EUROPEAN ANTITRUST LAW

SYLLABUS

Jean Monnet Module "Competition Law and Social inequalities" (CLAWSI)

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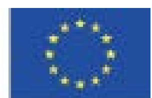


THE RESTRICTION OF COMPETITION

Article 101
(ex Article 81 TEC)

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,

- 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.

Competition rules applicable to undertakings - The Spaak Report (in French)

(…)
a) L E PRO B L E M E DE LA DISCRIM I A T ION

Le marché commun ne conduirait pas par lui-même a la répartition la plus rationnelle des activités si les fournisseurs gardaient la possibilité d'approvisionner les utilisateurs a des conditions différentes, en particulier suivant leur nationalité ou le pays de leur résidence. C'est dans ces termes que se pose le problème de la discrimination.
La discrimination peut prendre les formes les plus diverges, par exemple sur la qualité ou sur les délais de livraison. Elle peut, dans certains cas, aller jusqu' au refus de vendre, de quelque prétexte il s'entoure. Dans la plupart des cas, elle s'exercera sur les prix, soit sons la forme de doubles prix, c'est- dire de conditions plus onéreuses en dehors du marché national du fournisseur, soit sons la forme de dumping, dont une condition est en tout cas que les prix faits soient inferieurs a ceux que pratique l'entreprise sur son marché national.
Ces problèmes, qui se posent avec acuité dans le commerce international traditionnel et qui opposent de sérieux obstacles à la libéralisation des échanges ou à la réduction des droits de douane, tendent au contraire à se dissiper d' eux-mêmes dans un marché commun véritable. Une entreprise ne peut demander durablement des prix plus élevés que son tarif normal si l'utilisateur a la possibilité de s'adresser à un concurrent. Et le dumping lui-même ne peut être longtemps soutenu, si l'acheteur installé sur le marché national de l'entreprise en cause a la possibilité d' acheter les produits de cette firme sur les autres marches ou elle applique ces rabais. En d' autres termes, c'est dans la mesure même où le marche national d'une entreprise est protégé qu' elle peut pratiquer un dumping .sur les autres marches. Le caractère simultané et réciproque de la suppression des obstacles aux échanges à l'intérieur du marché commun tend à éliminer ce problème lui-même. Toutefois, au cours de la période de transition, ce mécanisme ne peut encore jouer à plein.
Au cours de cette période, rien n'empêche les Etats de maintenir ou d'introduire une législation anti-dumping qui aura a conformer aux notions admises dans le G. A. T. Au cas où cette législation serait indument restrictive, la Commission européenne en devra demander la modification; à défaut d'accord, la Commission, ou un autre Etat, peut porter plainte devant la Cour.
Une application abusive des législations en vigueur serait elle-même en contradiction avec le traite; les entreprises lésées ou Etat dont elles relèvent pourront donc entreprendre une action devant la Cour; la Commission européenne assurera l' instruction de la plainte.
Il va de soi que il serait préférable d' édicter dans les différents pays une législation uniforme ; la Commission européenne devra avoir le pouvoir de faire des propositions a cet effet. A la fin de la période de transition, la règlementation antidumping devra en tons cas être uniforme pour l'ensemble des pays du marché commun dans leurs relations avec les pays tiers.

b) PROBLEME DES MONOPOLES

Dans la période finale l'élimination des obstacles aux échanges fera disparaitre les possibilités de discrimination d'entreprises en concurrence entre elles. Le problème ne subsiste que du fait des entreprises qui, soit par leurs dimensions, soit par leur spécialisation, soit par les ententes qu'elles auraient conclues, jouissent d'une position de monopole. L'action contre la discrimination rejoint donc celle qui sera nécessaire

contre . la. formation de monopoles a l' intérieur du marché commun. Le traite devra sur ces points énoncer les règles de base.
Les règles et les procédures communes pourront être limitées aux pratiques qui affecteraient le commerce inter Etats, laissant aux Etats nationaux eux-mêmes le soin d' empêcher des discriminations ou la formation d' ententes a effet purement local.

1. Une intervention dans les cas de discrimination sera justifiée quand l'acheteur est pratiquement oblige de se soumettre aux conditions du fournisseur et subit, de ce fait, un dommage dans la concurrence. Tels sont les deux critères. Cette délimitation fait porter effort sur les discriminations exercées par une entreprise au bénéfice une position dominante sur le marché, ou résultant d' une entente entre entreprises, et la discrimination s'apprécie entre utilisateurs eux-mêmes en concurrence entre eux.
Dans ces conditions, les discriminations que la Communauté se charge de réprimer peuvent porter sur les prix ou autres conditions de vente dans les transactions comparables, ou sur des refus~ de livraison. est dans les mêmes limites qu'on définira réciproquement les discriminations exercées par des utilisateurs à l'encontre de fournisseurs.
2. Plus généralement, le traité devra prévoir les moyens d'éviter que des situations ou des pratiques de monopole mettent en échec les objectifs fondamentaux du marché commun. A ce titre, il conviendra d' empêcher
- une répartition des marches par entente entre les entreprises, parce qu'elle équivaudrait à en rétablir le cloisonnement;
- des accords pour limiter la production ou freiner le progrès technique parce qu'ils iraient au rebours du progrès de la productivité; -
- l'absorption ou la domination du marché d'un produit par une seule entreprise parce qu'elle éliminerait l'un des avantages essentiels d'un vaste marche, qui est de concilier l' emploi des techniques de production de masse et le maintien de la concurrence.

Les principes inscrits dans le traité doivent être assez précis pour permettre à la Commission européenne de prendre des règlements généraux d'exécution, qui seront soumis au vote de l' Assemblée, et qui auront pour objet d'élaborer les règles détaillées concernant la discrimination, d'organiser un contrôle des opérations de concentration, et de mettre en pratique une interdiction des ententes qui auraient pour effet une répartition ou une exploitation des marches une limitation de la production ou du progrès technique.
Les décisions générales pourront, le cas échéant, faire l'objet de recours devant la Cour.
Pour l' application concrète, il conviendra d'établir une procédure qui évite autant que possible une multiplication de procès devant la Cour. A cette fin, la Commission européenne constituerait un comité consultatif des ententes et discriminations qui l' aiderait dans une tache de conciliation et d'arbitrage. A défaut d'une solution acceptée par les parties à l' expiration d'un délai qui pourrait être fixe a deux mois, les Etats ou la Commission européenne elle-même pourraient introduire une plainte devant la Cour. Dans tous les cas, l' affaire sera instruite par la Commission européenne.
On notera l'intérêt, pour de tels problèmes, des chambres spécialisées a formation mixte qui sont prévues dans l'organisation de la Cour, et dans lesquelles, à côté des juristes, siègent les experts a compétence économique ou technique.
En tout état de cause, ce n' est pas là un domaine où les solutions puissent être fixées du premier jour et répondre a tous les cas qui peuvent se présenter. 11 faut donc à la fois compter sur une procédure évolutive et sur le développement d'un état d'esprit nouveau à mesure que les progrès du marché commun intensifieront les relations et les

échanges entre entreprises des divers pays. On ne doit pas en particulier essayer de fixer des règles rigides concernant l' acceptation ou le refus des commandes, ou les délais de livraison. On ne peut pas davantage obliger les acheteurs a élargir leurs appels d'offre et à relâcher leurs relations commerciales traditionnelles.
C'est seulement dans le cas des administrations ou entreprises relevant directement des pouvoirs publics qu'il sera nécessaire de prévoir l' élimination des clauses donnant une exclusivité ou une préférence aux entreprises relevant de l' Etat en cause pour les fournisseurs ou les travaux. II convient en contrepartie de reconnaitre que les discriminations les plus flagrantes sont exercées par les vendeurs sur instruction ou avec l' aide des Etats. Les règles de concurrence qui imposeront aux Etats viendront ainsi pour une large part faciliter ou même suppléer l'application des règles de concurrence aux entreprises.

Opinion od A.G Kokkot
T-Mobile Netherlands BV and Others
19 February 2009 Case C-8/08

57. From its wording alone, Article 81(1) EC is directed in general terms against the prevention, restriction or distortion *of competition* within the common market. Nor do the various examples listed in subparagraphs (a) to (e) of Article 81(1) EC contain any restriction in terms such that only anti-competitive business practices having a direct impact on final consumers are prohibited.
58. Instead, Article 81 EC forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 81 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.
59. Thus, a concerted practice has an anti-competitive object not only where it is capable of having a *direct* impact on consumers and the prices payable by them, or – as T-Mobile puts it – on 'consumer welfare'. Instead, an anti-competitive object must already be assumed if the concerted practice is capable of preventing, restricting or distorting *competition* within the common market. That provides an indication that a concerted practice – indirectly, at least – may also have a negative impact on consumers.
60. To narrow the prohibition of Article 81(1) EC simply to behavior having a direct influence on consumer prices would deprive that provision, which is fundamental for the internal market, of much of its practical effect.

T-Mobile Netherlands BV,
4 June 2009, C-8/08

32 Second, with regard to the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market (see *Suiker Unie and Others* v *Commission*, paragraph 173; Case

172/80 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 63; and Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 86).

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

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

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

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

37 On the contrary, it is apparent from Article 81(1)(a) EC that concerted practices may have an anti-competitive object if they 'directly or indirectly fix purchase or selling prices or any other trading conditions'. In the present case, as the Netherlands Government submitted in its written observations, as far as concerns postpaid subscriptions, the remuneration paid to dealers is evidently a decisive factor in fixing the price to be paid by the end user.

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

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

GlaxoSmithKline Services Unlimited/ Commission
6 October 2009, j.c. C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P,

58 According to settled case-law, in order to assess the anti-competitive nature of an agreement, regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (see, to that

effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraph 25, and Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-0000, paragraphs 16 and 21). In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the Community judicature from taking that aspect into account (see, to that effect, *IAZ International Belgium and Others* v *Commission*, cited above, paragraphs 23 to 25).

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

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

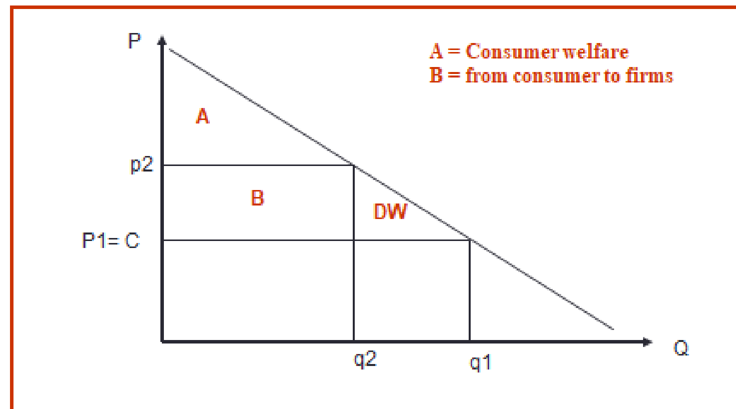
61 The Court has, moreover, held in that regard, in relation to the application of Article 81 EC and in a case involving the pharmaceuticals sector, that an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to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

62 With respect to the Court of First Instance's statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the Court notes that neither the wording of Article 81(1) EC nor the case-law lend support to such a position.

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

64 It follows that, by requiring proof that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti-competitive object and by not finding that that agreement had such an object, the Court of First Instance committed an error of law.

Article 101, para 1, in economic terms



Restriction 'by object' or 'by effect'

Groupement des cartes bancaires (CB) v. Commission
11 September 2014, C-67/13 P

- Examination of whether there is a restriction of competition by 'object' within the meaning of Article 81(1) EC.

48 It must be recalled that, to come within the prohibition laid down in Article 81(1) EC, an agreement, a decision by an association of undertakings or a concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market.

49 In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, judgments in *LTM*, 56/65, EU:C:1966:38, paragraphs 359 and 360; *BIDS*, paragraph 15, and *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 34 and the case-law cited).

50 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see, to that effect, in particular, judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160) paragraph 35 and the case-law cited).

51 Consequently, it is established that certain collusive behavior, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market (see, to that effect, in particular, judgment in *Clair*, 123/83, EU:C:1985:33, paragraph 22). Experience shows that such behavior leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.

52 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 34 and the case-law cited).
53 According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgment in *Allianz Hungária Biztosító and Others*(EU:C:2013:160), paragraph 36 and the case-law cited).
54 In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (see judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 37 and the case-law cited).

Toshiba v. Commission
20 January 2016, C-373/14 P

23 In paragraph 228 of the judgment under appeal, the General Court found that the Commission rightly held that, as a market-sharing agreement, an agreement such as the Gentlemen's Agreement had to be classified as a 'restriction by object'.
24 In that regard, it should be noted that, in order to be caught by 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. According to the settled case-law of the Court of Justice since the judgment in *LTM* (56/65, EU:C:1966:38), the alternative nature of that requirement, as shown by the conjunction 'or', means that it is first necessary to consider the precise object of the agreement (judgment in *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 30).
25 Thus, where the anticompetitive object of the agreement is established, it is not necessary to examine its effects on competition (see, to that effect, judgments in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 28 and 30, and *GlaxoSmithKline Services and Others* v *Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55).
26 With regard to the classification of a practice as a restriction by object, it is clear from the case-law of the Court that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that there is no need to examine their effects (judgment in *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 31). That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50).
27 The Court's case-law has also established that, in order to determine whether an agreement between undertakings reveals a sufficient degree of harm that it may be considered a 'restriction of competition by object' within the meaning of Article 101(1)

TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part (judgment in *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 33).

28 Thus, the Court has already held that market-sharing agreements constitute particularly serious breaches of the competition rules (see, to that effect, judgments in *Solvay Solexis* v *Commission*, C-449/11 P, EU:C:2013:802, paragraph 82, and *YKK and Others* v *Commission*, C-408/12 P, EU:C:2014:2153, paragraph 26). The Court has also held that agreements which aim to share markets have, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by Article 101(1) TFEU, and that such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned (judgment in *Siemens and Others* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 218).

29 In respect of such agreements, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object.

30 In the present case, Toshiba maintains that the General Court erred in law in characterizing the Gentlemen's Agreement as a 'restriction of competition by object', without ascertaining beforehand whether any entry to the EEA market represented an economically viable strategy for Japanese producers.

31 In that regard, it should be observed that the General Court examined Toshiba's argument that the Gentlemen's Agreement was not capable of restricting competition within the EEA due to the fact that the European and Japanese producers were not competitors on the European market. It is in that context that the General Court found, first, in paragraph 230 of the judgment under appeal, that, since Article 101 TFEU also concerns potential competition, the Gentlemen's Agreement was capable of restricting competition, unless insurmountable barriers to entry to the European market existed that ruled out any potential competition from Japanese producers.

32 Secondly, in paragraphs 232 and 233 of the judgment under appeal, the General Court held that those barriers could not be classified as insurmountable, which was shown by the fact that Hitachi had accepted projects coming from customers situated in Europe.

33 The General Court also held, in paragraph 231 of the judgment under appeal, that the Gentlemen's Agreement represented a 'strong indication that a competitive relationship existed' between the two categories of producers, which, as the Advocate General observes in point 100 of his Opinion, constitutes an element of the relevant economic and legal context.

34 The analysis which the General Court thus carried out is in accordance with the criteria set out in paragraphs 24 to 29 of this judgment in order to establish an infringement of Article 101(1) TFEU as a restriction by object, without a more detailed analysis of the relevant economic and legal context being necessary.

35 In any event, it must be held that, in so far as Toshiba claims that the General Court erred in finding that the barriers to entry to the European market were not insurmountable and that, consequently, there was potential competition between European and Japanese producers on that market, such arguments criticise the General Court's assessment of the facts, which, in the absence of a clear distortion of the facts, and subject to the analysis to be carried out within the context of the second ground of appeal of this judgment, is not subject to review by the Court of Justice on appeal

'restriction by object or by effect'

Step 1	Step 2	Step 3
Analysis of the content of the practice, its objectives and its economic and legal context.	Certain types of coordination reveal a sufficient degree of harm to competition	No need to examine their effects
	Certain types of coordination do not reveal a sufficient degree of harm to competition	Effects should be considered

Restrictions 'by object' and 'appreciable' restraint of competition

Expedia Inc.
13 December 2012, C-226/11

14 By its question, the referring court seeks to know, essentially, whether Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 must be interpreted as 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.
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).
(…)

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.
25 Furthermore, in the second and third sentences of paragraph 2 of that notice, the Commission states that market share thresholds used quantify what is not an appreciable restriction of competition within the meaning of Article 101 TFEU, but that the negative definition of the appreciability of such restriction does not imply that agreements of undertakings which exceed those thresholds appreciably restrict competition.
26 Moreover, contrary to the Commission notice on cooperation within the network of competition authorities (OH 2004 C 101, p. 43), the *de minimis* notice does not contain any reference to declarations by the competition authorities of the Member States that they acknowledge the principles set out therein and that they will abide by them.
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.
28 It is apparent from that paragraph, first, that the purpose of that notice is to make transparent the manner in which the Commission, acting as the competition authority of the European Union, will itself apply Article 101 TFEU. Consequently, by the *de minimis* notice, the Commission imposes a limit on the exercise of its discretion and must not depart from the content of that notice without being in breach of the general principles of law, in particular the principles of equal treatment and the protection of legitimate expectations (see, to that 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, paragraph 211). Furthermore, it intends to give guidance to the courts and authorities of the Member States in their application of that article.
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).
30 Accordingly, that notice was published in 2001 in the ‘C’ series of the *Official Journal of the European Union*, which, by contrast with the ‘L’ series of the Official Journal, is not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union (see, by analogy, Case C-410/09 *Polska Telefonia Cyfrowa* [2011] ECR I-3853, paragraph 35).
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.
(…)
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).
36 In that regard, the Court has emphasised that the distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (Case C-209/07 *Beef Industry Development Society and Barry Brothers ('BIDS')* [2008] ECR I-8637, paragraph 17, and Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 29).
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.

