a dominant position. It is clear that holding such market shares means that the position on the market of the undertaking concerned makes it an inevitable partner for other operators and guarantees it the freedom of conduct characteristic of a dominant position.

5. The special responsibility not to allow its conduct to impair genuine undistorted competition on the common market which Article 86 of the Treaty imposes on an undertaking in a dominant position on a given market must be understood as prohibiting it from engaging in any conduct which is such as to hinder the maintenance or the growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened.
   That is why the conduct of such an undertaking may be caught by and penalized under Article 86 even where it occurs on a market distinct from the dominated market, in so far as, because that market is closely linked to the dominated market and it is in a leading position on that market, it has freedom of conduct on that market compared with the other operators there present such as to impose on it, on that market also and without its being necessary to establish that it is in a dominant position, a special responsibility to maintain genuine undistorted competition.
6. The fact that an undertaking in a dominant position on a market imposes on the purchasers of the ma-chines which it markets an obligation to obtain the raw materials to supply those machines exclusively from itself or a supplier designated by it is an abuse of a dominant position within the meaning of Article 86 of the Treaty. Where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it deprives the customer of the ability to choose his source of supply and denies other manufacturers access to the market. It is irrelevant that such a tied sale is in accordance with commercial usage, since a usage which may be acceptable in a normal situation, on a competitive market, cannot be accepted in the case of a market where competition is already restricted.
7. Article 86 of the Treaty prohibits an undertaking in a dominant position, which manufactures and mar-kets both machines and the consumable products to supply them, from deciding of its own initiative and in reliance on technical requirements, product liability problems or considerations relating to the protection of public health or the protection of its reputation, that the two constitute an inseparable integrated system and consequently cannot be sold otherwise than by way of tied sale, thus denying possible competitors in the field of the consumable products access to the market.
8. Although it may be acceptable for an undertaking in a dominant position to sell at a loss in certain cir-cumstances, that would not be the case where such selling was eliminatory. Although Community competi-tion law recognizes that an undertaking in a dominant position has the right to take reasonable steps to protect its commercial interests, it does not countenance acts whose actual purpose is to strengthen that dominant position and abuse it. In particular, Article 86 of the Treaty prohibits an undertaking in a dominant position from eliminating a competitor by practising competition by means of price which does not come within the scope of competition on the basis of quality.
   The existence of gross or semi-gross margins ° obtained by subtracting from the sale price the variable direct costs or the average variable costs, being the costs relating to the unit produced which are negative suggests that a pricing practice is eliminatory. An undertaking in a dominant position has no interest in applying prices below average variable costs (that is to say, those which vary depending on the quantities produced) 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 equal to 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.
Furthermore, if the net margin is negative and the gross margin positive, that is to say, if the prices are below average total costs (fixed costs plus variable 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. The period during which such prices are applied as part of a plan for damaging a competitor is accordingly a factor to be taken into consideration.

9. For an undertaking in a dominant position to apply prices which discriminate between users established in different Member States is prohibited by Article 86(c) of the Treaty. Although that provision does not preclude such an undertaking from setting different prices in the various Member States, in particular where the price differences are justified by variations in the conditions of marketing and the intensity of competition, the dominant undertaking has the right only to take reasonable steps to protect its commercial interests in that way. In particular, it may not apply artificial price differences in the various Member States such as to place its customers at a disadvantage and to distort competition in the context of an artificial partitioning of national markets.
10. Where an undertaking has abused its dominant position by both discriminatory or predatory pricing and loyalty rebates, the Commission, in prohibiting that undertaking, on all the markets where it is subject to Article 86, from granting certain customers any rebate or more favourable condition in whatever form without objective consideration, is within the limits of its power under Article 3(1) of Regulation No 17 to issue orders to bring the infringements to an end.
11. By imposing in its final decision certain additional measures designed to put an end to the infringement, over and above the measures which it had already recommended during the administrative procedure, the Commission does not act in disregard of the principle of the protection of legitimate expectations. Article 3(3) of Regulation No 17 simply empowers the Commission to address to the undertakings recommendations for termination of the abuses before taking a decision finding an infringement under that article. The effect of compliance with such recommendations by the undertaking in question can in no case be to restrict the Commission' s power under paragraph (1) of that article to impose, when it takes the decision, any measure it considers necessary in order to bring the abuses found to an end.
12. Article 19(1) of Regulation No 17 and Article 7(1) of Regulation No 99/63 expressly provide that, where the Commission proposes to impose a fine, the undertakings concerned must have the opportunity to make their submissions on the matters to which the Commission has taken objection. It is thus by way of their submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement that the rights of the defence of the undertakings concerned are guaranteed before the Com-mission in relation to setting the amount of the fine.
13. The Commission is not bound to break down the amount of the fine between the various aspects of the abuse in order to enable the undertakings concerned to assess whether the fine imposed for abuse of a dominant position is of a proper amount and to put forward their defence and in order to enable the Community judicature to exercise its power of review. In particular, such a

breakdown is impossible where all the infringements found are part of a coherent overall strategy and must accordingly be dealt with globally for the purposes both of applying Article 86 of the Treaty and of setting the fine. It is sufficient for the Commission to specify its criteria for setting the general level of the fine imposed. It is not required to state specifically how it took into account each factor mentioned among those criteria which contribute to setting the general level of the fine.

14. In order for an infringement of the competition rules of the Treaty to be regarded as committed inten-tionally, it suffices that the undertaking concerned could not have been unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty.

15. In order to assess the gravity of the infringements of the Community competition rules attributable to an undertaking, with a view to determining a fine which is proportionate, the Commission may take into ac-count the exceptional duration of certain infringements, the number and diversity of the infringements, which concerned all or almost all the group' s products and some of which affected all the Member States, the particular gravity of infringements forming part of a deliberate and coherent strategy seeking by various eliminatory practices towards competitors and by a policy of retaining customers to maintain artificially or to strengthen the undertaking' s dominant position on markets where competition was already limited, the particularly harmful effects of the abuses in terms of competition and the benefit gained by the applicant from its infringements.

    A fine corresponding to approximately 2.2% of the total turnover of a given year is therefore not disproportionate. It falls within the parameters laid down by Article 15(2) of Regulation No 17, according to which the amount of the fine may be up to 10% of the turnover in the preceding business year of the undertaking concerned.

3. Case Solvay (Advocate General)

Case C 109/10, Solvay SA v European Commission (opinion of the advocate general)

(Appeals – Competition – Abuse of a dominant position (Article 82 EC) – Fidelity rebate – Discrimination against business partners – Rights of the defence – Access to the file – Loss of documents in the administrative procedure – Right to a hearing – Prohibition on the use of evidence

(Article 20(1) of Regulation No 17) – Right to have a matter adjudicated upon within a reasonable time – Excessive length of the proceedings – European market for soda ash)

Background to the dispute

7. As the General Court has established, in April 1989, the European Commission carried out unannounced searches (investigations), provided for in Article 14 of Regulation No 17, at the premises of a number of undertakings operating in the soda ash market, including the Belgian undertaking Solvay. It subsequently obtained additional information from the undertakings concerned.
8. Following the conclusion of its enquiries, the Commission accused Solvay, on the one hand, of participating in cartels and, on the other hand, of abusing its dominant position on the soda ash market.
9. The present proceedings are concerned only with the Commission's finding of abuse of a dominant position on the market. On the basis of that finding, in 1990, in an initial decision pursuant to Article 86 of the EEC Treaty in conjunction with Regulation No 17 (Decision 91/299/EEC), the Commission imposed on Solvay a fine equivalent to EUR 20 million, which was a relatively high sum for the time. However, as that decision was vitiated by a procedural defect relating to its authentication, it had to be annulled. Thereafter, in 2000, the Commission, without taking any further procedural steps – in particular, without hearing Solvay again – adopted a second decision, this time on the basis of Article 82 EC in conjunction with Regulation No 17, in which it again imposed

on Solvay a fine in the same amount (Decision 2003/6/EC). The latter decision constitutes the starting point for these judicial proceedings.

10. At first instance, Solvay had only marginal success with its action for annulment against Decision 2003/6. It is true that, by judgment of 17 December 2009, the General Court reduced the amount of the fine by 5% to EUR 19 million. However, it dismissed the remainder of Solvay's action as unfounded. By the present appeal, Solvay is now contesting that judgment at first instance, which took no less than eight years and nine months to deliver.

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Dominant position on national markets (second part of the seventh plea in law)

46. The second part of the seventh plea in law is concerned with the requirements attaching to evidence of a dominant position

Allegation that the General Court's analysis is confined to market shares alone

47. On the one hand, Solvay claims that the General Court infringed Article 102 TFEU (Article 82 EC) by basing its assumption that the undertaking had a dominant position on national markets on an examination of market shares alone, without taking other relevant factors into account.

48. That claim is unconvincing. It rests on a clearly erroneous reading of the judgment under appeal.

49. The General Court did not in any way confine its analysis to an examination of market shares alone. Rather, it was guided, as a first step, by the case-law to the effect that the existence of a dominant position derives in general from a combination of several factors which, taken separately, would not necessarily be determinative.

50. However, the General Court rightly assumed, as a second step, that very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. Furthermore, it rightly held that a market share of 50% constitutes in itself, save in exceptional circumstances, evidence of the existence of a dominant position.

51. Finally, as a third step, the General Court examined a number of issues raised in the proceedings at first instance which, being exceptional circumstances in Solvay's view, might have undermined the presumption that it held a dominant position.

52. Consequently, contrary to Solvay's claim, the General Court also examined factors other than market shares. …

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86. Against that background, the General Court's finding 'that, even where it is moderate, the amount of a fidelity rebate has an impact on the conditions of competition' is beyond legal reproach in the light of the circumstances of the present case. It is based on reasonable economic considerations.

Error of substantive law

98. Solvay also claims that paragraphs 398 and 400 of the judgment under appeal contain an infringement of subparagraph (c) of the second paragraph of Article 102 TFEU (subparagraph (c) of the second paragraph of Article 82 EC). It alleges that the General Court erred in law by failing to examine whether there was a relationship of competition between the undertakings in the sets of Solvay's customers referred to by way of example, in particular between two French customers (Durand and Perrier), on the one hand, and the German flat glass and hollow glass producers, on the other. …..

109. However, it is an error of law to declare the competitive relationships on the downstream market on which the customers of the undertaking in a dominant position are active to be entirely insignificant, as the General Court did in the present case.

110. Contrary to the view taken by the Commission, that error of law cannot be disregarded by reference to the fact that the aforementioned French customers Durant and Perrier and the German customers from the flat glass and hollow glass sectors are only individual examples. Where the General Court, in response to a complaint raised by a party to the proceedings, examines individual examples taken from the contested decision in order to determine whether there have been any errors of assessment, it must carry out that examination on the basis of legally correct criteria. This was not the case here.

111. A different conclusion cannot be drawn from the judgments in Hoffmann-La Rocheand Michelin I. The passages from those judgments which are cited by the Commission do not specifically relate to the application of subparagraph (c) of the second paragraph of Article 82EC contain general statements on the abusive nature of rebate systems operated by undertakings in a dominant position.

112. The fact that the competitive relationships between the business partners of the undertaking in a dominant position are significant for the purposes of subparagraph (c) of the second paragraph of Article 82 EC is demonstrated by the judgment concerning Portuguese airport charges. In that judgment, the Court of Justice expressly referred to the '[unjustified] economic advantage' which the discount recipients are able to obtain 'compared with their competitors'.

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117. The General Court gives no explanation for why it regards Solvay's arguments concerning the low cost of soda ash for glass producers as 'unsubstantiated'. In particular, it is not clear from the grounds of the judgment whether the General Court had taken note of the arguments put forward by Solvay in its rejoinder at first instance at all. In that rejoinder, as evidence for its contention as to lower costs, Solvay had cited a Commission regulation on anti-dumping in which the cost share represented by soda ash in glass production was said to be 8%.

118. Nor does the General Court explain why the allegedly low cost share represented by soda ash in glass production is 'not of such a kind as to call in question the discriminatory nature of Solvay's practices'. There may in fact be good reasons for that statement, but they are not even hinted at in the judgment under appeal.

119. Did the General Court take the view that the cost share represented by an important raw material is generally immaterial for the purposes of assessing the existence or otherwise of discrimination between customers of the undertaking in a dominant position? Or was it of the opinion that a cost share of the order described by Solvay (2 to 6%) has no bearing on the discriminatory nature of the business practices in question? And if so, why? A few additional sentences in the grounds of the judgment could and should have provided the clarity necessary here.

120. The General Court's findings in paragraph 401 of the judgment under appeal leave the reader uncertain as to why Solvay's arguments on the allegedly low cost of soda ash in glass production were rejected. As a result, moreover, the

Court of Justice is unable to exercise its power of review. Consequently, paragraph 401 of the judgment under appeal is vitiated by a failure to state reasons, with the result that the second part of the ninth plea in law is well-founded.

121. Accordingly, there is no need to examine the complaint of infringement of subparagraph (c) of the second paragraph of Article 102 TFEU. In any event, it raises no points which are not already contained in the complaint of failure to state reasons.

Interim conclusion

122. In summary, it must be concluded that the ninth plea in law is in part well-founded.

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136. Solvay concludes from all of the foregoing that use of the evidence obtained during the investigation to establish abuse of a dominant position within the meaning of Article 82 EC (formerly Article 86 of the EEC Treaty) was not permissible.

137. I am not convinced by that view.

138. It is true that, in a decision ordering an investigation, the Commission must 'clearly indicate the presumed facts which it intends to investigate'. This serves to ensure that the Commission does not carry out investigations on a speculative basis, without having any concrete suspicions, a practice for which the English term 'fishing expeditions' is often used.

139. However, the aim of the obligation to state the subject-matter and purpose of an investigation cannot be to secure a definitively binding description of all the legal provisions which the undertakings concerned might have infringed, since the Commission is not required to make a precise legal analysis of the suspected infringements at that early stage of its enquiries.

140. In any event, it is sometimes very difficult to assess in advance whether the conduct of an undertaking with a strong market position infringes the prohibition of cartels (Article 85 of the EEC Treaty, Article 81 EC or Article 101 TFEU) or constitutes an abuse of a dominant position (Article 86 of the EEC Treaty, Article 82 EC or Article 102 TFEU). As the Commission rightly points out, the scope ratione materiae of the prohibition of cartels and that of the prohibition against abuse of a dominant position may even overlap.

141. Moreover, investigations serve the same fundamental objective from the point of view of both provisions, that is to say to help implement the competition rules laid down in the Treaties and to protect competition in the internal market from distortion.

142. In the light of the foregoing, to restrict the subject-matter and purpose of an investigation in anti-trust proceedings ex ante to specific prohibitory provisions under substantive law which are expressly defined in the decision ordering the investigation, while categorically ruling out other prohibitory provisions, would represent an excessively narrow and formalistic approach.

143. The primary purpose of an investigation in anti-trust proceedings is to establish facts and obtain evidence on matters such as the existence of a specific agreement between undertakings, the existence of a specific form of market conduct and the economic considerations informing that conduct.

144. The Commission is not required to establish the precise legal classification of the facts investigated by it until very much later in the administrative procedure,

first provisionally in the form of the statement of objections and then definitively in its decision concluding the proceedings. This does not adversely affect the rights of defence of the undertakings concerned; indeed, these are in fact protected by the statement of objections and the associated right to a fair hearing.

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Conclusion

360. In the light of the foregoing considerations, I propose that the Court should:

(1) set aside the judgment of the General Court of 17 December 2009 in Case T 57/01 Solvay v Commission;

(2) Commission Decision 2003/6/EC of 13 December 2000

4. Case Magill (ECJ)

Judgment of the Court of 6 April 1995. - Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities. - Competition - Abuse of a dominant position - Copyright. - Joined cases C-241/91 P and C-242/91 P.

Summary

1. Broadcasting companies are in a dominant position within the meaning of Article 86 of the Treaty when, by reason of their de facto monopoly over the information relating to the listings of their programmes, which are received in most households in one Member State and in a substantial portion of households in the adjoining part of another Member State, they are in a position to prevent effective competition on the market in weekly television magazines in the areas concerned.
2. The conduct of an undertaking in a dominant position, consisting of the exercise of a right classified by national law as "copyright", cannot, by virtue of that fact alone, be exempt from review in relation to Article 86 of the Treaty.
   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 admittedly a matter for national rules and the exclusive

right of reproduction forms part of the author' s rights, with the result 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.
However, the exercise of an exclusive right by a proprietor may, in exceptional circumstances, involve abusive conduct. Such will be the case when broadcasting companies rely on copyright conferred by national legislation to prevent another undertaking from publishing on a weekly basis information (channel, day, time and title of programmes) together with commentaries and pictures obtained independently of those companies, where, in the first place, that conduct prevents the appearance of a new product, a comprehensive weekly guide to television programmes, which the companies concerned do not offer and for which there is a potential consumer demand, conduct which constitutes an abuse under heading (b) of the second paragraph of Article 86 of the Treaty; where, second, there is no justification for that refusal either in the activity of television broadcasting or in that of publishing television magazines; and where, third, the companies concerned, by their conduct, reserve to themselves the secondary market of weekly television guides by excluding all competition from the market through denial of access to the basic information which is the raw material indispensable for the compilation of such a guide.

3. Pursuant to Article 168a of the Treaty and Article 51 of the Statute of the Court of Justice of the EEC, an appeal may rely only on grounds relating to infringement of rules of law, to the exclusion of any appraisal of the facts.
4. In order to satisfy the condition that trade between Member States must be affected within the meaning of Article 86 of the Treaty, it is not necessary that the conduct in question should in fact have substantially affected that trade. It is sufficient to establish that the conduct is capable of having such an effect. This will be the case where an undertaking excludes all potential competitors on the geographical market consisting of one Member State and part of another Member State and thus modifies the structure of competition on that market, thereby affecting potential commercial exchanges between those Member States.
5. The provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State' s accession, to which Article 234 of the Treaty applies, cannot be relied on in intra-Community relations if the rights of non-member countries are not involved. Where an agreement has been ratified by a Member State already bound by the Treaty, it cannot be relied on to limit the powers of the Community, as provided for in the Treaty, since the latter can be amended only in accordance with the procedure laid down in Article 236.
6. Article 3 of Regulation No 17 is to be applied according to the nature of the infringement found and may include an order to do certain acts or things which, unlawfully, have not been done as well as an order to bring an end to certain acts, practices or situations which are contrary to the Treaty.
7. In the context of the application of Article 3 of Regulation No 17, the principle of proportionality means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed.
8. Commission decisions intended to find infringements of competition rules, issue directions and impose pecuniary sanctions must state the reasons on

which they are based, in accordance with Article 190 of the Treaty, which requires the Commission to set out the reasons which prompted it to adopt a decision, so that the Court can exercise its power of review and Member States and nationals concerned know the basis on which the Treaty has been applied. The Commission cannot, however, be required to discuss all the matters of fact and law which may have been dealt with during the administrative proceedings.

Judgement

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7. At the material time, no comprehensive weekly television guide was available on the market in Ireland or in Northern Ireland. Each television station published a television guide covering exclusively its own programmes and claimed, under Irish and United Kingdom legislation, copyright protection for its own weekly programme listings in order to prevent their reproduction by third parties.
8. RTE itself published its own weekly television guide, while ITV did so through ITP, a company established for that purpose.
9. ITP, RTE and BBC practised the following policy with regard to the dissemination of programme listings. They provided their programme schedules free of charge, on request, to daily and periodical newspapers, accompanied by a licence for which no charge was made, setting out the conditions under which that information could be reproduced. Daily listings and, if the following day was a public holiday, the listings for two days, could thus be published in the press, subject to certain conditions relating to the format of publication. Publication of "highlights" of the week was also authorized. ITP, RTE and the BBC ensured strict compliance with the licence conditions by instituting legal proceedings, where necessary, against publications which failed to comply with them.
10. Magill TV Guide Ltd ("Magill") attempted to publish a comprehensive weekly television guide but was prevented from doing so by the appellants and the BBC, which obtained injunctions prohibiting publication of weekly television listings.
11. Magill lodged a complaint with the Commission on 4 April 1986 under Article 3 of Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) ("Regulation No 17") seeking a declaration that the appellants and the BBC were abusing their dominant position by refusing to grant licences for the publication of their respective weekly listings. The Commission decided to initiate a proceeding, at the end of which it adopted Decision 89/205/EEC of 21 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851 ° Magill TV Guide/ITP, BBC and RTE) (OJ 1989 L 78, p. 43) ("the decision"), which was the subject-matter of the proceedings before the Court of First Instance.
12. In that decision the Commission found that there had been a breach of Article 86 of the EEC Treaty and ordered the three organizations to put an end to that breach, in particular "by supplying ... third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties". It was also

provided that, if the three organizations chose to grant reproduction licences, any royalties requested should be reasonable.

13. By order of 11 May 1989 in Joined Cases 76, 77 and 91/89 R RTE and Others v Commission [1989] ECR 1141, the President of the Court of Justice, at the request of the applicants, ordered suspension "of the operation of Article 2 of the ... decision in so far as it obliges the applicants to bring the infringement found by the Commission to an end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties".
14. At first instance the two appellants sought annulment of the Commission decision and an order requiring it to pay the costs of the proceedings.
15. The Court of First Instance dismissed the appellants' applications and ordered them to pay the costs.
16. RTE claims that the Court of Justice should:
    1. quash the judgment of the Court of First Instance;
    2. annul the decision of the Commission of 21 December 1988;
    3. order the Commission and the intervener to pay the costs.

17 ITP requests the Court of Justice to:
    1. quash the judgment of the Court of First Instance dated 10 July 1991 in Case T-76/89 ITP v Commission and itself give final judgment in the matter;
    2. declare Commission Decision IV/31.851 of 21 December 1988 (Magill TV Guide/ITP, BBC and RTE) void; and
    3. order the Commission and/or the intervener to pay the costs of ITP in the Court of First Instance and the Commission to pay the costs of ITP in this Court."

18. The Commission contends that the Court should dismiss the appeals, order each appellant to bear the costs of the proceedings brought by it and order IPO to bear the costs incurred by the Commission by virtue of IPO' s intervention.
19. In the alternative, in the event that the Court of Justice should hold, contrary to the Commission' s submissions, that the judgments of the Court of First Instance must be quashed on a particular point, the Commission submits that the Court of Justice should none the less confirm the operative parts of the judgments of the Court of First Instance while substituting its own reasoning in accordance with the judgment in Case C-30/91 P Lestelle v Commission [1992] ECR I-3755. The Commission contends that the operative parts of the judgments, which upheld the Commission' s decision, are sound since the conduct complained of in this case was evidently abusive, harmed the interests of consumers, drove Magill' s multi-channel guide out of the market, restricted trade between Member States and was intended (at least by two of the three applicants) to restrict such trade.
20. IPO claims that the Court should set aside the two judgments of the Court of First Instance, annul the decision of the Commission and order the Commission to bear IPO' s costs before the Court of Justice.
21. RTE relies on three pleas in law in support of its appeal. The first is that the Court of First Instance misconstrued the concept of abuse of a dominant position contained in Article 86 of the Treaty. The second is that the Court of First Instance misconstrued the concept of effects on trade between Member

States. The third is that the Court of First Instance wrongly refused to take into consideration the Berne Convention of 1886.

22. ITP, in support of its appeal, relies on the first plea raised by RTE, along with two further pleas in law. The first is that the Court of First Instance misconstrued Article 3 of Regulation No 17 by holding that the Commission had the power to require a proprietor of intellectual property rights to grant compulsory licences. The second is that Article 190 of the Treaty was infringed in so far as the Court of First Instance held that the reasoning of the decision satisfied the conditions relating to observance of the rights of the defence.

23. In its two statements in intervention, IPO particularly supports the plea common to both ITP and RTE, namely that the Court of First Instance misconstrued the concept of abuse of a dominant position within the meaning of Article 86 of the Treaty.

The existence of an abuse of a dominant position

24. So far as the existence of a dominant position is concerned, the Court of First Instance held that "ITP enjoyed, as a consequence of its copyright in ITV and Channel 4 programme listings, which had been transferred to it by the television companies broadcasting on those channels, the exclusive right to reproduce and market those listings. It was thus able, at the material time, to secure a monopoly over the publication of its weekly listings in the TV Times, a magazine specializing in the programmes of ITV and Channel 4". Consequently, in the opinion of the Court of First Instance, "the applicant clearly held at that time a dominant position both on the market represented by its weekly listings and on the market for the magazines in which they were published in Ireland and Northern Ireland. Third parties such as Magill who wished to publish a general television magazine were in a situation of economic dependence on the applicant, which was thus in a position to hinder the emergence of any effective competition on the market for information on its weekly programmes" (ITP judgment, paragraph 49). With regard to RTE, the Court of First Instance reached the same conclusion in nearly identical terms (RTE judgment, paragraph 63).

25. So far as the existence of an abuse of that dominant position was concerned, the Court of First Instance considered that it was necessary to interpret Article 86 in the light of copyright in programme listings. It pointed out that, in the absence of harmonization of national rules or Community standardization, determination of the conditions and procedures under which copyright was protected was a matter for national rules (ITP judgment, paragraphs 50 and 51). The relationship between national intellectual property rights and the general rules of Community law was governed expressly by Article 36 of the EEC Treaty, which provided for the possibility of derogating from the rules relating to the free movement of goods on grounds of the protection of industrial or commercial property, subject to the conditions set out in the second sentence of Article 36. Article 36 thus emphasized that the reconciliation between the requirements of the free movement of goods and the respect to which intellectual property rights were entitled had to be achieved in such a way as to protect the legitimate exercise of such rights, which alone was justified within the meaning of that article, and to preclude any improper exercise thereof likely to create artificial partitions within the market or pervert the rules governing competition within the Community. The Court of First Instance took the view that the exercise of intellectual property rights conferred by national legislation had

consequently to be restricted as far as was necessary for that reconciliation (ITP judgment, paragraph 52).

26. The Court of First Instance found, in the light of the case-law of the Court of Justice, that it followed from Article 36 of the Treaty that only those restrictions on freedom of competition, free movement of goods or freedom to provide services which were inherent in the protection of the actual substance of the intellectual property right were permitted in Community law. It based its view in particular on the judgment of the Court of Justice in Case 78/70 Deutsche Grammophon v Metro [1971] ECR 487, paragraph 11, in which the Court of Justice held that, although it permitted prohibitions or restrictions on the free movement of products which were justified for the purpose of protecting industrial and commercial property, Article 36 only admitted derogations from that freedom to the extent to which they were justified for the purpose of safeguarding rights which constituted the specific subject-matter of such property (ITP judgment, paragraph 54).

27. The Court of First Instance then observed that in principle the protection of the specific subject-matter of a copyright entitled the copyright-holder to reserve the exclusive right to reproduce the protected work (ITP judgment, paragraph 55).

28. However, the Court of First Instance took the view that, while it was plain that the exercise of the exclusive right to reproduce a protected work was not in itself an abuse, that did not apply when, in the light of the details of each individual case, it was apparent that that right was being exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86. In that event, the Court of First Instance continued, the copyright was no longer being exercised in a manner which corresponded to its essential function, within the meaning of Article 36 of the Treaty, which was to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86. From this the Court of First Instance concluded that the primacy of Community law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevailed over any use of a rule of national intellectual property law in a manner contrary to those principles (ITP judgment, paragraph 56).

29. In the present case, the Court of First Instance noted that the applicants, by reserving the exclusive right to publish their weekly television programme listings, were preventing the emergence on the market of a new product, namely a general television magazine likely to compete with their own magazines. The applicants were thus using their copyright in the programme listings produced as part of the activity of broadcasting in order to secure a monopoly in the derivative market of weekly television guides in Ireland and Northern Ireland. The Court of First Instance also regarded it as significant in that regard that the applicants had authorized, free of charge, the publication of their daily listings and highlights of their weekly programmes in the press in both Ireland and the United Kingdom.

30. The Court of First Instance accordingly took the view that conduct of that type ° characterized by preventing the production and marketing of a new product, for which there was potential consumer demand, on the ancillary market of weekly television guides and thereby excluding all competition from that market solely in order to secure the applicants' respective monopolies ° clearly

went beyond what was necessary to fulfil the essential function of the copyright as permitted in Community law. The applicants' refusal to authorize third parties to publish their weekly listings was, in this case, the Court of First Instance ruled, arbitrary in so far as it was not justified by the requirements peculiar to the activity of publishing television magazines. It was thus possible for the applicants to adapt to the conditions of a television magazine market which was open to competition in order to ensure the commercial viability of their weekly publications. The applicants' conduct could not, in those circumstances, be covered in Community law by the protection conferred by their copyright in the programme listings (ITP judgment, paragraph 58).

31. In the light of the foregoing considerations, the Court of First Instance found that, although the programme listings were at the material time protected by copyright as laid down by national law, which still determined the rules governing that protection, the conduct at issue could not qualify for such protection within the framework of the necessary reconciliation between intellectual property rights and the fundamental principles of the Treaty concerning the free movement of goods and freedom of competition. The aim of that conduct was clearly incompatible with the objectives of Article 86 (ITP judgment, paragraph 60).
32. The Court of First Instance accordingly dismissed the plea in law based on breach of Article 86.
33. RTE, supported by IPO, relies on the judgment in Case 238/87 Volvo v Veng [1988] ECR 6211 in arguing that the exercise by an owner of intellectual property rights of his exclusive rights, in particular his refusal to grant a licence, cannot in itself be regarded as an abuse of a dominant position.
34. According to RTE, ITP and IPO, one of the essential rights of the owner of a copyright, without which that right would be deprived of its substance, is the exclusive right of reproduction. That right, which has not been placed in question by the Treaty rules, entitles its holder to be rewarded by the exclusive sale of the products incorporating the protected work and to prevent competition by a third party in respect of those products.
35. ITP denies that the exercise of the exclusive right of reproduction is itself an abuse where it is in pursuit of an aim manifestly contrary to the objectives of Article 86 (ITP judgment, paragraph 56) since copyright owners ordinarily and naturally exercise their copyright in order to restrict competition with their own product by other products made using their copyright material, even on a derived market. That, it continues, is the essence of copyright.
36. IPO considers that copyright is by nature beneficial for competition, pointing out that it attributes exclusive proprietorial rights only to a particular expression of an idea or concept, not to the concept or idea itself.
37. RTE and IPO point out that, in the absence of Community harmonization, the scope of national copyright laws can be defined only by the legislature of each Member State. The definition of that scope cannot be altered by a measure adopted in implementation of Article 86, but only by specific Community legislation.
38. Moreover, according to RTE, the right of first marketing has been considered in the case-law of the Court of Justice as the specific subject-matter of all industrial property rights.
39. RTE contends that the owner of an intellectual property right is under no obligation to offer justification for his refusal to grant a licence, contrary to the view

taken by the Court of First Instance. ITP adds that this view of the Court of First Instance is not supported by the case-law of the Court of Justice and that, due to the imprecision of the criteria used, it undermines legal certainty for copyright owners.

40. According to RTE and IPO, a refusal, by the owner of a right, to grant a licence forms part of the specific subject-matter of his exclusive right. RTE considers that this would constitute an abuse only in very particular circumstances and IPO adds that the use of an intellectual property right is justified if it is within the scope of the specific subject-matter of the right in question.

41. IPO and RTE criticize the approach, adopted by the Court of First Instance and the Commission in this case, of seeing copyright as a mere combination of the right of attribution of authorship and the right to compensation for exploitation. IPO claims that this is in marked contrast not only to the laws of the various Member States but also to the Berne Convention and would represent a significant diminution of the protection afforded by copyright. ITP adds that this view overlooks the right of exclusive reproduction and distinguishes between the protection of moral rights and the protection of commercial rights with the result that assignees of the creator ° such as ITP ° cannot avail themselves of moral rights, which are inalienable, and will therefore be unable to exercise the right of exclusive reproduction.

42. RTE submits that consumer demand cannot justify application of Article 86 to the present cases and that it is for the national legislature alone to remedy such a situation, as has been done in the United Kingdom. ITP adds that it is ordinarily the case that a copyright owner who sells his own product made from his copyright material deprives consumers of the opportunity of obtaining it elsewhere.

43. Next, according to IPO, there is no presumption that the holder of an intellectual property right is in a dominant position within the meaning of Article 86 (judgments in Case 40/70 Sirena v EDA and Others [1971] ECR 69 and Case 78/70 Deutsche Grammophon, cited above). Relying in particular on the judgment in Case 322/81 Michelin v Commission [1983] ECR 3461, IPO takes the view that a dominant position presupposes a position of economic strength and for that reason it calls in question the analysis of the Court of First Instance that the appellants were dominant merely because they held copyrights without reference to any analysis whatever of economic power in the marketplace.

44. IPO also criticizes the Commission for having failed to apply the criterion of dominant position based on economic power and having taken the view that the appellants and the BBC held a factual monopoly. In doing so, the Commission takes the view that a factual monopoly is likely to arise wherever there exists a primary market and a secondary market and a third party wishes to avail itself of the products or services on the primary market in order to carry on business on the secondary market. According to IPO, the Commission considers that such a situation will result in a position of economic dependence which is characteristic of the existence of a dominant position.

45. IPO criticizes this conception in so far as it artificially links economic dependence with the intention of a third party, who would always have the possibility of undertaking some other economic venture. For IPO, the concept of "factual monopoly" appears to be an artificial construct whereby the Commission seeks to justify the use of competition law in order to change the specific subject-matter of copyright.

(a) Existence of a dominant position

46. So far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position.

47. However, the basic information as to the channel, day, time and title of programmes is the necessary result of programming by television stations, which are thus the only source of such information for an undertaking, like Magill, which wishes to publish it together with commentaries or pictures. By force of circumstance, RTE and ITP, as the agent of ITV, enjoy, along with the BBC, a de facto monopoly over the information used to compile listings for the television programmes received in most households in Ireland and 30% to 40% of households in Northern Ireland. The appellants are thus in a position to prevent effective competition on the market in weekly television magazines. The Court of First Instance was therefore right in confirming the Commission' s assessment that the appellants occupied a dominant position (see the judgment in Case 322/81 Michelin, cited above, paragraph 30).

(b) Existence of abuse

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.

Effects on trade between Member States (second plea in the appeal in Case C-241/91 P)

59. With regard to the effects on trade between Member States, the Court of First Instance first reviewed the case-law of the Court of Justice (paragraph 76 of the RTE judgment) before finding (at paragraph 77) that "the applicant' s conduct modified the structure of competition on the market for television guides in Ireland and Northern Ireland and thus affected potential trade flows between Ireland and the United Kingdom."

60. The reasons given by the Court of First Instance for this conclusion were based on the effects of RTE' s refusal to authorize third parties to publish its weekly listings on the structure of competition in the territory of Ireland and Northern Ireland. These, the Court of First Instance found, excluded all potential competition on the market in question, "thus in effect maintaining the partitioning

of the markets ... [of] Ireland and Northern Ireland respectively." It found that the appreciable effect which the policy in question had on potential commercial exchanges between Ireland and the United Kingdom was evidenced by the specific demand for a general television magazine. The Court of First Instance added that "the relevant geographical area, within which a single market in television broadcasting services has already been achieved, likewise represents a single market for information on television programmes, particularly since trade is greatly facilitated by a common language" (paragraph 77).

61. RTE states that Community competition rules are not intended to remedy situations which are purely internal to a Member State and it disputes the finding of the Court of First Instance that RTE had "in effect maintain[ed] the partitioning of the markets represented by Ireland and Northern Ireland respectively." RTE asserts that it has observed one and the same policy in respect of the supply of weekly programme listings and licensing, irrespective of the place of establishment of the undertakings concerned. It denies ever having stopped or hindered the export or import of television guides.

62. RTE also recalls the following facts, which are supported by the findings of the Commission and the Court of First Instance:
    (i) outside Ireland, RTE' s programmes are received only in part of Northern Ireland, which represents less than 1.6% of the United Kingdom television market and less than 0.3% of the EEC television market;
    (ii) according to the findings of the High Court of Ireland, the RTE signal is received by 30% to 40% of the population of Northern Ireland;
    (iii) sales of RTE' s television guide in the United Kingdom are less than 5% of sales in Ireland.

63. RTE adds that it does not have programmes or commercials aimed at or broadcast to Northern Ireland. Its programmes can be received in Northern Ireland only because of "overspill". In Northern Ireland, approximately 100 000 households receive RTE programmes and 5 000 copies of RTE' s television guide are sold.

64. According to RTE, these facts demonstrate the marginal importance of the cross-border sales of weekly guides containing RTE' s programmes.

65. Moreover, following the new licensing policy applied by RTE, it appears that:
    (i) sales in Ireland of Radio Times and TV Times, originating in the United Kingdom, have decreased;
    (ii) sales in Northern Ireland of the RTE Guide, originating in Ireland, have not increased; in general the inclusion of RTE' s programme listings in a multi-channel guide does not appreciably affect sales figures of such a guide in Northern Ireland;
    (iii) no other publishers have availed themselves of the new possibility of publishing comprehensive weekly television guides, including RTE' s programmes, and of selling them across the border.

66. RTE concludes from this information that its licensing policy, condemned by the Commission decision, has had no effect, or no more than an insignificant effect, on commercial exchanges between Ireland and the United Kingdom. In any event, RTE states, the Commission must prove that there is an appreciable effect on trade between Member States (judgment in Case 27/76 United Brands v Commission [1978] ECR 207), and that is something which the Court of First Instance failed to take into account. It points out that the Commission'

s arguments on this aspect relate only to sales in Great Britain, to ITP and to the BBC.

