2

Overview of EU and UK competition law

1. Introduction

This chapter will provide a brief overview of EU and UK competition law and the relevant institutions; it will also explain the relationship between EU competition law and the domestic competition laws of the Member States, in particular in the light of Article 3 of Regulation 1/2003[1]. The rules of the European Economic Area are briefly referred to, and the trend on the part of Member States to adopt domestic competition rules modelled on those in the EU is noted. Three diagrams at the end of the chapter explain the institutional structure of EU and UK competition law.

2. EU Law

(A) The Treaty on the Functioning of the European Union

The Rome Treaty of 1957[2] established what is now known as the European Union[3]. There are currently 27 Member States[4]. The Rome Treaty was renamed the Treaty on the Functioning

[1] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] OJ [2003] L 1/1, available at www.ec.europa.eu.

[2] The Treaty of Paris of 1951 had earlier established a special regime for coal and steel which contained provisions dealing specifically with competition; this Treaty expired on 23 July 2002: it is discussed briefly in ch 23, 'Coal and Steel', p 967.

[3] The original name 'European Economic Community' was replaced by the 'European Community' by the Maastricht Treaty of 1992, which, in turn, was subsumed into the European Union by the Lisbon Treaty of 2009; it follows that references are now to EU, not to EC, competition law.

[4] As to the position of territories such as the Isle of Man and Gibraltar under EU Law see Murray *EU & Member State Territories – The Special Relationship under Community Law* (Palladian Law Publishing, 2004).

of the European Union ('TFEU') by the Lisbon Treaty[5] with effect from 1 December 2009. The Lisbon Treaty also renumbered the Treaty Articles and renamed various institutions; for example the Court of First Instance is now known as the General Court; as with the rest of this book, this chapter will use the post-Lisbon terminology.

The TFEU consists of 358 Articles. It is a complex document, the predecessors of which have generated a considerable body of jurisprudence[6]. Much of EU law is concerned with the elimination of obstacles to the free movement of goods, services, persons and capital; the removal of these obstacles in itself promotes competition within the Union. Initiatives such as the establishment of a public procurement regime[7], the creation of the Euro[8] and the 'EU 2020 Strategy'[9] with its emphasis on 'smart, sustainable and inclusive growth' also contribute substantially to greater competition within the European economy. However, quite apart from this 'macro' effect on competition, the TFEU also contains specific competition rules that apply to undertakings and to the Member States themselves.

(i) The competition chapter in the TFEU

EU competition law is contained in Chapter 1 of Title VII of Part Three of the TFEU, which consists of Articles 101 to 109. It is necessary to read these provisions in conjunction with the objectives and principles laid down in the TFEU and also the Treaty on European Union ('TEU'). Article 3(3) TEU provides that one of the EU's objectives is a highly competitive social market economy. Article 3(3) TEU also states that the EU is to establish an internal market, which, in accordance with Protocol 27 on the internal market and competition, annexed to the TEU and the TFEU, is to include a system ensuring that competition is not distorted. The Protocol has the same force as a Treaty provision[10]. The Lisbon Treaty repealed Article 3(1)(g) of the EC Treaty that established as one of the activities of the European Community the achievement of a system of undistorted competition. In *Konkurrensverket v TeliaSonera Sverige AB*[11] the Court of Justice referred to Article 3(3) TEU and Protocol 27 as though there was no difference from Article 3(1)(g) EC[12].

Article 3(1)(b) TFEU provides that the EU shall have exclusive competence in establishing the competition rules necessary for the functioning of the internal market. Article 119(1) TFEU provides that the activities of the Member States and the EU shall be conducted in accordance with the principle of an open market economy with free competition.

These references to competition in the TEU and the TFEU have a significant effect on the decisions of the European Commission ('the Commission'), and judgments of the General

[5] [2007] OJ C 306/1; on the Treaty reform process that led up to the Lisbon Treaty and its legal effects see Craig 'The Treaty of Lisbon, process, architecture and substance' (2008) 33 EL Rev 137.

[6] For comprehensive analysis of EU law in general see Wyatt and Dashwood's *European Union Law* (Hart Publishing, 6th ed, 2011, eds Dashwood, Dougan, Rodger, Spaventa and Wyatt); Chalmers, Hadjiemmanuil, Monti and Tomkins *European Union Law* (Cambridge University Press, 2006); Craig and de Búrca *EU Law: Texts, Cases, and Materials* (Oxford University Press, 4th ed, 2007).

[7] On public procurement see Bovis *EC Public Procurement: Case Law and Regulation* (Oxford University Press, 2005); Arrowsmith *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2nd ed, 2005); Trepte *Public Procurement in the EU* (Oxford University Press, 2nd ed, 2007); Graells *Public Procurement and the EU Competition Rules* (Hart Publishing, 2011).

[8] On the Euro see Herdegen 'Price Stability and Budgetary Restraints in Economic and Monetary Union: the Law as Guardian of Economic Wisdom' (1998) 35 CML Rev 9; Louis 'A Legal and Institutional Approach for Building a Monetary Union' (1998) 35 CML Rev 33; Swann *The Economics of Europe* (Penguin Books, 9th ed, 2000), ch 7; see further 'Economic and monetary union', p 52 below.

[9] See *Europe 2020* COM(2010) 2020 final; see also *A Pro-active Competition Policy for a Competitive Europe* COM(2004)293 final, both available at www.ec.europa.eu.

[10] See Article 51 TEU.

[11] Case C-52/09 [2011] ECR I-000. [12] Ibid, paras 20–22.

Court and the Court of Justice (together, 'the EU Courts'), which have often interpreted the specific competition rules teleologically from the starting point of what are now Articles 3(3) TEU and Protocol 27[13]. Within Chapter 1 of Title VII of Part Three of the TFEU, Article 101(1) prohibits agreements, decisions by associations of undertakings and concerted practices that have as their object or effect the restriction of competition[14], although this prohibition may be declared inapplicable where the conditions in Article 101(3) are satisfied[15]. Article 102 prohibits the abuse by an undertaking or undertakings of a dominant position[16]. Article 106(1) imposes obligations on Member States in relation to the Treaty generally and the competition rules specifically, while Article 106(2) concerns the application of the competition rules to public undertakings and private undertakings to which a Member State entrusts particular responsibilities[17]. Articles 107 to 109 prohibit state aid to undertakings by Member States which might distort competition in the internal market[18]. An important additional instrument of EU competition law is the EU Merger Regulation ('the EUMR') which applies to concentrations between undertakings that have a Community dimension[19].

(ii) The single market imperative

As mentioned in chapter 1[20], it is important to stress that EU competition law is applied by the Commission and the EU Courts very much with the issue of single market integration in mind. The single market has been described by the Commission as one of the 'EU's biggest assets'[21] which it is determined to protect[22]. Agreements and conduct which might have the effect of dividing the territory of one Member State from another will be closely scrutinised and may be severely punished. The existence of 'single market' competition rules as well as 'conventional' competition rules is a unique feature of EU competition law. The fact that ten further countries acceded to the European Union on 1 May 2004 and two more on 1 January 2007, together with the possibility of future accessions, for example by some of the Balkan states and Turkey, means that single market integration is likely to remain a key feature of competition policy[23]. The arrival of the economic crisis in 2008 reinforced the Commission's determination to act as guardian of the single market; or, to put the point another way, to prevent a retreat into economic nationalism[24]. The Court of Justice reaffirmed the importance of the single market imperative in *GlaxoSmithKline Services Unlimited v Commission*[25].

[13] For examples of teleological interpretation of the competition rules see Cases C-68/94 and 30/95 *France v Commission* [1998] ECR I-1375, [1998] 4 CMLR 829, paras 169–178; Case T-102/96 *Gencor v Commission* [1999] ECR II-753, [1999] 4 CMLR 971, paras 148–158; Case T-99/04 *AC-Treuhand AG v Commission* [2008] ECR II-1501, [2008] 5 CMLR 962, paras 124–150.

[14] On Article 101(1) see ch 3.

[15] On Article 101(3) see ch 4.

[16] On Article 102 see chs 5, 17 and 18.

[17] On Article 106 see ch 6, 'Article 106', pp 222–244.

[18] Articles 107–109 are briefly discussed in ch 6, 'Articles 107 to 109 TFEU – State Aids', pp 246–247.

[19] Council Regulation 139/2004 on the control of concentrations between undertakings, OJ [2004] L 24/1; on the EUMR see ch 21.

[20] See ch 1, 'The single market imperative', pp 23–24.

[21] See the Commission's *Report on Competition Policy* (2009), para 9, available at www.ec.europa.eu.

[22] See eg Commission's *Guidelines on Vertical Restraints* OJ [2010] C 130/1, para 7; on the Commission's approach to vertical agreements see ch 16, 'The methodology for the analysis of vertical agreements in the Commission's *Vertical guidelines*', pp 631–637.

[23] For details of the progress of talks on future enlargement of the Union see www.ec.europa.eu/enlargement.

[24] See eg Speech of Commissioner Kroes of 11 May 2007 and Monti *A New Strategy for the Single Market – Report to the European Commission*, 9 May 2010, available at www.ec.europa.eu.

[25] Cases C-501/06 P etc [2009] ECR I-9291, [2010] 4 CMLR 50, paras 59–61.

(iii) Economic and monetary union

The creation of the Euro has an important influence on competition within the EU[26]. As explained in chapter 1 the competitive process depends, amongst other things, on consumers having adequate information to enable them to make rational choices[27]. Price comparisons are difficult when the same goods and services are sold in different, variable currencies; the problem is compounded by the cost of exchanging money. The Euro brings a transparency to price information that fundamentally transforms the position, and has a considerable impact on the way in which business is conducted. There are also moves towards the establishment of a 'Single Euro Payments Area' which would improve the efficiency of Euro payments[28].

(iv) The modernisation of EU competition law

During the course of the 1990s it became apparent that many aspects of EU competition law were in need of modernisation; in particular the law on vertical agreements, on horizontal cooperation agreements and on the obtaining of 'individual exemptions' under Article 101(3) TFEU were perceived by many people, including Commission officials, to be in need of radical reform. Proposals for reform were set out in 1998[29], and the modernisation programme gathered pace in 1999 and 2000[30]. There followed the reform of the vertical agreements regime[31], which involved a major repositioning of the law and economics of the subject and which has worked well in practice. Numerous other policy initiatives followed: a transformation of the Commission's approach to horizontal cooperation agreements[32], a new regime for technology transfer agreements[33], and considerable reform of the EUMR[34]. Even more radically, with effect from 1 May 2004 the way in which Articles 101 and 102 are applied in practice was fundamentally changed as a result of the entry into force of Regulation 1/2003[35]; in particular this Regulation abolished the system of notifying agreements to the Commission for individual exemption under Article 101(3), and removed the Commission's monopoly over the application of that provision to individual agreements[36]. This was followed, in 2009, by the publication of *Guidance on the Commission's Enforcement Priorities in Applying Article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings*[37], an important contribution to an understanding of that difficult subject. There is no question that these are major changes in the direction of competition law and policy in the EU.

[26] See eg the Commission's XXVIIth *Report on Competition Policy* (1997), pp 7–8 and XXVIIIth *Report on Competition Policy* (1998), pp 24–25.

[27] See ch 1, 'The model of perfect competition is based on assumptions unlikely to be observed in practice', p 7.

[28] See Directive 2007/64/EC of the European Parliament and of the Council on payment services in the internal market, OJ [2007] L 319/1, available at www.ec.europa.eu/internal_market; see also the Staff Working Paper accompanying the Commission's *Report on Competition Policy* (2009), paras 229–233.

[29] See eg Schaub 'EC Competition System – Proposals for Reform' [1998] Fordham Corporate Law Institute (ed Hawk), ch 9; see also Ehlermann 'The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 CML Rev 537.

[30] See the Commission's XXIXth *Report on Competition Policy* (1999), points 8–42.

[31] See ch 16, 'Vertical Agreements: Regulation 330/2010', pp 649–672.

[32] See ch 15, 'Research and Development Agreements', pp 592–599.

[33] See ch 19, 'Technology Transfer Agreements: Regulation 772/2004', pp 781–791.

[34] See ch 21 generally.

[35] See ch 2, n 1 above; Regulation 1/2003 is discussed at 'Regulation 1/2003', pp 76–79 below, and further in ch 4, 'Regulation 1/2003', pp 166–168 and in ch 7 generally.

[36] The system of block exemptions continues: see ch 4, 'Block Exemptions', pp 168–172.

[37] OJ [2009] C 45/7; see ch 5, 'The Commission's *Guidance on Article 102 Enforcement Priorities*', pp 174–177.

(B) **Institutions**[38]

(i) Council of the European Union

The supreme legislative body of the European Union is the Council of the European Union, often referred to as the Council of Ministers[39]. The Council is not involved in competition policy on a regular basis. However, acting under powers conferred by Articles 103 and 352 TFEU, the Council has adopted several major pieces of legislation, including the EUMR; it has delegated important powers to the Commission through regulations to enforce the competition rules in the TFEU, in particular Regulation 1/2003[40]; and it has given the Commission power to grant block exemptions in respect of certain agreements caught by Article 101(1) but which satisfy the criteria of Article 101(3)[41].

(ii) European Commission

The European Commission in Brussels is at the core of EU competition policy[42] and is responsible for fact-finding, taking action against infringements of the law, imposing penalties, adopting block exemption regulations, conducting sectoral inquiries, investigating mergers and state aids, and for developing policy and legislative initiatives. The Commission is also involved in the international aspects of competition policy, including cooperation with competition authorities around the world[43]. One of the Commissioners takes special responsibility for competition matters; this is regarded as one of the most important portfolios within the Commission, and confers upon the incumbent a high public profile. Certain decisions can be taken by the Commissioner for Competition rather than by the College of Commissioners. There are two Hearing Officers[44], directly responsible to the Commissioner, who are responsible for ensuring that the rights of the defence are respected in proceedings under Articles 101 and 102 and the EUMR and that draft decisions of the Commission take due account of the relevant facts[45].

DG COMP is the Directorate of the Commission specifically responsible for competition policy. DG COMP's website is an invaluable source of material. From the index page it is possible to navigate to a series of policy areas, including antitrust (that is to say Articles 101 and 102, though there is a specific area for cartels), mergers, state aid, liberalisation, and international matters[46]. Within each policy area there is a 'What's new' section as well as relevant legislation, draft legislation and details of current and decided cases; there is also useful statistical information. The website also leads to information about specific sectors such as agriculture and food, consumer goods, energy and financial services. The website also has a page dedicated to providing consumers with information about competition policy[47]. There is information about the Commissioner for Competition Policy, the composition of DG COMP and the European Competition Network ('the ECN'), which consists of the Commission and the 27 national competition authorities of the Member

[38] The institutional structure of EU and UK law is set out in diagrammatic form at the end of this chapter: see Figs 2.1, 2.2 and 2.3, pp 79–81 below.

[39] See Article 16 TEU and Articles 237–243 TFEU.

[40] On the Commission's powers of enforcement see ch 7.

[41] See ch 4, '*Vires* and block exemptions currently in force', pp 169–171.

[42] See Article 17(1) TEU; see also Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2001] ECR I-11369, [2001] 4 CMLR 449, para 46.

[43] On the international dimension of competition policy see ch 12.

[44] See www.ec.europa.eu/competition/hearing_officers/index_en.html.

[45] On the role of the Hearing Officers see ch 7, 'The conduct of proceedings', pp 284–285.

[46] See www.ec.europa.eu/comm/competition/index_en.html.

[47] See www.ec.europa.eu/competition/consumers/index_en.html.

States who are jointly responsible for the enforcement of Articles 101 and 102[48]. The ECN publishes an *ECN Brief*, which is published five times a year, summarising its work and that of its members[49]. Press Releases about competition policy matters can be accessed through the website, as can speeches of the Commissioner and officials of DG COMP, policy documents and the *Competition Policy Newsletter*, which is published three times a year. It is easy to follow the progress of public consultations through the website, and forthcoming Commission events of relevance to competition policy are announced there.

DG COMP publishes an *Annual Management Plan* in which it sets out its key objectives for the year ahead[50]. The Commission's *Annual Report on Competition Policy* provides essential information on matters of both policy and enforcement, as well as a statistical review of DG COMP's activities[51]. DG COMP's website also has links to other important sites, including those of the EU Courts and the national competition authorities.

DG COMP has a Director General and three Deputy Directors General. There is also a Chief Competition Economist who reports directly to the Director General. DG COMP is divided into nine administrative units. Directorate A is responsible for policy and strategy, including the ECN, for international relations and for consumer liaison. Directorates B to F are the operational units, each with responsibility for particular sectors, which conduct cases under Articles 101 and 102 and the EUMR, other than cartel cases, from start to finish; they also deal with state aid cases. Directorate G is exclusively concerned with cartels, the detection and eradication of which is a major priority of the Commission[52]. Directorate H is responsible for cohesion and enforcement issues arising in relation to state aid. Directorate R is responsible for the registry and for resources. Formal decisions of the Commission must be vetted by the Legal Service of the Commission, with which DG COMP works closely. The Legal Service represents the Commission in proceedings before the EU Courts[53]. An organigramme showing the composition of DG COMP can be accessed on its website[54].

(iii) General Court[55]

Actions for annulment of Commission decisions in competition cases (including cases on state aid) are brought in the first instance before the General Court[56]. The General Court must assess the legality of decisions according to the provisions of the TFEU[57]. Member States' actions used to be taken to the Court of Justice as happened, for example, in the case of *France v Commission*[58], an important judgment which established, amongst other things, that the EUMR was capable of application to collective dominance[59]; however since the Nice Treaty all actions for annulment of Commission decisions, including those

[48] See ch 7, 'Case allocation under Regulation 1/2003', p 289.

[49] See www.ec.europa.eu/competition/ecn/brief/index.html.

[50] See www.ec.europa.eu/dgs/competition/index_en.htm.

[51] This can be found at www.ec.europa.eu/comm/competition/annual_reports.

[52] On cartels see ch 13 generally.

[53] For details of the Legal Service see www.ec.europa.eu/dgs/legal_service/index_en.htm.

[54] See www.ec.europa.eu/dgs/competition/directory/organi_en.pdf.

[55] See the *Codified version of the Rules of Procedure of the General Court* OJ [2010] C 177/37; on the General Court see Kerse and Khan *EC Antitrust Procedure* (Sweet & Maxwell, 5th ed, 2005), paras 1.58–1.60

[56] On the types of action that can be brought see ch 7, 'Judicial Review', pp 290–294.

[57] See Article 261 (penalties); Article 263 (actions for annulment); Article 265 (failures to act) for a general account see Vesterdorf 'Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement' (2005) 1 Competition Policy International 3.

[58] Cases C-68/94 and 30/95 [1998] ECR I-1375, [1998] 4 CMLR 829; on collective dominance see ch 14, 'Article 102 and Collective Dominance', pp 571–582 and ch 21, 'The dominance/SLC debate', p 864.

[59] See further ch 21, 'The dominance/SLC debate', p 864.

brought by Member States, are taken to the General Court. It can happen that substantially similar matters are before both the General Court and the Court of Justice simultaneously, in which case it is likely that the General Court will suspend its proceedings pending the judgment of the Court of Justice: this happened, for example, in the case of the 'Irish ice-cream war', where the General Court stayed the appeal of Van den Bergh Foods Ltd against the Commission's decision finding infringements of Articles 101 and 102[60] pending the outcome of the Article 267 reference from the Irish Supreme Court in the case of *Masterfoods Ltd v HB Ice Cream Ltd*[61].

The website of the General Court (and of the Court of Justice) is an invaluable source of material where, for example, recent judgments of the Courts, opinions of the Advocates General of the Court of Justice and information about pending cases can be found; statistics on judicial activity; and there is also an Annual Report and a bibliography listing literature on the case law of the EU Courts[62]. The rules of the General Court were amended in December 2000 to provide for the possibility of a 'fast-track' or 'expedited' procedure for appeals in certain cases[63]; the expedited procedure has been used in several cases under the EUMR[64] and in an appeal against a commitment decision adopted by the Commission under Article 9 of Regulation 1/2003[65].

(iv) **Court of Justice**[66]

The Court of Justice hears appeals from the General Court on points of law only. The Court of Justice has been strict about what is meant by an appeal on a point of law, and it will not get drawn into factual disputes[67]. The Court also deals with points of law referred to it by national courts under Article 267 TFEU[68]. As mentioned above, the Court's website contains much useful material. The Court of Justice is assisted by an Advocate General, drawn from a panel of eight, who delivers an opinion on each case that comes before it. Although not binding, this opinion is frequently followed by the Court of Justice, and is often more cogent than the judgment of the Court of Justice itself which may be delphic, particularly where it represents a compromise between the judges (no dissenting judgments are given by the EU Courts). Anyone interested in competition law is strongly recommended to read the opinions of the Advocates General in competition cases, which are frequently of very high quality and contain a large amount of invaluable research material.

[60] *Van den Bergh Foods Ltd* OJ [1998] L 246/1, [1998] 5 CMLR 530, on appeal Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, [2004] 4 CMLR 14; the final Order disposing of this issue was made by the Court of Justice in 2006: Case C-552/03 P, [2006] ECR I-9091, [2006] 5 CMLR 1494.

[61] Case C-344/98 [2000] ECR I-11369, [2001] 4 CMLR 449.

[62] See www.curia.europa.eu.

[63] OJ [2000] L 322/4, Article 76(a); the expedited procedure came into force on 1 February 2001.

[64] See ch 21, 'Appeals against the Commission's refusal to take jurisdiction', p 895.

[65] See ch 7, 'Article 9: practical considerations', p 258.

[66] See the *Codified version of the Rules of Procedure of the Court of Justice* OJ [2010] C 177/1; on the Court of Justice see *Kerse and Khan* (ch 2, n 55 above), paras 1.55–1.57; Arnull *The European Union and its Court of Justice* (Oxford EC Law Library, 2nd ed, 2006); Neville Brown and Kennedy *The Court of Justice of the European Communities* (Sweet & Maxwell, 5th ed, 2000); Lasok *The European Court of Justice: Practice and Procedure* (Butterworths, 3rd ed, 2003); Barents 'The Court of Justice after the Treaty of Lisbon' (2010) 47 CML Rev 709.

[67] See eg Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, [1998] 5 CMLR 311, paras 17–22; Case C-551/03 P *General Motors BV v Commission* [2006] ECR I-3173, [2006] 5 CMLR 1, paras 50–51.

[68] On the Article 267 reference procedure see Anderson *References to the European Court* (Sweet & Maxwell, 2nd ed, 2002); *Kerse and Khan* (ch 2, n 55 above) para 1.57; Collins *European Community Law in the United Kingdom* (Butterworths, 5th ed, 2003); Hartley *The Foundations of European Community Law* (Oxford University Press, 7th ed, 2010), ch 9.

The EU Courts are sometimes over-stretched, and there can be considerable delays in some cases[69]. The Court of Justice published a document in May 1999 setting out proposals to deal with some of the problems it experiences[70]. Article 257 TFEU provides that the European Parliament and the Council may establish specialised courts attached to the General Court to deal with specific types of cases. However, in March 2011, the Court of Justice concluded that an increase in the number of judges of the General Court was 'clearly preferable' to the establishment of a specialised court[71]. This conclusion chimes with that of the House of Lords European Union Committee[72].

(v) Advisory Committee on Restrictive Practices and Dominant Positions

The Advisory Committee on Restrictive Practices and Dominant Positions consists of officials from the national competition authorities of the Member States[73]. They attend oral hearings, consider draft decisions of the Commission and comment on them[74]; they also discuss draft legislation and the development of policy generally. This Committee also deals with certain matters in the maritime and air transport sectors and in relation to the insurance sector[75].

(vi) Advisory Committee on Concentrations

The Advisory Committee on Concentrations consists of officials from the national competition authorities of the Member States; they attend oral hearings and must be consulted on draft decisions of the Commission under the EUMR[76].

(vii) National courts

National courts are increasingly asked to apply the EU competition rules, which are directly applicable and may be invoked by natural and legal persons (both as defendant and as claimant)[77]. The Commission maintains on its website a database of some of the judgments given by the courts of the Member States on the application of Articles 101 and 102 TFEU in the original language arranged in a chronological order[78]. An Association

[69] See Case C-385/07 P *Duales System Deutschland v Commission* [2009] ECR I-6155, [2009] 5 CMLR 2215, paras 180–195 (competition proceedings before the General Court did not satisfy the principle that cases should be dealt with within a reasonable time).

[70] Press Release 36/99, 28 May 1999; see also the discussion paper of the President of the Court of Justice 'The Future of the Judicial System of the European Union' and 'The EC Court of Justice and the Institutional Reform of the European Union' (April 2000), both of which can be found at www.curia.europa.eu; see Vesterdorf 'The Community Court System Ten Years from Now and Beyond: Challenges and Possibilities' (2003) 28 EL Rev 303.

[71] See draft *Amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto* (proposing to increase the number of General Court judges from 27 to 39), available at www.curia.europa.eu.

[72] See 14th Report of Session 2010–11 *The Workload of the Court of Justice of the European Union*, HL Paper 128, paras 135–136; see also 15th Report of Session 2006–2007, *An EU Competition Court*, HL Paper 75, recommending against the creation of a specialist competition court, a recommendation with which the UK Government agreed, available at www.parliament.uk.

[73] Provision is made for this Committee by Article 14 of Regulation 1/2003; on this Committee see ch 7, 'Article 14: Advisory Committee', p 264.

[74] On consulting the Advisory Committee see Case T-66/01 *Imperial Chemical Industries v Commission* [2010] ECR II-000, paras 163–171.

[75] See Regulation 1/2003, Articles 38, 41 and 42.

[76] See Council Regulation 139/2004, Article 19(3)–(7); on this Committee see ch 21, 'Close and constant liaison with Member States', pp 885–886.

[77] On the position of national courts see ch 8 generally.

[78] See www.ec.europa.eu/competition/elojade/antitrust/nationalcourts/.

of European Competition Law Judges has been established aimed at bringing together members of the judiciary of the Member States[79].

(viii) Parliament and ECOSOC

The European Parliament – in particular its Standing Committee on Economic and Monetary Matters – and the Economic and Social Committee ('ECOSOC'), are consulted on matters of competition policy and may be influential, for example, in the legislative process or in persuading the Commission to take action in relation to a particular issue.

(C) European Economic Area

On 21 October 1991 what is now the EU and its Member States and the Member States of the European Free Trade Association ('EFTA') signed an Agreement to establish the European Economic Area ('the EEA')[80]; it consists of the Member States of the EU, Norway, Iceland and Liechtenstein. The referendum in Switzerland on joining the EEA led to a 'no' vote, so that that signatory country remains outside. The EEA Agreement entered into force in 1994. It includes rules on competition which follow closely the TFEU and the EUMR. Article 101 on anti-competitive agreements appears as Article 53 of the EEA Agreement; Article 102 on the abuse of a dominant position is mirrored in Article 54; the EUMR is reflected in Article 57; and Article 106 on public undertakings and Article 107 on state aids appear as Articles 59 and 61 of the Agreement respectively.

The EEA Agreement and its associated texts establish a 'twin pillar' approach to jurisdiction: there are two authorities responsible for competition policy, the European Commission and the EFTA Surveillance Authority ('the ESA')[81], but any particular case will be investigated by only one of them. Article 108 of the EEA Agreement established the ESA; it mirrors the European Commission and is vested with similar powers. The ESA is subject to review by the EFTA Court of Justice[82], which sits in Luxembourg. Article 55 of the Agreement provides that the European Commission or the ESA shall ensure the application of Articles 53 and 54; Article 56 of the Agreement deals with the attribution of jurisdiction between these two bodies in cases caught by these Articles[83]; Article 57 provides for the division of competence in respect of mergers.

An important principle of the EEA Agreement is that there should be cooperation between the European Commission and the ESA, in order to develop and maintain uniform surveillance throughout the EEA and in order to promote a homogeneous implementation, application and interpretation of the provisions of the Agreement. Article 58

[79] The website of the AECLJ is www.aeclj.com.

[80] OJ [1994] L 1/1; the agreement entered into force on 1 January 1994; see Stragier 'The Competition Rules of the EEA Agreement and Their Implementation' (1993) 14 ECLR 30; Diem 'EEA Competition Law' (1994) 15 ECLR 263; see also Blanchet, Piiponen and Wetman-Clément *The Agreement on the European Economic Area (EEA)* (Clarendon Press, 1999); Forman 'The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and Its Implementation by the Two EEA Courts' (1999) 36 CML Rev 751; Blanco *EC Competition Procedure* (Oxford University Press, 2nd ed, 2006), ch 28; Broberg *The European Commission's Jurisdiction to Scrutinise Mergers* (Kluwer International, 3rd ed, 2006), ch 7.

[81] The website of the ESA is www.eftasurv.int.

[82] The EFTA States signed an *Agreement on the Establishment of a Surveillance Authority and a Court of Justice* on 2 May 1992: it is reproduced in (1992) 15 Commercial Laws of Europe, Part 10; the Court of Justice delivered two Advisory Opinions on these arrangements: Opinion 1/91 [1991] ECR I-6079, [1992] 1 CMLR 245; and Opinion 1/92 [1992] ECR I-2821, [1992] 2 CMLR 217; the website of the EFTA Court is www.eftacourt.int.

[83] The division of competences between the European Commission and the ESA was considered in Cases T-67/00 etc *JFE Engineering Corp v Commission* [2004] ECR II-2501, [2005] 4 CMLR 27, paras 482–493.

requires the authorities to cooperate, in accordance with specific provisions contained in Protocol 23 (dealing with restrictive practices and the abuse of market power) and Protocol 24 (dealing with mergers). Similarly Article 106 of the Agreement establishes a system for the exchange of information between the two courts with a view to achieving a uniform interpretation of its terms.

(D) **Modelling of domestic competition law on Articles 101 and 102**[84]

The Member States of the EU and the EEA now have systems of competition law modelled to a greater or lesser extent upon Articles 101 and 102[85]. An easy way of accessing the websites, and the national laws, of the national competition authorities is through a hyperlink provided by DG COMP[86]. Another simple way of doing so is through the website of the Global Competition Forum[87].

The so-called 'Europe Agreements' between the EU and the countries of central and eastern Europe were part of the framework for implementation of the accession process towards full membership of the EU. Since the accessions of many of those countries in 2004 and 2006 there are no remaining Europe Agreements[88]. The establishment of the 'Union for the Mediterranean' means that countries on the Mediterranean coast from Algeria to Turkey are parties to Euro-Mediterranean Association Agreements containing provisions based on the EU competition rules[89].

3. **UK Law**

The Competition Act 1998 and the Enterprise Act 2002 fundamentally changed both the substantive provisions and the institutional architecture of the domestic competition law

[84] See generally Gerber *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press, 1998), ch X; Maher 'Alignment of Competition Laws in the European Community' (1996) 16 Oxford Yearbook of European Law 223; *European Competition Laws: A Guide to the EC and its Member States* (Matthew Bender, 2002, ed Fine); Geradin and Henry 'Competition Law in the new Member States: Where do we come from? Where do we go?' in *Modernisation and Enlargement: Two Major Challenges for EC Competition Law* (Intersentia, 2005); *A Practical Guide to National Competition Rules Across Europe* (Kluwer, 2nd ed, 2007, eds Holmes and Davey).

[85] For some sceptical comments on the alignment of the domestic competition laws of the Member States see Ullrich 'Harmonisation within the European Union' (1996) 17 ECLR 178.

[86] www.ec.europa.eu/comm/competition/nca/index_en.html.

[87] www.globalcompetitionforum.org/europe.htm.

[88] See www.ec.europa.eu/enlargement/glossary/terms/europe-agreement_en.htm; it is possible in principle for agreements between the EU and third countries to have direct effect: see Case 104/81 *Hauptzollamt Mainz v Kupferburg* [1982] ECR 3641, [1983] 1 CMLR 1; Case C-192/89 *Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461, [1992] 2 CMLR 57 and Wyatt and Dashwood's *European Union Law*, pp 953–955; however there has yet to be a judgment on whether the competition rules in the Europe Agreements themselves have direct effect; on one occasion the Commission required amendments to Chanel's distribution agreements to remove restrictions on exports to countries with which the EU had negotiated 'Free Trade Agreements', but this was done by agreement and without a reasoned decision on the part of the Commission: *Chanel* OJ [1994] C 334/11, [1995] 4 CMLR 108.

[89] See Communication from the Commission to the European Parliament and the Council *Barcelona Process: Union for the Mediterranean* COM(2008) 319 final, 20 May 2008, available at www.ec.europa.eu/euromed/index_en.htm; Hakura 'The Extension of EC Competition Law to the Mediterranean Region' (1998) 19 ECLR 204; Geradin and Petit 'Competition Policy and the Euro-Mediterranean Partnership' (2003) 8 European Foreign Affairs Review 153; Geradin *Competition Law and Regional Integration: An Analysis of the Southern Mediterranean Countries* (The World Bank, 2004).

of the UK; in the course of this reform a raft of old legislation[90] was swept away. A further key piece of legislation is the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004[91] which brought UK law into conformity with the principles of Regulation 1/2003. In March 2011 the Government began a consultation exercise considering the case for introducing further changes to various aspects of domestic law and in particular the institutional architecture: it is possible that the Office of Fair Trading ('the OFT') and the Competition Commission ('the CC') will be merged to create a new Competition and Markets Authority[92]. Developments following this consultation will be explained on the Online Resource Centre[93].

(A) **Competition Act 1998**

The Competition Act 1998 received the Royal Assent on 9 November 1998; the main provisions entered into force on 1 March 2000. The Act contains two prohibitions. The so-called 'Chapter I prohibition' is modelled on Article 101 TFEU, and forbids agreements, decisions by associations of undertakings and concerted practices that have as their object or effect the restriction of competition[94]. The Chapter II prohibition in the Competition Act is modelled on Article 102 TFEU and forbids the abuse of a dominant position[95]. The Act gives to the OFT wide powers to obtain information, to carry out on-the-spot investigations, to adopt decisions and to impose penalties on undertakings[96]. In relation to certain sectors such as electronic communications and energy the powers of the OFT are shared concurrently with the relevant regulator, such as the Office of Communications[97]. As 'public authorities' the bodies invested with powers to enforce the Competition Act are obliged under section 6 of the Human Rights Act 1998 (which received the Royal Assent on the same day as the Competition Act) to apply the legislation in a manner that is compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. In competition law the right to a fair trial (Article 6(1) of the Convention), the presumption of innocence (Article 6(2)), the right to respect for private life (Article 8) and the right to peaceful enjoyment of possessions (Article 1 of the First Protocol) are of particular significance[98]. Section 60 of the Competition Act contains provisions designed to maintain consistency between the application of EU and domestic competition law; however this is subject to limitations, in particular with the result that judgments of the EU Courts motivated by single market considerations will not necessarily be followed in the UK[99].

[90] In particular the competition provisions in the Fair Trading Act 1973, the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the Competition Act 1980; note that section 11 of the Competition Act 1980, which provides for 'efficiency audits' of public-sector bodies, remains in force but has not been used for many years.

[91] SI 2004/1261.

[92] See *A Competition Regime for Growth: A Consultation on Options for Reform*, available at www.bis.gov.uk.

[93] www.oxfordtextbooks.co.uk/orc/whishandbailey7e.

[94] See ch 9, 'The Chapter I Prohibition', pp 327–353.

[95] See ch 9, 'The Chapter II Prohibition', pp 353–362.

[96] On the enforcement powers under the 1998 Act see ch 10.

[97] On concurrency see ch 10, 'Concurrency', pp 424–426.

[98] See further ch 10, 'Human Rights Act 1998 and Police and Criminal Evidence Act 1984', pp 400–401.

[99] See ch 9, '"Governing Principles Clause": Section 60 of the Competition Act 1998', pp 362–367.

(B) Enterprise Act 2002

The Enterprise Act 2002 received the Royal Assent on 7 November 2002; the main provisions entered into force on 20 June 2003. The Enterprise Act is a major piece of legislation that amends domestic competition law in a number of ways[100].

First, the Act effected a number of reforms to the institutional architecture of the domestic system. It abolished the office of Director General of Fair Trading[101] and created a new corporate body, the OFT[102]: the OFT has a variety of functions under the Competition Act and the Enterprise Act, including those formerly exercised by the Director General of Fair Trading[103]. The Act conferred on the CC the final decision-making role in relation to merger and market investigations[104]. The Act created the Competition Appeal Tribunal ('the CAT'), that has appellate and judicial review functions[105]. The Act also diminished substantially the powers of the Secretary of State to make decisions in competition law cases[106].

