Object contra effect in Swedish and European competition law

En rapport skriven av
Olav Kolstad
på uppdrag av Konkurrensverket

KONKURRENSVERKET
Swedish Competition Authority

Uppdragsforskningsrapport 2009:3
Olav Kolstad
ISSN-nr 1652-8069
Konkurrensverket 2009

Preface

The Competition Authority stimulates research in the area of competition and public procurement and publishes commissioned research in order to increase interest in competition issues to academics as well as to a wide audience.

The Swedish Competition Act (SCA) 6 § and EC Treaty Article 81(1) prohibits agreements, decisions by associations of undertakings and concerted practices "which have as their object of effect the prevention, restriction or distortion of competition". If an anti-competitive object is found, there is no need to assess effects under the SCA 6 § and Article 81(1).

This is the background to the Competition Authority's commission to Professor Olav Kolstad, Institutt for privatrett, to analyze the concepts of "object" and to develop a coherent and analytical tool for the assessment of object in individual cases under SCA 6 § and EC Treaty article 81(1). The result is presented in the report Object contra effect in Swedish and European competition law.

The author himself is responsible for the conclusions and the analysis in the report.

Stockholm, May 2009

Dan Sjöblom
Director General

Object contra effect in Swedish and European competition law

Professor dr. juris Olav Kolstad

1. Introduction

The parallel prohibitions against anti-competitive agreements in the Swedish Competition Act[1] Chapter 2, Article 1 and EC treaty Article 81(1) proscribe agreements, concerted practices and decisions by associations of undertakings which "have as their *object or effect* the prevention, restriction or distortion of competition". Object and effect are alternative and not cumulative requirements.[2] The ECJ has on several occasions stated clearly that if the object of an agreement is the restriction of competition, it is not necessary to show that the effect of the agreement is also restrictive. Indeed, as early as 1966, the ECJ stated in *Consten and Grundig v Commission* that, once an anti-competitive object has been shown, there is no need to show that the agreement in fact restricts competition:

> [F]or the purpose of applying Article [81(1)], 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.[3]

Even if the "object" and "effect" tests are distinct, the substantive criterion of restriction of competition is the same whether an agreement restricts competition by object or effect. When the ECJ, in *STM v Commission*, stated that "Article [81(1)] is based on an assessment of the effects of an agreement from two angles of economic evaluation", it confirmed that both "object" and "effect" seek to identify the same consequence of collusion: restriction of competition.[4]

An agreement has as its object to restrict competition if an analysis of its clauses "reveal[s] the effect on competition to be sufficiently deleterious".[5] Recently, in *Competition Authority v BIDS and Barry Brothers*, the ECJ made clear that the object criteria are reserved for agreements that by their very nature restrict competition:

---

1 Hereinafter the SCA.

2 See for example case C-219/95P *Ferriere Nord v Commission* [1997] ECR I-4411, para 14-16, cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 343, case 56/65 *STM v Maschinenbau Ulm* [1996] ECR 235 at 249, case 121/83 *Bureau National Interprofessional du Cognac v Guy Clair* [1985] ECR 391 and case C-250/92 *Gøttrup-Klim Grovvareforretning and others v Dansk Landbrugs Gorvvareselskap Amba (DLG)* [1994] ECR I-5641.

3 Joined cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299. See also case C-209/07 *Competition Authority v BIDS and Barry Brotherrs* of 20 November 2008, para 16.

4 Okeoghene Odudu: *The Boundaries of EC Competition Law – The Scope of Article* 81 p. 113.

5 Joined cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299. See also C-209/07 *Competition Authority v BIDS and Barry Brothers* of 20 November 2008, para 15.

> 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.[6]

According to the CFI in *European Night Services v Commission* the object-category consist of "obvious restrictions of competition".[7] Goyder writes that "some contractual restrictions are, *prima facie*, so likely to affect competition that this effect will be presumed".[8] Because restriction of competition is inevitable, agreements in the object category will "as such" restrict competition.[9] Thus, the competitive harm of agreements in the object category is not judged on a case by case basis. If an agreement has similar characteristics to agreements that in all or in the vast majority of cases restrict competition, it will restrict competition by object.

SCA Chapter 2, Article 1 is a blueprint of EC Treaty Article 81(1), and must be interpreted against the backdrop of Article 81(1). The words "object" and "effect" are to be interpreted the same way in SCA Chapter 2, Article 1 and Article 81(1). As a consequence, the case law of the European Court of Justice (ECJ) will not only be studied as a source of law when interpreting Article 81, but will also be relevant, and indeed a source of law with considerable weight, when interpreting SCA Chapter 2, Article 1.

2. "Object" as a presumption-based rule

To prove anti-competitive effect, it is necessary to engage in an in-depth analysis of the agreement in question and the economic context in which it functions. For some agreements, the harmful effects are so clear that it should not be necessary for the competition authorities and the courts to expend resources on an exhaustive inquiry into the effects of the agreements. The finding of an anti-competitive object dispenses with costly proof requirements, such as proof of market power.

6 Case C-209/07 *Competition Authority v BIDS and Barry Brothers* of 20 November 2008, para 17.

7 Joined cases T-374-375/94, 384/94 *European Night Services v Commission* [1998] ECR II-3141, para 136.

8 D.G. Goyder: *EC Competition Law* p. 96.

9 Cf. the judgment of the ECJ in joined cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

The “object” rule can be described as a presumption rule; if object is found, harmful effects on competition are presumed.[10] Whether the agreement really has the presumed effects is irrelevant.[11]

A prohibition based on the presumed effects of a class of agreements implies that the prohibition is based on experience with the effects of the agreements covered by the prohibition. If, in the case law or on the basis of experience, it turns out that agreements of a certain type always have severe negative effects on competition, this justifies a general prohibition against the class of agreements in question.

“Per se” rules in US antitrust law are developed on the basis of experience the Supreme Court has gained through its case law.[12] The per se rule in US antitrust law is described by the Supreme court in *Northern Pacific Railway Co v United States*:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[13]

Agreements falling under a per se rule are “unlawful in and of themselves” and it is not necessary to assess their impact on competition in the relevant market. The rationale behind the development of per se rules is to avoid the “necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved”, when the agreement can be presumed to harm competition.[14] Resorting to per

---

10 See also Article 81(3) guidelines para 21: “Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules”.

11 An object-rule produces a certain number of false positives. The social costs of false positives under Article 81(1) can be avoided by applying Article 81(3).

12 Hovenkamp: *Antitrust Law*, volume XI, ¶1911a describes the rationale behind *per se* illegality in US antitrust law in the following terms: “The rationale of the rule of per se illegality depends on the premises that (a) judicial experience with a particular class of restraints shows that virtually all restraints in that class operate so as to reduce output or increase price; and (b) particularized inquiry into the output or price effects or such restraint is not worth the cost. As a result, (c) once a restraint is placed in such a class, summary condemnation ‘as a matter of law’ is appropriate”.

13 *Northern Pacific Railway Co v United States* 356 US 1, 5 (1957).

14 If a per se rule is established, other lines of defence are also limited. In *United States v. Addyston Pipe & Steel Co.*, 85 F 271 (6th Cir. 1898), Judge Taft rejected reasonableness as a defence in price fixing cases: “[I] t has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold … were reasonable. We do not think the issue an important one, because … we do not think that at

se rules is confined to restraints "that would always or almost always tend to restrict competition and decrease output".[15] To justify a per se prohibition under the Sherman Act § 1, a restraint must have "manifestly anticompetitive"[16] effects and "lack … any redeeming virtue".[17] A per se rule is appropriate only after courts have acquired considerable experience with the type of restraint at issue,[18] and only if they can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason.[19] The US Supreme Court has "expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious".[20]

The assessment of object is not explicitly based on an induction from the analysis of similar agreements in earlier case law. The ECJ seems to prescribe a concrete assessment of whether the individual agreement restricts competition. An agreement cannot be assessed in the abstract, but must be assessed "in the economic context in which the agreement is to be applied".[21] The case law of the ECJ shows that this can usually be done on a relatively cursory basis, but a more detailed examination may sometimes be required.[22]

If an agreement is of a certain type this indicates that the agreement will have certain effects. If it is inferred, given the general effects similar agreements usually have, that an individual agreement is likely to have negative effects on competition, one may establish a presumption based on the central characteristics of the agreement in question. Thus, the classification of the agreement as belonging to a certain class of agreements will establish a presumption based on deduction from an analysis of similar agreements.[23]

---

common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices".

15 *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988).

16 *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977).

17 *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289 (1985).

18 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U. S. 1, 9 (1979).

19 *Arizona v. Maricopa County Medical Soc.*, 457 U. S. 332, 344. Pp. 5-7.

20 *State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997)

21 See for example Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v. Commission* [1984] ECR 1679 para 26.

22 Jonathan Faull, Ali Nikpay: The EC Law of Competition p. 223.

23 Cf. Hovenkamp: Antitrust Law, volume XI, ¶1910b on the per se rule developed by the US Supreme Court under the Sherman Act section 1: "The per se rule is based on the premise that particular restraints are unreasonable *as a class*. As a result, once the tribunal concludes that the restraint at issue is within the class, further inquiry into the merits of that particular restraint is unwarranted".

In *GlaxoSmithKlineServices v Commission*, the CFI confirmed that certain categories of agreements "in principle" restrict competition:

> Consequently, 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 the agreement may be presumed to deprive final consumers of those advantages.[24]

In stating that agreements which intend to limit parallel trade "in principle" restrict competition, the CFI must be referring to the general tendency of agreements of this type to restrict competition. The CFI thus concluded, on the basis of the general characteristics of an agreement and the likely effect on competition of similar agreements, that the specific agreement in question could be presumed to restrict competition.

This does not mean that it is sufficient for the finding of an anti-competitive object that an agreement be classified as belonging to a category of agreements that "in principle" restricts competition. The presumption of a restriction of competition may be rebutted on the basis of an analysis of the legal and economic context in which the agreement functions, see for example *GlaxoSmithKline Services v Commission*:

> However, if account is taken of the legal and economic context in which GSK's General Sales Conditions are applied, it cannot be presumed that those conditions deprive the final consumers of medicines of such advantages.[25]

Thus, a presumption based on the fact that an agreement belongs to a class of agreements that under normal market conditions are generally harmful to competition is not sufficient for the finding of an anti-competitive object. The presumption must be confirmed or rebutted on the basis of an assessment of the context in which the agreement operates. It may follow quite clearly from the context that the agreement is manifestly anti-competitive. On the other hand, the context in which the agreement is to apply may show that it cannot be presumed to have the same manifestly anti-competitive effects as similar agreements under normal market conditions.[26]

---

[24] Para 121.

[25] Para 122.

[26] Odudu argues that the "object" condition should not need to be satisfied when the foreseeable consequence of the agreement is a restriction of competition, Okeoghene Odudu: *Interpreting Article 81(1): The Object Requirement revisited*, E.L. Rev. 2001 26(4), 379-390. He argues that one cannot establish an irrebuttable presumption of effects based on the fact that the agreement in question

A presumption based on the fact that an agreement can be classified as a certain kind of agreement derives from experience. Based on empirical evidence or economic analysis, or both, it can be inferred that certain types of agreements under normal market conditions always, or almost always, restrict competition. Even if the ECJ has not referred expressly to experience or economic analysis, it is reasonable to suggest that the ECJ has been influenced by the general analysis of cartel agreements in its interpretation of "object". In this sense, "object" in Article 81(1) can be compared to the concept of per se rules in US antitrust law. There are however, difference between the object-rule in Article 81(1) and the per se prohibition under Sherman Act section.[27] First, a presumption of anti-competitive effect based on the fact that the agreement in question belongs to a certain class of agreements can be rebutted by an analysis of "the economic context in which the agreement is to be applied". No comparable criterion is used by the US Supreme Court when deciding whether a class of conduct should be covered by a per se rule under the Sherman Act Section 1 or 2. Second, an agreement falling foul of Article 81(1) may still fulfil the criteria in Article 81(3) even if it restricts competition by object. Such an assessment of "redeeming virtues" is not available for conduct covered by the per se rule in the Sherman Act section 1 or 2.

3. "Object" must be interpreted in light of the aims of competition rules

In interpreting Article 81(1), the ECJ is guided by the goals of the EC Treaty, as expressed in Article 2, and the role of competition rules in achieving these aims, described in Article 3. Interpreted in light of Articles 2 and 3, the EC Treaty competition rules serve two purposes. They are intended to contribute to the creation of a single market and to secure effective or workable competition within this market. "Object" in

belongs to a class of agreements that in most cases restrict competition. Rather, such effects provide a rebuttable presumption of intention, Okeoghene Odudu: *Interpreting Article 81(1): The Object Requirement revisited*, E.L. Rev. 2001 26(4), 379-390, p. 384. The presumption of intention can be rebutted if it can be shown that the agreement in question will not have anti-competitive effects, and the "object"-condition will not be satisfied. In his argument, Odudu does not take into account the possibility that the "legal and economic" context may rebut a presumption of anti-competitive effect, were the presumption is based on the fact that the agreement in question belongs to a class of agreements which under normal market conditions restrict competition.

27 In some cases, the ECJ has expressed itself in a way that seems to indicate that some restrictions on competition are prohibited per se under Article 81(1), see for instance joined cases 40-48, 50, 54-56, 111, 113 and 114/73 *Suiker Unie v Commission*, [1975] ECR 1663 para 182: "[T]he Commission does not maintain that such deliveries are illegal per se but infers that these operations are illegal from the fact that these deliveries were a constituent element of the concerted action". The use of the word per se does not indicate that "object" in Article 81(1) is a basis for formulating per se rules similar to those found in US antitrust law.

Article 81(1) refers both to agreements that have as their object the restriction of competition and agreements that tend to endanger the creation of a single market. In most instances agreements that harm one of these goals also harm the other. Agreements that restrict competition in a way that effects trade between Member States will in most cases, if not all, have a negative influence on the creation of a single market. For example, a price fixing cartel will reduce competition and also make it less attractive for the participants of the cartel to enter new markets (i.e. enter Member States where they are not present) to compete for new costumers. Another example is horizontal market sharing agreements, which are contrary to both the goal of effective competition and the goal of integration.