67. It is to be noted at the outset that the Court of Justice has consistently held that, pursuant to Article 168a of the Treaty and Article 51 of the Statute of the Court of Justice of the EEC, an appeal may rely only on grounds relating to infringement of rules of law, to the exclusion of any appraisal of the facts (judgment in Case C-53/92 P Hilti v Commission [1994] ECR I-667, paragraph 10). The arguments relied on by RTE must therefore be rejected in so far as they question the appraisal of the facts by the Court of First Instance.

68. Nevertheless, the condition that trade between Member States must be affected is a question of law and, as such, subject to review by the Court of Justice.

69. In order to satisfy the condition that trade between Member States must be affected, it is not necessary that the conduct in question should in fact have substantially affected that trade. It is sufficient to establish that the conduct is capable of having such an effect (judgments in Case 322/81 Michelin v Commission, cited above, paragraph 104, and in Case C-41/90 Hoefner and Elser v Macrotron [1991] ECR I-1979, paragraph 32).

70. In this case, the Court of First Instance found that the applicant had excluded all potential competitors on the geographical market consisting of one Member State (Ireland) and part of another Member State (Northern Ireland) and had thus modified the structure of competition on that market, thereby affecting potential commercial exchanges between Ireland and the United Kingdom. From this the Court of First Instance drew the proper conclusion that the condition that trade between Member States must be affected had been satisfied.

71. It follows that the plea in law alleging misapplication by the Court of First Instance of the concept of trade between Member States being affected must be dismissed.

The Berne Convention (third plea in the appeal in Case C-241/91 P)

72. So far as the Berne Convention ("the Convention") is concerned, RTE had submitted before the Court of First Instance that Article 9(1) thereof conferred an exclusive right of reproduction and that Article 9(2) allowed a signatory State to permit reproduction only in certain special cases, provided that such reproduction did not conflict with normal exploitation of the work and did not unreasonably prejudice the legitimate interests of the author. From this RTE deduced that Article 2 of the contested decision was incompatible with the Convention inasmuch as it conflicted with the normal exploitation of RTE' s copyright in the programme listings and seriously prejudiced its legitimate interests (RTE judgment, paragraph 100).

73. In response to those arguments, the Court of First Instance considered whether the Convention was applicable. Its first finding was that the Community was not a party to it. After reviewing Article 234 of the EEC Treaty and the case-law of the Court of Justice (RTE judgment, paragraph 102), the Court of First Instance pointed out that "In the present case concerning Ireland and the United Kingdom, ... under Article 5 of the Act of Accession, Article 234 of the EEC Treaty applies to agreements or conventions concluded before ... 1 January 1973." From this it deduced that "In intra-Community relations, therefore,

the provisions of the Berne Convention, ratified by Ireland and the United Kingdom before 1 January 1973, cannot affect the provisions of the Treaty. ... The argument that Article 2 of the decision is in conflict with Article 9(1) of the Berne Convention must therefore be dismissed, without there even being any need to inquire into its substance." With regard to Article 9(2) of the Convention, the Court of First Instance observed that this provision "was introduced by the Paris revision of 1971, to which the United Kingdom has been a party since 2 January 1990 and which Ireland has not yet ratified." The Court of First Instance then pointed out that an agreement or a convention concluded subsequent to accession without recourse to the procedure set out in Article 236 of the EEC Treaty cannot affect a provision of the Treaty (RTE judgment, paragraph 103).

74. The Court of First Instance accordingly dismissed as unfounded the plea alleging infringement of the Convention (RTE judgment, paragraph 104).

75. RTE claims that Article 9(2) of the Berne Convention, as revised in Paris in 1971, only allows for exceptions from authors' exclusive rights of reproduction to be made by legislation, in special cases, and provided that such reproduction does not prejudice the normal exploitation of the work or cause unreasonable prejudice to the legitimate interests of the author.

76. According to RTE, the Convention does not contain a definition of what comes under its protection but excludes only "miscellaneous news facts having the character of mere facts of press information" (Article 2(8)), an exception which must be interpreted restrictively. It is thus for the national legislature and courts to determine the scope of the Convention at national level.

77. RTE submits that the obligation imposed by the Commission' s decision has not been provided for by legislation which is sufficiently clear in its terms to define the circumstances in which, and the conditions on which, reproduction is to be permitted. The decision itself cannot be regarded as "legislation". Application of competition law does not fulfil the conditions of Article 9(2). A copyright holder must be able to know on the basis of explicit legislation whether or not he may be subject to an obligation of compulsory licensing. A provision such as Article 86 of the Treaty, which merely sets out a general obligation and must be made precise and adapted from case to case, does not fulfil the conditions laid down by Article 9(2) of the Convention. Community legislation alone is capable of providing a proper legislative basis.

78. RTE submits that the Convention is part of the rules of law relating to the application of the Treaty referred to in Article 173 of the EEC Treaty. In support of that proposition, RTE refers to numerous declarations made by the Commission which show that the Convention enjoys broad international support (see the preamble to the Proposal for a Council Decision concerning the accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 26 October 1961, OJ 1991 C 24, p. 5). According to RTE, the Commission has always regarded the Convention as establishing a minimum level of protection. It refers to the Proposal for a Council Directive on the legal protection of computer programs (OJ 1989 C 91, p. 4, particularly pp. 8 and 10) and Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42). The amended Commission proposal for a Council Decision

concerning the accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 26 October 1961 (OJ 1992 C 57, p. 13) states (Article 1a):

"In the exercise of its powers concerning copyright and neighbouring rights, the Community shall be guided by the principles and act in accordance with the provisions of the Berne Convention ...".

The Proposal for a Council Directive on the legal protection of databases, adopted on 29 January 1992, provides a legislative basis for compulsory licensing. RTE observes that, in all fields other than competition law, the Community respects the Convention.

79. RTE accordingly takes the view that, although the Community itself is not a party to the Convention, account must be taken of the rules of that Convention within the framework of Community law (judgments in Case 4/73 Nold v Commission [1974] ECR 491, and in Joined Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 2859).
80. According to RTE, the Community cannot, on the one hand, oblige the Member States to accede to and comply with the Convention and, on the other, adopt measures which do not comply with it.
81. In conclusion, it contends that examination of the scope of Articles 234 and 236 would be relevant only if a conflict between the obligations arising from the Convention and certain provisions of the EEC Treaty had been established.
82. IPO endorses this opinion and contends that harmonization of national intellectual property law can be achieved only by legislative means, namely by a Council measure adopted in accordance with the procedure provided for in Article 100a or Article 235 of the EEC Treaty. An individual decision issued by the Commission on the basis of competition law is not the appropriate way to resolve this issue.
83. It is appropriate to observe at the outset, as the Court of First Instance did, that the Community is not a party to the Convention for the Protection of Literary and Artistic Works.
84. Next, so far as the United Kingdom and Ireland are concerned, it is true that they were already parties to the Convention when they acceded to the Community and that Article 234 of the Treaty therefore applies to that Convention, in accordance with Article 5 of the Act of Accession. It is, however, settled case-law that the provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State' s accession cannot be relied on in intra-Community relations if, as in the present case, the rights of non-member countries are not involved (see, in particular, the judgment in Case 286/86 Ministère Public v Deserbais [1988] ECR 4907, paragraph 18).
85. Finally, the Paris Act, which amended Article 9(1) and (2) of the Convention (the provisions relied on by RTE), was ratified by the United Kingdom only after its accession to the Community and has still not been ratified by Ireland.

86. The Court of First Instance was therefore correct to hold that Article 9 of the Convention cannot be relied on to limit the powers of the Community, as provided for in the EEC Treaty, since the Treaty can be amended only in accordance with the procedure laid down in Article 236.
87. It follows that the plea that the Court of First Instance failed to have proper regard to the Convention must be dismissed as unfounded.

The powers conferred on the Commission by Article 3 of Regulation No 17 (second plea in the appeal in Case C-242/91 P)

88. The first limb of ITP' s second plea is that the Court of First Instance misconstrued Article 3 of Regulation No 17 in holding that that provision enabled the Commission to impose compulsory licensing, on conditions approved by it, relating to intellectual property rights conferred by the laws of the Member States. Relying on the judgment in Case 144/81 Keurkoop v Nancy Kean Gifts [1982] ECR 2853, ITP submits that only the Parliaments of Ireland and the United Kingdom may take away or replace the copyrights which they have conferred.
89. The second limb alleges infringement of the principle of proportionality in so far as the Court of First Instance held that the Commission' s decision was not contrary to that principle (ITP judgment, paragraphs 78 to 81). ITP contends that the Court of First Instance should have taken account of a number of considerations: the decision removed not only ITP' s exclusive right of reproduction, but also its right of first marketing, particularly important where, as in this case, the product has a useful life of 10 days; there is no reciprocity between ITP and the competitors (other than the BBC and RTE) to whom it is required to grant licences; many of those competitors, particularly the national newspapers, have turnovers and profits greatly in excess of those of ITP and they also possess valuable copyrights which they protect from reproduction.
90. It is appropriate to observe that Article 3 of Regulation No 17 is to be applied according to the nature of the infringement found and may include an order to do certain acts or things which, unlawfully, have not been done as well as an order to bring an end to certain acts, practices or situations which are contrary to the Treaty (judgment in Joined Cases 6/73 and 7/73 Commercial Solvents, cited above, paragraph 45).
91. In the present case, after finding that the refusal to provide undertakings such as Magill with the basic information contained in television programme listings was an abuse of a dominant position, the Commission was entitled under Article 3, in order to ensure that its decision was effective, to require the appellants to provide that information. As the Court of First Instance rightly found, the imposition of that obligation ° with the possibility of making authorization of publication dependent on certain conditions, including payment of royalties ° was the only way of bringing the infringement to an end.
92. The Court of First Instance was also entitled to dismiss, on the basis of the same findings of fact, the allegation that the principle of proportionality had been infringed.
93. As the Court of First Instance correctly pointed out, in the context of the application of Article 3 of Regulation No 17, the principle of proportionality means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary

to attain the objective sought, namely re-establishment of compliance with the rules infringed (ITP judgment, paragraph 80).

94. In holding, at paragraph 81 of the ITP judgment, that, in the light of the above findings, the order addressed to the applicant was an appropriate and necessary measure to bring the infringement to an end, the Court of First Instance did not commit an error of law.

The reasoning (third plea in the appeal in Case C-242/91 P)

95. In its third plea ITP claims that the Court of First Instance failed to comply with Article 190 of the EEC Treaty in finding that the decision was adequately reasoned (ITP judgment, paragraphs 64 and 65) when the Commission did no more than state that the exercise of copyright was outside the scope of the specific subject-matter of this right and went on to conclude that an exercise of copyright consisting simply in refusing to grant a reproduction licence was an abuse of a dominant position.

96. According to ITP, the crucial question whether a mere refusal to grant a licence could constitute an abuse was dealt with by the Commission in a summary fashion. There was no analysis of the special position occupied by owners of copyright in the context of the application of Article 86. ITP maintains that such an approach fails to meet the requirements laid down in the judgment in Case C-269/90 Hauptzollamt Muenchen-Mitte v Technische Universitaet Muenchen [1991] ECR I-5469. ITP maintains that it still does not know what the Commission meant by describing ITP' s use of its copyright as falling outside the scope of the specific subject-matter of the intellectual property right.

97. ITP claims that the inadequacy of the decision' s reasoning was highlighted by the numerous arguments advanced by the Commission in the course of the proceedings before the Court of First Instance. If the Commission could so act and remain within the law, Article 190 would be rendered nugatory. ITP submits that the Court of First Instance adopted its own legal reasoning which bore no relation to the decision.

98. The Court must observe here that, according to settled case-law, Commission decisions intended to find infringements of competition rules, issue directions and impose pecuniary sanctions must state the reasons on which they are based, in accordance with Article 190 of the EEC Treaty, which requires the Commission to set out the reasons which prompted it to adopt a decision, so that the Court can exercise its power of review and Member States and nationals concerned know the basis on which the Treaty has been applied (see the judgment in Case C-137/92 P Commission v BASF and Others [1994] ECR I-2555, paragraph 66).

99. However, the Commission cannot be required to discuss all the matters of fact and law which may have been dealt with during the administrative proceedings (judgment in Case 246/86 Belasco and Others v Commission [1989] ECR 2117, paragraph 55).

100. The Court of First Instance found in particular, at paragraph 64 of the ITP judgment, that "as regards the concept of abuse, the Commission clearly stated in the decision its reasons for finding that the applicant, by using its exclusive right to reproduce the listings as the instrument of a policy contrary to the objectives of Article 86, went beyond what was necessary to ensure the protection of the actual substance of its copyright and committed an abuse

within the meaning of Article 86." It accordingly arrived at the view that "Contrary to the applicant' s allegations, the statement of reasons in the contested decision is ... sufficient to allow interested parties to ascertain the main legal and factual criteria on which the Commission based its findings and to enable the Court to carry out its review. It therefore fulfils the conditions relating to the respect of the right to a fair hearing as they have consistently been defined in the case-law."

101. ITP' s criticisms fail to show that those assessments of the Court of First Instance are marred by an error of law.

102. It must be added that, in so far as those criticisms concern the inadequacy of the legal analysis of the situation made by the Commission in its decision, they substantially reproduce the arguments put forward to challenge the description of the appellants' conduct as an abuse of a dominant position, arguments which have already been rejected above in the examination of the first plea in law.

103. The plea of non-compliance with Article 190 of the Treaty must therefore be dismissed.

104. It follows that the appeals must be dismissed in their entirety.

…………..

On those grounds,
THE COURT hereby:

1. Dismisses the appeals;
2. Orders Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) to pay the costs of the appeals lodged by them;
3. Orders Intellectual Property Owners Inc. (IPO) to bear its own costs and to pay those incurred by the Commission due to its intervention.

5. Case Oscar Bronner (ECJ)

Judgment of the Court (Sixth Chamber) of 26 November 1998 – "Oscar Bronner GmbH & Co. KG – Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG."

THE COURT gives the following Judgement:

1. By order of 1 July 1996, received at the Court on 15 January 1997, the Oberlandesgericht Wien (Higher Regional Court, Vienna), in its capacity as the Kartellgericht (court of first instance in competition matters), referred to the Court

for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 86 of the Treaty.

2. The questions were raised in connection with an action brought by Oscar Bronner GmbH & Co. KG (`Oscar Bronner') against Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG (hereinafter collectively referred to as `Mediaprint') under Paragraph 35 of the Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Federal Law on Cartels and other Restrictive Practices; `the Kartellgesetz') of 19 October 1988 (BGBl. 1988, p. 600), as amended in 1993 (BGBl. 1993, p. 693) and 1995 (BGBl. 1995, p. 520).

3. Paragraph 35(1) of the Kartellgesetz provides:
`The Kartellgericht shall, upon application, order the undertakings concerned to bring the abuse of a dominant position to an end. Such abuse may consist, in particular, of:
   1. directly or indirectly imposing unfair purchase or selling prices or other trading conditions;
   2. limiting production, markets or technical development to the detriment of consumers;
   3. placing other trading parties at a competitive disadvantage by applying dissimilar conditions to equivalent transactions;
   4. making the conclusion of contracts subject to the acceptance by other trading parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject-matter of such contracts.'

4. The objects of Oscar Bronner are the editing, publishing, manufacture and distribution of the daily newspaper Der Standard. In 1994, that newspaper's share of the Austrian daily newspaper market was 3.6% of circulation and 6% of advertising revenues.

5. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG publishes the daily newspapers Neue Kronen Zeitung and Kurier. It carries on the marketing and advertising business of those newspapers through two wholly-owned subsidiaries, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.

6. In 1994, the combined market share of Neue Kronen Zeitung and Kurier was 46.8% of the Austrian daily newspaper market in terms of circulation and 42% in terms of advertising revenues. They reached 53.3% of the population from the age of 14 in private households and 71% of all newspaper readers.

7. For the distribution of its newspapers, Mediaprint has established a nationwide home-delivery scheme, put into effect through the intermediary of Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG. The scheme consists of delivering the newspapers directly to subscribers in the early hours of the morning.

8. In its action under Paragraph 35 of the Kartellgesetz, Oscar Bronner seeks an order requiring Mediaprint to cease abusing its alleged dominant position on the market by including Der Standard in its home-delivery service against payment of reasonable remuneration. In support of its claim, Oscar Bronner argues that postal delivery, which generally does not take place until the late morning, does not represent an equivalent alternative to home-delivery, and that, in view of its small number of subscribers, it would be entirely unprofitable for it to organise its own home-delivery service. Oscar Bronner further argues

that Mediaprint has discriminated against it by including another daily newspaper, Wirtschaftsblatt, in its home-delivery scheme, even though it is not published by Mediaprint.

9. In reply to those arguments, Mediaprint contends that the establishment of its home-delivery service required a great administrative and financial investment, and that making the system available to all Austrian newspaper publishers would exceed the natural capacity of its system. It also maintains that the fact that it holds a dominant position does not oblige it to subsidise competition by assisting competing companies. It adds that the position of Wirtschaftsblatt is not comparable to that of Der Standard, since the publisher of the former also entrusted the Mediaprint group with printing and the whole of distribution, including sale in kiosks, so that home-delivery constituted only part of a package of services.

10. Taking the view that, if the conduct of a market participant falls within the terms of Article 86 of the EC Treaty it must logically constitute an abuse of the market within the meaning of Paragraph 35 of the Kartellgesetz which is analogous in content, since under the principle of the primacy of Community law conduct which is incompatible with the latter cannot be tolerated under national law either, the Kartellgericht decided that it first needed to resolve the question whether the conduct of Mediaprint infringed Article 86 of the Treaty. Referring subsequently to the fact that Article 86 of the Treaty applies only if trade between Member States is capable of being affected by the conduct of traders in breach, the Kartellgericht found that condition met in the main proceedings, since refusal of access to the home-delivery scheme could have the effect of completely excluding Oscar Bronner from the daily newspaper market and Oscar Bronner, as publisher of an Austrian daily newspaper also sold abroad, participated in international trade.

11. In those circumstances, the Kartellgericht decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is Article 86 of the EC Treaty to be interpreted in such a way that there is an abuse of a dominant position, in the sense of an abusive barring of access to the market, where an undertaking which carries on the publication, production and marketing of daily newspapers, and with its products occupies a predominant position on the Austrian market for daily newspapers (46.8% of total circulation, 42% of advertising revenue and 71% range of influence, measured by the number of all daily newspapers), and operates the only nationwide home-delivery distribution service for subscribers, refuses to make a binding offer to another undertaking engaged in the publication, production and marketing of a daily newspaper in Austria to include that daily newspaper in its home-delivery scheme, in the light also of the circumstance that it is not possible, on account of the small circulation and the consequently small number of subscribers, for the undertaking seeking inclusion in the home-delivery scheme to build up its own home-delivery scheme for a reasonable cost outlay and operate it profitably, either alone or in cooperation with the other undertakings offering daily newspapers on the market?

(2) Does it amount to an abuse within the meaning of Article 86 of the EC Treaty, where, under the circumstances described at (1) above, the operator of the home-delivery scheme for daily newspapers makes the

entry into business relations with the publisher of a competing product dependent upon the latter entrusting him not only with home deliveries but also with other services (e.g. marketing through sales points, printing) within the context of an overall package?'

[…]

On those grounds, THE COURT (Sixth Chamber),
in answer to the questions referred to it by the Oberlandesgericht Wien by order of 1 July 1996, hereby rules:
The refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute the abuse of a dominant position within the meaning of Article 86 of the EC Treaty.

6. Case Microsoft

Judgment of the Court of 17 September 2007

Summary:

Parties:
Microsoft Corp
v
Commission of the European Communities

Background to the dispute

1. Microsoft Corp., a company established in Redmond, Washington (United States), designs, develops and markets a wide variety of software products for different kinds of computing devices. Those software products include, in particular, operating systems for client personal computers ('client PCs'), operating systems for work group servers and streaming media players. Microsoft also provides technical assistance for its various products.
2. On 15 September 1998, Mr Green, a Vice-President of Sun Microsystems, Inc. ('Sun'), a company established in Palo Alto, California (United States) which supplies, in particular, servers and server operating systems, wrote to Mr Maritz, a Vice-President of Microsoft, as follows:

'We are writing to you to request that Microsoft provide [Sun] with the complete information required to allow Sun to provide native support for COM objects on Solaris.

We also request that Microsoft provide [Sun] with the complete information required to allow [Sun] to provide native support for the complete set of Active Directory technologies on Solaris.
We believe it is in the industry's best interest that applications written to execute on Solaris be able to seamlessly communicate via COM and/or Active Directory with the Windows operating systems and/or with Windows-based software.

We believe that Microsoft should include a reference implementation and such other information as is necessary to insure, without reverse engineering, that COM objects and the complete set of Active Directory technologies will run in full compatible fashion on Solaris. We think it necessary that such information be provided for the full range of COM objects as well as for the full set of Active Directory technologies currently on the market. We also think it necessary that such information be provided in a timely manner and on a continuing basis for COM objects and Active Directory technologies which are to be released to the market in the future.'

6. On 10 December 1998, Sun lodged a complaint with the Commission pursuant to Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87).
7. Sun's complaint related to Microsoft's refusal to give it the information and technology necessary to allow its work group server operating systems to interoperate with the Windows client PC operating system.

8. On 2 August 2000, the Commission sent Microsoft a first statement of objections ('the first statement of objections'), which related in effect to questions concerning the interoperability of Windows client PC operating systems and other suppliers' server operating systems (client/server interoperability).
10. In the meantime, in February 2000, the Commission, acting on its own initiative, launched an investigation relating, particularly, to Microsoft's Windows 2000 generation of client PC and work group server operating systems and to the integration by Microsoft of its Windows Media Player in its Windows client PC operating system. The client PC operating system in the Windows 2000 range was intended for professional use and was called 'Windows 2000 Professional', whereas the server operating systems in that range were presented under the three following versions: Windows 2000 Server, Windows 2000 Advanced Server and Windows 2000 Datacenter Server.
11. That investigation concluded on 29 August 2001, when the Commission sent Microsoft a second statement of objections ('the second statement of objections'), in which it reiterated its previous objections concerning client/server interoperability. The Commission also addressed certain questions relating to interoperability between work group servers (server/server interoperability). In addition, the Commission raised a number of questions concerning the integration of Windows Media Player in the Windows client PC operating system.
20. On 24 March 2004, the Commission adopted Decision 2007/53/EC relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft Corp. (Case COMP/C-3.37.792 – Microsoft) (OJ 2007 L 32, p. 23; 'the contested decision').

The contested decision

21. In the contested decision, the Commission finds that Microsoft infringed Article 82 EC and Article 54 of the Agreement on the European Economic Area (EEA) by twice abusing a dominant position.
22. The Commission first identifies three separate worldwide product markets and considers that Microsoft had a dominant position on two of them. It then finds that Microsoft had engaged in two kinds of abusive conduct. As a result it imposes a fine and a number of remedies on Microsoft.

I – Relevant product markets and geographic market

23. The contested decision identifies three separate product markets, namely the markets for, respectively, client PC operating systems (recitals 324 to 342 to the contested decision), work group server operating systems (recitals 343 to 401 to the contested decision) and streaming media players (recitals 402 to 425 to the contested decision).
29. As regards the relevant geographic market, the Commission finds in the contested decision, as stated at paragraph 22 above, that it has a worldwide dimension for each of the three product markets (recital 427 to the contested decision).

II – Dominant position

30. In the contested decision, the Commission finds that Microsoft has had a dominant position on the client PC operating systems market since at least 1996 and also on the work group server operating systems market since 2002 (recitals 429 to 541 to the contested decision).

III – Abuse of a dominant position

A – Refusal to supply and authorise the use of interoperability information

36. The first abusive conduct in which Microsoft is found to have engaged consists in its refusal to supply its competitors with 'interoperability information' and to authorise the use of that information for the purpose of developing and distributing products competing with Microsoft's own products on the work group server operating systems market, between October 1998 and the date of notification of the contested decision (Article 2(a) of the contested decision).

40. In the contested decision, the Commission emphasises that the refusal in question does not relate to Microsoft's 'source code', but only to specifications of the protocols concerned, that is to say, to a detailed description of what the software in question must achieve, in contrast to the implementations, consisting in the implementation of the code on the computer (recitals 24 and 569 to the contested decision). It states, in particular, that it 'does not contemplate ordering Microsoft to allow copying of Windows by third parties' (recital 572 to the contested decision).

B – Tying of the Windows client PC operating system and Windows Media Player

43. The second abusive conduct in which Microsoft is found to have engaged consists in the fact that from May 1999 to the date of notification of the contested decision Microsoft made the availability of the Windows client PC operating system conditional on the simultaneous acquisition of the Windows Media Player software (Article 2(b) of the contested decision).

44. In the contested decision, the Commission considers that that conduct satisfies the conditions for a finding of a tying abuse for the purposes of Article 82 EC (recitals 794 to 954 to the contested decision). First, it reiterates that Microsoft has a dominant position on the client PC operating systems market (recital 799 to the contested decision). Second, it considers that streaming media players and client PC operating systems constitute separate products (recitals 800 to 825 to the contested decision). Third, it asserts that Microsoft does not give consumers the opportunity to buy Windows without Windows Media Player (recitals 826 to 834 to the contested decision). Fourth, it contends that the tying in question restricts competition on the media players market (recitals 835 to 954 to the contested decision).

III – Fine and remedies

46. In respect of the two abuses identified in the contested decision, a fine of EUR 497 196 304 is imposed (Article 3 of the contested decision).

47. Furthermore, the first paragraph of Article 4 of the contested decision requires that Microsoft bring an end to the infringement referred to in Article 2, in accordance with Articles 5 and 6 of that decision. Microsoft must also refrain from repeating any act or conduct that might have the same or equivalent object or effect to those abuses (second paragraph of Article 4 of the contested decision).

contends that the Court should dismiss the action.

Law

83. The pleas in law which Microsoft puts forward in support of its application for annulment of the contested decision are centred on three issues, namely, first, the refusal to supply and authorise the use of interoperability information; second, the tying of the Windows client PC operating system and Windows Media Player; and, third …

C – The refusal to supply and to authorise the use of interoperability information

101. In this first issue, Microsoft relies on a single plea alleging infringement of Article 82 EC. This plea may be broken down into three parts. In the first part, Microsoft claims that the criteria which permit an undertaking in a dominant position to be compelled to grant a licence, as defined by the Community judicature, are not satisfied in this case. In the second part, Microsoft claims that Sun did not request access to the 'technology' that the Commission ordered Microsoft to disclose and that the letter of 6 October 1998 cannot in any event be interpreted as containing an actual refusal on its part. Last, in the third part, Microsoft claims that the Commission does not properly take account of the obligations imposed on the Communities by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 (Annex 1 C to the Agreement Establishing the World Trade Organisation (WTO)) ('the TRIPS Agreement').

First part: the criteria on which an undertaking in a dominant position may be compelled to grant a licence, as defined by the Community judicature, are not satisfied in the present case

Findings of the Court

688. The Court notes, as a preliminary point, that although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.

689. In the present case, as the Commission found at recital 709 to the contested decision and as Microsoft expressly confirmed in the application, Microsoft relied as justification for its conduct solely on the fact that the technology concerned was covered by intellectual property rights. It made clear that if it were required to grant third parties access to that technology, that 'would … eliminate future incentives to invest in the creation of more intellectual property' (recital 709 to the contested decision). In the reply, the applicant also relied on that fact that the technology was secret and valuable and that it contained important innovations.

690. The Court considers that, even on the assumption that it is correct, the fact that the communication protocols covered by the contested decision, or the specifications for those protocols, are covered by intellectual property rights

cannot constitute objective justification within the meaning of Magill and IMS Health, paragraph 107 above. Microsoft's argument is inconsistent with the raison d'être of the exception which that case-law thus recognises in favour of free competition, since if the mere fact of holding intellectual property rights could in itself constitute objective justification for the refusal to grant a licence, the exception established by the case-law could never apply. In other words, a refusal to license an intellectual property right could never be considered to constitute an infringement of Article 82 EC even though in Magill and IMS Health, paragraph 107 above, the Court of Justice specifically stated the contrary.

691. It must be borne in mind that, as stated at paragraphs 321, 323, 327 and 330 above, the Community judicature considers that the fact that the holder of an intellectual property right can exploit that right solely for his own benefit constitutes the very substance of his exclusive right. Accordingly, a simple refusal, even on the part of an undertaking in a dominant position, to grant a licence to a third party cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only when it is accompanied by exceptional circumstances such as those hitherto envisaged in the case-law that such a refusal can be characterised as abusive and that, accordingly, it is permissible, in the public interest in maintaining effective competition on the market, to encroach upon the exclusive right of the holder of the intellectual property right by requiring him to grant licences to third parties seeking to enter or remain on that market. It must be borne in mind that it has been established above that such exceptional circumstances were present in this case.

692. The argument which Microsoft puts forward in the reply, namely that the technology concerned is secret and of great value to the licensees and contains important innovations, cannot succeed either.

693. First, the fact that the technology concerned is secret is the consequence of a unilateral business decision on Microsoft's part. Furthermore, Microsoft cannot rely on the argument that the interoperability information is secret as a ground for not being required to disclose it unless the exceptional circumstances identified by the Court of Justice in Magill and IMS Health, paragraph 107 above, are present, and at the same time justify its refusal by what it alleges to be the secret nature of the information. Last, there is no reason why secret technology should enjoy a higher level of protection than, for example, technology which has necessarily been disclosed to the public by its inventor in a patent-application procedure.

694. Second, from the moment at which it is established that – as in this case – the interoperability information is indispensable, that information is necessarily of great value to the competitors who wish to have access to it.

695. Third, it is inherent in the fact that the undertaking concerned holds an intellectual property right that the subject-matter of that right is innovative or original. There can be no patent without an invention and no copyright without an original work.

697. The Court finds that, as the Commission correctly submits, Microsoft, which bore the initial burden of proof (see paragraph 688 above), did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate.

701. It follows that it has not been demonstrated that the disclosure of the information to which that remedy relates will significantly reduce – still less eliminate – Microsoft's incentives to innovate.

702. In that context, the Court observes that, as the Commission correctly finds at recitals 730 to 734 to the contested decision, it is normal practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products and Microsoft itself had followed that practice until it was sufficiently established on the work group server operating systems market. Such disclosure allows the operators concerned to make their own products more attractive and therefore more valuable. In fact, none of the parties has claimed in the present case that such disclosure had had any negative impact on those operators' incentives to innovate.

703. The Court further considers that if the disclosures made under the United States settlement and the MCPP as regards server-to-client protocols had no negative impact on Microsoft's incentives to innovate (recital 728 to the contested decision), there is no obvious reason to believe that the consequences should be any different in the case of disclosure relating to server/server protocols.

711. It follows from all of the foregoing considerations that Microsoft has not demonstrated the existence of any objective justification for its refusal to disclose the interoperability at issue.

712. As the exceptional circumstances identified by the Court of Justice in Magill and IMS Health, paragraph 107 above, were also present in this case, the first part of the plea must be rejected as wholly unfounded.

Second part: Sun did not request Microsoft to supply the technology which the Commission orders it to disclose

Findings of the Court

735. By its argument in support of the second part of its single plea, Microsoft seeks to establish that the Commission had no valid ground on which to find, in the contested decision, that Microsoft had abused its dominant position by refusing to disclose the interoperability information, since it cannot in fact be accused of any real refusal. In support of that argument, Microsoft relies, in substance, on the exchange of letters between it and Sun in the latter part of 1998. Its argument comes under three main heads. In the first place, Microsoft claims that Sun's request in the letter of 15 September 1998 did not relate to interoperability information as referred to in the contested decision. In the second place, it denies in any event having refused that request in the letter of 6 October 1998. In the third place, Microsoft maintains that in the letter of 15 September 1998 Sun did not seek a licence covering intellectual property rights which Microsoft held in the EEA.

744. Next, in the light of those various factors, the Court finds, first, that while, as the Commission itself recognises in the defence, the scope of the request in the letter of 15 September 1998 was wider in certain regards than that of the contested decision, the fact remains that in that letter Sun qualified the scope of its request by stating that all that it wanted was that its products should be able to 'seamlessly communicate' with the Windows environment. Likewise, Sun also stated in its letter that the information requested should 'insure, with-

out reverse engineering, that COM objects and the complete set of Active Directory technologies will run in fully compatible fashion on Solaris'. In other words, it is clear from the wording of the letter of 15 September 1998 that Sun was seeking access to information and that the information should allow it to achieve interoperability between its products and the Windows environment.

758. The Court notes, in the first place, that in the letter of 6 October 1998 Mr Maritz wholly fails to answer the specific requests made by Sun in the letter of 15 September 1998 and merely refers Sun to sources of information and methods which were already in the public domain or available under licence. As Mr Maritz was clearly aware of the significance of the specific requests stated by Mr Green, such a reference cannot be interpreted as anything other than a refusal to communicate the information requested.

774. In the letter of 15 September 1998, Sun did not, admittedly, expressly request Microsoft to grant it a licence over intellectual property rights held in the EEA. However, there was no need for Sun to assess in its request whether the information to which it sought access was protected by intellectual property rights and whether the use of that information needed to be licensed by Microsoft. It is clear, moreover, that Sun wished Microsoft to supply the information at issue so that it would be able to implement that information in its own work group server operating systems. Furthermore, as the relevant geographic market for those systems is worldwide (see recital 427 to the contested decision), the territory of the EEA was necessarily covered by Sun's request, which was drafted in general terms. Last, as the Commission observes in its pleadings, as Sun had lodged a complaint pursuant to Article 3 of Regulation No 17 a few weeks later, Microsoft could in any event no longer fail to be aware that the EEA was also concerned.

775. It follows that the Commission was correct to find at recital 787 to the contested decision that when Microsoft had responded to the letter of 15 September 1998 it had not taken sufficiently into account its special responsibility not to hinder effective and undistorted competition in the common market. The Commission was also correct to state, at the same recital, that that particular responsibility derived from Microsoft's 'quasi-monopoly' on the client PC operating systems market. As is apparent from the considerations set out at paragraph 740 above, the refusal at issue concerned 'interface specifications that organise a network of Windows work group servers and client PCs and that, as such, are not attributable to one of the two [types of product] at stake (client PCs or work group servers), but rather represent a rule of compatibility between those two products' (recital 787 to the contested decision).

776. It follows from all of the foregoing considerations that the second part of the single plea put forward by Microsoft in connection with the refusal to supply and authorise the use of the interoperability information must be rejected as unfounded.

[…]

C – The bundling of Windows Media Player with the Windows client PC operating system

814. In this second issue, Microsoft relies on two pleas: first, infringement of Article 82 EC and, second, breach of the principle of proportionality. The first plea concerns the Commission's finding that Microsoft's conduct in making the

availability of the Windows client PC operating system conditional on the simultaneous acquisition of Windows Media Player constitutes an abusive tied sale (Article 2(b) of the contested decision). The second plea relates to the remedy prescribed in Article 6 of the contested decision.

First plea, alleging infringement of Article 82 EC

840. By way of introduction to the arguments which it develops in connection with the Windows Media Player issue, Microsoft makes a number of assertions concerning the conditions necessary to establish the existence of abusive bundling.

[…]

e) the absence of objective justification

Findings of the Court

1144. It must be borne in mind, as a preliminary point, that although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.

1146. First, Microsoft takes issue with the Commission for having ignored the benefits flowing from its business model, which entails the ongoing integration of new functionality into Windows. In that context, it claims, more particularly, that the integration of media functionality in Windows is indispensable in order for software developers and Internet site creators to be able to continue to benefit from the significant advantages offered by the ‘stable and well-defined’ Windows platform.

1147. Second, Microsoft claims that the removal of media functionality from the system consisting of Windows and Windows Media Player would create a series of problems to the detriment of consumers, software developers and Internet site creators. It refers, in particular, to the fact that its Windows operating system relies on the method know as ‘componentisation’ (see paragraph 1118 above) and that the withdrawal of media functionality would result in the degrading and ‘fragmentation’ of that system.

1149. The circumstance to which the Commission takes exception in the contested decision is not that Microsoft integrates Windows Media Player in Windows, but that it offers on the market only a version of Windows in which Windows Media Player is integrated, that is to say, that it does not allow OEMs or consumers to obtain Windows without Windows Media Player or, at least, to remove Windows Media Player from the system consisting of Windows and Windows Media Player. Thus, while Article 6(a) of the contested decision requires Microsoft to offer a ‘full-functioning version of the Windows Client PC Operating System which does not incorporate Windows Media Player’, it expressly states that ‘Microsoft … retains the right to offer a bundle of the Windows Client

PC Operating System and Windows Media Player' (see, to the same effect, recitals 1011 and 1023 to the contested decision).

1150. Thus, the Commission does not interfere with Microsoft's business model in so far as that model includes the integration of a streaming media player in its client PC operating system or the possibility for that operating system to allow software developers and Internet site creators to take advantage of the benefits offered by the 'stable and well-defined' Windows platform. The Commission takes issue with the fact that Microsoft does not market the version of Windows that corresponds to its business model and at the same time a version of that system without Windows Media Player, thus permitting OEMs or end users wishing to do so to install the product of their choice on their client PC as the first streaming media player.

1154. Furthermore, as the Commission and SIIA rightly submit, the other benefits on which Microsoft relies could just as easily be obtained in the absence of the impugned conduct.