Secondly, the Act contained new provisions for the investigation of mergers and markets[107]. Thirdly, the Enterprise Act supplemented and reinforced the Competition Act 1998 in various ways, in particular by introducing a new and separate criminal 'cartel offence' which, on indictment, can lead to the imprisonment of individuals for up to five years and/or a fine of an unlimited amount[108]; by providing for company director disqualification for directors who knew or ought to have known of competition law infringements committed by their companies[109]; and by facilitating private competition law actions[110].

(C) Changes to domestic law as a result of Regulation 1/2003

The adoption of Regulation 1/2003 required or made desirable a number of changes to the Competition Act 1998. Section 209 of the Enterprise Act 2002, in conjunction with section 2(2) of the European Communities Act 1972, gave the Secretary of State power, by statutory instrument, to make such modifications as may be appropriate for the purpose of eliminating or reducing any differences between the Competition Act and EU competition law. The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004[111] effected a number of changes to the Competition Act and to various other enactments pursuant to Regulation 1/2003; in particular they repealed the provisions in the Competition Act on the notification to the OFT of agreements and/or conduct for guidance and/or a decision. In December 2004 the OFT reissued most of the Competition Act

[100] A summary of the main provisions in the Enterprise Act can be found in an OFT publication *Overview of the Enterprise Act: the competition and consumer provisions* OFT 518, June 2003; it is available on the OFT's website, www.oft.gov.uk; see also Graham 'The Enterprise Act 2002 and Competition Law' (2004) 67 MLR 273.

[101] Enterprise Act 2002, s 2(2).

[102] Ibid, s 1(1).

[103] Ibid, s 2(1); see 'Functions of the OFT', pp 65–66 below.

[104] See further 'Competition Commission', pp 69–72 below and ch 22 (merger investigations) and ch 11 (market investigations).

[105] See further 'Competition Appeal Tribunal', pp 72–74 below; note that, prior to the Enterprise Act, the Competition Act 1998 had created a Competition Commission Appeals Tribunal within the CC: its functions were transferred by the 2002 Act to the CAT.

[106] See further ch 22, ' "Public Interest Cases", "Other Special Cases" and Mergers in the Water Industry', pp 956–961.

[107] See further ch 22 (merger investigations) and ch 11 (market investigations); these provisions replaced the merger and monopoly provisions formerly contained in the Fair Trading Act 1973.

[108] See ch 10, 'Penalties', pp 410–424.

[109] See ch 10, 'Grounds for disqualification', p 435.

[110] See ch 8, 'Damages Actions in the UK Courts', pp 306–319.

[111] SI 2004/1261.

guidelines that had originally been published in 2000 in order to reflect the changes in law and practice flowing from Regulation 1/2003[112]. The OFT's Rules were also amended in 2004[113]; and the exclusion of vertical agreements from the Chapter I prohibition of the Competition Act was repealed in order to bring domestic law into line with EU law[114].

(D) Institutions[115]

Competition law in the UK assigns roles to the Secretary of State for Business, Innovation and Skills, the Lord Chancellor, the OFT, the Serious Fraud Office (or, in Scotland, the Lord Advocate), the sectoral regulators, the CC, the CAT and to the civil and criminal courts. The competition authorities are also subject to scrutiny by the National Audit Office and by parliamentary bodies, including the Treasury Committee, the Business Innovations and Skills Committee and the Public Accounts Committee of the House of Commons and the European Union Committee of the House of Lords.

(i) Secretary of State and the Department for Business, Innovation and Skills

The Secretary of State for Business, Innovation and Skills has various functions under the Competition Act 1998 and the Enterprise Act 2002. In the exercise of these functions he is assisted by a Parliamentary Under-Secretary of State for Employment Relations, Consumer and Postal Affairs whose portfolio includes competition issues. Within the Department for Business, Innovation and Skills there is a Consumer and Competition Policy Directorate. The Department's website provides information and guidance on aspects of competition law and policy, including public consultations[116].

(A) Appointments

The Secretary of State for Business, Innovation and Skills makes most of the senior appointments in competition law, for example of the chairman and other members of the Board of the OFT[117]; the members of the CAT[118]; the Registrar of the CAT[119]; the 'appointed members' of the Competition Service within the CAT[120]; the Chairman, Deputy Chairmen and members of the CC[121]; and members of the CC Council[122]. The Secretary of State can also designate bodies which represent consumers to make 'super-complaints' under section 11 of the Enterprise Act 2002[123].

(B) Amendment of legislation, the adoption of delegated legislation and the making or approval of guidance

The Secretary of State is given various powers to amend primary legislation, to adopt delegated legislation and to make or approve rules under the Competition Act 1998 and

[112] On the implications of Regulation 1/2003 for UK law see the OFT's guidance *Modernisation* OFT 442, December 2004.

[113] Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751.

[114] Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004, SI 2004/1260, art 2.

[115] The institutional structure of EU and UK competition law is set out in diagrammatic form at the end of this chapter: see Figs 2.1, 2.2 and 2.3, pp 79–81 below.

[116] The website will be found at www.bis.gov.uk.

[117] Enterprise Act 2002, s 1 and Sch 1, para 1.

[118] Ibid, s 12(2)(c); note that the President of the Tribunal and the members of the panel of chairmen are appointed by the Lord Chancellor upon the recommendation of the Judicial Appointments Commission: ibid, s 12(2)(a) and (b).

[119] Ibid, s 12(3).

[120] Ibid, Sch 3, para 1(2).

[121] Ibid, Sch 7, para 3 (Chairman) and para 2 (members).

[122] Ibid, Sch 7, para 5(2).

[123] Ibid, s 11(5); see further ch 11, 'Super-Complaints', pp 454–455.

the Enterprise Act 2002. For example under the Competition Act the Secretary of State has power to amend (and has amended) Schedules 1 and 3[124]; to adopt block exemptions from the Chapter I prohibition[125]; to make provision for the determination of turnover for the purpose of setting the level of penalties[126]; to approve the guidance of the OFT as to the appropriate amount of penalties under the Chapter I and Chapter II prohibitions and Articles 101 and 102 TFEU[127]; to determine the criteria for conferring limited immunity on 'small agreements' and 'conduct of minor significance'[128]; to vary the application of the Competition Act to vertical and land agreements[129]; to approve the procedural rules of the OFT[130]; to make regulations on the concurrent application of the Competition Act by the OFT and the sectoral regulators[131]; and to amend the list of appealable decisions in section 46 of the Act[132]. The Secretary of State also has power under paragraph 7 of Schedule 3 to the Competition Act to order that the Chapter I and Chapter II prohibitions do not apply to particular agreements or conduct where there are exceptional and compelling reasons of public policy for doing so[133].

Under the Enterprise Act the Secretary of State has power to make rules or to amend primary legislation in relation to a variety of matters: these include the procedural rules of the CAT[134]; the determination of turnover for the purpose of domestic merger control[135]; the maximum penalties that the CC can impose for procedural infringements[136]; the payment of fees for merger investigations[137]; for the alteration of the 'share of supply' test applicable to merger cases[138]; and for shortening the period within which merger inquiries should be completed[139]. The Act also enables the Secretary of State to extend the 'super-complaint' system to include sectoral regulators[140] and to designate consumer bodies for the purposes of bringing claims under section 47B of the Competition Act[141]; to modify Schedule 8 to the Act, which sets out the provisions that can be contained in enforcement orders[142]; and to make such modifications to the Competition Act 1998 as

[124] Competition Act 1998, s 3(2), s 19(2) (Sch 1, dealing with mergers and concentrations) and s 3(3), s 19(3) (Sch 3, dealing with general exclusions): see ch 9, 'The Chapter I prohibition: excluded agreements', pp 348–356 and 'Exclusions', p 369 respectively.

[125] Competition Act 1998, ss 6–8: see ch 9, 'Block Exemptions', p 359.

[126] Ibid, s 36(8): see ch 10, 'Maximum amount of a penalty', p 410.

[127] Ibid, s 38(4): see ch 10, 'The OFT's *Guidance as to the appropriate amount of a penalty*', p 411.

[128] Ibid, s 39 (small agreements) and s 40 (conduct of minor significance): see ch 10, 'Immunity for small agreements and conduct of minor significance', pp 413–414.

[129] Ibid, s 50: see ch 9, 'Section 50: land agreements', p 356 and ch 16, 'Repeal of the exclusion for vertical agreements', p 678.

[130] Competition Act 1998, s 51.

[131] Ibid, s 54(4)–(5); see also Enterprise Act 2002, s 204, which creates a power for the Secretary of State to make regulations in relation to concurrency functions as to company director disqualification: for a discussion of the rules on concurrency see ch 10, 'Concurrency', pp 437–439.

[132] See the Competition Act 1998 (Notification of Excluded Agreements and Appealable Decisions) Regulations 2000, SI 2000/263, reg 10.

[133] See ch 9, 'Public policy', p 354.

[134] Enterprise Act 2002, s 15 and Sch 4, Part 2; see 'Establishment of the Competition Commission', pp 69–70 below.

[135] Ibid; see ch 22, 'The turnover test', p 921.

[136] Ibid, s 111(4); see ch 22, 'Investigation powers and penalties', p 949.

[137] Ibid, s 121; see ch 22, 'Fees', pp 928–929.

[138] Ibid, s 123; see ch 22, 'The share of supply test', pp 922–923.

[139] Enterprise Act 2002, s 40(8).

[140] Ibid, s 205; on super-complaints, see ch 10.

[141] Ibid, s 19; see ch 8, 'Claims brought on behalf of consumers', pp 318–319.

[142] Ibid, s 206; see ch 22, 'Schedule 8 of the Enterprise Act' and following sections, pp 945–948.

are appropriate for the purpose of eliminating or reducing any differences between that Act and EU law as a result of Regulation 1/2003[143].

(C) Receipt of reports

The Secretary of State receives Annual Reports from the OFT[144] and from the CC[145].

(D) Involvement in individual cases

The Secretary of State has little involvement in individual competition cases. Prior to the Enterprise Act 2002 the Secretary of State had an important role in merger and monopoly investigations. However the provisions of the Enterprise Act confer upon the CC the final decision-making role in relation to merger and market investigations[146]. The Secretary of State retains powers in relation to such investigations only in strictly limited circumstances[147]; one such case was *BSkyB/News Corp*[148].

(ii) The Lord Chancellor

The Lord Chancellor is responsible for appointing the President of the CAT and the panel of chairmen, pursuant to a recommendation from the Judicial Appointments Commission[149]. He is also given power to make provision for civil courts in England and Wales to transfer to the CAT cases based on an infringement decision of the European Commission or of the OFT or sectoral regulators under Articles 101 and/or 102 TFEU or the Chapter I and II prohibitions[150]. There is also provision to make rules for the receipt of cases by the civil courts that are transferred to them by the CAT[151]. As of 20 June 2011 these powers had not been exercised.

(iii) The OFT

(A) Establishment of the OFT

The OFT is established by section 1 of the Enterprise Act 2002. Section 1 of the Fair Trading Act 1973 had established the office of Director General of Fair Trading, and many of the most important functions in competition law were carried out in the name of the individual appointed by the Secretary of State to this position. Similarly in the regulated sectors individuals, such as the Director General of Telecommunications, were given a wide variety of responsibilities[152]. However there was a growing acceptance that it was not appropriate that such significant powers should be invested in an individual office-holder as opposed to a group of people. The Enterprise Act therefore created the OFT[153], and abolished the office of Director General of Fair Trading[154]; his functions were transferred to the OFT[155]. The Board of the OFT consists of a (non-executive) Chairman and no fewer than

[143] Ibid, s 209; see further 'Changes to domestic law as a result of Regulation 1/2003', pp 60–61 above.

[144] Ibid, s 4; see 'Annual plan and annual report', pp 64–65 below.

[145] Competition Act 1998, Sch 7, para 12A, inserted by Enterprise Act 2002, s 186; see 'Corporate plan and annual report', p 70 below.

[146] See ch 22, 'Determination of references by the CC', pp 929–931 (merger investigations) and ch 11, 'Market Investigation References', pp 466–477 (market investigations).

[147] Ibid, explaining ss 42–68, s 132, ss 139–153 and Sch 7 Enterprise Act 2002.

[148] See ch 22, 'Public interest cases', pp 956–958.

[149] Enterprise Act 2002, s 12(2)(a) and (b) and Sch 2, para 1; the Judicial Appointments Commission was established by the Constitutional Reform Act 2005; its website is www.jac.judiciary.gov.uk.

[150] Ibid, s 16(1)–(4).

[151] Ibid, s 16(5); on s 16 see further ch 8, 'Which court to see in: the jurisdiction of the High Court and the Competition Appeal Tribunal', p 307.

[152] See further 'Sectoral regulators', pp 68–69 below.

[153] Enterprise Act 2002, s 1(1).

[154] Ibid, s 2(2).

[155] Ibid, s 2(1); the transfer took place on 1 April 2003.

four other members, appointed by the Secretary of State[156]. The Secretary of State must also appoint a Chief Executive of the OFT, who may or may not be a member of the OFT Board[157]; since 2005 the Chief Executive may not be the same person as the Chairman[158]. On 20 June 2011 there were ten members of the Board, of whom four (the Chief Executive and three executive directors) were executive members and six non-executive[159]. The Rules of Procedure of the Board of the OFT are available on its website, and minutes of its meetings will also be found there[160]. The Board is responsible for the strategic direction, priorities, plans and performance of the OFT, including the adoption of the Annual Plan[161]. It also makes the decision whether to make market investigation references to the CC; other operational decisions are delegated by the Board to the executive of the OFT[162].

Many of the decisions of the OFT under the Competition Act can be appealed on the merits to the CAT[163]. In cases where the OFT's behaviour is not subject to the scrutiny of the CAT it may, nevertheless, be subject to judicial review by the Administrative Court of the Queen's Bench Division of the High Court. Decisions under the Enterprise Act 2002 in relation to mergers and market investigations are subject to review by the CAT[164].

(B) The staff of the OFT

The Chief Executive of the OFT is responsible for the day-to-day running of the organisation. There are three further Executive Directors who sit on the Board of the OFT, one responsible for Corporate Services and two for Markets and Projects. The General Counsel's office, the office of the Chief Economist and Competition Policy and the Procedural Adjudicator report directly to the Chief Executive. Operational matters such as the investigation of mergers and cases under the Competition Act are handled by staff who work in the Markets and Projects area of the OFT; its project and enforcement work is conducted in two market groupings, one covering goods and consumer and the other services, infrastructure and public markets. There are also specific enforcement teams for mergers and for cartel and criminal investigations[165]. The total number of permanent staff of the OFT in the year 2009–2010 was 597[166].

(C) Annual plan and annual report

The OFT is required, following a public consultation, to publish an annual plan containing a statement of its main objectives and priorities for the year; both the annual plan and the consultation document must be laid before Parliament[167]. The most recent annual plan was published in March 2011 explaining that the OFT's work will have two overarching themes, the first of which is high-impact enforcement and the second is to make markets work well by changing the behaviour of businesses, consumers and Government[168]. The OFT must also make an annual report to the Secretary of State containing an assessment of the extent to which the objectives and priorities set out in the annual plan have been met and a summary of significant decisions, investigations and other activities in the

[156] Ibid, Sch 1(1). [157] Ibid, Sch 1(5)(1). [158] Ibid, Sch 1(5)(2).

[159] Details of the members of the OFT Board are available at www.oft.gov.uk.

[160] See www.oft.gov.uk. [161] See 'Annual plan and annual report', p 64 below.

[162] Enterprise Act 2002, Sch 1, para 12. [163] See ch 10, 'Appeals', pp 439–449.

[164] See ch 11, 'Review of decisions under Part 4 of the Enterprise Act', pp 478–479 and ch 22, 'Review of decisions under Part 3 of the Enterprise Act', pp 950–951.

[165] An organisational diagram of the structure of the OFT is available at www.oft.gov.uk.

[166] *Annual Report and Resource Accounts 2009–2010*, p 73. [167] Enterprise Act 2002, s 3.

[168] *Annual Plan 2011–12*, OFT 1294, available at www.oft.gov.uk.

year[169]. The report must be laid before Parliament and must be published[170]. The report for 2009-10 was published in July 2010[171].

(D) Functions of the OFT

The OFT has stated that its mission is to make markets work well for consumers[172]. In order to achieve this end the OFT's activities are to enforce the competition and consumer protection rules, to investigate how well markets are working and to explain and improve public awareness and understanding. The *OFT Prioritisation Principles*[173] are used to decide which projects and cases the OFT will take on across its areas of responsibility. The general functions, as opposed to the enforcement functions, of the OFT include obtaining, compiling and keeping under review information relating to the exercise of its functions; making the public aware of ways in which competition may benefit consumers and the economy; providing information and advice to Ministers[174]; and promoting good consumer practice[175].

It is important to understand (but often overlooked by competition lawyers) that the OFT is not only a competition authority, but also has numerous consumer protection responsibilities under a variety of legal provisions, including:

- the Consumer Credit Act 1974
- the Estate Agents Act 1979
- the Consumer Protection (Cancellation of Contracts concluded away from Business Premises) Regulations 1987[176]
- the Control of Misleading Advertisements Regulations 1988[177]
- the Consumer Credit (Advertisements) Regulations 1989[178]
- the Package Travel, Package Holidays and Package Tours Regulations 1992[179]
- the Timeshare Regulations 1997[180]
- the Unfair Terms in Consumer Contracts Regulations 1999[181]
- the Consumer Protection (Distance Selling) Regulations 2000[182]
- the Stop Now Orders (EC Directive) Regulations 2001[183]
- the Enterprise Act 2002
- the Consumer Protection Cooperation Regulation[184]
- the Consumer Credit Act 2006
- the Consumers, Estate Agents and Redress Act 2007
- Consumer Protection from Unfair Trading Regulations 2008[185].

[169] Enterprise Act 2002, s 4(1) and (2). [170] Ibid, s 4(3).

[171] *Annual Report and Resource Accounts 2009–10*, HC 301.

[172] Ibid, p 9; see further Whish 'The Role of the OFT in UK Competition Law' in Rodger (ed) *Ten Years of UK Competition Law Reform* (Dundee University Press, 2010), ch 1.

[173] OFT 953, October 2008; see further ch 10, 'Inquiries and Investigations', pp 394–402.

[174] The OFT's website includes a page on 'advocacy and guidance for policy makers': www.oft.gov.uk/OFTwork/cartels-and-competition/advocacy-guidance/.

[175] Enterprise Act 2002, ss 5–8. [176] SI 1987/2117. [177] SI 1988/915.

[178] SI 1989/1125.

[179] SI 1992/3288. [180] SI 1997/1081. [181] SI 1999/2083.

[182] SI 2000/2334, as amended by SI 2005/689. [183] SI 2001/1422.

[184] Regulation 2006/2004, OJ [2004] 364/1; see also the Enterprise Act 2002 (Amendment) Regulations, SI 2006/3363 and the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2006, SI 2006/3372.

[185] SI 2008/1277.

The OFT manages Consumer Direct, a national telephone and online consumer advice scheme[186]; and it also provides a national voice for, and strategic leadership to, local Trading Standards Services. The OFT also has functions under the Money Laundering Regulations 2007[187]. The Regulatory Enforcement and Sanctions Act 2008 provides for the reduction and removal of regulatory burdens and requires the OFT to keep its regulatory functions under review[188].

The competition and consumer protection functions of the OFT are legally distinct. However in practice they are closely related since they are used collectively by the OFT with the aim of ensuring that markets work well for consumers[189]. As far as competition law is concerned the OFT has considerable powers under the Competition Act 1998: it plays the principal role in enforcing the Chapter I and Chapter II prohibitions, and has significant powers to obtain information, enter premises to conduct investigations, make interim and final decisions and impose financial penalties; it also has the power to enforce Articles 101 and 102 TFEU[190]. The OFT has an important role in relation to merger and market investigations under the Enterprise Act 2002[191], and works with the Serious Fraud Office in the case of a prosecution for commission of the 'cartel offence' under that Act[192]. The OFT has specific responsibilities in relation to competition as a result of provisions in the Courts and Legal Services Act 1990, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the Water Industry Act 1991, the Financial Services and Markets Act 2000[193], the Transport Act 2000, the Transport (Scotland) Act 2001, the Legal Services Act 2007 and the Payment Services Regulations 2009[194]. The OFT also has a duty to keep under review undertakings given as a result of investigations conducted under the monopoly and merger provisions of the now-repealed Fair Trading Act 1973[195]. The OFT liaises on competition matters with the European Commission in Brussels and is a member of the European Competition Network that brings together the Commission and the national competition authorities of the Member States pursuant to Regulation 1/2003[196]. The OFT attends meetings on competition policy on behalf of the UK at the Organisation for Economic Co-Operation and Development and the United Nations Conference on Trade and Development, and is an active participant in the International Competition Network[197].

The OFT has published details of arrangements that have been put in place for cooperation and constructive communication between it and the Co-operation and Competition Panel, established by the Secretary of State for Health, where cases arise involving the provision of healthcare services in England[198].

[186] The website of Consumer Direct is www.consumerdirect.gov.uk.

[187] SI 2007/2157.

[188] The OFT's regulatory functions consist of its powers to enforce consumer law, to license consumer credit businesses and to supervise anti-money laundering.

[189] See *Joining up Competition and Consumer Policy: The OFT's approach to building an integrated agency* OFT 1151, December 2009, available at www.oft.gov.uk; note however that in June the Department for Business, Innovation and Skills began a consultation on institutional changes in relation to the enforcement of consumer law: see www.bis.gov.uk for further information.

[190] See ch 10 generally.

[191] See ch 22, 'The OFT's duty to make references', pp 912–929 (merger investigations) and ch 11, 'Market Investigation References', pp 466–473 (market investigations).

[192] On the cartel offence see ch 10, 'The cartel offence', pp 425–434.

[193] See ch 9, 'Financial Services and Markets Act 2000', pp 351–352.

[194] SI 2009/209, Part 8.

[195] See further ch 11, 'Orders and undertakings under the Fair Trading Act 1973', pp 485–486 and ch 22, 'Enforcement functions of the OFT', pp 948–949.

[196] See ch 7, 'Regulation 1/2003 in Practice', pp 288–290.

[197] On the work of these bodies see ch 12, 'The Internationalisation of Competition Law', pp 506–511.

[198] Details of these arrangements can be found at www.oft.gov.uk/oft_at_work/partnership_working/CCP/; see also www.copanel.org.uk.

(E) Rules

Section 51 of and Schedule 9 to the Competition Act 1998 make provision for the adoption of procedural rules by the OFT, which require the approval of the Secretary of State[199]; the *Competition Act 1998 (Office of Fair Trading's Rules)* were adopted under this provision in 2004[200].

(F) Publications, information, guidance etc

The OFT is required by sections 6 and 7 of the Enterprise Act 2002 to provide information to the public and to Ministers. The OFT has published a statement setting out its approach to improving the transparency of its work[201]. The OFT's website is a vital source of information on UK competition law and policy and includes, among other things, a Public Register of its decisions and the decisions of the sectoral regulators under the Competition Act and the OFT's decisions under the Enterprise Act, the numerous guidelines on these Acts, Press Releases, the Annual Plan and the Annual Report of the OFT, consultations, speeches and articles[202].

The OFT has published a number of research papers on important issues in competition policy, for example on market definition, barriers to entry and exit and predatory behaviour, which are available on its website. Since the sixth edition of this book was published in 2008 the OFT has published the following 'economic discussion papers' by 20 June 2011:

- *An evaluation of the impact upon productivity of ending resale price maintenance on books*[203]
- *Interactions between competition and consumer policy*[204]
- *The economics of self-regulation in solving consumer quality issues*[205]
- *Road testing of consumer remedies*[206]
- *An assessment of discretionary penalties regimes*[207]
- *Behavioural Economics as Applied to Firms: A Primer*[208]
- *Minority interests in competitors*[209]
- *What does Behavioural Economics mean for Competition Policy?*[210]
- *The impact of price frames on consumer decision making*[211]

The OFT's Economic Discussion Paper Series is available on the OFT website[212].

The OFT has increasingly sought to carry out an evaluation of its work, both as a matter of external accountability, so that it can attempt to demonstrate that it provides value for money to the taxpayers that pay for it, and as a matter of internal management, in order to test whether it is prioritising its work effectively. The OFT has agreed to a performance target of delivering benefits to consumers worth more than five times the organisation's spending on competition enforcement[213]. In July 2010 the OFT published guidance on the way in which it calculates the direct customer benefits of its work[214]. The OFT has estimated that it saved consumers on average £359 million per year in the years from 2007

[199] Competition Act 1998, s 51(5). [200] SI 2004/2751, replacing the earlier rules in SI 2000/293.
[201] OFT 1234, June 2010. [202] See www.oft.gov.uk. [203] OFT 981, March 2008.
[204] OFT 991, April 2008. [205] OFT 1059, March 2009. [206] OFT 1099, July 2009.
[207] OFT 1132, October 2009.
[208] OFT 1213, March 2010. [209] OFT 1218, March 2010. [210] OFT 1224, March 2010.
[211] OFT 1226, May 2010.
[212] See www.oft.gov.uk/OFTwork/publications/publication-categories/reports/Economic-research/.
[213] OFT 962, November 2007, p 71. [214] Available at www.oft.gov.uk.

to 2010 as a result of its work in enforcing the Competition Act, reviewing mergers and taking action under its consumer powers against scams[215].

The OFT has published guidance explaining how it deals with requests for information under the Freedom of Information Act 2000[216].

(iv) Serious Fraud Office

Section 188 of the Enterprise Act 2002 introduced a criminal cartel offence for individuals responsible for 'hard-core' cartels[217]. Serious penalties – of up to five years in prison – can be imposed upon those found guilty of this offence. Prosecutions may be brought by or with the consent of the OFT[218], or by the Serious Fraud Office[219], working in close liaison with the OFT[220]. In Scotland the prosecution of the criminal offence is the responsibility of the Lord Advocate. Quite apart from the cartel offence, there are some rare circumstances in which some cartel agreements might be illegal under the common law criminal offence of conspiracy to defraud; the Serious Fraud Office is the prosecutor for this offence as well[221].

(v) Sectoral regulators

Various industries in the UK are subject to specific regulatory control, in particular utilities such as telecommunications and water. Originally the regulatory powers were vested in individuals such as the Director General of Telecommunications. Just as the position of Director General of Fair Trading has been superseded by the creation of an OFT Board, so too the individual regulators have been replaced by corporate boards, each supported by an office: these are the Gas and Electricity Markets Authority (supported by the Office of Gas and Electricity Markets (OFGEM))[222], the Office of Communications (OFCOM)[223], the Water Services Regulation Authority (OFWAT)[224], the Office of Rail Regulation (ORR)[225] and the Northern Ireland Authority for Energy Regulation (NIAER)[226]. These sectoral regulators, together with the Civil Aviation Authority[227], have concurrent power to enforce the Competition Act 1998, and Articles 101 and 102 TFEU, with the OFT. The Government intends to give Monitor, the regulator for health and social care, competition law functions[228]. Arrangements are in place for coordination of the performance of the concurrent functions under the Act[229]. Appeals against 'appealable decisions' of the sectoral regulators under the Competition

[215] See *Positive Impact 09/10* OFT 1251, July 2010, available at www.oft.gov.uk/OFTwork/publications/publication-categories/reports/Evaluating/.

[216] *Freedom of Information Act 2000 publication scheme* OFT 622, January 2005, available at www.oft.gov.uk/advice_and_resources/publications/corporate/general/oft622.

[217] See ch 10, 'The cartel offence', pp 425–434 below.

[218] Enterprise Act 2002, s 190(2)(b).

[219] The website of the SFO is www.sfo.gov.uk.

[220] Enterprise Act 2002, s 190(1); see ch 10, 'Prosecution and penalty', pp 430–431.

[221] See ch 10, 'Conspiracy to defraud at common law', pp 436–437.

[222] Utilities Act 2000, s 1.

[223] Office of Communications Act 2002, s 1.

[224] Water Act 2003, s 34.

[225] Railway and Transport Safety Act 2003, s 15.

[226] See the Energy Order 2003, SI 2003/419, art 3.

[227] See Airports Act 1986, s 41, which deals with anti-competitive practices at regulated airports, and Chapter V of the Transport Act 2000, which gives the Civil Aviation Authority ('the CAA') concurrent powers to enforce the Chapter I and II prohibitions in relation to air traffic services; the Government proposes to give the CAA concurrent powers to enforce the Chapter I and II prohibitions in relation to airport operator services; further details of these powers can be found at www.dft.gov.uk.

[228] See Chapter 2 of Part 3 of the Health and Social Care Bill introduced into Parliament on 19 January 2011.

[229] On concurrency see ch 10, 'Concurrency', pp 437–439.

Act lie to the CAT[230]; references in relation to the licensing functions of the sectoral regulators[231] and market investigations may be made to the CC[232]. Super-complaints may be made to the sectoral regulators under the provisions set out in section 11 of the Enterprise Act 2002[233]. The Government published, in March 2011, its proposals to make the sectoral regulators' exercise of their Competition Act powers less burdensome and to improve the practice of concurrency[234].

The OFT also works closely with the Financial Services Authority ('the FSA') across a range of matters; the OFT and the FSA have published a *Memorandum of Understanding* establishing a framework for cooperation between them[235].

As a separate matter, all economic regulators should consider whether their decisions might be called into question under Article 106 TFEU on the basis that they might result in infringements of Articles 101 and/or 102[236].

(vi) Competition Commission

(A) Establishment of the Competition Commission

The CC is an independent public body which was established by section 45(1) of the Competition Act 1998 and came into existence on 1 April 1999. Section 45(3) of the Act dissolved the Monopolies and Mergers Commission, which had been in existence under various names since 1948, and transferred its functions to the new CC[237]. Schedule 7 to the Competition Act, as amended by Schedule 11 to the Enterprise Act 2002, makes detailed provision in relation to the CC. It has a Chairman and some Deputy Chairmen. The Chairman is appointed on a full-time basis, as may be the Deputy Chairmen.

On 20 June 2011 there were 33 'reporting panel' members of the CC[238]. Members are appointed by the Secretary of State, following an open competition, for a single period of eight years; all members (other than the Chairman and some of the Deputy Chairmen) are part time. They are appointed for their diversity of background, individual experience and ability, not as representatives of particular organisations, interests or political parties. In each case referred to the CC a group will be appointed to conduct the investigation[239]. The Chairman appoints between three to six members to serve on an inquiry group[240]. In 2009/10 most of the investigations completed were conducted by groups of four[241].

[230] On the meaning of appealable decisions see ch 10, 'Appealable decisions', pp 440–443.

[231] On licence modification references see ch 23, 'Regulatory systems in the UK for utilities', pp 978–979.

[232] Enterprise Act 2002, Sch 9, Part 2.

[233] The Enterprise Act 2002 (Super-complaints to Regulators) Order 2003, SI 2003/1368; on super-complaints, see ch 11, 'Super-Complaints', pp 454–455.

[234] *A Competition Regime for Growth: A Consultation on Options for Reform*, March 2011, ch 7, available at www.bis.gov.uk; see also National Audit Office Report, *Review of the UK's Competition Landscape*, March 2010, available at www.nao.org.uk.

[235] December 2009; see also the OFT's *Financial Services Plan* OFT 1106, July 2009, both available at www.oft.gov.uk.

[236] See ch 6 generally, and in particular the reference at 'Introduction', p 215 to a decision of the UK National Lottery Commission not to authorise Camelot, the operator of the National Lottery, to provide 'ancillary services', available at www.natlotcomm.gov.uk.

[237] For an account of the work of the Monopolies and Mergers Commission in the 50 years from 1948 to 1998 see Wilks *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester University Press, 1999).

[238] See the CC's *Annual Report and Accounts* 2009/2010, p 49.

[239] Provision is made for this by the Competition Act 1998, Sch 7, Part II, as amended by the Enterprise Act 2002, Sch 11, paras 10–12.

[240] Competition Act 1998, Sch 7, para 15(2).

[241] Details of the groups will be found in the short discussions of each investigation in the CC's *Annual Report and Accounts*.

There is a utilities panel from which the Chairman must appoint at least one member when conducting an investigation concerned with the regulation of the water, electricity or gas sectors or an energy code modification appeal. There is also a newspaper panel and a Communications Act panel. The Chairman of the CC has published *Guidance to Groups* on the procedures to be adopted when conducting inquiries[242]: the *Guidance* must be read in conjunction with the *Competition Commission Rules of Procedure*[243].

The CC has a Council through which some of its functions, such as the appointment of staff and the keeping of accounts, must be performed; the Council consists of the Chairman, the Deputy Chairmen, such other members as the Secretary of State may appoint[244] and the Chief Executive (referred to in the legislation as the Secretary) of the CC[245]. Management of the CC and its policy development are taken forward through five key groups: the Senior Management Team, an Analysis Group, a Procedures and Practices Group, a Remedies Standing Group and a Finance and Regulation Group; each of the groups reports to the Council.

The CC is subject to review by the CAT under provisions contained in the Enterprise Act 2002[246]; it is also subject to judicial review by the Administrative Court of the Queen's Bench Division of the High Court.

(B) The staff of the CC

The most senior member of staff of the CC is the chief executive, referred to in the legislation as the Secretary, who is a member of the CC Council. At the end of March 2010 the CC had a permanent staff of 122 officials, including administrators and specialists such as accountants, economists, business advisers and lawyers[247].

(C) Business plan and annual report

The CC publishes its Business Plan on its website; it is required to make an Annual Report to the Secretary of State[248].

(D) Functions of the CC

The CC has no power to conduct investigations on its own initiative. Rather it conducts market investigations under the Enterprise Act 2002 referred to it by either the OFT, one of the sectoral regulators or the Secretary of State and merger inquiries referred to it by the OFT or the Secretary of State. The CC can be asked to conduct 'efficiency audits' of public sector bodies under the Competition Act 1980: this provision has not been used for many years[249].

The CC has various regulatory functions in relation to privatised utilities as a result of provisions in:

- the Airports Act 1986 and the Airports (Northern Ireland) Order 1994
- the Gas Act 1986 and the Gas (Northern Ireland) Order 1996
- the Electricity Act 1989 and the Electricity (Northern Ireland) Order 1992

[242] CC6, March 2006, available at www.competition-commission.org.uk.

[243] CC1, March 2006.

[244] At 20 June 2011 the Council had three non-executive members.

[245] Competition Act 1998, Sch 7, para 5(3), as amended by Enterprise Act 2002, Sch 11, para 4 and Sch 26.

[246] See further 'Functions of the CAT', pp 72–73 below and ch 11, 'Review of decisions under Part 4 of the Enterprise Act', pp 478–479 (market investigations) and ch 22, 'Review of decisions under Part 3 of the Enterprise Act', pp 950–951 (merger investigations) respectively.

[247] See the *CC's Annual Report and Accounts 2009–10*, p 52.

[248] Competition Act 1998, Sch 7, para 12A, inserted by the Enterprise Act 2002, s 186.

[249] On efficiency audits see *Halsbury's Laws of England*, Vol 47, (4th ed reissue, 2001), paras 143–145.

- the Water Industry Act 1991 and the Water Services (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005 and the Water and Sewerage Services (Northern Ireland) Order 2006
- the Railways Act 1993
- the Postal Services Act 2000
- the Transport Act 2000.

The CC has seldom been called upon to exercise these regulatory functions[250]. The CC has a role under the Financial Services and Markets Act 2000 to ensure that the rules and practices of the FSA do not impede competition. It also has a role under the Legal Services Act 2007 in relation to possible distortions on competition arising from regulatory rules applicable to the legal profession. The CC has an appellate function in relation to price control matters under the Communications Act 2003[251]. The CC also hears appeals in respect of modifications to the codes covering the energy industry by virtue of sections 173 to 177 of the Energy Act 2004[252].

The CC is not a designated competition authority for the purposes of Article 35 of Regulation 1/2003, with the result that it does not have the power to enforce Articles 101 and 102 TFEU[253]. The CC participates in the activities of the OECD, the United Nations Conference on Trade and Development ('UNCTAD') and the International Competition Network ('ICN').