For some restrictions it can be argued that they are obviously detrimental to the goal of integration, but not so clearly harmful to competition. The obvious example is vertical agreements giving the distributor territorial exclusivity. If a supplier assigns to distributors in different Member States their respective Member States as exclusive sales territory, the distribution agreements divide the single market into separate national markets. But it is not obvious that such agreements are “manifestly anticompetitive”. The agreement restricts intra-brand competition, but the supplier may face intense competition from other suppliers. The effects on competition should thus be assessed in each individual case. But as we will see from the assessment of vertical agreements below, vertical agreements giving distributors absolute territorial protection are found to restrict competition by object because of their potential effect on the single market.

The SCA serves only one master: effective competition. This follows from Chapter 1, Article 1, which states the purpose of the SCA:

> The purpose of this Act is to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products.

The creation of a single market is not one of the SCA’s aims. It can thus be argued that agreements that restrict competition by object under Article 81(1) because of their potential harm to the single market, only restrict competition by object under Article 6 if their potential harm to competition so justifies.

It follows from the preparatory works of the SCA that Article 6 shall be interpreted in line with the ECJ's interpretation of Article 81(1).[28] The preparatory works contained reservations regarding the aim or characteristics of the EC Treaty, but these have not been relevant at the national level.[29] Further, the preparatory works pointed out that, in the interpretation and implementation of the SCA, the special circumstances in Sweden were to be taken into account.[30] This indicates that cases were the ECJ has found an anti-competitive object because of potential harm to the creation of a single market are not relevant for the interpretation of object in Chapter 2, Article 1.

On the other hand, it can be argued that the single market goal is relevant also for the interpretation of the SCA. Sweden cannot apply the SCA in a way that contradicts the competition rules in the EC Treaty. To avoid different substantive standards under the SCA and the EC Treaty, agreements belonging to the object category under Article 81(1) should also be found to have an anti-competitive object under Chapter 2, Article 1. In what follows I will therefore interpret Chapter 2, Article 1 as being in line with Article 81(1).

4. Key factors for the assessment of "object"

4.1 Introduction

The ECJ has in its judgments developed criteria relevant for the assessment of object. Whether an agreement restricts competition by object must be assessed in light of three key factors: "its terms, the legal and economic context in which it was concluded and the conduct of the parties".[31]

---

28 "Genom materiell samordning med Romfödragets regler bör dock mycken ledning vid tillämpningen av en ny svensk konkurrenslag kunne hämtas från EG-domstolens praksis", Prop 1992/93:56 p. 21.

29 "Man måste beakta vissa speciella drag i EG-rätten som oftast inte spelar en så framtredande roll i nationelle rättsordningar", Prop 1992/93:56 p. 21.

30 "Man måste också beakta att tillämpningen av en svensk konkurrenslag i vissa fall kan behöva anpassas efter de särskilda förhållanden som gäller i Sverige", Prop 1992/93:56 p. 21.

31 Joined cases 96-102, 104, 105, 108 and 110/82 *IAZ v Commission* [1983] ECR 3369, para 23. See also Joined Cases 29/83 and 30/83 *CRAM v Commission* [1984] ECR 1679, Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, para 66 and Case C-209/07 *Competition Authority v BIDS and Barry Brothers*, para 16.

4.2 The terms of the agreement

The first step in an assessment of object is to analyze the clauses of the agreement in question.[32] In contract law the subjective aim of the parties to an agreement is central in interpreting the agreement. However, it follows from the case law of the ECJ that it is not the subjective purpose, aim or "object" of the agreement that is decisive under Article 81. Rather, the question is whether an agreement "as such" has as its object to restrict competition, cf. joined cases 29-30/83 *CRAM and Rheinzink* [1984] ECR 1679:

> In order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire which of the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common intent at the time when the agreement was concluded. It is rather a question of examining the aims pursued by the agreement as such, in the light of the economic context in which the agreement is to be applied.[33]

"The aims pursued by the agreement as such" are the effects an agreement of the type in question is likely to produce between the parties and under normal market conditions. These effects may be intended by the parties, but even if this is not the case, the agreement will have an anti-competitive object if it inevitably produces anti-competitive effects. It is thus not necessary to prove a subjective intention to fulfill the object requirement, cf. the judgment of the ECJ in *IAZ v Commission*:

> The purpose of the agreement, regard being had to its terms, the legal and economic context in which it was concluded and the conduct of the parties, is appreciably to restrict competition within the common market, … That finding is not invalidated by the fact that it has not been established that it was the intention of all the parties to the agreement to restrict competition.[34]

That intent is not a necessary condition for the finding of object also follows from the judgment of the ECJ in case C-551/03 P *General Motors v Commission*:

> It is true that proof of that intention is not a necessary factor in determining whether an agreement has such a restriction as its object. … However, even if the intention of the parties does not constitute a

[32] Case C-209/07 *Competition Authority v BIDS and Barry Brothers*, para 15.
[33] Para 26.
[34] Joined cases 96-102, 104, 105, 108 and 110/82 *IAZ v Commission* [1983] ECR 3369, para 25.

> necessary factor in determining the restrictive character of an agreement, there is nothing to prohibit the Commission or the Community courts from taking that intention into account.[35]

Nor is intent is a sufficient condition. In *General Motors v Commission*, the ECJ does not deal with subjective intent as a sufficient condition for the finding of "object", but as proof of object. The ECJ thus concludes that the CFI "could legitimately rely *also* on the intentions" of the parties.[36] In this regard, the ECJ refers to the opinion of Advocate General Tizzano:

> that the anti-competitive nature of an agreement may be deduced not only, obviously, from the content of its clauses but also from a series of factors including, precisely, the intention of the parties as it arises from the 'genesis' of the agreement and/or manifests itself in the 'circumstances in which it was implemented' and in the 'conduct' of the companies concerned.

The ECJ confirmed its *General Motors v Commission* ruling in *Competition Authority v BIDS and Barry Brothers*, where the ECJ held that subjective intent is irrelevant. "Object" must be assessed based upon an objective assessment of the wording of an agreement:

> In fact, to determine whether an agreement comes within the prohibition laid down in Article 81(1) EC, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain. In that regard, even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision.[37]

The ECJ's judgments in *General Motors v Commission* and *Competition Authority v BIDS and Barry Brothers* show that proof of subjective intention is not a sufficient condition for the finding of an anti-competitive object. This is supported by the CFI's judgment in *GlaxoSmithKline Services v Commission*. The CFI acknowledged that

[35] Paras 77 and 78.
[36] Para 79, emphasis added.
[37] Para 27.

> It … follows from the case-law that agreements that clearly intend to treat parallel trade unfavourably must in principle be regarded as having as their object the restriction of competition.[38]

Despite this,

> The Commission could not rely on the mere fact that Clause 4 of the General Sales Conditions established a system of differentiated price intended to limit parallel trade as the basis for its conclusion that that provision had as its object the restriction of competition.[39]
>
> …
>
> Consequently, the application of Article 81(1) EC to the present case cannot depend solely on the fact that the agreement in question is intended to limit parallel trade in medicines or to partition the common market, which leads to the conclusion that it affects trade between Member States, but also requires an analysis designed to determine whether it has as its object or effect the prevention, restriction or distortion of competition on the relevant market, to the detriment of the final consumer.[40]

An anti-competitive intent is thus not sufficient for the finding of an anti-competitive object.[41] Other factors can show that despite an anti-competitive intent an agreement does not restrict competition by object in the meaning of Article 81(1).[42]

It follows from this that "object" is an objective concept. Price fixing can be used as an example. If four producers agree to fix prices when demand is rapidly declining, the subjective purpose of the agreement may be to ensure that the parties to the agreement do not go bankrupt due to the low prices. The agreed prices may even be substantially

---

38 Para 116.

39 Para 117.

40 Para 119.

41 See also Advocate General Kokott's opinion in case C-8/*08 T-Mobile Netherlands BV and Others,* of 19.2.2009, para 39: "According to that case-law, the criteria from which to develop a presumption of an anti-competitive object are the content and objectives of the concerted practice, subject to the proviso that the subjective intentions of the parties are at best indicative but not decisive in the matter. Account must be taken also of the economic and legal context in which the concerted practice arises".

42 Odudu argues that even if subjective intent is not a necessary condition for the finding of "object", it is a sufficient condition, see Okeoghene Odudu: *Interpreting Article 81(1): Object as subjective intention*, E.L. Rev. 2001, 26(1), 60-75. Odudu acknowledges that the ECJ has not made an explicit ruling that subjective intention is sufficient to satisfy the object requirement", but alleges that the ECJ has not explicitly stated that subjective intent is insufficient either.[42] Odudu argues that the ECJ has "come very close" in IAZ and BAT to finding that subjective intention is sufficient to satisfy the object requirement. Further, the force of the Commission's argument and the applicants' acceptance of their line of argument in the Polypropylene case show that subjective intent to restrict competition is sufficient. Finally, the fact that an agreement does not need to have an anti-competitive effect to satisfy the object requirement supports his argument that subjective intention alone satisfies the object requirement. However, Odudu's interpretation has not found support in the latest case from the ECJ.

lower than the historical market price. But on an objective assessment, the agreements keep the price level higher than that naturally set by an unhindered price mechanism.

If it is not obvious from the wording that the aim pursued by the agreement is to restrict competition, it is necessary to assess the essential object of the agreement in more detail.[43] In these circumstances, the commercial context in which the agreement is entered into and the role of the agreement in this context must be taken into account. In *Consten and Grundig v Commission*, the ECJ found that the distribution agreement in question could not be analyzed in isolation from the distribution system it was a part of:

> in order to arrive at a true representation of the contractual position the contract must be placed in the economic and legal context in the light of which it was concluded by the parties.[44]

Factors relevant to the interpretation of the agreement can cast light on whether the agreement has an anti-competitive object or not. For example, it may be unclear from the wording whether an agreement aligns prices. However, if it is clear from e-mails, presentations given at contract meetings, minutes of meeting etc. that the intention of the parties was to create an incentive scheme that would result in the alignment of their prices, their subjective intent can be used as evidence in the assessment of "object".[45]

In *BMW Belgium v. Commission*, one of the questions was whether circulars sent from BMW Belgium to authorized Belgian dealers of BMW cars were intended to prohibit Belgian dealers from re-exporting BMW cars to customers outside Belgium.[46] The Commission had found that the circulars prohibited authorized Belgian BMW sellers from re-exporting BMW cars to purchasers outside Belgium, and thus restricted competition by object. BMW Belgium denied this and argued that the general context in which the circulars were set and the conduct of the parties showed that the sole object of the circulars was to prevent Belgian BMW dealers from selling cars to non-approved dealers generally and that they were thus not directed at export sales. The ECJ accepted that the circulars from BMW Belgium to authorized BMW dealers had to be assessed in light of "the legal and factual context" in which the circulars were set. Contrary to the

---

[43] See e.g. case C-238/05 *Asnef-Equifix v Ausbanc* [2006] ECR I-11125.

[44] Case 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342.

[45] See case C-551/03 P *General Motors v Commission*, [2006] ECR I-3173, para 77: "[E]ven if the intention of the parties does not constitute a necessary factor in determining the restrictive character of an agreement, there is nothing to prohibit the Commission or the Community courts from taking that intention into account".

[46] Case 32, 36, 82/78 *BMW Belgium v. Commission*, [1979] ECR 2435, para 28. See also Case C-209/07 *Competition Authority v BIDS and Barry Brothers* para 21.

interpretation submitted by BMW Belgium, the ECJ concluded that the circulars restricted competition by object because

> the circular from BMW Belgium of 29 September 1975 and the circular from the Belgian dealers' advisory committee of the same date, considered according to their tenor and in relation to the legal and factual context in which they are set and in relation to the conduct of the parties, indicate an intention to put an end to all exports of new BMW vehicles from Belgium.[47]

If an agreement has multiple aims, it is sufficient for a finding of anti-competitive object to show that one of the likely effects of the agreement is the restriction of competition, see case C-551/03 P *General Motors v Commission*, judgment of 6 April 2006:

> An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.[48]

4.3 <u>The conduct of the parties</u>

According to the Article 81(3) Guidelines, "[t]he way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect".[49] The case law of the ECJ confirms that a presumption of anti-competitive object may be based on the conduct of the parties even if the terms of the agreement alone do not suggest such a presumption.[50]

The conduct of the contracting parties may show that they have a common understanding to align their competition parameters that is not expressed in the agreement. In other words, the conduct shows the existence of a concerted practice. If two or more undertakings through concerted practice align their competition parameters in a way that would have been classified as restricting competition by object had the

---

47 Para 28.

48 Para 64. See also: Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342, *IAZ*, para 25; Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, para 122, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, para 491 and Case C-209/07 *Competition Authority v BIDS and Barry Brothers* para 21.

49 Para 22.

50 See for instance joined cases 96-102, 104, 105, 108 and 110/82 *IAZ v Commission* [1983] ECR 3369, where the ECJ found that steps taken by the parties after the conclusion of the agreement showed that their intention was to hinder parallel imports, para 23. Another example is case 32, 36, 82/78 *BMW Belgium v. Commission*, [1979] ECR 2435.

conduct been the result of express regulation in an agreement, the conduct itself can be regarded as having an anti-competitive object.

4.4 The legal and economic context

In its case law, the ECJ has not based its analysis of object on an analysis of the terms of the agreement alone. The agreement must also be assessed in its context. If an analysis of the legal and economic context in which the agreement is supposed to function shows that the agreement has a clear potential to harm competition, only then will the agreement be considered to have an anti-competitive object, cf. case 56/65 *STM v Maschinenbau Ulm* [1996] ECR 235, 249:

> the prohibition of such an agreement depends on one question alone, namely whether, taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the said prohibition as set out in Article [81(1)].

An analysis of the context in which an agreement functions can confirm that the agreement restricts competition by object. But an analysis of the legal and economic context can also rebut a presumption of anti-competitive object.[51] If it can be shown that agreements of the type in question (because of special circumstances in the relevant market) do not generally produce negative effects on competition in that market, an anti-competitive object cannot be established. The agreement will then only be caught by Article 81(1) and SCA Chapter 2, Article 1 if it can be established that the agreement itself has a restrictive effect on competition.

In most cases the inquiry into the legal and economic context can be done quite summarily. It is only necessary to enter into a more detailed analysis of the legal and economic context if it can be established that special market characteristics give rise to doubts regarding the presumed effects of agreements of a certain type.