Restrictions 'by effect' which do not appreciably distort competition

European Commission
De Minimis Notice, 30 August 2014

8 The Commission holds the view that agreements between undertakings which may affect trade between Member States and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty:
(a) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors) (7); or
(b) if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors).
9 In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 % threshold is applicable.
10 Where, in a relevant market, competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds set out in point 8 and 9 are reduced to 5 %, both for agreements between competitors and for agreements between non-competitors. Individual suppliers or distributors with a market share not exceeding 5 %, are in general not considered to contribute significantly to a cumulative foreclosure effect (8). A cumulative foreclosure effect is unlikely to exist if less than 30 % of the relevant market is covered by parallel (networks of) agreements having similar effects.
11 The Commission also holds the view that agreements do not appreciably restrict competition if the market shares of the parties to the agreement do not exceed the

thresholds of respectively 10 %, 15 % and 5 % set out in points 8, 9 and 10 during two successive calendar years by more than 2 percentage points.
12 In order to calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market. When defining the relevant market, reference should be had to the Notice on the definition of the relevant market (9). The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.

C. 4 Restrictions 'by object' which do not benefit from the *De Minimis Notice*

European Commission
Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice - 25 June 2014

1. FINDING GUIDANCE ON RESTRICTIONS OF COMPETITION "BY OBJECT"

The Commission's De Minimis Notice provides a safe harbour for agreements between undertakings which the Commission considers to have non-appreciable effects on competition. This safe harbour applies on condition that the market shares of the undertakings concluding those agreements do not exceed the market share thresholds set out in that Notice and provided that the agreements do not have as their object to restrict competition. For the purposes of the application of the De Minimis Notice, hardcore restrictions listed in the Commission block exemption regulations are generally considered to constitute restrictions by object. Therefore, agreements containing restrictions listed as hardcore restrictions in any current or future Commission block exemption regulation cannot benefit from the market share safe harbour set out in that Notice.

Article 101(1) of the Treaty on the Functioning of the European Union (the Treaty) prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. The distinction between "restrictions by object" and "restrictions by effect" arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. Restrictions of competition "by object" are those that by their very nature have the potential to restrict competition. These are restrictions which in the light of the objectives pursued by the Union competition rules have such a high potential for negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) of the Treaty to demonstrate any actual or likely anticompetitive effects on the market. This is due to the serious nature of the restriction and experience showing that such restrictions are likely to produce negative effects on the market and to jeopardise the objectives pursued by the EU Union competition rules.

In order to determine with certainty whether an agreement involves a restriction of competition "by object", regard must, according to the case law of the Court of Justice of the European Union, be had to a number of factors, such as the content of its provisions, its objectives and the economic and legal context of which it forms a part. In

addition, although the parties' intention is not a necessary factor in determining whether an agreement restricts competition "by object", the Commission may nevertheless take this aspect into account in its analysis.

The types of restrictions that are considered to constitute restrictions "by object" differ depending on whether the agreements are entered into between actual or potential competitors or between non-competitors (for example between a supplier and a distributor). In the case of agreements between competitors (horizontal agreements), restrictions of competition by object include, in particular, price fixing, output limitation and sharing of markets and customers. As regards agreements between non-competitors (vertical agreements), the category of restrictions by object includes, in particular, fixing (minimum) resale prices and restrictions which limit sales into particular territories or to particular customer groups.

The fact that an agreement contains a restriction "by object", and thus falls under Article 101(1) of the Treaty, does not preclude the parties from demonstrating that the conditions set out in Article 101(3) of the Treaty are satisfied. However, practice shows that restrictions by object are unlikely to fulfil the four conditions set out in Article 101(3).

In exceptional cases, a restriction "by object" may also be compatible with Article 101 of the Treaty not because it benefits from the exception provided for in Article 101(3) of the Treaty, but because it is objectively necessary for the existence of an agreement of a particular type or nature or for the protection of a legitimate goal, such as health and safety, and therefore falls outside the scope of Article 101(1) of the Treaty.

Types of practices that generally constitute restrictions of competition "by object" can be found in the Commission's guidelines, notices and block exemption regulations. These refer to restrictions by object or contain lists of so-called "hardcore" restrictions that describe certain types of restrictions which do not benefit from a block exemption on the basis of the nature of those restrictions and the fact that those restrictions are likely to produce negative effects on the market. Those so called "hardcore" restrictions are generally restrictions "by object" when assessed in an individual case. Agreements containing one or more "by object" or hardcore restrictions cannot benefit from the safe harbour of the De Minimis Notice.
(…)

2. "BY OBJECT" RESTRICTIONS IN AGREEMENTS BETWEEN COMPETITORS

The three classical "by object" restrictions in agreements between competitors are price fixing, output limitation and market sharing (sharing of geographical or product markets or customers).

However, restrictions of that kind may not constitute restrictions "by object" where they are part of a wider cooperation agreement between two competitors in the context of which the parties combine complementary skills or assets. For example, in the context of production agreements, it is not considered a "by object" restriction where the parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), provided that other parameters of competition are not eliminated. Another example is a production agreement that also provides for the joint distribution of the

jointly manufactured products and envisages the joint setting of the sales prices for those products, and only those products, provided that the restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place. In those scenarios the agreement on output or prices will not be assessed separately, but will be assessed in the light of the overall effects of the entire production agreement on the market.

The effect on trade concept

European Commission
Guidelines on the effect on trade concept, 27 April 2004

(…)
18 It follows from the wording of Articles 81 and 82 and the case law of the Community Courts that in the application of the effect on trade criterion three elements in particular must be addressed:
(a) The concept of "trade between Member States",
(b) The notion of "may affect", and
(c) The concept of "appreciability".
2.2. The concept of "trade between Member States"
19 The concept of "trade" is not limited to traditional exchanges of goods and services across borders (10). It is a wider concept, covering all cross-border economic activity including establishment (11). This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital.
20 According to settled case law the concept of "trade" also encompasses cases where agreements or practices affect the competitive structure of the market. Agreements and practices that affect the competitive structure inside the Community by eliminating or threatening to eliminate a competitor operating within the Community may be subject to the Community competition rules (12). When an undertaking is or risks being eliminated the competitive structure within the Community is affected and so are the economic activities in which the undertaking is engaged.
21 The requirement that there must be an effect on trade "between Member States" implies that there must be an impact on cross-border economic activity involving at least two Member States. It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State. Articles 81 and 82 may be applicable also in cases involving part of a Member State, provided that the effect on trade is appreciable (13).
22 The application of the effect on trade criterion is independent of the definition of relevant geographic markets. Trade between Member States may be affected also in cases where the relevant market is national or sub-national (14).
2.3. The notion "may affect"
23 The function of the notion "may affect" is to define the nature of the required impact on trade between Member States. According to the standard test developed by the Court of Justice, the notion "may affect" implies that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States(15)(16). As mentioned in paragraph 20 above the Court of Justice has in addition developed a test based on whether or not the agreement or practice affects the competitive structure. In cases

where the agreement or practice is liable to affect the competitive structure inside the Community, Community law jurisdiction is established.

24 The "pattern of trade"-test developed by the Court of Justice contains the following main elements, which are dealt with in the following sections:

(a) "A sufficient degree of probability on the basis of a set of objective factors of law or fact",

(b) An influence on the "pattern of trade between Member States",

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

2.3.1. A sufficient degree of probability on the basis of a set of objective factors of law or fact

25 The assessment of effect on trade is based on objective factors. Subjective intent on the part of the undertakings concerned is not required. If, however, there is evidence that undertakings have intended to affect trade between Member States, for example because they have sought to hinder exports to or imports from other Member States, this is a relevant factor to be taken into account.

26 The words "may affect" and the reference by the Court of Justice to "a sufficient degree of probability" imply that, in order for Community law jurisdiction to be established, it is not required that the agreement or practice will actually have or has had an effect on trade between Member States. It is sufficient that the agreement or practice is "capable" of having such an effect (17).

27 There is no obligation or need to calculate the actual volume of trade between Member States affected by the agreement or practice. For example, in the case of agreements prohibiting exports to other Member States there is no need to estimate what would have been the level of parallel trade between the Member States concerned, in the absence of the agreement. This interpretation is consistent with the jurisdictional nature of the effect on trade criterion. Community law jurisdiction extends to categories of agreements and practices that are capable of having cross-border effects, irrespective of whether a particular agreement or practice actually has such effects.

28 The assessment under the effect on trade criterion depends on a number of factors that individually may not be decisive (18). The relevant factors include the nature of the agreement and practice, the nature of the products covered by the agreement or practice and the position and importance of the undertakings concerned (19).

29 The nature of the agreement and practice provides an indication from a qualitative point of view of the ability of the agreement or practice to affect trade between Member States. Some agreements and practices are by their very nature capable of affecting trade between Member States, whereas others require more detailed analysis in this respect. Cross-border cartels are an example of the former, whereas joint ventures confined to the territory of a single Member State are an example of the latter. This aspect is further examined in section 3 below, which deals with various categories of agreements and practices.

30 The nature of the products covered by the agreements or practices also provides an indication of whether trade between Member States is capable of being affected. When by their nature products are easily traded across borders or are important for undertakings that want to enter or expand their activities in other Member States, Community jurisdiction is more readily established than in cases where due to their nature there is limited demand for products offered by suppliers from other Member States or where the products are of limited interest from the point of view of cross-border establishment or the expansion of the economic activity carried out from such place of establishment (20). Establishment includes the setting-up by undertakings in one Member State of agencies, branches or subsidiaries in another Member State.

31 The market position of the undertakings concerned and their sales volumes are indicative from a quantitative point of view of the ability of the agreement or practice concerned to affect trade between Member States. This aspect, which forms an integral part of the assessment of appreciability, is addressed in section 2.4 below.
32. In addition to the factors already mentioned, it is necessary to take account of the legal and factual environment in which the agreement or practice operates. The relevant economic and legal context provides insight into the potential for an effect on trade between Member States. If there are absolute barriers to cross-border trade between Member States, which are external to the agreement or practice, trade is only capable of being affected if those barriers are likely to disappear in the foreseeable future. In cases where the barriers are not absolute but merely render cross-border activities more difficult, it is of the utmost importance to ensure that agreements and practices do not further hinder such activities. Agreements and practices that do so are capable of affecting trade between Member States.
2.3.2. An influence on the "pattern of trade between Member States"
33 For Articles 81 and 82 to be applicable there must be an influence on the "pattern of trade between Member States".
34 The term "pattern of trade" is neutral. It is not a condition that trade be restricted or reduced (21). Patterns of trade can also be affected when an agreement or practice causes an increase in trade. Indeed, Community law jurisdiction is established if trade between Member States is likely to develop differently with the agreement or practice compared to the way in which it would probably have developed in the absence of the agreement or practice (22).
35 This interpretation reflects the fact that the effect on trade criterion is a jurisdictional one, which serves to distinguish those agreements and practices which are capable of having cross-border effects, so as to warrant an examination under the Community competition rules, from those agreements and practices which do not.
2.3.3. A "direct or indirect, actual or potential influence" on the pattern of trade
36 The influence of agreements and practices on patterns of trade between Member States can be "direct or indirect, actual or potential".
(…)

HORIZONTAL RESTRAINTS

Forms of collusion: introduction

Forms of collusion

Explicit collusion	Explicit collusion		Tacit collusion
Agreement	Concerted practices		Independent action
prohibited	prohibited		permitted
Joint intention expressed	The risks of competition substituted by cooperation		Intelligent adaptaion to competitors conduct
Reciprocal contacts	Direct contacts	Indirect contacts	No contacts

Agreements

Bayer AG v. Commission.
26 October 2000, Case T-41/96

66 The case-law shows that, where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 85(1) of the Treaty (Case 107/82 AEG v Commission [1983] ECR 3151, paragraph 38; Joined Cases 25/84 and 26/84 Ford and Ford Europe v Commission [1985] ECR 2725, paragraph 21; Case T-43/92 Dunlop Slazenger v Commission [1994] ECR II-441, paragraph 56).
67 It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 ACF Chemiefarma v Commission [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck and Others v Commission [1980] ECR 3125, paragraph 86; Case T-7/89 Hercules Chemicals v Commission [1991] ECR II-1711, paragraph 256).
68 As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in

accordance with its terms (see, in particular, ACF Chemiefarma, paragraph 112, and Van Landewyck, paragraph 86), without its having to constitute a valid and binding contract under national law (Sandoz, paragraph 13).
69 It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.
70 In certain circumstances, measures adopted or imposed in an apparently unilateral manner by a manufacturer in the context of his continuing relations with his distributors have been regarded as constituting an agreement within the meaning of Article 85(1) of the Treaty (Joined Cases 32/78, 36/78 to 82/78 BMW Belgium and Others v Commission [1979] ECR 2435, paragraphs 28 to 30; AEG, paragraph 38; Ford and Ford Europe, paragraph 21; Case 75/84 Metro v Commission (Metro II [1986] ECR 3021, paragraphs 72 and 73; Sandoz, paragraphs 7 to 12; Case C-70/93 BMW v ALD [1995] ECR I-3439, paragraphs 16 and 17).
71 That case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.
72 It is also clear from that case-law that the Commission cannot hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which he maintains with his dealers, in reality forms the basis of an agreement between undertakings within the meaning of Article 85(1) of the Treaty if it does not establish the existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer (BMW Belgium, paragraphs 28 to 30; AEG, paragraph 38; Ford and Ford Europe, paragraph 21; Metro II, paragraphs 72 and 73; Sandoz, paragraphs 7 to 12; BMW v ALD, paragraphs 16 and 17).

Agreements falling outside the scope of Article 101.

Albany International
21 September 1999, C-67/96

46. By its second question, which it is appropriate to consider first, the national court seeks essentially to ascertain whether Article 3(g) of the Treaty, Article 5 of the EC Treaty (now Article 10 EC) and Article 85 of the Treaty prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at there quest of organisations representing employers and workers in a given sector.
47. Albany contends that the request by management and labour to make affiliation to a sectoral pension fund compulsory constitutes an agreement between the undertakings operating in the sector concerned, contrary to Article 85(1) of the Treaty.
48.Such an agreement, in its view, restricts competition in two ways. First, by entrusting the operation of a compulsory scheme to a single manager, it deprives the undertakings operating in the sector concerned of the possibility of affiliation to another pension

scheme managed by other insurers. Second, that agreement excludes the latter insurers from a substantial part of the pension insurance market.
49. The effects of such an agreement on competition are 'appreciable�" because it affects the entire Netherlands textile sector. They are aggravated by the cumulative effect of making affiliation to pension schemes compulsory in numerous sectors of the economy and for all undertakings in those sectors.
50. Moreover, such an agreement affects trade between Member States in so far as it concerns undertakings which engage in cross-frontier business and deprives insurers established in other Member States of the opportunity to offer a full pension scheme in the Netherlands either by virtue of cross-frontier services or through branches or subsidiaries.
51. Therefore, according to Albany, by creating a legal framework for, and acceding to a request from, the two sides of industry to make affiliation to the sectoral pension fund compulsory, the public authorities favoured or furthered the implementation and operation of agreements between undertakings operating in the sectors concerned which are contrary to Article 85(1) of the Treaty, thereby infringing Articles 3(g), 5 and 85 of the Treaty.
52. It is necessary to consider first whether a decision taken by the organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector is contrary to Article 85 of the Treaty.
53. It must be noted, first, that Article 85(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The importance of that rule prompted the authors of the Treaty to provide expressly in Article 85(2) of the Treaty that any agreements or decisions prohibited pursuant to that article are to be automatically void.
54. Next, it is important to bear in mind that, under Article 3(g) and (i) of the EC Treaty (now, after amendment, Article 3(1)(g) and (j) EC), the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted�" but also 'a policy in the social sphere. Article 2of the EC Treaty (now, after amendment, Article 2 EC) provides that a particular task of the Community is 'to promote throughout the Community a harmonious and balanced development of economic activities�" and 'a high level of employment and of social protection�".
55. In that connection, Article 118 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) provides that the Commission is to promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers.
56. Article 118b of the EC Treaty (Articles 117 to 120 of the EC Treaty having been replaced by Articles 136 EC to 143 EC) adds that the Commission is to endeavor to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.
57. Moreover, Article 1 of the Agreement on social policy (OJ 1992 C 191, p. 91)states that the objectives to be pursued by the Community and the Member States include improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion.