(E) Rules

Schedule 7A to the Competition Act, inserted by Schedule 12 to the Enterprise Act 2002, makes provision for the adoption of procedural rules for the conduct of merger and market references by the CC. The current *Competition Commission Rules of Procedure* were adopted in March 2006 and are available on its website[254]. The CC has also published a series of guidance documents describing its approach to, and procedures for, merger and market investigations[255] and on several other matters, including *General Advice and Information*[256], a *Statement of Policy on Penalties*[257] and *Guidance on Disclosure of Information in Merger and Market Inquiries*[258].

(F) Publications, information, guidance etc

The CC has a website that contains a wide variety of information, for example on current inquiries, completed inquiries, press releases, evaluation reports and occasional papers, speeches, texts from the CC's lectures series, the *Annual Report and Accounts*,

[250] In 2007 the CC carried out the mandatory quinquennial review of airport charges; in August 2009 it rejected an appeal by Sutton and East Surrey Water plc against the price limits imposed on it by OFWAT, but an appeal by Bristol Water was partially successful in 2010. The CC's determinations are available at www.competition-commission.org.uk.

See the *Annual Report and Accounts 2006–2007*, p 6.

[251] See *Price control appeals under section 193 of the Communications Act 2003*, CC13, April 2011, available at www.competition-commission.org.uk.

[252] As amended by the Electricity and Gas Appeals (Designation and Exclusion) Order 2009 SI 2009/648; see further the *Energy Modification Rules*, CC10, July 2005, available at www.competition-commission.org.uk.

[253] See reg 3 of the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261 which designates the OFT and the sectoral regulators for this purpose.

[254] CC1, March 2006, available at www.competition-commission.org.uk.

[255] *Merger Assessment Guidelines* CC2 (Revised), September 2010 (jointly with the OFT) and *Market Investigation References* CC3, June 2003.

[256] CC4, March 2004.

[257] CC5, June 2003.

[258] CC7, July 2003.

the Business Plan and the way in which the CC is organised[259]. The CC has estimated that customers would have paid an extra £424 million for goods and services but for the decisions it took during the period from 1 April 2009 to 31 March 2010[260].

(vii) Competition Appeal Tribunal

(A) Establishment of the CAT

The CAT is established by section 12(1) of the Enterprise Act 2002[261]. It consists of a President[262], a panel of Chairmen appointed by the Lord Chancellor following a recommendation from the Judicial Appointments Commission[263] (the judges of the Chancery Division of the High Court have been appointed to this panel) and a panel of ordinary members appointed by the Secretary of State[264]. Cases are heard by a Tribunal of three persons, chaired by the President or one person from the panel of Chairmen. Procedural matters can be dealt with either by the President or by one of the Chairmen sitting alone. The CAT has a Registrar, also appointed by the Secretary of State[265]. Schedule 2 to the Enterprise Act contains provisions on such matters as eligibility for appointment as President or chairman of the Tribunal. Section 14 of the Act and Part I of Schedule 4 deal with the constitution of the Tribunal. Section 13 and Schedule 3 establish the Competition Service, the purpose of which is to fund and provide support services to the Tribunal[266]. The CAT's website provides details of decided and pending cases, and all of its judgments will be found there[267]. The CAT may sit outside London[268]. The CAT publishes an Annual Review and Accounts[269]. On 20 June 2011 the CAT had a staff of 13, including the Registrar and three referendaires. The CAT has established a User Group, which meets twice a year, to discuss its practical operation[270].

(B) Functions of the CAT

The CAT, which is an independent judicial body, has four functions under the Enterprise Act[271]; it also has some functions in relation to regulatory matters (see below). The first function under the Enterprise Act is to hear appeals from 'appealable decisions' of the OFT and the sectoral regulators under the Competition Act 1998 and Articles 101 and 102 TFEU[272]. Appeals on a point of law or as to the amount of a penalty lie from decisions of the

[259] The website of the CC is www.competition-commission.org.uk.

[260] See *Estimated benefits to consumers from the CC's actions in mergers and market investigations between April 2009 and March 2010*, available at www.competition-commission.org.uk.

[261] The Competition Act 1998 had established, within the CC, appeal tribunals which could hear appeals under that Act; these tribunals have been abolished, and the Competition Appeal Tribunal inherited their functions on 1 April 2003; s 21 of and Sch 5 to the Enterprise Act amend various provisions of the Competition Act 1998 in relation to proceedings of the Tribunal.

[262] Enterprise Act 2002, s 12(2)(a).

[263] Ibid, s 12(2)(b).

[264] Ibid, s 12(2)(c).

[265] Ibid, s 12(3).

[266] Ibid, s 13(2).

[267] The website of the CAT is www.catribunal.org.uk.

[268] See the Competition Appeal Tribunal Rules 2003, SI 2003/1372, rule 18; the CAT has sat in Belfast, in the *BetterCare* case and in Edinburgh in the *Aberdeen Journals* and *Claymore* cases: for details of these cases see the CAT's website.

[269] Available at www.catribunal.org.uk.

[270] The most recent minutes of the User Group meetings are available at www.catribunal.org.uk.

[271] See Bailey 'The early case law of the Competition Appeal Tribunal' in Rodger (ed) *Ten Years of UK Competition Law Reform* (Dundee University Press, 2010), ch 2.

[272] On appealable decisions see ch 10, 'Appealable decisions', pp 440–443; it is also possible that an application for judicial review of the OFT and sectoral regulators may be brought before the Administrative Court: ch 10, 'Appealable decisions', p 440.

CAT with permission to the Court of Appeal in England and Wales, to the Court of Session in Scotland and to the Court of Appeal of Northern Ireland in Northern Ireland[273]. From the Court of Appeal a further appeal may be taken, with permission, to the Supreme Court (formerly the House of Lords). It is also possible for the CAT to refer a matter of EU law to the Court of Justice[274]. The second function of the CAT is to hear monetary claims arising from infringement decisions made by the UK competition authorities or the European Commission under the Competition Act or the TFEU[275]. The third function is to deal with applications for review of decisions of the OFT, the Secretary of State or other Minister or the CC in relation to mergers[276] and market investigations[277]. The fourth function of the CAT under the Enterprise Act is to hear appeals against penalties imposed by the CC for failure to comply with notices requiring the attendance of witnesses or the production of documents in the course of a market or merger investigation[278].

The Communications Act 2003 provides that the CAT will hear appeals on the merits against certain decisions taken by OFCOM or the Secretary of State (as the case may be) under its provisions; the CAT must refer price control matters to the CC and decide the appeal on those matters in accordance with the CC's determination, unless it decides that the determination would be set aside on an application for judicial review[279]. The CAT has also been given certain functions under the Electricity (Single Wholesale Market)(Northern Ireland) Order 2007[280], the Mobile Roaming (European Communities) Regulations 2007[281], Schedule 2A to the Electricity Act 1989 in relation to determinations by OFGEM in respect of property schemes, and the Payment Services Regulations 2009[282].

Provision is made by section 16 of the Enterprise Act 2002 for the Lord Chancellor to adopt regulations enabling the transfer of cases between the civil courts and the CAT for it to determine whether there has been an infringement of Articles 101 and/or 102 TFEU or of the Chapter I and II prohibitions in the Competition Act. These provisions had not been activated as at 20 June 2011.

(C) Rules

Section 15 of the Enterprise Act 2002 and Part 2 of Schedule 4 provide for the Secretary of State to make rules with respect to proceedings before the CAT. The Competition Appeal Tribunal Rules 2003[283] entered into force in June 2003. The 2003 rules have been amended by the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004[284]. Following an Introduction in Part I, Part II of the 2003 Rules deals with appeals to the CAT respectively under the Competition Act and Communications Act[285];

[273] Competition Act 1998, s 49: see *t*he Competition Appeal Tribunal Rules 2003, SI 2003/1372, rules 58 and 59 and ch 10, 'Appeals from the CAT to the Court of Appeal', p 449.

[274] See The Competition Appeal Tribunal Rules 2003, SI 2003/1372, rule 60 and ch 10, 'Which courts or tribunals in the UK can make an Article 267 reference in a case under the Competition Act 1998?', p 450; the CAT was asked to make a reference but declined to do so in Case No 1100/3/3/08 *The Number (UK) Ltd v OFCOM* [2008] CAT 33, paras 159–173; the Court of Appeal subsequently made a reference for a preliminary ruling, [2009] EWCA Civ 1360 which the Court of Justice gave on 17 February 2011 in Case C-16/10 *The Number (UK) and Conduit Enterprises* [2011] ECR I-000.

[275] See ch 8, 'Follow-on actions in the CAT and the High Court', pp 317–319.

[276] Enterprise Act 2002, s 120: see ch 22, 'Review of decisions under Part 3 of the Enterprise Act', pp 950–951.

[277] Enterprise Act 2002, s 179: see ch 11, 'Review of decisions under Part 4 of the Enterprise Act', pp 478–479.

[278] See further ch 11, 'Powers of investigation', p 477 and ch 22, 'Investigation powers and penalties', p 949.

[279] Communications Act 2003, s 193 and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004, SI 2004/2068; see Case No 1146/3/3/09 *British Telecommunications Plc v OFCOM* [2010] CAT 15, paras 9–53.

[280] SI 2007/913. [281] SI 2007/1933. [282] SI 209/2009. [283] SI 2003/1372.

[284] SI 2004/2068.

[285] On appeals under the Competition Act see ch 10, 'Appeals', pp 439–449.

Part III is concerned with proceedings under the Enterprise Act, that is appeals against penalties in merger and market investigations[286] and reviews of merger and market investigation references[287]. Part IV of the Rules deals with claims for damages under section 47A and 47B of the Competition Act[288], and Part V contains provisions on matters such as hearings, confidentiality, decisions of the CAT, appeals to the Court of Appeal and Article 267 references to the Court of Justice[289]. The CAT published a *Guide to Proceedings* in October 2005 which provides guidance for parties and their legal representatives as to its procedures in relation to all cases which it is competent to entertain and which has the status of a Practice Direction under Rule 68(2) of the 2003 Rules. Dissenting judgments are possible: this had happened on three occasions by 20 June 2011[290].

(viii) Civil courts

Where a warrant is required to enter premises under section 28, section 28A or section 62A of the Competition Act 1998, this must be obtained from a judge of the High Court[291]. The High Court may also issue warrants to enter premises in relation to investigations under the EU competition rules[292].

Actions may be brought in the High Court where there are infringements of Articles 101 and 102 TFEU or the Chapter I and II prohibitions[293]; such actions are usually brought in the Chancery Division, but sometimes may be dealt with by the Commercial Court[294]. Where the OFT or the CAT has already found such an infringement its decisions are binding in proceedings before the ordinary courts[295]. As noted above, the Enterprise Act makes provision for the Lord Chancellor to adopt regulations for the transfer of cases to and from the CAT[296].

(ix) Criminal courts

The Competition Act 1998 and the Enterprise Act 2002 create a number of criminal offences. Most notably, the Enterprise Act establishes the 'cartel offence', the commission of which could attract a prison sentence of up to five years as well as a fine[297]. The cartel offence is described in detail in chapter 10[298], as is the possibility that some cartel behaviour may, in exceptional circumstances, be criminal at common law as a conspiracy to defraud[299]. Under the Competition Act various criminal offences may also be committed

[286] See ch 11, 'Powers of investigation', p 477 and ch 22, 'Investigation powers and penalties', p 949.

[287] See ch 22, 'Review of decisions under Part 3 of the Enterprise Act', pp 937–938 (mergers) and ch 11, 'Review of decisions under Part 4 of the Enterprise Act', pp 478–479 (market investigations).

[288] See ch 8, 'Follow-on actions in the CAT and the High Court', pp 317–319.

[289] On Article 267 references see ch 10, 'Article 267 References', pp 449–450.

[290] Case No 1061/1/1/06 *Makers UK Ltd v OFT* [2007] CAT 11, [2007] CompAR 699, paras 172–173; Case No 1085/3/3/07 *British Telecommunications Plc v OFCOM* [2009] CAT 1, paras 91–107; and Case No 1154/3/3/10 *Telefónica O2 UK Ltd v OFCOM* [2010] CAT 25, paras 106–175.

[291] Competition Act 1998, s 28(1) and s 59; in Scotland the relevant court is the Court of Session: ibid.

[292] Ibid, ss 62 and 63.

[293] On the enforcement of Articles 101 and 102 TFEU and the Competition Act in the civil courts see ch 8 generally.

[294] *Practice Direction – Competition Law – Claims Relating to the Application of Articles [101 and 102 TFEU] and Chapters I and II of Part I of the Competition Act 1998*, available at www.justice.gov.uk.

[295] Competition Act 1998, s 58A; the ordinary courts are also bound by findings of fact made by the OFT in the course of its investigation, unless the court directs otherwise: ibid, s 58.

[296] Claims which may be made under sections 47A and 47B of the Competition Act may be transferred between the civil courts and the CAT: see rules 48 and 49 of the Competition Appeal Tribunal Rules 2003, SI 2003/1372, and CPR Part 30 Practice Direction, 30PD.8, available at www.justice.gov.uk.

[297] Enterprise Act 2002, s 190.

[298] See ch 10, 'The cartel offence', pp 425–434.

[299] See ch 10, 'Conspiracy to defraud at common law', p 436.

where investigations are obstructed, documents are destroyed or falsified or where false or misleading information is provided[300]. It is also a criminal offence to obstruct investigations conducted under the EU competition rules[301].

4. The Relationship Between EU Competition Law and National Competition Laws

(A) Introduction

All the Member States of the EU have systems of competition law, in large part modelled upon Articles 101 and 102. Some Member States require that domestic law should be interpreted consistently with the EU rules, thereby reinforcing the alignment of EU and domestic law[302]. It follows that many cases will have the same outcome whether they are investigated under EU or under domestic law: for example, a horizontal price-fixing agreement would infringe Article 101(1), and would normally also be caught by any domestic system of competition law in the EU unless, for example, it occurred in a sector which was not subject to the domestic rules. Even though there is a high degree of convergence between EU and domestic competition law, nevertheless the possibility remains that there could be different outcomes depending on which system of law is applied. In some cases domestic law may be more generous than EU law; in other cases the possibility exists that domestic law could have a stricter effect than EU law.

Much thought has gone into the issue of conflicts between EU and domestic competition law over the years[303]. The starting point is that EU law takes precedence over national law, so that where a clash occurs it is the former which must be applied[304]: in *Walt Wilhelm v Bundeskartellamt*[305] the Court of Justice held that conflicts between the rules of the EU and national rules on cartels must be resolved by applying the principle that EU law takes precedence. However the *Walt Wilhelm* judgment did not provide answers to all the situations that could arise: for example, could a Member State prohibit an agreement which benefited from an EU block exemption[306]? These matters are now dealt with by Article 3 of Regulation 1/2003.

[300] Competition Act 1998, ss 42–44, ss 65L–65N and s 72: see ch 10, 'Offences', pp 401–402.

[301] Competition Act 1998, s 65.

[302] Section 60 of the Competition Act 1998 is an example of this in the UK: see ch 9, '"Governing Principles Clause": Section 60 of the Competition Act 1998', pp 362–367.

[303] See eg Markert 'Some Legal and Administrative Problems of the Co-existence of Community and National Competition Law in the EC' (1974) 11 CML Rev 92; Stockmann 'EC Competition Law and Member State Competition Laws' [1987] Fordham Corporate Law Institute (ed Hawk), pp 265–300; Bellamy and Child *European Community Law of Competition* (Sweet & Maxwell, 5th ed, 2001, ed Roth), paras 10–074 to 10–080; Whish *Competition Law* (Butterworths, 4th ed, 2001), pp 322–329; Goyder *EC Competition Law* (Oxford EC Law Library, 4th ed, 2003), pp 440–445; Kerse and Khan *EC Antitrust Procedure* (Sweet & Maxwell, 5th ed, 2005), para 5.56.

[304] See Case 6/64 *Costa v ENEL* [1964] ECR 585, [1964] CMLR 425; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, [1978] 3 CMLR 263; Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, [1990] 3 CMLR 1; Case C-221/89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 3)* [1991] ECR I-3905, [1991] 3 CMLR 589; note also that NCAs have an obligation to disapply national law that involves an infringement of EU competition law: Case C-198/01 *Consorzio Industrie Fiammiferi* [2003] ECR I-8055, [2003] 5 CMLR 829.

[305] Case 14/68 [1969] ECR 1, [1969] CMLR 100.

[306] The Court of Justice declined to give an answer to this question in Case C-70/93 *Bayerische Motoren Werke AG v ALD Auto-Leasing* [1995] ECR I-3439, [1996] 4 CMLR 478 and Case C-266/93 *Bundeskartellamt v Volkswagen ACT and VAG Leasing GmbH* [1995] ECR I-3477, [1996] 4 CMLR 478, since it concluded that

(B) Regulation 1/2003[307]

Under the regime introduced by Regulation 1/2003[308] the Commission shares the competence to apply Articles 101 and 102 with national competition authorities ('NCAs') and national courts; of course NCAs and national courts can also apply domestic law. Member States are required by Article 35 of the Regulation to designate the authorities responsible for the application of Articles 101 and 102[309]: in the UK the OFT and the sectoral regulators have been designated as NCAs[310]. Recitals 8 and 9 and Article 3 of the Regulation deal with the relationship between Articles 101 and 102 and national competition laws.

(i) Obligation to apply Articles 101 and 102

Recital 8 states that, in order to ensure the effective enforcement of EU competition law, it is necessary to oblige NCAs and national courts, where they apply national competition law to agreements or practices, to also apply Article 101 or 102 where those provisions are applicable. Article 3(1) therefore provides that, where NCAs or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices that may affect trade between Member States, they shall also apply Article 101; similarly they must apply Article 102 to any behaviour prohibited by that provision[311]. In its *Report on the functioning of Regulation 1/2003*[312] the Commission reported that Article 3(1) had led to a very significant increase in the application of Articles 101 and 102, 'making a single legal standard a reality on a very large scale'[313].

It is the concept of 'trade between Member States' that triggers the obligation to apply Articles 101 and 102, which is why the Commission published guidance on it in 2004[314]. The OFT's view is that the prosecution of *individuals* for commission of the cartel offence contained in section 188 of the Enterprise Act 2002 does *not* trigger the obligation to apply Article 101, since Article 101 is aimed at the anti-competitive agreements of *undertakings* rather than individuals[315]. The Court of Appeal concurred with this view, albeit on different grounds. In *IB v The Queen* the Court held that the cartel offence is not a 'national competition law' in the sense of Article 3 of Regulation 1/2003 and rejected the argument that the Crown Court, which is not a designated competition authority for the purposes of

the agreements under consideration in those cases were not covered by the block exemption for motor car distribution in force at that time.

[307] For further discussion of Article 3 of Regulation 1/2003 see Faull and Nikpay *The EC Law of Competition* (Oxford University Press, 2nd ed, 2007), paras 2.28–2.73; O'Neill and Saunders *UK Competition Procedure* (Oxford University Press, 2007), paras 3.08–3.93; see also the OFT's guidance *Modernisation* OFT 442, December 2004, paras 4.1–4.30.

[308] See ch 2, n 1 above.

[309] Designated national authorities have the right to participate in judicial proceedings against a decision that they have taken in relation to Articles 101 and/or 102: Case C-439/08 *VEBIC v Raad voor de Mededinging*, [2011] 4 CMLR 635.

[310] Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261, reg 3.

[311] The temporal effect of this provision is under examination in Case C-17/10 *Toshiba Corporation v Úřad pro ochranu hospodářské soutěže*, not yet decided.

[312] SEC(2009) 574; see also the Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, COM(2009) 206 final, paras 139–181 which contains detailed analysis of the operation of Article 3 between 2004 and 2009; both documents are available at www.ec.europa.eu/competition/antitrust/legislation.html.

[313] SEC(2009) 574, para 25.

[314] *Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU]* OJ [2004] C 101/81; the *Guidelines* are discussed in ch 3, 'The Effect on Trade between Member States', pp 142–146.

[315] See the OFT's guidance *Modernisation* OFT 442, December 2004, paras 4.21–4.22; see also Dekeyser's comments during a roundtable discussion at [2004] Fordham Corporate Law Institute (ed Hawk), pp 734–735.

that Regulation, did not have jurisdiction to try an indictment alleging the cartel offence[316]. The Court added that, even if the cartel offence were part of national competition law, it is a part of it which is not concerned with directly applying Article 101[317]. The position is not free from doubt, however[318]. In practice the reality is that the OFT, when proceeding against individuals under the Enterprise Act, would probably also conduct an investigation against the undertakings involved in the cartel under domestic and/or EU law[319]: whether it would be doing so as a result of an obligation arising from Article 3(1) may be a merely academic question.

In certain circumstances the use by sectoral regulators of their sector-specific regulatory powers might amount to the application of national competition law, with the consequence that the obligation to apply Articles 101 and 102 TFEU would arise in the event that the agreement or behaviour in question had an effect on trade between Member States[320].

(ii) Conflicts: Article 101

Recital 8 of Regulation 1/2003 states that it is necessary to create a 'level playing field' for agreements within the internal market. What this means is that, if an agreement is not prohibited under EU competition law, it should not be possible for an NCA or national court to apply stricter national competition law to it; this may be termed a 'convergence rule'[321]. Article 3(2) therefore provides that the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) or which fulfil the conditions of Article 101(3) or which are covered by a block exemption. There appear to have been no major difficulties with the application of the convergence rule between 2004 and 2009[322]. In terms of UK law it follows that, in so far as agreements affect trade between Member States but do not infringe Article 101(1) or do satisfy the criteria set out in Article 101(3), it would not be possible to take action against them under the market investigation provisions of the Enterprise Act 2002[323].

(iii) Conflicts: Article 102

The position in relation to Article 102 is different, since Regulation 1/2003 does not demand convergence in relation to unilateral behaviour. Recital 8 of the Regulation states that Member States should not be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct. Article 3(2) therefore makes provision to this effect. An example of a stricter national law on unilateral behaviour would be one that is intended to protect economically

[316] [2009] EWCA Crim 2575, [2010] 2 All ER 728, paras 21–37.

[317] Ibid, para 38; if an OFT investigation into an alleged cartel offence were considered to be 'acting under Article 101 or Article 102' for the purposes of Article 11(3) of Regulation 1/2003, the European Commission would have power under Article 11(6), by commencing its own proceedings, to relieve the OFT of the power to proceed.

[318] See eg Wils *Principles of European Antitrust Enforcement* (Hart Publishing, 2005), paras 153–157 and Wils 'Is Criminalization of EC Competition Law the Answer?' (2005) 28(2) World Competition 117, pp 130–133.

[319] *Modernisation* OFT 442, December 2004, paras 4.23–4.27.

[320] Ibid, paras 4.28–4.30.

[321] See the European Commission's *Guidelines on the application of Article [101(3) TFEU]* OJ [2004] C 101/8, para 14; *Faull and Nikpay*, para 2.30.

[322] See Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, COM(2009) 206 final, para 159.

[323] See further ch 11, 'Relationship with Regulation 1/2003', pp 469–470.

dependent undertakings: several Member States have laws to this effect[324]. In terms of UK law it follows from Article 3(2) that it would be possible to take action under the market investigation provisions of the Enterprise Act 2002 against unilateral behaviour, such as refusal to supply or the imposition of unfair prices or other trading conditions, to stricter effect than the position under Article 102[325]. In so far as legislation such as the UK Gas Act 1986, the Electricity Act 1989 or the Communications Act 2003 provides for the imposition of *ex ante* regulatory controls on the unilateral behaviour of regulated undertakings, and in so far as those controls could be regarded as provisions of competition law, Article 3(2) would allow them to be applied to achieve a stricter outcome than under Article 102. In the event that they were intended to protect some other legitimate interest than the protection of competition they could be applied by virtue of Article 3(3) (below).

In its *Report on the functioning of Regulation 1/2003*[326] the Commission noted that the business and legal communities had criticised the divergence of legal standards on unilateral conduct across the Member States. The Commission considers that the exclusion of unilateral conduct from the scope of the convergence rule is a matter which warrants further reflection.

(iv) Protection of 'other legitimate interests'

Recital 9 of Regulation 1/2003 states that its provisions should not preclude Member States from applying national legislation that protects legitimate interests other than the protection of competition on the market, provided that such legislation is compatible with the general principles and other provisions of EU law[327]. Article 3(3) therefore provides that the Regulation does not preclude the application of provisions of national law that 'predominantly pursue an objective different from that pursued by Articles [101 and 102 TFEU]'. Recital 9 of the Regulation says that Articles 101 and 102 have as their objective 'the protection of competition on the market', which provides a benchmark against which to measure whether a particular national provision pursues an objective different from the EU competition rules. The recital specifically says that a Member State could apply legislation intended to combat unfair trading practices, for example a law that prevents the imposition on customers of terms and conditions that are unjustified, disproportionate or without consideration.

There may be situations in which it will be unclear whether a particular national provision is predominantly concerned with matters other than the protection of competition. Certain regulatory rules – for example requiring the provision of a universal service or the protection of vulnerable consumers – clearly pursue objectives other than the protection of competition and so could be applied by virtue of Article 3(3)[328]. Consumer laws which provide protection against, for example, unfair contract terms, misleading advertising or sharp selling practices would also seem to pursue a predominantly different objective from

[324] The Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 SEC(2009) 574 final, paras 162–169 provides examples of national rules concerning economic dependence and similar situations, available at www.ec.europa.eu.

[325] See further ch 11, 'Relationship with Regulation 1/2003', p 469–470.

[326] SEC(2009) 574, para 27; see also Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, COM(2009) 206 final, paras 160–179.

[327] See, to similar effect, Article 21(4) of the EUMR, discussed in ch 21, 'Article 21(4): legitimate interest clause', pp 851–852.

[328] See further *Concurrent application to regulated industries* OFT 405, December 2004, para 4.7.

Articles 101 and 102 TFEU[329]. However a national rule that was dependent, for example, on a prior finding of significant market power would look more like a rule whose concern was the protection of competition[330]. In that case the derogation provided by Article 3(3) would not be applicable, so that the position would be governed by Article 3(2): a stricter national rule in relation to agreements could not be applied, but a stricter rule on unilateral behaviour could be.

In *Days Medical Aids Ltd v Pihsiang*[331] the High Court suggested that the common law doctrine of restraint of trade could not be said predominantly to pursue an objective different from Articles 101 and 102 TFEU, with the result that it could not be applied to invalidate an agreement that did not infringe Article 101.

5. The Institutional Structure of EU and UK Competition Law

The following diagrams set out the institutional architecture of EU and UK competition law.

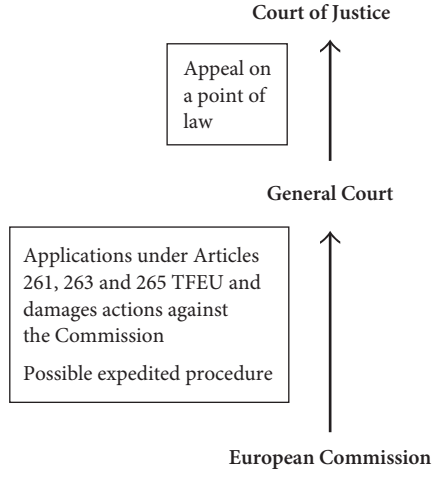

Fig. 2.1 Articles 101 and 102 TFEU; EU Merger Regulation

[329] For discussion on this point see Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, COM(2009) 206 final, para 181.

[330] See eg Communications Act 2003, s 45.

[331] [2004] EWHC 44, paras 254–266; see also *Jones v Ricoh UK Ltd* [2010] EWHC 1743, para 49.

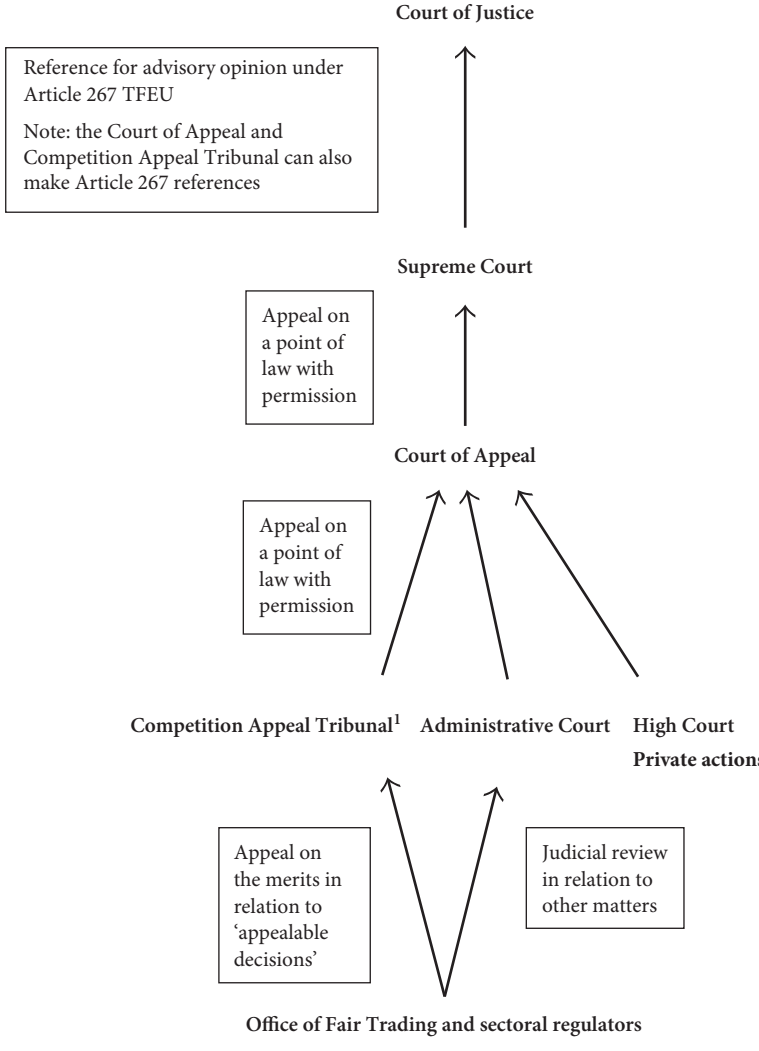

Fig. 2.2 Articles 101 and 102 TFEU; Competition Act 1998, Chapter I and II Prohibitions

[1] The Competition Appeal Tribunal also hears 'follow-on' actions for damages under sections 47A and 47B of the Competition Act 1998.

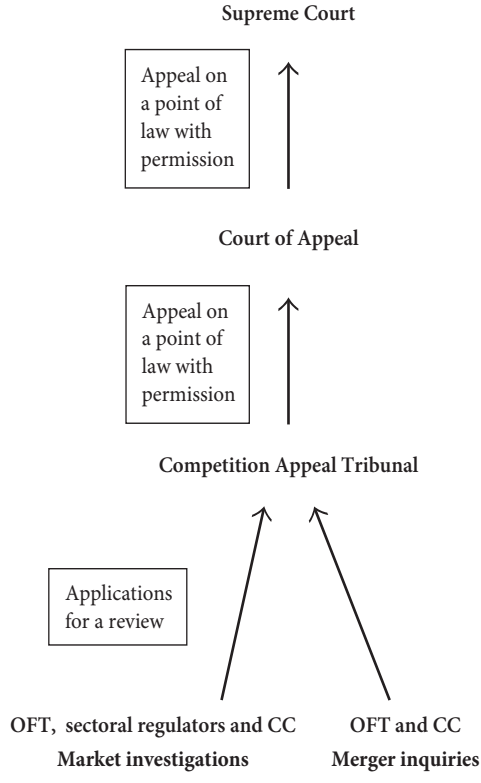

Fig. 2.3 Market investigations and merger investigations

3

Article 101(1)[1]

1. Introduction

This chapter is concerned with Article 101(1) TFEU which prohibits agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition. Article 101(1) may be declared inapplicable where the criteria set out in Article 101(3) are satisfied: the provisions of Article 101(3) are considered in chapter 4. An agreement which is prohibited by Article 101(1) and which does not satisfy Article 101(3) is stated to be automatically void by virtue of Article 101(2)[2]. The full text of Article 101 is as follows:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[1] For further reading on Article 101(1) readers are referred to Faull and Nikpay *The EC Law of Competition* (Oxford University Press, 2nd ed, 2007), ch 3, paras 3.01–3.392; Bellamy & Child *European Community Law of Competition* (Oxford University Press, 6th ed, 2008, eds Roth and Rose), ch 3.

[2] See ch 8, 'The sanction of voidness', pp 319–325 on the implications of the sanction of voidness in Article 101(2).

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   – any agreement or category of agreements between undertakings;
   – any decision or category of decisions by associations of undertakings;
   – any concerted practice or category of concerted practices;

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

Many aspects of the basic prohibition in Article 101(1) require elaboration. First, the meaning of 'undertakings' and 'associations of undertakings' and then the terms 'agreements', 'decisions' and 'concerted practices' will be explained. The fourth section of this chapter will consider what is meant by agreements that 'have as their object or effect the prevention, restriction or distortion of competition'. The fifth section deals with the *de minimis* doctrine. Section six explains the requirement of an effect on trade between Member States. The chapter concludes with a checklist of agreements that, for a variety of reasons, normally fall outside Article 101(1).

2. Undertakings and Associations of Undertakings[3]

Five issues must be considered in respect of this term: first, its basic definition for the purpose of Articles 101 and 102[4]; second, the meaning of 'associations of undertakings'; third, whether two or more legal persons form a single economic entity – and therefore comprise one undertaking – and the significance of such a finding; fourth, whether two or more entities may be treated as one undertaking where there is a corporate reorganisation; and fifth which undertaking is liable for an infringement of competition law when one business is sold to another.

The Treaty does not define an 'undertaking'[5]: it has been a task for the EU Courts to clarify its meaning[6]. However it is a critically important term, since only agreements and concerted practices *between undertakings* are caught by Article 101; similarly, Article 102 applies only to abuses committed by dominant *undertakings*. There is no doubt that organs of the Member States (for example public authorities, municipalities, communes, the health service) and entities entrusted by the Member States with regulatory or other

[3] For a particularly interesting discussion of this expression see Odudu 'The meaning of undertaking within Article 81 EC' in *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press, 2006), ch 3.

[4] The term undertaking has the same meaning under Article 102, and this section discusses cases decided under both Article 101 and Article 102.

[5] Article 80 of the former ECSC Treaty and Article 80 of the Euratom Treaty do contain definitions of an undertaking for their respective purposes, as does Article 1 of Protocol 22 of the EEA Agreement.

[6] See Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501, [2008] 5 CMLR 962, para 144: 'the gradual clarification of the notions of "agreement" and "undertaking" by the Community judicature is of decisive importance in assessing whether their application in practice is definite and foreseeable'.

functions are capable of distorting competition. The competition law question is whether the distortion of competition is the responsibility of an *undertaking*: if it is, the behaviour in question may infringe Articles 101 and/or 102, subject to the availability of various defences such as state compulsion[7] or Article 106(2)[8]. However where the behaviour that distorts competition is not that of an undertaking, it will not be subject to competition law scrutiny at all. As will be seen, there have been many cases in which the EU Courts have been asked whether a particular entity, accused of anti-competitive behaviour, qualified as an undertaking for the purpose of the competition rules. The question often arises in the case of so-called 'mixed markets', where the state and private firms are both present on a market and where, typically, the latter complain of anti-competitive conduct on the part of the former. In so far as it is thought that there should be 'competitive neutrality' – more colloquially a level playing field – there would seem to be an attraction in treating all the operators on such markets as undertakings, with the responsibilities that that entails[9]; however this is not the inevitable outcome, as will be seen in the case law discussed below.

A separate question, considered in chapter 6, is whether Member States themselves may be liable for the anti-competitive behaviour of public undertakings and undertakings that have 'special or exclusive rights'.

(A) Basic definition

The Court of Justice held in *Höfner and Elser v Macrotron GmbH*[10] that:

> the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.

In *Pavlov*[11] the Court added that:

> It has also been consistently held that any activity consisting in offering goods or services on a given market is an economic activity.

In *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*[12] the Court said that the competition rules in the Treaty:

> do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity . . . or which is connected with the exercise of the powers of a public authority.

These statements are a helpful starting point in understanding the meaning of the term undertaking and will be considered in the text that follows.

(i) Need to adopt a functional approach

It is important to understand at the outset that the same legal entity may be acting as an undertaking when it carries on one activity but not when it is carrying on another. A 'functional approach' must be adopted when determining whether an entity, when

[7] See 'State compulsion and highly regulated markets', pp 137–138 below.