The assessment of the legal and economic context is not an assessment of the concrete effects of an agreement. Rather the aim is to establish whether the general presumption of competitive harm, connected with agreements that in most markets restrict competition, is true also in the market in question. This must be assessed on a

51 Cf. the opinion of Advocate General Trstenjak in case C-209/07 *The Competition Authority v BIDS and Barry Brothers*, delivered on 4 September 2008, para 59, where it is argued that an analysis of the legal and economic context can rebut a presumption of harm to competition: “The legal and economic context is to be taken into account only in so far as it can cast doubt on the existence of a restriction of competition”.

market-wide, and thus more abstract, level. If agreements of the type in question do not produce the effects that earlier case law and experience show are the necessary effects on other markets of such agreements, a presumption-based object rule cannot be established for the class of agreements in question on the relevant market analyzed.[52]

The CFI's analysis of the legal and economic context in *GlaxoSmithKline Services v Commission* shows that such an analysis is not focused on the effects of the individual agreement, but relates to the presumed effects on the relevant market of the type of agreements in question.[53] In its judgment, the CFI assessed whether a clause that hindered parallel trade restricted competition by "object". It was not disputed that the clause was inserted with the intention of limiting parallel trade of certain medicines between Spain and other Member States. The CFI began by establishing that agreements hindering parallel trade must generally be considered to restrict competition by object:

> it follows from the case-law that agreements which ultimately seek to prohibit parallel trade must in principle be regarded as having as their object the prevention of competition. … It also follows from the case-law that agreements that clearly intend to treat parallel trade unfavourably must in principle be regarded as having as their object the restriction of competition.[54]

Even if agreements hindering parallel trade must "in principle" be regarded as having their object to restrict competition, the CFI held that this

> cannot depend solely on the fact that the agreement in question is intended to limit parallel trade in medicines or to partition the common market.[55]

---

[52] See also Advocate General Kokott's opinion in case C-8/*08 T-Mobile Netherlands BV and Others*, of 19.2.2009, para 45 and 46: "[T]he prohibition on 'infringement by object' may not be interpreted as meaning that an anti-competitive object gives rise merely to some kind of presumption of unlawfulness which may be rebutted, however, if in the specific case no negative consequences for the operation of the market can be demonstrated. … 46. Thus, it goes too far to make the finding of an anti-competitive object dependent on an actual determination of the presence or absence of an anti-competitive impact in an individual case, irrespective of whether that impact relates to competitors, consumers or the general public. Instead, for the prohibition of Article 81(1) EC to be triggered it is sufficient that a concerted practice has the potential – on the basis of existing experience – to produce a negative impact on competition. In other words, the concerted practice must simply be *capable in an individual case*, that is, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can at most be of relevance for determining the amount of any fine and in relation to claims for damages".

[53] Case T-168/01 *GlaxoSmithKline Services v Commission*, [2006] ECR II-2969.

[54] Para 116.

[55] Para 119.

According to the CFI, an agreement that is intended to limit parallel trade only restricts competition by object if it can be established that the agreement produces the harmful effects presumed:

> While it has been accepted since then that parallel trade must be given a certain protection, it is therefore not as such but, as the Court of Justice held, in so far as it favours the development of trade, on the one hand, and the strengthening of competition, on the other hand (Case C-373/90 *X* [1992] ECR I-131, paragraph 12), that is to say, in this second respect, in so far as it gives final consumers the advantages of effective competition in terms of supply or price (*Tepea* v *Commission*, paragraph 118 above, paragraphs 43 and 56). Consequently, 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 the agreement may be presumed to deprive final consumers of those advantages.[56]

it could not, according to the CFI, be presumed that the agreements in question would restrict competition to the detriment of consumers:

> However, if account is taken of the legal and economic context in which GSK's General Sales Conditions are applied, it cannot be presumed that those conditions deprive the final consumers of medicines of such advantages. In effect, the wholesalers, whose function, as the Court of Justice has held, is to ensure that the retail trade receives supplies with the benefit of competition between producers (*Metro I*, paragraph 109 above, paragraph 40), are economic agents operating at an intermediate stage of the value chain and may keep the advantage in terms of price which parallel trade may entail, in which case that advantage will not be passed on to the final consumers.[57]

This conclusion was based on an analysis of the market for medicine in Europe. The CFI accorded significant weight to the fact that the prices of the drugs in question were regulated by Member States and that consumers were reimbursed the costs of these drugs. Because of "the specific and essential characteristic of the sector" a presumption-based object rule could not be established for agreements of the type in question on the market for medicines:

> that circumstance means that it cannot be presumed that parallel trade has an impact on the prices charged to the final consumers of medicines reimbursed by the national sickness insurance scheme and

[56] Para 121.
[57] Para 122.

thus confers on them an appreciable advantage analogous to that which it would confer if those prices were determined by the play of supply and demand.[58]

The CFI thus rebutted the object-presumption on the basis of an analysis of the functioning of the market in question, and not based on the effects of the concrete agreement.

The judgment in *GlaxoSmithKline Services v Commission* dealt with a vertical restraint. Vertical restraints do not, as a general rule, have the same potential for harm to competition as horizontal restraints. There seems thus more reason to qualify the object-analysis based on an assessment of the legal and economic context in cases dealing with vertical restraints than in cases dealing with horizontal restraints.

4.5 “Object” - a competition policy question

Based on an analysis of the case law of the ECJ, a list of types of agreements that restrict competition by object can be developed. The assessment of object is not straightforward. It would therefore provide greater legal certainty if, in light of the case law of the ECJ, a list of object restrictions were developed.[59] Indeed, the CFI began developing such a list when, in *European Night Services v Commission*, it listed agreements on “price-fixing, market-sharing or the control of outlets” as examples of “obvious restrictions of competition”.[60] If it can be established that an agreement is of a type that the courts have found to have an anti-competitive object, the assessment of its object under Article 81(1) can be relatively cursory.

The “object list” must be developed on the basis of an analysis of the case law of the ECJ. The example list in Article 81(1)(a)-(e) does not constitute an exhaustive list of prohibited collusion.[61] Further, an object list should not be limited to obvious restrictions of competition as listed by the CFI in *European Night Services v*

58 Para 134.

59 Advocate General Trstenjak, in her opinion in case C-209/07 *The Competition Authority v BIDS and Barry Brothers*, delivered on 4 September 2008, expressed “reservations regarding the excessive categorisation of restrictions of competition”, para 104. Despite this, she acknowledged that “it may be helpful for undertakings and their legal advisors to form categories, in particular against the background of the self-assessment system which now applies”, para 105, and developed criteria for the identification of agreements restricting output that restricts competition by object.

60 Joined cases T-374-375/94, 384/94 *European Night Services v Commission* [1998] ECR II-3141, para 136.

61 Case C-209/07 *Competition Authority v BIDS and Barry Brothers* para 23.

Commission. Restrictions that are not "obvious" may also restrict competition by their very nature.

If an agreement is of a type not yet dealt with by the courts under Article 81 (i.e. it is not on the "object list"), the question arises whether one should assess the agreement in detail according to the criteria developed by the ECJ to find whether it restricts competition by object or not. If an agreement is found to have an anti-competitive object, the assessment is not limited to the individual agreement, but establishes a presumption for all agreements of the same kind regarding their "object". The question is thus a policy question: should the class to which the individual agreement belongs be assessed on the basis of the concrete effects on competition or should the type of agreement qualify for a presumption that it restricts competition?

It is for the ECJ to decide on the European Union's competition policy. Thus, the identification of classes of agreements that are to be regarded as having an anti-competitive object should be left to the ECJ. The Commission cannot widen the interpretation of "object", finding other agreements than those explicitly identified by the ECJ to have an anti-competitive object. Faull & Nikpay argue that it is up to "the Commission in its Notices and Guidelines" to decide on this policy issue.[62] The Commission's decision can always be overturned by the courts. However, Commission Notices and Guidelines should not be given broader relevance than Commission decisions. Further, the Commission cannot widen the scope of the object category through the so-called "black lists" in the different group exemption regulations. The role of a "black list" is to identify clauses that do not deserve to be covered by a group exemption because these clauses normally do not fulfill the criteria for exemption set out in Article 81(3). In most cases, "black list" clauses restrict competition by object, but to come to that conclusion based on the fact that a clause is on a black list alone would not be correct.

Further, it leaves very little room for national courts to expand the scope of restrictions caught by "object" beyond those explicitly identified as such by the European courts in their case law. This also has a bearing on the interpretation of the SCA. The SCA is applied in accordance with the ECJ's interpretation of Articles 81 and 82. Consequently, the Swedish Courts have the same limited scope to expand the object category. An exception must be made for *Högsta Domstolen* (the Supreme Court of Sweden), which rules in the last instance on the interpretation of the SCA.

---

[62] Jonathan Faull, Ali Nikpay: *The EC Law of Competition* p. 226.

Given this background, neither the Commission nor national courts can apply the criteria developed by the ECJ to identify new types of agreements restricting competition by object. The Commission and national courts must limit their inquiry into the existence of "object" to the search for agreements belonging to classes of agreements previously found to have an anti-competitive object by the ECJ.

If the agreement is of a type identified by the ECJ as restricting competition by object, it will be presumed to have an anti-competitive object. This presumption can be rebutted if it can be shown that the agreement do not "by its very nature" restrict competition in the relevant product market, based on the special characteristics of this market. National courts and competition authorities can use the contextual analysis to object to an agreement's classification in the object category based on its terms. In this regard, the criteria provide the Commission, national courts and competition authorities with a certain leeway to find that individual agreements, under special circumstances, should be assessed under Article 81(1) on the basis of their effects rather than on the basis of their characteristics.

5. Classes of horizontal conduct restricting competition by object

5.1 Introduction

Agreements between competitors to align competition parameters between them are considered to be inevitably harmful to competition. Cartel agreements are usually complex schemes combining distinct restrictive practices in the pursuance of their overall goal, the achievement of supra-competitive profits.[63] The great potential harm to competition has led to strict treatment of cartel agreements under Article 81(1), exemplified by the judgment of the CFI in *European Night Services v Commission*. The CFI identified, based on its own case law and that of the ECJ, price fixing and market sharing as agreements "containing obvious restrictions of competition".[64]

63 Jonathan Faull, Ali Nikpay: *The EC Law of Competition* p. 753.

64 Joined cases T-374-375/94, 384/94 *European Night Services v Commission* [1998] ECR II-3141, para 136. In addition, the CFI mentioned "the control of outlets" as an example of an obvious restriction of competition. By "control of outlets", the CFI meant agreements that reduce the parties' freedom to open outlets in sales territories assigned to the other parties, i.e. territorial restrictions that hinder export. Export bans are clearly harmful to the goal of single market integration and for this reason have an object contrary to Article 81(1).

5.2 Price fixing

The easiest way to align prices is of course to agree on the price level, i.e. on the price to charge in the market, but joint fixing of prices can, and usually will, take other forms. Collusion on prices can take the form of an agreement on the level of profits or a common price calculation scheme. Another example of price fixing is the setting of minimum prices. An agreement on minimum prices prevents the parties to the cartel agreement from charging prices lower than the minimum set. Another technique is the setting of "target" prices, for example through prices communicated to the market as the "list price" or the "official price", cf. the judgment of the CFI in *ICI v Commission*:

> The Court considers that for the purposes of the application of Article 85(1) of the EEC Treaty the fixing of target prices constitutes direct or indirect fixing of selling prices as mentioned, by way of example, in point (a) of that provision, which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have an anti-competitive object or effect.[65]

It will also constitute price fixing if competitors agree on discounts or terms of payment. In sum, all agreements

> having an actual effect on prices and altering the normal conditions of the market or those enabling the participants to predict competitors' pricing policy with a reasonable degree of certainty are unlawful under Article [81(1)].[66]

If an interpretation of the agreement reveals that the parties agree on elements relevant for the setting of market prices, the agreement will normally be found to have an anti-competitive object on this basis alone.

The Commission found in *Visa International-Multilateral Interchange Fee* that an agreement involving price fixing did not restrict competition by object.[67] Visa International issues rules and regulations, the Visa Rules, governing the Visa International payment card scheme. A part of the Visa Rules regulates the fee to be charged for transactions using a Visa card. According to these rules, a bank which contracts with merchants for Visa card acceptance must pay an interchange reimbursement fee for each transaction using a Visa card to the bank which has issued

65 Case T-13/89 *ICI v Commission*, [1992] ECR II-1021, para 310.
66 Case 8/72 *Vereniging van Cementhandelaren* [1972] ECR 977 para 21.
67 [2002] OJ L318/17.

the Visa card. The interchange fee is set by Visa. The Commission found that the Multilateral Interchange Fee (MIF) prevented issuing banks from developing an individual pricing policy vis-à-vis acquiring banks in so far as they provide services to them. The MIF also restricted price competition between acquiring banks, because the prices they charged to merchants accepting Visa cards for processing card transactions directly reflected the MIF. The Commission found in other words that the agreement was a price fixing agreement.

Despite this, the Commission did not consider the MIF agreement to restrict competition by object.[68] In the Commission's opinion, the agreement sought to increase the stability and efficiency of operation of the Visa card system, and as such strengthened the competitiveness of the Visa card system with respect to other payment systems. Thus, the Commission looked beyond the terms of the agreement. It assessed the agreement within its context and found that the fixing of the MIF was based on numerous objectives and not just that of fixing prices. Because of the role the agreement had in the Visa card system, it had to be assessed on the basis of its actual effects under Article 81(1). The Commission thus seems to accept that an analysis of the context can rebut a presumption of anti-competitive effects for price fixing agreements.