1155. Thus, consumer demand for an 'out-of-the-box' client PC incorporating a streaming media player can be fully satisfied by OEMs, who are in the business of assembling such PCs and combining, inter alia, a client PC operating system with the applications desired by consumers (recitals 68 and 119 to the contested decision). Nor does the contested decision prevent Microsoft from continuing to offer the bundled version of Windows and Windows Media Player to consumers who prefer that solution.

1167. It follows from all of the foregoing considerations that Microsoft has not demonstrated the existence of any objective justification for the abusive bundling of Windows Media Player with the Windows client PC operating system.

Second plea, alleging breach of the principle of proportionality

Findings of the Court

1216. First of all, the Court notes that, in support of the present plea, Microsoft reiterates in essence the same arguments it submitted in the first plea on the condition relating to the absence of objective justification (see paragraphs 1102 to 1122 above).

1228. It follows from all of the foregoing considerations that the second plea must be rejected as unfounded.

1229. It follows that the claims relating to the annulment of the contested decision must be rejected in so far as they concern the bundling of Windows and Windows Media Player.

7. Case Huawei

Judgment of the Court of 16 July 2015

Summary:

Parties:
Huawei Technologies Co. Ltd
v
ZTE Corp. and ZTE Deutschland GmbH

The dispute in the main proceedings and the questions referred for a preliminary ruling

21. Huawei Technologies, a multinational company active in the telecommunications sector, is the proprietor of, inter alia, the European patent registered under the reference EP 2 090 050 B 1, bearing the title 'Method and apparatus of establishing a synchronisation signal in a communication system', granted by the Federal Republic of Germany, a Contracting State of the EPC ('patent EP 2 090 050 B 1').
22. That patent was notified to ETSI on 4 March 2009 by Huawei Technologies as a patent essential to the 'Long Term Evolution' standard. At the same time, Huawei Technologies undertook to grant licences to third parties on FRAND terms.

23. The referring court states, in the order for reference, that that patent is essential to that standard, which means that anyone using the ‘Long Term Evolution’ standard inevitably uses the teaching of that patent.

24. Between November 2010 and the end of March 2011, Huawei Technologies and ZTE Corp., a company belonging to a multinational group active in the telecommunications sector and which markets, in Germany, products equipped with software linked to that standard, engaged in discussions concerning, inter alia, the infringement of patent EP 2 090 050 B 1 and the possibility of concluding a licence on FRAND terms in relation to those products.

25. Huawei Technologies indicated the amount which it considered to be a reasonable royalty. For its part, ZTE Corp. sought a cross-licensing agreement. However, no offer relating to a licensing agreement was finalised.

26. None the less, ZTE markets products that operate on the basis of the ‘Long Term Evolution’ standard, thus using patent EP 2 090 050 B 1, without paying a royalty to Huawei Technologies or exhaustively rendering an account to Huawei Technologies in respect of past acts of use.

27. On 28 April 2011, on the basis of Article 64 of the EPC and Paragraph 139 et seq. of the German Law on Patents, as amended most recently by Paragraph 13 of the Law of 24 November 2011, Huawei Technologies brought an action for infringement against ZTE before the referring court, seeking an injunction prohibiting the infringement, the rendering of accounts, the recall of products and an award of damages.

28. That court considers that the decision on the substance in the main proceedings turns on whether the action brought by Huawei Technologies constitutes an abuse of that company’s dominant position. It thus observes that it might be possible to rely on the mandatory nature of the grant of the licence in order to dismiss the action for a prohibitory injunction — in particular, on the basis of Article 102 TFEU — if, by its action, Huawei Technologies were to be regarded as abusing its dominant position. According to the referring court, the existence of that dominant position is not in dispute.

30. In this connection, the referring court observes that, on the basis of Article 102 TFEU, Paragraph 20(1) of the Law of 26 June 2013 against Restrictions of Competition and Paragraph 242 of the Civil Code, the Bundesgerichtshof (Federal Court of Justice, Germany) held, in its judgment of 6 May 2009 in Orange Book (KZR 39/06), that, where the proprietor of a patent seeks a prohibitory injunction against a defendant which has a claim to a licence for that patent, the proprietor of the patent abuses its dominant position only in certain circumstances.

39. In those circumstances, the Landgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does the proprietor of [an SEP] which informs a standardisation body that it is willing to grant any third party a licence on [FRAND] terms abuse its dominant market position if it brings an action for an injunction against a patent infringer even though the infringer has declared that it is willing to negotiate concerning such a licence?
or
Is an abuse of the dominant market position to be presumed only where the infringer has submitted to the proprietor of the [SEP] an acceptable,

unconditional offer to conclude a licensing agreement which the patentee cannot refuse without unfairly impeding the infringer or breaching the prohibition of discrimination, and the infringer fulfils its contractual obligations for acts of use already performed in anticipation of the licence to be granted?

(2) If abuse of a dominant market position is already to be presumed as a consequence of the infringer's willingness to negotiate:
Does Article 102 TFEU lay down particular qualitative and/or time requirements in relation to the willingness to negotiate? In particular, can willingness to negotiate be presumed where the patent infringer has merely stated (orally) in a general way that it is prepared to enter into negotiations, or must the infringer already have entered into negotiations by, for example, submitting specific conditions upon which it is prepared to conclude a licensing agreement?

(3) If the submission of an acceptable, unconditional offer to conclude a licensing agreement is a prerequisite for abuse of a dominant market position:
Does Article 102 TFEU lay down particular qualitative and/or time requirements in relation to that offer? Must the offer contain all the provisions which are normally included in licensing agreements in the field of technology in question? In particular, may the offer be made subject to the condition that the [SEP] is actually used and/or is shown to be valid

(4) If the fulfilment of the infringer's obligations arising from the licence that is to be granted is a prerequisite for the abuse of a dominant market position:
Does Article 102 TFEU lay down particular requirements with regard to those acts of fulfilment? Is the infringer particularly required to render an account for past acts of use and/or to pay royalties? May an obligation to pay royalties be discharged, if necessary, by depositing a security?

(5) Do the conditions under which the abuse of a dominant position by the proprietor of a[n SEP] is to be presumed apply also to an action on the ground of other claims (for rendering of accounts, recall of products, damages) arising from a patent infringement?'

Consideration of the questions referred

40. A preliminary point to note is that the present request for a preliminary ruling has arisen in the context of an action concerning infringement of a patent between two operators in the telecommunications sector, which are holders of numerous patents essential to the 'Long Term Evolution' standard established by ETSI, which standard is composed of more than 4 700 SEPs, in respect of which those operators have undertaken to grant licences to third parties on FRAND terms.

42. For the purpose of providing an answer to the referring court and in assessing the lawfulness of such an action for infringement brought by the proprietor of an SEP against an infringer with which no licensing agreement has been concluded, the Court must strike a balance between maintaining free competition — in respect of which primary law and, in particular, Article 102 TFEU prohibit

abuses of a dominant position — and the requirement to safeguard that proprietor's intellectual-property rights and its right to effective judicial protection, guaranteed by Article 17(2) and Article 47 of the Charter, respectively.

Questions 1 to 4, and Question 5 in so far as that question concerns legal proceedings brought with a view to obtaining the recall of products

45. First of all, it must be recalled that the concept of an abuse of a dominant position within the meaning of 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 (judgments in Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 91; AKZO v Commission, C 62/86, EU:C:1991:286, paragraph 69; and Tomra Systems and Others v Commission, C 549/10 P, EU:C:2012:221, paragraph 17).

46. It is, in this connection, settled case-law that the exercise of an exclusive right linked to an intellectual-property right — in the case in the main proceedings, namely the right to bring an action for infringement — forms part of the rights of the proprietor of an intellectual-property right, with the result that the exercise of such a right, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute an abuse of a dominant position (see, to that effect, judgments in Volvo, 238/87, EU:C:1988:477, paragraph 8; RTE and ITP v Commission, C 241/91 P and C 242/91 P, EU:C:1995:98, paragraph 49; and IMS Health, C 418/01, EU:C:2004:257, paragraph 34).

47. However, it is also settled case-law that the exercise of an exclusive right linked to an intellectual-property right by the proprietor may, in exceptional circumstances, involve abusive conduct for the purposes of Article 102 TFEU (see, to that effect, judgments in Volvo, 238/87, EU:C:1988:477, paragraph 9; RTE and ITP v Commission, C 241/91 P and C 242/91 P, EU:C:1995:98, paragraph 50; and IMS Health, C 418/01, EU:C:2004:257, paragraph 35).

48. Nevertheless, it must be pointed out, as the Advocate General has observed in point 70 of his Opinion, that the particular circumstances of the case in the main proceedings distinguish that case from the cases which gave rise to the case-law cited in paragraphs 46 and 47 of the present judgment.

49. It is characterised, first, as the referring court has observed, by the fact that the patent at issue is essential to a standard established by a standardisation body, rendering its use indispensable to all competitors which envisage manufacturing products that comply with the standard to which it is linked.

50. That feature distinguishes SEPs from patents that are not essential to a standard and which normally allow third parties to manufacture competing products without recourse to the patent concerned and without compromising the essential functions of the product in question.

52. Although the proprietor of the essential patent at issue has the right to bring an action for a prohibitory injunction or for the recall of products, the fact that that patent has obtained SEP status means that its proprietor can prevent products manufactured by competitors from appearing or remaining on the market and, thereby, reserve to itself the manufacture of the products in question.

53. In those circumstances, and having regard to the fact that an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, a refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU.
54. It follows that, having regard to the legitimate expectations created, the abusive nature of such a refusal may, in principle, be raised in defence to actions for a prohibitory injunction or for the recall of products. However, under Article 102 TFEU, the proprietor of the patent is obliged only to grant a licence on FRAND terms. In the case in the main proceedings, the parties are not in agreement as to what is required by FRAND terms in the circumstances of that case.
55. In such a situation, in order to prevent an action for a prohibitory injunction or for the recall of products from being regarded as abusive, the proprietor of an SEP must comply with conditions which seek to ensure a fair balance between the interests concerned.
57. Thus, the need to enforce intellectual-property rights, covered by, inter alia, Directive 2004/48, which — in accordance with Article 17(2) of the Charter — provides for a range of legal remedies aimed at ensuring a high level of protection for intellectual-property rights in the internal market, and the right to effective judicial protection guaranteed by Article 47 of the Charter, comprising various elements, including the right of access to a tribunal, must be taken into consideration (see, to that effect, judgment in Otis and Others, C 199/11, EU:C:2012:684, paragraph 48).
58. This need for a high level of protection for intellectual-property rights means that, in principle, the proprietor may not be deprived of the right to have recourse to legal proceedings to ensure effective enforcement of his exclusive rights, and that, in principle, the user of those rights, if he is not the proprietor, is required to obtain a licence prior to any use.
59. Thus, although the irrevocable undertaking to grant licences on FRAND terms given to the standardisation body by the proprietor of an SEP cannot negate the substance of the rights guaranteed to that proprietor by Article 17(2) and Article 47 of the Charter, it does, none the less, justify the imposition on that proprietor of an obligation to comply with specific requirements when bringing actions against alleged infringers for a prohibitory injunction or for the recall of products.
60. Accordingly, the proprietor of an SEP which considers that that SEP is the subject of an infringement cannot, without infringing Article 102 TFEU, bring an action for a prohibitory injunction or for the recall of products against the alleged infringer without notice or prior consultation with the alleged infringer, even if the SEP has already been used by the alleged infringer.
63. Secondly, after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, it is for the proprietor of the SEP to present to that alleged infringer a specific, written offer for a licence on FRAND terms, in accordance with the undertaking given to the standardisation body, specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated.
64. As the Advocate General has observed in point 86 of his Opinion, where the proprietor of an SEP has given an undertaking to the standardisation body to grant licences on FRAND terms, it can be expected that it will make such an

offer. Furthermore, in the absence of a public standard licensing agreement, and where licensing agreements already concluded with other competitors are not made public, the proprietor of the SEP is better placed to check whether its offer complies with the condition of non-discrimination than is the alleged infringer.

66. Should the alleged infringer not accept the offer made to it, it may rely on the abusive nature of an action for a prohibitory injunction or for the recall of products only if it has submitted to the proprietor of the SEP in question, promptly and in writing, a specific counter-offer that corresponds to FRAND terms.

67. Furthermore, where the alleged infringer is using the teachings of the SEP before a licensing agreement has been concluded, it is for that alleged infringer, from the point at which its counter-offer is rejected, to provide appropriate security, in accordance with recognised commercial practices in the field, for example by providing a bank guarantee or by placing the amounts necessary on deposit. The calculation of that security must include, inter alia, the number of the past acts of use of the SEP, and the alleged infringer must be able to render an account in respect of those acts of use.

68. In addition, where no agreement is reached on the details of the FRAND terms following the counter-offer by the alleged infringer, the parties may, by common agreement, request that the amount of the royalty be determined by an independent third party, by decision without delay.

69. Lastly, having regard, first, to the fact that a standardisation body such as that which developed the standard at issue in the main proceedings does not check whether patents are valid or essential to the standard in which they are included during the standardisation procedure, and, secondly, to the right to effective judicial protection guaranteed by Article 47 of the Charter, an alleged infringer cannot be criticised either for challenging, in parallel to the negotiations relating to the grant of licences, the validity of those patents and/or the essential nature of those patents to the standard in which they are included and/or their actual use, or for reserving the right to do so in the future.

70. It is for the referring court to determine whether the abovementioned criteria are satisfied in the present case, in so far as they are relevant, in the circumstances, for the purpose of resolving the dispute in the main proceedings.

71. It follows from all the foregoing considerations that the answer to Questions 1 to 4, and to Question 5 in so far as that question concerns legal proceedings brought with a view to obtaining the recall of products, is that Article 102 TFEU must be interpreted as meaning that the proprietor of an SEP, which has given an irrevocable undertaking to a standardisation body to grant a licence to third parties on FRAND terms, does not abuse its dominant position, within the meaning of Article 102 TFEU, by bringing an action for infringement seeking an injunction prohibiting the infringement of its patent or seeking the recall of products for the manufacture of which that patent has been used, as long as:

– prior to bringing that action, the proprietor has, first, alerted the alleged infringer of the infringement complained about by designating that patent and specifying the way in which it has been infringed, and, secondly, after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, presented to that infringer a specific, written offer for a licence on such terms, specifying, in particular, the royalty and the way in which it is to be calculated, and where the alleged infringer continues to use the patent in question, the alleged infringer has not diligently responded to that offer, in accordance with recognised commercial practices in the field and in good faith, this being a matter which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics.

8. Case Intel – C-413/14 P

JUDGMENT OF THE COURT (Grand Chamber)

6 September 2017 (*)

[Text rectified by orders of 19 September and 24 October 2017]

(Appeal— Article 102 TFEU — Abuse of a dominant position — Loyalty rebates — Commission's jurisdiction — Regulation (EC) No 1/2003 — Article 19)

In Case C 413/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 August 2014,

Intel Corporation Inc., established in Wilmington (United States), represented by D.M. Beard QC, and by A. Parr and R. Mackenzie, Solicitors,

appellant,
the other parties to the proceedings being:
European Commission, represented by T. Christoforou, V. Di Bucci, M. Kellerbauer and N. Khan, acting as Agents,

defendant at first instance,
Association for Competitive Technology Inc., established in Washington (United States), represented by J.-F. Bellis, avocat,
Union fédérale des consommateurs — Que choisir (UFC — Que choisir),
interveners at first instance,

THE COURT (Grand Chamber),
composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça (Rapporteur), E. Juhász, M. Berger, M. Vilaras and E. Regan, Presidents of Chambers, A. Rosas, J. Malenovský, E. Levits, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,
Advocate General: N. Wahl,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 June 2016,
after hearing the Opinion of the Advocate General at the sitting on 20 October 2016,
gives the following

Judgment

1. By its appeal, Intel Corporation Inc. ('Intel') asks the Court to set aside the judgment of the General Court of the European Union of 12 June 2014, Intel v Commission(T 286/09, 'the judgment under appeal', EU:T:2014:547) by which the General Court dismissed its action for annulment of Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/C 3/37.990 — Intel) ('the decision at issue').

Legal context

2. Recital 25 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] (OJ 2003 L 1, p. 1) states:
‘The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission’s powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. ... Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.’
3. According to recital 32 of that regulation:
‘The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.’
3. Article 19 of Regulation No 1/2003, entitled ‘Power to take statements’, provides:
    1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.
    2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.’
5. Article 3 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 [EC] (OJ 2004 L 123, p. 18), entitled ‘Power to take statements’, provides:
    1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.
    2. The interview may be conducted by any means including by telephone or electronic means.
    3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.’

Background to the dispute and the decision at issue

6. Intel is a US-based company that designs, develops, manufactures, and markets central processing units (‘CPUs’), chipsets, and other semiconductor

components, as well as platform solutions for data processing and communications devices.

7. The present case concerns the market for processors, in particular x86 CPUs. The x86 architecture is a standard designed by Intel for its CPUs and can run both the Windows and Linux operating systems.
8. Following a formal complaint submitted on 18 October 2000 by Advanced Micro Devices Inc. ('AMD'), supplemented on 26 November 2003, the Commission launched a round of investigations in May 2004 and, in July 2005, carried out inspections at several Intel premises, inter alia in Germany, Spain, Italy and the United Kingdom, as well as at the premises of several Intel customers, in Germany, Spain, France, Italy and the United Kingdom.
9. On 26 July 2007, the Commission sent Intel a statement of objections concerning its conduct vis-à-vis five major original equipment manufacturers ('OEMs'), namely Dell Inc., Hewlett-Packard Company (HP), Acer Inc., NEC Corp. and International Business Machines Corp. (IBM). Intel replied to that statement of objections on 7 January 2008, and an oral hearing was held on 11 and 12 March 2008.
10. On 17 July 2008, the Commission sent Intel a supplementary statement of objections concerning its conduct in respect of Media-Saturn-Holding GmbH ('MSH'), a retailer of electronic devices and the largest desktop computer distributor in Europe, and Lenovo Group Ltd. ('Lenovo'), another OEM. That supplementary statement included new evidence on Intel's conduct vis-à-vis some of the OEMs covered by the Statement of Objections of 26 July 2007. Intel did not reply within the prescribed period.
11. The Commission, in the decision at issue, described two types of conduct by Intel vis-à-vis its trading partners, namely conditional rebates and so-called 'naked restrictions', intended to exclude a competitor, AMD, from the market for x86 CPUs. The first type of conduct consisted in the grant of rebates to four OEMs, namely Dell, Lenovo, HP and NEC, which were conditioned on these OEMs purchasing all or almost all of their x86 CPUs from Intel. The second type of conduct consisted in making payments to OEMs so that they would delay, cancel or restrict the marketing of certain products equipped with AMD CPUs.
12. In the light of those considerations, the Commission found that Intel had committed a single and continuous infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), from October 2002 until December 2007, and therefore imposed on it a fine of EUR 1.06 billion.

The procedure before the General Court and the judgment under appeal

13. By application lodged at the Registry of the General Court on 22 July 2009, Intel brought an action for the annulment of the decision at issue, relying on nine pleas in law.
14. By document lodged at the Registry of the General Court on 2 November 2009, Association for Competitive Technology Inc. ('ACT') sought leave to intervene in the proceedings in support of Intel. It was granted leave to intervene by decision of 7 June 2010.
15. In support of its first plea in law, in relation to horizontal issues concerning the legal assessments carried out by the Commission, Intel disputed the allocation

of the burden of proof and the standard of proof required, the legal characterisation of the rebates and payments granted in consideration of exclusive supply as well as the legal characterisation of the payments, which the Commission referred to as 'naked restrictions', made to OEMs so that they would delay, cancel or restrict the marketing of products equipped with AMD CPUs.

16. The General Court held, in essence, in paragraph 79 of the judgment under appeal, that the rebates granted to Dell, HP, NEC and Lenovo were exclusivity rebates, since they were conditional upon customers' purchasing either all their x86 CPU requirements or most of their requirements from Intel. In addition, the General Court explained, in paragraphs 80 to 89 of the judgment under appeal, that the question whether such a rebate can be categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing the capability of that rebate to restrict competition.

17. For the sake of completeness, the General Court considered, in paragraphs 172 to 197 of the judgment under appeal, that the Commission established, to the requisite legal standard and on the basis of an analysis of the circumstances of the case, that the exclusivity rebates and payments that Intel granted to Dell, HP, NEC, Lenovo and MSH were capable of restricting competition.

18. As regards the second plea in law, alleging that the Commission did not establish its territorial jurisdiction to apply Articles 101 and 102 TFEU to the practices implemented in relation to Acer and Lenovo, the General Court first of all considered, in paragraph 244 of the judgment under appeal, that in order to justify the Commission's jurisdiction under public international law, it was sufficient to establish either the qualified effects of the practice in the European Union or that it was implemented in the European Union. It then held, in paragraph 296 of the judgment under appeal, that the substantial, immediate and foreseeable effect that Intel's conduct was capable of having within the European Economic Area (EEA) justified the Commission's jurisdiction. Lastly, for the sake of completeness, the General Court held, in paragraph 314 of the judgment under appeal, that that jurisdiction was also justified on account of the implementation of the conduct in question in the territory of the European Union and the EEA.

19. In support of its third plea in law, alleging that the Commission committed procedural irregularities, Intel submitted, inter alia, that its rights of defence had been breached because of the absence of a record transcribing the meeting with Mr D 1, arguing that some of the evidence provided in that meeting could have been used as exculpatory evidence. Intel also maintained that the Commission wrongly refused to hold a second hearing and to send Intel certain AMD documents which could have been relevant for its defence.

20. First, the General Court considered, in paragraph 618 of the judgment under appeal, that the meeting in question did not constitute formal questioning for the purposes of Article 19 of Regulation No 1/2003 and that the Commission was not required to carry out such questioning. It therefore concluded, in that paragraph, that Article 3 of Regulation No 773/2004 was not applicable, with the result that the argument alleging an infringement of the formal requirements laid down in that provision was ineffective.

21. Secondly, the General Court held, in paragraphs 621 and 622 of the judgment under appeal, that, even though the Commission had infringed the principle of

good administration by failing to draw up a document containing a brief summary of the subjects addressed at that meeting, as well as the names of the participants, it nevertheless remedied that initial omission by making the non-confidential version of an internal note relating to that meeting available to Intel.

22. As regards the fourth plea in law, alleging errors of assessment concerning the practices relating to the various OEMs and MSH, the General Court rejected all of the complaints raised by Intel in relation to Dell, HP, NEC, Lenovo, Acer and MSH in paragraphs 665, 894, 1032, 1221, 1371 and 1463 of the judgment under appeal.

23. As regards the fifth plea in law, by which Intel disputed the existence of an overall strategy aimed at foreclosing AMD's access to the most important sales channels, the General Court held, in paragraphs 1551 and 1552 of the judgment under appeal, that the Commission had, in essence, demonstrated to the requisite legal standard that Intel had attempted to conceal the anticompetitive nature of its practices and had implemented a long-term comprehensive strategy to foreclose AMD from those sales channels.

24. As regards the sixth plea in law, alleging that the Commission incorrectly applied the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2), the General Court considered, inter alia, in paragraph 1598 of the judgment under appeal, that neither the principle of legal certainty nor the principle that offences and punishments are to be strictly defined by law precludes the Commission from deciding to adopt and apply new guidelines on the method of setting fines, even after the infringement has been committed. In addition, the General Court considered, in that paragraph, that the interest in effective enforcement of the competition rules justifies that an undertaking must take account of the possibility of a modification to the general competition policy of the Commission as regards fines with respect both to the method of calculation and the level of fines.

25. As regards the seventh plea in law, alleging the absence of an intentional or negligent infringement of Article 102 TFEU, the General Court held, in essence, in paragraphs 1602 and 1603 of the judgment under appeal, that Intel could not have been unaware of the anticompetitive nature of its conduct and that the evidence relied on in the decision at issue demonstrated to the requisite legal standard that Intel had implemented a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels and that it had attempted to conceal the anticompetitive nature of its conduct.

26. As regards the eighth plea in law, concerning the allegedly disproportionate nature of the fine, the General Court held, in paragraphs 1614 to 1616 of the judgment under appeal, that the Commission's practice in previous decisions could not serve as a legal framework for the fines imposed in competition matters and that, in any event, the decisions relied on in that respect by Intel were not relevant as regards observance of the principle of equal treatment. Furthermore, contrary to Intel's assertions, the General Court pointed out, in paragraphs 1627 and 1628 of the judgment under appeal, that the Commission did not take into consideration the actual impact of the infringement on the market in order to determine its gravity.

27. As regards, lastly, the ninth plea in law, which sought a reduction of the fine by the General Court in the exercise of its unlimited jurisdiction, the General Court held, inter alia, in paragraph 1647 of the judgment under appeal, that there

was nothing in the complaints, arguments or matters of law and of fact put forward by Intel from which it might be concluded that the fine imposed was disproportionate. The General Court considered, in that paragraph, that the fine was appropriate to the circumstances of the case and emphasised that it was well below the 10% ceiling set in Article 23(2) of Regulation No 1/2003.

Forms of order sought by the parties before the Court of Justice

28. Intel claims that the Court should:
– set aside the judgment under appeal in whole or in part;
– annul the decision at issue in whole or in part;
– cancel or substantially reduce the fine imposed;
– in the alternative, refer the case back to the General Court for determination in accordance with the judgment of the Court of Justice; and
– order the Commission to pay the costs of these proceedings and of the proceedings before the General Court.

29. The Commission contends that the Court should:
– dismiss the appeal; and
– order Intel to pay the costs.

30. ACT claims that the Court should:
– allow Intel's appeal in its entirety; and
– order the Commission to pay the costs incurred by ACT in the context of the appeal and in that of the action for annulment.

The appeal

31. Intel puts forward six grounds in support of its appeal. By the first ground of appeal, Intel submits that the General Court erred in law by failing to examine the rebates at issue in the light of all the relevant circumstances. By the second ground of appeal, Intel submits that the General Court erred in law in assessing the finding of an infringement in 2006 and 2007, inter alia as regards the assessment of the market coverage of the rebates at issue in those two years. By the third ground of appeal, Intel argues that the General Court erred in law as regards the legal characterisation of the exclusivity rebates which Intel concluded with HP and Lenovo. By the fourth ground of appeal, Intel submits that the General Court wrongly concluded that there was no material procedural irregularity affecting Intel's rights of defence in the Commission's treatment of the interview with Mr D 1. By the fifth ground of appeal, Intel argues that the General Court misapplied the tests in relation to the Commission's jurisdiction over the agreements concluded between Intel and Lenovo in 2006 and 2007. Lastly, by the sixth ground of appeal, Intel asks the Court to annul or to reduce substantially the fine imposed, having regard to the principle of proportionality and the principle that the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 should not be applied retroactively.

The fifth ground of appeal, alleging that the General Court misapplied the tests relating to the Commission's jurisdiction over the agreements concluded between Intel and Lenovo in 2006 and 2007

Arguments of the parties

32. By its fifth ground of appeal, which it is appropriate to examine in the first place since it concerns the Commission's jurisdiction, Intel submits, first of all, that the General Court wrongly held that the Commission had jurisdiction to apply Article 102 TFEU as regards the agreements concluded between Intel and Lenovo, a Chinese company, in 2006 and 2007. Neither the test based on the place in which anticompetitive practices are implemented ('the implementation test') nor the test based on the qualified effects of those practices in the European Union ('the qualified effects test') could establish a basis for the Commission's jurisdiction in the present case.
33. Thus, according to Intel, the General Court wrongly held, in paragraph 311 of the judgment under appeal, that the implementation of those agreements could be established on the basis of practices affecting the plans of customers to sell downstream products anywhere in the world, including in the EEA. That circumstance could not justify a finding that the Commission had jurisdiction on the basis of the implementation test, since the conduct at issue was not implemented in the EEA and Intel did not sell products to Lenovo in the EEA.
34. In addition, the General Court erred in law by accepting the qualified effects test in order to determine the Commission's jurisdiction. According to Intel, the implementation test is the only test allowed by the case-law.
35. Intel then submits that, even if the qualified effects test were indeed applicable, it could not justify the Commission's jurisdiction in the present case. It refers, in that respect, to paragraph 87 of the judgment of 27 February 2014, InnoLux v Commission (T 91/11, EU:T:2014:92), in which the General Court considered that, in circumstances in which components are first sold outside of the EEA to unrelated purchasers, the link between the internal market and the infringement would be too weak. Intel infers from this that it was not foreseeable that the agreements with Lenovo regarding CPUs for delivery in China would have an immediate and substantial effect within the EEA. Furthermore, even if indirect effects could be sufficient to establish jurisdiction, the 2006 and 2007 agreements with Lenovo could not have had a substantial effect within the EEA.
36. In addition, according to Intel, the General Court unlawfully reversed the burden of proof, in paragraph 289 of the judgment under appeal, by requiring Intel to prove that all the planned sales concerned parts of the Europe, Middle-East and Africa region outside the EEA.
37. Lastly, Intel argues that the Commission's approach would give rise to jurisdictional conflict with other competition authorities and create a real risk of double jeopardy.
38. ACT agrees, in essence, with Intel's arguments. It submits, inter alia, that, according to the wording of Article 102 TFEU and the case-law arising from the judgment of 27 September 1988, Ahlström Osakeyhtiö and Others v Commission (89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447), it is necessary to demonstrate that the conduct in question restricts competition within the common market.
39. The Commission contends that the fifth ground of appeal must be rejected.

Findings of the Court

40. The General Court, in paragraph 244 of the judgment under appeal, held that the Commission's jurisdiction under public international law to find and punish conduct adopted outside the European Union may be established on the basis

of either the implementation test or the qualified effects test, before assessing the Commission's jurisdiction in the present case in the light of the qualified effects test and then, in the alternative, in the light of the implementation test.

41. In that context, it is appropriate to examine, in the first place, the argument put forward by Intel and ACT that the General Court wrongly accepted that the qualified effects test may serve as a basis for the Commission's jurisdiction.
42. In that respect, it must be borne in mind that, as the Advocate General noted in point 288 of his Opinion, the EU competition rules set out in Articles 101 and 102 TFEU are intended to prevent collective or unilateral conduct of undertakings limiting competition within the internal market. While Article 101 TFEU prohibits agreements and practices which have as their object or effect the prevention, restriction or distortion of competition 'within the internal market', Article 102 TFEU prohibits the abuse of a dominant position 'within the internal market or in a substantial part of it'.
43. Thus, the Court has held, as regards the application of Article 101 TFEU, that the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of that provision if that agreement is operative on the territory of the internal market (judgment of 25 November 1971, Béguelin Import, 22/71, EU:C:1971:113, paragraph 11).
44. Moreover, it must be noted that, in order to justify the application of the implementation test, the Court has emphasised that if the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions (see, by analogy, judgment of 27 September 1988, Ahlström Osakeyhtiö and Others v Commission, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 16).
45. The qualified effects test pursues the same objective, namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market.
46. The argument put forward by Intel, supported by ACT, that the qualified effects test cannot serve as a basis for the Commission's jurisdiction is therefore incorrect.
47. Accordingly, that argument must be rejected as unfounded.
48. In the second place, it is necessary to examine the argument put forward in the alternative by Intel, according to which, even if the qualified effects test were applicable in the present case, the General Court wrongly considered that the agreements concluded with Lenovo in 2006 and 2007 would have foreseeable, immediate and substantial effects in the EEA. Intel emphasises, in that respect, the allegedly limited number of products affected.
49. It must be noted, first of all, that, as the General Court held, in paragraphs 233 and 258 of the judgment under appeal, the qualified effects test allows the application of EU competition law to be justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union.
50. It must be pointed out, as the General Court did in paragraphs 268 and 280 of the judgment under appeal, that it is necessary to examine the conduct of the undertaking or undertakings in question, viewed as a whole, in order to determine whether the Commission has the necessary jurisdiction to apply, in each case, EU competition law.

51. Next, in so far as Intel criticises the General Court for considering that it was foreseeable that the agreements concluded with Lenovo concerning CPUs for delivery in China would have an immediate effect in the EEA, it must be pointed out, first, that the General Court rightly held, in paragraphs 251, 252 and 257 of the judgment under appeal, that it is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied.
52. Secondly, since in paragraph 255 of the judgment under appeal, the General Court found, in essence, that Intel's conduct vis-à-vis Lenovo formed part of an overall strategy intended to ensure that no Lenovo notebook equipped with an AMD CPU would be available on the market, including in the EEA, the General Court did not err in considering, in paragraph 277 of the judgment under appeal, that Intel's conduct was capable of producing an immediate effect in the EEA.
53. That argument must therefore be rejected as unfounded.
54. Lastly, Intel submits that the General Court wrongly considered that the agreements concluded with Lenovo concerning CPUs for delivery in China could have a substantial effect on the EEA market even though the effects of those agreements were negligible.
55. It suffices, in that respect, to note that the General Court held that Intel's conduct vis-à-vis Lenovo formed part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels, which, moreover, Intel does not dispute in its appeal.
56. Accordingly, in view of the considerations set out in paragraph 50 above, the General Court did not err in law in holding that, faced with a strategy such as that adopted by Intel, it was appropriate to take into consideration the conduct of the undertaking viewed as a whole in order to assess the substantial nature of its effects on the market of the EU and of the EEA.
57. As the Commission emphasises, to do otherwise would lead to an artificial fragmentation of comprehensive anticompetitive conduct, capable of affecting the market structure within the EEA, into a collection of separate forms of conduct which might escape the European Union's jurisdiction.
58. Consequently, the argument mentioned in paragraph 54 of the present judgment must be rejected as unfounded.
59. In the third place, as regards Intel's argument that the General Court, in paragraph 289 of argument is based on a misinterpretation of the judgment under appeal. As can be seen from paragraphs 286 to 289 of that judgment, the General Court noted, as regards the postponement of the worldwide launch of certain computer models, that it was apparent from the evidence before it that sales of those computers were planned in the Europe, Middle East and Africa region, of which the EEA is a very important part, which was sufficient for a finding that there were at least potential effects in the EEA.
60. In that context, the General Court indeed referred to the absence of specific indicia which might suggest that all the planned sales concerned parts of that region other than the EEA. However, that statement must be read in the light of paragraphs 287 and 288 of the judgment under appeal, from which it is clear that the General Court considered that the suggestion, made at the hearing, that all of those computers were intended for areas other than the EEA was mere speculation on Intel's part, in support of which it had not put forward any argument.

61. Accordingly, that argument is unfounded.
62. In the fourth place, and lastly, as regards Intel's arguments relating to the General Court's application of the implementation test, it suffices to note that the General Court specified, in paragraph 297 of the judgment under appeal, that it examined that test for the sake of completeness.
63. Complaints directed against grounds of the judgment under appeal included purely for the sake of completeness cannot lead to the judgment's being set aside (see, to that effect, judgment of 21 December 2011, France v People's Mojahedin Organization of Iran, C 27/09 P, EU:C:2011:853, paragraph 79 and the case-law cited).
64. Those arguments must therefore be rejected as ineffective.
65. It follows that the fifth ground of appeal must be rejected in its entirety.

The fourth ground of appeal, alleging a material procedural irregularity affecting Intel's rights of defence

Arguments of the parties

66. The fourth ground of appeal, which it is appropriate to examine in the second place since it concerns the administrative procedure before the Commission, relates to the procedural treatment of the Commission's interview with Mr D 1. It is divided into three parts.
67. In the first place, Intel submits that the General Court erred in law by considering, in paragraph 612 of the judgment under appeal, that the Commission had not infringed Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004.
68. First, the General Court thus made, in paragraph 614 of the judgment under appeal, an artificial distinction between 'formal' interviews and 'informal' interviews. Relying on the decision of the European Ombudsman of 14 July 2009, Intel submits that any meeting with a third party to collect information relating to the subject matter of an investigation is an interview within the meaning of Article 19 of Regulation No 1/2003 and must therefore be recorded.
69. Secondly, and in the alternative, in the event that Regulation No 1/2003 were to be interpreted as meaning that there is a category of 'informal' interviews which do not need to be recorded, Intel submits that the interview with Mr D 1 did not fall within that category, with the result that the Commission was required to record the content of that five-hour interview since it concerned very important matters bearing an objective link to the subject matter of the investigation.
70. In the second place, Intel argues that the General Court wrongly considered that the procedural defect resulting from the breach of Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004, could be cured by sending Intel the non-confidential version of a note listing the agenda items for the key parts of the interview in question, but lacking a summary of the content of Mr D 1's testimony. Intel submits, in that respect, that that note does not contain a brief summary of the subjects addressed, as the General Court indicated in paragraph 622 of the judgment under appeal; rather, it merely lists the topics addressed during the interview.
71. In addition, Intel submits that the Commission's argument, put forward in its response, that the belated disclosure of the aide-memoire note cured the

breach of Intel's rights of defence cannot be reconciled with the glaring omission in the note in question of the content of Mr D 1's testimony or with the Commission's admission that that note was not designed to accurately or fully reflect the content of the meeting concerned.

72. In the third place, Intel argues that the General Court erred in law by failing to apply the test established by the judgment of 25 October 2011, Solvay v Commission(C 109/10 P, EU:C:2011:686). By asserting, in paragraph 630 of the judgment under appeal, that the content of the interview in question could be reconstituted to the requisite legal standard even though Intel had not attended that interview, the General Court placed the burden upon Intel to prove the content of matters which were never disclosed to it.

73. ACT agrees with Intel's arguments in support of the fourth ground of appeal and emphasises, inter alia, that it cannot be ruled out that the views expressed by Mr D 1 would have been useful to Intel's defence given that that individual had provided exculpatory evidence in proceedings before the United States Federal Trade Commission in 2003.