[8] See ch 6, 'Article 106(2)', pp 235–242.

[9] For discussion see *Competition in mixed markets: ensuring competitive neutrality* OFT 1242, July 2010, available at www.oft.gov.uk.

[10] Case C-41/90 [1991] ECR I-1979, [1993] 4 CMLR 306, para 21.

[11] Cases C-180/98 etc [2000] ECR I-6451, [2001] 4 CMLR 30, para 75.

[12] Case C-309/99 [2002] ECR I-1577, [2002] 4 CMLR 913, para 57.

engaged in a particular activity, is doing so as an undertaking for the purpose of the competition rules[13]. As the Court of Justice said in *MOTOE*[14]:

> The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity[15].

Thus, for example, a local authority in the UK may (a) have powers to adopt bye-laws specifying where cars can and cannot be parked and (b) own land which it operates commercially as a car park. When performing function (a) the authority would, in the language of *Wouters*, be exercising the powers of a public authority and therefore would not be acting as an undertaking; the behaviour in (b), however, would be economic, and therefore that of an undertaking[16]. In *SELEX Sistemi Integrati SpA v Commission*[17] the General Court had to decide whether Eurocontrol, an entity created by Member States of the EU for the purpose of establishing navigational safety in the airspace of Europe, was acting as an undertaking for the purpose of the EU competition rules. The Court concluded that some of Eurocontrol's activities – for example setting technical standards, procuring prototypes and managing intellectual property rights – were not economic; however it also concluded that some other activities – for example the provision of technical assistance to national administrations – could be separated from its other functions[18] and be characterised as economic[19]. An appeal by SELEX to the Court of Justice against the former ruling was dismissed; and in the course of its judgment the Court held that the General Court had erred in concluding that the latter activities were economic[20].

(ii) 'Engaged in an economic activity'

The sentence quoted from the *Höfner and Elser* judgment states that every entity engaged in economic activity does so as an undertaking: it is the idea of economic activity, therefore, that needs to be explored.

(A) Offering goods or services on a given market is an economic activity

As noted above the Court of Justice stated in *Pavlov* that activity consisting in offering goods or services on a market is an economic activity. The Commission held in *Spanish Courier Services*[21] that the Spanish Post Office, in so far as it was providing services on the market, was acting as an undertaking; in *Höfner and Elser* the Court of Justice reached the same conclusion in respect of the German Federal Employment Office. In *Ambulanz Glöckner v Landkreis Südwestpfalz*[22] the Court of Justice held that medical aid organisations providing ambulance services for remuneration were acting as undertakings for the purpose of the competition rules[23]. A legal entity that acts as a 'facilitator' to a cartel can be an undertaking, even though it does not itself produce the goods or services that are

[13] On this point see the Opinion of Advocate General Jacobs in Cases C-67/96 etc *Albany International BV v SBT* [1999] ECR I-5751, [2000] 4 CMLR 446, para 207; this Opinion contains an invaluable discussion of the meaning of undertakings in Article 101(1).

[14] Case C-49/07 [2008] ECR I-4863, [2008] 5 CMLR 790. [15] Ibid, para 25.

[16] See eg *Eco-Emballages* OJ [2001] L 233/37, [2001] 5 CMLR 1096, para 70: French local authorities were acting as undertakings when entering into contracts in relation to the collection of household waste.

[17] Case T-155/04 [2006] ECR II-4797, [2007] 4 CMLR 372.

[18] Ibid, para 86. [19] Ibid, para 92.

[20] Case C-113/07 P *SELEX Sistemi Integrati SpA v Commission* [2009] ECR-I 2207, [2009] 4 CMLR 1083, paras 77–79.

[21] OJ [1990] L 233/19, [1991] 4 CMLR 560.

[22] Case C-475/99 [2001] ECR I-8089, [2002] 4 CMLR 726. [23] Ibid, paras 19–22.

cartelised[24]. The mere holding of shares in an undertaking does not, in itself, mean that the owner of the shares is itself an undertaking engaged in economic activity; however the position would be different where the shareholder actually exercises control by involving itself in the management of the undertaking[25].

(B) No need for a profit-motive or economic purpose

The fact that an organisation lacks a profit-motive[26] or does not have an economic purpose[27] does not, in itself, mean that an activity is not economic. On this basis the Commission held in *Distribution of Package Tours During the 1990 World Cup*[28] that FIFA, the body responsible for the 1990 Football World Cup in Italy, as well as the Italian football association and the local organising committee, were undertakings subject to Article 101[29]. In *Piau*[30] the General Court held that the practice of football by football clubs is an economic activity[31], and that national associations that group the clubs together are associations of undertakings; the position does not alter because the national associations group amateur clubs alongside professional ones[32]. The General Court also held in this case that FIFA was an association of undertakings[33].

(C) 'Regardless of the legal status of the entity and the way in which it is financed'

The Court of Justice in *Höfner and Elser* held that an assessment of whether an entity was acting as an undertaking was to be determined 'regardless of the legal status of the entity and the way in which it is financed'. An entity can be found to be acting as an undertaking only as a result of the activity it is engaged in; its legal form is irrelevant. Companies and partnerships of course can qualify as undertakings, but so too can other entities such as agricultural cooperatives[34], P and I clubs[35] and trade associations: it follows that agreements between trade associations may themselves be caught by Article 101(1)[36]. Natural persons have often been held to qualify as undertakings[37], although an individual acting

[24] *Organic peroxides*, Commission decision of 10 December 2003, paras 331–349, upheld on appeal to the General Court Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501, [2008] 5 CMLR 962; see further ch 13, 'Price fixing in any form is caught', p 525.

[25] Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR I-289, [2008] 1 CMLR 705, paras 111–113.

[26] See eg Cases 209/78 etc *Van Landewyck v Commission* [1980] ECR 3125, [1981] 3 CMLR 134, para 88; *P & I Clubs* OJ [1985] L 376/2, [1989] 4 CMLR 178; *P & I Clubs* OJ [1999] L 125/12, [1999] 5 CMLR 646; Case C-244/94 *Fédération Française des Sociétés d'Assurance* [1995] ECR I-4013, [1996] 4 CMLR 536, para 21; Cases C-67/96 etc *Albany International BV v SBT* [1999] ECR I-5751, [2000] 4 CMLR 446, para 85.

[27] Case 155/73 *Italy v Sacchi* [1974] ECR 409, [1974] 2 CMLR 177, paras 13–14; Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR I-289, [2008] 1 CMLR 705, para 123.

[28] OJ [1992] L 326/31, [1994] 5 CMLR 253, para 43.

[29] Ibid, paras 44–57; see similarly *UEFA's Broadcasting Regulations* OJ [2001] L 171/12, [2001] 5 CMLR 654, para 47.

[30] Case T-193/02 [2005] ECR I-209, [2005] 5 CMLR 42; see also Case C-519/04 P *Meca-Medina v Commission* [2006] ECR I-6991, [2006] 5 CMLR 1023: the IOC was held to be an undertaking and an association of undertakings.

[31] Case T-193/02 [2005] ECR I-209, [2005] 5 CMLR 42, para 69.

[32] Ibid, para 70. [33] Ibid, para 72.

[34] See eg Case 61/80 *Coöperative Stremsel- en Kleurselfabriek v Commission* [1981] ECR 851, [1982] 1 CMLR 240; *MELDOC* OJ [1986] L 348/50, [1989] 4 CMLR 853.

[35] *P & I Clubs* OJ [1985] L 376/2, [1989] 4 CMLR 178; *P & I Clubs* OJ [1999] L 125/12, [1999] 5 CMLR 646, paras 50–51.

[36] See eg Case 71/74 *FRUBO v Commission* [1975] ECR 563, [1975] 2 CMLR 123; Case 96/82 *IAZ International Belgium NV v Commission* [1983] ECR 3369, [1984] 3 CMLR 276; *Algemene Schippersvereniging v ANTIB* OJ [1985] L 219/35, [1988] 4 CMLR 698, upheld on appeal Case 272/85 *ANTIB v Commission* [1987] ECR 2201, [1988] 4 CMLR 677.

[37] See eg *AOIP v Beyrard* OJ [1976] L 6/8, [1976] 1 CMLR D14 where a patent licence between an individual and a company was held to fall within Article 101(1); *Reuter/BASF* OJ [1976] L 254/40, [1976] 2 CMLR D44;

as an employee would not be[38]; nor would an individual purchasing goods or services as an end user/consumer, since that behaviour is not economic[39].

Public authorities, such as the Federal Employment Office in *Höfner and Elser* or the Autonomous Administration of State Monopolies in *Banchero*[40], have been held to be engaged in activities of an economic nature with regard to employment procurement and the offering of goods and services on the market for manufactured tobacco respectively. State-owned corporations may act as undertakings[41], as may bodies entrusted by the state with particular tasks[42] and quasi-governmental bodies which carry on economic activities[43]. Aéroports de Paris, responsible for the planning, administration and development of civil air transport installations in Paris, the Portuguese Airports Authority, ANA and the Finnish Civil Aviation Administration were all found by the Commission to constitute undertakings[44]. In *Aluminum Products*[45] foreign trade organisations in east European countries were regarded as undertakings, even though they had no existence separate from the state under their domestic law: claims of sovereign immunity should be confined to acts which are those of government and not of trade. The same point was made by the Commission in its decision in *Amministrazione Autonoma dei Monopoli di Stato*[46].

(iii) Activities that are not economic

Activities provided on the basis of 'solidarity' are not economic; nor is the exercise of public power. Procurement pursuant to a non-economic activity is not economic.

(A) Solidarity[47]

There have been several cases in which the question has arisen whether entities providing social protection, for example social security, pensions, health insurance or health care, did so as undertakings. The case law makes a distinction between situations in which

RAI v UNITEL OJ [1978] L 157/39, [1978] 3 CMLR 306 where opera singers were undertakings; *Vaessen BV v Moris* OJ [1979] L 19/32, [1979] 1 CMLR 511; Case 35/83 *BAT v Commission* [1985] ECR 363, [1985] 2 CMLR 470; Case 42/84 *Remia BV and Verenigde Bedrijven Nutricia NV v Commission* [1985] ECR 2545, [1987] 1 CMLR 1; *Breeders' Rights: Roses* OJ [1985] L 369/9, [1988] 4 CMLR 193: *French Beef* OJ [2003] L 209/12, paras 104–108, upheld on appeal to the General Court Cases T-217/03 and T-245/03 *FNCBV v Commission* [2006] ECR II-4987, [2008] 5 CMLR 406 and again on appeal to the Court of Justice Cases C-101/07 P and C-110/07 P *FNCBV v Commission* [2008] ECR I-10193, [2009] 4 CMLR 743; see also Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-1627, [2005] 2 CMLR 402, a case on state aid in which a self-employed dentist was held to be acting as an undertaking.

[38] See 'Employees and trades unions', pp 90–91 below.

[39] On this point see Cases C-180/98 etc *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 30, paras 78–81.

[40] Case C-387/93 [1995] ECR I-4663, [1996] 1 CMLR 829, para 50.

[41] See eg Case 155/73 *Sacchi* [1974] ECR 409, [1974] 2 CMLR 177; Case 41/83 *Italy v Commission* [1985] ECR 873, [1985] 2 CMLR 368.

[42] Such bodies have a limited dispensation from the competition rules by virtue of Article 106(2) TFEU: see ch 6, 'Article 106(2)', pp 235–242.

[43] Case 258/78 *Nungesser KG v Commission* [1982] ECR 2015, [1983] 1 CMLR 278.

[44] See respectively *Alpha Flight Services/Aéroports de Paris* OJ [1998] L 230/10, [1998] 5 CMLR 611, paras 49–55, upheld on appeal Case T-128/98 [2000] ECR II-3929, [2001] 4 CMLR 1376, paras 120–126 and by the Court of Justice in Case C-82/01 P [2002] ECR I-9297, [2003] 4 CMLR 609, paras 78–82; *Portuguese Airports* OJ [1999] L 69/31, [1999] 5 CMLR 103, para 12, upheld on appeal Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, [2002] 4 CMLR 1319; *Ilmailulaitos/Luftfartsverket* OJ [1999] L 69/24, [1999] 5 CMLR 90, paras 21–23.

[45] OJ [1985] L 92/1, [1987] 3 CMLR 813: see the Commission's XIVth *Report on Competition Policy* (1984), point 57; see similarly *Re Colombian Coffee* OJ [1982] L 360/31, [1983] 1 CMLR 703.

[46] OJ [1998] L 252/47, [1998] 5 CMLR 786, para 21.

[47] See Winterstein 'Nailing the Jellyfish: Social Security and Competition Law' (1999) 20 ECLR 324.

such protection is provided in a market context on the one hand, or on the basis of 'solidarity' on the other. Solidarity was defined by Advocate General Fennelly in *Sodemare v Regione Lombardia*[48] as 'the inherently uncommercial act of involuntary subsidisation of one social group by another'[49]. Where social protection is provided on the basis of solidarity, it is not provided by an undertaking. The cases in which this issue has had to be examined are very fact-specific. As Advocate General Jacob said in his Opinion in *AOK Bundesverband*[50]:

> Schemes come in a wide variety of forms, ranging from State social security schemes at one end of the spectrum to private individual schemes operated by commercial insurers at the other. Classification is thus necessarily a question of degree[51].

In *Poucet v Assurances Générales de France*[52] the Court of Justice concluded that French regional social security offices administering sickness and maternity insurance schemes to self-employed persons were not acting as undertakings, but it reached the opposite conclusion in relation to a differently-constituted scheme in *Fédération Française des Sociétés d'Assurance*[53]. The difference was that in *Poucet* the benefits payable were identical for all recipients, contributions were proportionate to income, the pension rights were not proportionate to the contributions made and schemes that were in surplus helped to finance those which had financial difficulties; the schemes were based on the principle of solidarity. In *Fédération Française*, on the other hand, the benefits payable depended on the amount of the contributions paid by recipients and the financial results of the investments made by the managing organisation; the manager of the scheme was carrying on an economic activity in competition with life assurance companies. In *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*[54] the Court of Justice held that the pension fund in that case was acting as an undertaking, since it was carrying on an economic activity: its function was to make investments, the result of which determined the amount of benefits that the fund could pay to its members[55]; as such, this fund was different from the one in *Poucet*.

In *Cisal di Battistello Venanzio & C Sas v INAIL*[56] the Court of Justice held that INAIL, entrusted by law with management of a scheme providing insurance against accidents at work, was not acting as an undertaking for the purposes of the competition rules because it fulfilled an exclusively social function based on the principle of solidarity. Similarly in *AOK Bundesverband*[57] the Court of Justice held that German sickness funds were involved in the management of the social security system, fulfilling an exclusively social function founded on the principle of solidarity; it followed that they were not acting as undertakings. The same conclusion was reached in *Kattner Stahlbau GmbH v Maschinenbau- und Metal- Berufsgenossenschaft*[58] where MMB fulfilled an exclusively social function in providing insurance against accidents at work and occupational diseases, proceeded on the basis of solidarity and was subject to state supervision. In *AG2R Prévoyance v Beaudort*

[48] Case C-70/95 [1997] ECR I-3395, [1997] 3 CMLR 591.

[49] [1997] ECR I-3395, [1997] 3 CMLR 591, para 29.

[50] Cases C-264/01 etc [2004] ECR I-2493, [2004] 4 CMLR 1261. [51] Ibid, para 36.

[52] Cases C-159/91 and 160/91 [1993] ECR I-637.

[53] Case C-244/94 [1995] ECR I-4013, [1996] 4 CMLR 536.

[54] Cases C-67/96 etc [1999] ECR I-5751, [2000] 4 CMLR 446: for commentary on this case see Gyselen (2000) 37 CML Rev 425; see also Cases C-180/98 etc *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 30, paras 102–119.

[55] Ibid, paras 71–87. [56] Case C-218/00 [2002] ECR I-691, [2002] 4 CMLR 833.

[57] Cases C-264/01 etc [2004] ECR I-2493, [2004] 4 CMLR 1261; see also, under Article 107 TFEU on state aid, Cases C-266/04 *Casino France* [2005] ECR I-9481, paras 45–55.

[58] Case C-350/07 [2009] ECR I-1513, [2009] CMLR 1339, paras 33–68.

Père et Fils SARL[59] the Court of Justice suggested that AG2R, which operated a scheme for supplementary reimbursement of healthcare costs that was 'characterised by a high degree of solidarity'[60], might nevertheless be acting as an undertaking where it enjoyed a degree of autonomy, that is to say was relatively free from state control[61].

(B) Activities connected with the exercise of the powers of a public authority are not economic

Although it is clear that state-owned corporations or public authorities may qualify as undertakings when engaged in economic activity, the *Wouters* judgment says they would not do so when their behaviour 'is connected with the exercise of the powers of a public authority'[62]. In *Corinne Bodson v Pompes Funèbres des Régions Libérées SA*[63] a French law entrusted the performance of funeral services to local communes; many of the communes in turn awarded concessions to provide those services to private undertakings. The Court of Justice held that Article 101 did not apply to 'contracts for concessions concluded between communes *acting in their capacity as public authorities* and undertakings entrusted with the provision of a public service' (emphasis added)[64]. An entity acts in the exercise of official authority where the activity in question is 'a task in the public interest which forms part of the essential functions of the State' and where that activity 'is connected by its nature, its aim and the rules to which it is subject with the exercise of powers… which are typically those of a public authority'[65]. For the same reason, in *SAT Fluggesellschaft v Eurocontrol*[66] the Court of Justice concluded that Eurocontrol was not acting as an undertaking when it created and collected route charges from users of air navigation services on behalf of the States that had created it[67]. In *Calì e Figli*[68] the Court of Justice held that a private company engaged in anti-pollution surveillance in Genoa harbour would not be acting as an undertaking when discharging that particular responsibility, since this was a task in the public interest, forming part of one of the essential functions of the state in protecting the maritime environment: this judgment is of particular interest as the public duty was being carried out by a private body.

(C) Procurement that is ancillary to a non-economic activity is not economic

In *FENIN v Commission*[69] a complaint was made to the Commission that 26 public bodies in Spain responsible for the operation of the Spanish national health system were abusing their dominant buyer power by delaying unreasonably the payment of invoices. The Commission rejected the complaint on the basis that the public bodies were not acting as undertakings. FENIN, an association representing most undertakings marketing medi-

[59] Case C-437/09 [2011] ECR I-000, [2011] 4 CMLR 1029; see also the judgment of the EFTA Court in Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] 2 CMLR 818, paras 82–83: Norwegian State not acting as an undertaking when funding municipal kindergartens.

[60] Case C-437/09 [2011] ECR I-000, [2011] 4 CMLR 1029, para 52. [61] Ibid, paras 53–65.

[62] See to the same effect Case C-343/95 *Calì e Figli* [1997] ECR I-1547, [1997] 5 CMLR 484, paras 16–17.

[63] Case 30/87 [1988] ECR 2479, [1989] 4 CMLR 984. [64] Ibid, para 18.

[65] Case C-343/95 *Calì e Figli* [1997] ECR I-1547, [1997] 5 CMLR 484, para 23.

[66] Case C-364/92 [1994] ECR I-43, [1994] 5 CMLR 208, para 30; different activities of Eurocontrol were held not to be economic in the *SELEX* case, ch 3 n 20 above.

[67] A similar conclusion had earlier been reached by the Commercial Court in London in *Irish Aerospace (Belgium) NV v European Organisation for the Safety of Air Navigation* [1992] 1 Lloyd's Rep 383.

[68] Case C-343/95 [1997] ECR I-1547, [1997] 5 CMLR 484.

[69] Case T-319/99 [2003] ECR II-357, [2003] 5 CMLR 34; it is interesting to compare this judgment with that of the UK Competition Appeal Tribunal in Case No 1006/2/1/01 *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 7, [2002] Comp AR 299, a judgment which preceded that in *FENIN* and which came to a different view in relation to the procurement activities of the Health Trust in that case: see ch 9, 'The *BetterCare* case', pp 336–337.

cal goods and equipment used in Spanish hospitals, appealed to the General Court. The General Court dismissed the appeal. Its reasoning was that, when providing health care to citizens, the public bodies did so on the basis of solidarity: that behaviour therefore was not economic. The General Court then held that the activity of purchasing goods should not be dissociated from the purpose to which they would be put. Since the provision of health care was not economic, the ancillary behaviour of procurement for that purpose was not economic either[70]. This judgment was upheld on appeal to the Court of Justice[71]. The General Court's judgment did not say what the position would be where a health organisation purchasing goods uses them partly for the provision of state-sponsored health care on the basis of solidarity, but also charges certain patients, for example tourists from overseas, according to market principles: as the point had not been raised in the original complaint to the Commission, the General Court held that it did not need to adjudicate upon it[72]. The reasoning in *FENIN* was subsequently applied in *SELEX Sistemi Integrati SpA v Commission*[73].

(iv) The professions

Abundant case law has established that members of the professions can be undertakings for the purposes of the competition rules. In *Commission v Italy*[74] the Court of Justice held that customs agents in Italy, who offered for payment services consisting of the carrying out of customs formalities in relation to the import, export and transit of goods, were undertakings; it rejected the Italian Government's argument that the fact that the activity of customs agents is intellectual and requires authorisation and compliance with conditions meant that they were not undertakings. Self-employed medical specialists have been held to be undertakings[75], including when they are making contributions to their own supplementary pension scheme[76].

(v) Employees and trades unions

In *Jean Claude Becu*[77] the Court of Justice held that workers are, for the duration of their employment relationship, incorporated into the undertakings that employ them and thus form part of an economic unit with them; as such they do not constitute undertakings within the meaning of EU competition law[78]. Nor should the dock workers in that case, taken collectively, be regarded as constituting an undertaking[79]. However an ex-employee who carries on an independent business would be[80].

In *Albany*[81] the Court of Justice was concerned with a case where organisations representing employers and employees collectively agreed to set up a single pension fund

[70] Ibid, paras 35–36.

[71] Case C-205/03 P [2006] ECR I-6295, [2006] 5 CMLR 559, paras 25–26; Advocate General Maduro's Opinion in this case contains an extensive review of the law and literature on the issues raised.

[72] Case T-319/99 [2003] ECR II-357, [2003] 5 CMLR 34, paras 41–44. [73] See ch 3 n 20 above.

[74] Case C-35/96 [1998] ECR I-3851, [1998] 5 CMLR 889; see similarly Case T-513/93 *CNSD v Commission* [2000] ECR II-1807, [2000] 5 CMLR 614, upholding the Commission's decision in *CNSD* OJ [1993] L 203/27, [1995] 5 CMLR 889; *Coapi* OJ [1995] L 122/37, [1995] 5 CMLR 468; *EPI code of conduct* OJ [1999] L 106/14, [1999] 5 CMLR 540, partially annulled on appeal to the General Court Case T-144/99 *Institut des Mandataires Agréés v Commission* [2001] ECR II-1087, [2001] 5 CMLR 77.

[75] Cases C-180/98 etc *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 30, para 77.

[76] Ibid, paras 78–82; the Commission, intervening, had argued that, when making such contributions, the specialists were acting as consumers rather than as undertakings.

[77] Case C-22/98 [1999] ECR I-5665, [2001] 4 CMLR 968.

[78] Ibid, para 26. [79] Ibid, para 27.

[80] See eg *Reuter/BASF* OJ [1976] L 254/40, [1976] 2 CMLR D44. [81] See ch 3 n 54 above.

responsible for managing a supplementary pension scheme and requested the public authorities to make affiliation to the fund compulsory. One of the issues in the case was whether an agreement between such organisations was an agreement between undertakings. The Court of Justice's answer was that it was not. The Treaty's activities include not only the adoption of a competition policy, but also a policy in the social sphere: this is stated in Article 4(2)(b) TFEU and revealed, for example, in Article 153 TFEU, the purpose of which is to promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers. The Court of Justice's view was that the social objectives pursued by collective agreements would be seriously undermined if they were subject to Article 101 and that therefore they fall outside it[82]. However the same exclusion does not apply in relation to a decision taken by members of the liberal professions, since it is not concluded in the context of collective bargaining between employers and employees[83]. In *Norwegian Federation of Trade Unions v Norwegian Association of Local and Regional Authorities*[84] the EFTA Court took a similar view of collective labour agreements under Article 53 of the European Economic Area ('EEA') Agreement, but noted that provisions in such agreements which pursue objectives extraneous to that of improving conditions of work and employment could amount to an infringement[85].

In *FNCBV v Commission*[86] the General Court rejected an argument that the application of Article 101 to agreements between associations of farmers to fix prices and to prevent imports of beef into France restricted the freedom of trade union activity[87].

(B) 'Associations of undertakings'

Article 101 applies not only to agreements and concerted practices between undertakings; it also applies to the decisions of 'associations of undertakings'[88]. A trade association does not have to have a commercial or economic activity of its own to be subject to Article 101(1)[89]; it follows that Article 101(1) may be applicable to the *decisions* of a trade association, even if it does not apply to its *agreements* because the association does not enter into the agreements as an undertaking[90]. Where an association is an undertaking, an agreement between it and other undertakings may be caught by Article 101(1)[91]. Article 101(1)

[82] Ibid, para 59; for critical comment see Van den Bergh and Camesasca 'Irreconcilable Principles? The Court of Justice Exempts Collective Labour Agreements from the Wrath of Antitrust' (2000) 25 EL Rev 492; Boni and Manzini 'National Social Legislation and EC Antitrust Law' (2001) 24 World Competition 239; see also Case C-222/98 *Van der Woude v Stichting Beatrixoord* [2000] ECR I-7111, [2001] 4 CMLR 93; Case C-437/09 *AG2R Prévoyance v Beaudort Père et Fils SARL* [2011] ECR I-000, [2011] 4 CMLR 1029, paras 28–36.

[83] Cases C-180/98 etc *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 30, paras 67–70.

[84] Case E-8/00 [2002] 5 CMLR 160, paras 33–46.

[85] Ibid, paras 33–46 and 47–59.

[86] Cases T-217/03 and T-245/03 [2006] ECR II-4987, [2008] 5 CMLR 406, upheld on appeal Cases C-101/07 P and C-110/07 P *FNCBV v Commission* [2008] ECR I-10193, [2009] 4 CMLR 743.

[87] Ibid, paras 97–103.

[88] In *SEL-Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch) Roth J pointed out, at paras 36 and 41, that this expression is a term of art rather than one with a colloquial meaning.

[89] Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, para 1320, citing many earlier judgments of the Court of Justice and General Court to similar effect; *MasterCard*, Commission decision of 19 December 2007, para 342.

[90] See the Opinion of Advocate General Slynn in Case 123/85 *BNIC v Clair* [1985] ECR 391, p 396, [1985] 2 CMLR 430, p 442.

[91] Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, paras 1325 and 2622.

also applies to decisions by associations of trade associations[92]. A decision does not acquire immunity because it is subsequently approved and extended in scope by a public authority[93], nor does a trade association fall outside Article 101(1) because it is given statutory functions or because its members are appointed by the Government[94]. The Court of Justice has specifically stated that the public law status of a national body (for example an association of customs agents) does not preclude the application of Article 101[95].

In *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*[96] the Court of Justice held that the General Council of the Dutch Bar was an association of undertakings, and rejected the argument that this was not so in so far as it was exercising its regulatory functions; the position might have been different if a majority of the members of the Council had been appointed by the state, rather than by members of the profession, and if the state had specified the public interest criteria to be taken into account by the Council[97]. Just as a 'functional' approach should be taken to the concept of an undertaking[98], so too it may be that a body can qualify as an association of undertakings when carrying out some of its tasks, but not when performing others (for example regulatory supervision on behalf of the state)[99].

(C) The 'single economic entity' doctrine

Article 101(1) does not apply to agreements between two or more legal persons that form a single economic entity: collectively they comprise a single undertaking, and so there is no agreement *between* undertakings. The most obvious example of this is an agreement between a parent and a subsidiary company, though the relationship between a principal and agent[100] and between a contractor and sub-contractor[101] is analogous. Numerous important consequences flow from the single economic entity doctrine, as will be seen below: one is that a parent company can be held liable for infringement of the competition rules by a subsidiary[102].

(i) Parent and subsidiary: the basic rule

Firms within the same corporate group can enter into legally enforceable agreements with one another. However such an agreement will not fall within Article 101 if the relationship

[92] See eg *Cematex* JO [1971] L 227/26, [1973] CMLR D135 and *Milchförderungsfonds* OJ [1985] L 35/35, [1985] 3 CMLR 101.

[93] *AROW v BNIC* OJ [1982] L 379/1, [1983] 2 CMLR 240; *Coapi* OJ [1995] L 122/37, [1995] 5 CMLR 468, para 32.

[94] Ibid and *Pabst and Richarz KG v BNIA* OJ [1976] L 231/24, [1976] 2 CMLR D63.

[95] Case C-35/96 *Commission v Italy* [1998] ECR I-3851, [1998] 5 CMLR 889, para 40; Cases C-180/98; C-184/98 *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 30, para 85.

[96] Case C-309/99 [2002] ECR I-1577, [2002] 4 CMLR 913; the Opinion of Advocate General Léger deals with the meaning of 'association of undertakings' at length: see paras 56–87.

[97] Case C-309/99 [2002] ECR I-1577, [2002] 4 CMLR 913, paras 50–71.

[98] See 'Need to adopt a functional approach', pp 84–85 above.

[99] On this point see the Opinion of Advocate General Jacobs in Cases C-67/96 etc *Albany International BV v SBT* [1999] ECR I-5751, [2000] 4 CMLR 446, para 214 and Case C-309/99 *Wouters* [2002] ECR I-1577, [2002] 4 CMLR 913, para 64.

[100] See ch 16, 'Commercial Agents', pp 621–623 and, in particular, the Commission's *Guidelines on Vertical Restraints* OJ [2010] C 130/1, paras 12–21.

[101] See ch 16, 'Sub-Contracting Agreements', pp 676–677 and, in particular, the Commission's *Notice on Sub-contracting Agreements* OJ [1979] C 1/2, [1979] 1 CMLR 264.

[102] See 'Implications of the economic entity doctrine', pp 95–97 below; note that the same principle means that a principal may be found guilty of participating in a cartel if it was represented at cartel meetings by a commercial agent: see eg *Candle Waxes*, Commission decision of 1 October 2008, paras 399–409, on appeal to the General Court Cases T-543/08 etc *RWE and RWE Dea v Commission*, not yet decided.

between them is so close that economically they form a single economic entity, that is to say that they 'consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis, and can contribute to the commission of an infringement of the kind referred to in [Article 101 TFEU]'[103]. Where this is the case the agreement is regarded as the internal allocation of functions within an economic group rather than a restrictive agreement between independent undertakings.

(ii) **The *Viho* judgment**

The proposition that agreements between entities in the same economic group fall outside Article 101 can be traced back to 1971[104]. The issue was revisited in *Viho v Commission*[105]. Parker Pen had established an integrated distribution system for Germany, France, Belgium, Spain and the Netherlands, where it used subsidiary companies for the distribution of its products. The Commission concluded that Article 101 had no application to this allocation of tasks within the Parker Pen group. This finding was challenged by a third party, Viho, which had been trying to obtain supplies of Parker Pen's products and which considered that the agreements between Parker Pen and its subsidiaries infringed Article 101. The General Court and the Court of Justice upheld the decision of the Commission, that Article 101 had no application. At paragraph 15 of its judgment the Court of Justice noted that Parker Pen held 100 per cent of the shares in the subsidiary companies, it directed their sales and marketing activities and it controlled sales, targets, gross margins, sales costs, cash flow and stocks:

> Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them[106].

The Court of Justice went on to say that in those circumstances the fact that Parker Pen could divide national markets between its subsidiaries was outside Article 101, although it pointed out that such unilateral conduct could fall foul of Article 102 where the requirements for its application were satisfied[107]. In its *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*[108] the Commission relies on the *Viho* judgment for the proposition that '[w]hen a company exercises decisive influence over another company they form a

[103] See Case T-112/05 *Akzo Nobel NV v Commission* [2007] ECR II-5049, [2008] 4 CMLR 321, paras 57–58.

[104] See Case 22/71 *Béguelin Import v GL Import Export* [1971] ECR 949, [1972] CMLR 81; Case 15/74 *Centrafarm BV v Sterling Drug Inc* [1974] ECR 1147, [1974] 2 CMLR 480; Case 30/87 *Corinne Bodson v Pompes Funèbres des Régions Libérées SA* [1988] ECR 2479, [1989] 4 CMLR 984, para 19; the Commission reached a similar conclusion in *Re Christiani and Nielsen NV* JO [1969] L 165/12, [1969] CMLR D36 and in *Re Kodak* JO [1970] L 147/24, [1970] CMLR D19; see also *TFI/France 2 and France 3*, Commission's XXIXth *Report on Competition Policy* (1999), p 167.

[105] Case T-102/92 [1995] ECR II-17, [1995] 4 CMLR 299, upheld by the Court of Justice in Case C-73/95 P [1996] ECR I-5457, [1997] 4 CMLR 419: in his Opinion Advocate General Lenz discusses the case law on the economic entity doctrine referred to in footnote 104 ('an inconsistent picture') at paras 48–73; see also Case T-198/98 *Micro Leader Business v Commission* [1999] ECR II-3989, [2000] 4 CMLR 886, para 38 (agreements within the Microsoft group not subject to Article 101); on the similar position in US law see *Copperweld Corpn v Independence Tube Corpn* 467 US 752 (1984); *American Needle, Inc v National Football League et al* 560 US __ (2010).

[106] Case C-73/95 P [1996] ECR I-5457, [1997] 4 CMLR 419, para 16.

[107] Ibid, para 17; as to the possible application of Article 102 see *Interbrew,* Commission's XXVIth *Report on Competition Policy* (1996), pp 139–140.

[108] OJ [2011] C 11/1.

single economic entity and, hence, are part of the same undertaking'; it adds that the same would be true of 'sister companies, that is to say, companies over which decisive influence is exercised by the same parent company'[109].

(iii) The test of control

The crucial question, therefore, is whether parties to an agreement are independent in their decision-making or whether one is able to exercise decisive influence over the other with the result that the latter does not enjoy 'real autonomy' in determining its commercial policy on the market. For these purposes it is necessary to examine various factors such as the shareholding that a parent company has in its subsidiary, the composition of the board of directors, the extent to which the parent influences the policy of or issues instructions to the subsidiary and similar matters[110].

In *Akzo Nobel NV v Commission*[111] the issue before the Court of Justice was not whether an agreement between a parent and subsidiary infringed Article 101, but whether the Commission could address a decision to a parent company that it was liable for infringing Article 101 where it was a subsidiary company that was actually involved in the cartel. The Court held, referring to earlier judgments such as *Imperial Chemical Industries v Commission*[112], that where the parent has a 100 per cent shareholding in a subsidiary the parent exercises decisive influence over the subsidiary, and there is a rebuttable presumption that the parent does in fact exercise such influence[113]. In those circumstances the Commission may regard the parent as jointly and severally liable for any fine imposed on its subsidiary unless the parent can adduce sufficient evidence that the subsidiary acts independently on the market[114]. The Court added that, where the presumption applies, the Commission is not required to find additional evidence that the parent controlled the subsidiary: the presumption suffices unless rebutted[115]. In *Akzo Nobel* the General Court[116] had concluded that the parent had failed to rebut the presumption, and that judgment was upheld by the Court of Justice on appeal. There have been numerous other cases, before and since *Akzo*, in which a parent company has attempted to rebut the presumption: such attempts usually, though not inevitably, fail[117].

What is not clear is whether a minority shareholder might be held to have sufficient control to negate autonomy on the part of the subsidiary. Clearly the *Akzo* presumption would not apply, since that arises where a parent owns the totality, or almost the totality, of the shares of the subsidiary. Under Article 3(2) of the EU Merger Regulation ('the EUMR') a minority shareholder that would have the 'possibility of exercising decisive influence' over the affairs of another undertaking would have sufficient control for there to be a concentration[118]. The case law has yet to explain whether the notion of control in

[109] Ibid, para 11.

[110] See eg Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, [1984] 3 CMLR 325, paras 47–53.

[111] Case C-97/08 P [2009] ECR I-8237, [2009] 5 CMLR 2633.

[112] Case 48/69 [1972] ECR 619, [1972] CMLR 557.