The Commission assessed the effects of the agreement rather summarily and found that the agreement restricted competition. Interestingly enough, it was the effects of reduced price competition on the acquiring and issuing market that led to the finding that the agreement restricted competition by effect.[69] If it was relatively clear that the agreement restricted competition, one can question why the Commission found it necessary to assess the agreement on the basis of its effects rather than on the basis of its object. One explanation may be that this made it easier for the Commission to find that the agreement met the Article 81(3) criteria.[70] The Commission states in its *Guidelines on the interpretation on Article 81(3)* that agreements "identified as hardcore restrictions … are unlikely" to meet the criteria in Article 81(3). If an agreement is assessed on the basis of its effects rather than on the basis of its object one avoids this straight jacket starting point for the analysis under Article 81(3).[71]

---

68 Para 69.

69 Para 71.

70 See Alison Jones, Brenda Sufrin: *EC Competition Law* p. 223-224.

71 Agreements on interchange fees have also been viewed favourably under US antitrust law. The US Eleventh Circuit found in *Natl. Bancard Corp. (NaBanco) v. Visa, U.S.A.*, 259 F.2d 592 (11th. Cir.), cert. denied, 479 U.S. 923 (1986) that an agreement setting the "interchange fee" that banks issuing credit cards charged to banks that transferred the funds to merchants who accepted such cards, did not violate the Sherman Act section 1. The Eleventh Circuit discussed whether the agreement on the setting of interchange fees could be labelled a "price fixing" agreement covered by the per se prohibition under the Sherman Act section 1. The Eleventh Circuit did not conclude on this issue, but found that the agreement in any event qualified for a rule of reason analysis under the ancillary

Price fixing between buyers are the mirror of price fixing among sellers. A buyer cartel reduces the purchase prices, but does this through a reduction of the volume purchased by its members. A buyer cartel thus results in reduced rivalry among competing buyers, and an allocative efficiency loss. In *Spanish Raw Tobacco*, the Commission found that a buyer's cartel infringed Article 81(1) by object. Four major Italian processors of raw tobacco had entered into agreements aimed at fixing the trading conditions for the purchase of raw tobacco in Italy. Under the arrangement, the processors agreed on volume quotas, allocated suppliers and agreed on the purchase prices. The Commission found that the agreements had "by their very nature the object to restrict competition within the meaning of Article 81(1)".[72]

In US antitrust law, buying cartels are, as a general matter, illegal per se, just as seller cartels are.[73] According to Hovenkamp, "The per se rule entails that once a naked agreement is found between rivals in the buying market limiting the price they will pay or the amount they will purchase, they are condemned categorically without inquiry into market power or effects".[74] But the per se rule is limited to "naked" buyers' cartels: "Of course, the per se rule is limited to 'naked' or 'nearly naked' restraints. Buying arrangements that are reasonably ancillary to joint ventures with efficiency-creating potential are generally analyzed under the rule of reason".[75]

Agreement on a common purchase price is inherent in agreements on joint purchasing. The participants must agree with each other on what they are willing to pay for an input. Unlike buyer cartels, joint purchasing cooperation's manage to obtain lower prices or more favorable terms by purchasing in large volume. In joint purchasing arrangements the participants thus has an initiative to increase the volume purchased, and not reduce it. Another difference between buyer cartels and joint purchasing arrangements is that in joint purchasing arrangements the buyers typically negotiate

restraints doctrine: "BMI and Sylvania indicate that even if the IRF literally qualifies as price fixing, it may be subject to the rule of reason if it is no greater than reasonably necessary to achieve a legitimate commercial objective (i.e., has a procompetitive purpose), has no substantial anticompetitive impact, and is no broader than necessary to accomplish its procompetitive goals". The Eleventh Circuit found that the agreement on the interchange fee was justified under the rule of reason.

72 Case COMP/C.38.238/B.2 – *Spanish Raw Tobacco*, para 285. A non-confidential version of the decision is available at http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38281/en.pdf.

73 The US Supreme Court established in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1949) that buyers' naked cartels are illegal per se. For an analysis of price fixing by buyers under U.S. antitrust law, see Hovenkamp: *Antitrust Law*, volume XII, chapter 20B.

74 Hovenkamp: *Antitrust Law*, volume XII, ¶2012.

75 Hovenkamp: *Antitrust Law*, volume XII, ¶2012.

together, and thus reduces transaction costs. The Commission holds in its *Guidelines on horizontal restraints* that purchasing agreements are unlikely to have as their object the restriction of competition unless they amount to a disguised cartel on the downstream market:

> Purchasing agreements only come under Article 81(1) by their nature if the cooperation does not truly concern joint buying, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation.[76]

5.3 Market sharing

Article 81(1) refers specifically to agreements which "limit or control … markets" in litra (b) and agreements which "share markets" in litra (c) as practices prohibited under Article 81(1). Markets may be shared quantitatively, territorially or on the basis of customers' characteristics. If an agreement fixes volumes of supply or percentages of demand to be met by each party to the agreement, i.e. through production and output quotas, the market is shared quantitatively. The market is shared territorially if an agreement reserves particular geographical areas to different parties. If the parties to an agreement reserve certain groups of customers to different parties, the agreement divides the market on the basis of customers' characteristics.

Agreements that share the market territorially run directly counter to the principal objective of the EC Treaty: to establish a single market among the Member States. It follows from a number of ECJ decisions that horizontal market sharing restricts competition by object, starting with the judgment in *ACF Chemiefarma NV v Commission*.[77] Likewise, the CFI has consistently held that market sharing agreements restrict competition by object. Further, the CFI has refused to assess market sharing agreements in the context in which they function, see for instance *Sumitomo Metal Industries Ltd. v Commission*:

> agreements which involve respecting domestic markets in themselves pursue an object restrictive of competition and fall within a category of agreements expressly prohibited by Article 81(1) EC and that

---

76 Para 124.

77 Case 41/69 *ACF Chemiefarma NV v Commission*, [1970] ECR 661. See also joined cases 40-48, 50, 54-56, 111, 113 and 114/73 *Suiker Unie v Commission*, [1975] ECR 1663, joined cases 29 and 30/83 *CRAM v Commission* [1984] ECR 1679, joined cases C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland v Commission* [2004] ECR I-123 and cases T-9/99 *HFB Holding v Commission* [2002] ECR II-1487.

> object cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned.[78]

For market sharing agreements, an anti-competitive object can thus be identified on the basis of the terms of the agreement alone. The presumption that market sharing agreements have serious anti-competitive potential cannot be rebutted on the basis of an assessment of the agreement in the context in which it functions.

The CFI's treatment of market sharing agreements is strict. Indeed, it may seem contrary to its own judgment in *GlaxoSmithKline Services v Commission*, in which agreements regulating parallel trade were found not to restrict competition by object on the basis of an assessment of the context in which the agreements were to apply. On the other hand, the agreement assessed in *GlaxoSmithKline Services v Commission* was a vertical agreement. As horizontal market sharing has more severe consequences for competition and trade between Member States and has very few, if any, redeeming virtues, a more strict approach to horizontal agreements is understandable.

5.4 Agreements restricting output

The SCA Article 6(b) and EC Treaty Article 81(1)(b) expressly prohibit agreements that "limit or control production, markets, technical development or investment". Output restrictions that limit the overall output to a level at which it does not fully meet existing demand will invariably lead to higher prices. The Commission regards agreements on "output limitation" as restricting competition by object. This because output limitations

> lead to customers paying higher prices or not receiving the desired quantities. … It can therefore be presumed that these restrictions have negative market effects.[79]

Output limitation agreements are often part of complex cartels. In cartel arrangements output limitations frequently serve to support price-fixing.[80] Output limitation may also be found in horizontal agreements that give rise to significant competitive benefits, such as joint production agreements, research and development

---

78 Joined cases C-403 and 405/04 P *Sumitomo Metal Industries Ltd. V Commission*, [2007] ECR I-729. See also joined cases T-25, 26, 30-32, 34-39, 42/95-46/95, 48/95, 50/95-65/95, 68-71/95, 87, 88, 103-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paras 1085-1088.

79 Commission Guidelines on horizontal restraints, OJ 2001 C 3 s. 2-30, para 25.

80 See Mario Siragusa, Cesare Rizza (eds): *EU Competition Law, Volume III, Cartel Law* p. 59.

agreements and standardization agreements, even if they restrict competition by effect. Such agreements can be implemented between the parties and with regard to third parties if they fulfill the criteria in Article 81(3).

A special group of agreements restricting output are the so-called “crisis cartels”. In markets facing a rapid decrease in demand, suppliers must deal with a situation of overcapacity. This results in fierce price competition, “cut throat” competition, where suppliers accept to sell at prices that do not fully cover production costs in order to recoup at least part of their costs. Suppliers that have the financial capacity to endure the crisis will survive. They are not necessarily the most efficient producers. After the crisis, buyers face a more concentrated market with fewer suppliers. To secure an “orderly” reduction in production capacity and stable prices, the suppliers may form a “crisis cartel” and agree on how to eliminate overcapacity.

In *Competition Authority v BIDS and Barry Brothers*, the ECJ found that an agreement to reduce overcapacity in the Irish beef industry restricted competition by object. In 2002, the 10 principal processors of beef in Ireland formed a corporate body, BIDS, for the purpose of implementing a draft rationalization plan, which provided *inter alia* for a reduction in processing capacity of about 25%. The agreement was notified to the Irish Competition Authority. The Competition Authority found that the agreement restricted competition by object and applied to the High Court for an order restraining BIDS and Barry Brothers from implementing the agreement. The High Court dismissed the application and the Competition Authority appealed to the Supreme Court, which decided to ask the ECJ for a preliminary ruling on the matter. The Supreme Court asked the ECJ “whether agreements with features such as those of the BIDS arrangements are to be regarded, by reason of their object alone, as being anti-competitive and prohibited by Article 81(1)”.

The BIDS arrangements pursued two main objectives. First, the number of undertakings in the beef processing sector was to be reduced significantly. Second, 75% of the excess production capacity in the beef processing sector was to be eliminated.

These aims were to be achieved through agreements under which the “goers”, representing approximately 25% of active capacity, undertook to leave the industry. The goers were to sign a two year non-compete clause in relation to the processing of cattle throughout Ireland. Their plants were to be decommissioned and land associated with the decommissioned plants was not to be used for the purposes of beef processing for a period of five years. The goers’ equipment used for primary beef processing was to be sold only to stayers for use as back-up equipment or as spare parts to be sold outside Ireland.

The goers were to be compensated by BIDS. The "stayers" would finance BIDS by means of loans. The loans were to be financed by a levy. The stayers were to pay a rate of EUR 2 per head of their traditional percentage of total kills, and EUR 11 per head on cattle kill above that figure.

The ECJ compared the situation with and without the BIDS arrangements. Without the BIDS arrangements the market structure would have been forged by commercial rivalry or concentrations. It would in other words only be the most efficient processors left on the market, whether alone or merged. With the BIDS arrangements the beef processors avoided this process and shared the restructuring costs. The ECJ found that the purpose of the BIDS arrangements "conflicts patently with the concept inherent in the EC Treaty provisions relating to competition".

Further, the ECJ found that the means used to attain the objectives of the BIDS arrangements included restrictions whose object was anti-competitive.

First, the levy of EUR 11 per head of cattle slaughtered beyond each processor's usual volume deterred the producers from exceeding their usual volume of production. Because of the levy, producers who might have been able to increase their market share to the disadvantage of other stayers would instead freeze their production. There would be no development regarding market shares. Each producer would be secured a market share reflecting their usual volume of production. The BIDS arrangement thus both restricted output and had the characteristics of a market sharing arrangement.

Second, the restrictions on the goers relating to the disposal or use of their processing plants would effectively raise the barriers to entry for newcomers. The costs incurred by building a new processing plant are much greater than those incurred when taking over an existing plant. The restrictions were thus "obviously intended to dissuade any new entry of competitors" and constituted "by their very object, restrictions on competition".[81]

5.5 Information sharing agreements

The dissemination and exchange of information between competitors enhances transparency in the market. In certain markets it may be beneficial to the competitive structure to enhance market transparency. Increased market transparency is thus not "in

---

[81] Case C-209/07 *The Competition Authority v Beef Industry and Barry Brothers*, para 38.

itself" restrictive of competition. On the other hand, can increased knowledge of competitors pricing policies and commercial strategies under certain market conditions make it easier for competitors to act in concert?[82] By reducing the uncertainty regarding the future market behavior of competitors, information sharing agreements can make it possible to foresee market conduct and eliminate normal competitive rivalry. Thus, an information sharing agreement may result in the alignment of competition parameters like price and market sharing.

An exchange of information about future prices or market strategies does not bind the parties to adapt to the information exchanged and will not have as its explicit aim to restrict competition. If the information exchanged helps to reduce uncertainty regarding the future conduct of the parties, the arrangement will nevertheless result in reduced competition. In *Hüls AG v Commission*, the ECJ stated that where competitors exchange commercially sensitive information

> the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market.[83]

An exchange of future prices and market strategies can in other words be presumed to result in price fixing and the alignment of future market conduct. Even if the price fixing is not explicitly agreed, it will be the result of concerted practice between the parties. It follows from *Hüls AG v Commission* that "concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object".[84] Thus, for information exchange agreements that can be presumed to result in price fixing or other restrictions that have an anti-competitive object, it is not necessary to prove the actual effects of the information exchange on competition. In such cases an anti-competitive object will be found on the basis of the type of information exchanged alone.

---

82 See case C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, para 58: "[I]f supply on a market is highly concentrated, the exchange of certain information may, according in particular to the type of information exchanged, be liable to enable undertakings to be aware of the market position and commercial strategy of their competitors, thus distorting rivalry on the market and increasing the probability of collusion, or even facilitating it. On the other hand, if supply is fragmented, the dissemination and exchange of information between competitors may be neutral, or even positive, for the competitive nature of the market".

83 Case C-199/92 p *Hüls AG v Commission* [1999] ECR I-4287, para 162.

84 Case C-199/92 p *Hüls AG v Commission* [1999] ECR I-4287, para 164.

Information sharing agreements may be used as a mechanism for implementing or monitoring compliance with a cartel agreement.[85] The exchange of commercially sensitive information to facilitate a cartel agreement restricts competition by object. In *Aalborg Portland v Commission*, the ECJ found that exchange of price information that underpinned a cartel had as its object to restrict competition.[86] The Court acknowledged that the information exchanged was in the public domain and related to historical and purely statistical prices, but this did not alter the conclusion that the information exchange restricted competition by object. Thus, the Court assessed the information exchange in its context regarding its role in the implementation of a cartel, but was not willing to assess the exchange of information in a broader context. The type of information exchanged and its role in an anti-competitive arrangement was sufficient for the finding of an anti-competitive object.[87]

5.6 Bid rigging

Bid rigging occurs when undertakings collaborate on responses to invitations to tender for the supply of goods and services.[88] Bid rigging typically involves price fixing, market sharing and/or information exchange.[89] Instead of competing to submit the most attractive tender at the lowest possible price, the parties agree amongst themselves the terms for offer to be submitted or agree amongst themselves who shall be the most successful bidder.[90] Bid rigging will restrict competition by object; cf. the Commission decision in *Re The European Sugar Cartel*:

> In a system of tendering, competition is of essence. If tenders submitted by those taking part are not the result of individual economic calculation, but of knowledge of the tenders by other participants or of concertation with them competition is prevented, or at least distorted and restricted.[91]

---

85 Alison Jones, Brenda Sufrin: *EC Competition Law* p. 903.

86 Joined cases C-204, 205, 211, 213, 217 and 219/00 P *Aalborg Portland v Commission* [2004] ECR I-123, para 281.

87 See also joined cases T-25/95 etc. *Cimenteries CBR and others v Commission* [200] ECR II-491, where the CFI found that periodic exchanges of price information restricted competition by object because the exchange of information was designed to facilitate the implementation of a cartel agreement, see para 1647.