74. Besides its contention that the fourth ground of appeal is ineffective, the Commission submits, in the first place, that the European Ombudsman's decision, on which Intel relies, cannot be invoked in order to demonstrate an error of law, since Intel does not challenge paragraph 617 of the judgment under appeal, according to which the meeting at issue was not aimed at collecting evidence in the form of countersigned minutes or statements under Article 19 of Regulation No 1/2003. The Commission adds that the General Court, in paragraphs 614 to 616 of the judgment under appeal, equated the nature of information that might be obtained pursuant to Article 19 of Regulation No 1/2003 with that which might be obtained under Article 18 of that regulation before concluding that that meeting was not an interview within the meaning of Article 19.

75. The Commission submits, in the second place, that the disclosure of the internal note sufficiently cured the alleged procedural irregularity. It adds that the fact that Intel was not present during the interview in question does not demonstrate any error in the finding, in paragraph 631 of the judgment under appeal, that that evidence could be reconstituted. Intel effectively repudiates its own arguments at first instance, whereby it submitted that Mr D 1's statements could be reconstituted, at least to the extent of finding that those statements were necessarily exculpatory.

76. The Commission argues, in the third place, that the circumstances of the present case are far removed from those of the case that gave rise to the judgment of 25 October 2011, Solvay v Commission (C 109/10 P, EU:C:2011:686), where the infringement of the rights of defence was raised in relation to the finding that Solvay SA held a dominant position on the relevant market, which was based on a rebuttable presumption.

77. The Commission also maintains that the General Court did not err in law by applying the case-law established in the judgment of 25 October 2011, Solvay v Commission(C 109/10 P, EU:C:2011:686) to the circumstances of the present case in order to conclude that there had been no breach of the rights of defence.

78. Since all of Dell's statements denying the existence of exclusivity rebates were considered, in paragraph 582 of the judgment under appeal, not credible in the face of the other evidence adduced, the Commission submits that a verbatim

record of even the most emphatic denial by Mr D 1 would not have been of any use to Intel.

Findings of the Court

79. As a preliminary point, the Commission submits that the fourth ground of appeal is ineffective since the conclusion in the judgment under appeal that Intel granted exclusivity rebates to Dell is not disputed.

80. That argument must be rejected however since, by this ground of appeal, the appellant specifically seeks, first, a reduction in the amount of the fine imposed and, secondly, the annulment of the decision at issue in so far as it relates to Dell, arguing that the Commission, by failing to record the interview with Mr D 1, deprived the appellant of evidence and thus adversely affected its rights of defence.

81. Accordingly, it is appropriate to examine the substance of this ground of appeal.

82. By this ground of appeal, Intel submits, inter alia, that the General Court erred in law by considering, in paragraph 612 of the judgment under appeal, that the Commission had not infringed Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004.

83. In that respect, it should be noted, first of all, that, as the General Court pointed out in paragraph 621 of the judgment under appeal, it is apparent inter alia from the Commission’s internal note on the interview with Mr D 1 that the subjects addressed at that meeting, which lasted for more than five hours, concerned questions bearing an objective link with the substance of the investigation. In addition, Mr D 1 was one of the most senior executives of Intel’s largest customer and, as Intel emphasised without being contradicted in that respect, he was, more specifically, responsible for overseeing his company’s relationship with Intel. It follows that the Commission’s interview with Mr D 1 was aimed at the collection of information relating to the subject matter of its investigation concerning Intel, within the meaning of Article 19(1) of Regulation No 1/2003, which, moreover, the Commission has not disputed.

84. In the first place, as regards the criticised distinction made by the General Court between formal and informal interviews, in paragraph 614 of the judgment under appeal, it is apparent from the wording of Article 19(1) of Regulation No 1/2003 that that provision is intended to apply to any interview conducted for the purpose of collecting information relating to the subject matter of an investigation.

85. Recital 25 of Regulation No 1/2003 states, in that respect, that that regulation is intended to supplement the Commission’s powers of investigation by, inter alia, empowering the latter to interview any persons who may be in possession of useful information and to record the statements made.

86. Article 19(1) of Regulation No 1/2003 therefore constitutes a legal basis empowering the Commission to interview a person in the context of an investigation, which is confirmed by the travaux préparatoires for that regulation (see the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (COM(2000) 582 final, OJ 2000 C 365E, p. 284)).

87. There is nothing in the wording of that provision or in the objective that it pursues to suggest that the legislature intended to establish a distinction between

two categories of interview relating to the subject matter of an investigation or to exclude certain of those interviews from the scope of that provision.

88. The General Court therefore erred in considering, in paragraphs 614 to 618 of the judgment under appeal, that a distinction had to be made, among the interviews conducted by the Commission in the context of an investigation, between formal interviews subject to Article 19(1) of Regulation No 1/2003 in conjunction with Article 3 of Regulation No 773/2004, and informal interviews falling outside the scope of those provisions.

89. In the second place, as regards Intel's submission that the Commission is required to record any interview conducted on the basis of Article 19(1) of Regulation No 1/2003, it must be noted, first of all, that Article 3(1) of Regulation No 773/2004, which provides that the Commission 'shall also inform the person interviewed of its intention to make a record of the interview', must be understood as meaning, not that the recording of the interview is optional, but that the Commission is required to warn the person concerned of its intention to record it.

90. Next, Article 3(3) of Regulation No 773/2003, which states that '[t]he Commission may record the statements made by the persons interviewed in any form', implies, as the General Court correctly held in paragraph 617 of the judgment under appeal, that, if the Commission decides, with the consent of the person interviewed, to carry out such an interview on the basis of Article 19(1) of Regulation No 1/2003, it must record the interview in full, without prejudice to the fact that the Commission is free to decide on the type of recording.

91. It follows that the Commission is required to record, in a form of its choosing, any interview which it conducts, under Article 19 of Regulation No 1/2003, for the purpose of collecting information relating to the subject matter of an investigation.

92. As to whether the General Court was entitled to hold, in paragraph 622 of the judgment under appeal, that by making available to Intel, during the administrative procedure, the non-confidential version of an internal note drawn up by the Commission concerning its meeting with Mr D 1, the Commission had remedied the omission resulting from the lack of a record of the interview conducted during that meeting, it must be pointed out that, although, as the General Court noted in paragraphs 635 and 636 of the judgment under appeal, that internal note contains a brief summary of the subjects addressed during the interview in question, it does not, however, contain any indication of the content of the discussions that took place during that interview, in particular as regards the nature of the information that Mr D 1 provided during that interview on the subjects raised. In those circumstances, the General Court erred in concluding that the disclosure of that internal note to Intel during the administrative procedure had remedied the initial omission in that procedure resulting from the lack of a record of the interview in question.

93. It follows from the foregoing considerations that the General Court erred in law, first, by making a distinction, among interviews relating to the subject matter of a Commission investigation, between formal interviews, subject to Article 19(1) of Regulation No 1/2003 in conjunction with Article 3 of Regulation No 773/2004, and informal interviews, falling outside the scope of those provisions, secondly, by considering that the meeting between the Commission's services and Mr D 1, concerning a Commission investigation, did not fall within the scope of those provisions, on the ground that it did not constitute a formal

interview and, thirdly, by considering, in the alternative, that the disclosure, during the administrative procedure, of a non-confidential version of the internal note drawn up by the Commission in relation to that meeting had remedied the lack of a record of that meeting.

94. However, if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such an infringement is not capable of bringing about the annulment of that judgment, and a substitution of grounds must be made (judgment of 9 June 2011, Comitato 'Venezia vuole vivere' and Others v Commission, C 71/09 P, C 73/09 P and C 76/09 P, EU:C:2011:368, paragraph 118 and the case-law cited).

95. In the present case, it must be noted that the General Court emphasised, in paragraph 611 of the judgment under appeal, that it is undisputed between the parties that the Commission, in the decision at issue, did not make use of the information obtained during the interview with Mr D 1 to inculpate Intel.

96. That being said, in so far as Intel argued that Mr D 1 had provided exculpatory evidence to the Commission which the latter should have properly recorded and disclosed to Intel, it must be borne in mind that, as regards failure to disclose an exculpatory document, it is for the undertaking concerned to establish that the non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision (see, to that effect, judgment of 1 July 2010, Knauf Gips v Commission, C 407/08 P, EU:C:2010:389, paragraph 23 and the case-law cited).

97. The undertaking must thus show that it would have been able to use that exculpatory document for its defence, in the sense that, had it been able to rely on it during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in its decision (see, to that effect, judgment of 1 July 2010, Knauf Gips v Commission, C 407/08 P, EU:C:2010:389, paragraph 23 and the case-law cited).

98. It follows that the undertaking concerned must establish, first, that it did not have access to certain exculpatory evidence and, secondly, that it could have used that evidence for its defence (see, to that effect, judgment of 1 July 2010, Knauf Gips v Commission, C 407/08 P, EU:C:2010:389, paragraph 24).

99. In the present case, it is apparent from the detailed analysis carried out by the General Court in paragraphs 629 to 659 of the judgment under appeal that, during the administrative procedure, Intel was provided with not only the non-confidential version of the internal note drawn up by the Commission in relation to the interview with Mr D 1, but also a 'follow-up document' containing Dell's written responses to the oral questions put to Mr D 1 during that interview.

100. In addition, as indicated in paragraphs 44 to 49 and 628 of the judgment under appeal, although Intel was able to submit, during the proceedings before the General Court, its observations in the light of the confidential version of that internal note, which contained indications as to the content of the discussions, it has not however adduced any evidence to suggest that the Commission failed to record, during that interview, exculpatory evidence which could have been useful for its defence in that it would have been such as to cast a different light on the direct documentary evidence relied on in the decision at issue in order to establish the conditionality of the practices at issue.

101. In particular, as the Commission submits, Intel did not make use of the possibility open to it under Articles 68 to 76 of the Rules of Procedure of the General Court, in the version applicable when the judgment under appeal was delivered, to request that Mr D 1 be summoned before the General Court. It did not even demonstrate before the General Court that it had attempted to contact Mr D 1 so that he could confirm that he had provided, during his interview, exculpatory evidence which might have been useful to Intel's defence.
102. In those circumstances, the errors of law, identified in paragraph 93 of the present judgment, which vitiate the judgment under appeal are not such as to invalidate the conclusion, in paragraph 625 of the judgment under appeal, that the administrative procedure was not vitiated by an irregularity, in breach of Intel's rights of defence, capable of leading to the annulment of the decision at issue (see, to that effect, judgment of 18 July 2013, Commission and Others v Kadi, C 584/10 P, C 593/10 P and C 595/10 P, EU:C:2013:518, paragraph 164).
103. The first and second parts of the fourth ground of appeal must, consequently, be rejected as ineffective (see, to that effect, judgment of 12 February 2015, Commission v IPK International, C 336/13 P, EU:C:2015:83, paragraph 66).
104. In so far as the third part of the fourth ground of appeal concerns the application of the judgment of 25 October 2011, Solvay v Commission (C 109/10 P, EU:C:2011:686), to the present case, it should be noted that the General Court ruled on that issue in the context of its examination, for the sake of completeness, of the consequences of a hypothetical irregularity in the administrative procedure.
105. Complaints directed against grounds of a judgment of the General Court included purely for the sake of completeness cannot lead to the judgment's being set aside and are therefore ineffective (see, to that effect, judgment of 21 December 2011, France v People's Mojahedin Organization of Iran, C 27/09 P, EU:C:2011:853, paragraph 79 and the case-law cited).
106. It follows that the third part of the fourth ground of appeal must be rejected as ineffective.
107. It follows that the fourth ground of appeal must be rejected in its entirety.

The first ground of appeal, alleging that the General Court erred in law by failing to examine the rebates at issue in the light of all the relevant circumstances

Arguments of the parties

108. The first ground of appeal, which it is appropriate to examine in the third place, since it relates to the finding of an abuse of a dominant position, within the meaning of Article 102 TFEU, is subdivided into three parts.
109. By the first part of the first ground of appeal, Intel submits that loyalty rebates may be found abusive only after an examination of all the relevant circumstances in order to assess whether the rebates are capable of restricting competition. Intel relies, inter alia, on paragraphs 70 and 71 of the judgment of 19 April 2012, Tomra Systems and Others v Commission (C 549/10 P,

EU:C:2012:221), inferring from them that an analysis of all of the circumstances applies equally to exclusivity rebates and to other rebates that have a fidelity-building effect.

110. Intel adds that neither the wording nor the structure of Article 102 TFEU suggests that some types of conduct, when undertaken by an undertaking in a dominant position, must be treated as inherently anticompetitive.

111. Intel submits that the settled case-law of the Court requires, in order to find an abuse of a dominant position within the meaning of Article 102 TFEU, an examination of all the circumstances, including the level of the rebates in question, their duration, the market shares concerned, the needs of customers and the capability of the rebates to foreclose an as efficient competitor (as efficient competitor test, ‘the AEC test’), in order to establish that those rebates are capable of restricting competition and, accordingly, constitute an abuse of a dominant position within the meaning of Article 102 TFEU.

112. Moreover, the General Court’s assertion, in paragraph 94 of the judgment under appeal, that it is open to the dominant undertaking to show that its conduct is objectively justified, is an empty possibility, since, in paragraph 89 of that judgment, the General Court stated that the beneficial effects of such conduct cannot be accepted. Likewise, the Commission’s position effectively reverses the burden of proof, since Intel must justify its conduct before the Commission has even established that the conduct is likely to restrict competition.

113. By the second part of the first ground of appeal, Intel submits that the General Court failed to assess the likelihood of a restriction of competition. Thus, the fact that the rebates at issue were classified or assessed in the judgment under appeal as exclusivity rebates should not exclude an examination of their capability to restrict competition.

114. By the third part of the first ground of appeal, Intel submits that the General Court’s analysis, in paragraphs 172 to 197 of the judgment under appeal, concerning the capability of the rebates to restrict competition and intended to show that the conduct in question vis-à-vis the recipients of the discounts was capable of restricting competition, is insufficient and does not cure the errors of law identified above.

115. According to Intel, the General Court wrongly failed to consider highly relevant circumstances such as the insufficient market coverage of the rebates at issue, the short duration of the practices at issue, the lack of foreclosure and a rapid decline in prices as well as the prior ‘as efficient competitor’ analysis.

116. As regards the market coverage of the rebates at issue, the General Court incorrectly considered that the share of the market covered by the conduct at issue was significant. The coverage in question, of 14% on average, is not comparable to the foreclosure of 39% of the market concerned in the case that gave rise to the judgment of 19 April 2012, Tomra Systems and Others v Commission (C 549/10 P, EU:C:2012:221), and of 40% in the case that gave rise to the judgment of 23 October 2003, Van den Bergh Foods v Commission (T 65/98, EU:T:2003:281). Intel contests, in that respect, the Commission’s argument that the market coverage of the practices at issue is irrelevant, because it relates only to actual effects. Intel contends that substantial market coverage is a necessary element in order to find an abuse.

117. As regards the duration of the practices at issue, Intel submits that arrangements of short duration have no actual or potential adverse effects. Intel adds that the General Court’s assertion, in paragraph 113 of the judgment under

appeal, that the duration of the agreements was not short, was based not on the duration of individual agreements, but on the cumulation of multiple agreements, with the result that it was not able to take into consideration the fact that Intel's customers could frequently walk away from their agreements. Intel disputes, in that respect, the Commission's assertion that its OEM customers could not walk away from their agreements with Intel despite their short-term nature. The uncontroverted fact that Dell switched supplier to AMD at a time when its rebates from Intel were at an all-time high demonstrates that the ability to switch was real.

118. As regards its argument that the rebates at issue did not have a foreclosure effect, Intel submits that the General Court did not taken account of the capacity constraints with which AMD was faced and which prevented it from satisfying demand for its CPUs, with the result that Dell and Lenovo sourced solely from Intel during the periods concerned.

119. As regards the relevance of the AEC test, the General Court erred in law by failing to regard the analysis carried out by the Commission in the decision at issue as relevant and as forming part of the review that the General Court must perform in order to comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. According to Intel, whether the Commission was required to carry out that test is not the issue. Rather, since the Commission carried out that test, the properly assessed results should have been taken into account among all the circumstances relevant to demonstrating the likelihood of restricting competition.

120. ACT agrees, in essence, with Intel's position.

121. The Commission contends that the first ground of appeal is based on an unsubstantiated premiss that the exclusivity rebates were merely a type of pricing practice. The Court therefore need not examine this ground of appeal.

122. In the alternative, the Commission submits that the exclusivity rebates have anticompetitive features such that it is generally unnecessary to demonstrate that they are capable of restricting competition. Thus, those rebates have a dissuasive effect on customers caused by the prospect of losing the rebates over the non-contestable share of the market. It follows that they generally restrict the customer's freedom to choose the supplier with the most attractive offer.

123. In addition, Intel misinterpreted paragraphs 70 and 71 of the judgment of 19 April 2012, Tomra Systems and Others v Commission (C 549/10 P, EU:C:2012:221), by stating that those paragraphs relate to exclusivity rebates.

124. The Commission submits that the line of argument put forward by Intel in the second place is inadmissible since it does not refer to any error of law.

125. In any event, that line of argument is ineffective since, in paragraphs 172 to 197 of the judgment under appeal, the General Court considered that Intel's conduct was capable of restricting competition.

126. The Commission adds, in the alternative, that the legal test set out in the case-law on predatory pricing practices is not applicable to exclusivity rebates. It explains, in that respect, that the Court could have transposed the legal test for assessing the abusive nature of pricing practices to rebate schemes in the judgment of 19 April 2012, Tomra Systems and Others v Commission (C 549/10 P, EU:C:2012:221), but, in that judgment, it expressly reiterated that

an undertaking in a dominant position abuses that position when it makes use of such a rebate scheme.

127. The Commission submits, lastly, that it is unnecessary for the Court to examine the arguments raised by Intel concerning paragraphs 172 to 197 of the judgment under appeal, since it was for the sake of completeness that the General Court examined whether the Commission had established in the decision at issue that Intel's conduct was capable of restricting competition.

128. In the alternative, the Commission submits that the judgment under appeal demonstrates the existence of an overall strategy to the requisite legal standard and that Intel's arguments in that respect are inadmissible since they seek a reassessment of the findings of fact. It also responds to Intel's arguments concerning the relevance of the market coverage and the duration of the practices.

Findings of the Court

129. In the first place, by the first two parts of its first ground of appeal, Intel, supported by ACT, argues, in essence, that the General Court accepted that the practices at issue could be considered an abuse of a dominant position within the meaning of Article 102 TFEU without first examining all of the circumstances of the present case and without assessing the likelihood of that conduct restricting competition.

130. In the second place, by the third part of its first ground of appeal, Intel criticises the General Court's analysis, carried out for the sake of completeness, inter alia in paragraphs 172 to 197 of the judgment under appeal, concerning the capacity of the rebates and payments granted to Dell, HP, NEC, Lenovo and MSH to restrict competition in the circumstances of the case.

131. In that context, Intel challenges, inter alia, the General Court's assessment of the relevance of the AEC test applied by the Commission in the present case.

132. It submits, in particular, that, since the Commission applied that test, the General Court should have examined Intel's line of argument alleging that the application of that test was badly flawed and that, had it been correctly applied, it would have led to the conclusion contrary to that which the Commission reached, namely that the rebates at issue were not capable of restricting competition.

133. In that respect, it must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market (see, inter alia, judgment of 27 March 2012, Post Danmark, C 209/10, EU:C:2012:172, paragraph 21 and the case-law cited).

134. Thus, not every exclusionary effect is necessarily detrimental to competition. 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 (see, inter alia, judgment of 27 March 2012, Post Danmark, C 209/10, EU:C:2012:172, paragraph 22 and the case-law cited).

135. However, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (see, inter alia, judgments of 9 November 1983, Nederlandsche Banden-Industrie-Michelin v Commission, 322/81, EU:C:1983:313, paragraph 57, and of

27 March 2012, Post Danmark, C 209/10, EU:C:2012:172, paragraph 23 and the case-law cited).

136. That is why Article 102 TFEU 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, judgment of 27 March 2012, Post Danmark, C 209/10, EU:C:2012:172, paragraph 25).

137. In that regard, the Court has already held that 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 102 TFEU, whether the obligation 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 loyalty rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position (see judgment of 13 February 1979, Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 89).

138. However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

139. [As rectified by order of 19 September 2017] In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (see, by analogy, judgment of 27 March 2012, Post Danmark, C 209/10, EU:C:2012:172, paragraph 29).

140. [As rectified by order of 24 October 2017] The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer (judgment of 15 March 2007, British Airways v Commission, C 95/04 P, EU:C:2007:166, paragraph 86). That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.

141. If, in a decision finding a rebate scheme abusive, the Commission carries out such an analysis, the General Court must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings concerning the foreclosure capability of the rebate concerned.
142. In this case, while the Commission emphasised, in the decision at issue, that the rebates at issue were by their very nature capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an AEC test were not necessary in order to find an abuse of a dominant position (see, inter alia, paragraphs 925 and 1760 of that decision), it nevertheless carried out an in-depth examination of those circumstances, setting out, in paragraphs 1002 to 1576 of that decision, a very detailed analysis of the AEC test, which led it to conclude, in paragraphs 1574 and 1575 of that decision, that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor.
143. It follows that, in the decision at issue, the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.
144. In those circumstances, the General Court was required to examine all of Intel's arguments concerning that test.
145. It held, however, in paragraphs 151 and 166 of the judgment under appeal, that it was not necessary to consider whether the Commission had carried out the AEC test in accordance with the applicable rules and without making any errors, and that it was also not necessary to examine the question whether the alternative calculations proposed by Intel had been carried out correctly.
146. In its examination of the circumstances of the case, carried out for the sake of completeness, the General Court therefore attached no importance, in paragraphs 172 to 175 of the judgment under appeal, to the AEC test carried out by the Commission and, accordingly, did not address Intel's criticisms of that test.
147. Consequently, without it being necessary to rule on the second, third and sixth ground of appeal, the judgment of the General Court must be set aside, since, in its analysis of whether the rebates at issue were capable of restricting competition, the General Court wrongly failed to take into consideration Intel's line of argument seeking to expose alleged errors committed by the Commission in the AEC test.

Referral of the case back to the General Court

148. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits. However, that is not the case here.
149. The review by the General Court, in the light of the arguments put forward by Intel, of whether the rebates at issue are capable of restricting competition involves the examination of factual and economic evidence which it is for that Court to carry out.
150. Accordingly, the case must be referred back to the General Court.

9. Statement of the Bundeskartellamt referring to Facebook

Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules

Date of issue:02.03.2016

The Bundeskartellamt has initiated a proceeding against Facebook Inc., USA, the Irish subsidiary of the company and Facebook Germany GmbH, Hamburg. The authority is investigating suspicions that with its specific terms of service on the use of user data, Facebook has abused its possibly dominant position in the market for social networks.

There is an initial suspicion that Facebook's conditions of use are in violation of data protection provisions. Not every law infringement on the part of a dominant company is also relevant under competition law. However, in the case in question Facebook’s use of unlawful terms and conditions could represent an abusive imposition of unfair conditions on users. The Bundeskartellamt will examine, among other issues, to what extent a connection exists between the possibly dominant position of the company and the use of such clauses.

Andreas Mundt, President of the Bundeskartellamt: "Dominant companies are subject to special obligations. These include the use of adequate terms of service as far as these are relevant to the market. For advertising-financed internet services such as Facebook, user data are hugely important. For this reason it is essential to also examine under the aspect of abuse of market power whether the consumers are sufficiently informed about the type and extent of data collected."

Subject to the result of further market investigations, the Bundeskartellamt has indications that Facebook has a dominant market position in the separate market for social networks. Facebook collects a large amount of personal user data from various sources. By creating user profiles the company enables its advertising customers to better target their advertising activities. In order to access the social network, users must first agree to the company's collection and use of their data by accepting the terms of service. It is difficult for users to understand and assess the scope of the agreement accepted by them. There is considerable doubt as to the admissibility of this procedure, in particular under applicable national data protection law. If there is a connection between such an infringement and market dominance, this could also constitute an abusive practice under competition law.

The Bundeskartellamt is conducting the proceeding in close contact with the competent data protection officers, consumer protection associations as well as the European Commission and the competition authorities of the other EU Member States.

10. Artikel in der Börsenzeitung vom 20.12.2017

Kartellwächter verschärfen Ton gegen Facebook

Reuters Düsseldorf – Das Bundeskartellamt wirft Facebook den Missbrauch von Nutzerdaten vor. Dabei mache sich das weltgrößte Online-Netzwerk seine marktbeherrschende Stellung zunutze. Der US-Konzern mache den privaten Gebrauch seiner Plattform davon abhängig, jegliche Art von Nutzerdatenaus Drittquellen sammeln und mit dem Facebook-Konto zusammenführen zu dürfen, erklärte Kartellamtschef Andreas Mundt. Diese Bedingungen seien zumindest in diesem Punkt „nicht angemessen und verstoßen zulasten der Nutzer gegen datenschutzrechtliche Wertungen“.
Facebook dementierte, ein Monopol in Deutschland zu haben, sicherte aber gleichzeitig zu, auch weiterhin mit der Behörde zu kooperieren. Facebook-Managerin Yvonne Cunnane erklärte: „Die Realität ist, dass Facebook keinerlei Anzeichen einer dominanten Stellung in Deutschland oder anderswo zeigt.“ Überall hätten die Menschen Alternativen zu Facebook und könnten andere Netzwerke wählen, wie etwa Snapchat, Youtube, Flickr, Twitter, Google Photos oder Pinterest.

Entscheidung im Sommer

Das Bundeskartellamt führt gegen Facebook ein Verwaltungsverfahren, bei dem eine abschließende Entscheidung in der Sache nicht vor Frühsommer 2018 erwartet wird, so die Behörde. Derweil hat in Frankreich die Datenschutzbehörde CNIL den Facebook-Messenger-Dienst Whatsapp abgemahnt. Sie stellte dem Unternehmen ein Ultimatum, innerhalb eines Monats den Datenaustausch mit dem Mutterkonzern zu unterbinden. Andernfalls drohten Sanktionen. Nach Einschätzung der CNIL verstößt Whatsapp mit seiner Datennutzung gegen das Gesetz.
Der Austausch von Nutzerdaten zwischen Whatsapp und Facebook sorgt auch in Deutschland für Streit. So entschied das Hamburger Verwaltungsgericht im April, dass der US-Konzern keine personenbezogenen Daten von deutschen Whatsapp-Nutzern verwenden darf. Facebook hatte das Unternehmen im Jahr 2014 übernommen. Viele Smartphone-Besitzer nutzen Whatsapp als kostenlosen Ersatz für SMS-Botschaften.
Mundt forderte in einer ersten Einschätzung, den Facebook-Nutzern müssten Steuerungsmöglichkeiten eingeräumt werden, die die Datennutzung eingrenzen. Facebook sei ein marktbeherrschendes Unternehmen, seine Nutzer könnten daher nicht auf andere soziale Netzwerke ausweichen. Die Teilnahme am Netzwerk setze aber neben der Registrierung eine uneingeschränkte Zustimmung zu den Nutzungsbedingungen voraus. Der Nutzer habe keine andere Wahl, als das Gesamtpaket zu akzeptieren oder ganz zu verzichten.

Riesige Mengen

„Auf der einen Seite steht mit dem sozialen Netzwerk eine kostenlose Dienstleistung, auf der anderen Seite stehen attraktive Werbeplätze, deren Wert gerade deshalb so hoch ist, weil Facebook über riesige Mengen personalisierter Daten verfügt“, erklärte Behördenchef Mundt. Dabei müsse sich Facebook an die Regeln und Gesetze halten. „Das Kartellrecht verbietet es, dass ein Unternehmen seine Marktmacht missbräuchlich ausnutzt.“ Dank boomender Werbeeinnahmen hatte Facebook zuletzt einen Gewinnsprung verbucht. Damit setzte sich das Unternehmen aus Menlo Park in Kalifornien, zu dem auch die Foto- und Video-App Instagram und der Messenger-Dienst Whatsapp gehören, von seinem Konkurrenten Google ab.

11. Weiterer Verlauf des Facebook-Verfahrens

Ergänzend ist anzumerken, dass das Bundeskartellamt mittlerweile einen Beschluss gegen Facebook erlassen hat. Gegen diesen legte Facebook sodann Widerspruch beim OLG Düsseldorf ein. Das OLG gab dem Antrag statt und ordnete die aufschiebende Wirkung an.

Das Bundeskartellamt begann 2016 mit den Ermittlungen gegen Facebook. Am 06. Februar 2019 beschloss das Bundeskartellamt, Facebook auf Grundlage von § 19 Abs. 1 GWB die Verwendung von Konditionen, die die Nutzung des sozialen Netzwerks durch in Deutschland ansässige private Nutzer davon abhängig machen, dass Facebook nutzer- und gerätebezogene Daten, die bei der Nutzern der konzerneigene Dienste WhatsApp, Oculus, Masquerade und Instagram erhoben werden, ohne Einwilligung der Nutzer mit den für Facebook.com geführten Nutzerkonten verknüpfen und verwenden kann, zu untersagen. Gleiches gilt zudem für Konditionen, die die private Nutzung Facebooks davon abhängig machen, dass Facebook Daten, die bei dem Besuch von Webseiten oder bei der Nutzung mobiler Apps dritter Anbieter über Programmierstellen („Facebook Business Tools“) erfasst werden, ohne Einwilligung der Nutzer mit den unter den Facebook-Konten gespeicherten Daten verknüpfen und verwenden kann. Eine derartige wirksame Einwilligung liegt nur dann vor, wenn die Bereitstellung des Dienstes Facebook.com nicht von der Erteilung der Einwilligung abhängig gemacht wird.
Das Aktenzeichen lautet B6-22/16.

Für das Bundeskartellamt liegt in der Vorgehensweise von Facebook ein Konditionen- oder Ausbeutungsmissbrauch im Sinne der Generalklausel des § 19 Abs. 1 GWB aufgrund unangemessener Datenverarbeitung.

In dem umfangreichen Beschluss setzt sich das Bundeskartellamt intensiv mit dem Datenschutzrecht und Verstößen gegen die DSGVO im Verhältnis zu den privaten Facebook-Nutzern auseinander. Damit belegt das Bundeskartellamt einen kartellrechtlichen Verstoß durch Facebook. Argumentiert wurde unter anderen damit, dass die Einwilligung der Nutzer in den Nutzungsbedingungen keine freiwillige sei.

Facebook habe eine marktbeherrschende Stellung auf dem Markt für soziale Netzwerke in Deutschland. Aufgrund dessen unterliege Facebook besonderen kartellrechtlichen Pflichten, so Andreas Mundt, Präsident des Bundeskartellamts.[48]

Marktbeherrschende Unternehmen dürften die Marktgegenseite (die Nutzer von Facebook als Verbraucher) nicht ausbeuten, was vor allem dann gelte, wenn durch die Ausbeutung zugleich auch Wettbewerber behindert werden, die keinen solchen Datensatz ansammeln können.

Ferner argumentiert das Bundeskartellamt auch mit der Schaffung des § 18 Abs. 3a GWB.

Die Entscheidung begründet das Bundeskartellamt auch mit mehreren Urteilen des Bundesgerichtshofs, in denen nicht nur überhöhte Preise, sondern auch die Unangemessenheit von vertraglichen Regelungen und Konditionen eine missbräuchliche Ausbeutung darstellen (also der sog. Konditionenmissbrauch), wie die Entscheidungen VBL-Gegenwert I und II (BGH Urt. v. 06.11.2013 – KZR 58/11 sowie BGH Urt. v. 24.01.2017 – KZR 47/14) und Pechstein (BGH, Urt. v. 07.06.2016 – KZR 6/15) zeigen.

Die vom Bundeskartellamt festgestellten Verstöße gegen das Datenschutzrecht seien ein Ausfluss der Marktmacht von Facebook. Auch sei deswegen für das Bundeskartellamt keine Verhaltenskausalität erforderlich und begründet wird dies erneut mit dem aus den Urteilen gezogenen Verständnis. Eine Ergebniskausalität würde genügen und liege auch vor.

Laut Bundeskartellamt liege darin zugleich ein Verstoß gegen Art. 102 AEUV.

Gegen diesen Beschluss legte Facebook beim zuständigen OLG Düsseldorf form- und fristgerecht Beschwerde ein und beantragte die aufschiebende Wirkung im Rahmen des einstweiligen Rechtsschutzes.

Das OLG Düsseldorf entschied am 26. August 2019 (Az. VI-Kart 1/19 (V)) über das Eilverfahren und gab Facebook Recht, sodass die aufschiebende Wirkung angeordnet wurde aufgrund einer summarischen rechtlichen Prüfung, die an der Rechtmäßigkeit der Anordnungen des Bundeskartellamts ernstliche Zweifel aufkommen lasse. Facebook muss damit die Anordnungen des Bundeskartellamts bis zur Entscheidung des anhängigen Beschwerdeverfahrens in der Hauptsache nicht umsetzen.

Kern des Beschlusses ist vor allem, dass, selbst wenn die in Frage stehende Datenverarbeitung gegen Datenschutzbestimmungen verstoßen würde, darin nicht zugleich ein Verstoß gegen das Kartellrecht vorliege.

Insbesondere die genannten Urteile versteht das OLG anders als das Bundeskartellamt und lehnt die Ausführungen des Bundeskartellamts deutlich ab.

[48] Pressemitteilung des Bundeskartellamts vom 07.02.2019, https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2019/07_02_2019_Facebook.html (zuletzt aufgerufen am: 16.09.2019).

Lediglich die Annahme, dass Facebook marktbeherrschend sei, sieht das OLG als gegeben an.

Die in Frage stehenden Mehrdaten sind Gegenstand der kartellbehördlichen Anordnungen, sodass sich der Beschluss des OLG ausschließlich auf diese bezieht. Die Erfassung und Zusammenführung dieser führt für das OLG insbesondere zu keinem wettbewerbsschädlichen Ergebnis. Die Hingabe führe zu keiner Ausbeutung der privaten Netzwerknutzer, da die Daten (anders als entrichtetes Entgelt) ohne Weiteres duplizierbar sind und der Verbraucher so wirtschaftlich nicht durch Facebook geschwächt werde; vor allem können die Daten jedem Dritten noch zur Verfügung gestellt werden, gerade auch eventuellen Wettbewerbern von Facebook.

Auch einen „Kontrollverlust" durch die Datenhingabe sieht das Gericht im Gegensatz zum Bundeskartellamt nicht, da die Datenverarbeitung mit Wissen und Wollen der Nutzer geschehe und er durch die Einwilligung gerade die Kontrolle behalte. Die Abwägung, ob der Nutzer Teil von Facebook werden möchte und den Bedingungen zustimmt, unterliege seiner freien Entscheidung nach einer Abwägung von Vor- und Nachteilen, die er unbeeinflusst und vollkommen autonom treffen könne.

Auch würde eine Ergebniskausalität, so wie das Bundeskartellamt argumentierte, gar nicht ausreichen können.

Auch eine unbillige Behinderung sieht das OLG als nicht gegeben an, vor allem aber wäre die Anordnung bezüglich dieser ohnehin unrechtmäßig, da die Rechtsfolgenaussprüche des Amts sich nicht eignen würden, den vom ihm angenommenen Behinderungsmissbrauch abzustellen, da dieser sich lediglich auf die explizite Zustimmung des Nutzers beziehe. Auch bestehe für das OLG Düsseldorf in diesem Kontext keine praktisch wirksame Zutrittsschranke auf dem Markt und auch keine Gefahr der Übertragung der Marktmacht.

Vertiefend ist auf den Aufsatz von Torsten Körber in der NZKart 2019, 187 hinzuweisen, der sich mit der Entscheidung des Bundeskartellamts auseinandersetzt, sowie den Beitrag von Rupprecht Podszun in der LTO vom 13.09.2019 („Nach dem Facebook-Verfahren – Der Kartellrechts-Clash", abrufbar unter: https://www.lto.de/recht/hintergruende/h/facebook-verfahren-bkarta-ausbeutung-marktbeherrschung/; zuletzt abgerufen am 17.09.2019) zu der Entscheidung des OLG Düsseldorf.

VI. Cartel Procedure

1. Overview

a) Introduction

The legal sources for the European Cartel Procedure are Art. 101-106 TFEU, especially Art. 101, 102 TFEU and Reg. 1/2003. Art. 101, 102 TFEU are applied in a decentralised way. The European Commission is responsible alonside the national competition authorities. They execute the procedures in accordance with their national legislation. The reason for this proceeding is the principle of procedural autonomy of the Member States of the EU.

Significant elements of the European Cartel Procedure Law in accordance with Reg. 1/2003 are the European Competition Network (ECN), which is resulted of Art. 11 ff. Reg. 1/2003, the mutual consultation pursuant to Art. 11 paragraph 3 Reg. 1/2003 and the exchange of informations according to Art. 12 Reg. 1/2003. Furthermore there ist the so called Case Allocation: according to this, the authority gets to work on the case, who is best suited for this case. The European Commission still has the final say, comparing to Art. 11 paragraph 4 Reg. 1/2003.
Currently there are a lot of changes on a national and also European level. In Germany, there was recently ninth amendment of the GWB. On a European level, there is a recommendation of the European Commission for a new Regulation. This proposed directive is now going through the legislative process (see below Outlook).

b) The procedure oft he European Commission

As a result of having a European Cartel Procedure Law, there is a certain procedure of the European Commission. This partitions in three sections.