58. Under Article 4(1) and (2) of the Agreement, the dialogue between management and labour at Community level may lead, if they so desire, to contractual relations, including agreements, which will be implemented either in accordance with the procedures and practices specific to management and labour and the Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.
59. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.
60. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.
61. The next question is therefore whether the nature and purpose of the agreement at issue in the main proceedings justify its exclusion from the scope of Article 85(1)of the Treaty.
62. First, like the category of agreements referred to above which derive from social dialogue, the agreement at issue in the main proceedings was concluded in the form of a collective agreement and is the outcome of collective negotiations between organisations representing employers and workers.
63. Second, as far as its purpose is concerned, that agreement establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.
64. Consequently, the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty.

FNV Kunsten Informatie en Media
4 December 2014, C-413/13

21 By its two questions, which must be examined together, the referring court asks essentially whether, on a proper construction of EU law, a provision of a collective labour agreement, which sets minimum fees for self-employed service providers [musicians substituting for members of an orchestra (‘the substitutes’) *e.d.*] who are members of one of the contracting employees’ organisations and perform for an employer, under a works or service contract, the same activity as that employer’s employed workers, does not fall within the scope of Article 101(1) TFEU.
(…)
24 In the case in the main proceedings, the agreement concerned was concluded between an employers’ organisation and employees’ organisations of mixed composition, which negotiated, in accordance with national law, not only for employed substitutes but also for affiliated self-employed substitutes.
25 Therefore, it is necessary to examine whether the nature and purpose of such an agreement enable it to be included in collective negotiations between employers and employees and justify its exclusion, as regards minimum fees for self-employed substitutes, from the scope of Article 101(1) TFEU.

26 First, as regards the nature of that agreement, it is clear from the findings of the referring court that the agreement was concluded in the form of a collective labour agreement. However, that agreement, specifically as regards the provision in Annex 5 thereto on minimum fees, is the result of negotiations between an employers' organisation and employees' organisations which also represent the interests of self-employed substitutes who provide services to orchestras under a works or service contract.
27 It must be held in that regard that, although they perform the same activities as employees, service providers such as the substitutes at issue in the main proceedings, are, in principle, 'undertakings' within the meaning of Article 101(1) TFEU, for they offer their services for remuneration on a given market (judgment in Ordem dos Técnicos Oficiais de Contas, C-1/12, EU:C:2013:127, paragraphs 36 and 37) and perform their activities as independent economic operators in relation to their principal (see judgment in Confederación Española de Empresarios de Estaciones de Servicio, C-217/05, EU:C:2006:784, paragraph 45).
28 It is clear, as also observed by the Advocate General in point 32 of his Opinion and the NMa in its reflection document, that, <u>in so far as an organisation representing workers carries out negotiations acting in the name, and on behalf, of those self-employed persons who are its members, it does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings</u>.
29 It should also be added that, although the Treaty encourages dialogue between management and labour, it does not, however, contain provisions, like Articles 153 TFEU and 155 TFEU or Articles 1 and 4 of the Agreement on social policy (OJ 1992 C 191, p. 91), encouraging self-employed service providers to open a dialogue with the employers to which they provide services under a works or service contract and, therefore, to conclude collective agreements with a view to improving their terms of employment and working conditions (see, by analogy, judgment in Pavlov and Others, EU:C:2000:428, paragraph 69).
30 <u>In those circumstances, it follows that a provision of a collective labour agreement, such as that at issue in the main proceedings, in so far as it was concluded by an employees' organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU</u>.
31 <u>That finding cannot, however, prevent such a provision of a collective labour agreement from being regarded also as the result of dialogue between management and labour if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact 'false self-employed', that is to say, service providers in a situation comparable to that of employees.</u>
32 As observed by the Advocate General in point 51 of his Opinion, and by the FNV, the Netherlands Government and the European Commission at the hearing, in today's economy it is not always easy to establish the status of some self-employed contractors as 'undertakings', such as the substitutes at issue in the main proceedings.
33 As far as concerns the case in the main proceedings, it must be recalled that, according to settled case-law, on the one hand, a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking (see, to that effect, judgment in Confederación Española de Empresarios de Estaciones de Servicio, EU:C:2006:784, paragraphs 43 and 44).

34 On the other hand, the term 'employee' for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned. In that connection, it is settled case-law that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration (see judgments in N., C-46/12, EU:C:2013:97, paragraph 40 and the case-law cited, and Haralambidis, C-270/13, EU:C:2014:2185, paragraph 28).
35 From that point of view, the Court has previously held that the classification of a 'self-employed person' under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship (see, to that effect, judgment in Allonby, C-256/01, EU:C:2004:18, paragraph 71).
36 It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work (see judgment in Allonby, EU:C:2004:18, paragraph 72), does not share in the employer's commercial risks (judgment in Agegate, C-3/87, EU:C:1989:650, paragraph 36), and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking (see judgment in Becu and Others, C-22/98, EU:C:1999:419, paragraph 26).
37 In the light of those principles, in order that the self-employed substitutes concerned in the main proceedings may be classified, not as 'workers' within the meaning of EU law, but as genuine 'undertakings' within the meaning of that law, it is for the national court to ascertain that, apart from the legal nature of their works or service contract, those substitutes do not find themselves in the circumstances set out in paragraphs 33 to 36 above and, in particular, that their relationship with the orchestra concerned is not one of subordination during the contractual relationship, so that they enjoy more independence and flexibility than employees who perform the same activity, as regards the determination of the working hours, the place and manner of performing the tasks assigned, in other words, the rehearsals and concerts.

Concerted practices

Suiker Unie and. o v. Commission
16 December 1975, J.C. 40 to 48, 50, 54 to 56, 111, 113 and 114/73

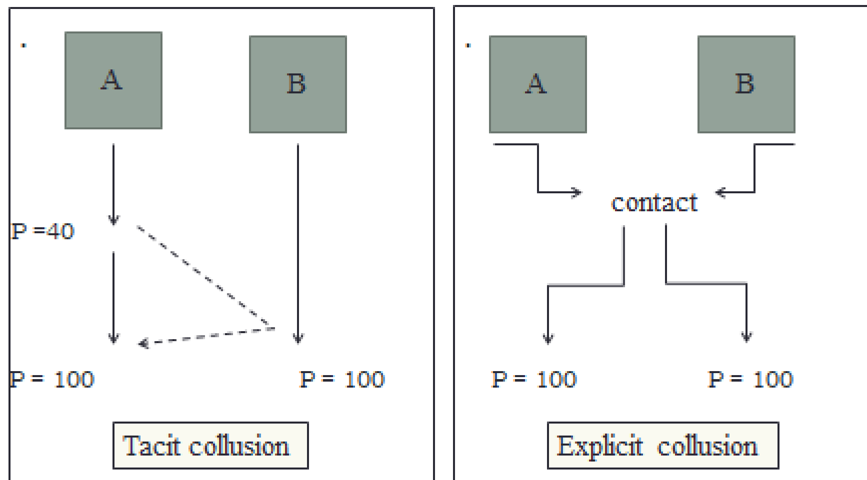
26 The concept of a 'concerted practice' refers to a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market.
27 Such practical cooperation amounts to a concerted practice, particularly if it enables the persons concerned 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.

(…)
172 SU and CSM submit that since the concept of 'concerted practices' presupposes a plan and the aim of removing in advance any doubt as to the future conduct of competitors, the reciprocal knowledge which the parties concerned could have of the parallel or complementary nature of their respective decisions cannot in itself be sufficient to establish a concerted practice; otherwise every attempt by an undertaking to react as intelligently as possible to the acts of its competitors would be an offence.
173 <u>The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells</u>.
174 Although it is correct to say that <u>this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.</u>

Commission v. Anic Partecipazioni Spa
8 July 1999, C-49/92 P

115 Thirdly, it must be borne in mind that a concerted practice, within the meaning of Article 85(1) of the Treaty, refers to a <u>form of coordination between undertakings which, without having been taken to a stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them</u> (see Suiker Unie and Others v Commission, cited above, paragraph 26, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeyhtiö and Others v Commission [1993] ECR I-1307, paragraph 63).
116 The Court of Justice has further explained that criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, <u>according to which each economic operator must determine independently the policy which he intends to adopt on the market</u> (see Suiker Unie and Others v Commission, cited above, paragraph 173; Case 172/80 Züchner [1981] ECR 2021, paragraph 13; Ahlström Osakeyhtiö and Others v Commission, cited above, paragraph 63; and John Deere v Commission, cited above, paragraph 86).
117 According to that case-law, although <u>that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market</u> (see,

to that effect, Suiker Unie and Others v Commission, paragraph 174; Züchner, paragraph 14; and John Deere v Commission, paragraph 87, all cited above).
118 It follows that, as is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.
119 The Court of First Instance therefore committed an error of law in relation to the interpretation of the concept of concerted practice in holding that the undertakings' collusive practices had necessarily had an effect on the conduct of the undertakings which participated in them.
120 It does not, however, follow that the cross-appeal should be upheld. As the Court of Justice has repeatedly held (see, inter alia, Case C-30/91 P Lestelle v Commission [1992] ECR I-3755, paragraph 28), if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds, the appeal must be dismissed.
121 For one thing, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.
122 For another, a concerted practice, as defined above, falls under Article 85(1) of the Treaty even in the absence of anti-competitive effects on the market.
123 First, it follows from the actual text of Article 85(1) that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.
124 Next, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition.
125 Lastly, that interpretation is not incompatible with the restrictive nature of the prohibition laid down in Article 85(1) of the Treaty (see Case 24/67 Parke Davis v Centrafarm [1968] ECR 55, p. 71) since, far from extending its scope, it corresponds to the literal meaning of the terms used in that provision.



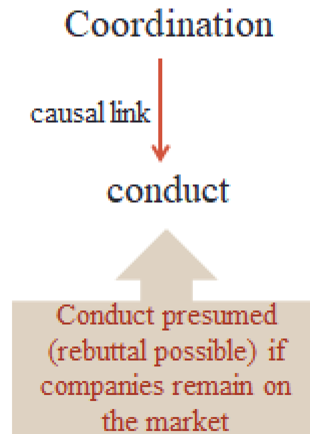
Causal link between concerting and the subsequent conduct

T-Mobile Netherlands BV
4 June 2009, C-8/08

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

Concerted practice: legal standard

A concerted practice implies:
- undertakings concerting with each other
- subsequent conduct on the market
- a relationship of cause and effect between the two
subject to proof to the contrary, it must be presumed that the undertakings remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market.



Exchange of information

Solvay v. Commission
5 December 2013, C-455/11 P

39 In the case of a highly concentrated oligopolistic market, such as the market in question in the present case, the exchange of commercial information between competitors is such as to enable operators to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between economic operators (see T-Mobile Netherlands and Others, paragraph 34 and the case-law cited).
40 In those circumstances, the exchange of commercial information between competitors in preparation for an anti-competitive agreement suffices to prove the existence of a concerted practice within the meaning of Article 81(1) EC. In that regard, it is not necessary to show that those competitors formally undertook to adopt a particular course of conduct or that the competitors colluded over their future conduct on the market.
41 It follows that the General Court cannot be criticised for having held, in paragraphs 148 and 149 of the judgment under appeal, first, that, even if the Commission does not succeed in showing that the undertakings concluded an agreement, in the strict sense of the term, it is sufficient, in order to find an infringement of Article 81(1) EC, that the competitors have made direct contact with a view to 'stabilising the market' and, next, for having rejected Solvay's contention that the disclosure of information to competitors may be deemed to be a concerted practice only where an anti-competitive agreement has already been concluded and negotiations take place only in order to effect its implementation.
42 Second, as regards Solvay's argument that the General Court failed to take account of its observations that the information exchanged was not sufficient to have negative effects on competition, it should be borne in mind that the Court of Justice has held that,

subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period (see, inter alia, T-Mobile Netherlands and Others, paragraph 51 and the case-law cited).
43 In order to rebut that presumption, it is for the undertaking concerned to prove that the concerted action did not have any influence whatsoever on its own conduct on the market (see Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraph 167). The proof to the contrary must therefore be such as to rule out any link between the concerted action and the determination, by that undertaking, of its conduct on the market.
44 In that regard, it must be stated that probative data illustrating the competitive nature of the market and, in particular, the decrease of prices during the period concerned cannot suffice, of itself, to rebut that presumption. That data does not of itself make it possible to prove that that undertaking did not take account of the information exchanged with its competitors in determining its conduct on the market. It follows that that data does not of itself preclude the presumption that the concerted action enabled that undertaking to eliminate uncertainties regarding its conduct on the market, so that normal competition might as a result have been prevented, restricted or distorted.

T-Mobile Netherlands BV
4 June 2009, C-8/08

32 Second, with regard to the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market (see *Suiker Unie and Others* v *Commission*, paragraph 173; Case 172/80 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 63; and Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 86).
33 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 174; *Züchner*, paragraph 14; and *Deere* v *Commission*, paragraph 87).
34 At paragraphs 88 et seq. of *Deere* v *Commission*, the Court therefore held that on a highly concentrated oligopolistic market, such as the market in the main proceedings, the exchange of information was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders.

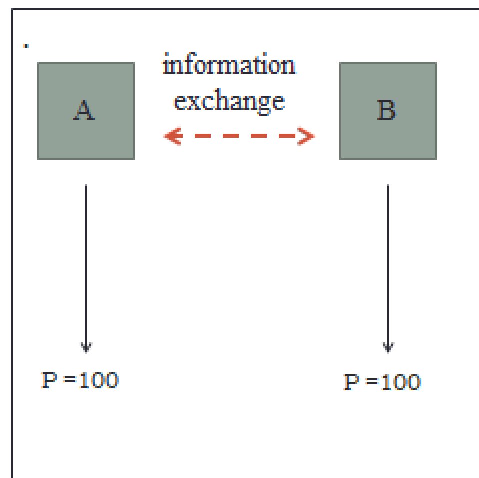
35 It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (see *Deere* v *Commission*, paragraph 90, and Case C-194/99 P *Thyssen Stahl* v *Commission*[2003] ECR I-10821, paragraph 81).
36 Third, as to whether a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices, it is not possible on the basis of the wording of Article 81(1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited.
37 On the contrary, it is apparent from Article 81(1)(a) EC that concerted practices may have an anti-competitive object if they 'directly or indirectly fix purchase or selling prices or any other trading conditions'. In the present case, as the Netherlands Government submitted in its written observations, as far as concerns postpaid subscriptions, the remuneration paid to dealers is evidently a decisive factor in fixing the price to be paid by the end user.
38 In any event, as the Advocate General pointed out at point 58 of her Opinion, Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.
39 Therefore, contrary to what the referring court would appear to believe, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.

Exchange of information

On a highly concentrated oligopolistic market the exchange of information enables traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition.

It is incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market.

TMobile C-8/08, ptt. 34-35



European Commission
Guidelines on the applicability of Article 101 to horizontal co-operation agreements, 14 January 2011

62. A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice (47). Such

disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behavior, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behavior (48). For example, mere attendance at a meeting (49) where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices (50). When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data (51).
63. Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1) (52). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.
(…)
2.2.2. Restriction of competition by object
72. Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. In assessing whether an information exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the legal and economic context in which the information exchange takes place (55). To this end, the Commission will take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition (56).
73.Exchanging information on companies' individualized intentions concerning future conduct regarding prices or quantities (57) is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices (see Example 1, paragraph 105). Moreover, it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data.
74.Information exchanges between competitors of individualized data regarding intended future prices or quantities should therefore be considered a restriction of competition by object (58) (59). In addition, private exchanges between competitors of their individualized intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities. Information exchanges that constitute cartels not only infringe Article 101(1), but, in addition, are very unlikely to fulfil the conditions of Article 101(3).

2.2.3. Restrictive effects on competition
75.The likely effects of an information exchange on competition must be analyzed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition compares the

likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange (60). For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of information exchanged.

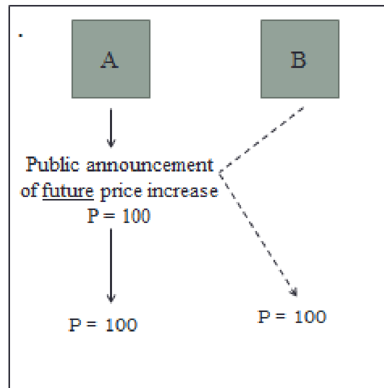
76. Certain market conditions may make coordination easier to achieve, sustain internally, or sustain externally (61). Exchanges of information in such markets may have more restrictive effects compared to markets with different conditions. However, even where market conditions are such that coordination may be difficult to sustain before the exchange, the exchange of information may change the market conditions in such a way that coordination becomes possible after the exchange – for example by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. For this reason it is important to assess the restrictive effects of the information exchange in the context of both the initial market conditions, and how the information exchange changes those conditions. This will include an assessment of the specific characteristics of the system concerned, including its purpose, conditions of access to the system and conditions of participation in the system. It will also be necessary to examine the frequency of the information exchanges, the type of information exchanged (for example, whether it is public or confidential, aggregated or detailed, and historical or current), and the importance of the information for the fixing of prices, volumes or conditions of service (62). The following factors are relevant for this assessment.