88 Alison Jones, Brenda Sufrin: *EC Competition Law* p. 893.

89 Mario Siragusa, Cesare Rizza (eds): *EU Competition Law, Volume III, Cartel Law* p. 102.

90 Alison Jones, Brenda Sufrin: *EC Competition Law* p. 893.

91 *Re The European Sugar Cartel* [1973] OJ L140/17, para 42. See also *Pre-Insulated Pipe Cartel* [1999] OJ L24/1, upheld on appeal in case T-9/99 etc. *HFB Holdings v. Commission* [2002] ECR II-1487 and case C-189/02 P etc. *Dansk Rørindustri v Commission* [2005] ECR I-5425. See also case T-29/92 *SPO v Commission* [1995] ECR II-289.

In practice, the presumption that bid rigging is very harmful to competition cannot be rebutted on the basis of an analysis of the context in which it functions.

5.7 Collective exclusive dealing and collective boycott agreements

Collective exclusive dealing takes place when undertakings agree to conduct their business exclusively through certain distribution channels. Collective exclusive dealing arrangements are potentially very harmful to competition. Distributors that are part of the "collective" can hinder competing distributors from getting supplies from suppliers of products attractive to the end customer. But the harm that collective dealing arrangements may cause depends on the market share of the distributors that are part of the arrangement. If the market share of the supplier and the aggregate market share of the distributor are not substantial, the anti-competitive potential may be small. From an economic point of view it can thus be questioned whether collective exclusive dealing should be regarded as having an anti-competitive object.

It can be argued that the Commission in *FEG and TU* found that collective exclusive dealing had as its object to restrict competition.[92] NAVEG, an association of suppliers, agreed with FEG, an association of wholesalers, that it would advise the members of NAVEG to sell only to members of FEG. The Commission found that the collective exclusive dealing restricted competition by object because

> The arrangement restricts the freedom of suppliers to determine themselves which wholesalers they wish to supply. The result is that both the suppliers and the wholesalers who do not belong to the FEG are placed at a disadvantage.[93]

The Commission described the effects of the arrangement in more detail, based on a market-analysis. The analysis of the Commission was thus not an abstract or inductive object analysis, based on the supposed effects of collective exclusive dealing arrangements, but a concrete analysis of the arrangement in question in the market context in which it functioned.

---

[92] *FEG and TU*, OJ [2000] L 39/1. Richard Whish: *Competition Law* p. 119, Alison Jones, Brenda Sufrin: *EC Competition Law* p. 223, fn 50 and Jonathan Faull, Ali Nikpay: *The EC Law of Competition* p. 224 argue that the Commission in *FEG and TU* characterized collective exclusive dealing as having as its object to restrict competition. In my opinion it is not clear from the reasoning of the Commission that it regarded collective exclusive dealing as restrictive of competition by object.

[93] Para 105.

Collective boycott agreements amount essentially to collective exclusive dealing in negative terms: the undertakings agree not to use selected distributors or sellers and in this way allocate the sale of the products in question to other, indirectly selected, distributors or sellers. The US Supreme Court has clearly identified the kinds of boycott agreements which qualify for the per se approach and those which do not. In *Northwest Wholesale Stationers*, the court found that the per se approach was appropriate when the allegations were of

> joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.[94]

In their analysis of the case P. Areeda & H. Hovenkamp state that the Court identified three elements that per se boycott cases usually contain:

> (1) denial of something a competitor needs to compete effectively, (2) defendants with a dominant position in the relevant market, and (3) the absence of any plausible contention that the challenged behavior would "enhance overall efficiency and make markets more competitive".[95]

For the per se rule to apply it was not enough that the agreement appeared on its face to be a collective boycott agreement:

> A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive.[96]

It can be argued that under Article 81(1) that only collective exclusive dealing agreements and collective boycott agreements with clearly anti-competitive characteristics should be included in the object-category.

---

94 *Northwest Wholesale Stationers v. Pacific Stationary &Printing Co.*, 472 U.S. 284 (1985) at 294. See also *Rossi v. Standard Roofing*, 156 F.3d 452 (3d Cir. 1998).

95 Antitrust Law volume XI (2[nd]. ed.) ¶ 1510 Quoting 472 U.S. at 294-295.

96 *Northwest Wholesale Stationers v. Pacific Stationary &Printing Co.*, 472 U.S. 284 (1985) at 298.

5.8 Horizontal agreements and "object" – conclusions

In its analysis of whether horizontal agreements restrict competition by "object", the ECJ has limited itself to an assessment of the text of the agreement in question. If the agreement can be characterized as an "obvious restriction of competition", this is sufficient for the finding of an anti-competitive object.[97] In cases regarding horizontal agreements obviously restricting competition neither the ECJ nor the CFI has been willing to assess whether the presumption of anti-competitive effects can be rebutted on the basis of an analysis of the context in which the agreement applies. The Commission seems to be more willing to consider analysis of the context of the agreement in special cases to rebut the presumption of anti-competitive effects.

The unwillingness of the ECJ to assess horizontal agreements in their context can be explained by "hard core" horizontal agreements' considerable potential for competitive harm. There is no indication in the case law that the strict interpretation of "object" concerning horizontal agreements will be tempered by taking into account the context in which the agreement is to be applied.

6. Vertical agreements restricting competition by object

6.1 Introduction

Vertical agreements are generally not as harmful to competition as horizontal agreements. This can explain why the ECJ has found fewer vertical agreements restricting competition by object than is the case for horizontal agreements. There are two kind of vertical restrictions that have been found to restrict competition by object: agreements hindering parallel trade and vertical price restraints.

6.2 Agreements hindering parallel trade

6.2.1 Introduction

In distribution agreements, it is common to find clauses protecting the distributor from competition with others selling the supplier's products within the distributor's

[97] See Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services v Commission* [1998] ECR II-3141, where the CFI held that in the case of obvious restrictions such as price-fixing, market-sharing or the control of outlets there is no need to examine the legal and economic context. In the opinion of Advocate General Trstenjak, this "shows that consideration of the legal and economic context may be summary" in cases concerning obvious restrictions of competition, Case C-209/07 *The Competition Authority v BIDS and Barry Brothers*, fn 26.

designated territory. The most efficient way to limit intra-brand competition is to hinder parallel trade, i.e. prevent the supplier's product from being sold on a particular distributor's territory other than through the "official" channels of distribution.

Agreements that hinder parallel trade obstruct the creation of a single market. As a consequence, the ECJ has treated agreements that hinder parallel trade very strictly under Article 81(1). This shows that the notion of restriction of competition under Article 81(1) is not a purely economic concept. Agreements that thwart the creation of the single market will also restrict competition under Article 81(1).

The SCA is not intended to support the creation of a single market. One could thus argue that only agreements that are very harmful to competition in a purely economic sense should be found to restrict competition by object under SCA Chapter 2, Article 1. As pointed out in section 4, the SCA should also be interpreted so as to further the goal of market integration. The ECJ case law on agreements hindering parallel trade should thus be relevant also under SCA Chapter 2, Article 1.

6.2.2 Absolute territorial protection

In *Consten and Grundig v Commission*, the ECJ found that an exclusive distribution agreement in which the distributor was given absolute territorial protection restricted competition by object.[98] The Court started by analyzing the contractual obligation imposed on the parties. In the agreement, Grundig, the supplier, undertook not to deliver, even indirectly to third parties, products which were intended for the area covered by the contract. This protected Consten, the distributor, from direct and indirect competition from Grundig. Further, in its distribution agreements, Grundig prohibited all its distributors from exporting Grundig's products outside their contract areas. This effectively limited the sale of products from the area of one distributor to the areas of other distributors. In addition, Grundig had registered its trademark in France so as to obtain protection under the law on intellectual property rights. Grundig could use the protection to hinder the import of Grundig products from other Member States for resale in France. The analysis of the agreement in its legal context showed that the agreement "results in the isolation of the French market and makes it possible to charge for the products in question prices which are sheltered from all effective competition".[99]

98 Case 56/64 and 58/64 *Consten and Grundig v Commission*, [1966] ECR 299.
99 Case 56/64 and 58/64 *Consten and Grundig v Commission*, [1966] ECR 299, 343.

The Court also analyzed the economic context in which the agreement would function. Competition on the product market in question was not intense because of strong trademarks. Because distribution costs had a considerable impact on the aggregate cost price, it was important to stimulate competition between distributors of products of the same trademark, i.e. intra-brand competition. The effects on intra-brand competition were sufficient to find a distortion of competition.

Because the restriction on intra-brand competition resulted in an isolation of the French market it was not necessary for the ECJ to assess the effects of the agreement on inter-brand competition, even if it acknowledged earlier in the judgment that "competition between producers is generally more noticeable than that between distributors of the same make". There is little doubt that the effects on intra-brand competition were sufficient to find a restriction of competition by object. If the negative effects on the single market are severe, an agreement will be found to have an anti-competitive object on this basis alone. It is not necessary in such cases to show in addition that the likely impact on the market mechanism is severe.

In its case law since *Consten and Grundig v Commission*, the ECJ has consistently held that agreements which isolate national markets and preclude all cross border trade restrict competition by object.

Another illustrative case where a clause giving a distributor absolute territorial protection was found to restrict competition by object is *BMW v ALD Auto-Leasing*.[100] BMW, a motor vehicle manufacturer, circulated a letter to its authorized dealers in Germany, prohibiting them from supplying cars to leasing companies that made cars available to customers residing or having their seat outside the contract territory of the dealer in question. The Court found that the letter formed part of an agreement within the meaning of Article 81(1). The ECJ found that "by virtue of the agreement in question" the BMW dealers were given absolute territorial protection regarding the supply of leasing companies situated within their territories.[101] The wording of the agreement sufficed for the finding of an anti-competitive object. The court did not analyze the legal and economic context of the agreement in question.

The analysis of the ECJ in *Consten and Grundig v Commission* and in *BMW v ALD Auto-Leasing* shows that the starting point is always the consequences of the agreement on the conduct of the parties. It follows from *Société Technique Minière v*

---

[100] Case C-70/93 *BMW v ALD Auto-Leasing*, [1995] ECR I-3439.
[101] Para 19.

Maschinenbau Ulm GmbH that "object" must be inferred from the wording of the agreement:

> When the object of the exclusive dealing agreement is considered, this finding must result from all or some of the clauses of the agreement considered in themselves.[102]

The next step in the analysis is to assess how the contractual obligations will function, taking into account of the agreement as a whole.[103] In this assessment, elements that influence the effectiveness of the contractual obligations in question are taken into account. If the contractual obligations, viewed in their actual context, are intended to further aims contrary to Article 81(1), the agreement has an anti-competitive "object".

In *STM v Maschinenbau Ulm GmbH*, the ECJ differentiates between the "effect" of an agreement and the "consequences of the agreement … in fact". It is only necessary to consider the "consequences … in fact" if an analysis of the contractual clauses in question "does not reveal the effect on competition to be sufficiently deleterious".[104] The "effect" of the agreement is the presumed effect, based on an analysis of the wording of the agreement, in its legal and economic context, but not verified by an analysis of the actual effects of the agreement.

6.2.3 Export bans

The ECJ has consistently held that export prohibitions restrict competition by object, see for instance *Miller v Commission*:

> [b]y its very nature, a clause prohibiting exports constitutes a restriction on competition, whether it is adopted at the instigation of the supplier or of the customer since the agreed purpose of the contracting parties is the endeavor to isolate a part of the market.[105]

---

[102] Case 56/65 *STM v Maschinenbau Ulm GmbH*, [1966] ECR 235, 250. In *STM v Maschinenbau Ulm GmbH*, the ECJ found that an exclusive distribution agreement without territorial protection did not have an anti-competitive aim.

[103] If an anti-competitive aim cannot be inferred from the wording of the agreement, it is not necessary to assess the agreement in its legal and economic context. The agreement will then only be caught by Article 81(1) the actual effect of the agreement is to restrict competition.

[104] Case 56/65 *STM v Maschinenbau Ulm GmbH*, [1966] ECR 235, 249.

[105] Case 19/77 *Miller International Schallplatten GmbH v Commission*, [1978] ECR 131, para 7. See also the judgment of CFI in case T-77/92 *Parker Pen Ltd v Commission*, [1994] ECR II-549, para 37.

In *BMW Belgium v Commission*, BMW had sent circulars to all authorized dealers in BMWs selective distribution system in Belgium, which prohibited Belgian dealers from exporting BMW cars to unauthorized dealers in other countries.[106] The ECJ based its analysis of object on an interpretation of the circulars and found that the content of the circulars "indicate an intention to put an end to all exports of new BMW vehicles from Belgium". By signing the circular the BMW dealers in Belgium had subscribed to agreements that restricted competition by object.