The first phase is the investigation phase, followed by the case allocation phase. The last phase is the decision phase, specified the initiation of the proceeding and closure of proceedings.
The investigation is opened following a complaint or on the European Commission's own initiative.
Any act in contravention is followed by sanctions. The European Commission has a broad discretion for sanctions.
Especially the Leniency Programme becomes particular important. But even false voluntary declarations will be sanctioned by the European Commission.

Procedural principles are the burden of proof (Art. 2 Reg. 1/2003), the right to be heard in front of a Court (Art. 27 Reg. 1/2003 in conjunction with Art. 10 ff. Reg. 773/2004), the right of access to documents (Art. 27 paragraph 2 Reg. 1/2003 in conjunction with Art. 15 f. Reg. 773/2004), recovery restrictions and confidentiality procetion (Art. 28 Reg. 1/2003), the right to withhold information in a very limited area, the legal professional privilege (the written correspondence with lawyers is protected, according to the European Court of Justice this doesn't apply for in-house lawyers).

c) Cooperation between Competition authorities

aa) Vertical cooperation, Art. 11 Reg. 1/2003

There is vertical and horizontal cooperation between the Competition authorties. The vertical cooperation contains especially the European Competition Network (ECN). The core is the case allocation, as you can see in Official Journal 2004 C 101/43. The case allocation results from the so called Network Notice. According to Art. 11 paragraph 6 Reg. 1/2003 the European Commission still has the final say. The Network Notice is a ascertainment of Art. 11 Reg. 1/2003. The European Court of Justice states that there is no legally binding character for the member states of the EU.

According to the case allocation the authority is competent, who seems to be particularly suitable for the individual case. A national authority is particularly suitable, if the authority fulfils three qualifications. According to this qualifications, the cartel has a significant impact within the territory of the authority, the authority has the opportunity to stop the cartel and the authority can produce evidence against the cartel.The European Commission is particularly suitable, if the cartel affects at least three member states and a decision of the Commission is necessary to develop further the collaborative competition policy or to ensure the effective implementation of Art. 101, 102 TFEU.

Another problem ist the legal procetion against case allocation, especially legal protection against the competence of a certain authority. The Network Notice only acts internally and does not have any external impact. An incompetent authority is no cause of action, which means – according to prevailing opinion – there are no possibilities for legal protection against that.

bb) Horizontal cooperation, Art. 12 Reg. 172003

Next to the vertical cooperation, there is the horizontal cooperation, which means the cooperation between authorities in a way of exchanging informations about relevant cartels. For example, the national implementation in Germany is stated in § 50a GWB. A problem seems to be divergent procedural law with different standards on fundamental rights. This complicates the flow of information and sometimes leads to a prohibition of utilisation of evidence.

d) Entitlements

aa) Investigatory Power

There are certain powers that can be used. The investigatory powers are set down in Section V of Reg. 1/2003. Always necessary is an initial suspicion that there is an infringement according to Art. 101, 102 TFEU.

The authorities are authorized to investigate seperate industries and seperate agreements according to Art. 17 Reg. 1/2003.
Furthermore the authorities can request information, Art. 19 Reg. 1/2003.
They also are allowed to questioning, Art. 20 f. Reg. 1/2003.

Additional the authorities have the power of review according to Art. 22 Reg. 1/2003 in public and also in private rooms.
Between national authorities there is the opportunity of administrative assistance, Art. 22 Reg. 1/2003.
Divergent procedural law with different standards on fundamental rights is also problematic as well.

bb) Decision-making authority

Next to the investigatory power, there is a decision-making authority. The decision-making authority is limited by the principle of proportionality.
The decision-making authority concludes the determination and the treatment of infringement, Art. 7 Reg. 1/2003. Furthermore it includes provisional measures (Art. 8 Reg. 1/2003) and commitments (Art. 9 Reg. 1/2003). It also contains the determination of non-applicability pursuant to Art. 10 Reg. 1/2003, especially on public interest entities in the context of Art. 101, 102 TFEU.
Art. 16 Reg. 1/2003 implies that no inconsistent decision should be taken. So there is a obligation to consider decisions of the European Commission and to not contradict them.
There is also the possibility of a submission in front of the European Court of Justice under the terms of Art. 267 TFEU.

cc) Power of sanctions

Third power is the power of sanctions. The power of sanctions includes financial penalty according to Art. 23 Reg. 1/2003. These penalties don't have a criminal character. Sometimes this leads to a problem relating to the amount because the penalties can reach a very high level.
They also include penalty payments, Art. 24 Reg. 1/2003. These payments can be collected by means of enforcement.

Within the financial penalties, the Leniency Program has an important role. The Leniency Program leads to freedom from the sanction, consisting of a full immunity of fines or at least a reduction of the amount of the fine. When it comes to that, the European Commission possesses a broad discretion.

This settlement is the result of Art. 34 of the Regulation for Penalties and the so called Leniency Notes of the year 2006.
This also poses the problem that there is no legally binding character between the competition authorities and there aren't harmonising procedural rights between the Member States of the EU.
Furthermore, there is the opportunity to initiate a settlement procedure. The possibility of Settlements is based on the Notice of Settlements from 2008. The procedure comprises a summary examination by the European Commission. Following to that, the company can admit their participation in a cartel and assume responsibility for it. The „reward“ is a reduction of the penalty in the amount of 10 %.

The possibility of a settlement procedure leads to the question, if there is any legal procetion against the results of the settlement.

e) Procedure of the competition authorities of the Member States and the collaboration in the ECN

The national authorities apply the European Cartel Procedure Law in a decentralized way (see Art. 35 Reg. 1/2003). For example, Germany put that down on a national level in § 50 GWB. There are some rights and obligations. According to Art. 3 Reg. 1/2003 (see also Art. 101, 102 TFEU), there are obligations towards application and convergence. Furthermore the powers of the national authorities of the Member States are written down in Art. 5 Reg. 1/2003.

Again, there are problems emerging from different standards of national procedural rights.

aa) Collaboration, Art. 11 ff. Reg. 1/2003

Art. 11 Reg. 1/2003 contains the obligation of collaboration. This is substantiated in the Network Notice, the so called European Competition Network (ECN).For example, there is the exchange of information pursuant to Art. 12 Reg. 1/2003 and the mutual information according to Art. 11 paragraph 3 Reg. 1/2003.
It is noted that there can be problems due to different procedual rights containing different standards of fundamental rights.

bb) Kinds of decisions of the national authorities

Art. 5 Reg. 1/2003 implies the possible kinds of decisions for national authorities of the Member States of the EU.

f) *Legal protection against decisions of the European Commission and against decisions about financial penalties*

It is questionable if there is any legal protection against decisions of the European Commission, especially against decisions about financial penalties. According to Art. 263 TFEU, there is the possiblity to file an action for annulment in front of the European Court of Justice. The Court is allowed to unlimited jurisdiction of the decisions of the European Commission, Art. 31 Reg. 1/2003. But in legal practice, often there is only a legality audit resulting of a wide discretion to the Commission. Therefore, a lot of legal scholars criticise this and demand for a reform. Otherwise according to Art. 6 Reg. 1/2003, the national civil courts of the Member States are competent for any cases that occupy the application of Art. 101, 102 TFEU, including claims for damages, claims for injunctives and defensive claims. Pursuant to Art. 15 Reg. 1/2003, the European Commission and the national Courts of the Member States collaborate. Due to the decentralised application of Art. 101, 102 TFEU, the European Competition Law is applied uniformly in the Member States.

g) *Outlook*

At the moment, there are a lot of possible changes in the European Cartel Procedure Law and as well in the national laws of the Member States. In 2017, there is a new recommendation of the European Commission for a regulation, that should lead to a duty of harmonisation. The reason this is suggested is, that the national cartel procedual law of each Member States of the EU often isn't harmonised to the laws of the other Member States. This leads to the already mentioned problems. The various differences affect the collaboration and application of Art. 101, 102 TFEU and also result in legal uncertainties. The prior measures used to be voluntary. If it is accepted, it will lead to the fact, that the principle of the procedural autonomy of the Member States will be given up. There would be a consistent system of enforcement in the ECN. But the European Commission still has the last say.

These are all reasons in favor of the necessarity of a duty of harmonisation. It seems to be problematic, that the legislative powers of the European Union are probably not broad enough. Furthermore, it appears to be difficult to find a consistent standard for fundamental rights. At the moment, this goes through the legislative process.

h) *German cartel Procedure Law*

The German Cartel Procedure Law is especially set down in §§ 54 ff., 81 ff. GWB. Characteristic for the German Cartel Procedure Law is that there is a so called two-lane-way with §§ 54 ff. GWB on the one hand and §§ 81 ff. GWB on the other hand. This could cause problems regarding to the new recommendation, especially the “mixing” of administrative law and criminal law. The §§ 54 ff. GWB regulate the administrative procedures. The §§ 81 ff. GWB structure the sanctions. In Germany, the sanctions are administrative offences.

Elements of the German Cartel Procedure Law are the GWB, the OWiG and the StPO. In general, there is no criminalisation. An exception is the criminal offence of § 298 StGB. According to § 298 StGB, anticompetitive agreements for tenders are criminal.

2. Field Study on Leniency

a) The Commissiion has fined 11 air cargo carriers €799 million in price fixing cartel

based on the European Commission Decision C(2010) 7694 final of 9 November 2010

- started with a view to discuss fuel surcharges
- Introducing and keeping a security surcharge
- No discount to partners (freight forwarders) and/or consumers

Decision achieved by application of leniency rule; no full judicial control by ECJ so far:

		Fine (€)*	**Includes reduction (%) under the Leniency Notice**
1.	Air Canada	21 037 500	15%
2.	Air France	182 920 000	20%
	KLM	127 160 000	20%
3.	Martinair	29 500 000	50%
4.	British Airways	104 040 000	10%
5.	Cargolux	79 900 000	15%
6.	Cathay Pacific Airways	57 120 000	20%

7.	Japan Airlines	35 700 000	25%
8.	LAN Chile	8 220 000	20%
9.	Qantas	8 880 000	20%
10.	SAS	70 167 500	15%
11.	Singapore Airlines	74 800 000	
12.	Lufthansa	0	100%
	Swiss Int. Air Lines	0	100%

b) Commission Notice on Immunity from fines and reduction of fines in cartel cases

(2006/C 298/11)
I. INTRODUCTION

(1) This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC [1].

(2) By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. They ultimately result in artificial prices and reduced choice for the

consumer. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.

(3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.

(4) The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.

(5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.

(6) In addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.

(7) The supervisory task conferred on the Commission by the Treaty in competition matters does not only include the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy. The protection of corporate statements in the public interest is not a bar to their disclosure to other addressees of the statement of objections in order to safeguard their rights of defence in the procedure before the Commission, to the extent that it is technically possible to combine both interests by rendering corporate statements accessible only at the Commission premises and normally on a single occasion following the formal notification of the objections. Moreover, the Commission will process personal data in the context of this notice in conformity with its obligations under Regulation (EC) No 45/2001. [2]

II. IMMUNITY FROM FINES

A. Requirements to qualify for immunity from fines

(8) The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel

affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

(a) carry out a targeted inspection in connection with the alleged cartel [3];

or

(b) find an infringement of Article 81 EC in connection with the alleged cartel.

(9) For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Commission with the information and evidence listed below, to the extent that this, in the Commission's view, would not jeopardize the inspections:

(a) A corporate statement [4] which includes, in so far as it is known to the applicant at the time of the submission:
- A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.
- The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel;
- The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;
- Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel; and

(b) Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

(10) Immunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.

(11) Immunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Commission to find an infringement of Article 81 EC,.

(12) In addition to the conditions set out in points (8)(a), (9) and (10) or in points (8)(b) and 11, all the following conditions must be met in any case to qualify for any immunity from a fine:

(a) The undertaking cooperates genuinely [5], fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. This includes:
- providing the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;
- remaining at the Commission's disposal to answer promptly to any request that may contribute to the establishment of the facts;
- making current (and, if possible, former) employees and directors available for interviews with the Commission;
- not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and
- not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed;

(b) The undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections;

(c) When contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

(13) An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor.

B. Procedure

(14) An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate General for Competition. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines in order to meet the conditions in points (8)(a) or (8)(b), as appropriate. The Commission may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued.

(15) The Commission services may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Commission on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. Where a marker is granted, the Commission services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. Undertakings which have been granted a marker cannot perfect it by making a formal application in hypothetical terms. If the applicant

perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

(16) An undertaking making a formal immunity application to the Commission must:
  (a) provide the Commission with all information and evidence relating to the alleged cartel available to it, as specified in points (8) and (9), including corporate statements; or
  (b) initially present this information and evidence in hypothetical terms, in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of the applying undertaking and of other undertakings involved in the alleged cartel need not be disclosed until the evidence described in its application is submitted. However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.

(17) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for immunity from fines, confirming the date and, where appropriate, time of the application.

(18) Once the Commission has received the information and evidence submitted by the undertaking under point (16)(a) and has verified that it meets the conditions set out in points (8)(a) or (8)(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.

(19) If the undertaking has presented information and evidence in hypothetical terms, the Commission will verify that the nature and content of the evidence described in the detailed list referred to in point (16)(b) will meet the conditions set out in points (8)(a) or (8)(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.

(20) If it becomes apparent that immunity is not available or that the undertaking failed to meet the conditions set out in points (8)(a) or (8)(b), as appropriate, the Commission will inform the undertaking in writing. In such case, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section III of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

(21) The Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement, irrespective of whether the immunity application is presented formally or by requesting a marker.

(22) If at the end of the administrative procedure, the undertaking has met the conditions set out in point (12), the Commission will grant it immunity from fines in the relevant decision. If at the end of the administrative procedure, the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favorable treatment under this Notice. If the Commission, after

having granted conditional immunity ultimately finds that the immunity applicant has acted as a coercer, it will withhold immunity.

III. REDUCTION OF A FINE

A. Requirements to qualify for reduction of a fine

(23) Undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the conditions under section II above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

(24) In order to qualify, an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession and must meet the cumulative conditions set out in points (12)(a) to (12)(c) above.

(25) The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested.

(26) The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

- first undertaking to provide significant added value: a reduction of 30-50 %,
- second undertaking to provide significant added value: a reduction of 20-30 %,
- subsequent undertakings that provide significant added value: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point (24) was submitted and the extent to which it represents added value.

If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.

B. Procedure

(27) An undertaking wishing to benefit from a reduction of a fine must make a formal application to the Commission and it must present it with sufficient evidence of the alleged cartel to qualify for a reduction of a fine in accordance with point (24) of this Notice. Any voluntary submission of evidence to the Commission which the undertaking that submits it wishes to be considered for the beneficial treatment of section III of this Notice must be clearly identified at the time of its submission as being part of a formal application for a reduction of a fine.

(28) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for a reduction of a fine and of any subsequent submissions of evidence, confirming the date and, where appropriate, time of each submission. The Commission will not take any position on an application for a reduction of a fine before it has taken a position on any existing applications for conditional immunity from fines in relation to the same alleged cartel.

(29) If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value within the meaning of points (24) and (25), and that the undertaking has met the conditions of points (12) and (27), it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point (26). The Commission will also, within the same time frame, inform the undertaking in writing if it comes to the preliminary conclusion that the undertaking does not qualify for a reduction of a fine. The Commission may disregard any application for a reduction of fines on the grounds that it has been submitted after the statement of objections has been issued.

(30) The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted. The Commission will determine in any such final decision:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) whether the conditions set out in points (12)(a) to (12)(c) above have been met;

(c) the exact level of reduction an undertaking will benefit from within the bands specified in point (26).

If the Commission finds that the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favourable treatment under this Notice.

IV. Corporate statements made to qualify under this notice

(31) A corporate statement is a voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice. Any statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file and can thus be used in evidence.

(32) Upon the applicant's request, the Commission may accept that corporate statements be provided orally unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements will be recorded and transcribed at the Commission's premises. In accordance with Article 19 of Council Regulation (EC) No 1/2003 [6] and Articles 3 and 17 of Commission Regulation (EC) No 773/2004 [7], undertakings making oral corporate statements will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral statements within a given time limit. Undertakings may waive these rights within the said time-limit, in which

case the recording will from that moment on be deemed to have been approved. Following the explicit or implicit approval of the oral statement or the submission of any corrections to it, the undertaking shall listen to the recordings at the Commission's premises and check the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment under this Notice.

(33) Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, — together with the legal counsels getting access on their behalf -, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements. The Commission considers that this specific protection of a corporate statement is not justified as from the moment when the applicant discloses to third parties the content thereof.

(34) In accordance with the Commission Notice on rules for access to the Commission file [8], access to the file is only granted to the addressees of a statement of objections on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points (12) and (27) of this Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceeding, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

(35) Corporate statements made under the present Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation No 1/2003, provided that the conditions set out in the Network Notice [9] are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

V. GENERAL CONSIDERATIONS

(36) The Commission will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose.

(37) From the date of its publication in the Official Journal, this notice replaces the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. However, points (31) to (35) of the current notice will be applied from the moment

of its publication to all pending and new applications for immunity from fines or reduction of fines.

(38) The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.

(39) In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.

(40) The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 [10], even after the decision has been taken.

[1] Reference in this text to Article 81 EC also covers Article 53 EEA when applied by the Commission according to the rules laid down in Article 56 of the EEA Agreement.

[2] OJ L 8, 12.1.2001, p. 1.

[3] The assessment of the threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant.

[4] Corporate statements may take the form of written documents signed by or on behalf of the undertaking or be made orally.

[5] This requires in particular that the applicant provides accurate, not misleading, and complete information. Cfr judgement of the European Court of Justice of 29 June 2006 in case C-301/04 P, Commission v SGL Carbon AG a.o., at paragraphs 68-70, and judgement of the European Court of Justice of 28 June 2005 in cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, Dansk Rørindustri A/S a.o. v. Commission, at paragraphs 395-399.

[6] OJ L 1, 4.1.2003, p. 1.

[7] OJ L 123, 27.4.2004, p. 18.

[8] OJ C 325, 22.12.2005, p. 7.

[9] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43.

[10] OJ L 145, 31.5.2001, p. 43.

3. Case Schenker

Summary:

30. the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
    (1) May breaches of Article 101 TFEU committed by an undertaking be penalised by means of a fine in the case where the undertaking erred with regard to the lawfulness of its conduct and that error is unobjectionable?
    If Question 1 is answered in the negative:
        (a) Is an error with regard to the lawfulness of conduct unobjectionable in the case where the undertaking acts in accordance with advice given by a legal adviser experienced in matters of competition law and the erroneous nature of the advice was neither obvious nor capable of being identified through the scrutiny which the undertaking could be expected to exercise?
        (b) Is an error with regard to the lawfulness of conduct unobjectionable in the case where the undertaking has relied on the correctness of a decision taken by a national competition authority which examined the conduct under review solely on the basis of national competition law and found it to be permissible?
    (2) Are the national competition authorities competent to find that an undertaking participated in a cartel which infringes European Union competition law in a case where no fine is to be imposed on the undertaking on the ground that it has requested application of a leniency programme?'

Consideration of the questions referred
The first question

34. Under Article 23(2) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, 'either intentionally or negligently', they infringe Article 101 TFEU or 102 TFEU.
35. Article 5 of Regulation No 1/2003 defines the powers of the competition authorities of the Member States for the purpose of applying Articles 101 TFEU and 102 TFEU and provides that those authorities may, in particular, impose fines, periodic penalty payments or any other penalty provided for in their national law. It is not apparent from the wording of Article 5 of the regulation that conditions relating to intention or negligence have to be met in order for the measures of application which are provided for by the regulation to be adopted.
36. However, if, in the general interest of uniform application of Articles 101 TFEU and 102 TFEU in the European Union, the Member States establish conditions relating to intention or negligence in the context of application of Article 5 of Regulation No 1/2003, those conditions should be at least as stringent as the

condition laid down in Article 23 of Regulation No 1/2003 so as not to jeopardise the effectiveness of European Union law.

37. In relation to the question whether an infringement has been committed intentionally or negligently and is, therefore, liable to be punished by a fine in accordance with the first subparagraph of Article 23(2) of Regulation No 1/2003, it follows from the case-law of the Court that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty (see 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 45; Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, paragraph 107; and Case C 280/08 P Deutsche Telekom v Commission [2010] ECR I 9555, paragraph 124).

38. Therefore, the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct.

39. It is apparent from the order for reference that the members of the SSK coordinated their behaviour in relation to their tariffs for domestic consolidated consignment transport throughout Austria. Undertakings which directly coordinate their behaviour in respect of their selling prices quite evidently cannot be unaware of the anti-competitive nature of their conduct. It follows that, in a situation such as that at issue in the main proceedings, the condition in the first subparagraph of Article 23(2) of Regulation No 1/2003 is met.

40. Finally, the national competition authorities may exceptionally decide not to impose a fine although an undertaking has infringed Article 101 TFEU intentionally or negligently. That may in particular be the case where a general principle of European Union law, such as the principle of the protection of legitimate expectations, precludes imposition of a fine.

41. However, a person may not plead breach of the principle of the protection of legitimate expectations unless he has been given precise assurances by the competent authority (see Case C 221/09 AJD Tuna [2011] ECR I 1655, paragraph 72, and Case C 545/11 Agrargenossenschaft Neuzelle [2013] ECR, paragraph 25). It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine.

42. As for the national competition authorities, since they do not have the power to adopt a negative decision, that is to say, a decision concluding that there is no infringement of Article 101 TFEU (Case C 375/09 Tele2 Polska [2011] ECR I 3055, paragraphs 19 to 30), they cannot cause undertakings to entertain a legitimate expectation that their conduct does not infringe that provision. It appears, moreover, from the wording of the first question that the national competition authority examined the conduct of the undertakings at issue in the main proceedings on the basis of national competition law only.

43. Consequently, the answer to the first question is that Article 101 TFEU must be interpreted as meaning that an undertaking which has infringed that provision may not escape imposition of a fine where the infringement has resulted from that undertaking erring as to the lawfulness of its conduct on account of

the terms of legal advice given by a lawyer or of the terms of a decision of a national competition authority.

The second question

45. Article 5 of Regulation No 1/2003 admittedly does not provide expressly that the national competition authorities have the power to find an infringement of Article 101 TFEU without imposing a fine, but it does not exclude that power either.

46. However, in order to ensure that Article 101 TFEU is applied effectively in the general interest (see Case C 439/08 VEBIC [2010] ECR I 12471, paragraph 56), the national competition authorities must proceed by way of exception only not to impose a fine where an undertaking has infringed that provision intentionally or negligently.

47. It should be noted, furthermore, that such a decision not to impose a fine can be made under a national leniency programme only in so far as the programme is implemented in such a way as not to undermine the requirement of effective and uniform application of Article 101 TFEU.

48. Thus, in the case of the Commission's power to reduce fines under its own leniency programme, it is apparent from the Court's case-law that a reduction of a fine for cooperation on the part of undertakings participating in infringements of European Union competition law is justified only if such cooperation makes it easier for the Commission to carry out its task of finding an infringement and, where relevant, of bringing it to an end, whilst the undertaking's conduct must also reveal a genuine spirit of cooperation (see, to this effect, Joined Cases C 189/02 P, C 202/02 P, C 205/02 P to C 208/02 P and C 213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I 5425, paragraphs 393, 395 and 396).

49. As regards immunity from or not imposing a fine, in order for such treatment – which is moreover at issue in the main proceedings – not to undermine the effective and uniform application of Article 101 TFEU, it can be accorded in strictly exceptional situations only, such as where an undertaking's cooperation has been decisive in detecting and actually suppressing the cartel.

50. The answer to the second question therefore is that Article 101 TFEU and Articles 5 and 23(2) of Regulation No 1/2003 must be interpreted as meaning that, in the event that the existence of an infringement of Article 101 TFEU is established, the national competition authorities may by way of exception confine themselves to finding that infringement without imposing a fine where the undertaking concerned has participated in a national leniency programme.

4. Case Kone

Judgment of the Court of 5 June 2014

Summary:

Parties:
Kone AG, Otis GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Schindler Liegenschafts-verwaltung GmbH, ThyssenKrupp Aufzüge GmbH
v
ÖBB-Infrastruktur AG

The dispute in the main proceedings and the question referred for a preliminary ruling

5. Since the 1980s at least, Kone, Otis, Schindler Aufzüge und Fahrtrappen, Schindler Liegenschaftsverwaltung and ThyssenKrupp Aufzüge have implemented, in numerous Member States, a large scale agreement purporting to divide up the elevator and escalator market.
6. On 21 February 2007, the European Commission imposed on Kone, Otis, Schindler Aufzüge und Fahrtrappen and Schindler Liegenschaftsverwaltung a fine totalling EUR 992 million for their participation in cartels involving the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands.
7. By judgment of 8 October 2008, the Oberster Gerichtshof, acting as appellate court in matters involving the law on cartels, upheld the order of 14 December 2007, by which the Kartellgericht (Antitrust Court) had imposed fines on Kone, Otis and Schindler Aufzüge und Fahrtrappen, as well as on two other companies. As ThyssenKrupp Aufzüge had chosen to give evidence in order to qualify for leniency, that undertaking did not participate in the proceedings concerning the law on cartels.
8. The object of the cartel at issue in the main proceedings (‘the cartel at issue’) was to ensure for the preferred undertaking a higher price than that which would have been achievable under normal competitive conditions. It distorted the market and, in particular, the price development that would otherwise have occurred under such conditions.
10. Relying on the ‘umbrella effect’, ÖBB-Infrastruktur claims from the appellants in the main proceedings compensation for loss assessed at EUR 1 839 239.74,

as a result of buying from third undertakings not party to the cartel at issue elevators and escalators at a higher price than it would have paid but for the existence of that cartel, on the ground that those third undertakings benefited from the existence of the cartel in adapting their prices to the higher level.

11. The court of first instance rejected ÖBB-Infrastruktur's claim, but it was upheld by the appellate court.

12. Proceedings having been brought before it by the appellants in the main proceedings, the Oberster Gerichtshof is considering the conditions for bringing the liability of participants in a cartel into play, in the light of Article 101 TFEU and the case-law of the Court of Justice, in particular the judgments in Case C 453/99 Courage and Crehan EU:C:2001:465; Joined Cases C 295/04 to C 298/04 Manfredi and Others EU:C:2006:461; and Case C 360/09 Pfleiderer EU:C:2011:389.

13. According to the case-law of the Austrian courts, a person who makes a claim for damages based on non-contractual liability must establish an adequate causal link and a link of unlawfulness, that is the infringement of a protective provision for the purposes of Article 1311 of the ABGB.

17. Accordingly, the Oberster Gerichtshof decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:
'Is Article 101 TFEU (Article 81 EC, Article 85 of the EC Treaty) to be interpreted as meaning that any person may claim from members of a cartel damages also for the loss which he has been caused by a person not party to the cartel who, benefiting from the protection of the increased market prices, raises his own prices for his products more than he would have done without the cartel (umbrella pricing), so that the principle of effectiveness laid down by the Court … requires the grant of a claim under national law?'

The question referred for a preliminary ruling

20. It should be recalled that Articles 101(1) TFEU and 102 TFEU produce direct effects in relations between individuals and create rights for the individuals concerned, which the national courts must safeguard (see Case C 127/73 BRT and SABAM EU:C:1974:25, paragraph 16; Courage and Crehan EU:C:2001:465, paragraph 23; and Manfredi and Others EU:C:2006:461, paragraph 39).

22. Any person is thus entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU (Manfredi and Others EU:C:2006:461 paragraph 61, and Otis and Others EU:C:2012:684, paragraph 43).

24. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed (Manfredi and Others EU:C:2006:461, paragraph 64).

27. In the main proceedings, ÖBB-Infrastruktur claims that part of the loss it suffered was caused by the cartel at issue, which made it possible to maintain a market price at such a high level that even competitors not party to the cartel were able to benefit from a market price that was higher than it would otherwise have been but for the existence of that cartel, whether in terms of profit margin,

or simply of survival, if their cost structure was such that normal conditions of competition resulted in their removal from the market.

29. In that regard, it should be noted that market price is one of the main factors taken into consideration by an undertaking when it determines the price at which it will offer its goods or services. Where a cartel manages to maintain artificially high prices for particular goods and certain conditions are met, relating, in particular, to the nature of the goods or to the size of the market covered by that cartel, it cannot be ruled out that a competing undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, that is, in the absence of that cartel. In such a situation, even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that such a decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules.

30. It follows that, contrary to the assertions of Schindler Aufzüge und Fahrtrappen and Schindler Liegenschaftsverwaltung, a loss being suffered by the customer of an undertaking not party to a cartel, but benefiting from the economic conditions of umbrella pricing, because of an offer price higher than it would have been but for the existence of that cartel is one of the possible effects of the cartel, that the members thereof cannot disregard.

31. As regards the national legislation at issue in the main proceedings, it appears from the order for reference that Austrian law categorically excludes a right to compensation in a situation such as that at issue in the main proceedings, owing to the fact that the causal link between the loss sustained and the cartel in question is considered, in the absence of a contractual link with a member of that cartel, to have been broken by the autonomous decision of the undertaking not party to the cartel, but which applied, owing to the existence of the cartel, umbrella pricing.

32. It is true, as pointed out in paragraph 24 of the present judgment, that it is, in principle, for the domestic legal system of each Member State to lay down the detailed rules governing the application of the concept of the ‘causal link’. However, it is clear from the case-law of the Court, referred to in paragraph 26 of the present judgment, that that national legislation must ensure that European Union competition law is fully effective (see, to that effect, VEBIC EU:C:2010:739, paragraph 63). Those rules must therefore specifically take into account the objective pursued by Article 101 TFEU, which aims to guarantee effective and undistorted competition in the internal market, and, accordingly, prices set on the basis of free competition. In those circumstances, the Court has held, as noted in paragraph 22 of the present judgment, that national legislation must recognise the right of any individual to claim compensation for loss sustained.

33. The full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets.

34. Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel. It is for the referring court to determine whether those conditions are satisfied.
37. In the light of all the foregoing considerations, the answer to the question referred is that Article 101 TFEU must be interpreted as meaning that it precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions.

5. Case DHL

Judgment of the Court of 20 January 2016

Summary:

Parties:
DHL Express (Italy) Srl, DHL Global Forwarding (Italy) SpA
v
Autorità Garante della Concorrenza e del Mercato

The dispute in the main proceedings and the questions referred for a preliminary ruling

17. On 5 June 2007, DHL submitted to the European Commission an application for immunity from fines concerning several infringements of EU competition law in the sector of international freight forwarding. On 24 September 2007, the Commission granted DHL conditional immunity for the entire international forwarding sector, that is to say, as regards maritime, air and road transit. On 20 December 2007, DHL brought to the attention of the Commission certain information concerning the conduct of undertakings in the international road freight forwarding sector in Italy. In June 2008, the Commission decided to pursue only the part of the cartel concerning international air freight forwarding services, leaving the national competition authorities the possibility of pursuing the infringements in relation to the sea and road freight forwarding services.
18. In parallel, on 12 July 2007, DHL submitted to the AGCM a summary application for immunity under the national leniency programme. In that application, DHL provided information concerning unlawful conduct in the international

freight forwarding and transport market. According to the AGCM, that application concerned only the international sea and air freight transport sectors, and did not concern the road transport sector. However, according to DHL, that summary application concerned illegal conduct observed throughout the international freight forwarding and transport market. DHL stated that, whilst its application of 12 July 2007 did not give concrete and specific examples of conduct observed in relation to road freight forwarding, that was merely because such conduct had not yet been discovered.

19. On 23 June 2008, DHL submitted an additional summary application for immunity to the AGCM, supplementing the application initially submitted on 12 July 2007, in order to expressly extend that application to the international road freight forwarding sector. In that additional application, DHL stated that 'the present declaration merely constitutes, for all purposes and effects, a supplement to the application submitted on 12 July 2007, in so far as the additional conduct to which it relates does not amount to a separate infringement not covered by the original declaration and is nothing more than a new manifestation of infringements already reported and, as such, the Commission took account of them for the purposes of the leniency granted to the undertaking'.

22. On 18 November 2009, the AGCM opened a procedure concerning possible infringements of Article 101 TFEU in the international freight transport sector.

23. In the decision at issue, adopted on 15 June 2011, the AGCM concluded that several undertakings, including DHL, Schenker and Agility had, in breach of Article 101 TFEU, taken part in a cartel in the international road freight forwarding sector affecting operations to and from Italy.

25. DHL brought an action for partial annulment of the decision at issue before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court for Lazio, Italy) on the ground that it should have been accorded the first place in the queue for the national leniency programme and therefore immunity from fines. According to DHL, the principles of EU law require a national authority which receives a summary leniency application to assess it taking into account the main application for immunity which that company submitted to the Commission.

26. The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court for Lazio, Italy) rejected the action brought by DHL on the basis that, as a matter of principle, the different leniency programmes and the applications in relation to those programmes were autonomous and independent.

27. DHL lodged an appeal before the referring court against the judgment at first instance. That company submits that the decision at issue does not respect the principles set out, inter alia, in the Notice on Cooperation and in the ECN Model Leniency Programme. According to DHL, the rules and instruments of the ECN are binding on the AGCM, since it is a national competition authority which forms part of that network.

28. In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'On a proper construction of Article 101 TFEU, Article 4(3) TEU and Article 11 of Regulation (EC) No 1/2003, does it follow that national competition authorities may not, in their own implementation practices, deviate from the instruments defined and adopted by the ECN and, in particular, from the ECN Model Leniency Programme, in a case such as that at issue before the referring court, without running counter to the findings of the Court of Justice of the European Union in paragraphs 21 and 22 of the judgment of 14 June 2011 in Pfleiderer (Case C 360/09, EU:C:2011:389)?

Consideration of the questions referred

30. It is settled case-law that the cooperation mechanism between the Commission and the national competition authorities which was set up in Chapter IV of Regulation No 1/2003 is intended to ensure the coherent application of the competition rules in the Member States (see, to that effect, judgments in X, C 429/07, EU:C:2009:359, paragraph 20, and in Tele2 Polska, C 375/09, EU:C:2011:270, paragraph 26).

31. According to recital 15 of Regulation No 1/2003, the Commission and the competition authorities of the Member States should form together a network of public authorities applying the EU competition rules in close cooperation. In that respect, paragraph 1 of the Notice on Cooperation states that that network is a forum for discussion and cooperation in the application and enforcement of EU competition policy.

32. It follows that the ECN, being intended to encourage discussion and cooperation in the Implementation of competition policy, does not have the power to adopt legally binding rules.

33. In that respect, the Court has already held that neither the Commission Notice on Cooperation, nor the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; ‘the Leniency Notice’) is binding on Member States (see judgment in Pfleiderer, C 360/09, EU:C:2011:389, paragraph 21).

36. As regards, in particular, the leniency programme applicable, within the European Union, to undertakings that cooperate with the Commission or with the national competition authorities in order to uncover unlawful cartels, it must be noted that neither the provisions of the FEU Treaty on competition nor Regulation No 1/2003 lay down common rules on leniency (judgment in Pfleiderer, C 360/09, EU:C:2011:389, paragraph 20). Thus, in the absence of a centralised system, at the EU level, for the receipt and assessment of leniency applications in relation to infringements of Article 101 TFEU, the treatment of such applications sent to a national competition authority is determined by that authority under the national law of the Member State in question.

37. In that respect, it should be pointed out that the Leniency Notice relates only to leniency programmes implemented by the Commission itself (judgment in Pfleiderer, C 360/09, EU:C:2011:389, paragraph 21).

38. In that context, it must be recalled that the Court has already held that the ECN Model Leniency Programme has no binding effect on the courts and tribunals of the Member States (judgment in Pfleiderer, C 360/09, EU:C:2011:389, paragraph 22).

41. First, given that, in accordance with Article 35(1) of Regulation No 1/2003, the Member States may designate courts as national competition authorities, the uniform application of EU law in the Member States would be undermined. The binding effect of the ECN Model Leniency Programme would vary depending on the nature, judicial or administrative, of the national competition authorities of the various Member States.

43. Furthermore, DHL's argument that the national competition authorities have formally undertaken to respect the principles set out in the Notice on Cooperation does not change the legal status, under EU law, of that notice, nor that of the ENC Model Leniency Programme.

44. In the light of the foregoing, the answer to the first question is that EU law, in particular Article 101 TFEU and Regulation No 1/2003, must be interpreted as meaning that the instruments adopted in the context of the ECN, in particular the ECN Model Leniency Programme, are not binding on national competition authorities.

VII. European Framework for Unfair Competition Law

1. Case Yves Rocher

Judgment of the Court of 18 May 1993. - Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH. - Reference for a preliminary ruling: Bundesgerichtshof - Germany. - Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Prohibition of advertising using price comparisons. - Case C-126/91.

Article 30 of the Treaty is to be interpreted as precluding the application of a rule of law of a Member State which prohibits an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from another Member State, from using advertisements relating to prices in which the new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure.
Such a prohibition, by compelling a trader either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective, may constitute an obstacle to

imports even if it applies to domestic products and imported products without distinction. In so far as the prohibition affects all eye-catching advertisements making use of price comparisons, whether they are true or false, it cannot be justified by urgent requirements relating either to consumer protection, since the objective pursued can be ensured by measures which are less restrictive of intra-Community trade, or to the protection of fair trading, since correct price comparisons cannot in any way distort the conditions of competition.