[113] Case C-97/08 P [2009] ECR I-8237, [2009] 5 CMLR 2633, para 60; the presumption was also held to apply where Elf Aquitaine owned more than 97 per cent of the shares in Arkema France: Cases T-299/08 and T-343/08 *Elf Aquitaine v Commission* [2011] ECR II-000, on appeal to the Court of Justice Case C-401/11 P, not yet decided.

[114] Case C-97/08 P [2009] ECR I-8237, [2009] 5 CMLR 2633, para 61.

[115] Ibid, para 62; in saying this the Court was trying to avoid any possible confusion caused by its judgment in Case C-286/98 P *Stora Kopparberegs v Commission* [2000] ECR I-9925, [2001] 4 CMLR 370, which appeared to suggest that further indicia of control were needed even where the presumption applies.

[116] Case T-112/05 *Akzo Nobel NV v Commission* [2007] ECR II-5049, [2008] 4 CMLR 321.

[117] See 'Implications of the economic entity doctrine', pp 95–97 below.

[118] See ch 21, 'The concept of control', pp 834–836; note the more formalistic test of control for the purpose of calculating the turnover of 'undertakings concerned' in Article 5(4) of the EUMR: 'Turnover', pp 842–843.

the EUMR should be applied to the 'single economic entity' doctrine under Article 101(1), or whether the notions of control differ as between these two provisions. There are arguments for the adoption of a consistent approach[119]; however the notion of control under the EUMR includes negative control, and has the jurisdictional function of determining which transactions have to be scrutinised under that Regulation; the language of the cases under Article 101 suggest that there the requirement is for positive rather than negative control, where the test has substantive, as opposed to jurisdictional, consequences.

(iv) Decisions where the economic entity doctrine did not apply

In *Ijsselcentrale*[120] the Commission rejected the argument that four Dutch electricity generating companies and the joint venture that they controlled formed a single economic entity, and that therefore Article 101 did not apply to agreements between them. The fact that the generators formed part of an indivisible system of public electricity supply did not mean that they were one unit, for they were separate legal persons, not controlled by a single natural or legal person, and were able to determine their own conduct independently. In *Gosmé/Martell-DMP*[121] DMP was a joint subsidiary of Martell and Piper-Hiedsieck. Each parent held 50 per cent of the capital of DMP and the voting rights; half of the supervisory board members represented Martell shareholders and half Piper-Hiedsieck shareholders; DMP distributed brands not belonging to its parent companies; Martell and Piper-Hiedsieck products were invoiced to wholesalers on the same document; DMP had its own sales force and it alone concluded the contracts of sale with buying syndicates in France. In these circumstances the Commission concluded that Martell and DMP were independent undertakings, so that an agreement between them to identify and prevent parallel exports infringed Article 101 and attracted fines of €300,000 in the case of Martell and €50,000 in the case of DMP[122].

If a subsidiary becomes independent of its parent, for example by being sold off, an agreement between the two companies could be caught by Article 101 once the parent–subsidiary relationship ends. In *Austin Rover/Unipart*[123] the relationship between those undertakings following the privatisation of British Leyland and the selling off of Unipart was investigated by the Commission under Article 101, but was found to satisfy the criteria of Article 101(3).

(v) Implications of the economic entity doctrine

Numerous consequences flow from the economic entity doctrine.

First, although an agreement between connected firms may not infringe Article 101, the manipulation of a subsidiary company by a parent might mean that the competition rules are broken in other ways; for example a parent might order its subsidiaries to impose export bans on their distributors: the agreements containing such restrictions could themselves infringing Article 101[124].

[119] See Wils 'The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons' (2000) 25 EL Rev 99, pp 104–108.

[120] OJ [1991] L 28/32, [1992] 5 CMLR 154, paras 22–24.

[121] OJ [1991] L 185/23, [1992] 5 CMLR 586, para 30.

[122] Note, however, the General Court's judgment in Case T-314/01 *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA* [2006] ECR II-3085, [2007] 4 CMLR 9, where the General Court held that the parents of a joint venture were responsible for its participation in a cartel and could therefore be fined: see in particular paras 135–142.

[123] OJ [1988] L 45/34, [1988] 4 CMLR 513.

[124] See eg *Re Kodak* JO [1970] L 147/24, [1970] CMLR D 19.

Secondly, as already noted in *Akzo Nobel*, the economic entity doctrine means that a parent company can be liable for the activities of its subsidiaries. Whereas Article 101 applies to agreements between *undertakings*, Commission decisions must be addressed to *legal entities*, and one undertaking can consist of many entities. The Commission regularly addresses infringement decisions to both a parent and its subsidiary, each of which is then jointly and severally liable for the infringement[125]; the parents of a joint venture can also be the addressees of a decision where their joint venture has infringed Article 101[126]. In *Bananas*[127] the Commission concluded that Del Monte was jointly and severally liable with Weichert for infringing Article 101 as a result of the combination of a partnership agreement and a distribution agreement between them that enabled Del Monte to exercise decisive influence over Weichert[128]. There have been many appeals in which parents have argued that the presumption that 100 per cent ownership of a subsidiary confers decisive influence has been successfully rebutted: such appeals usually fail. However the General Court held in *Alliance One International v Commission*[129] that the presumption had been rebutted by one member of the Standard Group of companies, Trans-Continental Leaf Tobacco Corp, although not by two others, Alliance One International and Standard Commercial Tobacco[130].

Thirdly, where a parent and a subsidiary (or subsidiaries) form a single economic entity, the maximum fine permitted by Article 23(2) of Regulation 1/2003 of 10 per cent of an undertaking's worldwide turnover refers to the entire group's turnover, not just the turnover of the entity that actually committed the infringement: clearly this means that the maximum fine that can be imposed – for example where the subsidiary is part of a large conglomerate group – may be vastly greater than would otherwise be the case[131]. Fourthly, it may be that an action for damages can be brought either against a parent of a subsidiary company, or even against a subsidiary of a parent company; this can have significant implications for jurisdictional issues in civil litigation, potentially increasing the range of countries in which the action may be brought[132]. Fifthly, from a competition authority's point of view, it is desirable to attribute responsibility for infringements of the competition rules to the highest possible entity within a corporate group, not least in the hope that the board of directors of the parent company will take responsibility for eradicating anti-competitive behaviour from the entire organisation. Sixthly, the economic entity doctrine means that a parent company may bear responsibility for any infringements committed by subsidiaries within the corporate group, and this may lead to the imposition of higher fines because of recidivism[133].

A seventh point is that the Commission can carry out a surprise inspection of a legal entity that is part of an economic unit even though the alleged infringement of the competition rules was the responsibility of another part of it[134]. A further point is that the

[125] Recent examples include *Power transformers*, Commission decision of 7 October 2009, paras 175ff; *Heat stabilisers*, Commission decision of 11 November 2009, paras 500ff.

[126] See ch 3 n 122 above.

[127] Commission decision of 15 October 2008.

[128] The decision is on appeal to the General Court in Case T-587/08 *Fresh Del Monte Produce v Commission*, not yet decided.

[129] Case T-24/05 [2010] ECR II-000, [2011] 4 CMLR 545; see also Case T-185/06 *Air Liquide SA v Commission* [2011] ECR II-000, paras 63–64.

[130] Both the Commission and the two unsuccessful applicants have appealed to the Court of Justice in Cases C-628/10 P and C-14/11 P, not yet decided.

[131] See Case T-112/05 *Akzo Nobel NV v Commission* [2007] ECR II-5049, [2008] 4 CMLR 321, paras 90–91.

[132] See *Provimi Ltd v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm), [2003] All ER (D) 59 (May), a case arising out of the *Vitamins Cartel*, paras 31–36; see further ch 8, 'Private international law', pp 308–309.

[133] On the significance of recidivism to the level of fines see ch 7, 'Adjustments to the basic amount', pp 277–280.

[134] Case T-66/99 *Minoan Lines v Commission* [2003] ECR II-5515, [2005] 5 CMLR 1597.

logical consequence of the economic entity doctrine is that, when counting the number of undertakings that are party to an agreement for the purpose of applying one of the block exemptions, the legal and natural persons that form a single economic entity are counted as one[135]. Lastly, the immunity of agreements from Article 101 is in a sense a double-edged weapon: the EU Courts and the Commission have held that EU law can be applied to a parent company not present within the EU because of the conduct of its subsidiaries carried on there[136].

(D) **Corporate reorganisation**

Separate legal entities may be treated as one and the same undertaking where there is a corporate reorganisation in which one entity succeeds another: the liabilities of the latter may be attributed to the former[137]. In *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*[138] the Court of Justice held that:

> a change in the legal form and name of an undertaking does not create a new undertaking free of liability for the anticompetitive behaviour of its predecessor when, from an economic point of view, the two are identical.

In *PVC*[139] the Commission held that it is a matter of EU law whether one undertaking can be liable for the past conduct of another: changes in organisation under national company law are not decisive. In order to decide whether there is 'undertaking identity', the expression used by the Commission in the *PVC* decision, the determining factor 'is whether there is a functional and economic continuity between the original infringer and the undertaking into which it was merged'[140]. It repeated this formulation in the second *PVC* decision[141]. In *All Weather Sports Benelux BV v Commission*[142] the General Court held that the Commission must adequately explain its reasoning when it imposes a fine on a successor to the entity that committed the infringement.

[135] Case 170/83 *Hydrotherm Gerätebau v Andreoli* [1984] ECR 2999, [1985] 3 CMLR 224; this is relevant, for example, under Regulation 330/2010, which requires that, for the block exemption to apply, there must not be two undertakings to a vertical agreement operating at the same level of the market: see ch 16, 'Article 2(4): agreements between competing undertakings', pp 658–659; and under Regulation 772/2004 on technology transfer agreements, which confers block exemption only on bilateral agreements: see ch 19, 'The exempted agreement must be bilateral', p 783.

[136] See Case 48/69 *ICI v Commission* [1972] ECR 619, [1972] CMLR 557; Case 6/72 *Europemballage Corpn and Continental Can Co Inc v Commission* [1973] ECR 215, [1973] CMLR 199; see ch 12 on extraterritoriality generally.

[137] See Garzaniti and Scassellati-Sforzolini 'Liability of Successor Undertakings for Infringements of EC Competition Law Committed Prior to Corporate Reorganisations' (1995) 16 ECLR 348; Dyekjær-Hansen and Hoegh 'Succession for Competition Law Infringements with Special Reference to Due Diligence and Warranty Claims' (2003) 24 ECLR 203; Chandler 'Successor Liability for Competition Law Infringements and How to Avoid It' (2006) 5 Competition Law Journal 63.

[138] Cases 29 and 30/83 [1984] ECR 1679, [1985] 1 CMLR 688, para 9; see also Case T-134/94 *NMH Stahlwerke GmbH v Commission* [1999] ECR II-239, [1997] 5 CMLR 227, paras 122–141; Case C-297/98 P *SCA Holdings Ltd v Commission* [2000] ECR I-10101, [2001] 4 CMLR 413, paras 23–32; Cases C-204/00 P etc *Aalborg Portland A/S v Commission* [2004] ECR I-123, [2005] 4 CMLR 251, para 59.

[139] OJ [1989] L 74/1, [1990] 4 CMLR 345, para 42.

[140] OJ [1989] L 74/1, [1990] 4 CMLR 345, para 43; see similarly *LdPE* OJ [1989] L 74/21, paras 49–54; other decisions of the Commission dealing with this point are *Peroxygen Products* OJ [1985] L 35/1, [1985] 1 CMLR 481, *Polypropylene* OJ [1986] L 230/1, [1988] 4 CMLR 347 and *Welded Steel Mesh* OJ [1989] L 260/1, [1991] 4 CMLR 13, para 194.

[141] OJ [1994] L 239/14, paras 14–43.

[142] Case T-38/92 [1994] ECR II-211, [1995] 4 CMLR 43, paras 26–36.

In *Autoritá Garante della Concurrenza e del Mercato v Ente tabacchi italiani – ETI SpA*[143] the Amministrazione autonoma del monopoli di Stato ('AAMS') was an organ of the Italian state that had responsibility for managing the tobacco monopoly in that country. In 1999 its activities were transferred by law to a newly-created public body, Ente tabacchi italiani ('ETI'). ETI was subsequently transformed into a public company and was then privatised, coming under the control of British American Tobacco plc. The Italian competition authority adopted a decision that the Philip Morris group of companies had implemented a cartel in Italy in conjunction with AAMS and, subsequently, with ETI. A fine of €20 million was imposed on ETI. In its decision the Italian competition authority attributed AAMS's conduct prior to 1999 to ETI. An Italian court held that it was wrong to have done so; on appeal the Italian Council of State referred the matter to the Court of Justice under Article 267 TFEU. The Court of Justice held that it was legitimate for the Italian competition authority to have imposed the fine on ETI: AAMS and ETI were answerable to the same public authority, and the same unlawful conduct was carried out first by AAMS and then by its successor, ETI; the Court applied the reasoning of the *Rheinzink* case, and said that it made no difference that the activity transferred to ETI occurred not as a result of individuals but through the action of the legislature preparing ETI for privatisation[144].

(E) Liability for competition law infringements when one business is sold to another

An important question arises where one undertaking commits an infringement of the competition rules, but then sells the business that was responsible for the infringement to a third party. Clearly the purchaser will need to know whether it bears the risk of a future fine in the event of a competition authority adopting a decision. The basic rule of personal responsibility is that, if the undertaking that was responsible for the business is still in existence, it remains liable for the infringement rather than the acquirer[145]. For example in *Zinc Phosphate*[146] the Commission decided that, where an undertaking commits an infringement of Article 101 and then disposes of the assets that were the vehicle of the infringement and withdraws from the market, it will still be held responsible if it is still in existence[147]. However the liability may pass to a successor where the corporate entity which committed the violation has ceased to exist in law after the infringement was committed[148]; or where the initial participant in the cartel still has a legal existence but no longer carries on an economic activity on the relevant market and where there are structural links between the initial entity and the new operator of the undertaking[149]. In *Hoechst GmbH v Commission*[150] Hoechst failed to establish that its liability in relation to a monochloroacetic acid cartel had passed to the purchaser of that business under either of these two exceptions[151]. In *Conex Bänninger Ltd v European Commission*[152] the purchaser of assets from an undertaking that had been fined for infringing Article 101 in the *Copper*

[143] Case C-280/06 [2007] ECR I-10893, [2008] 4 CMLR 277. [144] Ibid, paras 38–52.

[145] See eg Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, para 78.

[146] OJ [2003] L 153/1.

[147] Ibid, para 238, relying, *inter alia*, on Case T-80/89 *BASF v Commission* [1995] ECR II-729.

[148] Case C-49/92 *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, [2001] 4 CMLR 602, para 145.

[149] Cases C-204/00 P etc *Aalborg Portland A/S v Commission* [2004] ECR I-123, [2005] 4 CMLR 251, para 359.

[150] Case T-161/05, [2009] ECR II-3555, [2009] 5 CMLR 2728. [151] Ibid, paras 50–67.

[152] [2010] EWHC 1978 (Ch).

fittings decision[153] faced the uncertainty of not knowing whether the Commission would seek to enforce the fines against it; however Conex failed in its attempt to obtain a declaration from the High Court in England and Wales that it was not liable and/or to have the matter referred to the Court of Justice in Luxembourg.

3. Agreements, Decisions and Concerted Practices

The policy of Article 101 is to prohibit cooperation between undertakings which prevents, restricts or distorts competition. In particular Article 101 is concerned with the eradication of cartels: chapter 13 will examine this subject in detail. However it is important to bear in mind that Article 101 can also apply to vertical agreements: the difficulties in establishing the existence of a vertical agreement are discussed below[154].

The application of Article 101(1) is not limited to legal contracts: this would make evasion of the law simple. Article 101 applies also to cooperation achieved through informal agreements, decisions of trade associations and concerted practices. The Chapter I prohibition in the UK Competition Act 1998 has the same scope[155]. As will be seen, a broad interpretation has been given to each of the terms 'agreement', 'decision' and 'concerted practice'. A difficult issue is whether parallel behaviour by firms in an oligopolistic industry is attributable to an agreement or concerted practice between them, in which case Article 101(1) would be applicable; or whether it is a natural effect of the structure of the market, in which case a different competition law response might be needed. Chapter 14 will consider the issue of oligopoly, tacit collusion and so-called 'collective dominance' under Article 102 and the Chapter II prohibition in the Competition Act.

(A) Agreements

In *Bayer AG v Commission*[156] the General Court reviewed the case law on the meaning of agreement and stated that the concept:

> centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention[157].

In this section examples will be given of fact patterns that have been characterised as agreements for the purposes of Article 101. Consideration will then be given to the way in which the term 'agreement' applies to complex cartels. Discussion will follow on the steps that should be taken by an undertaking that wishes to 'publicly distance' itself from a cartel agreement. The final part of this section will look at the problems of proving that undertakings are party to a vertical agreement; the Court of Justice has stated specifically that the standard of proof on the Commission to prove the existence of an agreement contrary to Article 101(1) is the same whether the case is a horizontal or a vertical one[158].

[153] Commission decision of 20 September 2006.

[154] See '"Unilateral" conduct and Article 101(1) in vertical cases', pp 105–110 below.

[155] See ch 9, 'Agreements', pp 337–340.

[156] Case T-41/96 [2000] ECR II-3383, [2001] 4 CMLR 176.

[157] Ibid, para 69; this paragraph was quoted, apparently with approval, by the Court of Justice in the appeal against the General Court's judgment in the *Bayer* case in Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV v Bayer* AG [2004] ECR I-23, [2004] 4 CMLR 653, at para 97; for discussion see Black 'Agreement: Concurrence of Wills, or Offer and Acceptance?' (2008) 4 European Competition Journal 103.

[158] Case C-260/09 P *Activision Blizzard Germany GmbH v Commission* [2011] ECR I-000, [2011] 4 CMLR 964, para 71.

(i) Examples of agreements

A legal contract of course qualifies as an agreement, including a compromise of litigation such as a trade mark delimitation agreement[159] or the settlement of a patent action[160]. 'Gentleman's agreements'[161] and simple understandings[162] have been held to be agreements, though neither is legally binding; there is no requirement that an agreement should be supported by enforcement procedures[163]. A 'protocol' which reflects a genuine concurrence of will between the parties constitutes an agreement within the meaning of Article 101(1)[164]. Connected agreements may be treated as a single one[165]. An agreement may be oral[166]. The Commission will treat the contractual terms and conditions in a standard-form contract as an agreement within Article 101(1)[167]. An agreement which has expired by effluxion of time but the effects of which continue to be felt can be caught by Article 101(1)[168]. The constitution of a trade association qualifies as an agreement[169]. An agreement entered into by a trade association might be construed as an agreement on the part of its members[170]. An agreement to create a European Economic Interest Grouping, or the bye-laws establishing it, may be caught by Article 101(1)[171]. There may be 'inchoate understandings and conditional or partial agreement' during a

[159] See eg *Re Penney's Trade Mark* OJ [1978] L 60/19, [1978] 2 CMLR 100; *Re Toltecs and Dorcet* OJ [1982] L 379/19, [1983] 1 CMLR 412, upheld on appeal Case 35/83 *BAT v Commission* [1985] ECR 363, [1985] 2 CMLR 470; it is not entirely clear what effect embodiment of the compromise in an order of a national court has on the applicability of Article 101(1): see Case 258/78 *LC Nungesser KG v Commission* [1982] ECR 2015, [1983] 1 CMLR 278, paras 80–91, where the Court of Justice was delphic on this issue; the tenor of the Court of Justice's judgment in *BAT v Commission* would suggest that the agreement would be caught even where sanctioned by a national court. On trade mark delimitation agreements, see further ch 19, 'Settlements of litigation', pp 795–796.

[160] See eg Case 65/86 *Bayer v Süllhofer* [1988] ECR 5249, [1990] 4 CMLR 182; see further ch 19, 'Settlements of litigation', pp 795–796.

[161] See Case 41/69 *ACF Chemiefarma NV v Commission* [1970] ECR 661, [1970] CMLR 43 and Case T-53/03 *BPB plc v Commission* [2008] ECR II-1333, [2008] 5 CMLR 1201, para 72.

[162] *Re Stichting Sigarettenindustrie Agreements* OJ [1982] L 232/1, [1982] 3 CMLR 702 (an 'understanding' between trade associations held to be an agreement); *National Panasonic* OJ [1982] L 354/28, [1983] 1 CMLR 497, where there was no formal agreement between Panasonic and its dealers, but the Commission still held that there was an agreement as opposed to a concerted practice between them; *Viho/Toshiba* OJ [1991] L 287/39, [1992] 5 CMLR 180, where the Commission found an understanding between Toshiba's German subsidiary and certain distributors that an export prohibition should apply, even though the standard distribution agreements had been amended to remove an export prohibition clause.

[163] *Soda-ash/Solvay, CFK* OJ [1991] L 152/16, [1994] 4 CMLR 645, para 11; *PVC* OJ [1994] L 239/14, para 30; *CISAC*, Commission decision of 16 July 2008 [2009] 4 CMLR 577, para 130.

[164] *HOV SVZ/MCN* OJ [1994] L 104/34, para 46.

[165] *ENI/Montedison* OJ [1987] L 5/13, [1988] 4 CMLR 444.

[166] Case 28/77 *Tepea v Commission* [1978] ECR 1391, [1978] 3 CMLR 392; Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, para 2341.

[167] *Putz v Kawasaki Motors (UK) Ltd* OJ [1979] 1 16/9, [1979] 1 CMLR 448; *Sandoz* OJ [1987] L 222/28, [1989] 4 CMLR 628, upheld on appeal Case 277/87 *Sandoz Prodotti Farmaceutici SpA v Commission* [1990] ECR I-45.

[168] Case T-7/89 *SA Hercules NV v Commission* [1991] ECR II-1711, [1992] 4 CMLR 84, para 257; Case 51/75 *EMI Records Ltd v CBS UK Ltd* [1976] ECR 811, pp 848–849, [1976] 2 CMLR 235, p 267; Case T-48/98 *Acerinox v Commission* [2001] ECR II-3859, para 63; *E.ON/GDF*, Commission decision of 8 July 2009, on appeal to the General Court Cases T-360/09 and T-370/09, not yet decided.

[169] *Re Nuovo CEGAM* OJ [1984] L 99/29, [1984] 2 CMLR 484.

[170] Cases 209/78 etc *Heintz Van Landewyck v Commission* [1980] ECR 3125, [1981] 3 CMLR 134.

[171] *Orphe* Commission's XXth *Report on Competition Policy* (1990), point 102; *Tepar* [1991] 4 CMLR 860; *Twinning Programme Engineering Group* OJ [1992] C 148/8, [1992] 5 CMLR 93.

bargaining process sufficient to amount to an agreement in the sense of Article 101(1)[172]. Guidelines issued by one person that are adhered to by another can amount to an agreement[173]; and circulars and warnings sent by a manufacturer to its dealers may be treated as part of the general agreement that exists between them, although the Commission lost a case of this kind in *Volkswagen*[174]. The exchange of correspondence can amount to an agreement[175]. The fact that formal agreement has not been reached on all matters does not preclude a finding of an agreement[176], and there can be an agreement or concerted practice notwithstanding the fact that only one of the participants at a meeting reveals its intentions[177]. Undertakings cannot justify infringement of the competition rules by claiming that they were forced into an agreement by the conduct of other traders[178]. Where an agreement is entered into unwillingly, this may be significant in influencing the Commission to mitigate a fine[179], not to impose a fine[180] or not to institute proceedings at all. The fact that one party accepts that it was party to an agreement does not preclude the other(s) from challenging the existence of the same agreement[181]. The fact that the natural person who entered into the agreement did not have authority to do so does not mean that the undertaking that employs him or her is not liable[182].

(ii) Complex cartels

Many cartels are complex and of long duration. Over a period of time some firms may be more active than others in the running of a cartel; some may 'drop out' for a while but subsequently re-enter; others may attend meetings or communicate in other ways in order to be kept informed, without necessarily intending to fall in line with the agreed plan; there may be few occasions on which all the members of a cartel actually meet or behave precisely in concert with one another. This presents a problem for a competition authority: where the shape and active membership of a cartel changes over a period of time, must the authority prove a series of discrete agreements or concerted practices, and identify each of the parties to each of those agreements and concerted practices? This would require a considerable amount of evidence and impose a very high burden on the competition authority. It might also mean that it would not be possible to impose fines in relation to 'old' agreements and concerted practices, in relation to which infringement

[172] *Pre-Insulated Pipe Cartel* OJ [1999] L 24/1, [1999] 4 CMLR 402, para 133, substantially upheld on appeal Cases T-9/99 etc *HFB Holding v Commission* [2002] ECR II-1487, [2002] 5 CMLR 571.

[173] *Anheuser-Busch Incorporated/Scottish & Newcastle* OJ [2000] L 49/37, [2000] 5 CMLR 75, para 26.

[174] See 'Judgments since *Bayer v Commission* annulling Commission findings of an agreement', pp 109–110 below.

[175] *Nintendo* OJ [2003] L 255/33, para 196, substantially upheld on appeal to the General Court Case T-18/03 *CD-Contact Data v Commission* [2009] ECR II-1021, [2009] 5 CMLR 1469, paras 52–69 and on appeal to the Court of Justice Case C-260/09 P *Activision Blizzard Germany GmbH v Commission* [2011] ECR I-000, [2011] 4 CMLR 964.

[176] *Pre-Insulated Pipe Cartel* OJ [1999] L 24/1, [1999] 4 CMLR 402, para 134.

[177] Cases T-202/98 etc *Tate & Lyle v Commission* [2001] ECR II-2035, [2001] 5 CMLR 859, para 54.

[178] Case 16/61 *Modena v High Authority* [1962] ECR 289, [1962] CMLR 221; *Musique Diffusion Française v Commission* [1983] ECR 1825, [1983] 3 CMLR 221, paras 90 and 100; Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, para 2557.

[179] *Hasselblad* OJ [1982] L 161/18, [1982] 2 CMLR 233; *Wood Pulp* OJ [1985] L 85/1, [1985] 3 CMLR 474, para 131.

[180] *Burns Tractors Ltd v Sperry New Holland* OJ [1985] L 376/21, [1988] 4 CMLR 306; *Fisher-Price/Quaker Oats Ltd—Toyco* OJ [1988] L 49/19, [1989] 4 CMLR 553.

[181] Case T-18/03 *CD-Contact Data v Commission* [2009] ECR II-1021, [2009] 5 CMLR 1469, para 51.

[182] Case T-53/03 *BPB plc v Commission* [2008] ECR II-1333, [2008] 5 CMLR 1201, para 360.

proceedings had become time-barred[183]: precisely this issue arose, for example, in *BASF AG v Commission*[184], an appeal in the *Choline Chloride* case.

The Commission, upheld by the EU Courts, has addressed these problems in two ways: first, by developing the idea that it is not necessary to characterise infringements of Article 101(1) specifically as an agreement on the one hand or a concerted practice on the other; and secondly by establishing the concept of a 'single overall agreement' for which all members of a cartel bear responsibility, irrespective of their precise involvement from day to day[185].

(A) Agreement 'and/or' concerted practice

The Commission has stated that agreements and concerted practices are conceptually distinct[186]. However Advocate General Reischl has said that there is little point in defining the exact point at which agreement ends and concerted practice begins[187]. It may be that, in a particular case, linguistically it is more natural to use one term than the other, but legally nothing turns on the distinction: the important distinction is between collusive and non-collusive behaviour[188]. Sometimes the Commission will say that, even if contacts between competitors do not amount to an agreement, they can still be characterised as a concerted practice[189]. In *PVC*[190] the Commission reached the conclusion that the parties to the cartel had participated in an agreement 'and/or' a concerted practice. On appeal to the General Court Enichem argued that the Commission was not entitled to have made this 'joint classification'. In its judgment the General Court rejected this argument and upheld the Commission[191]. It held that:

> In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty[192].

The General Court went on to say that joint classification was permissible where the infringement includes elements both of an agreement and of a concerted practice, with-

[183] Under Article 26 of Regulation 1/2003, OJ [2003] L 1/1, the Commission cannot impose fines in relation to an infringement that ended five years or more before it initiated proceedings: see Kerse and Khan *EC Antitrust Procedure* (Sweet & Maxwell, 5th ed, 2005), paras 7.82–7.85.

[184] Cases T-101/05 and T-111/05 [2007] ECR II-4949, [2008] 4 CMLR 347, paras 132–223.

[185] See generally Joshua 'Attitudes to Anti-Trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law' [1995] Fordham Corporate Law Institute (ed Hawk), 85.

[186] See *Polypropylene* OJ [1986] L 230/1, [1988] 4 CMLR 347, para 86.

[187] See Cases 209/78 etc *Van Landewyck v Commission* [1980] ECR 3125, p 3310, [1981] 3 CMLR 134, p 185.

[188] *Polypropylene* OJ [1986] L 230/1, [1988] 4 CMLR 347, para 87, substantially upheld on appeal Case T-7/89 *SA Hercules NV v Commission* [1991] ECR II-1711, [1992] 4 CMLR 84, upheld on appeal to the Court of Justice Case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR I-4235, [1999] 5 CMLR 976; *Soda-ash/Solvay, ICI* OJ [1991] L 152/1, [1994] 4 CMLR 645, para 55.

[189] See eg *Candle Waxes*, Commission decision of 1 October 2008, para 239, on appeal to the General Court, Cases T-543/08 etc *RWE and RWE Dea v Commission*, not yet decided.

[190] OJ [1994] L 239/14, paras 30–31; this decision was taken by the Commission after its earlier decision, OJ [1989] L 74/1, had been annulled by the Court of Justice for infringement of essential procedural requirements: Cases C-137/92 P etc *Commission v BASF* [1994] ECR I-2555.

[191] Cases T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, [1999] 5 CMLR 303, paras 695–699; the General Court had noted the possibility of a joint classification in its earlier judgments in the *Polypropylene* case: see eg Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, paras 125–127 and Case T-8/89 *DSM v Commission* [1991] ECR II-1833, paras 234–235.

[192] Cases T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, [1999] 5 CMLR 303, para 696.

out the Commission having to prove that there was both an agreement and a concerted practice throughout the period of the infringement. This approach has been confirmed by the Court of Justice in *Commission v Anic*[193] and in *Asnef-Equifax*[194] where, in the case of cooperation between competitors in the form of an indirect exchange of information, it concluded that there was no need to characterise the cooperation at issue specifically as a concerted practice, an agreement or a decision of an association of undertakings.

The Commission has adopted a joint classification approach in many decisions, for example *Cartonboard*[195] and *Pre-Insulated Pipe Cartel*[196] and, more recently, *Car Glass*[197] and *Marine Hoses*[198]; it has taken this approach in vertical cases as well as horizontal ones[199]. As one former Commission official has put it: the search should not be for an agreement on the one hand or a concerted practice on the other; rather for a 'partnership for unlawful purposes with all the possible disagreements about methods that may occur in such a venture without affecting the cohesion of the shared purpose and design'[200].

(B) The concept of a 'single, overall agreement'[201]

In a series of decisions from the mid-1980s the Commission has developed the concept of a 'single, overall agreement' for which undertakings bear responsibility, even though they may not be involved in its operation on a day-to-day or a continuing basis. For example in *Polypropylene*[202] the Commission investigated a complex cartel agreement in the petrochemicals sector involving 15 firms over many years. It held that the detailed arrangements whereby the cartel operated were all part of a single, overall agreement: this agreement was oral, not legally binding, and there were no sanctions for its enforcement. Having established that there was a single agreement, the Commission concluded that all 15 firms were guilty of infringing Article 101, even though some had not attended every meeting of the cartel and had not been involved in every aspect of its decision-making: participation in the overall agreement was sufficient to establish guilt. Furthermore, the fact that some members of the cartel had reservations about whether to participate – or indeed intended to cheat by deviating from the agreed conduct – did not mean that they were not party to an agreement. The Commission reached similar conclusions in other cases, for example *PVC*[203], *LdPE*[204], in its second decision on *PVC*[205], in *Amino Acids*[206] and in *Dutch Bitumen*[207].

[193] Case C-49/92 [1999] ECR I-4125 [2001] 4 CMLR 602, paras 132 and 133: for critical comment on the Court of Justice's judgment in *Anic* see Wessely (2001) 38 CML Rev 739, 762–764; see also Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, [2000] 5 CMLR 853, para 237

[194] Case C-238/05 [2006] ECR I-11125, [2007] 4 CMLR 224, para 32.

[195] OJ [1994] L 243/1, [1994] 5 CMLR 547, para 128.

[196] OJ [1999] L 24/1, [1999] 5 CMLR 402, paras 131–132.

[197] Commission decision of 12 November 2008, paras 121 and 486.

[198] Commission decision of 28 January 2009, para 272.

[199] See *Nintendo* OJ [2003] L 255/33, paras 261ff.

[200] Joshua 'Attitudes to Anti-Trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law?' [1995] Fordham Corporate Law Institute (ed Hawk), 85.

[201] For discussion of this concept see Seifert 'The Single Complex and Continuous Infringement – "Effet Utilitarianism?"' [2008] 29 ECLR 546; Joshua 'Single Continuous Infringement of Article 81 EC: Has the Commission Stretched the Concept Beyond the Limit of its Logic?' (2009) 5(2) European Competition Journal 451; Bailey 'Single, overall agreement in EU Competition Law' (2010) 47 CML Rev 473.

[202] OJ [1986] L 230/1, [1988] 4 CMLR 347.

[203] OJ [1989] L 74/1, [1990] 4 CMLR 345.

[204] OJ [1989] L 74/21, [1990] 4 CMLR 382, paras 49–54.

[205] OJ [1994] L 239/14, paras 30–31.

[206] OJ [2001] L 152/24, [2001] 5 CMLR 322, paras 237–238.

[207] Commission decision of 13 December 2006, paras 138–141.

The General Court has confirmed the concept of a 'single overall agreement'[208]. In the appeal against the second *PVC* decision the General Court upheld the Commission's view that an undertaking can be held responsible for an overall cartel, even though it participated in only one or some of its constituent elements, 'if it is shown that it knew, or must have known, that the collusion in which it participated… was part of an overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel'[209]. However the General Court has also said, in the *Cement* cases, that where there are numerous bilateral and multilateral agreements between a large number of undertakings, it cannot be *presumed* from this that they form part of a single, overall agreement: it is necessary for the Commission to prove that this is the case[210]. In *BASF v Commission*[211] the General Court annulled a Commission finding of a single overall agreement: the global and the European cartels were separate from one another, and the Commission was time-barred from imposing a fine in respect of the global cartel, which had ended in 1994[212]. The Court also annulled a finding of a single and continuous agreement in *Verhuizingen Coppens NV v Commission*[213], one of the appeals in the *International Removal Services* case, as the Commission had failed to show that Verhuizingen knew, or ought to have known, about the offending conduct of the other participants in the cartel[214].

It is not impossible that an undertaking might want to argue that it *did* participate in a single, overall agreement: for example the Commission imposed a series of fines on undertakings involved in four different infringements of Article 101 involving various graphite products[215]. The aggregated fines amounted to more than 10 per cent of SGL Carbon's turnover; the General Court held that the Commission was permitted to impose four fines, since each decision involved a different infringement; if it had decided that there was a single, overall agreement affecting all graphite products, the 10 per cent ceiling would have been applicable and the fines on SGL would have been subject to a cap[216].

The cumulative effect of these judgments is clearly beneficial to the Commission in its anti-cartel policy, since the EU Courts seem to have deliberately refrained from construing the expressions 'agreement' and 'concerted practice' in a legalistic or formalistic manner: what emerges, essentially, is that any contact between competitors that touches upon business behaviour such as pricing, markets, customers and volume of output is risky in the extreme.

(iii) 'Public distancing' from a cartel

In *Tréfileurope v Commission*[217], one of the appeals in the *Welded Steel Mesh* case, the General Court held that the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose does not relieve it of full

[208] See Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, para 126.

[209] Cases T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, [1999] 5 CMLR 303, para 773.

[210] Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, paras 4027, 4060, 4109 and 4112.

[211] Cases T-101/05 and T-111/05 [2007] ECR II-4949, [2008] 4 CMLR 347.

[212] Ibid, paras 157–210.

[213] Case T-210/08 [2011] ECR II-000, [2011] 5 CMLR 333.

[214] Ibid, paras 28–32.

[215] See *Graphite electrodes* Commission decision of 18 July 2001; *Speciality graphite* Commission decision of 17 December 2002 (note that in that decision the Commission fined SGL Carbon twice for participating in two separate price-fixing cartels); and *Electrical and mechanical carbon and graphite products* Commission decision of 3 December 2003.