Indirect export bans, i.e. indirect measures with the same effect as direct export bans, are also caught by Article 81(1). In *ETA Fabriques d'Ebauches v DK Investments*, the ECJ found that a guarantee that was given only if a product were purchased through authorized dealers had as its object to restrict competition.[107] The Court assessed the guarantee clause in conjunction with the other clauses of the exclusive distribution agreement in question and assessed the effect of the guarantee scheme in the actual context in which it functioned:

> The crucial element to be taken into consideration in that respect is the actual or potential effect of withholding the guarantee on the competitive position of parallel distributors. In that connection it is necessary to consider whether parallel imports may be hindered, or whether opportunities for marketing such products may be restricted, regard being had in particular to the reaction of consumers and to the importance of the guarantee as an incentive to buy the products.[108]

The Court found that a guarantee scheme, under which a supplier restricts a guarantee to customers who have bought their products from one of the authorized distributors, placed parallel importers at a disadvantage. Customers would prefer to go to authorized dealers in order to be covered by the producer's guarantee. It was irrelevant that the supplier tolerated the distribution of his products through a network of parallel importers, since the guarantee scheme contributed to the partitioning of national markets and thus restricted competition by object.[109]

In its assessment of the guarantee scheme, the ECJ analyzed the actual and potential effects of the agreement on parallel traders. In this respect, the ECJ was quite detailed and concrete in its analysis of effects. But the ECJ did not go into an analysis of the effects on competition. When harm to parallel trade is established, harm to competition

---

[106] Joined cases 32, 36 and 82/78 *BMW Belgium v Commission*, [1979] ECR 2435, paras 20-33.
[107] Case 31/85 *ETA Fabriques d'Ebauches v DK Investments* [1985] ECR 3933.
[108] Para 12.
[109] Para 15.

is presumed. The case shows that an analysis of the object of an agreement may require a quite detailed analysis of the potential effects of the agreement. At the same time, the judgment shows that a detailed analysis of the consequences for the market mechanism is not required if it can be shown that the agreement has manifest potential for harm.

6.2.4 The decision of the CFI in GlaxoSmithKline Services v. Commission

In *GlaxoSmithKline Services v Commission*, the CFI assessed whether a clause that hindered parallel trade restricted competition by "object".[110] Clause 4 of the General Sales Conditions of GlaxoSmithKline (GSK) was inserted with the intention to limit parallel trade between Spain and other Member States in the sale of medicines. This was not disputed by GSK, but GSK disputed that the clause had as its object to restrict competition within the meaning of Article 81(1).

The CFI began the object-analysis by stating that agreements which ultimately seek to prohibit parallel trade, and agreements that clearly intend to treat parallel trade unfavorably, "must in principle be regarded as having as their object the restriction of competition".[111] The Commission could not, however, on the grounds that the agreement intended to limit parallel trade alone, conclude that the agreement had as its object to restrict competition:

> [H]aving regard to the legal and economic context, the Commission could not rely on the mere fact that Clause 4 of the General Sales Conditions established a system of differentiated price intended to limit parallel trade as the basis for its conclusion that that provision had as its object the restriction of competition.[112]

"Object" had to be interpreted in light of the objective assigned to Article 81(1), in particular concerning the functioning of the internal market. The objective of Article 81(1) is, in the opinion of the CFI,

> to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question.[113]

---

[110] Case T-168/01 *GlaxoSmithKline Services v Commission*, [2006] ECR II-2969.

[111] Case T-168/01 *GlaxoSmithKline Services v Commission*, [2006] ECR II-2969, paras 115 and 116. See also case C-551/03 *General Motors v Commission*, [2006] ECR I-3173 and joined cases 96-102/82, 104-105/82, 108/82 and 110/82 *IAZ v Commission*, [1983] ECR 3369.

[112] Case T-168/01 *GlaxoSmithKline Services v Commission*, 2006] ECR II-2969, para 117.

[113] Para 118.

A teleological interpretation of Article 81(1) has been prescribed by the ECJ in numerous judgments. The consequences for the interpretation of "object" is that one cannot in every case conclude on the basis of abstract analysis alone that an agreement has an anti-competitive object. It must be shown that the individual agreement has as its object to restrict competition to the detriment of consumers on the relevant market:

> Consequently, the application of Article 81(1) EC to the present case cannot depend solely on the fact that the agreement in question is intended to limit parallel trade in medicines or to partition the common market, which leads to the conclusion that it affects trade between Member States, but also requires an analysis designed to determine whether it has as its object or effect the prevention, restriction or distortion of competition on the relevant market, to the detriment of the final consumer. As may be seen from the case-law … , that analysis, which may be abridged when the clauses of the agreement reveal in themselves the existence of an alteration of competition, … , must, on the other hand, be supplemented, depending on the requirements of the case, where that is not so.[114]

The CFI is careful to distinguish *GlaxoSmithKline Services v Commission* on the facts of the case. First, the CFI underlines that in "the present case" object cannot be decided solely on the basis of an abstract analysis. Second, if the clauses of an agreement "reveal in themselves" the existence of an alteration of competition it is not necessary to supplement the abstract analysis with an analysis of the legal and economic context in which the agreement is to apply. The CFI thus acknowledge that certain categories of agreements can be presumed to restrict competition to the detriment of the consumers, and thus be presumed to have an anti-competitive object:

> [I]t 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 the agreement may be presumed to deprive final consumers of those advantages.[115]

But the presumption could in the opinion of the CFI be rebutted in the concrete case:

> However, if account is taken of the legal and economic context in which GSK's General Sales Conditions are applied, it cannot be presumed that those conditions deprive the final consumers of medicines of such advantages.[116]

---

[114] Case T-168/01 *GlaxoSmithKline Services v Commission,* 2006] ECR II-2969, para 119.
[115] Para 121.

The CIF carried out a thorough examination of the "special and essential characteristics" of the pharmaceutical sector. The CFI found that "it cannot be presumed that parallel trade has an impact on the prices charged to the final consumers of medicines",[117] and, accordingly, that "it cannot be considered that examination of Clause 4 of the General Sales Conditions, … reveals in itself that competition is prevented, restricted or distorted".[118]

Thus, the Commission could not, on the basis of an analysis of the text of the agreement alone, conclude that it had as its object to restrict competition, without taking into account the legal and economic context:

> [T]he Commission is not entitled, … merely to draw parallels with the agreements which it has had occasion to examine in its previous practice in taking decisions and take the view that Clause 4 of the General Sales Conditions resembles those agreements or can be treated in the same way as them. Such an approach ultimately ignores the elements of legal and economic context described above, which are not present in the decisions adopted pursuant to Article 81(1) EC to which the Commission referred.[119]

Because of the special circumstances in the case the CFI came to the conclusion that in the market for pharmaceuticals

> it cannot be taken for granted at the outset that parallel trade tends to reduce those prices and thus to increase the welfare of final consumers. An analysis of the terms of Clause 4 of the General Sales Conditions, carried out in that context, therefore does not permit the presumption that that provision, which seeks to limit parallel trade, thus tends to diminish the welfare of final consumers. In this largely unprecedented situation, it cannot be inferred merely from a reading of the terms of that agreement, in its context, that the agreement is restrictive of competition, and it is therefore necessary to consider the effects of the agreement, if only to ascertain what the regulatory authority was able to apprehend on the basis of such a reading.[120]

Even if the CFI was careful to underline that the case was decided on the basis of the special characteristics of the markets for pharmaceuticals in Europe, the case shows the

[116] Para 122.
[117] Para 134.
[118] Para 136.
[119] Para 138.
[120] Para 147.

reality of the ECJ's statement that the assessment of whether an agreement restricts competition by object must be made based on the legal and economic context. Thus, national courts and competition authorities must always assess an agreement that on its face restricts competition by object in its context to see whether the presumption that follows from an analysis of the terms of the agreement may be rebutted on the basis of special market characteristics. This also follows from the Commission *Guidelines on the application of Article 81(3)*:

> In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object.[121]

6.3 Resale price maintenance

6.3.1 RPM under Article 81(1)

It follows from the case law of the ECJ that resale price maintenance restricts competition by object.[122] This was clearly stated in *Binon*:[123]

> It should be observed in the first place that provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of Article [81(1)] which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty.[124]

In his opinion Advocate General Slynn pointed out that

> The fixing of selling prices is specifically referred to in paragraph 1 (a) of Article [81] as being a prohibited practice.[125]

---

[121] Para 22.

[122] See for instance case 123/83 *BNIC v Clair* [1985] ECR 391, case 311/85 *ASBL Vereniging van Vlamsee Reisbureaus v ASBL Sociale Dienst van de Plaatselijke and Gewestelijke Overheidsdiensten* [1987] ECR 3801 and case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919.

[123] Case 243/83 *SA Binon Cie v SA Agence et Messageries de la Presse* [1985] ECR 2015.

[124] Para 44.

[125] Case 243/83 *SA Binon Cie v SA Agence et Messageries de la Presse* [1985] ECR 2015, p. 2030.

In addition the Commission contended before the Court that “any price fixing agreement constitutes, of itself, a restriction on competition”.[126] The Court followed the approach of the Advocate General and the Commission, basing the result on a literal interpretation of Article 81(1)(a). The ECJ did not discuss the potential anti-competitive harm of vertical price fixing.

In *Binon*, the German government argued that the market in question, the market for newspapers and periodicals, had special characteristics, and that because of these characteristics, the fixing of resale prices should be accepted under the competition rules. This can be understood as an argument relating to the analysis of object. An analysis of the context in which the agreement was to apply showed, in the opinion of the German government, that the resale price fixing could not be regarded to have an anti-competitive object.

The ECJ rejected this view. The special characteristics of the market for newspapers were only relevant for assessment of the agreement under Article 81(3) and not for assessment under Article 81(1). Thus, the argument that fixing of resale prices was objectively necessary for ensuring a wide selection of newspapers could not be taken into account under Article 81(1), but was relevant under Article 81(3):

> If, in so far as the distribution of newspapers and periodicals is concerned, the fixing of the retail price by publishers constitutes the sole means of supporting the financial burden resulting from the taking back of unsold copies and if the latter practice constitutes the sole method by which a wide selection of newspapers and periodicals can be made available to readers, the commission must take account of those factors when examining an agreement for the purposes of Article [81(3)].[127]

The ECJ was thus not willing to assess the object of the agreement in the light of the its context, but concluded on the facts alone that it fixed selling prices.

In *Binon*, neither the ECJ nor the Advocate General found reason to distinguish between horizontal and vertical price fixing under Article 81(1)(a). The underlying rationale seems to be that horizontal and vertical price fixing are equally harmful to competition. In *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, the ECJ expressly equated vertical price fixing with horizontal price fixing. The case concerned agreements on the licensing of plant breeders’ rights. The breeder, i.e. the licensor, had in circulars to growers of the seeds in question, i.e. to the licensees, notified the

[126] Para 43.
[127] Para 46.

minimum prices at which the protected varieties were to be sold. The Court found that the vertical price fixing had as its object to restrict competition because it produced the same effects as a horizontal price fixing scheme:

> In this connection it must be pointed out that Article [81(1)] of the Treaty expressly mentions as being incompatible with the common market agreements which “directly or indirectly fix purchase or selling prices or any other trading conditions”. According to the judgment of the national court the plaintiff in the main proceedings concluded with other growers agreements identical to the contested agreement, as a result of which those agreements have the same effects as a price system fixed by a horizontal agreement. In such circumstances the object and effect of such a provision is to restrict competition within the common market.[128]

The ECJ found in other words that the minimum prices facilitated price fixing between the licensees. As a result of the RPM agreement there was no price competition between the licensees when they sold the protected varieties.

It follows from the judgments in *Binon* and *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* that the ECJ bases its finding of anti-competitive object in relation to vertical price restraints on the understanding that vertical price fixing agreements have the same effect as horizontal price fixing between distributors of a given trademark.

6.3.2 RPM in the US after Leegin

In *Dr. Miles*, a decision from 1911, the US Supreme Court established that agreements on minimum resale prices were covered by a per se prohibition under the Sherman Act section 1.[129] The per se rule in *Dr. Miles* was overruled by the US Supreme Court decision in *Leegin*, where the US Supreme Court found that vertical price restraints were to be judged by the rule of reason.[130]

In *Dr. Miles*, the Supreme Court found that an agreement between a manufacturer and his distributors to resell products was analogous to a price fixing agreement between the distributors. The reasoning of the Court was rather formalistic. The Court relied upon a common law rule against restraints on alienation, stating that “general restraint upon alienation is ordinarily invalid”. In this connection, the Court relied upon

---

[128] Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919, para 15.
[129] *Dr. Miles Medical Co. V. John D. Park & Sons Co.*, 220 U.S. 373 (1911).
[130] *Leegin Creative Leather Products, Inc., v. PSKS, Inc*., 2007 WL 1835892, 127 S. Ct. 2705 (June 28, 2007).

a treatise published in 1628. The Court did not assess the effects of vertical price restraints, but found them to be analogous to a combination among competing distributors, i.e. analogous to horizontal price fixing. In *Leegin*, the Court concluded that the reasons articulated in *Dr. Miles* for supporting a per se prohibition were not persuasive:

> As a consequence, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the per se rule is nonetheless appropriate.

In its analysis of RPM, the Supreme Court started by identifying the pro-competitive justifications for RPM. The Court based this analysis on the analysis of RPM in the economic literature. The Court then assessed the potential anti-competitive consequences of vertical price restraints. This assessment too was based on the analysis of the effects of vertical restraints in the economic literature. The Court found that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated". The Court then balanced the potential pro- and anti-competitive consequences of vertical price restraints, and found that RPM did not warrant a per se prohibition (citing *Business Electronics*):

> Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance always or almost always tend[s] to restrict competition and decrease output. *Business Electronics*, … at 723 … . Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. And although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical. … As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for *per se* condemnation.

After the substantive analysis of the potential effects of vertical price restraints, the Supreme Court discussed the contention of the respondent, "that vertical price restraints should be per se unlawful because of the administrative conveniences of *per se* rules".[131] The Supreme Court pointed out that administrative costs were only one element in the assessment of per se illegality, and that administrative "advantages are

[131] See e.g. *GTE Sylvania*, , 433 U.S., at 50, n. 16; "per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system".

not sufficient in themselves to justify the creation of per se rules".[132] Reduced administrative costs could not justify a per se prohibition of pro-competitive conduct. The "demanding standard" for adopting per se rules is thus whether the conduct in question is "manifestly" anti-competitive.

The respondent further argued that vertical price restraints would lead to higher prices. The Supreme Court stated that the respondent "is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct", and rejected the respondent's argument. The Court admitted that RPM "does have economic dangers", but found that the rule of reason was the appropriate standard to single out vertical price restraints that were harmful to competition. The application of the rule of reason to vertical price restraints must be developed in the case law:

> The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints. A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.

The Supreme Court overruled the per se prohibition for RPM established in *Dr. Miles* based on an economic analysis of potential pro- and anti-competitive effects of vertical price restraints.[133] In *Leegin*, the Supreme Court thus shifted from a formalistic approach to vertical price restraints to an approach based on economic effects.