In Case C-126/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesgerichtshof for a preliminary ruling in the proceedings pending before that court between

Schutzverband gegen Unwesen in der Wirtschaft e.V.

and

Yves Rocher GmbH

on the interpretation of Articles 30 and 36 of the EEC Treaty,

……………………

1. By order of 11 April 1991, received at the Court on 30 April 1991, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 30 and 36 of the Treaty, in order to assess the compatibility with those provisions of a rule of national law on commercial advertising.
2. That question was raised in proceedings between the Schutzverband gegen Unwesen in der Wirtschaft e.V., a non-profit-making association based in Munich (hereinafter "the Schutzverband"), and Yves Rocher GmbH (hereinafter "Yves Rocher"), a subsidiary of the French company Laboratoires de Biologie Végétale Yves Rocher, concerning advertisements by Yves Rocher which consisted in a comparison between the old and new prices of its products.
3. Before 1986 advertising by means of comparisons between prices charged by the same undertaking was lawful in so far as it was not unfair or liable to mislead consumers. Following pressure by certain retailers, the German legislature adopted the Gesetz zur AEnderung wirtschafts-, verbraucher-, arbeits- and sozialrechtlicher Vorschriften (Law amending certain provisions of economic, consumer, labour and social welfare legislation) of 25 July 1986 inserting into the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition, hereinafter "the UWG") of 7 June 1909 a Paragraph 6e prohibiting advertisements making use of individual price comparisons. That prohibition is intended to protect consumers and competitors against advertising by means of price comparisons.
4. However, the prohibition under Paragraph 6e of the UWG is not absolute. There is an exception in favour of price comparisons which are not "eye-catching" (blickfangmaessig) (Paragraph 6e(2)(1) of the UWG) and advertising by means of catalogues (Paragraph 6e(2)(2) of the UWG).
5. Yves Rocher sells by mail order in the Federal Republic of Germany cosmetics supplied by its parent company, most of which are manufactured in France. Advertising for those products is produced by the parent company to a standard design for the various Member States in question, and is distributed in catalogues and sales brochures. As part of its sales activities, Yves Rocher distributed a brochure which, under the heading "Save up to 50% and more on 99 of your favourite Yves Rocher products", showed, next to the crossed-out old prices, the new lower prices of those products, in large red characters.

6. The Schutzverband considered that such advertising was contrary to Paragraph 6e (2)(1) of the UWG and brought proceedings against Yves Rocher in the Landgericht Muenchen I (Munich I Regional Court). The Landgericht took the view that that provision of the UWG prohibited advertising in which old and new prices were compared, if that advertising was "eye-catching", and ordered Yves Rocher not to distribute such advertising.
7. Yves Rocher appealed against that decision to the Oberlandesgericht Muenchen (Higher Regional Court, Munich), which set aside the Landgericht' s order on the basis of Paragraph 6e(2)(2) of the UWG. The Schutzverband appealed on a point of law against that decision to the Bundesgerichtshof, which held that Paragraph 6e(2)(2) did not apply. However, the Bundesgerichtshof considered that the application of Paragraph 6e(1) of the UWG raised a question concerning the interpretation of Community law, and therefore stayed the proceedings pending a preliminary ruling by the Court on the following question:
"Must Article 30 of the EEC Treaty be interpreted as precluding the application of a rule of law of Member State A prohibiting an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which there is an eye-catching display of the new price and reference is made to a higher price shown in an earlier catalogue or sales brochure?"
8. Reference is made to the Report for the Hearing for a fuller account of the facts and legal background of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
9. Under Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. It is settled law that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute measures having an effect equivalent to quantitative restrictions (judgment in Case 8/74 Dassonville [1974] ECR 837, paragraph 5).
10. The Court has also held that national legislation which restricts or prohibits certain forms of advertising or certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. To compel an economic operator either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction (see the judgments in Case 286/81 Oosthoek' s Uitgeversmaatschappij [1982] ECR 4575, paragraph 15; Case 382/87 Buet [1989] ECR 1235, paragraph 7; Case C-362/88 GB-INNO-BM [1990] ECR I-667, paragraph 7; and Joined Cases C-1/90 and C-176/90 Aragonesa de Publicidad Exterior and Publivía [1991] ECR I-4151, paragraph 10).
11. A prohibition of the kind at issue in the main proceedings is thus capable of restricting imports of products from one Member State into another and therefore constitutes, in that respect, a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty.

12. However, the Court has consistently held that in the absence of common rules relating to marketing, obstacles to the free movement of goods within the Community resulting from disparities between national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be justified as being necessary in order to satisfy mandatory requirements relating inter alia to consumer protection or fair trading (see, in particular, GB-INNO-BM, cited above, paragraph 10). Those rules must, however, as the Court has repeatedly held (see, in particular, Buet, cited above, paragraph 11), be proportionate to the goals pursued.
13. It is undisputed that a prohibition of the kind at issue in the main proceedings applies both to domestic products and to imported products.
14. Moreover, the German Government has stated that the prohibition in Paragraph 6e of the UWG is intended to protect consumers against the special lure of advertising containing price comparisons, which is frequently liable to mislead. First, it is particularly easy to deceive consumers, since they are generally not in a position to verify the comparison between the old and the new prices. Second, advertising by means of price comparisons may suggest a level of prices which is favourable as a whole, without that being true for the entire range of products.
15. Since the protection of consumers against misleading advertising is a legitimate objective from the point of view of Community law, the Court must examine, in accordance with the settled case-law, whether the national provisions are suitable for attaining the aim pursued and do not go beyond what is necessary for that purpose.
16. It should be observed, first, that a prohibition of the kind at issue in the main proceedings applies where price comparisons catch the eye, whether or not they are correct. The prohibition does not therefore apply to price comparisons which are not eye-catching. In the present case the advertising is prohibited not because it is alleged to be incorrect, but because it is eye-catching. It follows that any eye-catching advertising making use of price comparisons is prohibited, whether it is true or false.
17. Moreover, the prohibition in question goes beyond the requirements of the objective pursued, in that it affects advertising which is not at all misleading and contains comparisons of prices actually charged, which can be of considerable use in that it enables the consumer to make his choice in full knowledge of the facts.
18. Furthermore, a comparative examination of the laws of the Member States shows that information and protection of the consumer can be ensured by measures which are less restrictive of intra-Community trade than those at issue in the main proceedings (see paragraph 52 of the Opinion of the Advocate General).
19. It follows that a prohibition of the kind at issue in the main proceedings is not proportionate to the aim pursued.
20. The German Government argues further that the prohibition in question cannot be incompatible with Article 30 of the Treaty, in that it causes only a marginal restriction of the free movement of goods.
21. On this point, leaving aside rules having merely hypothetical effect on intra-Community trade, it has been consistently held that Article 30 of the Treaty does not make a distinction between measures which can be described as

measures having equivalent effect to a quantitative restriction according to the magnitude of the effects they have on trade within the Community.

22. As for the protection of fair trading, and hence of competition, it is important to note that correct price comparisons, prohibited by a rule of law of the kind at issue, cannot in any way distort the conditions of competition. On the other hand, a rule which has the effect of prohibiting such comparisons may restrict competition.

23. Accordingly, the answer to the national court' s question must be that Article 30 of the Treaty is to be interpreted as precluding the application of a rule of law of Member State A which prohibits an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which the new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure.

................................On those grounds,
Article 30 of the EEC Treaty is to be interpreted as precluding the application of a rule of law of Member State A which prohibits an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which the new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure.

2. Case Mars (ECJ)

Judgment of the Court (Fifth Chamber) of 6 July 1995. - Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH. - Reference for a preliminary ruling:

Landgericht Köln - Germany. - Free movement of goods - Measures having an effect equivalent to quantitative restrictions - Presentation of a product likely to restrict freedom to fix retail prices and mislead the consumer. - Case C-470/93. European Court reports 1995 Page I-01923

Free movement of goods ° Quantitative restrictions ° Measures having equivalent effect ° Prohibition of importing and marketing a product whose packaged units were increased in quantity during a publicity campaign with the increase being indicated on the packaging ° Not permissible ° Justification ° Protection of consumers ° None

(EC Treaty, Art. 30)

Article 30 of the Treaty is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another Member State, whose packaged units were increased in quantity during a short publicity campaign and the wrapping marked "+ 10%",

° on the ground that that presentation may induce the consumer into thinking that the price of the goods offered for sale is the same as that at which the goods had previously been sold in their old presentation, a circumstance which would have the consequence that, in the event that the trader increased the price, the consumer could be the victim of deception within the meaning of the national law applicable, or, in the event that the price was not increased, the offer would meet the consumer' s expectation but might then entail a breach of the prohibition of imposing prices on retailers enacted by the same national law,

° on the ground that the new presentation, owing to the fact that the band marked "+ 10%" occupies more than 10% of the total surface area of the wrapping, would give the impression to the consumer that the volume and the weight of the product had been increased to an extent greater than indicated.

Although it applies to all products without distinction, such a prohibition is by nature such as to hinder intra-Community trade, since it may compel the importer to adjust the presentation of his products according to the place where they are to be marketed and it cannot be justified as being necessary in order to satisfy overriding requirements relating to the protection of consumers where it does not appear that the prices of those products have been increased, where, on the contrary, the constraint imposed on retailers not to increase their prices, which is in fact favourable to consumers, does not arise from any contractual stipulation and applies only during the short duration of the publicity campaign in question and, finally, where the "+ 10%" marking is not such as to mislead a reasonably circumspect consumer.

Judgment:

1. By order of 11 November 1993, received at the Court on 17 December 1993, the Landgericht Koeln (Regional Court, Cologne) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question relating to the interpretation of Article 30 of that treaty.
2. The question was raised in proceedings between an association for combatting unfair competition, the Verein gegen Unwesen in Handel und Gewerbe

Koeln eV, and Mars GmbH (hereafter "Mars") concerning the use of a certain presentation for the marketing of ice-cream bars of the Mars, Snickers, Bounty and Milky Way brands.

3. Mars imports those goods from France where they are lawfully produced and packaged by an undertaking belonging to the American group, Mars Inc., Mc Lean, in a uniform presentation for distribution throughout Europe.
4. At the material time, the ice-cream bars were presented in wrappers marked "+ 10%". That presentation had been chosen as part of a short publicity campaign covering the whole of Europe during which the quantity of each product was increased by 10%.
5. Under Paragraph 1 of the Gesetz gegen unlauteren Wettbewerb (Law on Unfair Competition, hereafter "the UWG") proceedings may be brought in order to restrain improper competitive practices while under Paragraph 3 of that Law proceedings may be brought in order to restrain the use of misleading information. Furthermore, under Paragraph 15 of the Gesetz gegen Wettbewerbsbeschraenkungen (Law on Restraints of Competition, hereafter "the GWB"), agreements between undertakings restricting the freedom of one of the parties to fix prices in contracts concluded with third parties for the supply of goods are void.
6. The plaintiff association brought proceedings under those provisions before the Landgericht Koeln in order to prevent the "+ 10%" marking from being used in Germany.
7. It contends first of all that the consumer is bound to assume that the advantage indicated by the "+ 10%" marking is granted without any price increase, since a product whose composition is only slightly changed and which is sold at a higher price offers no advantage. So, in order not to mislead the consumer, the retailer should maintain the final price previously charged. Since the marking in question was binding on the retail trade as regards the fixing of the price for sale to the ultimate consumer, it constituted a breach of Paragraph 15 of the GWB which had to be brought to an end in accordance with Paragraph 1 of the UWG.
8. Secondly, the plaintiff in the main proceedings contends that the way in which the "+ 10%" marking was incorporated in the presentation gave the consumer the impression that the product had been increased by a quantity corresponding to the colored part of the new wrapping. The colored part occupied considerably more than 10% of the total surface area of the wrapping and this, in the plaintiff' s view, was misleading and therefore contrary to Paragraph 3 of the UWG.
9. In interlocutory proceedings the Landgericht Koeln had, by order of 10 December 1992, granted an interim restraining order against the defendant. The Landgericht took the view that the presentations in question, conveying the idea that more of the product, negligible in quantitative terms, was being offered without any increase in price, restricted freedom of retail trade in the matter of the fixing of prices.
10. When it came to rule on the substance of the case, the Landgericht Koeln decided to refer the following question to the Court:
"Is it compatible with the principles of the free movement of goods to prohibit the marketing in a Member State of ice-cream snacks in a particular presentation which are produced in another Member State and lawfully marketed there in that same presentation, which is described in the application,

(1) on the ground that the (new) presentation is liable to give consumers the impression that the goods are offered for the same price as under the old presentation,
(2) on the ground that the visual presentation of the new feature '+ 10% ice-cream' gives consumers the impression that either the volume or the weight of the product has been considerably increased?"

Applicability of Article 30 of the Treaty

11. The first question to be examined is whether a prohibition of the marketing of goods bearing on their packaging a publicity marking such as that in question in the main proceedings constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.
12. According to the case-law of the Court, Article 30 is designed to prohibit any trading rules of Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see the judgment in Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, paragraph 5). The Court has held that, in the absence of harmonization of legislation, obstacles to the free movement of goods that are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, such as those relating, for example, to their presentation, labelling and packaging, are prohibited by Article 30, even if those rules apply without distinction to national products and to imported products (judgment in Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 15).
13. Although it applies to all products without distinction, a prohibition such as that in question in the main proceedings, which relates to the marketing in a Member State of products bearing the same publicity markings as those lawfully used in other Member States, is by nature such to hinder intra-Community trade. It may compel the importer to adjust the presentation of his products according to the place where they are to be marketed and consequently to incur additional packaging and advertising costs.
14. Such a prohibition therefore falls within the scope of Article 30 of the Treaty.

The grounds of justification relied on

15. It is settled law that obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions may be justified as being necessary in order to satisfy overriding requirements relating, inter alia, to consumer protection and fair trading. However, in order to be permissible, such provisions must be proportionate to the objective pursued and that objective must be incapable of being achieved by measures which are less restrictive of intra-Community trade (see the judgments in Case 120/78 Rewe -Zentral [1979] ECR 649; Case C-238/89 Pall [1990] ECR I-4827, paragraph 12; and Case C-126/91 Yves Rocher [1993] ECR I-2361, paragraph 12).
16. It is contended in the main proceedings that the prohibition is justified on two legal grounds, which are indicated in the first and second parts of the preliminary question.

The consumer' s expectation that the price previously charged is being maintained

17. It is argued that the "+ 10%" marking may lead the consumer to think that the "new" product is being offered at a price identical to that at which the "old" product was sold.
18. As the Advocate General points out in Paragraphs 39 to 42 of his Opinion, on the assumption that the consumer expects the price to remain the same, the referring court considers that the consumer could be the victim of deception within the meaning of Paragraph 3 of the UWG and that if the price did not increase the offer would meet the consumer' s expectation but then a question would arise concerning the application of Paragraph 15 of the GWB, which prohibits manufacturers from imposing prices on retailers.
19. As regards the first possibility, it must be observed first of all that Mars has not actually profited from the promotional campaign in order to increase its sale prices and that there is no evidence that retailers have themselves increased their prices. In any case, the mere possibility that importers and retailers might increase the price of the goods and that consequently consumers may be deceived is not sufficient to justify a general prohibition which may hinder intra-Community trade. That fact does not prevent the Member States from taking action, by appropriate measures, against duly proved actions which have the effect of misleading consumers.
20. As regards the second possibility, the principle of freedom of retail trade in the matter of the fixing of prices, provided for by a system of national law, and intended in particular to guarantee the consumer genuine price competition, may not justify an obstacle to intra-Community trade such as that in question in the main proceedings. The constraint imposed on the retailer not to increase his prices is in fact favorable to the consumer. It does not arise from any contractual stipulation and has the effect of protecting the consumer from being misled in any way. It does not prevent retailers from continuing to charge different prices and applies only during the short duration of the publicity campaign in question.

The visual presentation of the "+ 10%" marking and its alleged misleading effect

21. It is accepted by all the parties that the "+ 10%" marking is accurate in itself.
22. However, it is contended that the measure in question is justified because a not insignificant number of consumers will be induced into believing, by the band bearing the "+ 10%" marking, which occupies more than 10% of the total surface area of the wrapping, that the increase is larger than that represented.
23. Such a justification cannot be accepted.
24. Reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product' s quantity and the size of that increase.
25. The reply to the preliminary question must therefore be that Article 30 of the Treaty is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another Member State, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking "+ 10%",
    a) on the ground that that presentation may induce the consumer into thinking that the price of the goods offered is the same as that at which the goods had previously been sold in their old presentation,

b) on the ground that the new presentation gives the impression to the consumer that the volume and weight of the product have been considerably increased.

On those grounds,

THE COURT (Fifth Chamber),
in answer to the question referred to it by the Landgericht Koeln, by order of 11 November 1993, hereby rules:
Article 30 of the EC Treaty is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another Member State, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking "+ 10%",

(a) on the ground that that presentation may induce the consumer into thinking that the price of the goods offered is the same as that at which the goods had previously been sold in their old presentation,

(b) on the ground that the new presentation gives the impression to the consumer that the volume and the weight of the product have been considerably increased.

3. Unfair Commericial Practices Directive

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the European Economic and Social Committee [1],
Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:
(1) Article 153(1) and (3)(a) of the Treaty provides that the Community is to contribute to the attainment of a high level of consumer protection by the measures it adopts pursuant to Article 95 thereof.
(2) In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The development of fair commercial practices within the area without internal frontiers is vital for the promotion of the development of cross-border activities.
(3) The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. In the field of advertising, Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising [3] establishes minimum criteria for harmonising legislation on misleading advertising, but does not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers. As a result, Member States' provisions on misleading advertising diverge significantly.
(4) These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market.

(5) In the absence of uniform rules at Community level, obstacles to the free movement of services and goods across borders or the freedom of establishment could be justified in the light of the case-law of the Court of Justice of the European Communities as long as they seek to protect recognised public interest objectives and are proportionate to those objectives. In view of the Community's objectives, as set out in the provisions of the Treaty and in secondary Community law relating to freedom of movement, and in accordance with the Commission's policy on commercial communications as indicated in the Communication from the Commission entitled "The follow-up to the Green Paper on Commercial Communications in the Internal Market", such obstacles should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty.

(6) This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. Nor does this Directive cover or affect the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising. Further, this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers' perceptions of products and influence their behaviour without impairing the consumer's ability to make an informed decision.

(7) This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. It does not address commercial practices carried out primarily for other purposes, including for example commercial communication aimed at investors, such as annual reports and corporate promotional literature. It does not address legal requirements related to taste and decency which vary widely among the Member States. Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice. Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof.

(8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. It is

understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.

(9) This Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law, on intellectual property rights, on the health and safety aspects of products, on conditions of establishment and authorisation regimes, including those rules which, in conformity with Community law, relate to gambling activities, and to Community competition rules and the national provisions implementing them. The Member States will thus be able to retain or introduce restrictions and prohibitions of commercial practices on grounds of the protection of the health and safety of consumers in their territory wherever the trader is based, for example in relation to alcohol, tobacco or pharmaceuticals. Financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders. For this reason, in the field of financial services and immovable property, this Directive is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers. It is not appropriate to regulate here the certification and indication of the standard of fineness of articles of precious metal.

(10) It is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. This Directive therefore amends Directive 84/450/EEC, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [4], Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [5] and Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services [6]. This Directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products. This Directive consequently complements the Community acquis, which is applicable to commercial practices harming consumers' economic interests.

(11) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers' economic behaviour. It also sets rules on aggressive commercial practices, which are currently not regulated at Community level.

(12) Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all

aspects of unfair commercial practices across the EU. The effect will be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and to enable the internal market to be achieved in this area.

(13) In order to achieve the Community's objectives through the removal of internal market barriers, it is necessary to replace Member States' existing, divergent general clauses and legal principles. The single, common general prohibition established by this Directive therefore covers unfair commercial practices distorting consumers' economic behaviour. In order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution. The general prohibition is elaborated by rules on the two types of commercial practices which are by far the most common, namely misleading commercial practices and aggressive commercial practices.

(14) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice. In conformity with the laws and practices of Member States on misleading advertising, this Directive classifies misleading practices into misleading actions and misleading omissions. In respect of omissions, this Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision. Such information will not have to be disclosed in all advertisements, but only where the trader makes an invitation to purchase, which is a concept clearly defined in this Directive. The full harmonisation approach adopted in this Directive does not preclude the Member States from specifying in national law the main characteristics of particular products such as, for example, collectors' items or electrical goods, the omission of which would be material when an invitation to purchase is made. It is not the intention of this Directive to reduce consumer choice by prohibiting the promotion of products which look similar to other products unless this similarity confuses consumers as to the commercial origin of the product and is therefore misleading. This Directive should be without prejudice to existing Community law which expressly affords Member States the choice between several regulatory options for the protection of consumers in the field of commercial practices. In particular, this Directive should be without prejudice to Article 13(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [7].

(15) Where Community law sets out information requirements in relation to commercial communication, advertising and marketing that information is considered as material under this Directive. Member States will be able to retain or add information requirements relating to contract law and having contract law consequences where this is allowed by the minimum clauses in the existing Community law instruments. A non-exhaustive list of such information requirements in the acquis is contained in Annex II. Given the full harmonisation introduced by this Directive only the information required in Community law is considered as material for the purpose of Article 7(5) thereof. Where Member States have introduced information requirements over and above what is specified in Community law, on the basis of minimum clauses, the omission of that

extra information will not constitute a misleading omission under this Directive. By contrast Member States will be able, when allowed by the minimum clauses in Community law, to maintain or introduce more stringent provisions in conformity with Community law so as to ensure a higher level of protection of consumers' individual contractual rights.

(16) The provisions on aggressive commercial practices should cover those practices which significantly impair the consumer's freedom of choice. Those are practices using harassment, coercion, including the use of physical force, and undue influence.

(17) It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.

(18) It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase. The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.

(19) Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

(20) It is appropriate to provide a role for codes of conduct, which enable traders to apply the principles of this Directive effectively in specific economic fields. In sectors where there are specific mandatory requirements regulating the behaviour of traders, it is appropriate that these will also provide evidence as to the requirements of professional diligence in that sector. The control exercised by code owners at national or Community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged. With the aim of pursuing a high level of

consumer protection, consumers' organisations could be informed and involved in the drafting of codes of conduct.

(21) Persons or organisations regarded under national law as having a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings. While it is for national law to determine the burden of proof, it is appropriate to enable courts and administrative authorities to require traders to produce evidence as to the accuracy of factual claims they have made.

(22) It is necessary that Member States lay down penalties for infringements of the provisions of this Directive and they must ensure that these are enforced. The penalties must be effective, proportionate and dissuasive.

(23) Since the objectives of this Directive, namely to eliminate the barriers to the functioning of the internal market represented by national laws on unfair commercial practices and to provide a high common level of consumer protection, by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to eliminate the internal market barriers and achieve a high common level of consumer protection.

(24) It is appropriate to review this Directive to ensure that barriers to the internal market have been addressed and a high level of consumer protection achieved. The review could lead to a Commission proposal to amend this Directive, which may include a limited extension to the derogation in Article 3(5), and/or amendments to other consumer protection legislation reflecting the Commission's Consumer Policy Strategy commitment to review the existing acquis in order to achieve a high, common level of consumer protection.

(25) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1
GENERAL PROVISIONS

Article 1: Purpose
The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.

Article 2: Definitions
For the purposes of this Directive:

(a) "consumer" means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

(b) "trader" means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;
(c) "product" means any goods or service including immovable property, rights and obligations;
(d) "business-to-consumer commercial practices" (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;
(e) "to materially distort the economic behaviour of consumers" means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;
(f) "code of conduct" means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;
(g) "code owner" means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it;
(h) "professional diligence" means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;
(i) "invitation to purchase" means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;
(j) "undue influence" means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;
(k) "transactional decision" means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;
(l) "regulated profession" means a professional activity or a group of professional activities, access to which or the pursuit of which, or one of the modes of pursuing which, is conditional, directly or indirectly, upon possession of specific professional qualifications, pursuant to laws, regulations or administrative provisions.

Article 3: Scope

1. This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.
3. This Directive is without prejudice to Community or national rules relating to the health and safety aspects of products.
4. In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.
5. For a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to in Article 18 may, if considered appropriate, include a proposal to prolong this derogation for a further limited period.
6. Member States shall notify the Commission without delay of any national provisions applied on the basis of paragraph 5.
7. This Directive is without prejudice to the rules determining the jurisdiction of the courts.
8. This Directive is without prejudice to any conditions of establishment or of authorisation regimes, or to the deontological codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity on the part of the professional, which Member States may, in conformity with Community law, impose on professionals.
9. In relation to "financial services", as defined in Directive 2002/65/EC, and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.
10. This Directive shall not apply to the application of the laws, regulations and administrative provisions of Member States relating to the certification and indication of the standard of fineness of articles of precious metal.

Article 4: Internal market
Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.

CHAPTER 2
UNFAIR COMMERCIAL PRACTICES

Article 5: Prohibition of unfair commercial practices
1. Unfair commercial practices shall be prohibited.
2. A commercial practice shall be unfair if:
   (a) it is contrary to the requirements of professional diligence,
   and
   (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it

reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.
4. In particular, commercial practices shall be unfair which:
   (a) are misleading as set out in Articles 6 and 7,
   or
   (b) are aggressive as set out in Articles 8 and 9.
5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.

Section 1 Misleading commercial practices

Article 6: Misleading actions

1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:
   (a) the existence or nature of the product;
   (b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
   (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;
   (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
   (e) the need for a service, part, replacement or repair;
   (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
   (g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of

the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [8], or the risks he may face.

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:
   (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;
   (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
   (i) the commitment is not aspirational but is firm and is capable of being verified,
   and
   (ii) the trader indicates in a commercial practice that he is bound by the code.

Article 7: Misleading omissions

1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.
4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:
   (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
   (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
   (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;

(e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.

Section 2
Aggressive commercial practices

Article 8: Aggressive commercial practices
A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.
Article 9 Use of harassment, coercion and undue influence
In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:

(a) its timing, location, nature or persistence;

(b) the use of threatening or abusive language or behaviour;

(c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;

(d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;

(e) any threat to take any action that cannot legally be taken.

CHAPTER 3
CODES OF CONDUCT

Article 10: Codes of conduct
This Directive does not exclude the control, which Member States may encourage, of unfair commercial practices by code owners and recourse to such bodies by the persons or organisations referred to in Article 11 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article.
Recourse to such control bodies shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Article 11.

CHAPTER 4
FINAL PROVISIONS

Article 11: Enforcement

1. Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.
   Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:
   (a) take legal action against such unfair commercial practices;
   and/or
   (b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.
   It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 10. These facilities shall be available regardless of whether the consumers affected are in the territory of the Member State where the trader is located or in another Member State.
   It shall be for each Member State to decide:
   (a) whether these legal facilities may be directed separately or jointly against a number of traders from the same economic sector;
   and
   (b) whether these legal facilities may be directed against a code owner where the relevant code promotes non-compliance with legal requirements.
2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:
   (a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices;
   or
   (b) if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice,
   even without proof of actual loss or damage or of intention or negligence on the part of the trader.
   Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:
   - either with interim effect,
   or
   - with definitive effect,
   on the understanding that it is for each Member State to decide which of the two options to select.
   Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of unfair commercial practices the cessation of which has been ordered by a final decision:

(a) to require publication of that decision in full or in part and in such form as they deem adequate;
(b) to require in addition the publication of a corrective statement.

3. The administrative authorities referred to in paragraph 1 must:
(a) be composed so as not to cast doubt on their impartiality;
(b) have adequate powers, where they decide on complaints, to monitor and enforce the observance of their decisions effectively;
(c) normally give reasons for their decisions.

Where the powers referred to in paragraph 2 are exercised exclusively by an administrative authority, reasons for its decisions shall always be given. Furthermore, in this case, provision must be made for procedures whereby improper or unreasonable exercise of its powers by the administrative authority or improper or unreasonable failure to exercise the said powers can be the subject of judicial review.

Article 12: Courts and administrative authorities: substantiation of claims
Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11:
(a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case;
and
(b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.

Article 13: Penalties
Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.

Article 14
Amendments to Directive …… 84/450/EEC
……

Article 17: Information
Member States shall take appropriate measures to inform consumers of the national law transposing this Directive and shall, where appropriate, encourage traders and code owners to inform consumers of their codes of conduct.

Article 18: Review
1. By 12 June 2011 the Commission shall submit to the European Parliament and the Council a comprehensive report on the application of this Directive, in par-

ticular of Articles 3(9) and 4 and Annex I, on the scope for further harmonisation and simplification of Community law relating to consumer protection, and, having regard to Article 3(5), on any measures that need to be taken at Community level to ensure that appropriate levels of consumer protection are maintained. The report shall be accompanied, if necessary, by a proposal to revise this Directive or other relevant parts of Community law.

2. The European Parliament and the Council shall endeavour to act, in accordance with the Treaty, within two years of the presentation by the Commission of any proposal submitted under paragraph 1.

Article 19: Transposition
Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 12 June 2007. They shall forthwith inform the Commission thereof and inform the Commission of any subsequent amendments without delay.
They shall apply those measures by 12 December 2007. When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 20: Entry into force
This Directive shall enter into force on the day following its publication in the Official Journal of the European Union.

Article 21: Addressees
This Directive is addressed to the Member States.

Annex I Commercial practices which are in all circumstances considered unfair
Misleading commercial practices

1. Claiming to be a signatory to a code of conduct when the trader is not.
2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have.
4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.
5. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).
6. Making an invitation to purchase products at a specified price and then:
   (a) refusing to show the advertised item to consumers;
   or
   (b) refusing to take orders for it or deliver it within a reasonable time;
   or

(c) demonstrating a defective sample of it,
with the intention of promoting a different product (bait and switch)

7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.
8. Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.
9. Stating or otherwise creating the impression that a product can legally be sold when it cannot.
10. Presenting rights given to consumers in law as a distinctive feature of the trader's offer.
11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 89/552/EEC [1].
12. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.
13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.
14. Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.
15. Claiming that the trader is about to cease trading or move premises when he is not.
16. Claiming that products are able to facilitate winning in games of chance.
17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.
18. Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.
19. Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.
20. Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.
21. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.
22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

23. Creating the false impression that after-sales service in relation to a product is available
in a Member State other than the one in which the product is sold.

Aggressive commercial practices

24. Creating the impression that the consumer cannot leave the premises until a contract is formed.
25. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.
26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC [2] and 2002/58/EC.
27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.
28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.
29. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling).
30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.
31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:
    - there is no prize or other equivalent benefit,
    or
    - taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

[1] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989, p. 23). Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

ANNEX II

COMMUNITY LAW PROVISIONS SETTING OUT RULES FOR ADVERTISING AND COMMERCIAL COMMUNICATION

4. Case Köck

Judgment of the Court of 17 January 2013

Summary:

Parties:
Georg Köck
v
Schutzverband gegen unlauteren Wettbewerb,

The main proceedings and the question referred for a preliminary ruling

17. Mr Köck, a trader established in Innsbruck (Austria), announced in a newspaper a 'total clearance' of the products in his shop, and also advertised it in front of his shop by means of billboards and window stickers. In addition to the term 'total clearance', he used expressions such as 'Everything must go' and 'Up to 90% off'. Mr Köck had not applied to the district administrative authority for authorisation to announce the clearance sale.

18. Since it considered that Mr Köck's advertisement was an announcement of a clearance sale within the meaning of the national legislation and infringed Paragraph 33a et seq. of the UWG, as it had not been the subject of prior administrative authorisation, the Schutzverband gegen den unlauteren Wettbewerb brought an action in the Landesgericht Innsbruck (Regional Court, Innsbruck) for a prohibitory order and publication of the judgment.

19. That action was dismissed, and the Schutzverband gegen den unlauteren Wettbewerb appealed to the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck). That court issued an interim order as sought by the appellant.

20. Mr Köck brought an appeal on a point of law (Revisionsrekurs) against the order of the Oberlandesgericht Innsbruck before the referring court.

21. According to the order for reference, first, the judicial proceedings in the present case concern solely the question whether Mr Köck has an appropriate authorisation issued by an administrative authority. In those proceedings, the assessment of whether a commercial practice is unfair is transferred from the courts to the administrative authorities, and there is no presumption that the practice is unfair 'in all circumstances' from the point of view of Article 5(5) of the Directive.

23. Since it considered that the outcome of the main proceedings depended on the interpretation of provisions of the Directive, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:
'Do Articles 3(1) and 5(5) of [the Directive] or other provisions of that directive preclude a national provision under which the announcement of a clearance sale without the authorisation of the competent administrative authority is not

permitted and for that reason must be prohibited in judicial proceedings, without it being necessary in those proceedings for the court to consider whether such a commercial practice is misleading, aggressive or otherwise unfair?'

Consideration of the question referred

25. To answer that question, it must be determined, as a preliminary point, whether a commercial practice such as the announcement of a clearance sale, mentioned in Paragraph 33a(1) of the UWG, is a 'commercial practice' within the meaning of Article 2(d) of the Directive, and accordingly subject to the rules laid down in the Directive.

27. Advertising measures, such as those at issue in the main proceedings, which concern the sale of goods to consumers on advantageous terms or at advantageous prices clearly form part of the commercial strategy of an operator and are aimed directly at the promotion and sale of those goods. It follows that they are 'commercial practices' within the meaning of Article 2(d) of the Directive and consequently fall within its material scope.

28. That having been determined, it must be examined whether provisions of national law such as Paragraphs 33b and 34(3) of the UWG can fall within the scope of the Directive in terms of their objectives.

30. As may be seen from recital 6 in the preamble to the Directive, it is only national legislation relating to unfair commercial practices which harm 'only' competitors' economic interests or which relate to a transaction between traders that is excluded from the scope of the Directive (Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 21).

31. In the case at issue in the main proceedings, as the referring court states, an 'announcement of a clearance sale' within the meaning of Paragraph 33a(1) of the UWG, a provision applied in the main proceedings, is a 'commercial practice' within the meaning of the Directive. The referring court thus implicitly accepts, as the Advocate General observes in point 38 of her Opinion, that that provision is aimed at the protection of consumers, and not solely the protection of competitors and other operators in the market.

32. Moreover, Paragraph 33b of the UWG provides that an announcement of a clearance sale is only lawful if it has been the subject of prior administrative authorisation. It also lists the elements that must accompany an application for authorisation. Paragraph 34(3) of the UWG for its part provides that any failure to comply with the provisions of Paragraphs 33a to 33d of that law may give rise to an action for a prohibitory order or, in the case of fault, for damages.

33. In those circumstances, it is clear that provisions of national law such as Paragraphs 33b and 34(3) in conjunction with Paragraph 33a(1) of the UWG which prohibit, subject to penalties, a commercial practice that has not been authorised constitute measures intended to combat unfair commercial practices in the interests of consumers, and therefore fall within the scope of the Directive.

34. That having been established, it must be ascertained whether the Directive precludes national legislation such as that at issue in the main proceedings.

35. According to settled case-law, the only commercial practices which can be regarded by national law as unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the Directive are those listed in Annex I to the Directive. Consequently, a practice not covered by that annex may be declared unfair only after an examination of its unfairness in accordance with the

criteria set out in Articles 5 to 9 (see, to that effect, Case C 304/08 Plus Warenhandelsgesellschaft [2010] ECR I 217, paragraphs 41 to 45, and Mediaprint Zeitungs- und Zeitschriftenverlag, paragraphs 30 to 34).

36. A commercial practice consisting in the announcement of a clearance sale, as referred to in Paragraph 33a(1) of the UWG, by a trader who has not obtained the corresponding prior authorisation from the competent authority cannot be regarded as falling, as such, within the practices listed in Annex I to the Directive.

43. In those circumstances, it must be assessed whether the national legislation referred to in paragraph 33 above runs counter to the system introduced by the Directive.

44. The Directive, as the Advocate General observes in points 44 to 55 of her Opinion, leaves Member States a margin of discretion as to the choice of national measures intended, in accordance with Articles 11 and 13 of the Directive, to combat unfair commercial practices, on condition in particular that they are adequate and effective and that the penalties thus laid down are effective, proportionate and dissuasive.

45. Given that anticipatory or preventive measures on the part of the Member State may in certain circumstances prove more adequate and more appropriate than subsequent measures ordering the cessation of a commercial practice that has already been carried out or is imminent, those national measures may consist inter alia in providing for a system of prior authorisation, with penalties for non compliance, of certain practices whose nature makes such measures necessary with a view to combating unfair commercial practices.

46. However, the system laid down by those national measures, which constitutes the transposition of the Directive, cannot result in a commercial practice being prohibited solely because prior authorisation has not been granted by the competent authority, without there having been an assessment of the practice's unfairness.

50. It follows from all the foregoing that the Directive must be interpreted as precluding a national court from ordering the cessation of a commercial practice not covered by Annex I to the Directive on the sole ground that the practice has not been the subject of prior authorisation by the competent administrative authority, without itself carrying out an assessment of the unfairness of the practice in question against the criteria set out in Articles 5 to 9 of the Directive.