[216] Case T-68/04 *SGL Carbon AG v Commission* [2008] ECR II-2511, [2009] 4 CMLR 7, paras 122–134.

[217] Case T-141/89 [1995] ECR II-791, para 85.

responsibility for its participation in the cartel, if it has not publicly distanced itself from what was agreed in the meetings[218]. This has been repeated on numerous occasions, for example in *BPB de Eendracht NV v Commission*[219], an appeal in the *Cartonboard* case, in the *Cement* cases[220] and in *Steel Beams*[221]: the reason for this rule is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and that it would comply with it[222]. In *Westfalen Gassen Nederland BV*[223], an appeal in the *Industrial and medical gases* case, the General Court said that the notion of 'public distancing' as a means of excluding liability must be interpreted narrowly[224]; the Court did not go so far as to say that, in order to do so, the undertaking concerned should have blown the whistle to a competition authority, but it did suggest that, at the least, it should have written to its competitors and to the secretary of the trade association responsible for the meetings to say that it did not wish to be considered to be a member of the cartel nor to participate in meetings that were a cover for unlawful concerted action[225].

(iv) 'Unilateral' conduct and Article 101(1) in vertical cases[226]

The scheme of the EU competition rules is that Article 101 applies to conduct by two or more undertakings which is consensual and that Article 102 applies to unilateral action by a dominant firm. It follows that unilateral conduct by a firm that is not dominant is not caught at all. In a number of vertical cases the Commission has held that conduct which at first sight appeared to be unilateral fell within Article 101(1) as an agreement or a concerted practice; these were cases in which the Commission was concerned either that exports from one Member State to another were being inhibited or that resale prices were being maintained. Several of these decisions were upheld on appeal by the EU Courts; however in a number of cases, beginning with *Bayer AG/Adalat*[227] in 1996, findings of the Commission that there were agreements between a supplier and its distributors have been annulled on appeal[228].

(A) AEG Telefunken v Commission; Ford v Commission

Two judgments of the Court of Justice in the 1980s provide an important starting point when considering this issue. In *AEG-Telefunken v Commission*[229] the Court of Justice rejected a claim that refusals to supply retail outlets which were objectively suitable to handle AEG's goods were unilateral acts falling outside Article 101(1). The Court of Justice held that the refusals arose out of the contractual relationship between AEG and

[218] See Bailey 'Publicly Distancing Oneself from a Cartel' (2008) 32 World Competition 177.

[219] Case T-311/94 [1998] ECR II-1129, para 203.

[220] Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, paras 1353, 1389 and 3199.

[221] Cases T-141/94 etc *Thyssen Stahl v Commission* [1999] ECR II-347, [1999] 4 CMLR 810; see similarly Cases T-202/98 etc *Tate & Lyle v Commission* [2001] ECR II-2035, [2001] 5 CMLR 859, paras 64–65 and Case T-48/98 *Acerinox v Commission* [2001] ECR II-3859, paras 29–46.

[222] See eg Case C-403/04 P *Sumitomo Metal Industries Ltd v Commission* [2007] ECR I-729, [2007] 4 CMLR 650, para 48.

[223] Case T-302/02 [2006] ECR II-4567, [2007] 4 CMLR 334.

[224] Ibid, para 103.

[225] Ibid.

[226] See Lianos 'Collusion in Vertical Relations under Article 81 EC' (2008) 45 CML Rev 1027.

[227] OJ [1996] L 201/1, [1996] 5 CMLR 416.

[228] See 'Judgments since *Bayer v Commission* annulling Commission findings of an agreement', pp 109–110 below.

[229] Case 107/82 [1983] ECR 3151, [1984] 3 CMLR 325.

the established distributors within its selective distribution system and their mutual acceptance, tacit or express, of AEG's intention to exclude from the network distributors who, though qualified technically, were not prepared to adhere to its policy of maintaining a high level of prices and excluding modern channels of distribution[230]. The frequency of AEG's refusals to supply precluded the possibility that they were isolated cases not forming part of systematic conduct[231]. The AEG case suggested that it may be relatively easy to infer an agreement and/or concerted practice between the participants in a selective distribution system who have a strong mutual interest in excluding firms willing to undercut the prevailing retail price[232].

In *Ford v Commission*[233] the Court of Justice held that a refusal by Ford's German subsidiary to supply right-hand drive cars to German distributors was attributable to the contractual relationship between them; at the time right-hand drive cars were sold in Germany to British military forces stationed there: they could then bring them back to the UK, having bought them in Germany at prices considerably below those in the UK. The *Ford* judgment appeared to be a considerable extension of *AEG*. In *AEG* there was an obvious community of interest between participants in the selective distribution system in excluding discounters. In *Ford*, however, the German distributors with whom Ford had entered into contracts did not themselves benefit from the refusal to supply right-hand drive cars: the beneficiaries of this policy were distributors in the UK, who would be shielded from cheaper parallel imports. In *Ford* the 'unilateral' act held to be attributable to the agreements between the supplier and its distributors was not an act for the benefit of those very distributors. However, the main issue in *Ford* was not whether there were agreements between Ford and its German distributors: of course there were. Rather the issue with which the Court of Justice was concerned was whether the agreements, as implemented in practice, satisfied the criteria of Article 101(3), and the Court decided that they did not[234]. This is how the Court distinguished the *Ford* judgment in its 2004 judgment in the *Bayer* case[235], and is an important limiting principle.

(B) Subsequent cases prior to Bayer

In a number of decisions after AEG and Ford the Commission successfully applied Article 101(1) to apparently unilateral conduct. In *Sandoz*[236] it held that, where there was no written record of agreements between a producer and its distributors, unilateral measures, including placing the words 'export prohibited' on all invoices, were attributable to the continuing commercial relationship between the parties and were within Article 101(1). On appeal the Court of Justice upheld the Commission's decision[237]. In *Vichy*[238] the Commission specifically applied paragraph 12 of the *Sandoz* judgment, and its decision finding an agreement was upheld on appeal[239]. In *Tipp-Ex*[240] the Commission applied the

[230] On selective distribution systems see ch 16, 'Selective distribution agreements', pp 641–645.

[231] Case 107/82 [1983] ECR 3151, [1984] 3 CMLR 325, paras 31–39.

[232] Note also the two UK cases, *Football Shirts* and *Toys and Games*, in which it was found that there could be a multilateral agreement between a supplier and its distributors, having both horizontal and vertical characteristics, that comes about as a result of contact between each distributor and the supplier, though without necessarily there being any contact between the distributors themselves (a so-called 'hub and spoke' arrangement in which the supplier is the hub and the vertical agreement with each distributor are spokes): see ch 9, 'Agreements', pp 337–340.

[233] Cases 25/84 and 26/84 [1985] ECR 2725, [1985] 3 CMLR 528.

[234] Ibid, para 12.

[235] See '*Bayer v Commission*', pp 107–109 below.

[236] OJ [1987] L 222/28, [1989] 4 CMLR 628.

[237] Case C-277/87 *Sandoz Prodotti Farmaceutici SpA v Commission* [1990] ECR I-45.

[238] OJ [1991] L 75/57.

[239] Case T-19/91 *Vichy v Commission* [1992] ECR II-415.

[240] OJ [1987] L 222/1, [1989] 4 CMLR 425.

Court of Justice's judgments in *AEG* and *Ford*, holding that there was an infringement of Article 101 consisting of agreements between Tipp-Ex and its authorised dealers regarding the mutual protection of territories; again the Commission's decision was upheld on appeal[241]. In *Konica*[242] the Commission held that the sending of a circular to its distributors requiring them not to export Konica film from the UK to Germany was an offer by Konica, and that by complying with the circular the distributors had accepted it, with the result that there was an agreement or at least a concerted practice within Article 101; there was no appeal in this case. In *Bayo-n-ox*[243] goods were supplied at a special price, on condition that customers use them for their own requirements: they could not resell them; this stipulation was contained in circulars sent by the supplier to the customers. The Commission said that by accepting the products at the special price the customers had tacitly agreed to abide by the 'own requirements' condition. The Commission has said that the fact that a customer is acting contrary to its own best interests in agreeing to its supplier's terms does not mean that it is not party to a prohibited agreement under Article 101(1)[244]. In *Volkswagen AG v Commission*[245] the General Court rejected Volkswagen's argument that it had acted unilaterally as opposed to by agreement with its distributors to restrict parallel trade from Italy to Germany and Austria[246]. These cases clearly demonstrated the considerable risks borne by suppliers that attempt to control the resale activities of their distributors; however the *Bayer* case discussed in the next section revealed that the notion of an agreement in Article 101(1) is not infinitely elastic, and that the Commission will be successful on appeal before the EU Courts only where it can adduce convincing evidence of a meeting of minds between a supplier and its distributor(s).

(C) Bayer v Commission

In *Bayer AG/Adalat*[247] the Commission adopted a decision that Bayer and its wholesalers were parties to an agreement to restrict parallel trade in a pharmaceutical product, Adalat, from France and Spain to the UK. On this occasion, however, the General Court annulled the decision since, in its view, the Commission had failed to prove the existence of an agreement[248]; an appeal by the Commission and a parallel importer to the Court of Justice to reverse the General Court's judgment failed[249].

In order to prevent its French and Spanish wholesalers from supplying to parallel exporters to the UK, and thereby to protect its UK pricing strategy, Bayer had reduced the volume of its supplies of Adalat to France and Spain. An important feature of the case was that wholesalers in France and Spain were required to maintain sufficient stocks to enable them to supply local pharmacies with their requirements for drugs: clearly this

[241] Case C-279/87 *Tipp-Ex GmbH v Commission* [1990] ECR I-261.

[242] OJ [1988] L 78/34, [1988] 4 CMLR 848.

[243] OJ [1990] L 21/71, [1990] 4 CMLR 930; see also *Bayer Dental* OJ [1990] L 351/46, [1992] 4 CMLR 61.

[244] See eg *Gosmé/Martell-DMP* OJ [1991] L 185/23, [1992] 5 CMLR 586.

[245] Case T-62/98 [2000] ECR II-2707, [2000] 5 CMLR 853, upheld on appeal to the Court of Justice Case C-338/00 P *Volkswagen AG v Commission* [2003] ECR I-9189, [2004] 4 CMLR 351, paras 60–69.

[246] Ibid, paras 236–239.

[247] OJ [1996] L 201/1, [1996] 5 CMLR 416; for criticism of the Commission's decision see Kon and Schoeffer 'Parallel Imports of Pharmaceutical Products: a New Realism or Back to Basics?' (1997) 22 EL Rev 123; Lidgard 'Unilateral Refusal to Supply: an Agreement in Disguise?' (1997) 18 ECLR 352; Jakobsen and Broberg 'The Concept of Agreement in Article 81(1) EC: On the Manufacturer's Right to Prevent Parallel Trade within the European Community' (2002) 23 ECLR 127.

[248] Case T-41/96 [2000] ECR II-3383, [2001] 4 CMLR 176.

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

meant that, if Bayer assessed the level of domestic demand correctly, it could limit the volumes of Adalat supplied to the point where there would be none available for export. Prices for pharmaceuticals in France and Spain were as much as 40 per cent lower than in the UK, so that the market was ripe for parallel trade. The Commission concluded that a tacit agreement existed between Bayer and its wholesalers not to export to the UK that was contrary to Article 101(1): in its view the agreement was evidenced by the fact that the wholesalers had ceased to supply the UK in response to Bayer's tactic of reducing supplies. It has to be said that this would appear to be counter-intuitive, given that the wholesalers had tried every means possible to defy Bayer and to obtain extra supplies for the purpose of exporting to the UK: there was no 'common interest' in this case between Bayer and its wholesalers, whose respective needs were diametrically opposed. To put the point another way, this case was certainly not like *AEG*; if anything it was like *Ford*, where the beneficiary of Ford's restriction of supplies was not the German distributors deprived of suppliers, but the UK distributors protected from parallel trade. Bayer did not deny that it had reduced the quantities delivered to France and Spain, but it argued that it had acted unilaterally rather than pursuant to an agreement.

On appeal the General Court held that there was no agreement and annulled the Commission's decision. The Court acknowledged that there could be an agreement where one person tacitly acquiesces in practices and measures adopted by another[250]; however it concluded that the Commission had failed both to demonstrate that Bayer had intended to impose an export ban[251] and to prove that the wholesalers had intended to adhere to a policy on the part of Bayer to reduce parallel imports[252]. The General Court was satisfied that earlier judgments, including *Sandoz*, *Tipp-Ex* and *AEG*, were distinguishable[253]. It also rejected the argument that the wholesalers, by maintaining their commercial relations with Bayer after the reduction of supplies, could thereby be held to have agreed with it to restrain exports[254]. The General Court was not prepared to extend the scope of Article 101(1), acknowledging the importance of 'free enterprise' when applying the competition rules[255].

The Commission and a parallel importer appealed to the Court of Justice, which upheld the General Court's judgment[256]. At paragraph 88 of its judgment the Court of Justice held that:

> The mere fact that the unilateral policy of quotas implemented by Bayer, combined with the national requirements on the wholesalers to offer a full product range, produces the same effect as an export ban does not mean either that the manufacturer imposed such a ban or that there was an agreement prohibited by Article [101(1)] of the Treaty.

The Court of Justice noted that the Commission's analysis risked confusing the respective roles of Articles 101 and 102[257], and that the *AEG* and *Ford* cases were distinguishable[258].

[250] Ibid, para 71.

[251] Ibid, paras 78–110. [252] Ibid, paras 111–157. [253] Ibid, paras 158–171.

[254] Ibid, paras 172–182. [255] Ibid, para 180.

[256] Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV v Bayer AG* [2004] ECR I-23, [2004] 4 CMLR 653; the Court of Appeal in England and Wales applied the Court of Justice's judgment in *Bayer* in *Unipart Group Ltd v O2 (UK) Ltd* [2004] EWCA 1034, [2004] UKCLR 1453, in deciding that Unipart was not the victim of a margin squeeze imposed upon it by a co-contractor, O2: since O2 was not dominant Unipart could not proceed against it on the basis of Article 102 and therefore tried to argue that the margin squeeze arose from its contractual relationship with O2.

[257] Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV v Bayer AG* [2004] ECR I-23, [2004] 4 CMLR 653, para 101.

[258] Ibid, paras 107–108.

The importance of the judgments of the General Court and Court of Justice in *Bayer* cannot be overstated. Had the Commission's decision been upheld, the notion that an agreement for the purpose of Article 101(1) requires consensus between the parties would have been virtually eliminated; while this would have given the Commission greater control over restrictions of parallel trade within the EU, it would have done so at the expense of the integrity of the competition rules, which clearly apprehend unilateral behaviour only where a firm has a dominant position in the sense of Article 102.

(D) Judgments since Bayer v Commission *annulling Commission findings of an agreement*[259]

There have been several cases since *Bayer* in which decisions of the Commission that vertical agreements existed between a supplier and its distributors have been annulled on appeal. For example in *JCB* the Commission imposed fines on JCB for various infringements of Article 101, including for entering into agreements with distributors to fix discounts and resale prices[260]. On appeal the General Court annulled the Commission's decision on this point: it was true that JCB had recommended prices to its distributors, and that the prices that it charged to them would influence their own resale prices; however this was not sufficient in itself to show that there was an agreement between JCB and the distributors[261]. In *General Motors Nederland BV v Commission*[262] the General Court heard an appeal from a Commission decision, *Opel Nederland* BV[263], in which it had imposed fines of €43 million on Opel, a subsidiary of General Motors. The General Court annulled one of the Commission's findings: the Commission had argued that Opel's policy was to limit the number of cars that would be supplied to its Dutch dealers in order to prevent exports, and that this policy had been communicated to the dealers and agreed to by them; the General Court held that there was no direct proof in the decision that there had been any such communication, and even less that that measure had entered into the contractual relations between Opel and its dealers[264]. As a consequence the fine was reduced from €43 million to €35 million. A separate finding in this case – that a bonus system that the dealers had undoubtedly agreed to had as its object the restriction of competition – was updated by the General Court[265].

In a second decision involving Volkswagen[266] the Commission fined that company €30.96 million for agreeing to fix prices with its distributors for the VW Passat car. Volkswagen had sent circulars and letters to its distributors urging them not to sell the Passat at discounted prices. In the Commission's view the objectives set out in these circulars or letters became integral parts of the dealership agreement that the distributors had entered into; relying on cases such as *AEG* and others on selective distribution

[259] The Commission's decisions finding vertical agreements were upheld in *Nintendo* OJ [2003] L 255/33, upheld on appeal Case T-13/03 *Nintendo v Commission* [2009] ECR II-975, [2009] 5 CMLR 1421 and Case T-18/03 *CD-Contact Data GmbH v Commission* [2009] ECR II-1021, [2009] 5 CMLR 1469, paras 46–75: the latter case was also upheld on appeal to the Court of Justice in Case C-260/09 P *Activision Blizzard Germany GmbH v Commission* [2011] ECR I-000, [2011] 4 CMLR 964, and in *SEP et autres/Peugeot SA* Commission decision of 5 October 2005, upheld on appeal Case T-450/05 *Automobiles Peugeot and Peugeot Nederland v Commission* [2009] ECR II-2533.

[260] OJ [2002] L 69/1, [2002] 4 CMLR 148, paras 138–149.

[261] Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, [2004] 4 CMLR 1346, paras 121–133.

[262] Case T-368/00 [2003] ECR II-4491, [2004] 4 CMLR 1302.

[263] OJ [2001] L 59/1, [2001] 4 CMLR 1441.

[264] Case T-368/00 [2003] ECR II-4491, [2004] 4 CMLR 1302, paras 78–89.

[265] Ibid, paras 97–106; upheld on appeal Case C-551/03 P [2006] ECR I-3173, [2006] 5 CMLR 9.

[266] *Volkswagen* OJ [2001] L 262/14, [2001] 5 CMLR 1309, paras 61–69.

systems[267] the Commission argued that, within a selective distribution system, calls by a supplier such as Volkswagen of the type set out in the circulars and letters became part of the contractual relationship, without the need to prove any acquiescence on the part of the distributors. The General Court rejected the Commission's arguments and annulled the decision in *Volkswagen v Commission*[268]: the General Court did not accept the Commission's analysis of the case law on selective distribution, especially given that this would mean that the distributors, who had signed perfectly lawful dealership agreements in the first place, would be taken to have agreed to subsequent calls from Volkswagen that would make the implementation of the agreements illegal. On appeal the Court of Justice set aside the judgment of the General Court[269] in so far as it had suggested that a lawful clause in an agreement could never authorise a call contrary to Article 101[270]; nevertheless the Court of Justice still reached the same substantive conclusion, that the Commission had failed to establish an agreement[271].

(E) ***Comment***

Clearly the judgments in the previous section in which Commission findings of agreements in vertical relationships were annulled mean that it must be particularly careful to adduce evidence that there exists 'a concurrence of wills between at least two parties', in the words of the General Court's judgment in *Bayer*. However it would be dangerous for suppliers, wishing to suppress exports or to maintain resale prices, to suppose that this case law means that this is something that can be achieved without risk. In so far as they can achieve their intended purpose on a purely unilateral basis, *Bayer* shows that Article 101 can be avoided. However it should be stressed that, in that case, if it were not for the stock-holding obligations to supply French and Spanish pharmacies with Adalat, the wholesalers in question could have decided to sell all the Adalat that they acquired to parallel traders: in other words Bayer's unilateral reduction of suppliers was not enough, in itself, to staunch the parallel trade. In *General Motors* the Commission lost on the point about Opel's export policy because it had failed to show that the policy had been communicated to its distributors or that they had reacted to a policy known to them: if one reverses the facts – suppose that Opel had communicated the policy and the distributors had changed their behaviour accordingly – there would have been an agreement. As far as *Volkswagen* is concerned, the Commission appears to have argued its case in much too legalistic a manner, basing itself on the terms of the standard-form dealership agreement and the inferences to be drawn from it. Had the Commission argued that the distributors knew of Volkswagen's intentions and altered their pricing practices accordingly, it might have succeeded. These cases are highly fact-specific, and it would be wrong for suppliers and their distributors to draw too comforting a conclusion from the Commission's succession of defeats.

(B) Decisions by associations of undertakings

Coordination between independent undertakings may be achieved through the medium of a trade association. A trade association may have a particularly important role where the cartel consists of a large number of firms, in which case compliance with the rules of the cartel needs to be monitored: where only a few firms collude, it is relatively easy for

[267] See the cases cited in paras 18 and 19 of the General Court's judgment.
[268] Case T-208/01 [2003] ECR I-5141, [2004] 4 CMLR 727, paras 30–68.
[269] Case C-74/04 P *Commission v Volkswagen* [2006] ECR I-6585, [2008] 4 CMLR 1297.
[270] Ibid, paras 43–44. [271] Ibid, para 54.

each firm to monitor what the others are doing[272]. The possibility that trade associations may play a part in cartel activity is explicitly recognised in Article 101(1) by the proscription of 'decisions by associations of undertakings' that could restrict competition. The application of Article 101(1) to decisions means that the trade association itself may be held liable and be fined[273]; where the Commission intends to impose a fine on the association as well as, or in addition to, its members, this must be made clear in the statement of objections[274]. In *FNCBV v Commission*[275] the General Court upheld a decision of the Commission in which it had held that, as farm operators, farmers and breeders were engaged in economic activities, they were acting as undertakings; and that it followed that their trade unions and the federations that grouped those unions together were associations of undertakings. The federations, rather than the individual undertakings, were fined in this case[276]: the General Court reduced the fines slightly. Further appeals to the Court of Justice were rejected[277]; the Court confirmed that, in determining the maximum fine that could be imposed on the federations, the Commission was entitled to take into account the members' turnover; even though they had no power to bind their members, they had been engaged in practices directly for the benefit of their members and in co-operation with them[278].

It has been held that the constitution of a trade association is itself a decision[279], as well as regulations governing the operation of an association[280]. An agreement entered into by an association might also be a decision. A recommendation made by an association has been held to amount to a decision: the fact that the recommendation is not binding upon its members does not prevent the application of Article 101(1)[281], nor that it is not unanimously accepted by the members[282]. In such cases it is necessary to consider whether members in the past have tended to comply with recommendations that have

[272] See ch 14, 'The theory of oligopolistic interdependence', pp 560–567 on tacit collusion in oligopolistic markets.

[273] See eg *AROW v BNIC* OJ [1982] L 379/1, [1983] 2 CMLR 240 where BNIC was fined €160,000; *Fenex* OJ [1996] L 181/28, [1996] 5 CMLR 332 where Fenex was fined €1,000; *Belgian Architects Association* Commission decision of 24 June 2004 OJ [2005] L 4/10, where the association was fined €100,000.

[274] Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, para 485.

[275] Cases T-217/03 and T-245/03 [2006] ECR II-4987, [2008] 5 CMLR 406.

[276] Note that the association is obliged to ask for contributions from its members in the event that the association is insolvent: Article 23(4) of the Modernisation Regulation.

[277] Cases C-101/07 P and Case C-110/07 P *Coop de France bétail et viande v Commission* [2008] ECR I-10193, [2009] 4 CMLR 743.

[278] Ibid, para 97.

[279] See eg *Re ASPA* JO [1970] L 148/9, [1970] CMLR D25; *National Sulphuric Acid Association* OJ [1980] L 260/24, [1980] 3 CMLR 429.

[280] *Publishers' Association – Net Book Agreements* OJ [1989] L 22/12, [1989] 4 CMLR 825, upheld on appeal Case T-66/89 *Publishers' Association v Commission (No 2)* [1992] ECR II-1995, [1992] 5 CMLR 120, partially annulled on appeal to the Court of Justice in Case C-360/92 P *Publishers' Association v Commission* [1995] ECR I-23, [1995] 5 CMLR 33; *Sippa* OJ [1991] L 60/19; *Coapi* OJ [1995] L 122/37, [1995] 5 CMLR 468, para 34; *Nederlandse Federative Vereniging voor de Grootlandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU)* OJ [2000] L 39/1, [2000] 4 CMLR 1208, para 95; *Visa International* OJ [2001] L 293/24, [2002] 4 CMLR 168, para 53; *Visa International – Multilateral Interchange Fee* OJ [2002] L 318/17, [2003] 4 CMLR 283, para 55.

[281] Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, [1973] CMLR 7; Case 71/74 *FRUBO v Commission* [1975] ECR 563; [1975] 2 CMLR 123; Cases 209/78 etc *Van Landewyck v Commission* [1980] ECR 3125, [1981] 3 CMLR 134; Case 45/85 *VDS v Commission* [1987] ECR 405, [1988] 4 CMLR 264, para 32; see also *Distribution of railway tickets by travel agents* OJ [1992] L 366/47, paras 62–69, partially annulled on appeal Case T-14/93 *UIC v Commission* [1995] ECR II-1503, [1996] 5 CMLR 40; *Fenex* OJ [1996] L 181/28, [1996] 5 CMLR 332, paras 32–42.

[282] See *MasterCard*, Commission decision of 19 December 2007, para 384; the decision is on appeal to the General Court, Case T-111/08 *MasterCard Inc v Commission*, not yet decided.

been made, and whether compliance with the recommendation would have a significant influence on competition within the relevant market. In *IAZ International Belgium NV v Commission*[283] an association of water-supply undertakings recommended its members not to connect dishwashing machines to the mains system which did not have a conformity label supplied by a Belgian association of producers of such equipment. The Court of Justice confirmed the Commission's view that this recommendation, though not binding, could restrict competition, since its effect was to discriminate against appliances produced elsewhere in the EU.

In its decision in *MasterCard*[284] the Commission concluded that the rules of the MasterCard organisation remained a 'decision' of an association of undertakings even after MasterCard Inc was floated on the New York Stock Exchange[285].

(C) Concerted practices

The inclusion of concerted practices within Article 101 means that conduct which is not attributable to an agreement or a decision may nevertheless amount to an infringement. While it can readily be appreciated that loose, informal understandings to limit competition must be prevented as well as agreements, it is difficult both to define the type or degree of coordination within the mischief of the law and to apply that rule to the facts of any given case. In particular there is the problem that parties to a cartel may do all they can to destroy incriminating evidence of meetings, emails, faxes and correspondence, in which case the temptation of the competition authority may be to infer the existence of an agreement or concerted practice from circumstantial evidence such as parallel conduct on the market. This can be dangerous, for it may be that firms act in parallel not because of an agreement or concerted practice, but because their individual appreciation of market conditions tells them that a failure to match a rival's strategy could be damaging or even disastrous. The problem of parallel behaviour in oligopolistic markets will be examined in chapter 14.

It is necessary to consider first the legal meaning of a concerted practice; secondly the question of whether a concerted practice must have been put into effect for Article 101(1) to have been infringed; and lastly the burden of proof in such cases.

(i) Meaning of concerted practice[286]

ICI v Commission[287] (usually referred to as the *Dyestuffs* case) was the first important case on concerted practices to come before the Court of Justice. The Commission had fined several producers of dyestuffs which it considered had been guilty of price fixing through concerted practices[288]. The Commission's decision relied upon various pieces of evidence, including the similarity of the rate and timing of price increases and of instructions sent out by parent companies to their subsidiaries and the fact that there had been informal contact between the firms concerned. The Court of Justice upheld the Commission's

[283] Cases 96/82 etc [1983] ECR 3369, [1984] 3 CMLR 276.

[284] Commission decision of 19 December 2007.

[285] Ibid, paras 3 and 397–398.

[286] For stimulating discussion of the complexity of the notion of a concerted practice see Black 'Communication and Obligation in Arrangements and Concerted Practices' (1992) 13 ECLR 200; Black 'Concerted Practices, Joint Action and Reliance' (2003) 24 ECLR 219; Odudu *The Boundaries of EC Competition Law* (Oxford University Press, 2006), pp 71–91; for the treatment of concerted practices under the UK Competition Act 1998 see ch 9, 'Concerted practices', p 341.

[287] Case 48/69 [1972] ECR 619, [1972] CMLR 557.

[288] *Re Aniline Dyes Cartel* JO [1969] L 195/11, [1969] CMLR D23.

decision. It said that the object of bringing concerted practices within Article 101 was to prohibit:

> a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition[289].

In *Suiker Unie v Commission*[290] (the *Sugar Cartel* case) the Court of Justice elaborated upon this test. The Commission had held[291] that various sugar producers had taken part in concerted practices to protect the position of two Dutch producers on their domestic market. The producers denied this as they had not worked out a plan to this effect. The Court of Justice held that it was not necessary to prove that there was an actual plan. Article 101 strictly precluded:

> any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market[292].

These two cases provide the legal test of what constitutes a concerted practice for the purpose of Article 101: there must be a mental consensus whereby practical cooperation is *knowingly* substituted for competition; however the consensus need not be achieved verbally, and can come about by direct or indirect contact between the parties.

The European Commission has provided guidance on the meaning of a concerted practice in the section of its *Guidelines on Horizontal Cooperation Agreements* that deals with the exchange of information[293]. It says that the exchange of information between competitors can amount to a concerted practice where it reduces 'strategic uncertainty' in the market, thereby facilitating collusion[294]. In paragraph 62 of those *Guidelines* it refers to the *Cement* appeals[295], where the General Court found that Lafarge was party to a concerted practice when it received information at a meeting about the future conduct of a competitor: it could not argue that it was merely the passive recipient of such information[296]. The Commission then cites the Court of Justice's judgment in *T-Mobile*[297] and says that mere attendance at a meeting where an undertaking discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices, adding, in support of this proposition, the presumption in the *Hüls* judgment cited below that contact between competitors leads to common conduct on the market.

(ii) Must a concerted practice have been put into effect?: the need for a 'causal connection'

The Court of Justice held in *Hüls*, one of the *Polypropylene* cases, that 'a concerted practice . . . is caught by Article [101(1) TFEU], even in the absence of anti-competitive effects on the market'[298]; however, in the *Cement* cases the General Court said that there would

[289] Case 48/69 [1972] ECR 619, [1972] CMLR 557, para 64; see similarly Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, [2009] 5 CMLR 1701, para 26 and the cases cited therein.

[290] Cases 40/73 etc [1975] ECR 1663, [1976] 1 CMLR 295.

[291] *Re European Sugar Cartel* OJ [1973] L 140/17, [1973] CMLR D65.

[292] [1975] ECR 1663, p 1942, [1976] 1 CMLR 295, p 425.

[293] OJ [2011] C 11/1, paras 60–63.

[294] Ibid, para 61.

[295] Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204.

[296] Ibid, para 1849.

[297] Ch 3 n 289 above.

[298] Cases C-199/92 P etc *Hüls AG v Commission* [1999] ECR I-4287, [1999] 5 CMLR 1016, para 163.

be no infringement if the parties can prove to the contrary[299]. In reaching its conclusion in *Hüls* the Court of Justice stated that, as established by its own case law[300], Article 101(1) requires that each economic operator must determine its policy on the market independently. At paragraph 161 the Court acknowledged that the concept of a concerted practice implies that there will be common conduct on the market, but added that there must be a presumption that, by making contact with one another, such conduct will follow. In *T-Mobile*[301] the Court of Justice held that this presumption of a 'causal connection' between competitor contact and conduct on the market forms an integral part of EU law, in consequence of which a national court[302] applying Article 101 would be bound to apply the same presumption[303]; to put the point a different way, the national court would not be permitted to apply stricter evidential rules of national law than the EU presumption. The Court also held that the presumption in *T-Mobile* could apply even in the event of a single meeting between competitors[304]. In *Bananas*[305] the Commission held that three producers of bananas were party to a concerted practice by which they coordinated quotation prices for bananas in the north of Europe over a period of nearly three years[306]; in doing so it said that the presumption of a causal connection was stronger where the undertakings concert together on a regular basis over a long period[307].

(iii) The burden of proof

An important issue is to consider who bears the burden of proof in a concerted practice case. It is clear that the overall burden is on the Commission to establish that there has been a concerted practice; the EU Courts have annulled decisions where they were not convinced by the evidence on which the Commission relied[308]. However, the evidential burden of proof may be reversed, for example where the presumption of a causal connection between competitor contact and market conduct discussed in the previous paragraph applies: in that situation it will be for the parties to adduce evidence to rebut the presumption. Where the parties are able to produce evidence that appears to prove the innocence of their behaviour, the overall burden on the Commission requires it to demonstrate why that evidence is unpersuasive. For example in *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*[309] the Commission had concluded that the simultaneous cessation of deliveries to a Belgian customer, Schlitz, by CRAM and

[299] Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, para 1865.

[300] Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, [1976] 1 CMLR 295, para 73; Case 172/80 *Züchner v Bayerische Vereinsbank AG* [1981] ECR 2021, [1982] 1 CMLR 313, para 13; Cases 89/85 etc *Ahlström v Commission* [1993] ECR I-1307, [1993] 4 CMLR 407, para 63; Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, [1998] 5 CMLR 311, para 86.

[301] See ch 3 n 289 above.

[302] And also, one can assume, a national competition authority, though that was not the issue under consideration in *T-Mobile*.

[303] Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, [2009] 5 CMLR 1701, paras 44–53.

[304] Ibid, paras 54–62

[305] Commission decision of 15 October 2008, on appeal Case T-587/08 *Fresh Del Monte Produce v Commission*, not yet decided.

[306] Commission decision of 15 October 2008, paras 212–240.

[307] Ibid, para 218.

[308] See eg Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, [1976] 1 CMLR 295; Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* [1984] ECR 1679, [1985] 1 CMLR 688; and Cases T-68/89 etc *Società Italiano Vetro v Commission* [1992] ECR II-1403, [1992] 5 CMLR 302, in each of which the EU Courts quashed some or all of the findings of concerted practices.

[309] Cases 29/83 and 30/83 [1984] ECR 1679, [1985] 1 CMLR 688.

Rheinzink of Germany was attributable to a concerted practice to protect the German market. The Court of Justice held that there was a possible alternative explanation of the refusal to supply, which was that Schlitz had been failing to settle its accounts on the due date; as the Commission had not dealt with this possible explanation of the conduct in question its decision should be quashed. On the other hand in *CISAC*[310] the Commission was of the opinion that the only explanation for the fact that collecting societies restricted the grant of licences to licensees domiciled within their national territories was the existence of a concerted practice between them[311].

4. The Object or Effect of Preventing, Restricting or Distorting Competition

Article 101(1) prohibits agreements that have as their object or effect the prevention, restriction or distortion of competition[312]. It contains an illustrative list of agreements that may be caught such as price fixing and market sharing, but this is insufficient in itself to explain the numerous intricacies involved in understanding how this provision works. Judgments of the General Court and, at the top of the hierarchy, the Court of Justice contain the most authoritative statements of the law, and some of the best analyses will be found in Opinions of the Advocates General; the Commission's decisions, Notices and Guidelines provide important insights of its views on the application of Article 101(1), as do its *Annual Report on Competition Policy* and the quarterly *Competition Policy Newsletter*[313].

The application of Article 101(1) to agreements, in particular by the Commission, was for many years controversial. In essence the complaint of many commentators was that Article 101(1) was applied too broadly, catching many agreements that were not detrimental to competition at all[314]. Agreements that are caught by Article 101(1) are void and unenforceable[315], and may attract a fine, unless they satisfy the criteria set out in Article 101(3). Under Regulation 17[316], which conferred upon the Commission the power to enforce Articles 101 and 102, only it could grant a so-called 'individual exemption'

[310] Commission decision of 16 July 2008, on appeal to the General Court Cases T-398/08 etc, not yet decided.

[311] Ibid, paras 156–222.

[312] In the text that follows the term 'restriction' of competition is taken to include the prevention and distortion of competition.

[313] All of these materials are available on DG COMP's website at www.europa.eu.int/comm/competition/publications/cpn.

[314] See eg Bright 'EU Competition Policy: Rules, Objectives and Deregulation' (1996) 16 Oxford Journal of Legal Studies 535; there is a considerable amount of academic literature criticising the 'over'-application of Article 101(1): see eg Joliet *The Rule of Reason in Antitrust Law; American, German and Common Market Laws in Comparative Perspective* (1967), pp 77–106, 117 to the end; Korah 'The Rise and Fall of Provisional Validity' (1981) 3 NJILB 320; Schechter 'The Rule of Reason in European Competition Law' [1982(2)] Legal Issues in European Integration 1; Forrester and Norall 'The Laicization of Community Law: Self-help and the Rule of Reason' (1984) 21 CML Rev 11; Korah 'EEC Competition Policy – Legal Form or Economic Efficiency' (1986) 39 CLP 85; Venit 'Pronuptia: Ancillary Restraints or Unholy Alliances?' (1986) 11 EL Rev 213; Holley 'EEC Competition Practice; a Thirty-Year Retrospective' in [1992] Fordham Corp L Inst (ed Hawk), 669, p 689; Nazzini 'Article 81 EC Between Time Present and Time Past: A Normative Critique of 'Restriction of Competition' in EU Law (2006) 43 CML Rev 497; Marquis 'O2 (Germany) v Commission and the Exotic Mysteries of Article 81(1) EC' (2007) 32 EL Rev 29.