The judges were divided over the case (5-4). The dissenting judges also discussed the effects of vertical price restraints using economic analysis. Their focus was on parts of the economic discussion which showed that vertical price restraints may be harmful to competition, but they accepted that RPM may involve benefits that are likely to outweigh potential harms. "[T]he uncertainties that surround key items in the overall balance sheet" made it difficult to decide on the issue of per se/rule of reason. Justice

[132] Citing *GTE Sylvania*, 433 U.S., at 50, n. 16.

[133] The Supreme Court rejected the argument that the *stare decisis* doctrine compelled their continued adherence to the *per se* rule against vertical price restraints.

Breyer, as spokesman for the minority, accepted that economic theory provides arguments for modification of the per se rule:

> [I]f forced to decide now, at most I might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable and temporary condition of new entry.

When assessing "what should be the rule", a balancing of potentially pro- and anti-competitive effects, based on the pros and cons found in economic theory, was decisive for both the majority and the minority. But Justice Breyer did not see the question before the Court as a question of "what should be the rule". The question before the Court was "whether to change a clear and simple price-related antitrust rule that the courts have applied for nearly a century". The dissenting judges found that according to *stare decisis* the per se rule should not be overruled.

With *Leegin*, the assessment for vertical price restraints is brought in line with the method of assessment for other vertical restraints as developed in *GTE Sylvania* and subsequent case law. In *GTE Sylvania*, the Supreme Court criticized its own treatment of vertical restraints under the Sherman Act section 1, as based on "formalistic" legal doctrine rather than "demonstrable economic effects".[134] In *GTE Sylvania*, the Court in reality altered its assessment of vertical restraints and lay down a more favorable approach towards vertical restraints under the rule of reason. Since the *GTE Sylvania* decision in 1977 very few private plaintiffs have successfully challenged vertical nonprice restraints.[135]

6.3.3 Should the object rule on RPMs in the EU be reformed?

In *Binon*, the ECJ based its decision on a literal interpretation of Article 81(1)(a). As discussed above, there seems to be an underlying rationale behind the formal approach in *Binon* and in the subsequent case law, that there is no reason to distinguish between horizontal and vertical price fixing under Article 81(1)(a).

Vertical price restraints may facilitate horizontal price fixing between suppliers or between distributors. Resale price maintenance can assist a cartel between suppliers in identifying price-cutting suppliers. If all suppliers in a cartel set minimum resale prices, the resale prices of their distributors should reveal whether the suppliers charge the

---

134 *Continental T. V., Inc. V. GTE Sylvania Inc.*, 433 U.S.36, 58-59 (1977).

135 See Hovenkamp: *Federal Antitrust Policy*, note 61 at §11.6b and Phillip E. Areeda, Herbert Hovenkamp: *Antitrust Law Index and Tables Pamphlet 2008 Edition*, Special addendum, p. A-29.

agreed prices or not. Resale price maintenance can facilitate price collusion between distributors if they compel the supplier to set a price agreed between the distributors as a minimum resale price.

The fact that vertical price restraints may facilitate horizontal price fixing does not justify a similar rule for horizontal and vertical price fixing. RPM must be assessed on its own merits. The arguments used by the US Supreme Court to make vertical price restraints subject to the rule of reason may be used to argue that the assessment of vertical price restraints under Article 81(1) should be based on demonstrable economic effects rather than on a formalistic legal doctrine.

"Object" must be interpreted in light of the aims of Article 81(1). This supports the argument that it is only agreements that are clearly detrimental to competition that should be found to restrict competition by object. On the other hand, the ECJ has explicitly linked the assessment of the pro-competitive effects of vertical price restraints to Article 81(3). To enable a change from "object" to "effect", the ECJ must alter and open up its analysis under Article 81(1) in accordance with the analysis of the US Supreme Court in *Leegin*.

6.4 Vertical object restrictions as ancillary restraints

The ECJ has in some cases concerning export bans found that they fall outside the prohibition in Article 81(1) because of the market context in which they apply. In these cases, the export bans have been viewed as ancillary restraints, directly related and necessary to the implementation of a main agreement furthering a legitimate purpose, or as objectively necessary in order to penetrate a new market. Because of their subordinate role in an agreement furthering a legitimate purpose, export bans have not only been found not to restrict competition by object, but have also been found to fall outside Article 81(1).

Louis Erauw-Jacquerey v La Hesbignonne SC concerned an agreement on the licensing of a plant breeder's right.[136] The licensor, i.e. the breeder, prohibited his licensee to sell and export basic seeds protected by the plant breeder's right.[137] The ECJ pointed out that the development of basic lines may involve considerable financial

[136] Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919.

[137] In case 258/78 *Nungesser v Commission*, [1982] ECR 2015 the ECJ defined plant breeders' rights as follows: "breeders' rights are those rights conferred on the breeder of a new plant variety or his successor in title pursuant to which the production, for purposes of commercial marketing, of the reproductive or vegetative propagation material, as such, of the new variety and the offering for sale or marketing of such material are subject to the prior authorization of the breeder", para 2.

commitment. To protect their investments, the owners of plant breeders' rights must be able to protect themselves against any "improper handling" of the varieties of seed they have developed. The ECJ acknowledged that to protect his interests a breeder can prohibit his licensees to sell and export basic seeds that are placed at their disposal only for the purposes of propagation. In this way, the licensor can prevent people other than the licensees appointed by him from propagating basic seeds and so protect his economic interests in the intellectual property right. As pointed out by Advocate General Mischo, the right holder would lose the exclusive right granted to him if he were unable to control the use and destination of the basic seed. The provision in the licensing agreement was thus covered by the existence of the intellectual property right and not contrary to Article 81(1).

The ECJ accepted that the export ban fell outside Article 81(1)

> in so far as it is necessary in order to enable the breeder to select growers who are to be licensees.[138]

The export ban must in other words be proportionate in relation to the protection of the right holder's economic interests. If this is the case, the export ban is "objectively justified", with the consequence that the export ban is not caught by Article 81(1).

Two other judgments in which export bans in licensing agreements were found to be objectively justified by the ECJ are *Nungesser* and *Coditel II*.[139]

In *Nungesser*, the ECJ assessed whether an open, exclusive license, where the licensor had undertaken not to grant other licenses covering the same territory and not to compete himself with the licensee on that territory, were incompatible with Article 81(1). The ECJ found that a license that granted the licensee an exclusive territory but did not affect the possibility for parallel importers or other licensees to sell into that territory, did not "in itself" restrict competition contrary to Article 81(1). The Court came to this conclusion "having regard to the specific nature of the products in question".[140]

In *Coditel II* the ECJ found that the mere fact that a licensee was given an exclusive right to exhibit a film in a Member State, consequently prohibiting others from showing the film, was not "in itself" restrictive of competition. The Court based this finding on an assessment of the special characteristics of the film industry:

---

[138] Para 11.
[139] Case 258/78 *Nungesser v Commission*, [1982] ECR 2015 and case 262/81 *Coditel SA v Ciné-Vog Films SA*, [1982] ECR 3381.
[140] Para 58.

> The characteristics of the cinematographic industry and of its markets in the Community, especially those relating to dubbing and subtitling for the benefit of different language groups, to the possibilities of television broadcasts, and to the system of financing cinematographic production in Europe serve to show that an exclusive exhibition licence is not, in itself, such as to prevent, restrict or distort competition.[141]

Both *Nungesser*, *Louis Euraw-Jacquerey v La Hesbignonne* and *Coditel II* concerned the licensing of intellectual property rights. But vertical agreements containing clauses giving territorial protection may also be "objectively justified" under Article 81(1), based on an analysis of the special characteristics of the agreement and the market in question.[142]

A rather special case is *Javico*.[143] Yves Saint Laurent Parfums SA (YSLP), a producer of perfumes, entered into a distribution agreement with Javico, appointing Javico as YSLP's distributor in two countries outside the EU. Javico undertook not to sell YSLP products outside the two countries. Shortly after concluding the contracts, Javico started to sell YSLP products in different Member States. The French *Cour d'Appel* asked the ECJ for a preliminary ruling, and wanted the Court's opinion on whether the export ban was in breach of Article 81(1).

The ECJ observed that it in its earlier case law it had been held that an agreement which requires a reseller not to resell contractual products outside the contractual territory has as its object the exclusion of parallel imports within the Community, and thus that such agreements by their very nature restrict competition. Based on an interpretation of the wording of agreement, the ECJ found that

> stipulations of the type mentioned in the question must be construed not as being intended to exclude parallel imports and marketing of the contractual product within the Community but as being designed to enable the producer to penetrate a market outside the Community by supplying a sufficient quantity of contractual products to that market. That interpretation is supported by the fact that, in the agreements at issue, the prohibition of selling outside the contractual territory also covers all other non-member countries.

[141] Para 16.
[142] Cf. also Commission *Guidelines on the application of Article 81(3)*, para 22.
[143] Case C-306/96 *Javico International v Yves Saint Laurent Parfums* [1998] ECR I-1983.

Because the export ban was related to exports from a non-Member State, it could not be regarded as aiming to restrict parallel imports within the Community. The interpretation of the agreement thus brought it outside the object-category. In addition, a contextual assessment of the agreement showed that it did not have an anti-competitive aim. The prohibition on exporting the contract products outside the designated territories aimed to secure sufficient supply to penetrate the new markets in question.

The ECJ has not been willing to apply the doctrine on ancillary restraints to vertical price fixing or to view resale price maintenance as objectively necessary in order to penetrate new markets. The Commission, on the other hand, appears to be willing to take into account the special context in which an agreement applies in relation also to resale price maintenance. In its *Guidelines on the application of Article 81(3)*, the Commission sets out the basic principles for assessing agreements under Article 81(1). In assessing whether an agreement restricts competition, it is necessary to take the likely impact of an agreement on inter-brand competition and the likely impact on intra-brand competition into account. The assessment of the likely impact on intra-brand competition foresees the possibility of what Faull & Nikpay characterize "an objective justification under Article 81(1)":[144]

> Where a supplier restricts its distributors from competing with each other, (potential) competition that could have existed between the distributors absent the restraints is restricted. Such restrictions include resale price maintenance and territorial or customer sales restrictions between distributors. *However, certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature.* Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting. For instance, territorial restraints in an agreement between a supplier and a distributor may for a certain period of time fall outside Article 81(1), if the restraints are objectively necessary in order for the distributor to penetrate a new market. Similarly, a prohibition imposed on all distributors not to sell to certain categories of end users may not be restrictive of competition if such restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question.[145]

[144] Jonathan Faull, Ali Nikpay: *The EC Law of Competition* p. 1156.
[145] Para 18(2) (emphasis added, footnotes omitted).

The Commission does not distinguish between clauses restricting competition by object or effect. It can be argued that in certain cases an agreement on resale price maintenance is necessary in order to stimulate a distributor to penetrate a new market, and in so doing stimulate inter-brand competition. Vertical price restraints tend to eliminate intra-brand competition, but this in turn may encourage a distributor to invest in tangible or intangible services or promotional efforts that aid the establishment of the supplier's product on a new market. Absent the vertical price restraint, discount distributors may free ride on the investments selling their products into the new market. If it can be shown that the distributor would not invest in order to establish the supplier's product on a new market without the agreement on prices, it can be argued that the agreement is objectively necessary for the existence of a pro-competitive agreement, at least for a certain period. The agreement will give consumers more options and enhance inter-brand competition by facilitating the establishment of a new product on the market.

The *Guidelines on the application of Article 81(3)* seem to be in conflict with the ECJ's judgment in *Binon*, where the Court ties the objective necessity test to Article 81(3). On the other hand, in *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, the ECJ acknowledged that an export ban in a licensing agreement was objectively justified and not caught by Article 81(1), in so far as the export ban was necessary to prevent the licensed products from being sold by someone other than the licensees appointed by the right holder. The case concerned licensing agreements involving both export bans and the setting of minimum resale prices. Both types of restrictions impinge on competition by object. The objective necessity test was only used in relation to the export ban. Nevertheless, the judgment illustrates that the ECJ is willing to apply the objective necessity test to Article 81(1) for certain kind of restrictions. There is no obvious reason why this test should not be relevant for vertical price restraints under Article 81(1).

If the ancillary restraints doctrine is applied to export bans or vertical price restrictions or such restrictions are considered objectively necessary for the penetration of new markets, Article 81(1) does not apply. This contrasts with the role given to the ancillary restraints doctrine in US antitrust law. Under US antitrust law, restrictions that are usually subject to a per se rule may qualify as ancillary restraints, but the consequence is not that the restriction in question is not caught by the Sherman Act, Section 1. Rather, the restriction will be subject to a per se rule. The ancillary restraints doctrine in US antitrust law is thus a technique used to single out agreements that belong to a class of agreements subject to a per se rule, but which, given the individual circumstances of the case, are instead made subject to a rule of reason. One might ask why the ECJ has drawn the conclusion that where vertical restraints belonging to the object category can be objectively justified they fall outside Article 81(1). They might instead have been subject to an effects analysis before deciding whether they should be caught by Article 81(1) or not. The ancillary restraints doctrine is, according to the CFI in *M6 v Commission*, rather abstract and does not take into account the concrete effects of an agreement.[146] Rather than a formalistic assessment under the ancillary restraints doctrine, an assessment of the concrete effects should be carried out to decide whether a restriction is caught by Article 81(1) or not.

6.5 <u>Vertical agreements and "object" – conclusions</u>

The ECJ and the CFI have not applied the notion of "object" strictly to agreements restricting parallel trade and to vertical price restraints.

Even if the starting point is clear – clauses hindering parallel trade restrict competition by object – the courts have in several cases found that because of the context in which an agreement applies it cannot be said to restrict competition by object. The analysis is not an analysis of the effects of the agreement in question. Rather, it is an assessment of whether special market circumstances support the conclusion that clauses restricting imports or exports do not have as their aim to restrict competition.

The ECJ has not been willing to allow rebuttal of the presumption of an anti-competitive object on the basis of an assessment of the context in which a vertical price restraint applies. The analysis of object has been carried out as an analysis of the text of the agreement alone. This can be explained by the fact that the ECJ views the effects of vertical price restraints as analogous to the effects of horizontal price fixing.