5. Case Good News

Judgment of the Court of 17 October 2013

Summary:

Parties:
RLvS Verlagsgesellschaft mbH
v
Stuttgarter Wochenblatt GmbH

Facts and the question referred for a preliminary ruling

21. Stuttgarter Wochenblatt publishes a weekly newspaper of the same name, whilst RLvS, established in Stuttgart (Germany), publishes the 'GOOD NEWS' advertiser. In the June 2009 edition of the advertiser, RLvS published two articles for which it had received remuneration from sponsors.
24. Stuttgarter Wochenblatt considers that the two publications infringe Paragraph 10 of the Land Press Law as they are not clearly identified as being advertisements. They submit that, since they were sponsored, they are publications for remuneration within the meaning of that provision.
25. In the action at first instance brought before it by Stuttgarter Wochenblatt, the Landgericht Stuttgart (Regional Court, Stuttgart) upheld the action and ordered RLvS not to publish or cause to be published for remuneration in the GOOD NEWS advertiser any publication not identified by the term 'advertisement' ('Anzeige'), in the manner of the two articles in question in the June 2009 issue and the nature of which as advertisements is not generally apparent from their arrangement and layout. RLvS appealed against that judgment before the Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart), but was unsuccessful.
26. In its appeal on a point of law ('Revision') before the Bundesgerichtshof (Federal Court of Justice) (Germany), RLvS maintains its form of order seeking dismissal of Stuttgarter Wochenblatt's application, arguing that Paragraph 10 of the Land Press Law infringes European Union law and is therefore not applicable.
27. The Bundesgerichtshof is uncertain as to whether the full and complete application of Paragraph 10 of the Land Press Law, in the context of Paragraph

4(11) of the Federal Law on unfair competition, complies with EU law, in particular in the light of the complete harmonisation by Directive 2005/29 of the rules concerning unfair business-to-consumer commercial practices. Given that, in the main proceedings, both lower courts granted Stuttgarter Wochenblatt's application on the basis of Paragraphs 4(11) of the Federal Law on unfair competition and Paragraph 10 of the Land Press Law, the Bundesgerichtshof wishes to leave open the question whether the publications at issue may also infringe Paragraph 3(3) of the Federal Law on unfair competition, read in conjunction with point 11 of the annex relating to that paragraph, and Paragraph 4(3) of that law, provisions which correspond in essence to Article 5(5) of Directive 2005/29, read in conjunction with point 11 of Annex I thereto, and Article 7(2) of that directive.

29. In those circumstances the Bundesgerichtshof decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'Do Article 7(2) and point 11 of Annex I, in conjunction with Articles 4 and 3(5), of [Directive 2005/29] preclude the application of a national provision (in this case, Paragraph 10 of [the Land Press Law] which is intended not only to protect consumers against misleading practices but also to protect the independence of the press and which, in contrast to Article 7(2) and point 11 of Annex I to the Directive, prohibits any publication for remuneration, irrespective of the purpose thereby pursued, if that publication is not identified by the use of the term 'advertisement', unless it is already evident from the arrangement and layout of the publication that it is an advertisement?'

The question referred for a preliminary ruling

33. On that point, it is true that since Directive 2005/29 effects a complete harmonisation of the rules on unfair business-to-consumer commercial practices, two points must be noted: (i) only the 31 commercial practices listed in Annex I to that directive are to be deemed unfair 'in all circumstances' on the territory of the Member States; and (ii) the possibility the Member States have for maintaining or establishing in their territory measures which have as their aim or effect the classification of commercial practices as unfair on grounds relating to maintenance of the pluralism of the press does not appear amongst the derogations from the scope of the directive as set out in recitals 6 and 9 and in Article 3 thereof (see, to that effect, Case C 540/08 Mediaprint Zeitungs- und Zeitschriftenverlag [2010] ECR I 10909, paragraphs 26, 27 and 34).

34. However, such considerations are relevant in circumstances such as those of the main proceedings only if the practices in question, namely the publication of editorial content by a newspaper publisher, do in fact come within the scope of Directive 2005/29.

35. In that connection, even when a national provision does pursue consumer protection objectives, on which it is for the referring court to make a finding, in order to ascertain whether such a provision comes within the scope of Directive 2005/29 it is also necessary that the conduct covered by that national provision is a commercial practice within the meaning of Article 2(d) of that directive (see, to that effect, Case C 304/08 Plus Warenhandelsgesellschaft [2010] ECR I 217, paragraph 35; Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 16; and order in Case C 288/10 Wamo [2011] ECR I 5835, paragraphs 28 and 29).

37. Although Directive 2005/29 gives a particularly broad definition of 'commercial practices' (see Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 17, and order in Wamo, paragraph 30), the fact remains that the practices covered by it must be commercial in nature, that is to say, they must originate from traders, and they must be directly connected with the promotion, sale or supply of their products to consumers.
39. In circumstances such as those at issue in the main proceedings, however, it is common ground that the publications in question, namely two articles with informative and descriptive editorial content, are not such as to promote the newspaper publisher's product, in this case a free newspaper, but rather the products and services of undertakings which are not parties to the main proceedings.
40. Even though such publications are thus liable to be classified as commercial practices, there are two considerations which must be borne in mind. Firstly, even if a direct connection could be established with respect to such a piece of commercial communication, that connection would be with the products and services of those undertakings, in this case, in the main proceedings, Scharr and Germanwings. Secondly, it is common ground that RLvS did not act in the name of or on behalf of those undertakings within the meaning of Article 2(b) of Directive 2005/29. In such a scenario, and given its ratione personae scope, Directive 2005/29 is indeed intended to protect consumers of products and services of those same undertakings and their legitimate competitors.
41. However, since the fact that the newspaper publisher proceeds with such publications which are liable to promote – possibly indirectly – the products and services of a third party is not liable to alter significantly the economic behaviour of the consumer in his decision to purchase or take possession of the (free) newspaper in question (on this aspect see Mediaprint Zeitungs- und Zeitschriftenverlag, paragraphs 44 and 45), such a publishing practice is not in itself liable to be classified as a 'commercial practice' within the meaning of Article 2(d) of Directive 2005/29.
42. In such circumstances, that directive is not intended to protect a competitor of the newspaper publisher in question on the ground that the latter proceeded with publications which are liable to promote the products or services of advertisers sponsoring those publications, without the identification as 'advertising', contrary to the requirement laid down in Paragraph 10 of the Land Press Law.
43. That delimitation on the scope of Directive 2005/29 is corroborated, first, by point 11 of Annex I to that directive. Under point 11 and without prejudice to Directive 89/552, unfair commercial practice covers in all circumstances the use of editorial content in the media to promote a product where a trader has paid for the editorial content, without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).
44. Although the possibility cannot be ruled out that a newspaper publisher may itself employ, in its products or in other media, a commercial practice which may be classified as unfair in relation to the consumer concerned, in this case the reader, for example, by offering the chance of winning a prize in games, puzzles or competitions, thereby encouraging the consumer to purchase the product concerned, namely a newspaper (see, in that regard, in the context of Article 30 EC, now Article 36 TFEU, Case C 368/95 Familiapress [1997] ECR I 3689, paragraph 28), it must be remembered that point 11 of Annex I to Directive 2005/29 is not intended as such to require newspaper publishers to

prevent possible unfair commercial practices by advertisers for which a direct connection could thereby be potentially established with the promotion, sale or supply to consumers of the products or services of those advertisers.

47. Consequently, in a situation such as that at issue in the main proceedings, even if, according to the findings made by the referring court, which are disputed by the German Government, the application of Paragraph 10 of the Land Press Law to the disputed publications, in the context of Paragraph 4(11) of the Federal Law on unfair competition, pursues both the objective of guaranteeing the independence of the press and that of protecting consumers against misleading practices, that cannot have the effect of extending the application of Directive 2005/29 to practices or persons from whom those practices originate who do not come within its scope.

49. Since the European Union legislature has not yet adopted this kind of secondary legislation for the written press, the Member States retain the power to impose obligations on newspaper publishers to indicate when editorial content has been sponsored, whilst complying however with the provisions of the Treaty, in particular those relating to the freedom to provide services and freedom of establishment.

50. In the light of the foregoing, the answer to the question referred is that, in circumstances such as those of the main proceedings, Directive 2005/29 may not be relied on as against newspaper publishers, with the result that, in those circumstances, that directive must be interpreted as not precluding the application of a national provision under which those publishers are required to identify specifically, in this case through the use of the term ‘advertisement’ (‘Anzeige’), any publication in their periodicals for which they receive remuneration, unless it is already evident from the arrangement and layout of the publication that it is an advertisement.

6. Case CDiscount

Judgment of the Court of 8 September 2015

Summary:

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 9 September 2014 in the criminal proceedings against Cdiscount SA

The case in the main proceedings and the question referred for a preliminary ruling

14. As transpires from the decision to refer, on 16 October 2009 the services of the Gironde Direction départementale de la protection des personnes (departmental body responsible for, inter alia, competition and consumer protection) drew up an official report recording several infringements of the Decree of 31 December 2008.

15. Those services found that Cdiscount, which operates an e-commerce website, had not indicated in the context of reduced price promotions either the reference prices before the application of any reduction, or the price recommended by the manufacturer before the reduction. Failure by retailers to display or mark the reference price during the announcement of reduced prices amounts to a breach of the provisions of that decree and of Article L. 113-3 of the Consumer Code, punishable by a criminal penalty.

16. Cdiscount was summoned before the tribunal de police (Local Criminal Court) of Bordeaux which dismissed Cdiscount's argument that the Decree of 31 December 2008 is incompatible with the provisions of the Unfair Commercial Practices Directive; it found the accused guilty of the offending conduct.
17. Cdiscount lodged an appeal against this decision before the Court of Appeal of Bordeaux which, by judgment of 5 July 2013, upheld the decision on the grounds that the marking or display of the reference price is not in itself a commercial practice but a way of executing the commercial practice of announcing price reductions. Therefore, this type of marking or display would not fall within the scope of the Unfair Commercial Practices Directive.
18. Cdiscount's conviction having been upheld on appeal, Cdiscount brought an appeal in cassation on a point of law.
20. Taking the view that the outcome of the case depends on an interpretation of the Unfair Commercial Practices Directive, the Cour de cassation decided to stay proceedings and referred the following question to the Court of Justice for a preliminary ruling:
'Do Articles 5 to 9 of the [Unfair Commercial Practices Directive] preclude a rule which prohibits, in all circumstances and regardless of the impact they may have on the decision of the average consumer, price reductions which are not calculated against a reference price laid down by regulation?'

Consideration of the question referred

24. In order to answer this question, it must first be established whether Articles 1(2) and 2 of the Decree of 31 December 2008, which apply to the facts of the main proceedings, pursue the objective of protecting consumers, so that they are liable to fall within the scope of the Unfair Commercial Practices Directive.
25. In accordance with recital 8, the Directive under consideration 'directly protects consumer economic interests from unfair business-to-consumer commercial practices' and guarantees, as stipulated for instance in Article 1, 'a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interest' (order in INNO, C 126/11, EU:C:2011:851, paragraph 27 and the case-law cited).
26. By contrast, in accordance with recital 6, the national laws on unfair commercial practices which harm 'only' competitors' economic interests or which relate to transactions between traders are excluded from the scope of the Unfair Commercial Practices Directive (order in INNO, C 126/11, EU:C:2011:851, paragraph 28 and the case-law cited).
28. It is worth clarifying that it is not for the Court to rule on the interpretation of national law in the context of a reference for a preliminary ruling. This is the exclusive role of the referring court. The Court must take account, under the division of jurisdiction between the Courts of the European Union and the national courts, of the factual and legislative context, as defined in the decision for reference, in which the questions put to it are set (orders in Koukou, C 519/08, EU:C:2009:269, paragraph 43 and the case-law cited, and Wamo, C 288/10, EU:C:2011:443, paragraph 27).
29. It is therefore for the national court and not for this Court to establish whether the national provisions at issue in the main proceedings, namely, Articles 1(2) and 2 of the Decree of 31 December 2008 concerning price reduction announcements to consumers, actually pursue objectives relating to consumer

protection, in order to determine whether such provisions are liable to fall within the scope of the Unfair Commercial Practices Directive (order in Wamo, C 288/10, EU:C:2011:443, paragraph 28).

30. Were the national court to reach such a conclusion, it would still be necessary to establish whether the announcements of price reductions which do not show the reference price when the price is marked or displayed, which is the subject of the prohibition at issue in the main proceedings, constitute commercial practices within the meaning of Article 2(d) of the Unfair Commercial Practices Directive and are therefore subject to the rules laid down by that directive (see, to that effect, order in Wamo, C 288/10, EU:C:2011:443, paragraph 29).

32. Price reductions, such as those at issue in the main proceedings, intended to induce consumers to buy products on an e-commerce website, clearly form part of an operator's commercial strategy and relate directly to the promotion and sale of these products. It follows that these reductions amount to commercial practices within the meaning of Article 2(d) of the Unfair Commercial Practices Directive and, consequently, come within its material scope (see, to that effect, order in Wamo, C 288/10, EU:C:2011:443, paragraph 31).

33. That having been established, it must be ascertained whether the Unfair Commercial Practices Directive precludes a prohibition of price reduction announcements which do not contain the reference price when the price is marked or displayed, such as that provided for in Articles 1(2) and 2 of the Decree of 31 December 2008.

34. In that regard, it is important to bear in mind, first of all, that since the Unfair Commercial Practices Directive fully harmonises the rules relating to unfair business-to-consumer commercial practices, Member States may not adopt stricter rules than those provided for in the Directive, as expressly provided for in Article 4 thereof, even in order to achieve a higher level of consumer protection (order in Wamo, C 288/10, EU:C:2011:443, paragraph 33 and the case-law cited).

35. Next, it must also be borne in mind that Article 5 of the Unfair Commercial Practices Directive sets out the criteria which make it possible to determine the circumstances in which a commercial practice must be considered to be unfair and therefore prohibited.

38. Lastly, the Directive sets out, in its Annex I, an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of the Directive, are regarded as unfair 'in all circumstances'. Consequently, as Recital 17 in the preamble to the Directive expressly states, only those commercial practices can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the Unfair Commercial Practices Directive (order in Wamo, C 288/10, EU:C:2011:443, paragraph 37 and the case-law cited).

39. As regards the national provisions at issue in the main proceedings, it is undisputed that practices which consist of announcing to consumers price reductions which do not show the reference price when the price is marked or displayed do not appear in Annex I to the Unfair Commercial Practices Directive. Therefore, they may not be prohibited in all circumstances, but only after a specific assessment has determined whether the practices are unfair (see, to that effect, order in Wamo, C 288/10, EU:C:2011:443, paragraph 38).

40. The fact however remains that Articles 1(2) and 2 of the Decree of 31 December 2008 prohibit in a general manner announcements of price reductions which do not show the reference price when the price is marked or displayed,

without any need to determine by having regard to the facts of each particular case, whether the commercial transaction at issue is 'unfair' in the light of the criteria set out in Articles 5 to 9 of the Unfair Commercial Practices Directive (see, to that effect, order in Wamo, C 288/10, EU:C:2011:443, paragraph 39 and the case-law cited).

41. In those circumstances, the answer to the question referred is that the Unfair Commercial Practices Directive must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which provides for a general prohibition of announcements of price reductions, in so far as the provision pursues objectives relating to consumer protection. It is for the referring court to assess whether this is the case in the main proceedings.

7. Case Uber C-434715

JUDGMENT OF THE COURT (Grand Chamber)
20 December 2017 (*)

(Reference for a preliminary ruling — Article 56 TFEU — Article 58(1) TFEU — Services in the field of transport — Directive 2006/123/EC — Services in the internal market — Directive 2000/31/EC — Directive 98/34/EC — Information society services — Intermediation service to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys — Requirement for authorisation)

In Case C 434/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona, Spain), made by decision of 16 July 2015, received at the Court on 7 August 2015, in the proceedings

Asociación Profesional Élite Taxi
v.
Uber Systems Spain SL,

THE COURT (Grand Chamber),
composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby (Rapporteur), C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 November 2016,
after considering the observations submitted on behalf of:

- Asociación Profesional Elite Taxi, by M. Balagué Farré and D. Salmerón Porras, abogados, and J.A. López-Jurado González, procurador,
- Uber Systems Spain SL, by B. Le Bret and D. Calciu, avocats, R. Allendesalazar Corcho, J.J. Montero Pascual, C. Fernández Vicién and I. Moreno-Tapia Rivas, abogados,
- the Spanish Government, by M.A. Sampol Pucurull and A. Rubio González, acting as Agents,
- the Estonian Government, by N. Grünberg, acting as Agent,

– Ireland, by E. Creedon, L. Williams and A. Joyce, acting as Agents, and A. Carroll, Barrister,
– the Greek Government, by M. Michelogiannaki, acting as Agent,
– the French Government, by D. Colas, G. de Bergues and R. Coesme, acting as Agents,
– the Netherlands Government, by H. Stergiou and M. Bulterman, acting as Agents,
– the Polish Government, by B. Majczyna, acting as Agent,
– the Finnish Government, by S. Hartikainen, acting as Agent,
– the European Commission, by É. Gippini Fournier, F. Wilman, J. Hottiaux and H. Tserepa-Lacombe, acting as Agents,
– the EFTA Surveillance Authority, by C. Zatschler, Ø. Bø and C. Perrin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2017, gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Articles 56 TFEU, Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34'), Article 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), and Articles 2 and 9 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).
2. The request has been made in proceedings between Asociación Profesional Elite Taxi ('Elite Taxi'), a professional taxi drivers' association in Barcelona (Spain), and Uber Systems Spain SL, a company related to Uber Technologies Inc., concerning the provision by the latter, by means of a smartphone application, of the paid service consisting of connecting non-professional drivers using their own vehicle with persons who wish to make urban journeys, without holding any administrative licence or authorisation.

Legal context

EU law

Directive 98/34

4. Article 1(2) of Directive 98/34 provides:

'For the purposes of this Directive, the following meanings shall apply:

…

(2) "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– "at a distance" means that the service is provided without the parties being simultaneously present,

– “by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
– “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.
…’

5. In accordance with Articles 10 and 11 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), Directive 98/34 was repealed on 7 October 2015. Nevertheless, Directive 98/34 remains applicable ratione temporis to the dispute in the main proceedings.

Directive 2000/31

6. Article 2(a) of Directive 2000/31 provides that, for the purposes of the directive, ‘information society services’ means services within the meaning of Article 1(2) of Directive 98/34.
7. Article 3(2) and (4) of Directive 2000/31 states:
   2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

   …

   4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:
      (a) the measures shall be:
         (i) necessary for one of the following reasons:
            – public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
            – the protection of public health,
            – public security, including the safeguarding of national security and defence,
            – the protection of consumers, including investors;
         (ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;
         (iii) proportionate to those objectives;
      (b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,
– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.'

Directive 2006/123

8. According to recital 21 of Directive 2006/123, 'transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive'.

9. Article 2(2)(d) of Directive 2006/123 provides that the directive does not apply to services in the field of transport, including port services, falling within the scope of Title V of Part Three of the EC Treaty, which is now Title VI of Part Three of the FEU Treaty.

10. Under Article 9(1) of Directive 2006/123, which falls under Chapter III thereof, headed 'Freedom of establishment for providers':

'Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.'

10. Under Chapter IV of the directive, headed 'Free movement of services', Article 16 lays down the procedures enabling service providers to provide services in a Member State other than that in which they are established.

Spanish law

11. In the metropolitan area of Barcelona, taxi services are governed by Ley 19/2003 del Taxi (Law No 19/2003 on taxi services) of 4 July 2003 (DOGC No 3926 of 16 July 2003 and BOE No 189 of 8 August 2003) and by Reglamento Metropolitano del Taxi (Regulation on taxi services in the metropolitan area of Barcelona) of 22 July 2004 adopted by the Consell Metropolitá of the Entitat Metropolitana de Transport de Barcelona (Governing Board of the Transport management body for the metropolitan area of Barcelona, Spain).

12. Under Article 4 of that law:

1. The provision of urban taxi services is subject to the prior grant of a licence entitling the licence holder for each vehicle intended to carry out that activity.
2. Licences for the provision of urban taxi services are issued by the town halls or the competent local authorities in the territory where the activity shall be carried out.
3. The provision of interurban taxi services is subject to the prior grant of the corresponding authorisation issued by the ministry of transport of the regional government.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13. On 29 October 2014, Elite Taxi brought an action before the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona, Spain) seeking a declaration from that court that the activities of Uber Systems Spain infringe the legislation in force and amount to misleading practices and acts of unfair competition within the meaning of Ley 3/1991 de Competencia Desleal (Law No 3/1991 on unfair competition) of 10 January 1991. Elite Taxi also claims that Uber Systems Spain should be ordered to cease its unfair conduct consisting of supporting other companies in the group by providing on-demand booking services by means of mobile devices and the internet. Lastly, it claims that the court should prohibit Uber Systems Spain from engaging in such activity in the future.

14. The Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) noted at the outset that although Uber Systems Spain carries out its activity in Spain, that activity is linked to an international platform, thus justifying the assessment at EU level of the actions of that company. It also observed that neither Uber Systems Spain nor the non-professional drivers of the vehicles concerned have the licences and authorisations required under the Regulation on taxi services in the metropolitan area of Barcelona of 22 July 2004.

15. In order to determine whether the practices of Uber Systems Spain and related companies (together, ‘Uber’) can be classified as unfair practices that infringe the Spanish rules on competition, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) considers it necessary to ascertain whether or not Uber requires prior administrative authorisation. To that end, the court considers that it should be determined whether the services provided by that company are to be regarded as transport services, information society services or a combination of both. According to the court, whether or not prior administrative authorisation may be required depends on the classification adopted. In particular, the referring court takes the view that if the service at issue were covered by Directive 2006/123 or Directive 98/34, Uber’s practices could not be regarded as unfair practices.

16. To that end, the referring court states that Uber contacts or connects with non-professional drivers to whom it provides a number of software tools — an interface — which enables them, in turn, to connect with persons who wish to make urban journeys and who gain access to the service through the eponymous software application. According to the court, Uber’s activity is for profit.

17. The referring court also states that the request for a preliminary ruling in no way concerns those factual elements but solely the legal classification of the service at issue.

18. Consequently, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Inasmuch as Article 2(2)(d) of [Directive 2006/123] excludes transport activities from the scope of that directive, must the activity carried out for profit by [Uber Systems Spain], consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — in the words of

[Uber Systems Spain], "smartphone and technological platform" interface and software application — which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of [Directive 98/34]?

(2) Within the identification of the legal nature of that activity, can it be considered to be … in part an information society service, and, if so, ought the electronic intermediary service to benefit from the principle of freedom to provide services as guaranteed in [EU] legislation — Article 56 TFEU and Directives [2006/123] and … [2000/31]?

(3) If the service provided by [Uber Systems Spain] were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, is Article 15 of Law [No 3/1991] on unfair competition [of 10 January 1991] — concerning the infringement of rules governing competitive activity — contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorisation schemes, when the reference to national laws or to legal provisions is made without taking into account the fact that the scheme for obtaining licences, authorisations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment?

(4) If it is confirmed that Directive [2000/31] is applicable to the service provided by [Uber Systems Spain], are restrictions in one Member State regarding the freedom to provide the electronic intermediary service from another Member State, in the form of making the service subject to an authorisation or a licence, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, valid measures that constitute derogations from Article 3(2) of Directive [2000/31] in accordance with Article 3(4) thereof?'

The jurisdiction of the Court

19. Elite Taxi claims that the legal classification of the service provided by Uber does not fall within the Court's jurisdiction because that classification requires a decision on issues of fact. In those circumstances, according to Elite Taxi, the Court has no jurisdiction to answer the questions referred.

20. In that regard, it should be recalled that the referring court has clearly stated, as is apparent from paragraph 17 above, that its questions concern solely the legal classification of the service at issue and not a finding or assessment of the facts of the dispute in the main proceedings. The classification under EU law of facts established by that court involves, however, the interpretation of EU law for which, in the context of the procedure laid down in Article 267 TFEU, the Court of Justice has jurisdiction (see, to that effect, judgment of 3 December 2015, Banif Plus Bank, C 312/14, EU:C:2015:794, paragraphs 51 and 52).

21. The Court therefore has jurisdiction to reply to the questions referred.

Consideration of the questions referred
Admissibility

22. The Spanish, Greek, Netherlands, Polish and Finnish Governments, the European Commission and the EFTA Surveillance Authority note that the order for reference is insufficiently precise as regards both the applicable national legislation and the nature of the activities at issue in the main proceedings.
23. In that regard, it should be recalled that the Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it (judgment of 27 June 2017, Congregación de Escuelas Pías Provincia Betania, C 74/16, EU:C:2017:496, paragraph 25).
24. On that last point, the need to provide an interpretation of EU law which will be of use to the referring court requires that court, according to Article 94(a) and (b) of the Rules of Procedure of the Court, to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based (see judgment of 10 May 2017, de Lobkowicz, C 690/15, EU:C:2017:355, paragraph 28).
25. Furthermore, according to the settled case-law of the Court, the information provided in orders for reference not only enables the Court to give useful answers but also serves to ensure that the governments of the Member States and other interested persons are given an opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under Article 23, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case file that may be sent to the Court by the national court (judgment of 4 May 2016, Pillbox 38, C 477/14, EU:C:2016:324, paragraph 26 and the case-law cited).
26. In the present case, it must be noted that the order for reference, while brief in its reference to the relevant national provisions, nevertheless serves to identify those that may apply to the provision of the service at issue in the main proceedings, from which it would follow that a licence or prior administrative authorisation is required for that purpose.
27. Similarly, the referring court’s description of the service provided by Uber, the content of which is set out in paragraph 16 above, is sufficiently precise.
28. Lastly, in accordance with Article 94(c) of the Rules of Procedure, the referring court sets out precisely the reasons for its uncertainty as to the interpretation of EU law.
29. Consequently, it must be held that the order for reference contains the factual and legal material necessary to enable the Court to give a useful answer to the referring court and to enable interested persons usefully to take a position on the questions referred to the Court, in accordance with the case-law referred to in paragraph 25 above.
30. The Polish Government also expresses its doubts as to whether Article 56 TFEU, inter alia, is applicable to the present case, on the ground that the matter in the main proceedings is allegedly a purely internal matter.
31. However, it is apparent from the order for reference, in particular the information referred to in paragraph 14 above and the other documents in the file before the Court, that the service at issue in the main proceedings is provided

through a company that operates from another Member State, namely the Kingdom of the Netherlands.

32. In those circumstances, the request for a preliminary ruling must be held to be admissible.

Substance

33. By its first and second questions, which should be considered together, the referring court asks, in essence, whether Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123 and Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, is to be classified as a 'service in the field of transport' within the meaning of Article 58(1) TFEU and, therefore, excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31, or whether, on the contrary, the service is covered by Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

34. In that regard, it should be noted that an intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle. It should be added that each of those services, taken separately, can be linked to different directives or provisions of the FEU Treaty on the freedom to provide services, as contemplated by the referring court.

35. Accordingly, an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an 'information society service' within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31. That intermediation service, according to the definition laid down in Article 1(2) of Directive 98/34, is 'a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

36. By contrast, non-public urban transport services, such as a taxi services, must be classified as 'services in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123, read in the light of recital 21 thereof (see, to that effect, judgment of 1 October 2015, Trijber and Harmsen, C 340/14 and C 341/14, EU:C:2015:641, paragraph 49).

37. It is appropriate to observe, however, that a service such as that in the main proceedings is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey.

38. In a situation such as that with which the referring court is concerned, where passengers are transported by non-professional drivers using their own vehicle, the provider of that intermediation service simultaneously offers urban transport services, which it renders accessible, in particular, through software

tools such as the application at issue in the main proceedings and whose general operation it organises for the benefit of persons who wish to accept that offer in order to make an urban journey.

39. In that regard, it follows from the information before the Court that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.

40. hat intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as ‘an information society service’ within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as ‘a service in the field of transport’ within the meaning of Article 2(2)(d) of Directive 2006/123.

41. That classification is indeed confirmed by the case-law of the Court, according to which the concept of ‘services in the field of transport’ includes not only transport services in themselves but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport (see, to that effect, judgment of 15 October 2015, Grupo Itevelesa and Others, C 168/14, EU:C:2015:685, paragraphs 45 and 46, and Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017, EU:C:2017:376, paragraph 61).

42. Consequently, Directive 2000/31 does not apply to an intermediation service such as that at issue in the main proceedings.

43. Such service, in so far as it is classified as ‘a service in the field of transport’, does not come under Directive 2006/123 either, since this type of service is expressly excluded from the scope of the directive pursuant to Article 2(2)(d) thereof.

44. Moreover, since the intermediation service at issue in the main proceedings is to be classified as ‘a service in the field of transport’, it is covered not by Article 56 TFEU on the freedom to provide services in general but by Article 58(1) TFEU, a specific provision according to which ‘freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport’ (see, to that effect, judgment of 22 December 2010, Yellow Cab Verkehrsbetrieb, C 338/09, EU:C:2010:814, paragraph 29 and the case-law cited).

45. Accordingly, application of the principle governing freedom to provide services must be achieved, according to the FEU Treaty, by implementing the common transport policy (judgment of 22 December 2010, Yellow Cab Verkehrsbetrieb, C 338/09, EU:C:2010:814, paragraph 30 and the case-law cited).

46. However, it should be noted that non-public urban transport services and services that are inherently linked to those services, such as the intermediation service at issue in the main proceedings, has not given rise to the adoption by the European Parliament and the Council of the European Union of common rules or other measures based on Article 91(1) TFEU.
47. It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty.
48. Accordingly, the answer to the first and second questions is that Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123 and Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ within the meaning of Article 58(1) TFEU. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.
49. In the light of the answer given to the first and second questions, it is not necessary to provide an answer to the third and fourth questions, which were referred on the assumption that Directive 2006/123 or Directive 2000/31 applied.

VIII. National Legislation on Cartel Law (Germany)

1. Act Against Restaints of Competition – GWB (selection only)

Full citation: Act against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 1 of the law of 1 June 2017 (Federal Law Gazette I, p. 1416)

Note: In Germany, there already is a 10th amendment of the GWB from 2018. The content of the printed laws is still from the 9th amendment from 2017.

Part 1 Restraints of Competition

Chapter 1 Agreements, Decisions and Concerted Practices Restricting Competition

§ 1 Prohibition of Agreements Restricting Competition

Agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition are prohibited.

§ 2 Exempted Agreements

(1) Agreements between undertakings, decisions by associations of undertakings or concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not

1. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or

2. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question shall be exempted from the prohibition of § 1.

(2) For the application of paragraph 1, the Regulations of the Council or the European Commission on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions by associations of undertakings and concerted practices (block exemption regulations) shall apply mutatis mutandis. This shall also apply where the agreements, decisions and practices mentioned therein are not capable of affecting trade between the Member States of the European Union.

§ 3 Cartels of Small or Medium-Sized Enterprises

Agreements between competing undertakings and decisions by associations of undertakings whose subject matter is the rationalisation of economic activities through inter-firm cooperation fulfil the conditions of § 2(1) if:

1. competition on the market is not significantly affected thereby, and

2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises.

§§ 4 – 17 (abolished)

Chapter 2 Market Dominance, Other Restrictive Practices

§ 18 Market Dominance

(1) An undertaking is dominant where, as a supplier or purchaser of a certain type of goods or commercial services on the relevant product and geographic market, it

1. has no competitors,

2. is not exposed to any substantial competition, or

3. has a paramount market position in relation to its competitors.

(2) The relevant geographic market may be broader than the area of application of this Act.

(2a) The assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge.

(3) In assessing the market position of an undertaking in relation to its competitors, account shall be taken in particular of the following:

1. its market share,
2. its financial strength,
3. its access to supply or sales markets,
4. links with other undertakings,
5. legal or factual barriers to market entry by other undertakings,
6. actual or potential competition from undertakings domiciled within or outside the area of application of this Act,
7. its ability to shift its supply or demand to other goods or commercial services, and
8. the ability of the opposite market side to resort to other undertakings.

(3a) In particular in the case of multi-sided markets and networks, in assessing the market position of an undertaking account shall also be taken of:

1. direct and indirect network effects,
2. the parallel use of services from different providers and the switching costs for users,
3. the undertaking's economies of scale arising in connection with network effects,
4. the undertaking's access to data relevant for competition,
5. innovation-driven competitive pressure.

(4) An undertaking is considered to be dominant if it has a market share of at least 40 per cent.

(5) Two or more undertakings are dominant to the extent that

1. no substantial competition exists between them with respect to a certain type of goods or commercial services and
2. they fulfil in their entirety the requirements of paragraph 1.

(6) A body of undertakings is presumed to be dominant if it

1. consists of three or fewer undertakings reaching a combined market share of 50 per-cent, or
2. consists of five or fewer undertakings reaching a combined market share of two thirds.

(7) The presumption of paragraph 6 can be refuted if the undertakings demonstrate that

1. the conditions of competition are such that substantial competition between them can be expected, or

2. that the body of undertakings has no paramount market position in relation to the remaining competitors.

(8) The Federal Ministry for Economic Affairs and Energy shall report to the legislative bodies on the experience made with paragraphs 2a and 3a three years after the entry into force of the provisions.

§ 19 Prohibited Conduct of Dominant Undertakings

(1) The abuse of a dominant position by one or several undertakings is prohibited.

(2) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services

1. directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification;

2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition exists shall be taken into account;

3. demands less favourable payment or other business terms than the dominant undertaking demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;

4. refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate consideration, provided that without such joint use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such joint use is impossible or cannot reasonably be expected;

5. requests other undertakings to grant it advantages without any objective justification; in this regard particular account shall be taken of whether the other undertaking has been given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request.

(3) Paragraph 1 in conjunction with paragraph 2 nos 1 and 5 shall also apply to associations of competing undertakings within the meaning of §§ 2, 3, and 28(1), § 30(2a) and (2b) and § 31(1) nos 1, 2 and 4. Paragraph 1 in conjunction with paragraph 2 no. 1 shall also apply to undertakings which set prices pursuant to § 28(2) or § 30(1) sentence 1 or § 31(1) no. 3.

§ 20 Prohibited Conduct of Undertakings with Relative or Superior Market Power

(1) § 19(1) in conjunction with paragraph 2 no. 1 shall also apply to undertakings and associations of undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist

(relative market power). A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

(2) § 19(1) in conjunction with paragraph 2 no. 5 shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on them.

(3) Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede such competitors directly or indirectly in an unfair manner. An unfair impediment within the meaning of sentence 1 exists in particular if an undertaking

1. offers food within the meaning of § 2(2) of the German Food and Feed Code [*Lebensmittel- und Futtermittelgesetzbuch*] below cost price, or

2. offers other goods or commercial services not just occasionally below cost price, or

3. demands from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services a price for the delivery of such goods or services which is higher than the price it itself offers on such market,

unless there is, in each case, an objective justification. Cost price within the meaning of sentence 2 shall be the price agreed between the undertaking with superior market power and its supplier for the provision of the good or service; general discounts that can be expected with reasonable certainty at the time the offer is made shall be proportionally deducted from the agreed price unless otherwise explicitly agreed with regard to specific goods or services. The offer of food below cost price is objectively justified if such an offer is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises through a timely sale, or in equally severe cases. The donation of food to charity organisation for use within the scope of their responsibilities shall not constitute an unfair impediment.

Footnote 1: § 20(3) in the version of the 8th Amendment to the Act against Restraints of Competition was intended to be valid until the end of 2017. Paragraph 3 in the version of the 9th Amendment to the Act against Restraints of Competition shall henceforth be valid for an unlimited period, see official explanation to § 20(3).

(4) If, on the basis of specific facts and in the light of general experience, it appears that an undertaking has abused its market power within the meaning of paragraph 3, the undertaking shall be obliged to disprove this appearance and to clarify such circumstances in its field of business which give rise to claims and which cannot be clarified by the competitor concerned or by an association within the meaning of § 33(4), but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which claims are made.

(5) Business and trade associations or professional organisations as well as quality mark associations may not refuse to admit an undertaking if such refusal would constitute an objectively unjustified unequal treatment and place the undertaking at an unfair competitive disadvantage.

§ 21 Prohibition of Boycott and Other Restrictive Practices

(1) Undertakings and associations of undertakings may not request that another undertaking or other associations of undertakings refuse to supply to or purchase from certain undertakings, with the intention of unfairly impeding these undertakings.

(2) Undertakings and associations of undertakings may not threaten or cause disadvantages, or promise or grant advantages, to other undertakings in order to induce them to engage in conduct which, under the following rules and regulations, may not be made the subject matter of a contractual commitment:

1. under this Act,

2. under Articles 101 or 102 of the Treaty on the Functioning of the European Union, or

3. pursuant to a decision issued by the European Commission or the competition authority pursuant to this Act or pursuant to Articles 101 or 102 of the Treaty on the Functioning of the European Union.

(3) Undertakings and associations of undertakings may not compel other undertakings

1. to accede to an agreement or a decision within the meaning of §§ 2, 3, 28(1) or § 30(2a) or (2b), or

2. to merge with other undertakings within the meaning of § 37, or

3. to act uniformly in the market with the intention of restricting competition.

(4) It is prohibited to cause economic harm to another person because such person has applied for or suggested that action be taken by the cartel authority.

Chapter 3 Application of European Competition Law

§ 22 Relationship between this Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union

(1) The provisions of this Act may also be applied to agreements between undertakings, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union, which may affect trade between the Member States of the European Union within the meaning of that provision. Pursuant to Article 3(1) sentence 1 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ EC 2003 No. L 1, p.1), Article 101 of the Treaty on the Functioning of the European Union shall also apply in that case.

(2) Pursuant to Article 3(2) sentence 1 of Regulation (EC) No. 1/2003, the application of the provisions of this Act may not lead to the prohibition of agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States of the European Union but

1. which do not restrict competition within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union, or

2. which fulfil the conditions of Article 101(3) of the Treaty on the Functioning of the European Union, or

3. which are covered by a regulation regarding the application of Article 101(3) of the Treaty on the Functioning of the European Union.