Declaration of intention

Cooperation does not necessary imply a common plan.

It is sufficient that, through its declaration of intention, the competitor has eliminated or, at the very least, substantially reduced the uncertainty as to the conduct to be expected from it on the market.

Degussa T-279/02, pr. 133



Factors	Low antitrust risks	High antirust risks
Type of market	Competitive / Not transparent Complex (multi product) Unstable demand / offer Not homogenous companies	Oligopolistic / Transparent / Simple (mono product) Similar companies in terms of costs capacity/ market quotas/ product range
Type of Data	Non- strategic	Strategic: actual prices, discounts, increases, rebates, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, R&D
Market coverage	Companies involved possess small market quotas; (in context of R&D contracts: 25% in context of specialization contract: 20%)	Companies involved covers a sufficiently large part of the relevant market
Form of data	Aggregated: the recognition of the personal data related to a single company is very difficult /impossible	Individualized: data refers to each single company
Age of data	Historic data: ex, refers to average duration of the industry's contract x N.	Recent data – notion of 'recent' depends to the characteristics of each particular market
Frequency of exchange	Low frequency in relation to the duration of the contract	High frequency in relation to the duration of the contract
Availability of data	Genuinely public data: information that is generally equally accessible (in terms of costs of access) to all competitors and customers	'Secret' or, merely, 'in the public domain', that is to say, that the data is hypothetically available, but the costs involved in collecting it deter other companies and customers from doing so.
'Lieu' of exchange	Information exchange is genuinely public if it makes the exchanged data equally accessible (in terms of costs of access) to all competitors and customers	The exchange of data is done in places not easily accessible (in terms of costs)

Common responsibility and responsibility of the facilitator

Common responsibility and responsibility of the facilitator: legal standard

A company is liable for all the elements of the infringement, if:
a) it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk, and
b) it intended to contribute by its own conduct to the common objectives pursued by all the participants.

Commission v. Anic Partecipazioni Spa
8 July 1999, C-49/92 P

78 On this question the Court must observe, first of all, that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, responsibility for committing those infringements is personal in nature.
79 Secondly, the agreements and concerted practices referred to in Article 85(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms

according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged.

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

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

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

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

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

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

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

87 When, as in the present case, the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.

AC- Treuhand AG,
22 October 2015, C-194/14 P

26 It is necessary to determine in the present case whether a consultancy firm may be held liable for infringement of Article 81(1) EC where such a firm actively contributes, in full knowledge of the relevant facts, to the implementation and continuation of a cartel among producers active on a market that is separate from that on which the undertaking itself operates.
(…)
30 When, as in the present case, the infringement involves anticompetitive agreements and concerted practices, it is apparent from the Court's case-law that the Commission must demonstrate, in order to be able to find that an undertaking participated in an infringement and was liable for all the various elements comprising the infringement, that the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (see, to that effect, judgments in *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 86 and 87, and *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 83).
31 In that connection, the Court has held in particular that passive modes of participation in the infringement, such as the presence of an undertaking in meetings at which anticompetitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion capable of rendering the undertaking liable under Article 81(1) EC, since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery (see, to that effect, judgment in *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 142 and 143 and the case-law cited).
32 It is true that the Court has stated, when called upon to determine whether there was an 'agreement' within the meaning of Article 81(1) EC, that the issue was whether the parties had expressed their concurrent intention to conduct themselves on the market in a particular manner (see, to that effect, inter alia, judgment in *ACF Chemiefarma* v *Commission*, 41/69, EU:C:1970:71, paragraph 112). The Court has also held that the criteria of coordination and cooperation which are constituent elements of a 'concerted practice' within the meaning of that provision must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, to the effect that each economic operator must determine independently the policy which he intends to adopt on the common market (see, inter alia, judgment in *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 116)

33 However, it cannot be inferred from those considerations that the terms ‘agreement’ and ‘concerted practice’ presuppose a mutual restriction of freedom of action on one and the same market on which all the parties are present.

34 Moreover, it cannot be inferred from the Court’s case-law that Article 81(1) EC concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed the markets upstream or downstream of that market or neighbouring markets or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice.

35 Indeed, it is apparent from the Court’s well established case-law that the text of Article 81(1) EC refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question (see, to that effect, judgments in *LTM*, 56/65, EU:C:1966:38, p. 358; *Consten and Grundig* v *Commission*, 56/64 and 58/64, EU:C:1966:41, p.p. 492 and 493; *Musique Diffusion française and Others* v *Commission*, 100/80 to 103/80, EU:C:1983:158, paragraphs 72 to 80; *Binon*, 243/83, EU:C:1985:284, paragraphs 39 to 47; and *Javico*, C-306/96, EU:C:1998:173, paragraphs 10 to 14).

36 It should also be noted that the main objective of Article 81(1) EC is to ensure that competition remains undistorted within the common market. The interpretation of that provision advocated by AC-Treuhand would be liable to negate the full effectiveness of the prohibition laid down by that provision, in so far as such an interpretation would mean that it would not be possible to put a stop to the active contribution of an undertaking to a restriction of competition simply because that contribution does not relate to an economic activity forming part of the relevant market on which that restriction comes about or is intended to come about.

37 In the present case, according to the findings of fact made by the General Court in paragraph 10 of the judgment under appeal, AC-Treuhand played an essential and similar role in both the infringements at issue by organising a number of meetings which it attended and in which it actively participated, collecting and supplying to the producers of heat stabilisers data on sales on the relevant markets, offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises, for which it received remuneration.

38 It follows that the conduct adopted by AC-Treuhand is directly linked to the efforts made by the producers of heat stabilisers, as regards both the negotiation and monitoring of the implementation of the obligations entered into by those producers in connection with the cartels, the very purpose of the services provided by AC-Treuhand on the basis of service contracts concluded with those producers being the attainment, in full knowledge of the facts, of the anticompetitive objectives in question, namely — as is apparent from paragraph 4 of the judgment under appeal — price-fixing, market-sharing and customer-allocation and the exchange of commercially sensitive information.

Proof of the collusion

Allocation of the burden of proof

Regulation N. 1/2003
On the implementation of the rules on competition, 16 December 2002

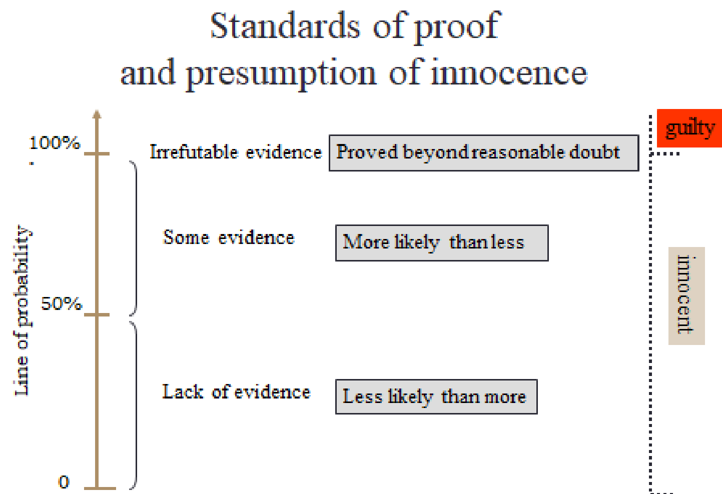
Article 2

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.

Dalmine Spa v. Commission
25 January 2007, C-407/04 P

63 As regards the use of that information by the Commission, the Court of First Instance correctly observed at paragraph 90 of the judgment under appeal that Dalmine's arguments could affect only 'the reliability and therefore the probative value of its managers' statements and not the admissibility of that evidence in the present proceedings'. As stated in the context of the assessment of the first part of this plea, the principle which prevails in Community law is that of the unfettered evaluation of evidence and the only relevant criterion for the purpose of assessing the evidence adduced relates to its credibility. Accordingly, as the transmission of the minutes in issue was not declared unlawful by an Italian court, those documents cannot be considered to have been inadmissible evidence which ought to have been removed from the file.

Proof beyond any reasonable doubt



Dresdener Bank v. Commission
12 September 2007, T-44/02 OP and T-54/02 OP

58 The Commission maintains that, for the purpose of interpreting a decision applying Article 81 EC, the Court is required to take into account its wording and also its context and its aims, in accordance with the 'practical effect' principle (Case 337/82 St. Nikolaus Brennerei [1984] ECR 1051, paragraph 10; Case C-84/95 Bosphorus [1996] ECR I-3953, paragraph 11; and Case C-151/98 P Pharos v Commission [1999] ECR I-8157, paragraph 19). That need is even greater when the agreements and practices

prohibited by Article 81 EC often assume a clandestine character, so that their existence can be inferred only on the basis of a large number of indicia considered together (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 55, and Opinion of Advocate General Ruíz-Jarabo Colomer in Case C-338/00 P Volkswagen v Commission [2003] ECR I-9189, at I-9193). Thus, the Court could not go so far as to require that the documentary evidence upheld in the contested decision constitutes 'irrefutable evidence' of an infringement. The case-law requires only the submission of sufficient evidence (Case T-337/94 Enso-Gutzeit v Commission [1998] ECR II-1571, paragraphs 94 and 153). Any manifest error is precluded if the assessment of the facts made by the Commission is more likely than that proposed by the applicants.

59 The Court recalls that, as regards the production of evidence of an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of the facts 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 Anic Partecipazioni [1999] ECR I-4125, paragraph 86).

60 Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine.

61 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention on Human Rights, which is one of the fundamental rights which, according to the case-law of the Court of Justice, reaffirmed in the preamble to the Single European Act, by Article 6(2) of the Treaty on European Union and in Article 6(2) EU, are general principles of Community law. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P Montecatini v Commission[1999] ECR I-4539, paragraphs 175 and 176).

62 Thus, the Commission must show precise and consistent evidence in order 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).

63 However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 Limburgse Vinyl Maatschappij and Others v Commission('PVC II'), paragraphs 768 to 778, and in particular paragraph 777, confirmed on the relevant point by the Court of Justice, on appeal, in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschaapij and Others v Commission, paragraphs 513 to 523).

64 As anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders

concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted.
65 The existence of an anti-competitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Aalborg Portland and Others v Commission, paragraphs 55 to 57).

E.ON v. Commission
22 November 2012, C-89/11 P

71 It should be borne in mind, as the General Court rightly stated at paragraph 48 of the judgment under appeal, that, in the field of competition law, where there is a dispute as to the existence of an infringement, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraph 58 and Joined Cases C-2/01 P and C-3/01 P BAI and Commission v Bayer [2004] ECR I-23, paragraph 62).
72 Moreover, where the Court still has a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement (see, to that effect, Case 27/76 United Brands and United Brands Continentaal v Commission [1978] ECR 207, paragraph 265). Indeed, the presumption of innocence constitutes a general principle of European Union law, currently laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union.
73 According to the Court’s case-law, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraphs 149 and 150, and Montecatini vCommission, paragraphs 175 and 176).
74 Admittedly, if the Commission finds that there has been an infringement of the competition rules on the basis that the established facts cannot be explained other than by the existence of anti-competitive behaviour, the Courts of the European Union will find it necessary to annul the decision in question where those undertakings put forward arguments which cast the facts established by the Commission in a different light and thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement occurred. In such a case, it cannot be considered that the Commission has adduced proof of an infringement of competition law (see, to that effect, Joined Cases 29/83 and 30/83 CRAM and Rheinzink v Commission [1984] ECR 1679, paragraph 16 and Joined Cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström and Others v Commission [1993] ECR I-1307, paragraphs 126 and 127).
75 However, the Court has also held that, where the Commission has been able to establish that an undertaking had taken part in meetings between undertakings of a manifestly anti-competitive nature, the General Court was entitled to consider that it was for that undertaking to provide another explanation of the tenor of those meetings. In so doing, the General Court had neither unduly reversed the burden of proof nor set aside the presumption of innocence (Montecatini v Commission, paragraph 181).
76 Likewise, as the General Court rightly pointed out, at paragraph 56 of the judgment under appeal, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking

concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence so that the Commission bears the burden of proving that that circumstance was not capable of affecting the probative value of that evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance relied on by it and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission.

Public distancing

Aalborg v. Commission
7 January 2004, C-204/00 P

81 According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraph 155, and Case C-49/92 P Commission v Anic [1999] ECR I-4125, paragraph 96).
82 The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.
83 The principles established in the case-law cited at paragraph 81 of this judgment also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (Commission v Anic, paragraph 87).
84 In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.
85 Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting (see Case C-291/98 P Sarrió v Commission [2000] ECR I-9991, paragraph 50).
86 Neither is the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate material to the establishment of the existence of an infringement on its part. Those factors must be taken into consideration only when the gravity of the

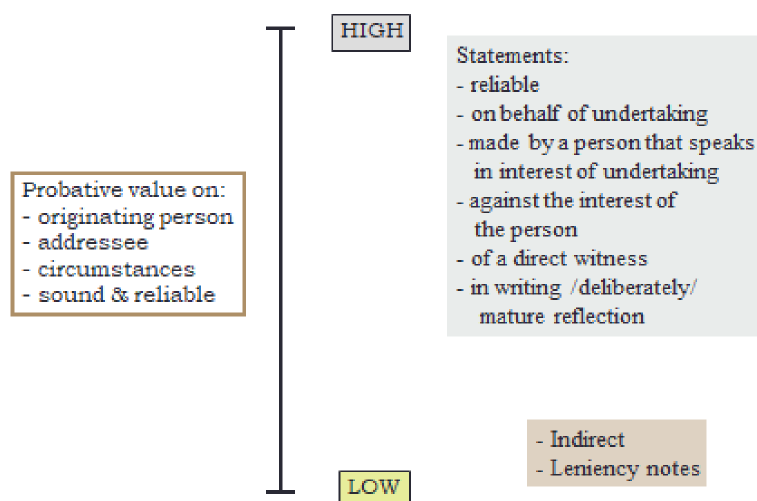
infringement is assessed and if and when it comes to determining the fine (see, to that effect, Commission v Anic, paragraph 90).

Total marketing service v. Commission
17 September 2015 C- 634/13 P

The General Court ruled that it could not be concluded that an undertaking had definitively ceased to belong to a cartel unless it had publicly distanced itself from the content of the cartel and it added that the decisive criterion in that regard was the understanding that the other parties participating in the cartel had of that undertaking's intention.
19 Thus, as the General Court ruled, even if it is undisputed that an undertaking is no longer participating in the collusive meetings of a cartel, <u>it must distance itself publicly from that cartel if it is to be considered as having discontinued its participation in it, and the evidence of that distancing must be assessed according to the perception of the other participants in that cartel.</u>
20 It must be noted that, in accordance with the case-law of the Court, a public distancing is necessary in order that an undertaking which participated in collusive meetings can prove that its participation was without any anti-competitive intention. For that purpose, the undertakings must demonstrate that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (judgment in Aalborg Portland and Others v Commission, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 81 and 82 and the case-law cited).
21 The Court has also held that an undertaking's participation in an anti-competitive meeting creates a presumption of the illegality of its participation, which that undertaking must rebut through evidence of public distancing, which must be perceived as such by the other parties to the cartel (see, to that effect, judgment in Comap v Commission, C-290/11 P, EU:C:2012:271, paragraphs 74 to 76 and the case-law cited).
22 Therefore, the case-law of the Court requires a public distancing as necessary proof in order to rebut the presumption recalled in the previous paragraph only in the case of an undertaking that participated in anti-competitive meetings; however, it does not require in all circumstances that there be such a distancing that puts an end to participation in the infringement.
23 With regard to participation in an infringement that took place over several years rather than in individual anti-competitive meetings, it can be concluded from the case-law of the Court that the absence of public distancing forms only one factor amongst others to take into consideration with a view to establishing whether an undertaking has actually continued to participate in an infringement or has, on the contrary, ceased to do so (see, to that effect, judgment in Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, paragraph 75).
24 Consequently, the General Court erred in law in considering in paragraphs 372 and 374 of the judgment under appeal, that public distancing constitutes the only means available to an undertaking involved in a cartel of proving that it has ceased participating in that cartel, even in the case where that company has not participated in anti-competitive meetings.
25 Nevertheless, that error of law by the General Court cannot invalidate the findings in the judgment under appeal concerning the appellant's participation in the infringement between 12 May 2004 and 29 April 2005.