7. Appreciable effect

An agreement which has as its object to restrict competition can nevertheless escape the prohibition in Article 81(1) if it has only an "insignificant effect" on competition or

[146] "Consequently, as the Commission has correctly asserted, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation", Case T-112/99 *M6 v. Commission*, [2001] ECR II-2459, para 109 (see also para 58).

trade.[147] To be caught by Article 81(1), the effect of the agreement on competition must be “appreciable”.[148]

If the analysis of object leads to the conclusion that an agreement restricts competition by object, it must be assessed whether the agreement falls outside Article 81(1) on grounds of “insignificant effect”. Even if the ECJ has stated that “there is no need to take account of the concrete effect of an agreement” once an anti-competitive object has been shown, cf. *Consten and Grundig v Commission*,[149] concrete effects must nevertheless be assessed to the extent necessary to decide whether the agreement has more than an insignificant effect on competition.[150]

The analysis of whether an agreement with an anti-competitive object has more than an insignificant effect on competition does not require a full-fledged market analysis of the effects of the agreement. But the market effects must be assessed to the extent necessary to conclude whether the agreement has an insignificant effect on competition or not.

This can be illustrated by the Court’s judgment in *Società Italiana Vetro, Fabrica Pisana and PPG Vernante Pennitalia v Commission*.[151] In the decision brought before the Court, the Commission had found that an agreement between the parties in question restricted competition by object. The Commission had come to this conclusion mainly on the basis of written evidence, and stated before the Court that

> the written evidence of the agreements between the three producers was unambiguous and explicit, it made any investigation whatsoever into the structure of the market entirely superfluous.[152]

The Court disagreed:

---

[147] See for example case 5/96 *Völk v Vervaecke* [1969] ECR 295, paras 5/7 and case C-306/96 *Javico International v Yves Saint Laurent Parfums* [1998] ECR I-1983, para 16.

[148] Case 22/71 *Béguelin Import v GL Import-Export*, [1971] ECR 949: “In order to come within the prohibition imposed by Article [81], the agreement must affect trade between Member States and the free play of competition to an appreciable extent”, para 16.

[149] Joined cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

[150] Case C-306/96 *Javico International v Yves Saint Laurent Parfums* [1998] ECR I-1983, para 17: “[E]ven an agreement imposing absolute territorial protection may escape the prohibition laid down in Article [81] if it affects the market only insignificantly, regard being had to the weak position of the persons concerned on the market in the products in question”.

[151] Joined cases T-68/89, T-77-78/89, *Società Italiana Vetro, Fabrica Pisana and PPG Vernante Pennitalia v Commission*, [1992] ECR II-1403.

[152] Para 96, see also para 158.

> The Court cannot agree with the Commission's view that an analysis of the market would have been superfluous. The Court considers, on the contrary, that the appropriate definition of the market in question is a necessary precondition of any judgment concerning allegedly anti-competitive behaviour. Even if the Commission is not required to discuss in its decisions all the arguments raised by the undertakings, the Court considers that, having regard to the arguments of the applicants set out above, the Commission ought to have examined more fully the structures and the functioning of the market in order to show why the conclusions drawn by the applicants were groundless.[153]

Thus, where an agreement restricts competition by object, it must also be shown, on the basis of a market analysis, that the agreement has an appreciable effect on competition.

8. Restrictions by object and SCA Chapter 2, Article 2 / Article 81(3)

An agreement that restricts competition by object may lawfully be implemented between the parties, and in respect of third parties, if it fulfills the criteria for exemption under Article 81(3) or SCA Chapter 2, Article 2. This was clearly stated by the CFI in *Matra Hachette SA v Commission*:

> The Court observes that such reasoning presumes that there are adverse effects on competition which, by their nature cannot qualify for an exemption under Article [81(3)]. In other words, as the Commission rightly points out, such reasoning presumes acceptance of the view that there are infringements which are inherently incapable of qualifying for an exemption but Community competition law, the applicability of which is subject to the existence of a practice which is anti-competitive in intent or has an anti-competitive effect on a given market, certainly does not embody that principle. On the contrary, the Court considers that, in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article [81(3)] of the Treaty are satisfied and the practice in question has been properly notified to the Commission.[154]

An anti-competitive agreement is lawful if the efficiencies relevant under Article 81(3) outweigh the negative effects the restriction of competition has on competition and allocative efficiency.[155] To apply this balancing test, the allocative efficiency loss

---

[153] Para 159.
[154] Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, para 85.
[155] Cf. Case T-374, 375, 384, 388/94 *European Night Services v Commission* [1998] ECR II-3141, para 136: “Before any examination of the parties' arguments as to whether the Commission's analysis as

through reduced competition must be quantified. In other words, the application of Article 81(3) makes it necessary to assess the concrete effects on competition of agreements that restrict competition by object.

Agreements restricting competition by object are not treated more severely than other anti-competitive agreements, in the sense that the criteria in Article 81(3) are applied more strictly to agreements in the object-category. The same balancing test is applied to all agreements covered by Article 81(1). But agreements restricting competition by object in most cases have great potential for anti-competitive harm, and will, under normal market conditions, be detrimental to competition. An agreement that restricts competition by object normally has little chance of realizing the type of production efficiencies relevant under Article 81(3). Further, because of the great potential for anti-competitive harm resulting from agreements that restrict competition by object, the efficiencies must be quite substantial for the criteria in Article 81(3) to be fulfilled. In practice, it will only be in rare cases that agreements that restrict competition by object will be found to satisfy Article 81(3).

9. The two step test – concluding remarks

The CFI prescribes in *GlaxoSmithKline Services v Commission* a two step test for the assessment of "object". Analysis of the cases where agreements have been found to restrict competition by object shows that the two step test is clearly in line with the case law of the ECJ.

First, the text of the agreement must be analyzed. If the text "in itself" reveals that the agreement restricts competition "by its nature", it can be presumed that the agreement harms the welfare of consumers and consequently that the agreement has an anti-competitive object.

Second, it must be assessed whether the presumption based on the text and the nature of the agreement can be rebutted on the basis of the facts of the case. The thoroughness of the second leg of investigation may vary depending on the facts of the individual case. If it is apparent that there are no particular circumstances which suggest that the

---

regards restrictions of competition was correct, it must be borne in mind that in assessing an agreement under Article [81(1)] of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned … , unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets… . In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article [81(3)] of the Treaty, with a view to granting an exemption from the prohibition in Article [81(1)]" (case citations omitted).

presumption of reduced competition and harm to consumers may be rebutted, the second step of the analysis will be brief. If the case exhibits special characteristics which suggest that the effect of the clauses in question is not apparent, a more extensive analysis must be carried out.

The two steps of the analysis are interrelated. An agreement cannot be classified as "in itself" restrictive of competition, without taking into account the context in which it is to apply. The facts decisive for the second part of the analysis will thus, at least to a certain extent, be taken into account in the first part of the analysis. If, on the basis of the text of the agreement and on a first assessment of the facts, it is clear that it can be presumed that the agreement has an anti-competitive object, there will be no distinction between steps one and two.

The CFI is careful to distinguish the analysis in *GlaxoSmithKline Services v Commission* on the basis of the facts of the case. This does not mean that the test is not relevant for other cases, but that the test must be applied to the concrete facts in each individual case. If an agreement is classified as belonging to a category of agreements that can be presumed to harm competition and the welfare of consumers, then only in special circumstances will it be possible to rebut a presumption of harm to competition and consumers. An analysis of the relevant market must show that, due to special market conditions, an agreement of a type presumed to have an anti-competitive object will not be able to produce the typical, negative effects on the relevant market that an agreement of the same type would produce on a "normal" market. It must be shown that agreements of the relevant type will in general not be harmful to competition if implemented on the relevant market.

If an agreement is of a type which according to the case law belongs to the object-category and there are no special circumstances which rebut the presumption that an agreement of the type in question will also have an anti-competitive effect on the relevant market, the agreement will be caught by Article 81(1) regardless of its effects. For an individual agreement to fall outside Article 81(1), it is not sufficient to show that, due to special circumstances, it has no negative impact on competition. The special circumstances must cover all agreements of the type in question. The rationale for the prohibition of agreements with an anti-competitive object is the considerable anti-competitive potential of certain types of agreements. If 99 out of 100 agreements of a certain type restrict competition, it is not a good use of resources to examine all 100 agreements thoroughly under Article 81(1) to find the one which does not actually restrict competition. The assessment of the concrete impact of the individual agreement must be carried out under Article 81(3). The extent to which each of the 99 agreements restricts competition may vary, but resources should only be used to analyze this for agreements that the parties can show produce efficiencies relevant under Article 81(3). These efficiencies must then be weighed against the concrete, negative effects on allocative efficiency and consumer welfare. If it can be shown that the net effects of the agreement are positive it can be implemented.

Bibliography

Phillip E. Areeda, Herbert Hovenkamp: *Antitrust Law Index and Tables Pamphlet 2008 Edition*, Special addendum (New York 2008)
Jonathan Faull, Ali Nikpay: *The EC Law of Competition* (2nd edition, Oxford 2007)
D.G. Goyder: *EC Competition Law* (4th edition, Oxford 2003)
Herbert Hovenkamp: *Federal Antitrust Policy – The Law of Competition and its Practice* (St. Paul 2005)
Herbert Hovenkamp: *Antitrust Law*, volume XI (2nd edition, New York 2005)
Herbert Hovenkamp: *Antitrust Law*, volume XII (2nd edition, New York 2005)
Alison Jones, Brenda Sufrin: *EC Competition Law* (3rd edition, Oxford 2008)
Okeoghene Odudu: *Interpreting Article 81(1): The Object Requirement revisited*, E.L. Rev. 2001 26(4), 379-390
Okeoghene Odudu: *Interpreting Article 81(1): Object as subjective intention*, E.L. Rev. 2001, 26(1), 60-75
Okeoghene Odudu: *The Boundaries of EC Competition Law – The Scope of Article 81* (Oxford 2006)
Mario Siragusa, Cesare Rizza (eds): *EU Competition Law, Volume III, Cartel Law* (Leuven 2007)
Richard Whish: *Competition Law* (6th edition, Oxford 2009)

Decisions of the European Court of Justice

56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299,
56/65 *STM v Maschinenbau Ulm* [1996] ECR 235
5/69 *Völk v Vervaecke* [1969] ECR 295
41/69 *ACF Chemiefarma NV v Commission*, [1970] ECR 661
22/71 *Béguelin Import v GL Import-Export*, [1971] ECR 949
8/72 *Vereniging van Cementhandelaren* [1972] ECR 977
40-48, 50, 54-56, 111, 113 and 114/73 *Suiker Unie v Commission*, [1975] ECR 1663
19/77 *Miller International Schallplatten GmbH v Commission*, [1978] ECR 131
32, 36 and 82/78 *BMW Belgium v Commission*, [1979] ECR 2435
258/78 *Nungesser v Commission*, [1982] ECR 2015
262/81 *Coditel SA v Ciné-Vog Films SA*, [1982] ECR 3381
96-102, 104, 105, 108 and 110/82 *IAZ v Commission* [1983] ECR 3369

29/83 and 30/83 *CRAM and Rheinzink v. Commission* [1984] ECR 1679
121/83 *Bureau National Interprofessional du Cognac v Guy Clair* [1985] ECR 391
123/83 *BNIC v Clair* [1985] ECR 391
243/83 *SA Binon Cie v SA Agence et Messageries de la Presse* [1985] ECR 2015
31/85 *ETA Fabriques d'Ebauches v DK Investments* [1985] ECR 3933
311/85 *ASBL Vereniging van Vlamsee Reisbureaus v ASBL Sociale Dienst van de Plaatselijke and Gewestelijke Overheidsdiensten* [1987] ECR 3801
27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919
C-199/92 p *Hüls AG v Commission* [1999] ECR I-4287
C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539
C-250/92 *Gøttrup-Klim Grovvareforretning and others v Dansk Landbrugs Gorvvareselskap Amba (DLG)* [1994] ECR I-5641
C-70/93 *BMW v ALD Auto-Leasing*, [1995] ECR I-3439
C-219/95P *Ferriere Nord v Commission* [1997] ECR I-4411
C-306/96 *Javico International v Yves Saint Laurent Parfums* [1998] ECR I-1983
C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375
C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland v Commission* [2004] ECR I-123
C-189/02 P etc. *Dansk Rørindustri v Commission* [2005] ECR I-5425
C-551/03 P *General Motors v Commission*, [2006] ECR I-3173
C-403 and 405/04 P *Sumitomo Metal Industries Ltd. V Commission*, [2007] ECR I-729
C-238/05 *Asnef-Equifix v Ausbanc* [2006] ECR I-11125
C-209/07 *Competition Authority v BIDS and Barry Brotherrs* of 20 November 2008
C-8/*08 T-Mobile Netherlands BV and Others*, of 19.2.2009

Decision of the Court of First Instance

T-13/89 *ICI v Commission*, [1992] ECR II-1021
T-68/89, T-77-78/89, *Società Italiana Vetro, Fabrica Pisana and PPG Vernante Pennitalia v Commission*, [1992] ECR II-1403
T-29/92 *SPO v Commission* [1995] ECR II-289
T-77/92 *Parker Pen Ltd v Commission*, [1994] ECR II-549
T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595

T-374-375/94, 384/94 *European Night Services v Commission* [1998] ECR II-3141
T-25, 26, 30-32, 34-39, 42/95-46/95, 48/95, 50/95-65/95, 68-71/95, 87, 88, 103-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-49
T-9/99 *HFB Holding v Commission* [2002] ECR II-1487
T-112/99 *M6 v. Commission*, [2001] ECR II-2459
T-168/01 *GlaxoSmithKline Services v Commission*, [2006] ECR II-2969

United States cases

Arizona v. Maricopa County Medical Soc., 457 U. S. 332
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U. S. 1, 9 (1979)
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988)
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977)
Dr. Miles Medical Co. V. John D. Park & Sons Co., 220 U.S. 373 (1911)
Leegin Creative Leather Products, Inc., v. PSKS, Inc., 2007 WL 1835892, 127 S. Ct. 2705 (June 28, 2007)
Natl. Bancard Corp. (NaBanco) v. Visa, U.S.A., 259 F.2d 592 (11th. Cir.), cert. denied, 479 U.S. 923 (1986)
Northern Pacific Railway Co v United States 356 US 1, 5 (1957)
Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289 (1985)
State Oil Co. v. Kahn, 522 U.S. 3, 10 (1997)
United States v. Addyston Pipe & Steel Co., 85 F 271 (6th Cir. 1898)
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1949)