The provisions of Chapter 2 shall remain unaffected. In other cases, the primacy of Article 101 of the Treaty on the Functioning of the European Union is determined by the relevant provisions under European Union law.

(3) The provisions of this Act may also be applied to practices which constitute an abuse prohibited by Article 102 of the Treaty on the Functioning of the European Union. Pursuant to Article 3(1) sentence 2 of Regulation (EC) No. 1/2003, Article 102 of the Treaty on the Functioning of the European Union shall also apply in that case. The application of stricter provisions of this Act shall remain unaffected.

(4) Without prejudice to European Union law, paragraphs 1 to 3 do not apply to the extent that provisions concerning the control of concentrations are applied. Provisions that predominantly pursue an objective different from that pursued by Articles 101 and 102 of the Treaty on the Functioning of the European Union shall not be affected by the provisions of this Chapter.

[…]

<u>Section 2 Damages and Disgorgement of Benefits</u>

§ 33 Claim for Injunction and Rectification

(1) Whoever violates a provision of this Part or Articles 101 or 102 of the Treaty on the Functioning of the European Union (infringer) or whoever violates a decision taken by the competition authority shall be obliged to the person affected to rectify the harm caused by the infringement and, where there is a risk of recurrence, to desist from further infringements.

(2) A right to apply for injunction already exists if an infringement is impending.

(3) Affected persons are competitors or other market participants impaired by the infringement.

(4) Claims pursuant to paragraph 1 may also be asserted by

1. associations with legal capacity for the promotion of commercial or independent professional interests, provided

   a) they have a significant number of member undertakings that are affected persons within the meaning of paragraph 3 and

   b) are able, in particular with regard to their human, material and financial resources, to actually exercise their functions of pursuing commercial or independent professional interests, as laid down in the statutes of the association;

2. entities proving that they have been entered in

   a) the list of qualified entities under § 4 of the German Act on Injunctive Relief [*Unterlassungsklagengesetz*] or

b) the European Commission's list of qualified entities pursuant to Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110 of 1 May 2009, p. 30), as amended from time to time.

§ 33a Liability for Damages

(1) Whoever intentionally or negligently commits an infringement pursuant to § 33(1) shall be liable for any damages arising from the infringement.

(2) It shall be rebuttably presumed that a cartel results in harm. A cartel within the meaning of this Section is an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition. Such agreements or concerted practices include

1. the fixing or coordination of purchase or selling prices or other trading conditions,

2. the allocation of production or sales quotas,

3. the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or

4. anti-competitive actions against other competitors.

(3) § 287 of the German Code of Civil Procedure [*Zivilprozessordnung*] shall apply to quantify the harm caused by the infringement. In quantifying the harm, account may, in particular, be taken of the proportion of the profit which the infringer has derived from the infringement under paragraph 1.

(4) The infringer shall pay interest on its pecuniary debts pursuant to paragraph 1 from the time the harm occurred. §§ 288 and 289 sentence 1 of the German Civil Code shall apply mutatis mutandis.

§ 33b Binding Effect of Decisions of a Competition Authority

Where damages are claimed for an infringement of a provision of this Part or of Articles 101 or 102 of the Treaty on the Functioning of the European Union, the court shall be bound by a finding that an infringement has occurred, as made in a final decision by the competition authority, the European Commission, or the competition authority - or court acting as such - in another Member State of the European Union. The same applies to such findings in final court judgements on appeals against decisions pursuant to sentence 1. This obligation applies without prejudice to the rights and obligations under Article 267 of the Treaty on the Functioning of the European Union.

§ 33c Passing-on of Overcharges

(1) Where a good or service is purchased at an excessive price (overcharge), the fact that this good or service was resold shall not exclude the occurrence of harm. The harm incurred by the purchaser shall be deemed to be remedied to the extent that the purchaser has passed on the overcharge resulting from an infringement of § 33a(1) to its customers (indirect purchasers). The injured party's right to claim compensation for lost profits under § 252 of the German Civil Code shall remain unaffected, to the extent that such loss of profit is the result of the passing-on of the overcharge.

(2) It shall be presumed in the indirect purchaser's favour that the overcharge has been passed on to it if

1. the infringer has violated § 1 or § 19 of this Act or Articles 101 or 102 of the Treaty on the Functioning of the European Union,

2. the infringement has resulted in an overcharge for the direct purchaser of the infringer, and

3. the indirect purchaser has purchased goods or services that

   a) were the object of the infringement,

   b) were derived from goods or services that were the object of the infringement, or

   c) contained goods or services that were the object of the infringement.

(3) The presumption under paragraph 2 shall not apply where it is credibly demonstrated to the satisfaction of the court that the overcharge was not, or not entirely, passed on to the indirect purchaser.

(4) Paragraphs 1 to 3 shall apply mutatis mutandis to cases where the violation of § 1 or § 19 of this Act or Articles 101 or 102 of the Treaty on the Functioning of the European Union concerns supplies to the infringer.

(5) When quantifying the extent to which the overcharge has been passed on, § 287 of the German Code of Civil Procedure shall apply mutatis mutandis.

§ 33d Joint and Several Liability

(1) Where several infringers jointly commit an infringement pursuant to § 33a(1), they shall be jointly and severally liable for the harm caused by the infringement. §§ 830 and 840(1) of the German Civil Code shall apply besides.

(2) The proportion to which the joint and several debtors shall be liable, in relation to one another, to pay damages and the amount that has to be compensated shall depend on the circumstances of the case, in particular, on the extent to which they have caused the harm. §§ 421 to 425 as well as § 426(1) sentence 2 and (2) of the German Civil Code shall apply besides.

(3) Where several undertakings violate § 1 or § 19 of this Act or Articles 101 or 102 of the Treaty on the Functioning of the European Union, the liability of a small or medium-sized enterprise within the meaning of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124 of 20 May 2003, p. 36) shall be limited to the damage suffered by its direct and indirect purchasers or providers as a result of the infringement, provided

1. its market share in the relevant market was below 5 per cent at any time during the period in which the infringement was committed and

2. the application of the liability provisions under paragraph 1 would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

The small and medium-sized enterprise shall only be liable for the damage suffered by other injured parties as a result of an infringement under § 33a(1) where these are unable to obtain full compensation from the other infringers with the exception of the immunity recipient. § 33e(2) shall apply mutatis mutandis.

(4) The other infringers may recover compensations under paragraph 2 from the small or medium-sized enterprise within the meaning of paragraph 3 sentence 1 only up to the amount of harm the enterprise caused to its own direct or indirect purchasers or providers. Sentence 1 shall not apply to compensation of harm caused to parties other than the direct or indirect purchasers or providers of the other infringers.

(5) The limitation of liability pursuant to paragraphs 3 and 4 shall not apply if

1. the small or medium-sized enterprise has led the infringement or

2. the small or medium-sized enterprise has coerced the other infringers to participate in the infringement, or

3. the small or medium-sized enterprise has previously been found by an authority or court to have violated § 1 or § 19 of this Act or Articles 101 or 102 of the Treaty on the Functioning of the European Union or competition law pursuant to § 89e(2) of this Act.

§ 33e Immunity Recipient

(1) In derogation of § 33a(1), an undertaking or natural person participating in a cartel who has received immunity from fines under a leniency programme (immunity recipient) shall only be liable for the harm caused to its own direct or indirect purchasers or providers. The immunity recipient shall only be liable for the damage suffered by other injured parties as a result of an infringement under § 33a(1) where these are unable to obtain full compensation from the other infringers.

(2) In cases under paragraph 1 sentence 2, the immunity recipient shall not be liable for the harm caused where the limitation period for damages claims against the other infringers has already expired.

(3) The other infringers may recover compensations under § 33d(2) from the immunity recipient only up to the amount of harm the immunity recipient caused to its own direct or indirect purchasers or providers. This limitation shall not apply to compensation of harm caused to parties other than the direct or indirect purchasers or providers of the undertakings participating in the cartel.

§ 33f Effect of Consensual Settlements

(1) In the case of a consensual settlement of a damages claim under § 33a(1), the claim of the settling injured party against the settling co-infringer shall be reduced by the latter's share of the harm that the infringement inflicted upon the settling injured party, unless agreed otherwise. The non-settling co-infringers shall solely be obliged to pay for the damages that remain after the deduction of the settling co-infringer's share. The settling injured party may only exercise the remaining claim against the settling co-infringer where the non-settling co-infringers are unable to completely pay the remaining damages. Sentence 3 shall not apply if the settling parties have excluded its application under the terms of the consensual settlement.

(2) Co-infringers that have not entered into the consensual settlement under paragraph 1 shall not be permitted to demand compensation under §§ 33d(2) from the settling co-infringer for the recovery of damages by the settling injured party that remain after the deduction of the settling co-infringer's share.

§ 33g Right to have Evidence Surrendered and Information Disclosed

(1) Whoever is in possession of evidence necessary for a claim for damages under § 33a(1) shall be obliged to surrender such evidence to a party that credibly demonstrates to the satisfaction of the court that it has such a claim if said party specifies the item as precisely as possible on the basis of reasonably available facts.

(2) Whoever is in possession of evidence necessary for the defence against a claim for damages under § 33a(1) shall be obliged to surrender such evidence to the party against whom a case for a claim under paragraph 1 or a claim for damages under § 33a(1) is pending, if said party specifies the item as precisely as possible on the basis of reasonably available facts. The right under sentence 1 shall also exist where a party has applied for a declaratory decision that another party has no claim against it under § 33a(1) and the former does not contest the infringement within the meaning of § 33a(1) on which the claim for damages is based.

(3) The surrender of evidence under paragraphs 1 and 2 shall be excluded where, considering the legitimate interests of all parties concerned, this is disproportionate. In this consideration, particular account shall be taken of:

1. the extent to which the claim is based on available information and evidence;

2. the scope of evidence and the costs of surrendering the evidence, in particular where such evidence is requested from a third party;

3. the exclusion of a discovery of facts that are not relevant for the enforcement of the claim pursuant to § 33a(1) or for the defence against such claim;

4. the binding effect of decisions pursuant to § 33b;

5. the effectiveness of public antitrust enforcement; and

6. the protection of operating and business secrets as well as any other confidential information and the protective measures taken for this purpose.

No account shall be taken of the interest of the party against whom a claim under § 33a(1) is made to prevent the enforcement of that claim.

(4) The surrender of a document or record, also on the content of a hearing conducted during a competition authority's proceeding, shall be excluded where and to the extent that it includes a voluntary presentation made by, or on behalf of, an undertaking or a natural person to a competition authority,

1. describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme (leniency statement); or

2. describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which presentation was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure (settlement submission).

Evidence that has not been specifically produced for a competition authority's proceeding shall not be considered part of the leniency statement irrespective of whether or not the information is also contained in the files of a competition authority. Where a party obliged to surrender evidence claims that a piece of evidence or parts thereof are excluded from the obligation to surrender in accordance with sentence 1, the claimant may, in accordance with § 89b(8), demand surrender to the competent court for the sole purpose of examining the validity of this claim.

(5) Until the final conclusion of the competition authority's proceedings against all parties involved, the surrender of evidence shall be excluded if, and to the extent that, it contains the following:

1. information that has been produced by a natural or legal person or association of persons specifically for the competition authority's proceedings;

2. communications from the competition authority to the parties to the proceedings; or

3. settlement submissions that have been withdrawn.

(6) The surrender of evidence under paragraphs 1 and 2 may be refused if, and to the extent that, the party in possession of the evidence would, in a legal dispute over a claim under § 33a(1) of this Act, be entitled to refuse to testify in accordance with § 383(1) nos 4 to 6 or § 384 no. 3 of the German Code of Civil Procedure [*Zivilprozessordnung*]. In this case, the claimant may request that the evidence be surrendered to the competent court for a decision pursuant to § 89b(6). Sentence 2 shall not apply to

1. persons within the meaning of § 383(1) nos 4 and 5 of the German Code of Civil Procedure, to the extent that they would be entitled to refuse to testify under this provision; and

2. persons within the meaning of § 203(1) nos 1 to 5, (2) and (3) of the German Criminal Code [*Strafgesetzbuch*], to the extent that they would be entitled to refuse to testify under § 383(1) no. 6 of the German Code of Civil Procedure.

Assistants of clerics and persons working for a cleric as part of their training for the exercise of the clerical profession shall be treated as clerics.

(7) Where the party obliged to surrender evidence in accordance with paragraphs 1 or 2 incurs costs which he may reasonably consider necessary, he shall be entitled to claim from the other party the reimbursement of these costs.

(8) Where the party obliged to surrender evidence in accordance with paragraphs 1 or 2 intentionally or with gross negligence discloses incorrect or incomplete information, or fails to disclose information, or intentionally or with gross negligence surrenders incorrect or incomplete evidence, or fails to surrender evidence, he shall be liable for any resulting damage incurred by the claimant.

(9) The information disclosed or evidence surrendered by a party obliged under paragraphs 1 and 2 may only be used in a criminal proceeding or administrative offence proceeding against that party or against its next of kin as listed in § 52(1) of the German Code of Criminal Procedure on account of an offence committed prior to the disclosure of the information or the surrender of the evidence, if the party obliged agrees to such use. This shall also apply where the information is disclosed or repeated during an examination of a witness or party. Sentences 1 and 2 shall not apply in proceedings against undertakings.

(10) Paragraphs 1 to 9 and §§ 89b to 89d on the surrender of evidence shall apply mutatis mutandis to the disclosure of information.

§ 33h Limitation Periods

(1) Claims pursuant to § 33(1) and § 33a(1) shall become statute-barred after five years.

(2) The limitation period shall begin to run with the end of the calendar year in which

1. the claim arose;

2. the claimant has obtained knowledge, or should have obtained knowledge without gross negligence,

   a) of the circumstances giving rise to the claim and of the fact that these constitute an infringement under § 33(1), as well as

   b) of the identity of the infringer; and

3. the infringement under § 33(1) giving rise to the claim has ceased.

(3) Irrespective of any knowledge or grossly negligent ignorance of the circumstances under paragraph 2 no. 2, claims under § 33(1) and § 33a(1) shall become statute-barred ten years from the date when

1. the claim arose and

2. the infringement under § 33(1) ceased.

(4) Apart from this, claims shall become statute-barred 30 years from the date when the infringement under § 33(1) that caused the damage occurred.

(5) Statutory limitation shall take effect when one of the periods under paragraphs 1, 3 or 4 has expired.

(6) Limitation periods for a claim under § 33(1) or § 33a(1) shall be suspended if

1. a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement within the meaning of § 33(1);

2. the European Commission or the competition authority of another Member State of the European Union - or a court acting as such - takes action for the purpose of the investigation or its proceedings in respect of an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union or an infringement of a provision of the

national competition law of another Member State of the European Union within the meaning of § 89e(2); or

3. the claimant has brought an action against the infringer for the disclosure of information or surrender of evidence under § 33g.

The suspension shall end one year after the infringement decision has become final or after the proceedings are otherwise terminated. § 204(2) sentence 2 and § 3 of the German Civil Code shall apply mutatis mutandis.

(7) Limitation periods for a claim to recover compensation under § 33d(2) for the settlement of a claim for damages under § 33a(1) shall begin with the settlement of this claim for damages.

(8) By derogation from paragraph 2, the limitation period for claims for damages under § 33a(1) of injured parties,

1. that are not direct or indirect purchasers or providers of the immunity recipient, against that immunity recipient shall begin with the end of the year in which the injured party was unable to obtain full compensation of the damage suffered as a result of the infringement from the other infringers;

2. that are not direct or indirect purchasers or providers of a small or medium-sized enterprise within the meaning of § 33d(3) sentence 1, against that enterprise shall begin with the end of the year in which the injured party under § 33d(3) sentence 2 was unable to obtain full compensation of the damage suffered as a result of the infringement from the other infringers with the exception of the immunity recipient.

Paragraph 3 shall not apply to claims for damages for whom the limitation period begins to run subject to this paragraph.

§ 34 Disgorgement of Benefits by the Competition Authority

(1) If an undertaking has intentionally or negligently violated a provision of this Part, Articles 101 or 102 of the Treaty on the Functioning of the European Union or a decision of the competition authority and thereby gained an economic benefit, the competition authority may order the disgorgement of the economic benefit and require the undertaking to pay a corresponding sum.

(2) Paragraph 1 shall not apply if the economic benefit has been disgorged by

1. the payment of damages,

2. the imposition of a fine,

3. virtue of an order of forfeiture or

4. reimbursement.

To the extent that payments pursuant to sentence 1 are made by the undertaking after the disgorgement of benefits, the undertaking shall be reimbursed for the amount of such payment.

(3) If the disgorgement of benefits would result in undue hardship, the order shall be limited to a reasonable sum or not be issued at all. It shall also not be issued if the economic benefit is insignificant.

(4) The amount of the economic benefit may be estimated. The amount of money to be paid shall be specified numerically.

(5) The disgorgement of benefits may be ordered only within a time limit of up to seven years from termination of the infringement, and only for a time period not exceeding five years. § 33h(6) shall apply mutatis mutandis. In the case of a final decision within the meaning of § 33b sentence 1 or a final court judgement within the meaning of § 33b sentence 2, the limitation period under sentence 1 shall begin to run anew.

§ 34a Disgorgement of Benefits by Associations

(1) Whoever intentionally commits an infringement within the meaning of § 34(1) and thereby gains an economic benefit at the expense of multiple purchasers or suppliers may be required by those entitled to an injunction under § 33(2) to surrender the economic benefit to the federal budget unless the competition authority orders the disgorgement of the economic benefit by the imposition of a fine, by forfeiture, by reimbursement or pursuant to § 34(1).

(2) Payments made by the undertaking because of the infringement shall be deducted from the claim. § 34(2) sentence 2 shall apply mutatis mutandis.

(3) If several creditors claim the disgorgement of benefits, §§ 428 to 430 of the German Civil Code shall apply mutatis mutandis.

(4) The creditors shall supply the Bundeskartellamt with information about the assertion of claims pursuant to paragraph 1. They may demand reimbursement from the Bundeskartellamt for the expenses necessary for asserting the claim if they are unable to receive reimbursement from the debtor. The claim for reimbursement is limited to the amount of the economic benefit paid to the federal budget.

(5) Claims pursuant to paragraph 1 shall become statute-barred after five years. §§ 33b and 33h(6) shall apply mutatis mutandis.

2. Act Against Unfair Competition – UWG (selection only)

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Chapter1 General provisions

Section 1 Purpose of the Act

This Act shall serve the purpose of protecting competitors, consumers and other market participants against unfair commercial practices. At the same time, it shall protect the interests of the public in undistorted competition.

Section 2 Definitions

(1) Within the meaning of this Act the following definitions shall apply:

1. "Commercial practice" shall mean any conduct by a person for the benefit of that person's or a third party's business before, during, or after, the conclusion of a business transaction, which conduct is objectively connected with promoting the sale or the procurement of goods or services, or with the conclusion or the performance of a contract concerning goods or services; "goods" shall be deemed to include immovable property as well, and "services" also rights and obligations;

2. "Market participant" shall mean, in addition to competitors and consumers, any person who supplies or demands goods or services;

3. "Competitor" shall mean any person who has a concrete competitive relationship with one or more entrepreneurs supplying or demanding goods or services;

4. "Communication" shall mean any information that is exchanged or passed on among a finite number of participants via a publicly accessible electronic communications ser-

vice; this shall not include information that is passed on to the public as part of a broadcasting service via an electronic communications network, so far as such information cannot be linked with an identifiable participant or user receiving it;

5. “Code of conduct” shall mean an agreement or set of rules which defines the conduct of entrepreneurs who have undertaken to be bound by the code in relation to business sectors or individual commercial practices, without such obligations having been imposed by statutory or administrative provisions;

6. “Entrepreneur” shall mean any natural or legal person engaging in commercial practices within the framework of his or its trade, business, craft or profession and anyone acting in the name of, or on behalf of, such person;

7. “Professional diligence” shall mean the standard of special skill and care towards consumers, to which an entrepreneur can reasonably be expected to conform, commensurate with good faith and having regard to honest market practices, in the entrepreneur’s field of activity;

8. “to materially distort the economic behaviour of consumers” shall mean to engage in a commercial practice to appreciably impair a consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision which he would not have taken otherwise;

9. “transactional decision” shall mean any decision taken by a consumer or other market participant regarding whether, how and on what terms to conclude a transaction, make a payment for, retain or dispose of goods or services, or to exercise a contractual right in relation to the goods or services, regardless of whether the consumer or other market participant decides to act.

(2) Section 13 of the Civil Code shall apply mutatis mutandis to the term “consumer”.

Section 3 Prohibition of unfair commercial practices

(1) Unfair commercial practices shall be illegal.

(2) Commercial practices targeting or reaching consumers shall be unfair if they are not in compliance with professional diligence and are suited to materially distorting the economic behaviour of consumers.

(3) The commercial practices in relation to consumers listed in the Annex to this Act shall always be illegal.

(4) When assessing commercial practices in relation to consumers reference shall be made to the average consumer or, when the commercial practice is directed towards a particular group of consumers, to the average member of that group. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to these practices or the underlying goods or services because of their mental or physical infirmity, age or credulity in a way which the entrepreneur could reasonably be expected to foresee shall be assessed from the perspective of the average member of that group.

Section 3a Breach of law

Unfairness shall have occurred where a person violates a statutory provision which is also intended to regulate market conduct in the interest of market participants and the breach of law is suited to appreciably harming the interests of consumers, other market participants and competitors.

Section 4 Protection of competitors

Unfairness shall have occurred where a person

1. discredits or denigrates the distinguishing marks, goods, services, activities, or personal or business circumstances of a competitor;

2. asserts or disseminates facts about the goods, services or business of a competitor or about the entrepreneur or a member of the management of the business, such facts being suited to harming the operation of the business or the credit of the entrepreneur, to the extent that the facts are not demonstrably true; if the communications are confidential and if the person making, or receiving, the communication has a legitimate interest therein, the action shall only be unfair where facts are asserted or disseminated contrary to the truth;

3. offers goods or services that are replicas of goods or services of a competitor if he

    a) causes avoidable deception of the purchaser regarding their commercial origin;

    b) unreasonably exploits or impairs the assessment of the replicated goods or services; or

    c) dishonestly obtained the knowledge or documents needed for the replicas;

4. deliberately obstructs competitors.

Section 4a Aggressive commercial practices

(1) Unfairness shall have occurred where a person engages in an aggressive commercial practice which is suited to causing the consumer or other market participant to take a transactional decision which he would not have taken otherwise. A commercial practice shall be regarded as aggressive where, in the factual context and taking account of all its features and circumstances, it is suited to significantly impairing the consumer's or other market participant's freedom of choice by

1. harassment,

2. coercion, including the use of physical force, or

3. undue influence.

Undue influence shall have occurred where the entrepreneur exploits a position of power in relation to the consumer or other market participant so as to exert pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's or other market participant's ability to make an informed decision.

(2) When determining whether a commercial practice is aggressive within the meaning of the second sentence of subsection (1) account shall be taken of

1. the timing, location, nature or persistence of the practice;

2. the use of threatening or abusive language or behaviour;

3. the deliberate exploitation of any specific misfortune or circumstance of such gravity as to impair the consumer's or other market participant's judgement in order to influence his decision;

4. any onerous or disproportionate non-contractual barriers imposed by the entrepreneur where a consumer or other market participant wishes to exercise rights under the contract, including the right to terminate a contract or to switch to other goods or services or to another entrepreneur;

5. any threat to take any illegal action.

The circumstances of which account is to be taken pursuant to number 3 include, in particular, the mental and physical infirmity, age, inexperience in commercial dealings, credulity, fears and predicament of consumers.

Section 5 Misleading commercial practices

(1) Unfairness shall have occurred where a person engages in a misleading commercial practice which is suited to causing the consumer or other market participant to take a transactional decision which he would not have taken otherwise. A commercial practice shall be regarded as misleading if it contains false statements or other information suited to deception regarding the following circumstances:

1. the main characteristics of the goods or services, such as availability, nature, execution, benefits, risks, composition, accessories, method or date of manufacture, delivery or provision, fitness for purpose, uses, quantity, specification, after-sale customer assistance, complaint handling, geographical or commercial origin, the results to be expected from their use, or the results or material features of tests carried out on the goods or services;

2. the reason for purchase such as the existence of a specific price advantage, the price or the manner in which the price is calculated, or the conditions on which the goods are supplied or the services provided;

3. the nature, attributes or rights of the entrepreneur such as his identity, assets, including intellectual property rights, the extent of his commitments, his qualifications, status, approval, affiliation or connections, awards or distinctions, motives for the commercial practice or the nature of the sales process;

4. any statement or symbol in relation to direct or indirect sponsorship or approval of the entrepreneur or of the goods or services;

5. the need for a service, part, replacement or repair;

6. compliance with a code of conduct by which the entrepreneur has undertaken to be bound when he makes reference to such commitment; or

7. the rights of consumers, particularly those based on promised guarantees or warranty rights in the event of impaired performance.

(2) A commercial practice shall also be regarded as misleading if in connection with the marketing of goods or services, including comparative advertising, it creates a risk of confusion with other goods or services or with the trade mark or other distinguishing mark of a competitor.

(3) Information within the meaning of subsection (1), second sentence, shall also be regarded to include information forming part of comparative advertising as well as pictorial illustrations and other events that are targeted at, and are suitable for, taking the place of such information.

(4) It shall be presumed to be misleading to advertise with a price reduction in a case where the price concerned has been demanded for only an unreasonably short period of time. In the event of dispute as to whether, and for what period of time, the price was demanded, the burden of proof shall fall upon the person who advertised with the price reduction.

Section 5a Misleading by omission

(1) In assessing whether the concealment of a fact is misleading, consideration shall be given in particular to its significance for the transactional decision according to prevailing public opinion, as well as to the suitability of the concealment for influencing the decision.

(2) Unfairness shall have occurred where a person, in a factual context and taking account of all the features and circumstances, omits material information

1. which the consumer needs, according to the context, to take an informed transactional decision and

2. whose omission is suited to causing the consumer to make a transactional decision which he would not have taken otherwise.

The following shall also be regarded as an omission of information:

1. the hiding of material information,

2. the provision of material information in an unclear, unintelligible or ambiguous manner,

3. the provision of material information in an untimely manner.

(3) Where goods or services are offered with reference to their characteristics and price in such manner appropriate to the communication medium used that an average consumer can conclude the transaction, the following information shall be regarded as material within the meaning of subsection (2) if not already apparent from the context:

1. all main characteristics of the goods or services to an extent appropriate thereto and to the communication medium used;

2. the identity and the geographical address of the entrepreneur and, where applicable, the identity and geographical address of the entrepreneur on whose behalf he is acting;

3. the total price, or in cases where the nature of the goods or services means that such price cannot be calculated in advance, the manner in which the price is calculated as well as, where appropriate, all additional freight, delivery or postal charges or, where these

charges cannot be calculated in advance, the fact that such additional charges may be payable;

4. arrangements for payment, delivery and performance, as well as complaint handling policies so far as they depart from the requirements of professional diligence; and

5. the existence of a right of withdrawal or cancellation.

(4) Such information shall also be regarded as material within the meaning of subsection (2) as shall not be omitted in respect of consumers by virtue of EU Regulations or pursuant to legal provisions for the implementation of EU Directives for commercial communication including advertising or marketing.

(5) When deciding whether information has been omitted, account shall be taken of

1. the limitations of space or time imposed by the medium used to communicate the commercial practice and

2. any measures taken by the entrepreneur to make the information available to consumers by means other than the medium used to communicate the commercial practice referred to in number 1.

(6) Unfairness shall also have occurred where the commercial intent of a commercial practice is not identified, unless this is directly apparent from the context, and where such failure to identify the commercial intent is suited to causing the consumer to take a transactional decision which he would not have taken otherwise.

Section 6 Comparative advertising

(1) Comparative advertising shall mean any advertising which explicitly or by implication identifies a competitor, or goods or services offered by a competitor.

(2) Unfairness shall have occurred where a person conducting comparative advertising uses a comparison that

1. does not relate to goods or services meeting the same needs or intended for the same purpose;

2. does not objectively relate to one or more material, relevant, verifiable and representative features of the goods concerned, or to the price of those goods or services;

3. leads in the course of trade to a risk of confusion between the advertiser and a competitor, or between the goods or services offered, or the distinguishing marks used, by them;

4. takes unfair advantage of, or impairs, the reputation of a distinguishing mark used by a competitor;

5. discredits or denigrates the goods, services, activities or personal or business circumstances of a competitor; or

6. presents goods or services as imitations or replicas of goods or services sold under a protected distinguishing mark.

Section 7 Unacceptable nuisance

(1) A commercial practice which constitutes an unacceptable nuisance to a market participant shall be illegal. This shall apply to advertising particularly in cases where it is apparent that the solicited market participant does not want this advertising.

(2) An unacceptable nuisance shall always be assumed in the case of

1. advertising using a medium of commercial communication not listed under numbers 2 and 3 which is suited to distance marketing and through which a consumer is persistently solicited although it appears that he does not want this;

2. advertising by means of a telephone call, made to a consumer without his prior express consent, or made to another market participant without at least the latter's presumed consent;

3. advertising using an automated calling machine, a fax machine or electronic mail without the addressee's prior express consent; or

4. advertising using a communication

   a) where the identity of the sender, on whose behalf the communication is transmitted, is concealed or kept secret or

   b) which violates section 6 (1) of the Telemedia Act or in which the recipient is prompted to call up a website which violates said provision or

   c) where there is no valid address to which the recipient can send an instruction to terminate transmission of communications of this kind, without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates.

(3) Notwithstanding subsection (2), number 3, an unacceptable nuisance shall not be assumed to exist in the case of advertising using electronic mail if

1. the entrepreneur has obtained from the customer the latter's electronic mail address in connection with the sale of goods or services;

2. the entrepreneur uses the address for direct advertising of his own similar goods or services;

3. the customer has not objected to this use; and

4. the customer has been clearly and unequivocally advised, when the address is collected and each time it is used, that he can object to such use at any time, without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates.

Chapter 2 Legal consequences

Section 8 Elimination; injunctive relief

(1) Whoever engages in an illegal commercial practice pursuant to section 3 or section 7 can be sued for elimination, and in the event of the risk of recurrence, to cease and desist. The claim to cease and desist shall already pertain in the event of the risk of such contravention of section 3 or section 7.

(2) Where the contraventions are committed in a business by a member of the staff or by a person exercising a mandate, the claim to cease and desist and the claim to elimination shall be deemed to apply in relation to the owner of the business as well.

(3) The claims under subsection (1) shall vest in

1. every competitor;

2. associations with legal personality which exist for the promotion of commercial or of independent professional interests, if a considerable number of entrepreneurs belong thereto, and which distribute goods or services of the same or similar type on the same market, provided such associations are actually in a position, particularly in terms of their personnel, material and financial resources, to pursue the tasks, under their memoranda of association, of promoting commercial or independent professional interests, and so far as the contravention affects the interests of their members;

3. qualified entities that prove that they are entered in the list of qualified entities pursuant to section 4 of the Injunctive Relief Act or on the list of the European Commission pursuant to Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer interests (OJ L 110 of 1.5.2009, p. 30);

4. Chambers of Industry and Commerce or Craft Chambers.

(4) The assertion of the claims referred to in subsection (1) shall be inadmissible where such assertion is improper having regard to all the circumstances, especially where it predominantly serves the purpose of generating a claim for reimbursement of expenses or of the costs of taking legal action against the contravening party. In such cases the party against which the claim is directed may demand reimbursement of the costs of his legal defence. Further claims for reimbursement shall remain unaffected.

(5) Section 13 of the Injunctive Relief Act shall apply mutatis mutandis; in section 13 (1) and (3), second sentence, of the Injunctive Relief Act the claims listed therein under the Injunctive Relief Act shall be replaced by the claims under this provision. In all other respects, the Injunctive Relief Act shall not apply, unless one of the cases listed in section 4a of the Injunctive Relief Act applies.

Section 9 Compensation for damage

Whoever, while acting with intent or negligently, engages in an illegal commercial practice pursuant to section 3 or section 7 shall be obliged to compensate competitors for the damage arising therefrom. The compensation claim can be asserted against persons responsible for periodical printed matter only in the case of contravention with intent.

Section 10 Confiscation of profits

(1) Whoever, while acting with intent, engages in an illegal commercial practice pursuant to section 3 or section 7, thereby making a profit to the detriment of numerous purchasers, can be sued for surrender of such profit to the Federal budget by those entitled, pursuant to section 8 (3), numbers 2 to 4, to assert a claim to cease and desist.

(2) Such payments as were made by the debtor, because of the contravention, to third parties or the state shall be deducted from the profit. So far as the debtor made such payments only

at a time subsequent to satisfaction of the claim pursuant to subsection (1), the competent agency of the Federation shall reimburse the debtor the profit thus paid in the sum of the recorded payments.

(3) Where there is more than one creditor claiming the profit, sections 428 to 430 of the Civil Code shall apply mutatis mutandis.

(4) Creditors shall notify the competent agency of the Federation of the assertion of claims pursuant to subsection (1). Creditors can request reimbursement from the competent agency of the Federation for such expenses as were necessary for assertion of the claim, so far as they cannot obtain satisfaction from the debtor. The reimbursement claim shall be limited to the sum of the profit paid into the Federal budget.

(5) The competent agency within the meaning of subsections (2) and (4) shall be the Federal Office of Justice.

Section 11 Statute-barred limitation

(1) The claims under sections 8, 9 and 12 (1), second sentence, shall become statute-barred after six months.

(2) The period of statute-barred limitation shall commence when

1. the claim arises and

2. the creditor obtains knowledge, or should, without being grossly negligent, have obtained knowledge of the circumstances giving rise to the claim and of the debtor's identity.

(3) Compensation claims shall become statute-barred, irrespective of knowledge or of grossly negligent ignorance, ten years after they arise, or thirty years at the latest after occurrence of the act giving rise to the damage.

(4) Other claims shall become statute-barred, irrespective of knowledge or of grossly negligent ignorance, three years after they arise.

Chapter 3 Procedural provisions

Section 12 Enforcement of claims, authorisation to publish, reduction of the pecuniary value of the dispute

(1) Parties entitled to assert a claim to cease and desist should warn the debtor prior to initiating court proceedings and should give him the opportunity to resolve the dispute by incurring the obligation to cease and desist subject to a reasonable contractual penalty. If the warning is justified, reimbursement of the necessary expenses can be demanded.

(2) Provisional injunctions can be granted in order to secure the claim to cease and desist specified in this Act, also without exposition and substantiation of the conditions required by sections 935 and 940 of the Civil Procedure Code.

(3) Where by virtue of this Act a court action has been brought for injunctive relief, the court can authorise the prevailing party to publicise the judgment at the expense of the losing party if the prevailing party demonstrates a legitimate interest therein. The nature and extent of publication shall be determined in the judgment. The authorisation shall expire if it is not used

within three months after entry into final and binding force. The declaration pursuant to the first sentence shall not be provisionally enforceable.

(4) Where a party in a legal dispute in which an action is brought to assert a claim resulting from one of the legal relations governed by this Act substantiates that the burden of the costs of the proceedings based on the full value in dispute would pose a substantial risk to his economic situation, the court may, upon the application of said party, order that said party's obligation to pay court costs shall be proportionate to a part of the value in dispute as adjusted to his economic situation. The order shall have the effect that

1. the beneficiary shall also be required to pay the fees of his lawyer only in relation to this part of the value in dispute,

2. the beneficiary, insofar as the costs of the legal dispute are imposed on that party or that party assumes these costs, must reimburse the court costs paid by the opposing party and the fees of his lawyer only in relation to the part of the value in dispute and

3. the beneficiary's lawyer, insofar as extra-judicial costs are imposed on the opposing party or are assumed by that party, may recover his fees from the opposing party in relation to such value in dispute as applies to the latter.

(5) The application referred to in subsection (4) may be declared for the records of the registry of the court. It shall be made before the hearing in the main proceedings. Thereafter, it shall be permissible only where the assumed or determined value in dispute is subsequently increased by the court. The opposing party is to be heard before the decision is taken on the application.

Section 13 Jurisdiction as to subject-matter

(1) The Regional Courts shall have exclusive jurisdiction over all civil law disputes where a claim is asserted by virtue of this Act. Section 95 (1), number 5, of the Courts Constitution Act shall apply.

(2) The *Land* governments shall be empowered to designate by ordinance one such Regional Court as the court to hear competition disputes for the districts of several Regional Courts, provided this is conducive to the administration of justice in respect of competition disputes, especially for the purpose of ensuring consistent court decisions. The *Land* governments can delegate this power to the *Land* departments of justice.

Section 14 Local jurisdiction

(1) For court actions brought by virtue of this Act jurisdiction shall lie with the court in whose districts the defendant has his or its commercial place of business or his independent professional place of business, or in the absence thereof, his or its place of residence. The defendant's domestic place of abode shall be the decisive point of reference in a case where the defendant also does not have a place of residence.

(2) Moreover, for court actions brought by virtue of this Act jurisdiction shall lie solely with the court in whose district the act was committed. The first sentence shall apply to court actions brought by those entitled to assert a claim to cease and desist, pursuant to section 8 (3), numbers 2 to 4, only if the defendant has neither a domestic commercial, or independent professional, place of business nor a place of residence.

IX. Anhang: Ausgewählte PowerPoint Tafeln