26 It is settled case-law that in most cases the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see judgments in Aalborg Portland and Others v Commission, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 57, and in Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, paragraph 70).
27 As regards, in particular, an infringement extending over a number of years, the Court has held that the fact that direct evidence of an undertaking's participation in that infringement during a specified period has not been produced does not preclude that participation from being regarded as established also during that period, provided that that finding is based on objective and consistent indicia (see, to that effect, judgments in Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission, C-105/04 P, EU:C:2006:592, paragraphs 97 and 98, and in Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, paragraph 72).
28 Even if a public distancing is not the only means available to an undertaking implicated in a cartel of proving that it has ceased participating in that cartel, such distancing none the less constitutes an important fact capable of establishing that anti-competitive conduct has come to an end. The absence of public distancing forms a factual situation on which the Commission can rely in order to prove that an undertaking's anti-competitive conduct has continued. However, in a case where, over the course of a significant period of time, several collusive meetings have taken place without the participation of the representatives of the undertaking at issue, the Commission must also base its findings on other evidence.

Items of evidence and probative value



Aragonesas v. Commission
25 October 2011, T-348/08

97 Moreover, as anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted. The existence of an anti-competitive practice or agreement may thus be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraphs 55 to 57, and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP Dresdner Bank and Others v Commission [2006] ECR II-3567, paragraphs 64 and 65).
98 In so far as concerns the types of evidence which may be relied on to establish an infringement of Article 81 EC and Article 53 of the EEA Agreement, the prevailing principle of European Union law is the unfettered evaluation of evidence (see, by analogy, Case T-50/00 Dalmine v Commission [2004] ECR II-2395, paragraph 72).
99 Consequently, an absence of documentary evidence is relevant only in the overall assessment of the body of evidence relied on by the Commission. It does not, in itself, enable the undertaking concerned to call the Commission's claims into question by submitting a different version of the facts. The applicant may do so only where the evidence submitted by the Commission does not enable the existence of the infringement to be established unequivocally and without the need for interpretation (see, to that effect, the judgment of 12 September 2007 in Case T-36/05 Coats Holdings and Coats v Commission, not published in the ECR, paragraph 74).
100 In addition, no provision or general principle of European Union law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Article 81 EC and Article 53 of the EEA Agreement, which is borne by the Commission, would be unsustainable and incompatible with its task of supervising the proper application of those provisions (see, by analogy, JFE Engineering and Others v Commission, paragraph 91 above, paragraph 192).
101 However, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter undertakings unless it is supported by other evidence, given that the degree of corroboration required may be lesser in view of the reliability of the statements at issue (JFE Engineering and Others v Commission, paragraph 91 above, paragraphs 219 and 220).
102 As regards the probative value of the various items of evidence, the sole criterion relevant in that evaluation is the reliability of the evidence (Dalmine v Commission, paragraph 98 above, paragraph 72).
103 According to the general rules relating to evidence, the credibility and, thus, the probative value, of a document depends on the person from whom it originates, the circumstances in which it came into being, the person to whom it was addressed and whether it appears sound and reliable (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95

to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR and Others v Commission [2000] ECR II-491, paragraphs 1053 and 1838).
104 As regards statements, particularly great probative value may also be attached to those which, first, are reliable, second, are made on behalf of an undertaking, third, are made by a person under a professional obligation to act in the interests of that undertaking, fourth, go against the interests of the person making the statement, fifth, are made by a direct witness of the circumstances to which they relate and, sixth, were provided in writing deliberately and after mature reflection (see, to that effect, JFE Engineering and Others v Commission, paragraph 91 above, paragraphs 205 to 210).
105 Moreover, even if some caution as to the evidence provided voluntarily by the main participants in an unlawful agreement is generally called for, considering the possibility, in this case, that they might tend to play down the importance of their contribution to the infringement and maximise that of others, the fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction in the fine does not necessarily create an incentive for the other participants in the offending cartel to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the person seeking to benefit, and thereby jeopardise his chances of benefiting fully under the Leniency Notice (see, to that effect, Case T-120/04 Peróxidos Orgánicos v Commission [2006] ECR II-4441, paragraph 70).
106 The Court also notes, in that regard, that the potential consequences of the submission of distorted evidence to the Commission are even more serious since, as is apparent from paragraph 101 above, a statement of an undertaking that is disputed must be corroborated by other evidence. That being so, the likelihood of the Commission and the other undertakings accused of participating in the infringement of detecting the inaccurate nature of those statements is increased.

Different probative presumptions

Wood Pulp
31 March 1993, j.c.C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85

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

Anic
8 July 1999, C 49/92

121 For one thing, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.

Aalborg
7 January 2004, C- 204/00 P

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

CB v. Commission
11 September 2014, C-67-13 P

48 It must be recalled that, to come within the prohibition laid down in Article 81(1) EC, an agreement, a decision by an association of undertakings or a concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market.
49 In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, judgments in LTM, 56/65, EU:C:1966:38, paragraphs 359 and 360; BIDS, paragraph 15, and Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160, paragraph 34 and the case-law cited).
50 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see, to that effect, in particular, judgment in Allianz Hungária Biztosító and Others (EU:C:2013:160) paragraph 35 and the case-law cited).
51 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market (see, to that effect, in particular, judgment in Clair, 123/83, EU:C:1985:33, paragraph 22). Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.
52 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (judgment in Allianz Hungária Biztosító and Others (EU:C:2013:160), paragraph 34 and the case-law cited).

Akzo Nobel
10 September 2009, C-97/08

61 In that regard, it must be made clear that, while it is true that at paragraphs 28 and 29 of Stora, paragraph 60 above, the Court of Justice referred, as well as to the fact that the parent company owned 100% of the capital of the subsidiary, to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. Accordingly, the fact that the Court of Justice upheld the findings of the Court of First Instance in that case cannot have the consequence that the principle laid down in paragraph 50 of AEG[-Telefunken] v Commission, paragraph 60 above, is amended.

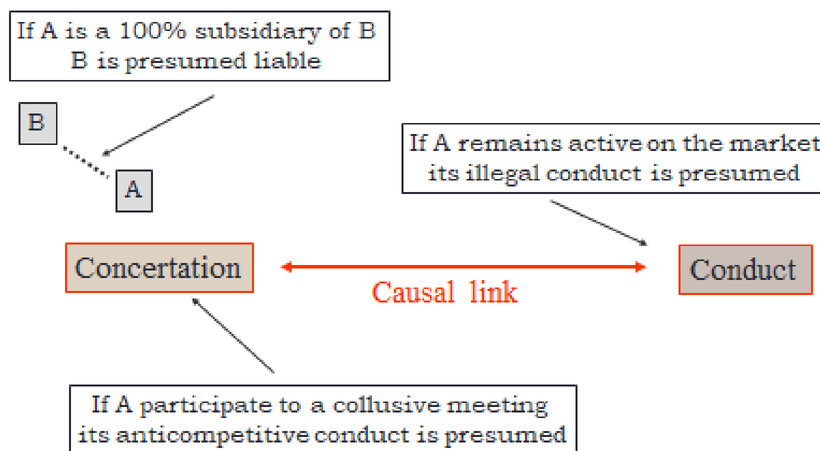
Probative presumption and presumption of innocence

Eturas
21 January 2016, C-74/14

26 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that, where the administrator of an information system, intended to enable travel agencies to sell travel packages on their websites using a uniform booking method, sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped and, following the dissemination of that message, the system in question undergoes the technical modification necessary to implement that measure, it may be presumed that those operators were aware or ought to have been aware of that message and, in the absence of any opposition on their part to such a practice, it may be considered that those operators participated in a concerted practice within the meaning of that provision.
(…)
36 In that respect, it must be recalled that, according to the case-law of the Court, in most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see, to that effect, judgment in Total Marketing Services v Commission, C-634/13 P, EU:C:2015:614, paragraph 26 and the case-law cited).
37 Consequently, the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent.
38 In so far as the referring court has doubts as to the possibility, in view of the presumption of innocence, of finding that the travel agencies were aware, or ought to have been aware, of the message at issue in the main proceedings, it must be recalled that the presumption of innocence constitutes a general principle of EU law, now enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment in E.ON Energie v Commission, C-89/11 P, EU:C:2012:738, paragraph 72), which the Member States are required to observe when they implement EU competition law (see, to that effect, judgments in VEBIC, C-439/08, EU:C:2010:739, paragraph 63, and N., C-604/12, EU:C:2014:302, paragraph 41).

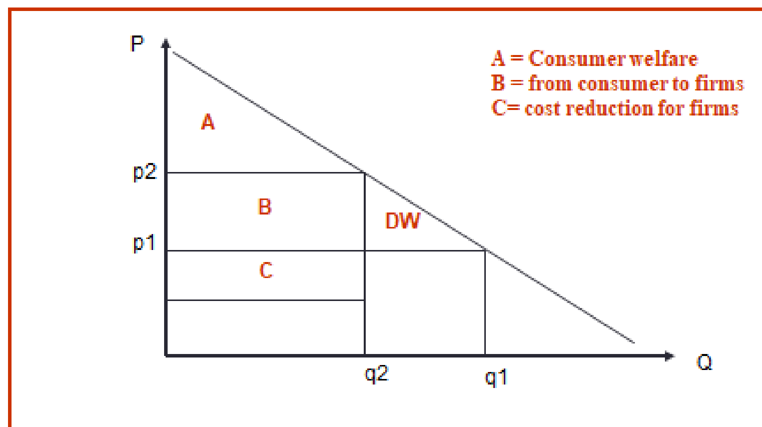
39 The presumption of innocence precludes the referring court from inferring from the mere dispatch of the message at issue in the main proceedings that the travel agencies concerned ought to have been aware of the content of that message.
40 However, the presumption of innocence does not preclude the referring court from considering that the dispatch of the message at issue in the main proceedings may, in the light of other objective and consistent indicia, justify the presumption that the travel agencies concerned were aware of the content of that message as from the date of its dispatch, provided that those agencies still have the opportunity to rebut it.
41 In that regard, the referring court cannot require that those agencies take excessive or unrealistic steps in order to rebut that presumption. The travel agencies concerned must have the opportunity to rebut the presumption that they were aware of the content of the message at issue in the main proceedings as from the date of that message's dispatch, for example by proving that they did not receive that message or that they did not look at the section in question or did not look at it until some time had passed since that dispatch.

A possible 'chain' of presumptions



VERTICAL RESTRAINTS

Article 101, para. 3 'only efficiency counts'



Definition of vertical restraints

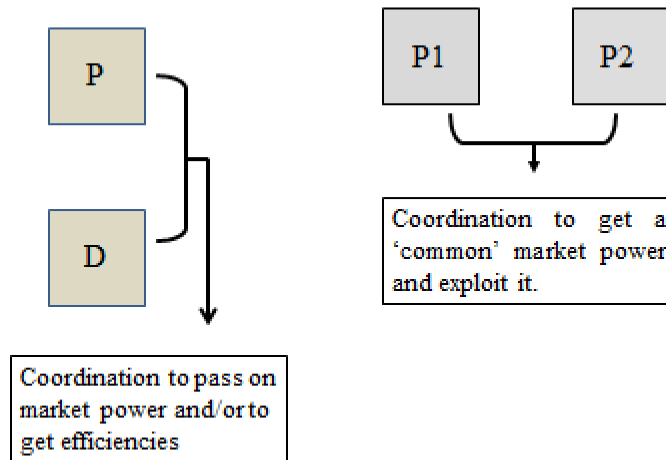
Regulation 330/2010, 20 April 2010
on the application of Article 101(3) to categories of vertical restraints
(hereinafter quoted as Regulation 330/10)

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;

Vertical and horizontal restraints compared



The application of Article 101(1) to vertical restraints

Consten and Grundig v Commission
13 July 1966 — j.c. 56 and 58/64

Pag. 338 The complaints concerning the applicability of Article 85 (1) to sole distributorship contracts The applicants submit that the prohibition in Article 85 (1) applies only to so-called horizontal agreements. The Italian Government submits furthermore that sole distributorship contracts do not constitute 'agreements between undertakings' within the meaning of that provision, since the parties are not on a footing of equality.

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

Furthermore, the possible application of Article 85 to a sole distributorship contract cannot be excluded merely because the grantor and the concessionnaire are not competitors inter se and not on a footing of equality. Competition may be distorted within the meaning of Article 85 (1) not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. For this purpose, it is irrelevant

whether the parties to the agreement are or are not on a footing of equality as regards their position and function in the economy.

This applies all the more, since, by such an agreement, the parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an unjustified advantage at the expense of the consumer or user, contrary to the general aims of Article 85. It is thus possible that, without involving an abuse of a dominant position, an agreement between economic operators at different levels may affect tradebetween Member States and at the same time have as its object or effect the prevention, restriction or distortion of competition, thus falling under the prohibition of Article 85 (1).

Allianz Hungaria Biztositò Zrt.
14 March 2013, C-32/11

43 In that regard, it must, first, be noted that, in contrast to the view apparently held by Allianz and Generali, the fact that both cases concern vertical relationships in no way excludes the possibility that the agreement at issue in the main proceedings constitutes a restriction of competition 'by object'. While vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, they can, nevertheless, in some cases, also have a particularly significant restrictive potential. The Court has thus already held on several occasions that a vertical agreement had as its object the restriction of competition (see Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 429; Case 19/77Miller International Schallplatten v Commission [1978] ECR 131; Case 243/83 Binon [1985] ECR 2015; and Pierre Fabre Dermo-Cosmétique).

Generalities on the conditions of application of Article 101 (3)

European Commission
Guidelines on the application of Article 81(3)

(…)
3.1. General principles
40. Article 81(3) of the Treaty only becomes relevant when an agreement between undertakings restricts competition within the meaning of Article 81(1). In the case of non-restrictive agreements there is no need to examine any benefits generated by the agreement.
41. Where in an individual case a restriction of competition within the meaning of Article 81(1) has been proven, Article 81(3) can be invoked as a defense. According to Article 2 of Regulation 1/2003 the burden of proof under Article 81(3) rests on the undertaking(s) invoking the benefit of the exception rule. Where the conditions of Article 81(3) are not satisfied the agreement is null and void, cf. Article 81(2). However, such automatic nullity only applies to those parts of the agreement that are incompatible with Article 81, provided that such parts are severable from the agreement as a whole(50). If only part of the agreement is null and void, it is for the applicable national law to determine the consequences thereof for the remaining part of the agreement(51).

42. According to settled case law the four conditions of Article 81(3) are cumulative(52), i.e. they must all be fulfilled for the exception rule to be applicable. If they are not, the application of the exception rule of Article 81(3) must be refused(53). The four conditions of Article 81(3) are also exhaustive. When they are met the exception is applicable and may not be made dependent on any other condition. Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)(54).
43. The assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. The Community competition rules have as their objective the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers(55) must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market(56). Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same(57). Indeed, in some cases only consumers in a downstream market are affected by the agreement in which case the impact of the agreement on such consumers must be assessed. This is for instance so in the case of purchasing agreements(58).
(…)

GlaxoSmithKline Services Unlimited / Commission
27 September 2006, T-168/01

233 Any agreement which restricts competition, whether by its effects or by its object, may in principle benefit from an exemption (Consten and Grundig v Commission, paragraph 110 above, pp. 342, 343 and 347, and Case T-17/93 Matra Hachette v Commission [1994] ECR II-595, paragraph 85), as the Commission, moreover, observed at recital 153 to the Decision and at the hearing.
234 The application of that provision is subject to certain conditions, satisfaction of which is both necessary and sufficient (Remia and Others v Commission, paragraph 57 above, paragraph 38, and Matra Hachette v Commission, paragraph 233 above, paragraph 104). First, the agreement concerned must contribute to improving the production or distribution of the goods in question, or to promoting technical or economic progress; second, consumers must be allowed a fair share of the resulting benefit; third, it must not impose on the participating undertakings any restrictions which are not indispensable; and, fourth, it must not afford them the possibility of eliminating competition in respect of a substantial part of the products in question.
235 Consequently, a person who relies on Article 81(3) EC must demonstrate that those conditions are satisfied, by means of convincing arguments and evidence (Joined Cases 43/82 and 63/82 VBVB and VBBB v Commission [1984] ECR 19, paragraph 52, and Aalborg Portland and Others v Commission, paragraph 55 above, paragraph 78).
236 The Commission, for its part, must adequately examine those arguments and that evidence (Consten and Grundig v Commission, paragraph 110 above, p. 347), that is to say, it must determine whether they demonstrate that the conditions for the application of Article 81(3) EC are satisfied. In certain cases, those arguments and that evidence may be of such a kind as to require the Commission to provide an explanation or

justification, failing which it is permissible to conclude that the burden of proof borne by the person who relies on Article 81(3) EC has been discharged (Aalborg Portland and Others v Commission, paragraph 55 above, paragraph 79). As the Commission agrees in its written submissions, in such a case it must refute those arguments and that evidence.
(…)
b) Evidence of a gain in efficiency
247 In order to be capable of being exempted under Article 81(3) EC, an agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. That contribution is not identified with all the advantages which the undertakings participating in the agreement derive from it as regards their activities, but with appreciable objective advantages, of such a kind as to offset the resulting disadvantages for competition (see, for a contribution towards improvement in production or distribution, Consten and Grundig v Commission, paragraph 110 above, pp. 348 and 349; Case T-7/93 Langnese-Iglo v Commission [1995] ECR II-1533, paragraph 180; and Van den Bergh Foods v Commission, paragraph 201 above, paragraph 139; see also, for a contribution towards the promotion of progress, Matra Hachette v Commission, paragraph 233 above, paragraphs 108 to 111).
248 It is therefore for the Commission, in the first place, to examine whether the factual arguments and the evidence submitted to it show, in a convincing manner, that the agreement in question must enable appreciable objective advantages to be obtained (see, to that effect, Metro I, paragraph 109 above, paragraph 43; Metro II, paragraph 58 above, paragraph 55; M6 and Others v Commission, paragraph 171 above, paragraph 143; and Case T-231/99 Joynson v Commission [2002] ECR II-2085, paragraphs 48 and 49), it being understood that these advantages may arise not only on the relevant market but also on other markets (Case T-86/95 Compagnie générale maritime and Others v Commission [2002] ECR II-1011, paragraph 343).
249 That approach may entail a prospective analysis, in which case it is appropriate to ascertain whether, in the light of the factual arguments and the evidence provided, it seems more likely either that the agreement in question must make it possible to obtain appreciable advantages or that it will not (see, to that effect, Compagnie générale maritime and Others vCommission, paragraph 248 above, paragraph 365, and Van den Bergh Foods v Commission, paragraph 201 above, paragraph 143; see also, by analogy, Tetra Laval v Commission, paragraph 242 above, paragraphs 42 and 43, and General Electric v Commission, paragraph 242 above, paragraph 64).
250 In the affirmative, it is for the Commission, in the second place, to evaluate whether those appreciable objective advantages are of such a kind as to offset the disadvantages identified for competition in the context of the examination carried out under Article 81(1) EC (see, to that effect, Van Landewyck and Others v Commission, paragraph 186 above, paragraphs 183 to 185).