[315] See further ch 8, 'Competition law as a defence', pp 319–325.

[316] JO 204/62, OJ (Special Edition 1959–62) p 57.

to an agreement under Article 101(3); individual exemptions were rarely given, and the procedure for obtaining one was time-consuming, costly and cumbersome. A consequence was that many firms would ensure that they satisfied the terms of one of the 'block exemptions' under Article 101(3) in order to be certain that their agreements were legally enforceable[317]; where no block exemption was available firms that did not notify their agreements to the Commission for an individual exemption ran the risk of voidness and fines. An obvious solution proposed by critics of this situation was that Article 101(1) should be applied to fewer agreements: only those agreements that posed a real threat to competition should be caught in the net of competition law; others should not be ensnared by the competition rules at all.

These criticisms were loud and persistent throughout the 1980s and 1990s. However it is important to note that the advent of Regulation 1/2003[318] in May 2004 changed this position significantly. Under this Regulation the Commission no longer enjoys a 'monopoly' over individual exemptions under Article 101(3) – indeed there is no longer any such thing as an individual exemption; and the procedure of notifying agreements to the Commission for such an exemption has been abolished[319]. Instead the Commission now shares with national courts and national competition authorities ('NCAs') the power to make decisions on the application of Article 101 in its entirety. It follows that it is no longer necessary to argue that an agreement falls outside Article 101(1) for the procedural reason that it is not block exempted and has not been notified to the Commission for an individual exemption. Since Regulation 1/2003 it is always possible to argue that an agreement that is restrictive of competition under Article 101(1) satisfies the terms of Article 101(3), whether a case is being decided by the Commission, a national court or an NCA: there is no longer a procedural tail to wag the substantive dog[320]. Coupled with the introduction of Regulation 1/2003 is the undoubted fact that the Commission, for many years, has taken a more realistic approach both to Article 101(1) and Article 101(3), in particular to ensure that Article 101 as a whole is applied in accordance with sound economic principles. The Commission today takes a much narrower view of what is meant by a restriction of competition for the purpose of Article 101(1); and it also has a narrower approach to the circumstances in which Article 101(3) is satisfied[321]. Since Regulation 1/2003 the precise sphere of application of Article 101(1) on the one hand and Article 101(3) on the other does not have the significance that it did in the days of notification for individual exemption[322]; today the real question is whether an agreement infringes Article 101 as a whole.

(A) Three preliminary comments

The text that follows will examine the meaning of agreements having as their 'object or effect' the prevention, restriction or distortion of competition. However, a few preliminary comments may be helpful.

[317] On block exemptions see ch 4, 'Block Exemptions', pp 168–172.

[318] OJ [2003] L 1/1.

[319] See ch 4, 'The end of the system of notification for individual exemption', p 167.

[320] See Wils *Principles of European Antitrust Enforcement* (Hart Publishing, 2005), para 35.

[321] See ch 4, 'First condition of Article 101(3): an improvement in the production or distribution of goods or in technical or economic progress', pp 156–162 for a discussion of the 'narrow' and the 'broad' interpretations of Article 101(3).

[322] Note however that the burden of proof rests with different persons under Article 101(1) and Article 101(3): see ch 4, 'The burden of proving that the conditions of Article 101(3) are satisfied', pp 152–153.

First, there are many judgments of the EU Courts that demonstrate that a contractual restriction does not necessarily result in a restriction of competition[323]. It is essential to understand this key point: the concept of a restriction of competition is an economic one, and as a general proposition economic analysis is needed to determine whether an agreement could have an anti-competitive effect. A relatively small class of agreements are considered by law to have as their object the restriction of competition[324]; in the case of all other agreements anti-competitive effects must be demonstrated for there to be an infringement of Article 101(1)[325].

Secondly, in several judgments the EU Courts have made clear that the Commission must adequately demonstrate that an agreement is restrictive of competition, and that they will not simply 'rubber-stamp' its analysis: a particularly good example is *European Night Services v Commission*[326], where the General Court exposed the thorough inadequacy of the Commission's reasoning in its decision in that case[327].

Thirdly, the General Court has said that in a case under Article 101(1) the definition of the market is relevant at the stage of determining whether there has been an impairment of competition or an effect on trade between Member States; it is not something that must be undertaken as a preliminary matter, as in the case of Article 102 where it is a necessary precondition to a finding of abuse of a dominant position[328].

(B) Horizontal and vertical agreements

One point is absolutely clear: Article 101 is capable of application both to horizontal agreements (between undertakings at the same level of the market) and to vertical agreements (between undertakings at different levels of the market). It was at one time thought that Article 101 might have no application at all to vertical agreements, but that idea was firmly contradicted by the Court of Justice's judgment in *Consten and Grundig v Commission*[329]; it remains the case that undertakings must carry out a careful assessment of whether their vertical agreements are compliant with the law. The application of Article 101 to vertical agreements will be considered in detail in chapter 16.

(C) The 'object or effect' of preventing, restricting or distorting competition

Article 101(1) prohibits agreements 'which have as their *object or effect* the prevention, restriction or distortion of competition' (emphasis added). It is important to understand the significance of the words 'object or effect' in Article 101(1).

[323] See the cases discussed at 'Cases in which agreements containing contractual restrictions were found not to have anti-competitive effects', pp 128–129 below.

[324] See 'Agreements that have as their object the prevention, restriction or distortion of competition', pp 121–125.

[325] See 'Agreements that have as their effect the prevention, restriction or distortion of competition', pp 125–137 below.

[326] Cases T-374/94 etc [1998] ECR II-3141, [1998] 5 CMLR 718.

[327] *European Night Services Ltd* OJ [1994] L 259/20, [1995] 5 CMLR 76.

[328] Case T-29/92 *SPO v Commission* [1995] ECR II-289, para 75; Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, para 833; Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, [2000] 5 CMLR 853, paras 230–232; Case T-213/00 *CMA CGM v Commission* [2003] ECR II-913, [2003] 5 CMLR 268, para 206.

[329] Cases 56 and 58/64 [1966] ECR 299, [1966] CMLR 418.

(i) 'Object or effect' to be read disjunctively

It is clear that these are alternative, and not cumulative, requirements for a finding of an infringement of Article 101(1). In *Société Technique Minière v Maschinenbau Ulm*[330] the Court of Justice stated that the words were to be read disjunctively. This means that where an agreement has as its object the restriction of competition, it is unnecessary to prove anti-competitive effects; only if it is not clear that the object of an agreement is to restrict competition is it necessary to consider whether it might have the effect of doing so. This has been regularly repeated by the Court of Justice, in recent years for example in *Competition Authority v Beef Industry Development Society Ltd*[331], *T-Mobile Netherlands*[332] and in *GlaxoSmithKline Services Unlimited v Commission*[333]. Advocate General Kokott has pointed out that a law that forbids people from driving cars when under the influence of alcohol does not require, for a conviction, that the driver has caused an accident – that is to say proof of an effect; in the same way Article 101(1) prohibits certain agreements that have the object of restricting competition, irrespective of whether they produce adverse effects on the market in an individual case[334].

(ii) 'Object'

Case law has established that there are some types of agreement[335] the anti-competitiveness of which can be determined simply from their object. In *GlaxoSmithKline Services Unlimited v Commission*[336] the Court of Justice, citing earlier cases, said that in order to decide whether an agreement restricts by object:

> regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms part[337].

In *T-Mobile Netherlands*[338] the Court said that, in order to ascribe an anti-competitive object to a concerted practice[339], it is sufficient that it has the *potential* to have a negative impact on competition: the effects of such a practice would be relevant only to the level of any fine or the award of damages to victims of the harm[340]. The Court also said that, in order to find a restriction by object, it was not necessary to demonstrate a direct effect on prices to end users: Article 101 is designed to protect the structure of the market and competition as such[341].

The text below will examine which types of agreement have been found to restrict by object[342]. However it may be helpful to begin with some general comments about object restrictions. The first is that the word 'object' in this context does not mean the

[330] Case 56/65 [1966] ECR 235, p 249, [1966] CMLR 357, p 375.

[331] Case C-209/07, [2008] ECR I-8637, [2009] 4 CMLR 310, paras 15 and 16.

[332] Case C-8/08 [2009] ECR I-4529, [2009] 5 CMLR 1701, paras 28 and 30.

[333] Cases C-501/06 P etc [2009] ECR I-9291, [2010] 4 CMLR 50, para 55.

[334] Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, [2009] 5 CMLR 1701, para 47.

[335] The Court of Justice has confirmed that a concerted practice can also have the object of restricting competition: see eg Cases C-199/92 P etc *Hüls AG v Commission* [1999] ECR I-4287, [1999] 5 CMLR 1016, para 164; Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, [2009] 5 CMLR 1701, paras 28–30.

[336] Case C-501/06 P [2009] ECR I-9291, [2010] 4 CMLR 50. [337] Ibid, para 58.

[338] Case C-8/08 [2009] ECR I-4529, [2009] 5 CMLR 1701.

[339] The *T-Mobile* case concerned a concerted practice, but the Court would presumably have said the same if it had been dealing with an agreement.

[340] Case C-8/08 *T-Mobile* [2009] ECR I-4529, [2009] 5 CMLR 1701, para 31; see eg *Amino Acids* OJ [2001] L 154/24, [2001] 5 CMLR 322, paras 261–298.

[341] Case C-8/08 *T-Mobile* [2009] ECR I-4529, [2009] 5 CMLR 1701, paras 36–39.

[342] See also the Commission's *Guidelines on the application of Article [101(3)] of the Treaty* OJ [2004] C 101/8, paras 21–23 and its *Guidelines on Horizontal Cooperation Agreements* OJ [2011] C 11/1, paras 24–25.

subjective intention of the parties when entering into the agreement, but the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied[343]. This does not mean that subjective intention is altogether irrelevant: in *T-Mobile*[344] the Court of Justice said that

> while the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive, there is nothing to prevent the Commission of the European Communities or the competent Community judicature from taking it into account.[345]

It follows from the proposition that subjective intention is not a *necessary* condition to characterise an agreement as restrictive by object that the Court of Justice has held that it is irrelevant that the agreement was not in the commercial interest of some of the participants[346]; and that, where an agreement has an anti-competitive object, it does not cease to be characterised as such because it had an alternative, lawful, purpose[347].

A second point about object restrictions is that, from a competition authority's point of view, the fact that it does not need to demonstrate, for example, that horizontal price-fixing agreements produce adverse economic effects relieves it of some of the burden that would otherwise rest upon it. In her Opinion in *T-Mobile*[348] Advocate General Kokott said that the classification of certain types of agreement as restrictive by object 'sensibly conserves resources of competition authorities and the justice system'[349]. She also pointed out that the existence of object restrictions 'creates legal certainty and allows all market participants to adapt their conduct accordingly'[350] adding that, although the concept of restriction by object should not be given an unduly broad interpretation, nor should it be interpreted so narrowly as to deprive it of its practical effectiveness[351].

The third point is that, where the parties to an agreement that is restrictive by object wish to assert that it could produce efficiency-enhancing effects, they can do so only by proving that it satisfies the criteria of Article 101(3), the burden of proof being on them to prove that this is so[352]. Having decided in *Competition Authority v Beef Industry Development Society Ltd*[353] that an agreement between beef processors in Ireland to reduce overcapacity by encouraging some of them to withdraw from the market restricted competition by object, the Court of Justice said that the agreement could be defended only under Article 101(3)[354].

[343] Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission* [1984] ECR 1679, [1985] 1 CMLR 688, paras 25–26; Case C-277/87 *Sandoz Prodotti Farmaceutici v Commission* [1990] ECR I-45; Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, para 79; Case C-551/03 P *General Motors v Commission* [2006] ECR II-3173, [2006] 5 CMLR 4491, paras 77–78.

[344] Case C-8/08 [2009] ECR I-4529, [2009] 5 CMLR 1701.

[345] Ibid, para 27; on the relevance of subjective intention see Odudu 'Interpreting Article 81(1): Object as Subjective Intention' (2001) 26 EL Rev 60 and Odudu 'Interpreting Article 81(1): the Object Requirement Revisited' (2001) 26 EL Rev 379.

[346] See eg Case C-403/04 P *Sumitomo Metal Industries Ltd v Commission* [2007] ECR I-729, [2007] 4 CMLR 650, paras 45–46.

[347] Case C-551/03 P [2006] ECR I-3173, [2006] 5 CMLR 9, para 64; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637, [2009] 4 CMLR 310, para 21; the same point was made by the General Court in Cases T-49/02 etc *Brasserie Nationale SA v Commission* [2005] ECR II-3033, [2006] 4 CMLR 266, para 85.

[348] Case C-8/08 [2009] ECR I-4529, [2009] 5 CMLR 1701. [349] Ibid, para 43. [350] Ibid.

[351] Ibid, para 44.

[352] See ch 4 generally on Article 101(3), including the burden of proof and the nature of the evidence required to succeed in showing that that provision is satisfied.

[353] Case C-209/07 [2008] ECR I-8637, [2009] 4 CMLR 310; for comment on this judgment see Odudu 'Restrictions of Competition by Object – What's the Beef?' (2009) 8(1) Competition Law Journal 11.

[354] Ibid, paras 21 and 39; the case was remitted to the High Court in Ireland to consider whether the criteria of Article 101(3) were satisfied; however BIDS withdrew its defence before the Court had made

A fourth point is that the fact that there is no need to prove anti-competitive effects in the case of object restrictions does not mean that there is no quantitative component to object analysis at all. There is a rule that any restriction of competition must be *appreciable*: even a restriction of competition by object could fall outside Article 101(1) if its likely impact on the market is minimal[355]. Furthermore, as a jurisdictional matter, an agreement infringes Article 101(1) only if it has an *appreciable* effect on trade between Member States: again, therefore, some quantitative analysis may be required before determining that Article 101(1) is infringed[356]. Because of the need to prove appreciability, it is necessary for the Commission to define the relevant market even in a case involving an object restriction[357].

(iii) 'Effect'

Where an agreement does not have as its object the restriction of competition, it is necessary to demonstrate that it would have a restrictive effect; this is a much more onerous task for the Commission or the person wishing to establish an infringement of Article 101(1). The position was stated clearly by the General Court in *European Night Services v Commission*[358]:

> it must be borne in mind that in assessing an agreement under Article [101(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 [101(3)] of the Treaty, with a view to granting an exemption from the prohibition in Article [101(1)] (emphasis added).

(iv) Comment on the 'object or effect' distinction

Clearly it is important to know which agreements can be classified as having as their object the restriction of competition since in such cases it is not necessary to prove that anti-competitive effects would follow.

It may be helpful to think of the position in terms of two boxes, as follows:

OBJECT	EFFECT
Agreements that have as their object the restriction of competition	Agreements that have as their effect the restriction of competition

a decision on the matter: see Irish Competition Authority, Press Release of 25 January 2011, available at www.tca.ie/default.aspx.

[355] For discussion of this rule see 'The *De Minimis* Doctrine', pp 140–144 below.

[356] See 'The Effect on Trade between Member States', pp 144–149 below on the requirement of an appreciable effect on trade between Member States.

[357] See eg Case T-199/08 *Ziegler SA v Commission* [2011] ECR II-000, [2011] 5 CMLR 261, paras 41–45 (one of the appeals in the *International Removal Services* case).

[358] Cases T-374/94 etc [1998] ECR II-3141, [1998] 5 CMLR 718, para 136.

Article 101(1), as interpreted by the EU Courts, allocates particularly pernicious types of agreement that are overwhelmingly likely to harm consumer welfare to the object box, with the consequences just described. This is done as a matter of policy: certain agreements are so clearly inimical to the objectives of the EU that they can be permitted only where they can be shown to satisfy the requirements of Article 101(3). In all other cases, however, the lawfulness of an agreement under Article 101(1) must be tested according to its anti-competitive effects and this, as we shall see, requires a wide-ranging analysis of the market[359].

There is clearly an analogy here with the position under section 1 of the Sherman Act 1890 in the US, which characterises some agreements as *per se* infringements of the Act, whereas others are subject to so-called 'rule of reason' analysis[360]. Where there is a *per se* infringement, it is not open to the parties to the agreement to argue that it does not restrict competition: it belongs to a category of agreement that has, by law, been found to be restrictive of competition. However, there is an important difference in EU law in that, even if an agreement has as its object the restriction of competition, that is to say that it infringes Article 101(1) *per se*, the parties can still argue that the agreement satisfies the terms of Article 101(3). This possibility does not exist in US law, since there is no equivalent of Article 101(3) in that system. For this reason a judgment such as that of the US Supreme Court in *Leegin*[361], in which that Court determined that minimum resale price maintenance should be analysed under a rule of reason standard, rather than being subjected to a *per se* rule, brings US law into alignment with that of the EU: it has always been possible for an undertaking to argue that resale price maintenance satisfies Article 101(3), even though it is classified as having as its object the restriction of competition for the purpose of Article 101(1). Paragraph 46 of the Commission's *Guidelines on the application of Article [101(3)] of the Treaty*[362] cites the General Court's judgment in *Matra Hachette v Commission*[363], which established that there is no type of agreement that, on *a priori* grounds, can be said to be incapable of satisfying the criteria of Article 101(3): even agreements that restrict competition by object can do so, provided that probative evidence in support of efficiency gains can be adduced.

(D) Agreements that have as their object the prevention, restriction or distortion of competition

In *European Night Services v Commission*[364] the General Court referred to agreements 'containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets'; without using the terminology used in this chapter, it seems clear that the General Court considered that agreements of this nature should be allocated to

[359] See 'Agreements that have as their effect the prevention, restriction or distortion of competition', pp 125–137 below.

[360] For an interesting discussion of this topic see Black 'Per Se Rules and Rules of Reason: What Are They?' (1997) 18 ECLR 145: this article contains extensive citation of the literature on the position under US law; see also Jones 'Analysis of agreements under US and EC antitrust law – Convergence or divergence?' (2006) 51 Antitrust Bulletin 691; Andreangeli 'From Mobile Phones to Cattle: How the Court of Justice Is reframing the Approach to Article 101 of the EU Treaty' (2011) 34 World Competition 215.

[361] *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007).

[362] OJ [2004] C 101/97.

[363] Case T-17/93 [1994] ECR II-595.

[364] Cases T-374/94 etc [1998] ECR II-3141, [1998] 5 CMLR 718.

the 'object' box. Advocate General Trstenjak said in her Opinion in *Competition Authority v Beef Industry Development Society Ltd*[365] that the notion of restriction of competition by object cannot be reduced to an exhaustive list, and that it should not be limited just to the examples of anti-competitive agreements given in Article 101(1) itself[366]. It is for the EU Courts to determine which agreements restrict competition by object; over a period of time the contents of the object box may expand or contract[367].

(i) Price fixing and exchanges of information in relation to future prices

Price fixing is specifically cited as an example of an anti-competitive agreement in Article 101(1)(a) of the Treaty, and it is unsurprising that it is characterised as having as its object the restriction of competition, whether horizontal[368] or vertical[369]. In *T-Mobile*[370] the Court of Justice said that the exchange of information between competitors 'is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings'[371]; in that case mobile telephone operators exchanged information about the remuneration that they intended to pay to their dealers for the services that they provided. In its *Guidelines on Horizontal Cooperation Agreements*[372] the Commission says that it considers the exchange of information between competitors of individualised data regarding intended future prices or quantities to be restrictive of competition by object[373]. In *Bananas*[374] the Commission held that 'pre-pricing communications' in which undertakings discussed price-setting factors relevant to the setting of future quotation prices amounted to object restrictions[375]. Other information exchanges require effects analysis[376].

(ii) Market sharing, quotas, collective exclusive dealing

Market-sharing agreements are specifically mentioned in Article 101(1)(c), and again their treatment as restrictive by object is to be expected, in particular because they are likely to be harmful to the internal market[377].

The General Court did not refer in *European Night Services* to agreements to limit output when discussing 'obvious' restrictions of competition, but they must also be allo-

[365] Case C-209/07 [2008] ECR I-8637, [2009] 4 CMLR 310.

[366] Ibid, para 48; the Court of Justice's judgment appears to agree with this, although paragraph 23 of its judgment says only that Article 101 does not constitute an exhaustive list of prohibited collusion: the context of the statement suggests that it meant that it is not an exhaustive list of collusion *by object*.

[367] See 'Refinement of the range of agreements within the object box', pp 124–125 below; for criticism of the current lack of clarity in determining whether a restriction is one by object see Jones 'Left Behind my Modernisation? Restrictions by Object Under Article 101(1)' (2010) European Competition Journal 649; King 'The Object Box: Law, Policy or Myth?' (2011) 7(2) European Competition Journal 269.

[368] See ch 13, 'Horizontal Price Fixing', pp 522–530.

[369] See ch 16, 'Article 4(a): resale price maintenance', pp 664–665.

[370] Case C-8/08 [2009] ECR I-4529, [2009] 5 CMLR 1701. [371] Ibid, para 43.

[372] OJ [2011] C 11/1.

[373] Ibid, para 74.

[374] *Bananas* Commission decision of 15 October 2008, paras 263–277, on appeal Case T-587/08 *Fresh Del Monte Produce v Commission*, not yet decided.

[375] Ibid, paras 263–277.

[376] See eg Case C-238/05 *Asnef-Equifax v Asociación de Usuarios de Servcicios Bancarios (Ausbanc)* [2006] ECR I-11125, [2007] 4 CMLR 224 and the Commission's *Guidelines on Horizontal Cooperation Agreements* OJ [2011] C 11/1, paras 75–94; information agreements are discussed in ch 13, 'Exchanges of Information', pp 539–547.

[377] See ch 13, 'Horizontal Market Sharing', pp 530–533.

cated to the object box on the basis that they clearly restrict competition, and they are specifically referred to in Article 101(1)(b); analogous agreements, for example to limit sales, must also be included[378]. In *Competition Authority v Beef Industry Development Society Ltd*[379] the Court of Justice held that arrangements to enable several undertakings to implement a common policy of encouraging some of them to withdraw from the market in order to reduce overcapacity had the object of restricting competition[380]. The Commission has also characterised collective exclusive dealing as restricting competition by object[381].

(iii) Controlling outlets; export bans

The General Court in *European Night Services* referred to agreements to control outlets as containing obvious restrictions of competition; the control of outlets is not specifically referred to in Article 101(1), but the Court presumably had in mind the imposition on distributors of export bans from one Member State to another, which have consistently been found to have as their object the restriction of competition[382]: nothing could be more obviously inimical to the goal of market integration than restrictions of this kind. The judgment of the General Court in *GlaxoSmithKline v Commission*[383] somewhat muddied this apparently simple point by suggesting that, in the specific and unusual conditions in which pharmaceutical products are bought and sold, an indirect export ban did not have its object the restriction of competition[384], although it did restrict competition by effect[385]. However the Court of Justice reversed the judgment of the General Court, repeating that an agreement aimed at prohibiting or limiting parallel trade has as its object the restriction of competition, and that that principle applies to the pharmaceutical sector as it does to any other[386]; the Court added that, in order to be found to restrict by object, it was not necessary to show that the agreement entailed disadvantages for final consumers[387].

The Court of Justice has also held that the imposition of fixed or minimum resale prices on distributors is restrictive of competition by object[388].

[378] See ch 13, 'Anti-Competitive Horizontal Restraints', pp 550–552.

[379] Case C-209/07 [2008] ECR I-8637, [2009] 4 CMLR 310. [380] Ibid, paras 33–34.

[381] See eg *Nederlandse Federative Vereniging voor de Grootlandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU)* OJ [2000] L 39/1, [2000] 4 CMLR 1208, para 105, and the further examples given in footnote 120 of that decision; the Commission's decision was upheld on appeal, Cases T-5/00 and 6/00 [2003] ECR II-5761, [2004] 5 CMLR 962.

[382] See eg Case 19/77 *Miller International Schallplaten v Commission* [1978] ECR 131, [1978] 2 CMLR 334, paras 7 and 18; see similarly Case C-551/03 P *General Motors BV v Commission* [2006] ECR I-3173, [2006] 5 CMLR 9, in particular paras 64–80; Cases T-175/95 and T-176/95 *BASF v Commission* [1999] ECR II-1581, [2000] 4 CMLR 33, para 133; Case T-176/95 *Accinauto SA v Commission* [1999] ECR II-1635, [2000] 4 CMLR 67, para 104.

[383] Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, [2006] 5 CMLR 1623.

[384] Ibid, paras 114–147.

[385] Ibid, paras 148–192.

[386] Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, [2010] 4 CMLR 50, paras 59 and 60.

[387] Ibid, paras 62–64.

[388] Case 161/84 *Pronuptia de Paris GmbH v Schillgalis* [1986] ECR 353, [1986] 1 CMLR 414, paras 23 and 25.

Following the order of the text above, it seems that the contents of the 'object' box can be depicted as follows:

The object box[389]

Horizontal agreements:

- to fix prices
- to exchange information that reduces uncertainty about future behaviour
- to share markets
- to limit output, including the removal of excess capacity
- to limit sales
- for collective exclusive dealing

Vertical agreements:

- to impose fixed or minimum resale prices
- to impose export bans

(iv) Refinement of the range of agreements within the object box

An important qualification must be made. This presentation of the position slightly oversimplifies the position in so far as it suggests that the content of the object box is capable of precise definition: it is not; furthermore the content of the object box is capable of change over a period of time, as the EU Courts are called upon to consider, or perhaps to reconsider, the restrictive nature of particular types of agreements. This process of categorisation and recategorisation is natural and to be expected, and has a parallel in the US where the courts are from time to time called upon to determine whether a particular type of agreement should be tested according to a *per se* or a rule of reason standard[390]. However the fact that a particular type of agreement might be characterised as not having as its object the restriction of competition does *not* mean that an agreement that is found to restrict by object ceases to do so if it can be proven in an individual case that it does not have a restrictive effect: in that case all object cases would, in reality, be converted into effects ones, thereby undermining the very distinction between the two[391].

[389] It will be seen that the contents of the object box correspond to a large extent with the provisions that are blacklisted in Articles 4(a) and 4(b) of Regulation 330/2010 on vertical agreements (ch 16, 'Article 4(a): resale price maintenance', pp 664–665, and ch 16, 'Article 4(b): territorial and customer restrictions', pp 665–668), Article 5 of Regulation 1217/2010 on research and development agreements (ch 15, 'Article 4: the market share threshold and duration of exemption', p 597) and Article 4 of Regulation 1218/2010 on specialisation agreements (ch 15, 'Article 4: hardcore restrictions', p 602).

[390] In the US see *Continental TV v GTE Sylvania* 433 US 36 (1977), where the Supreme Court overruled an earlier judgment, *US v Arnold Schwinn & Co* 388 US 365 (1967), that had subjected non-price vertical restraints to a *per se* rule; *National Society of Professional Engineers v US* 435 US 679 (1978), where a trade association's rules prohibiting competitive bidding by members were tested under the rule of reason rather than a *per se* rule; *Broadcast Music Inc v CBS* 441 US 1 (1979), where the rule of reason was applied to the rules of a copyright collecting society: the Supreme Court accepted that the agreement was a price fixing agreement 'in the literal sense', but concluded that it was not a 'naked restraint', but instead enabled copyright owners to market their product more efficiently; *State Oil Co v Khan* 522 US 3 (1997), where the Supreme Court held that maximum resale price maintenance should be tested under the rule of reason and not a *per se* standard; and *Leegin Creative Leather Products, Inc v PSKS, Inc* 551 US 877 (2007) where the Supreme Court decided that agreements on *minimum* resale prices should be transferred from *per se* to rule of reason analysis.

[391] See on this Advocate General Kokott in Case C-8/08 *T-Mobile* [2009] ECR I-4529, [2009] 5 CMLR 1701, paras 45–46; see also Kolstad 'Object contra effect in Swedish and European competition law', Swedish Competition Authority, 2009, available at www.kkv.se/.

A few examples can be given of agreements that might have been considered to be restrictive by object, and yet in which the Commission or Court analysed them on the basis of effects instead. In *Visa International – Multilateral Interchange Fee*[392] participants in the Visa system agreed on the level of the 'multilateral interchange fee' that 'acquiring banks' (which act for merchants) pay to 'issuing banks' (which issue Visa cards to consumers) for each transaction with a Visa card; the Commission concluded that this did restrict the freedom of banks to decide their own pricing policies[393], but that this did not amount to a restriction of competition by object[394], but by effect[395]; the Commission decided that the agreement satisfied the criteria of Article 101(3)[396]. In *MasterCard*[397] the Commission left open the question of whether the interchange fee restricted by object since it considered that it clearly had an anti-competitive effect[398].

There have been a few occasions on which the Court of Justice has concluded that an export ban, in the context of a specific type of agreement, did not have as its object the restriction of competition. An example can be found in *Erauw-Jacquery Sprl v La Hesbignonne Société Coopérative*[399], where the Court of Justice held that a provision preventing a licensee from exporting so-called 'basic' seeds protected by plant breeders' rights could fall outside Article 101(1) where it was necessary to protect the right of the licensor to select his licensees. In *Javico v Yves St Laurent*[400], where an export ban was imposed on distributors in Russia and the Ukraine, the Court of Justice held that:

> In the case of agreements of this kind 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 [EU] but as being designed to enable the producer to penetrate a market outside the [EU] 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 other non-member countries[401].

Having concluded that the agreement in *Javico* did not have as its object the restriction of competition, the Court of Justice went on to consider whether it might have this effect. The *Javico* judgment is easy to understand, given that the export ban was not imposed on a distributor within the EU, but rather concerned exports from Russia and the Ukraine.

(E) Agreements that have as their effect the prevention, restriction or distortion of competition

(i) Extensive analysis of an agreement in its market context is required to determine its effect[402]

Where it is not possible to say that the object of an agreement is to restrict competition, it is necessary to conduct an extensive analysis of its effect on the market before it can be

[392] OJ [2002] L 318/17, [2003] 4 CMLR 283. [393] Ibid, paras 64–66.
[394] Ibid, para 69. [395] Ibid, para 68.
[396] Ibid, paras 74–110; see further ch 13, 'Article 101(3)', pp 529–530.
[397] Commission decision of 19 December 2007. [398] Ibid, paras 401–407.
[399] Case 27/87 [1988] ECR 1919, [1988] 4 CMLR 576; see similarly the Commission's decision in *Sicasov* OJ [1999] L 4/27, [1999] 4 CMLR 192, paras 53–61.
[400] Case C-306/96 [1998] ECR I-1983, [1998] 5 CMLR 172. [401] Ibid, para 19.
[402] On the issue of anti-competitive effect see Odudu 'Interpreting Article 81(1): Demonstrating Restrictive Effect' (2001) 26 EL Rev 261 and Odudu 'A New Economic Approach to Article 81(1)?' (2001) 26 EL Rev 100.

found to infringe Article 101(1)[403]. This has been stressed by the EU Courts on a number of occasions. For example, in *Brasserie de Haecht v Wilkin*[404] the Court of Justice said that:

> it would be pointless to consider an agreement, decision or practice by reason of its effect if those effects were to be taken distinct from the market in which they are seen to operate, and could only be examined apart from the body of effects, whether convergent or not, surrounding their implementation. Thus in order to examine whether it is caught by Article [101(1)] an agreement cannot be examined in isolation from the above context, that is, from the factual or legal circumstances causing it to prevent, restrict or distort competition. The existence of similar contracts may be taken into consideration for this objective to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade[405].

An important case which demonstrates the depth of analysis required in determining whether an agreement has the effect of restricting competition is *Delimitis v Henninger Bräu AG*[406]. There the Court of Justice considered a provision in an agreement between a brewery and a licensee of a public house owned by the brewery, whereby the licensee was required to purchase a minimum amount of beer each year. The litigation in the German courts concerned the refusal by the brewery, on termination, to return the full deposit to the licensee that he had paid when entering into the agreement: the brewery had deducted sums that it considered it was entitled to. The licensee claimed that the agreement was void and unenforceable under Article 101; an appeal court in Germany referred the case to the Court of Justice under Article 267 TFEU. The Court of Justice said that beer supply agreements of the type under consideration do not have as their object the restriction of competition[407]. Instead it stressed that the agreement had to be considered in the context in which it occurred[408]. To begin with it was necessary to define the relevant product and geographic markets[409]: these were defined as the sale of beer in licensed premises (as opposed to beer sold in retail outlets) in Germany. Having defined the markets, the Court then said that it was necessary to determine whether access to the market was impeded: could a new competitor enter the market, for example by buying an existing brewery together with its network of sales outlets or by opening new public houses[410]? If the answer was that access to the market was impeded, it was necessary to ask whether the agreements entered into by Henninger Bräu contributed to that foreclosure effect, for example because of their number and duration[411]. Only if the answer to both of these questions was yes could it be held that Article 101(1) was infringed. The analysis suggested in this case was specific to the issues raised by beer supply agreements, and is not

[403] Helpful guidance on the Commission's approach to the establishment of anti-competitive effects can be found in the Commission's *Guidelines on the application of Article [101(3)] of the Treaty* OJ [2004] C 101/8, paras 24–27 and in its *Guidelines on Horizontal Cooperation Agreements* OJ [2011] C 11/1, paras 26–47.

[404] Case 23/67 [1967] ECR 407, [1968] CMLR 26.

[405] Case 23/67 [1967] ECR 407, p 415, [1968] CMLR 26, p 40; see similarly Cases C-7/95 P and C-8/95 P *John Deere v Commission* [1998] ECR I-3111, [1998] 5 CMLR 311, paras 76 and 91 respectively and Cases C-215/96 and C-216/96 *Carlo Bagnsaco v BPN* [1999] ECR I-135, [1999] 4 CMLR 624, para 33.

[406] Case C-234/89 [1991] ECR I-935, [1992] 5 CMLR 210, para 13; see Korah 'The Judgment in *Delimitis:* A Milestone Towards a Realistic Assessment of the Effects of an Agreement – or a Damp Squib' (1992) 14 EIPR 167; there is a longer version in (1998) 8 Tulane European and Civil Law Forum 17; Lasok 'Assessing the Economic Consequences of Restrictive Agreements: A Comment on the Delimitis Case' (1991) 12 ECLR 194; see similarly Case C-214/99 *Neste Markkinointi Oy v Yötuuli* [2000] ECR I-11121, [2001] 4 CMLR 993; Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653, [2004] 4 CMLR 14, paras 75–119.

[407] Case C-234/89 [1991] ECR I-935, [1992] 5 CMLR 210, para 13. [408] Ibid, para 14.

[409] Ibid, paras 16–18; on market definition see ch 1, 'Market definition', pp 27–42.

[410] Ibid, paras 19–23. [411] Ibid, paras 24–27.

necessarily the same to be applied, for example, to restrictive covenants taken on the sale of a business[412] or to the rules of a group purchasing association[413]. However the important point about the judgment is its requirement that a full analysis of the agreement in its market context must be carried out before it is possible to determine whether its effect is to restrict competition.

(ii) The need to establish a 'counter-factual'

In determining whether an agreement has a restrictive effect on competition, it is necessary to consider what the position would have been in the absence of the agreement[414]: by comparing the two situations it should be possible to form a view as to whether the agreement could restrict competition. The need to examine the 'counter-factual' was stressed by the General Court in *O2 (Germany) GmbH & Co, OHG v Commission*[415], where it annulled a Commission decision[416] finding that a roaming agreement in the mobile telephony sector had the effect of restricting competition: the Commission had failed to show what the position would have been in the absence of the agreement, or that the agreement could have restrictive effects on competition[417].