The application of Article 101(3) to vertical restraints

European Commission
Guidelines on Vertical Restraints, 19 May 2010

97. The assessment of whether a vertical agreement has the effect of restricting competition will be made by comparing the actual or likely future situation on the relevant market with the vertical restraints in place with the situation that would prevail in the absence of the vertical restraints in the agreement. In the assessment of individual

cases, the Commission will take, as appropriate, both actual and likely effects into account. For vertical agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation, or the variety or quality of goods and services can be expected with a reasonable degree of probability. The likely negative effects on competition must be appreciable (3). Appreciable anticompetitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102.

98.Vertical restraints are generally less harmful than horizontal restraints. The main reason for the greater focus on horizontal restraints is that such restraints may concern an agreement between competitors producing identical or substitutable goods or services. In such horizontal relationships, the exercise of market power by one company (higher price of its product) may benefit its competitors. This may provide an incentive to competitors to induce each other to behave anticompetitively. In vertical relationships, the product of the one is the input for the other-, in other words, the activities of the parties to the agreement are complementary to each other. The exercise of market power by either the upstream or downstream company would therefore normally hurt the demand for the product of the other. The companies involved in the agreement therefore usually have an incentive to prevent the exercise of market power by the other.

99. Such self-restraining character should not, however, be over-estimated. When a company has no market power, it can only try to increase its profits by optimising its manufacturing and distribution processes, with or without the help of vertical restraints. More generally, because of the complementary role of the parties to a vertical agreement in getting a product on the market, vertical restraints may provide substantial scope for efficiencies. However, when an undertaking does have market power it can also try to increase its profits at the expense of its direct competitors by raising their costs and at the expense of its buyers and ultimately consumers by trying to appropriate some of their surplus. This can happen when the upstream and downstream company share the extra profits or when one of the two uses vertical restraints to appropriate all the extra profits.

(…)

Positive aspects of vertical restrictions

(106) It is important to recognise that vertical restraints may have positive effects by, in particular, promoting non-price competition and improved quality of services. When a company has no market power, it can only try to increase its profits by optimising its manufacturing or distribution processes. In a number of situations vertical restraints may be helpful in this respect since the usual arm's length dealings between supplier and buyer, determining only price and quantity of a certain transaction, can lead to a sub-optimal level of investments and sales.

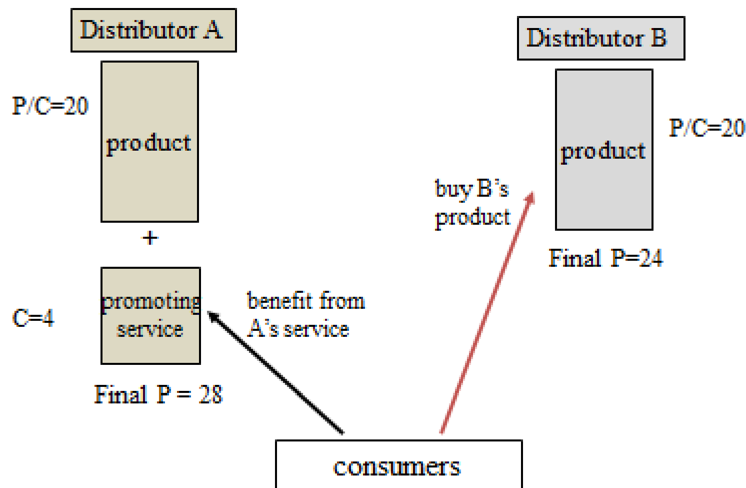
(107) While trying to give a fair overview of the various justifications for vertical restraints, these Guidelines do not claim to be complete or exhaustive. The following reasons may justify the application of certain vertical restraints:

(a) To "solve a "free-rider" problem". One distributor may free-ride on the promotion efforts of another distributor. This type of problem is most common at the wholesale and retail level. Exclusive distribution or similar restrictions may be helpful in avoiding such free-riding. Free-riding can also occur between suppliers, for instance where one invests in promotion at the buyer's premises, in general at the retail level, that may also attract customers for its competitors. Non-compete type restraints can help to overcome this situation of free-riding. For there to be a problem, there needs to be a real free-rider issue. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. The product will usually need to be relatively new or technically complex or the reputation of the product must be a major determinant of its demand, as the customer may otherwise very well know what he or she wants, based on past purchases. And the product must be of a reasonably high value as it is otherwise not attractive for a customer to go to one shop for information and to another to buy. Lastly, it must not be practical for the supplier to impose on all buyers, by contract, effective promotion or service requirements. Free-riding between suppliers is also restricted to specific situations, namely to cases where the promotion takes place at the buyer's premises and is generic, not brand specific[1].

(b) To "open up or enter new markets". Where a manufacturer wants to enter a new geographic market, for instance by exporting to another country for the first time, this may involve special "first time investments" by the distributor to establish the brand in the market. In order to persuade a local distributor to make these investments it may be necessary to provide territorial protection to the distributor so that he can recoup these investments by temporarily charging a higher price. Distributors based in other markets should then be restrained for a limited period from selling in the new market (see also paragraph 61 in Section III.3). This is a special case of the free-rider problem described under point (1).

(c) The "certification free-rider issue". In some sectors, certain retailers have a reputation for stocking only "quality" products. In such a case, selling through these retailers may be vital for the introduction of a new product. If the manufacturer cannot initially limit his sales to the premium stores, he runs the risk of being delisted and the product introduction may fail. This means that there may be a reason for allowing for a limited duration a restriction such as exclusive distribution or selective distribution. It must be enough to guarantee introduction of the new product but not so long as to hinder large-scale dissemination. Such benefits are more likely with "experience" goods or complex goods that represent a relatively large purchase for the final consumer.

[1] Whether consumers actually overall benefit from extra promotional efforts depends on whether the extra promotion informs and convinces and thus benefits many new customers or mainly reaches customers who already know what they want to buy and for whom the extra promotion only or mainly implies a price increase



(d) The so-called "hold-up problem". Sometimes there are client-specific investments to be made by either the supplier or the buyer, such as in special equipment or training. For instance, a component manufacturer that has to build new machines and tools in order to satisfy a particular requirement of one of his customers. The investor may not commit the necessary investments before particular supply arrangements are fixed. However, as in the other free-riding examples, there are a number of conditions that have to be met before the risk of under-investment is real or significant. Firstly, the investment must be relationship-specific. An investment made by the supplier is considered to be relationship-specific when, after termination of the contract, it cannot be used by the supplier to supply other customers and can only be sold at a significant loss. An investment made by the buyer is considered to be relationship specific when, after termination of the contract, it cannot be used by the buyer to purchase and/or use products supplied by other suppliers and can only be sold at a significant loss. An investment is thus relationship-specific because for instance it can only be used to produce a brand-specific component or to store a particular brand and thus cannot be used profitably to produce or resell alternatives. Secondly, it must be a long-term investment that is not recouped in the short run. And thirdly, the investment must be asymmetric i.e. one party to the contract invests more than the other party. When these conditions are met, there is usually a good reason to have a vertical restraint for the duration it takes to depreciate the investment. The appropriate vertical restraint will be of the non-compete type or quantity-forcing type when the investment is made by the supplier and of the exclusive distribution, exclusive customer allocation or exclusive supply type when the investment is made by the buyer.

(e) The "specific hold-up problem that may arise in the case of transfer of substantial know-how". The know-how, once provided, cannot be taken back and the provider of the know-how may not want it to be used for or by his competitors. In as far as the know-how was not readily available to the buyer, is substantial and indispensable for the operation of the agreement, such a transfer may justify a non-compete type of restriction. This would normally fall outside Article 101(1).

(…)

Hold up problem

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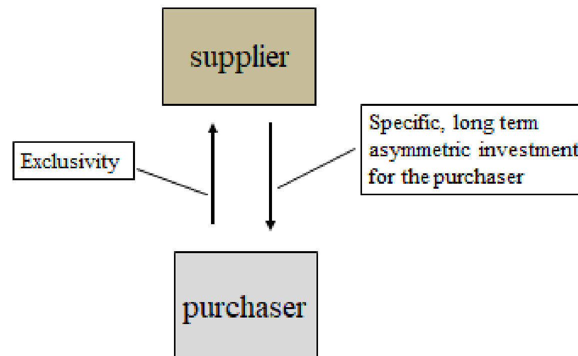


The double 30% as general rule of exemption from 101 (1) of vertical restrains

European Commission
Guidelines on Vertical Restraints 19 May 2010

Safe harbour created by the Block Exemption Regulation
(23) For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Provided that they do not contain hardcore restrictions of competition, which are restrictions of competition by object, the Block Exemption Regulation creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer. Pursuant to Article 3 of the Block Exemption Regulation, it is the supplier's market share on the market where it sells the contract goods or services and the buyer's market share on the market where it purchases the contract goods or services which determine the applicability of the block exemption. In order for the block exemption to apply, the supplier's and the buyer's market share must each be 30 % or less. Section V of these Guidelines provides guidance on how to define the relevant market and calculate the market shares. Above the market share threshold of 30 %, there is no presumption that vertical agreements fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3) but there is also no presumption that vertical agreements falling within the scope of Article 101(1) will usually satisfy the conditions of Article 101(3).

Regulation 330/2010: article 2 - exemption

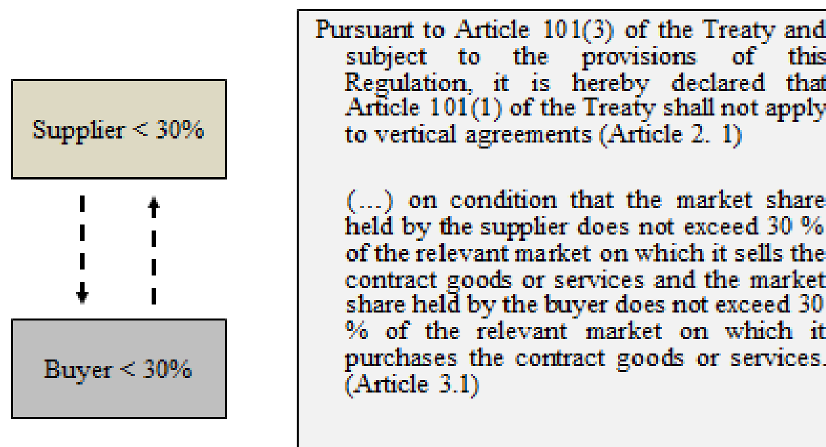
1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.
This exemption shall apply to the extent that such agreements contain vertical restraints.
(…)

Regulation 330/2010: article 3 - market shares 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.

Legal standard: the double 30% threshold



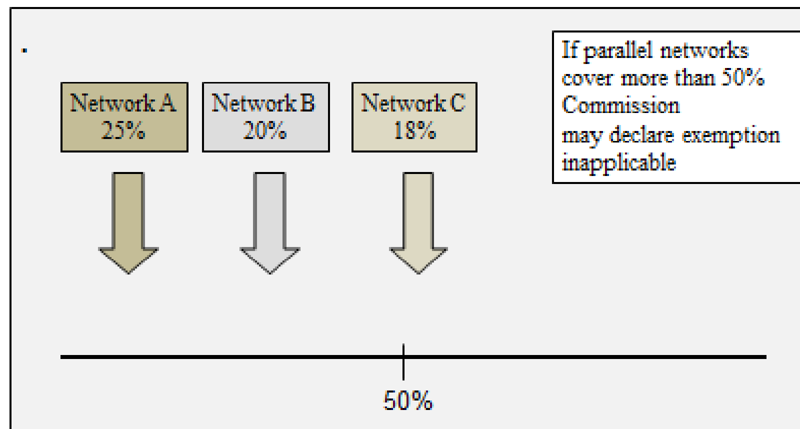
Non application of the exemption in case of parallel networks of similar vertical restraints

Regulation 330/2010: 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.

Legal standard: in case of parallel networks



Example of a practice subject to the double 30% rule: single branding (or exclusive dealing)

European Commission
Guidelines on Vertical Restraints 19 May 2010

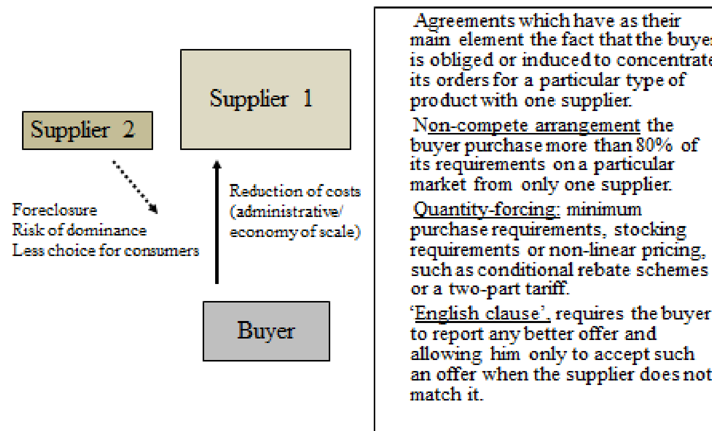
129. Under the heading of 'single branding' fall those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier. That component can be found amongst others in non-compete and quantity-forcing on the buyer. A non-compete arrangement is based on an obligation or incentive scheme which makes the buyer purchase more than 80% of its requirements on a particular market from only one supplier. It does not mean that the buyer can only buy directly from the supplier, but that the buyer will not buy and resell or incorporate competing goods or services. Quantity-forcing on the buyer is a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate its purchases to a large extent with one supplier. Quantity-forcing may for example take the form of minimum purchase requirements, stocking requirements or non-linear pricing, such as conditional rebate schemes or a two-part tariff (fixed fee plus a price per unit). A so-called 'English clause', requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer.

130. The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in case of cumulative use and, where the buyer is a retailer

selling to final consumers, a loss of in-store inter-brand competition. Such restrictive effects have a direct impact on inter-brand competition.

131. Single branding is exempted by the Block Exemption Regulation where the supplier's and buyer's market share each do not exceed 30 % and are subject to a limitation in time of five years for the non-compete obligation.

Single branding



Clause samples for single branding

Exclusive dealing	The Distributor undertakes the obligation not to manufacture, purchase, sell or resell goods in direct or indirect competition with the contract goods
Minimum requirements	The Distributor undertakes the obligation to purchase from the Supplier or from another company designated by the Supplier at least 85 % of its total purchases of the contract goods, calculated on the basis of the value (or the volume of its purchases in the preceding calendar year).
'English clause'	The Distributor undertakes the obligation to purchase from the Supplier or from another company designated by the Supplier at least 85 % of its total purchases of the contract goods, calculated on the basis of the value (or the volume of its purchases in the preceding calendar year).

Specific rules concerning the 'hard core' vertical restrictions

General provisions

European Commission
Guidelines on Vertical Restraints, 19 May 2010

(47) Article 4 of the Block Exemption Regulation contains a list of hardcore restrictions which lead to the exclusion of the whole vertical agreement from the scope of application of the Block Exemption Regulation (26). Where such a hardcore restriction is included in an agreement, that agreement is presumed to fall within Article 101(1). It is also presumed that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings may demonstrate pro-competitive effects under Article 101(3) in an individual case (27). Where the undertakings substantiate that likely efficiencies result from including the hardcore restriction in the agreement and demonstrate that in general all the conditions of Article 101(3) are fulfilled, the Commission will be required to effectively assess the likely negative impact on competition before making an ultimate assessment of whether the conditions of Article 101(3) are fulfilled (28).

Regulation 330/2010: Article 4 -
Restrictions that remove the benefit of the block exemption

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;

prohibited

(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:

prohibited

(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,

admitted

(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;

prohibited

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

prohibited

(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.

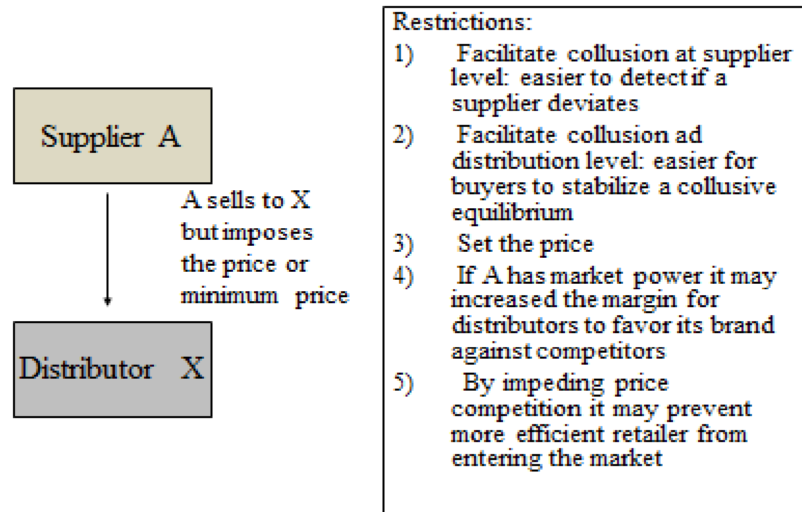
Provisions concerning the single restrictions

Resale price maintenance (RPM)

European Commission
Guidelines on Vertical Restraints, 19 May 2010

(48) The hardcore restriction set out in Article 4(a) of the Block Exemption Regulation concerns resale price maintenance (RPM), that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. In the case of contractual provisions or concerted practices that directly establish the resale price, the restriction is clear cut. However, RPM can also be achieved through indirect means. Examples of the latter are an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level. Similarly, direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging

the buyer to apply a most-favoured-customer clause. The same indirect means and the same 'supportive' measures can be used to make maximum or recommended prices work as RPM. However, the use of a particular supportive measure or the provision of a list of recommended prices or maximum prices by the supplier to the buyer is not considered in itself as leading to RPM.



Restriction of territory or costumers

European Commission
Guidelines on Vertical Restraints, 19 May 2010

(50) The hardcore restriction set out in Article 4(b) of the Block Exemption Regulation concerns agreements or concerted practices that have as their direct or indirect object the restriction of sales by a buyer party to the agreement or its customers, in as far as those restrictions relate to the territory into which or the customers to whom the buyer or its customers may sell the contract goods or services. This hardcore restriction relates to market partitioning by territory or by customer group. That may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors. It may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as refusal or reduction of bonuses or discounts, termination of supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported or profit pass-over obligations. It may further result from the supplier not providing a Union-wide guarantee service under which normally all distributors are obliged to provide the guarantee service and are reimbursed for this service by the supplier, even in relation to products sold by other distributors into their territory (30). Such practices are even more likely to be viewed as a restriction of the buyer's sales when used in conjunction with the implementation by the supplier of a monitoring system aimed at verifying the effective destination of the supplied goods,

such as the use of differentiated labels or serial numbers. However, obligations on the reseller relating to the display of the supplier's brand name are not classified as hardcore. As Article 4(b) only concerns restrictions of sales by the buyer or its customers, this implies that restrictions of the supplier's sales are also not a hardcore restriction, subject to what is stated in paragraph (59) regarding sales of spare parts in the context of Article 4(e) of the Block Exemption Regulation. Article 4(b) applies without prejudice to a restriction on the buyer's place of establishment. Thus, the benefit of the Block Exemption Regulation is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory.

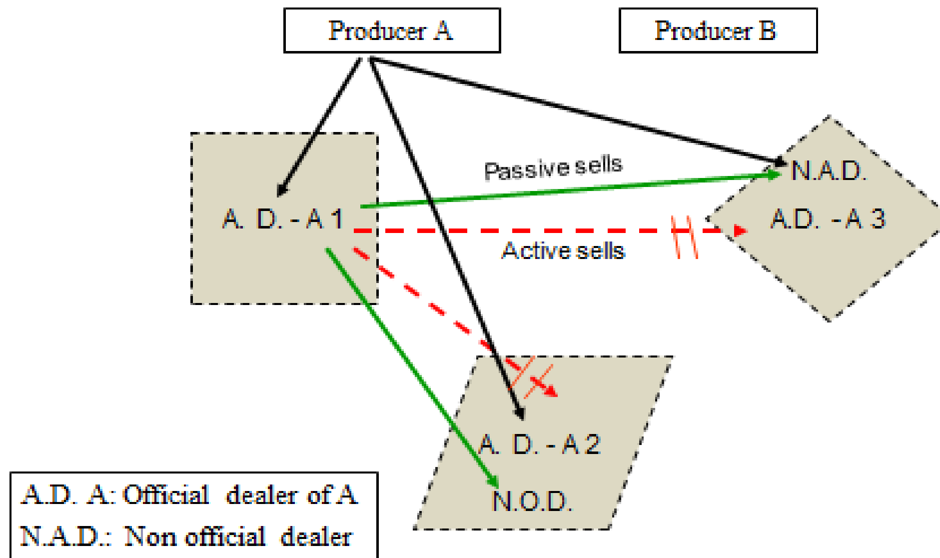
Exclusive distribution system

European Commission
Guidelines on Vertical Restraints, 19 May 2010

(51) There are four exceptions to the hardcore restriction in Article 4(b) of the Block Exemption Regulation. The first exception in Article 4(b)(i) allows a supplier to restrict active sales by a buyer party to the agreement to a territory or a customer group which has been allocated exclusively to another buyer or which the supplier has reserved to itself. A territory or customer group is exclusively allocated when the supplier agrees to sell its product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into its territory or to its customer group by all the other buyers of the supplier within the Union, irrespective of sales by the supplier. The supplier is allowed to combine the allocation of an exclusive territory and an exclusive customer group by for instance appointing an exclusive distributor for a particular customer group in a certain territory. Such protection of exclusively allocated territories or customer groups must, however, permit passive sales to such territories or customer groups. For the application of Article 4(b) of the Block Exemption Regulation, the Commission interprets ‘active’ and ‘passive’ sales as follows:

- ‘Active’ sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory.
- ‘Passive’ sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.

Exclusive distribution agreements



Selective distribution system

Regulation 330/2010, whereas

Article 1 - Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(…)

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;

European Commission
Guidelines on Vertical Restraints, 19 May 2010

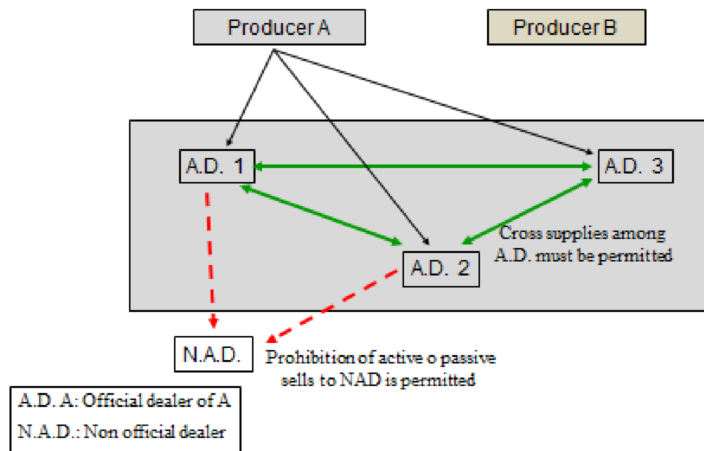
(174) Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorized distributors on the one hand and the possibilities of resale on the other. The difference with exclusive distribution is that the restriction of the number of dealers does not depend on the number of territories but on selection criteria linked in the first place to the nature of the product. Another difference with exclusive distribution is that the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non-

authorized distributors, leaving only appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products.

(175) The possible competition risks are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of certain type(s) of distributors and softening of competition and facilitation of collusion between suppliers or buyers. To assess the possible anti-competitive effects of selective distribution under Article 101(1), a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. Purely qualitative selective distribution selects dealers only on the basis of objective criteria required by the nature of the product such as training of sales personnel, the service provided at the point of sale, a certain range of the products being sold etc. (52) The application of such criteria does not put a direct limit on the number of dealers. Purely qualitative selective distribution is in general considered to fall outside Article 101(1) for lack of anti-competitive effects, provided that three conditions are satisfied. First, the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary (53). Quantitative selective distribution adds further criteria for selection that more directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, etc.

(176) Qualitative and quantitative selective distribution is exempted by the Block Exemption Regulation as long as the market share of both supplier and buyer each do not exceed 30 %, even if combined with other non-hardcore vertical restraints, such as non-compete or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted. The Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria. However, where the characteristics of the product (54) do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the Block Exemption Regulation is likely to be withdrawn. In addition, the remainder of this section provides guidance for the assessment of selective distribution in individual cases which are not covered by the Block Exemption Regulation or in the case of cumulative effects resulting from parallel networks of selective distribution.

Selective distribution system



Selective distribution v. exclusive distribution

Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorized distributors and the possibilities of resale.
The difference with exclusive distribution are:

1) the restriction of the number of dealers does not depend on the number of territories but on selection criteria linked in the first place to the nature of the product.

2) the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non-authorized distributors, leaving only appointed dealers and final customers as possible buyers.

The Metro 'exemption'

Metro v. Commission
11 December 1980, c. 31/80

20. The requirement contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market. In accordance with this requirement the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.

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

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

Selective distribution systems and on-line trade

Fabre
13 October 2011, C-439/09

13 Articles 1.1 and 1.2 of the general conditions of distribution and sale of the brands stipulate:
'The authorised distributor must supply evidence that there will be physically present at its outlet at all times during the hours it is open at least one person specially trained to:
acquire a thorough knowledge of the technical and scientific characteristics of the products…, necessary for the proper fulfilment of the obligations of professional practice…
regularly and consistently give the consumer all information concerning the correct use of the products...
give on-the-spot advice concerning sale of the…product that is best suited to the specific health or care matters raised with him or her, in particular those concerning the skin, hair and nails.
In order to do this, the person in question must have a degree in pharmacy awarded or recognised in France…
The authorised distributor must undertake to dispense the products…only at a marked, specially allocated outlet…'
14 Those requirements exclude *de facto* all forms of selling by internet.
(…)
42 Although it is for the referring court to examine whether the contractual clause at issue prohibiting *de facto* all forms of internet selling can be justified by a legitimate aim, it is for the Court of Justice to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see *L'Oréal*, paragraph 14).
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).
45 Pierre Fabre Dermo-Cosmétique also refers to the need to maintain the prestigious image of the products at issue.
46 The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.
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.

Coty
6 December 2017, C-230/16

Article 2(1)(6) of the distribution contract states that 'the signage for the sales location, including the name of the undertaking and any add-ons or company slogans, must not give the impression of a limited selection of goods, low-quality outfitting or inferior advice, and it must be mounted in such a way that it does not obscure the authorised retailer's decorations and showrooms'.
14 Furthermore, the contractual framework linking the parties includes a supplemental agreement on internet sales which provides, in Article 1(3), that 'the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorised'.
15 Following the entry into force of Regulation No 330/2010, Coty Germany revised the selective distribution network contracts as well as that supplemental agreement, by providing in the first subparagraph of Clause I(1) of that supplemental agreement that 'the authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an "electronic shop window" of the authorised store and the luxury character of the products is preserved'. In addition, Clause I(1)(3) of that supplemental agreement expressly prohibits the use of a different business name as well as the recognisable engagement of a third-party undertaking which is not an authorised retailer of Coty Prestige.
(…)
24. However, the Court has ruled that the organization of a selective distribution network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is

necessary (judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraph 41 and the case-law cited).

25 With particular regard to the question whether selective distribution may be considered necessary in respect of luxury goods, it must be recalled that the Court has already held that the quality of such goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect the actual quality of those goods (see, to that effect, judgment of 23 April 2009, *Copad*, C-59/08, EU:C:2009:260, paragraphs 24 to 26 and the case-law cited).

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

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

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

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

(…)

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

THE NOTION OF UNDERTAKING

The economic activity

Höfner and Elser
23 April 1991, C-41/90

16 In its fourth question, the national court asks more specifically whether the monopoly of employment procurement in respect of business executives granted to a public employment agency constitutes an abuse of a dominant position within the meaning of Article 86, having regard to Article 90(2).
(…)
20 Having regard to the foregoing considerations, it is necessary to establish whether a public employment agency such as the Bundesanstalt may be regarded as an undertaking within the meaning of Articles 85 and 86 of the Treaty.
21 It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.
22 The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.

Wouters
19 February 2002, C-309/99

46 According to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération française des sociétés d'assurances and Others* [1995] ECR I-4013, paragraph 14; and Case C-55/96 *Job Centre* [1997] ECR I-7119, *Job Centre II*, paragraph 21).
47. It is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity (Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, *CNSD*, paragraph 36).
48 Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.
49 That being so, registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, to that effect, with regard to medical practitioners, Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 77).

Poucet et Pistre
17 February 1993, C-159/91 and C-160/91

2 Those questions were raised in proceedings brought by Christian Poucet against Caisse Mutuelle Régionale du Languedoc-Roussillon, which manages the sickness and maternity insurance scheme for self-employed persons in non-agricultural occupations, and the company which acts as its agent, Assurances Générales de France, and by Daniel Pistre against Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans, Clermont-Ferrand.
3 In those proceedings, Mr Poucet and Mr Pistre seek the annulment of orders served on them to pay social security contributions to the two funds mentioned above. Without challenging the principle of compulsory affiliation to a social security scheme, they consider that, for such purposes, they should be free to approach any private insurance company established within the territory of the Community and not have to be subject to the conditions laid down unilaterally by the abovementioned organizations, which, they maintain, hold a dominant position, contrary to the rules on freedom of competition laid down in the Treaty.
(…)
6 As the Court held in Case 238/82 Duphar v Netherlands [1984] ECR 523, paragraph 16, Community law does not detract from the powers of the Member States to organize their social security systems.
7 Under the social security system at issue in the main proceedings, self-employed persons in non-agricultural occupations are the subject of compulsory social protection, including that provided by autonomous statutory schemes, in particular the sickness and maternity insurance scheme, which is applicable to all self-employed persons in non-agricultural occupations and the old-age insurance scheme for the craft occupations concerned.
8 Those schemes pursue a social objective and embody the principle of solidarity.
9 They are intended to provide cover for all the persons to whom they apply, against the risks of sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation.
10 The principle of solidarity is, in the sickness and maternity scheme, embodied in the fact that the scheme is financed by contributions proportional to the income from the occupation and to the retirement pensions of the persons malting them; only recipients of an invalidity pension and retired insured members with very modest resources are exempted from the payment of contributions, whereas the benefits are identical for all those who receive them. Furthermore, persons no longer covered by the scheme retain their entitlement to benefits for a year, free of charge. Solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover.
11 In the old-age insurance scheme, solidarity is embodied in the fact that the contributions paid by active workers serve to finance the pensions of retired workers. It is also reflected by the grant of pension rights where no contributions have been made and of pension rights that are not proportional to the contributions paid.
12 Finally, there is solidarity between the various social security schemes, in that those in surplus contribute to the financing of those with structural financial difficulties.
13 It follows that the social security schemes, as described, are based on a system of compulsory contribution, which is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes.
(…)
16 The foregoing considerations must be taken into account in examining whether the

term 'undertaking', within the meaning of Articles 85 and 86 of the Treaty, includes organizations charged with managing a social security scheme of the kind referred to by the national court.
17 The Court has held (in particular in Case C-41/90 Höfner v Elser [1991] ECR I-1979, paragraph 21) that in the context of competition law the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.
18 Sickness funds, and the organizations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions.
19 Accordingly, that activity is not an economic activity and, therefore, the organizations to which it is entrusted are not undertakings within the meaning of Articles 85 and 96 of the Treaty.

Inapplicability of Article 101 in the internal relation of a group of companies

Viho / Commission
24 October 1996, C-73/95 P

13.The appellant claims that the fact that the conduct in question occurs within a group of companies does not preclude the application of Article 85(1), since the division of responsibilities between the companies in the Parker group aims to maintain and partition national markets by means of absolute territorial protection. The evaluation of such conduct, which has harmful effects on competition, should not therefore depend on whether it takes place within a group or between Parker and its independent distributors. The appellant points out that such territorial protection prevents third parties such as itself from obtaining supplies freely within the Community from the subsidiary which offers the best commercial terms, so as to be able to pass such benefits on to the consumer.
14 Consequently, the appellant considers that Article 85(1), interpreted in the light of Articles 2 and 3(c) and (g) [formerly Article 3(f) of the EEC Treaty] , of the EC Treaty must apply, since the referral policy in question goes far beyond a mere internal allocation of tasks within the Parker group.
15 It should be noted, first of all, that it is established that Parker holds 100% of the shares of its subsidiaries in Germany, Belgium, Spain, France and the Netherlands and that the sales and marketing activities of its subsidiaries are directed by an area team appointed by the parent company and which controls, in particular, sales targets, gross margins, sales costs, cash flow and stocks. The area team also lays down the range of products to be sold, monitors advertising and issues directives concerning prices and discounts.
16 Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them (Case 48/69 ICI v Commission [1972] ECR 619, paragraphs 133 and 134; Case 15/74 Centrafarm v Sterling Drug [1974] ECR 1147, paragraph 41; Case 16/74 Centrafarm v Winthrop [1974] ECR 1183, paragraph 32; Case 30/87 Bodson v Pompes Funèbres [1988] ECR 2479, paragraph 19; and Case 66/86 Ahmed Saeed Flugreisen

and Others v Zentrale zur Bekämpfung Unlauteren Wettbewerbs [1989] ECR 803, paragraph 35).
17. In those circumstances, the fact that Parker's policy of referral, which consists essentially in dividing various national markets between its subsidiaries, might produce effects outside the ambit of the Parker group which are capable of affecting the competitive position of third parties cannot make Article 85(1) applicable, even when it is read in conjunction with Article 2 and Article 3(c) and (g) of the Treaty. On the other hand, such unilateral conduct could fall under Article 86 of the Treaty if the conditions for its application, as laid down in that article, were fulfilled.

Parental liability

Akzo Nobel v. Commission
10 September 2009, C-97/08

54 It must be observed, as a preliminary point, that Community competition law refers to the activities of undertakings (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 59), and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, in particular, Dansk Rørindustri and Others v Commission, paragraph 112; Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraph 107; and Case C-205/03 P FENIN v Commission, [2006] ECR I-6295, paragraph 25).
55 The Court has also stated that the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio [2006] ECR I-11987, paragraph 40).
56 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see, to that effect, Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, paragraph 145; Case C-279/98 P Cascades v Commission [2000] ECR I-9693, paragraph 78; and Case C-280/06 ETI and Others [2007] ECR I-10893, paragraph 39).
57 The infringement of Community competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person (see, to that effect, Aalborg Portland and Others v Commission, paragraph 60, and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P August Koehler and Others v Commission [2009] ECR I-0000, paragraph 38). It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations.
58 It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, to that effect, Imperial Chemical Industries v Commission, paragraphs 132 and 133; Geigy v Commission, paragraph 44; Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraph 15; and Stora, paragraph 26), having regard in particular to the economic, organisational and legal links between those two legal entities (see, by analogy, Dansk Rørindustri and Others v Commission, paragraph 117, and ETI and Others, paragraph 49).

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

Responsibility of the economic unit:
legal standard

The concept of undertaking designates an economic unit, even if in law that economic unit consists of several persons, natural or legal.

When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement.

The infringement of competition rules must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person.

The conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company having regard in particular to the economic, organisational and legal links between those two legal entities.

Akzo Nobel v. Commission
10 September 2009, C-97/08

60 In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary (see, to that effect, Imperial Chemical Industries v Commission, paragraphs 136 and 137) and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see, to that effect, AEG-Telefunken v Commission, paragraph 50, and Stora, paragraph 29).
61 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, Stora, paragraph 29).
(…)
72 As noted in paragraph 58 of this judgment, the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the

market, but carries out, in all material respects, the instructions given to it by the parent company.
73 It is clear, as the Advocate General pointed out in paragraphs 87 to 94 of her Opinion, that the conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit.
74 It also follows from paragraph 58 of this judgment that, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken not only of the factors set out in paragraph 64 of the judgment under appeal, but also of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list.
75 It follows that the Court of First Instance has not committed an error of law as regards the sphere in which the parent company exercises influence over its subsidiary.
76 That conclusion is not affected by the appellants' argument relating to strict liability.
77 It must be observed in that connection that, as it is clear from paragraph 56 of this judgment, Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit, which, as stated in paragraph 55 of this judgment, may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability.

The Dow Chemical Company v. Commission
26 September 2013, C-179/12 P

56 It should be noted in that regard that the principle that it is necessary to check whether the parent company actually exercised decisive influence over its subsidiary applies only where the subsidiary is not wholly owned by its parent company. According to settled case-law of the Court of Justice, where the entire capital of the subsidiary is owned, there is no longer any requirement to carry out such a check since, in those circumstances, there is a presumption of decisive influence on the part of the parent company which has the burden of rebutting that presumption (see *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v. *Alliance One International and Others*, paragraphs 46 and 47 and the case-law cited).
57 More specifically, with regard to the claim that the General Court misconstrued the terms 'single economic unit' and 'single undertaking', it must be stated that, in paragraph 73 of the judgment under appeal, the General Court pointed out that, according to the settled case-law of the Court of Justice, in competition law the term undertaking must be understood as designating an economic unit for the purposes of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal (Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40; and *Akzo Nobel and Others* v *Commission*, paragraph 55).
58 Where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in the infringement of that law and

only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those three entities can be considered to form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC.

59 It must therefore be held that, as part of the verification process of the assessment carried out by the Commission, the General Court did not misconstrue the terms 'single economic unit', 'single undertaking' and the 'existence of … decisive influence'.

Fuji Electric Co. Ltd. v. Commission
12 July 2011, T-132/07

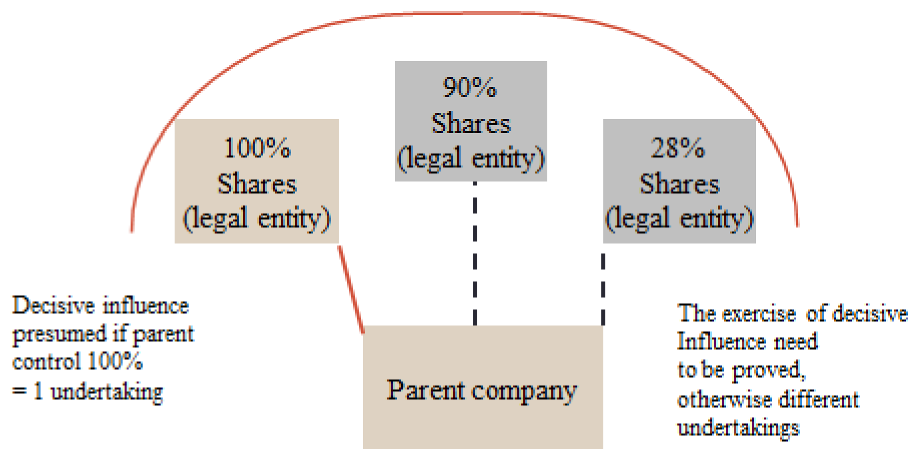
181 Against that background, it is, as a rule, for the Commission to demonstrate that the parent company or companies actually exercised a decisive influence on the market conduct of their subsidiary, on the basis of a body of factual evidence, including, in particular, any management power exercised by the parent company or companies over their subsidiary (see, to that effect, Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136 and case-law cited).

182 It is generally the case that if a parent company holds a majority interest in the subsidiary's share capital, that can enable it actually to exercise a decisive influence on its subsidiary and, in particular, on the subsidiary's market conduct. It has accordingly been held that where the control actually exercised by a parent company over a subsidiary in which it has a 25.001% holding represents a minority interest, far short of a majority interest, it cannot be concluded that the parent company and its subsidiary belong to a single group, within which they form an economic unit (see, to that effect, Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 129).

183 None the less, a minority interest may enable a parent company actually to exercise a decisive influence on its subsidiary's market conduct, if it is allied to rights greater than those normally granted to minority shareholders in order to protect their financial interests and which, when considered in the light of a set of consistent legal or economic indicia, are such as to show that a decisive influence is exercised over the subsidiary's market conduct. Proof of the actual exercise of a decisive influence may therefore be adduced by the Commission by relying on a body of evidence, even if each of those indicia taken in isolation does not have sufficient probative value.

184 The actual exercise of management power by the parent company or parent companies over their subsidiary may be capable of being inferred directly from the implementation of the applicable statutory provisions or from an agreement between the parent companies, entered into under those statutory provisions, in relation to the management of their common subsidiary (see, to that effect, *Avebe* v *Commission*, paragraph 181 above, paragraphs 137 to 139). The extent of the parent company's involvement in the management of its subsidiary may also be proved by the presence, in leading positions of the subsidiary, of many individuals who occupy managerial posts within the parent company. Such an accumulation of posts necessarily places the parent company in a position to have a decisive influence on its subsidiary's market conduct since it enables members of the parent company's board to ensure, while carrying out their managerial functions within the subsidiary, that the subsidiary's course of conduct on the market is consistent with the line laid down at management level by the parent company. That objective can be attained even though member(s) of the parent company who take on managerial functions within the subsidiary do not have authority as agents of the parent company. Lastly, the involvement of the parent company or companies in the management of the subsidiary may follow from the business relationship which they have with each other. Accordingly, where a parent company is also the supplier or

customer of its subsidiary, it has a very specific interest in managing the production or distribution activities of the subsidiary, in order to take full advantage of the added value created by the vertical integration thus achieved (see, to that effect, Opinion of Advocate General Mischo in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 58 above, paragraphs 50 and 51).



Parental liability and presumption of innocence

Schindler v. Commission.
18 July 2013, C-501/11 P

107 In their reply, the appellants contest the basis of the case-law resulting from Akzo Nobel and Others v Commission in the light of Article 6 of the ECHR, submitting that the question of the legality, in the light of that provision, of the presumption that the parent company exercises decisive influence over its subsidiary is still not decided. The Court pointed out, however, in Elf Aquitaine v Commission, paragraph 62, that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded (see, to this effect, Case C-45/08 Spector Photo Group and Van Raemdonck [2009] ECR I-12073, paragraphs 43 and 44, and the judgment of the European Court of Human Rights in Janosevic v. Sweden, no. 34619/97, § 101 et seq., ECHR 2002-VII).

108 The presumption that decisive influence is exercised over a subsidiary wholly or almost wholly owned by its parent company is intended, in particular, to strike a balance between, on the one hand, the importance of the objective of combatting conduct contrary to the competition rules, in particular to Article 81 EC, and of preventing a repetition of such conduct and, on the other hand, the requirements flowing

from certain general principles of European Union law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender and the principle of legal certainty as well as the rights of the defence, including the principle of equality of arms (Elf Aquitaine v Commission, paragraph 59). It follows that such a presumption is proportionate to the legitimate aim pursued.
109 Furthermore, first, the aforesaid presumption is based on the fact that, save in quite exceptional circumstances, a company holding all, or almost all, the capital of a subsidiary can, by dint merely of holding it, exercise decisive influence over that subsidiary's conduct and, second, it is within the sphere of operations of those entities against which the presumption operates that evidence of the lack of actual exercise of that power to influence is generally apt to be found. The presumption is, however, rebuttable and the entities wishing to rebut it may adduce all factors relating to the economic, organisational and legal links tying the subsidiary to the parent company that they consider to be capable of demonstrating that the subsidiary and the parent company do not constitute a single economic entity, but that the subsidiary acts independently on the market (see Case C-286/98 P Stora Kopparbergs Bergslags v Commission[2008] ECR I-9925, paragraph 29; Akzo Nobel and Others v Commission, paragraph 61; and Elf Aquitaine v Commission, paragraphs 57 and 65).
110 Finally, the parent company must be heard by the Commission before the latter adopts a decision against it and review of that decision may be sought from the European Union judicature which must, in deciding the case, observe the rights of the defence.

Liability in case of corporate reconstructions, sales and other legal organizational changes

E.T.I. Spa
11 December 2007, C-280/06

30 By the two questions, which should be examined together, the Consiglio di Stato asks, essentially, what, in accordance with Article 81 et seq. EC and, where appropriate, with any other relevant rule of Community law, are the criteria to be adopted in determining the undertaking to be penalized for breach of the competition rules where undertakings have succeeded each other, more specifically where the last part of an infringement of the competition rules was carried out by the economic successor of the entity that commenced the infringement and the latter entity, while no longer operating in the economic sector concerned by the penalty, is still in existence.
(…)
38 It is apparent from the case-law that Community competition law refers to the activities of undertakings (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 59) and that the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (see, in particular, 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, paragraph 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107; and Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 25).
39 When such an entity infringes competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see, to that effect,

Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145, and Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78).
40 As to the circumstances in which an entity that is not responsible for the infringement can nevertheless be penalized for that infringement, it must be held first that this situation arises if the entity that has committed the infringement has ceased to exist, either in law (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 145) or economically. With regard to the latter, it is worth noting that a penalty imposed on an undertaking that continues to exist in law, but has ceased economic activity, is likely to have no deterrent effect.
41 Next, it must be noted that if no possibility of imposing a penalty on an entity other than the one which committed the infringement were foreseen, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organizational changes. This would jeopardize the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 173; Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 61; and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-0000, paragraph 22).
42 Consequently, as the Court has already held, when an entity that has committed an infringement of the competition rules is subject to a legal or organizational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical (see, to that effect, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 9, and *Aalborg Portland and Others* v *Commission*, paragraph 59).
43 In accordance with that case-law, the legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant. Imposing a penalty for the infringement on the successor can therefore not be excluded simply because, as in the main proceedings, the successor has a different legal status and is operated differently from the entity that it succeeded.
44 The fact that the decision to transfer an activity is taken not by individuals, but by the legislature in view of a privatization, is equally irrelevant. Measures to restructure or reorganize undertakings adopted by the authorities of a Member State cannot have the effect, lawfully, of compromising the effectiveness of Community competition law (see, to that effect, Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraphs 33 and 34).

Skanska Industrial solutions Oy
14 March 2019, C-724/17

23 By its first and second questions, which it is appropriate to examine together, the national court asks essentially whether Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares of the companies which have participated in a cartel prohibited by that article were acquired by other companies, which dissolved the former companies and carried on their commercial activities, the acquiring companies may be held liable for the damage caused by that cartel.
(…)
36 That being said, it must be recalled that the concept of an 'undertaking', within the meaning of Article 101 TFEU covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (judgment of

11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 38 and the case-law cited).
37 That concept, placed in that context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (judgment of 27 April 2017, Akzo Nobel and Others v Commission, C-516/15 P, EU:C:2017:314, paragraph 48 and the case-law cited).
38 As regards the restructuring of an undertaking, such as that at issue in the main proceedings, in which the entity which committed the infringement of EU competition law has ceased to exist, it must be recalled that, when an entity that has committed an infringement of the competition rules is subject to a legal or organizational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical (see, to that effect, judgments of 11 December 2007, ETI and Others, C-280/06, EU:C:2007:775, paragraph 42; of 5 December 2013, SNIA v Commission, C-448/11 P, not published, EU:C:2013:801, paragraph 22; and of 18 December 2014, Commission v Parker Hannifin Manufacturing and Parker-Hannifin, C-434/13 P, EU:C:2014:2456, paragraph 40).
39 It is therefore not contrary to the principle of individual liability to impute liability for an infringement to a company which has taken over the company which committed the infringement where the latter has ceased to exist (judgment of 5 December 2013, SNIA v Commission, C-448/11 P, not published, EU:C:2013:801, paragraph 23 and the case-law cited).
40 Furthermore, the Court has stated that, for the effective implementation of the EU competition rules, it may be necessary to consider that the purchaser of the offending undertaking is liable for the infringement of those rules if that offending undertaking ceases to exist by reason of the fact that it has been taken over by the purchaser, which as the acquiring company, takes over its assets and liabilities, including its liability for breaches of EU law (judgment of 5 December 2013, SNIA v Commission, C-448/11 P, not published, EU:C:2013:801, paragraph 25)
41 In that connection, Asfaltmix argues, in essence, that the case-law cited in paragraphs 36 to 40 of this judgment has been developed in a context in which the Commission imposes fines for the implementation of Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), that case-law is not applicable to an action for damages such as that at issue in the main proceedings.
42 That argument cannot be accepted.
43 As stated in paragraph 25 of this judgment, the right to claim compensation for damage caused by an agreement or conduct prohibited by Article 101 TFEU ensures the full effectiveness of that article and, in particular, the effectiveness of the prohibition laid down in paragraph 1 thereof.
44 That right strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 23 and the case-law cited).
45 As the Advocate General stated essentially, in point 80 of his Opinion, actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behavior on the part of undertakings and to deter them from engaging in such conduct.

46 Therefore, if the undertakings responsible for damage caused by an infringement of the EU competition rules could escape penalties by simply changing their identity through restructurings, sales or other legal or organizational changes, the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties would be jeopardized (see, by analogy, judgment of 11 December 2007, *ETI and Others*, EU:C:2007:775, paragraph 41 and the case-law cited).

47 <u>It follows that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules.</u>