(iii) Actual and potential competition

In deciding whether Article 101 is infringed the Commission and the EU Courts will not limit their consideration to whether existing competition will be restricted by the agreement; they will also take into account the possibility that an agreement might affect potential competition in a particular market. Following criticism of its overly interventionist approach in the 1980s the Commission shifted its perception of 'potential competition' under Article 101(1), and it now adopts a more realistic view of the expression so that fewer agreements are caught than previously[418]. The General Court in *European Night Services v Commission*[419] rejected in its entirety a finding of the Commission that the establishment of the joint venture European Night Services Ltd could restrict actual or potential competition between its parents: the Court considered this to be:

> a hypothesis unsupported by any evidence or any analysis of the structure of the relevant market from which it might be concluded that it represented a real, concrete possibility[420].

However, the Commission would be erring in law if it were to disregard altogether the impact of an agreement on potential competition[421]; while in *Visa Europe Ltd v*

[412] On agreements of this kind see *Remia BV and Verenidge Bedrijven and Nutricia v Commission*, 'Cases in which agreements containing contractual restrictions were found not to have anti-competitive effects', p 129 below.

[413] On agreements of this kind see *Gøttrup-Klim Grovvareforeninger v Dansk Landburgs Grovvareselskab AmbA*, see 'Cases in which agreements containing contractual restrictions were found not to have anti-competitive effects', p 129 below.

[414] See Case 56/65 *Société Technique Minière v Maschinendau Ulm* [1966] ECR 235, pp 249–250, [1966] CMLR 357, p 375; 'Purpose and scope of Guidelines on Horizontal Cooperation Agreements', pp 588–589; see also the Commission's *Guidelines on Horizontal Cooperation Agreements* OJ [2011] C 11/1, para 29.

[415] Case T-328/03 [2006] ECR II-1231, [2006] 5 CMLR 258.

[416] *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag* OJ [2004] L 75/32.

[417] See in particular paras 65–117 of the General Court's judgment.

[418] See eg *Konsortium ECR 900* OJ [1990] L 228/31, [1992] 4 CMLR 54; *Elopak/Metal Box—Odin* OJ [1990] L 209/15, [1991] 4 CMLR 832; Commission's *Guidelines on Horizontal Cooperation Agreements* OJ [2011] C 11/1, para 10 and footnotes 3 and 4; see further ch 15, 'Potential competitors', p 576.

[419] Cases T-374/94 etc [1998] ECR II-3141, [1998] 5 CMLR 718.

[420] Ibid, paras 139–147.

[421] See Case T-504/93 *Tiercé-Ladbroke v Commission* [1997] ECR II-923, [1997] 5 CMLR 309, where the General Court annulled a Commission decision which failed to take into account a possible restriction of potential competition.

Commission[422] the General Court upheld the Commission's decision in *Morgan Stanley/Visa International*[423] that Morgan Stanley was a potential entrant into the acquiring market for payment cards and had been illegally excluded from that market[424].

(iv) Cases in which agreements containing contractual restrictions were found not to have anti-competitive effects

The point was made earlier that a contractual restriction does not necessarily result in a restriction of competition. There have been many judgments in which the EU Courts have concluded that agreements containing contractual restrictions did not have the effect of restricting competition. Several of these cases were Article 267 references, where one party was trying to avoid a contractual restriction freely entered into by invoking Article 101(2) TFEU – which says that agreements that infringe Article 101 are void – in litigation in a national court.

The first case of note was as long ago as 1966: in *Société Technique Minière v Maschinenbau Ulm*[425] the Court of Justice said that a term conferring exclusivity on a distributor might not infringe Article 101(1) where this seemed to be 'really necessary for the penetration of a new area by an undertaking'. Two weeks later, the Court of Justice in *Consten and Grundig v Commission*[426] reached the conclusion that an agreement conferring absolute territorial protection on a distributor had as its object the restriction of competition and did not satisfy the criteria of Article 101(3). These two judgments are highly instructive. *Société Technique Minière* shows that simply granting exclusive rights to a territory, without export bans, may not infringe Article 101(1) at all: it is an empirical question whether such an agreement, assessed in its market context, has a restrictive effect; *Consten and Grundig*, however, shows that where an agreement goes further, imposing export bans and preventing the possibility of parallel trade, it is considered by law to have as its object the restriction of competition. There is no better illustration of the impact of the 'single market imperative'[427] than this.

In *Metro SB–Grossmärkte v Commission*[428] the Court of Justice held that restrictive provisions in a selective distribution system may fall outside Article 101(1) where they satisfy objective, qualitative criteria and are applied in a non-discriminatory manner[429]. In *LC Nungesser KG v Commission*[430] the Court of Justice held that an open exclusive licence of plant breeders' rights would not infringe Article 101(1) where, on the facts of the case, the licensee would not have risked investing in the production of maize seeds at all without some immunity from intra-brand competition[431]. In *Coditel v Ciné Vog Films SA (No 2)*[432] the Court of Justice held that an exclusive copyright licence to exhibit a film in a Member State would not necessarily infringe Article 101(1), even where this might prevent transmission of that film by cable broadcasting from a neighbouring Member State, where this was necessary to protect the investment of the licensee. Restrictive covenants may fall outside Article 101(1), provided that they are duly limited in time, space and subject-matter; in other words that they satisfy the principle of proportionality. This

[422] Case T-461/07 [2011] ECR II-000, [2011] 5 CMLR 74.
[423] Commission decision of 3 October 2007.
[424] Case T-461/07 [2011] ECR II-000, [2011] 5 CMLR 74, paras 162–197.
[425] Case 56/65 [1966] ECR 235, p 250, [1966] CMLR 357, p 375.
[426] Cases 56 and 58/64 [1966] ECR 299, [1966] CMLR 418.
[427] See ch 1, 'The single market imperative', pp 23–24 and ch 2, 'The single market imperative', p 51.
[428] Case 26/76 [1977] ECR 1875, [1978] 2 CMLR 1.
[429] See ch 16, 'Selective distribution agreements', pp 641–645.
[430] Case 258/78 [1982] ECR 2015, [1983] 1 CMLR 278.
[431] See ch 19, 'Territorial exclusivity and the *Maize Seeds* case', pp 774–775.
[432] Case 262/81 [1982] ECR 3381, [1983] 1 CMLR 49.

was established by the Commission in *Reuter/BASF*[433], and confirmed by the Court of Justice in *Remia BV and Verenidge Bedrijven and Nutricia v Commission*[434]; there the Court recognised that, in order to effect the sale of a business together with its associated goodwill, it may be necessary that the vendor should be restricted from competing with the purchaser; in the absence of such a covenant it may not be possible to sell the business at all. In *Métropole télévision v Commission*[435] the General Court held that an ancillary restriction is one that is 'directly related and necessary to the implementation of a main operation'[436], and said that this is a 'relatively abstract' matter that does not require a full market analysis[437].

In *Pronuptia de Paris v Schillgalis*[438] the Court of Justice held that many restrictive provisions in franchising agreements designed to protect the intellectual property rights of the franchisor and to maintain the common identity of the franchise system fall outside Article 101(1). In *Erauw-Jacquery Sprl v La Hesbignonne Société Coopérative*[439] the Court of Justice held that a provision preventing a licensee from exporting basic seeds protected by plant breeders' rights could fall outside Article 101(1) where it was necessary to protect the right of the licensor to select his licensees. In *Gøttrup-Klim Grovvareforeninger v Dansk Landburgs Grovvareselskab AmbA*[440] the Court of Justice held that a provision in the statutes of a cooperative purchasing association, forbidding its members from participating in other forms of organised cooperation which were in direct competition with it, did not necessarily restrict competition, and may even have beneficial effects on competition[441]; it was necessary to consider the effect of the provision on the market, and it would not be caught by Article 101(1) if it was restricted to what was necessary to ensure that the cooperative could function properly and maintain its contractual power in relation to the suppliers with which it had to deal[442].

(v) Commercial ancillarity

These judgments of the EU Courts show that, when considering whether an agreement has the effect of restricting competition, it is possible to argue successfully that restrictions which are necessary to enable the parties to an agreement to achieve a legitimate commercial purpose fall outside Article 101(1)[443]. The legitimate purposes under consideration were of various kinds: for example the penetration of a new market, the sale of a business and the successful establishment of a group purchasing association. An idea

[433] OJ [1976] L 254/40, [1976] 2 CMLR D44.

[434] Case 42/84 [1985] ECR 2545, [1987] 1 CMLR 1.

[435] Case T-112/99 [2001] ECR II-2459, [2001] 5 CMLR 1236.

[436] Ibid, para 104, citing the Commission's *Notice on Ancillary Restraints* OJ [1990] C 203/5, which has since been replaced by the *Notice on restrictions directly related and necessary to concentrations* OJ [2005] C 56/24; ancillary restraints are discussed further in the context of the EU Merger Regulation: see ch 21, 'Contractual restrictions directly related and necessary to a merger: "ancillary restraints"', pp 882–884.

[437] [2001] ECR II-2459, [2001] 5 CMLR 1236, para 109; on ancillary restraints under Article 101 see the Commission's *Guidelines on the application of Article [101(3] of the Treaty* OJ [2004] C 101/97, paras 28–31.

[438] Case 161/84 [1986] ECR 353, [1986] 1 CMLR 414.

[439] Case 27/87 [1988] ECR 1919, [1988] 4 CMLR 576, see similarly the Commission's decision in *Sicasov* OJ [1999] L 4/27, [1999] 4 CMLR 192, para 53–61.

[440] Case C-250/92 [1994] ECR I-5641, [1996] 4 CMLR 191.

[441] Ibid, para 34.

[442] Ibid, paras 35–45; the Court of Justice subsequently applied *Gøttrup-Klim* in Cases 319/93 etc *Dijkstra v Friesland Coöperatie BA* [1995] ECR I-4471, [1996] 5 CMLR 178 and in Case C-399/93 *Luttikhuis v Verenigde Coöperatieve Melkindustrie Coberco BA* [1995] ECR I-4515, [1996] 5 CMLR 178, paras 14 and 18; so did the Commission in *P and I Clubs* OJ [1999] L 125/12, [1999] 5 CMLR 646, paras 66ff.

[443] These issues are interestingly discussed in an English case, *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), upheld on appeal [2009] EWCA Civ 750.

that unifies these judgments is that the restrictions found to fall outside Article 101(1) were ancillary to a legitimate commercial operation, and the expression 'commercial ancillarity' might be helpful in understanding that group of cases[444]; they can be distinguished from the judgment of the Court of Justice in *Wouters*, discussed in the next section, which recognises the idea of 'regulatory ancillarity'.

(vi) Regulatory ancillarity: the judgment of the Court of Justice in *Wouters*

In the cases discussed in the previous section the Court of Justice concluded that restrictions in agreements fell outside Article 101(1) where they were necessary to facilitate a commercial activity. In *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*[445] the Court of Justice dealt with a rather different situation. In that case Mr Wouters challenged a rule adopted by the Dutch Bar Council which prohibited lawyers in the Netherlands from entering into partnership with non-lawyers: Mr Wouters wished to practise as a lawyer in a firm of accountants. A number of questions were referred to the Court of Justice as to the compatibility of such a rule with EU competition law. In its judgment the Court, consisting of 13 judges, stated that a prohibition of multi-disciplinary partnerships 'is liable to limit production and technical development within the meaning of Article [101(1)(b)] of the Treaty'[446]; it also considered that the rule had an effect on trade between Member States[447]. However, at paragraph 97 of its judgment the Court stated:

> However, not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience . . . It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives[448].

This is a most interesting, and controversial, judgment. The early part of the judgment reads as though the Court would conclude that Article 101(1) was infringed, whereas from paragraph 97 onwards it explains why Article 101(1) would not be infringed if the rule in question could 'reasonably be considered to be necessary in order to ensure the proper

[444] The term 'commercial ancillarity' is used here to connote a broader concept than the narrowly-focused 'ancillary restraints doctrine' considered in the *Métropole* judgment discussed above and in ch 21, 'Contractual restrictions directly related and necessary to a merger: "ancillary restraints" ', pp 882–884.

[445] Case C-309/99 [2002] ECR I-1577, [2002] 4 CMLR 913; for comment on this case see Vossestein (2002) 39 CML Rev 841; Monti 'Article 81 EC and Public Policy' (2002) 39 CML Rev 1057; O'Loughlin 'EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the Court of Justice *Wouters* Decision' (2003) 24 ECLR 62; Loozen 'Professional ethics and restraints of competition' (2006) 31 EL Rev 28; see also the judgment of the High Court in Ireland that the Medical Council of Ireland was not subject to competition law when making and applying professional rules in *Hemat v The Medical Council*, [2006] IEHC 187; the case is noted by Ahern at (2007) 28 ECLR 366.

[446] [2002] ECR I-1577, [2002] 4 CMLR 913, para 90; see also paras 86 and 94.

[447] Ibid, para 95.

[448] To similar effect see Case T-144/99 *Institut des Mandataires Agréés v Commission* [2001] ECR II-1087, [2001] 5 CMLR 77, para 78.

practice of the legal profession, as it is organised in [the Netherlands]'[449]. The judgment means that, in certain cases, it is possible to balance *non-competition* objectives against a restriction of competition, and to conclude that the former outweigh the latter, with the consequence that there is no infringement of Article 101(1). The Court does not make findings of fact in an Article 267 reference; rather it gives a preliminary ruling which the domestic court must apply to the case before it. However, it is clear that the judgment provides a basis on which the Dutch court could decide that the rule in question did not infringe Article 101(1). It also would seem from paragraphs 107 and 108 of the *Wouters* judgment that the Court of Justice was disinclined to interfere with the Bar Council's assessment of the need for, and content of, the rules in question; the position should be contrasted with Article 101(3), where the burden of proof rests on the undertaking(s) defending the agreement and where the Commission insists on convincing evidence of economic efficiencies[450].

Numerous questions arise from the judgment in *Wouters*. First, why did the Court of Justice decide that Article 101(1) was not applicable? Secondly, how does this judgment fit with those discussed in section (iv) above? Thirdly, how broad is the rule in *Wouters*? Finally, could the Court have decided the case in a different way, but still have come to the conclusion that the rule in question did not infringe Article 101?

(A) Why was Article 101(1) not applicable?

On the first point, the Court of Justice must have felt that it was appropriate to establish that 'reasonable' regulatory rules fall outside Article 101(1). Furthermore, it is possible that the Court was deliberately trying to reach a similar outcome under Article 101 to that which would have been achieved under Article 56 TFEU had the case been argued under the provisions on the free movement of services. It might have been the case that the rule in question had been adopted by the Dutch Government itself, if the regulatory regime for the legal profession in the Netherlands had been different: in that case the rule could not have been challenged under Article 101(1), but might have been under Article 56. Under that provision a Member State may adopt rules which restrict the free movement of services to the extent that they are necessary to achieve a legitimate public interest[451]; the judgment in *Wouters* effectively applies the same reasoning to a case in which the regulatory function was not carried out by a Member State, and so was not susceptible to challenge under Article 56, but by a private body empowered by the state to adopt regulatory rules, subject to control, if at all, under the competition rules[452].

(B) The relationship between the judgment in Wouters *and earlier case law of the EU Courts*

On the second point, the judgment in *Wouters* does have a conceptual similarity to the cases discussed in section (iv) above, in that they all are concerned with the idea

[449] [2001] ECR I-1577, [2002] 4 CMLR 913, para 107.

[450] See ch 4, 'The burden of proving that the conditions of Article 101(3) are satisfied', pp 152–153.

[451] See eg Case 33/74 *Van Binsbergen v Bestuur Van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, [1975] 1 CMLR 298, para 14.

[452] The Court cited Case 107/83 *Klopp* [1984] ECR 2971, para 17 and Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, para 37, cases on Article 56 TFEU, in para 99 of its judgment in *Wouters*: in these cases it had held that, in the absence of specific EU rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory; on the point discussed in the text see Monti 'Article 81 EC and Public Policy' (2002) 39 CML Rev 1057, in particular at pp 1086–1090, and Mortelmans 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' (2001) 38 CML Rev 613; see also O'Loughlin 'EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the Court of Justice *Wouters* Decision' (2003) 24 ECLR 62.

of ancillarity: restrictions on conduct, even ones that, in a colloquial sense, appear to restrict competition, do not infringe Article 101(1) where they are ancillary to some other legitimate purpose. What is of interest about *Wouters*, however, is that the restriction in that case was not necessary for the execution of a commercial transaction or the achievement of a commercial outcome on the market; instead it was ancillary to a regulatory function 'to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience'[453]. This seems to be a different application of the concept of ancillarity from that in the earlier case law: the *Wouters* case is concerned with what could be described as 'regulatory ancillarity', whereas earlier judgments were concerned with 'commercial ancillarity'; perhaps the use of these two terms would be useful in, first, demonstrating a continuity with the earlier case law, through the common use of the idea of ancillarity, while also capturing the difference between the two situations, by distinguishing commercial and regulatory cases.

(C) How broad is the rule in Wouters*?*

On the third point, that is the breadth of the rule in *Wouters*, there is nothing in the judgment itself that expressly limits its application to so-called 'deontological' (that is to say professional ethical) rules for the regulation of the legal profession, nor to the liberal professions generally. The Court of Justice's judgment in *Meca-Medina v Commission*[454] confirms that the *Wouters* doctrine can apply to other regulatory rules. In *Meca-Medina* the Court of Justice concluded that the anti-doping rules of the International Swimming Federation had a legitimate objective: to combat drugs in order for competitive sport to be conducted fairly, including the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport[455]; the Court went on to decide that the restrictions of competition inherent in the rules were proportionate[456]. The *Meca-Medina* judgment justifies the way in which the Commission had dismissed a complaint about rules of UEFA, the body responsible for the Champions League football tournament, which restricted the ownership of shares in more than one football team competing in the Champions League: the rules were necessary to protect the integrity of the tournament and were therefore, pursuant to *Wouters*, outside Article 101(1)[457]: spectators would not be confident that the results of football matches were genuine if the same person controlled opposing teams[458].

In *Wouters* the rules under scrutiny undoubtedly had a public law character: Dutch legislation provided for the regulation of the legal profession, albeit that the rule-making function belonged to a private law association of undertakings. In *Meca-Medina* the International Olympic Committee ('IOC') was responsible for the regulatory system: the IOC is a creature of public international law, which may explain the Court of Justice's willingness to apply the *Wouters* doctrine in that case. An intriguing question for the future is whether *Wouters* could be extended yet further, to a purely private regulatory system where there is no public component at all. Many sporting organisations have a purely private law character, such as the Football Association in the UK: the Court of Justice may be prepared to extend the *Wouters* case to such bodies. However other cases

[453] Case C-309/99 *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577, [2002] 4 CMLR 913, para 97.

[454] Case C-519/04 P [2006] ECR I-6991, [2006] 5 CMLR 1023; see Weatherill 'Anti-doping revisited – the demise of the rule of "purely sporting interest"?' (2006) 27 ECLR 645.

[455] Case C-519/04 P [2006] ECR I–6991, [2006] 5 CMLR 1023, paras 42–45.

[456] Ibid, paras 47–56.

[457] Commission Press Release IP/02/942, 27 June 2002.

[458] See further 'The application of Article 101(1) to sporting rules', pp 133–134 below.

are less easy to predict: for example, suppose that firms in a particular sector were to adopt rules for the protection of the environment on their own initiative, without any encouragement by the kind cognisable under Article 101(3): it remains to be seen whether *Wouters* could be invoked in such a case. In *Hilti v Commission*[459] the General Court said that, where there is a public authority with powers, for example, in relation to product safety, it is not for private undertakings to take private initiatives to eliminate products that they consider to be unsafe[460].

(D) Could the Court of Justice in Wouters *have reached the same conclusion by a different route?*

On the fourth point, it is interesting to consider whether the Court of Justice could have reached the conclusion that there was no infringement of the competition rules in *Wouters* by some other route than the one it adopted. Perhaps the most obvious alternative solution would have been to hold that the rules did infringe Article 101(1) – as noted, the Court did say that the prohibition on multi-disciplinary partnerships was liable to limit production and technical development within the meaning of Article 101(1)(b) – but that they satisfied the terms of Article 101(3)[461]. However this approach was not available in *Wouters* since, at the relevant time, a decision under Article 101(3) could be made only by the Commission pursuant to a notification under Article 4 of Regulation 17 and no notification had been made. It was not open to the Court of Justice to apply the provisions of Article 106(2) TFEU, since the Bar Council itself was not an entrusted undertaking[462]. The Court could have concluded that there was no effect on trade between Member States, so that Article 101(1) did not apply, thereby in effect referring the matter back to the Netherlands for the application of Dutch competition law; however it expressly held that trade between Member States was affected[463].

(vii) The application of Article 101(1) to sporting rules[464]

This discussion of the *Wouters* judgment provides an opportunity for a brief diversion, to discuss the application of Article 101(1) to sporting rules. All sports have rules: footballers, with the exception of goalkeepers, cannot handle the ball; boxers must not hit 'below the belt'; javelin throwers should not throw the javelin at other javelin throwers. These are 'the rules of the game', and self-evidently do not infringe Article 101(1). Similarly, all sports have disciplinary rules: violent conduct can lead to suspension; taking prohibited drugs may lead to bans. Again, football clubs that belong to one league will be prohibited

[459] Case T-30/89 [1991] ECR II-1439, [1992] 4 CMLR 16. [460] Ibid, para 118.

[461] On this point see Case No 1003/2/1/01 *Institute of Independent Insurance Brokers v Director General of Fair Trading* [2001] CAT 4, [2001] CompAR 62, paras 168–178, in which the UK Competition Appeal Tribunal considered that the regulatory rules of the General Insurance Standards Council infringed s 2 of the Competition Act 1998 (the domestic equivalent of Article 101(1)), and should have been examined under ss 4 and 9 of that Act (the equivalent of Article 101(3)): see further ch 9, 'Object or effect the prevention, restriction or distortion of competition within the UK', p 342.

[462] See ch 6, 'Article 106(2)', pp 235–242 on the derogation from the application of Articles 101 and 102 provided by Article 106(2).

[463] Case C-309/99 [2002] ECR I-1577, [2002] 4 CMLR 913, para 95.

[464] For a general discussion of EU law and sport see Weatherill ' "Fair Play Please": Recent Developments in the Application of EC law to Sport' (2003) 40 CML Rev 51; Van den Bogaert and Vermeersch 'Sport and the EC Treaty: a Tale of Uneasy Bedfellows?' (2006) 31 ECLR 821; Szyszcak 'Competition and sport' (2007) 32 EL Rev 95; Kienapfel and Stein 'The application of Articles 81 and 82 EC in the sport sector' (2007) 3 *Competition Policy Newsletter* 6; the Opinion of Advocate General Kokott in Case C-49/07 *MOTOE*, [2008] ECR I-4863, [2008] 5 CMLR 790; note also the Commission's *Declaration on Sport*, annexed to the final act of the Treaty of Amsterdam, OJ [1997] C 340/136. For the position in the US see *National Collegiate Athletic Association v Board of Regents of University of Oklahoma* 468 US 85 (1984).

from belonging to another one. A conundrum for EU competition law has been to determine whether, and if so when, sporting rules might infringe Article 101 or 102. It is clear that some rules could have restrictive effects on competition in the market, for example where they go beyond 'the rules of the game' and instead distort competition in neighbouring broadcasting markets[465].

In *Meca-Medina* the General Court had held that a sporting rule that 'has nothing to do with any economic consideration'[466] falls entirely outside Articles 101 and 102. On appeal the Court of Justice held that this was an error of law on the General Court's part and therefore set the judgment aside[467]. The Court of Justice's approach is clearly preferable to that of the General Court: the latter's judgment would mean that sporting rules could not be scrutinised at all under the competition provisions, whereas the Court of Justice's means that they can be tested for anti-competitive effects, albeit that they might be permissible by virtue of the *Wouters* doctrine.

(viii) Have the EU Courts embraced the 'rule of reason'?

As mentioned above, critics of Article 101(1) complain that it is applied to too many agreements; they argue for the application of a 'rule of reason', which would result in fewer agreements being caught. The judgments that have just been discussed raise the question of whether the EU Courts have adopted a rule of reason under Article 101(1). Discussion of the rule of reason under Article 101(1) is often very imprecise. It is sometimes used as little more than a slogan by opponents of the judgments of the Courts and, in particular, decisions of the Commission. In so far as the call for a rule of reason is a request for good rather than bad, or reasonable rather than unreasonable, judgments and decisions, no one could disagree with it. However, if proponents of the rule of reason mean that US jurisprudence on the rule of reason under the Sherman Act 1890 should be incorporated into EU competition law, this seems to be misplaced: EU law is different in many ways from US law, not least in that it has the 'bifurcation' of Article 101(1) and Article 101(3), which does not exist in the Sherman Act, and that it is concerned with the promotion of a single market as well as with 'conventional' competition law concerns[468].

(A) The rule of reason in US law

In US law the rule of reason has a particular meaning. In *Continental TV Inc v GTE Sylvania* the Supreme Court defined the rule of reason as calling for a case-by-case evaluation 'that is, the factfinder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition'[469]. In particular this means that, when determining whether an agreement restrains trade in the sense of section 1 of the Sherman Act, it is necessary to balance the agreement's pro- and anti-competitive effects; where the latter outweigh the former, the agreement will be unlawful. However US and EU competition law are materially different in numerous respects, and terminology should not be imported from US law that could

[465] On the joint selling of sporting rights see ch 13, 'Joint selling agencies', p 526.

[466] Case T-313/02 [2004] ECR II-3291, [2004] 3 CMLR 1314, para 47.

[467] Case C-519/04 P [2006] ECR I-6991, [2006] 5 CMLR 1023, paras 33 and 34.

[468] See ch 1, 'The single market imperative', pp 23–24 and ch 2, 'The single market imperative', p 51.

[469] 433 US 36, 49 (1977); see also *National Collegiate Athletic Association v Board of Regents of University of Oklahoma* 468 US 85 (1984); *California Dental Association v Federal Trade Commission* 526 US 756 (1999); for discussion of the rule of reason in US law see Areeda and Hovenkamp *Antitrust Law* Vol VII, ch 15 (2nd ed, 2003); Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (West Publishing Company, 2nd ed, 2000), paras 6.4, 11.1, 11.2 and 11.6.

blur this significant fact[470]. The fact that the Court of Justice has handed down reasonable judgments does not mean that it has adopted the rule of reason in the sense in which that expression is used in the US. Various commentators have argued against incorporation into EU law of a rule of reason modelled upon US experience[471]. In its *White Paper on Modernisation*[472] the Commission said that it did not see the adoption of the rule of reason as a solution to the problems of enforcement and procedure that it had identified. In particular, it said that it would 'be paradoxical to cast aside Article [101(3)] when that provision in fact contains all the elements of a "rule of reason"' and that the adoption of the rule of reason under Article 101(1) would 'run the risk of diverting Article [101(3)] from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations'[473].

(B) The judgment of the General Court in Métropole

In *Métropole Télévision v Commission*[474] the General Court expressly rejected the suggestion that a rule of reason existed under Article 101(1). Six television companies in France had established a joint venture, Télévision par Satellite ('TPS'), to devise, develop and broadcast digital pay-TV services in French in Europe: TPS would be a competitor to the dominant pay-TV company, Canal+. The parties notified a number of agreements to the Commission. In 1999 the Commission adopted a decision that the creation of TPS was not caught by Article 101(1); however it concluded that a non-competition clause, preventing the parents of TPS from becoming involved in other digital pay-TV satellite companies, could be cleared (that is, found not to infringe Article 101(1)) for a period of three years; and that clauses giving TPS rights of pre-emption in relation to certain channels and services offered by its parents and exclusive rights to other channels infringed Article 101(1) but could be exempted under Article 101(3) for three years. Four of the shareholders in TPS applied to the General Court requesting that the Commission's decision should be annulled. They argued that the Commission should have applied the rule of reason, according to which 'an anti-competitive practice falls outside Article [101(1)] of the Treaty if it has more positive than negative effects on competition on a given market'[475]; in particular the clauses in the agreements giving TPS rights of pre-emption and exclusivity would enable it to enter the market dominated by Canal+, and therefore would 'favour' new competition[476]. Several well-known judgments of the Court of Justice and General Court were cited in support of this version of the rule of reason[477]. What is of interest is the explicit way in which the General Court's judgment rejected the applicants' argument:

> 72. According to the applicants, as a consequence of the existence of a rule of reason in Community competition law, when Article [101(1)] of the Treaty is applied it is necessary to weigh the pro and anti-competitive effects of an agreement in order to determine

[470] See Whish and Sufrin 'Article 85 and the Rule of Reason' (1987) 7 Ox YEL 1.

[471] *Whish and Sufrin* (1987) 7 Ox YEL 1; Waelbroeck 'Vertical Agreements: is the Commission Right not to Follow the US Policy?' (1985) 25 Swiss Rev ICL; Schröter 'Antitrust Analysis and Article [81(1)] and (3)' [1987] Fordham Corp L Inst (ed Hawk), ch 27; Caspari (formerly Director General of DG COMP at the Commission) [1987] Fordham Corp L Inst (ed Hawk), p 361.

[472] OJ [1999] C 132/1, [1999] 5 CMLR 208.

[473] OJ [1999] C 132/1, [1999] 5 CMLR 208, para 57.

[474] Case T-112/99 [2001] ECR II-2459, [2001] 5 CMLR 1236: for comment on this case see Manzini 'The European Rule of Reason – Crossing the Sea of Doubt' (2002) 23 ECLR 392.

[475] Case T-112/99 [2001] ECR II-2459 [2001] 5 CMLR 1236, para 68.

[476] Ibid, para 69.

[477] Ibid, paras 68 and 70, referring, *inter alia*, to Case 258/78 *Nungesser and Eisele v Commission (Maize Seeds)* [1982] ECR 2015; Case 262/81 *Coditel v Ciné Vog Films* [1982] ECR 3381 and Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141.

> whether it is caught by the prohibition laid down in that article. It should, however, be observed, first of all, that contrary to the applicant's assertions the existence of such a rule has not, as such, been confirmed by the Community courts. Quite to the contrary, in various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful[478].

The General Court went on to say that the pro- and anti-competitive aspects of a restriction of competition should be weighed at the stage of considering whether an agreement satisfies the terms of Article 101(3)[479]: in the General Court's view:

> Article [101(3)] would lose much of its effectiveness if such an examination had to be carried out already under Article [101(1)] of the Treaty[480].

The General Court acknowledged that in various judgments the EU Courts have been 'more flexible' in their interpretation of Article 101(1), but concluded that this did not mean that they had adopted the 'rule of reason' in the sense argued for by the applicants[481]. Rather, the more flexible judgments of the Courts demonstrate that they are not willing to find a restriction 'wholly abstractly'; instead a full market analysis is required[482]. The General Court came to the same conclusion in *Van den Bergh Foods Ltd v Commission*[483] and in *O2 (Germany) GmbH & Co, OHG v Commission*[484]. The Commission cites the *Métropole* judgment in paragraph 11 of its *Guidelines on the application of Article [101(3) TFEU]* in support of its proposition that '[t]he balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article [101(3)]'[485].

(C) Comment

In the authors' view the judgment in *Métropole* was correct to reject the US-style rule of reason in Article 101(1). Of course, the Commission and the Courts should be 'reasonable' when applying Article 101(1), but that does not mean that they should import the method of analysis adopted in the quite different context of the Sherman Act. An interesting question is whether the judgment of the Court of Justice in *Wouters* should be read as importing a rule of reason under Article 101(1)[486]. The doctrine of regulatory ancillarity in that case provides for a balancing of any restriction of competition against the reasonableness of regulatory rules adopted for non-competition reasons; as such, it appears to these authors that the *Wouters* judgment does not apply a US-style rule of reason, and it is preferable not to use this expression in order to explain it[487].

[478] Case T-112/99 [2001] ECR II-2459 [2001] 5 CMLR 1236, para 72.

[479] [2001] ECR II-2459 [2001] 5 CMLR 1236, para 74.

[480] Ibid, para 74.

[481] Ibid, paras 75–76.

[482] Ibid, para 76.

[483] Case T-65/98 [2003] ECR II-4653, [2004] 4 CMLR 14, para 106.

[484] Case T-328/03 [2006] ECR II-1231, [2006] 5 CMLR 258, para 69; for discussion of this case see Marquis '*O2(Germany) v Commission* and the Exotic Mysteries of Article 81(1) EC' (2007) 21 ELR 29.

[485] OJ [2004] C 101/97.

[486] See Korah 'Rule of reason: apparent inconsistency in the case law under Article 81' (2002) 1 Competition Law Insight 24.

[487] An alternative would be to refer to the rule in *Wouters* as a 'European style rule of reason': see Monti 'Article 81 EC and Public Policy' (2002) 39 CML Rev 1057.

(ix) Joint ventures

Article 101(1) does not apply to full-function joint ventures, which are dealt with under the provisions on merger control: this is explained in chapter 21[488].

(F) Article 106(2)

Article 106(2) precludes the application of the competition rules to undertakings in so far as compliance with them would obstruct them in the performance of a task entrusted to them by a Member State. This subject is dealt with in chapter 6[489].

(G) State compulsion and highly regulated markets

The competition rules do not apply to undertakings in so far as they are compelled by law to behave in a particular way: this is sometimes referred to as the 'state compulsion' defence; nor do they apply where a legal framework leaves no possibility for competitive activity on the part of undertakings, that is to say where they operate on highly regulated markets. These two defences have often been invoked, but they are narrowly applied and almost invariably fail[490]. Where undertakings genuinely have no room for autonomous behaviour they would not be liable for infringing Article 101[491]; however the position would alter if a decision to disapply the national legislation has been taken and become definitive[492]. An argument that the Italian sugar market was so highly regulated that there was no scope for competition succeeded in *Suiker Unie v Commission*[493]. In *DaimlerChrysler AG v Commission*[494] the General Court annulled a decision of the Commission that DaimlerChrysler had infringed Article 101 by prohibiting its Spanish dealers from supplying cars to leasing companies in the absence of an identified customer

[488] Ch 21, 'Joint ventures – the concept of full-functionality', pp 837–838.

[489] See ch 6, 'Article 106(2)', pp 235–242.

[490] The 'state compulsion' defence was rejected in *Wood Pulp* OJ [1985] L 85/1, [1985] 3 CMLR 474; *ENI/Montedison* OJ [1987] L 5/13, [1988] 4 CMLR 444, para 25; *Aluminum Products* OJ [1985] L 92/1, [1987] 3 CMLR 813; *SSI* OJ [1982] L 232/1, [1982] 3 CMLR 702, upheld on appeal to the Court of Justice Cases 240/82 etc *SSI v Commission* [1985] ECR 3831, [1987] 3 CMLR 661; *French-West African Shipowners' Committee* OJ [1992] L 134/1, [1993] 5 CMLR 446, paras 32–38; and in *CNSD v Commission* Case T-513/93 [2000] ECR II-1807, [2000] 5 CMLR 614, paras 58–59; see also Cases C-359/95 and 379/95 P *Commission v Ladbroke Racing* [1997] ECR I-6265, [1998] 4 CMLR 27, para 33; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, [1999] 5 CMLR 1300, para 130; the 'highly regulated markets' defence was rejected in Cases 209/78 etc *Van Landewyck v Commission* [1980] ECR 3125, [1981] 3 CMLR 134, paras 126–134 ; Cases 240/82 etc *SSI v Commission* [1985] ECR 3831, [1987] 3 CMLR 661, paras 13–37 and Case 260/82 *NSO v Commission* [1985] ECR 3801, [1988] 4 CMLR 755, paras 18–27; *Greek Ferry Services Cartel* OJ [1999] L 109/24, [1999] 5 CMLR 47, paras 98–108, upheld on appeal Cases T-56/99 etc *Marlines SA v Commission* [2003] ECR II-5225, [2005] 5 CMLR 1761; *French-West Africa Shipowners' Committees* OJ [1992] L 134/1, [1993] 5 CMLR 446; Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035, [2001] 5 CMLR 859, paras 44–45; *Spanish Raw Tobacco* Commission decision of 20 October 2004, paras 349–356; *Raw Tobacco Italy* Commission decision of 20 October 2005, paras 315–324; *Bananas* Commission decision of 15 October 2008, on appeal to the General Court, Cases T-587/08 etc *Fresh Del Monte Produce v Commission,* not yet decided; *E.ON/GDF Suez* Commission decision of 8 July 2009, on appeal to the General Court, Cases T-360/09 etc *E.ON Ruhrgas and E.ON v Commission*, not yet decided.

[491] See eg Case T-387/94 *Asia Motor France v Commission* [1996] ECR II-961, [1996] 5 CMLR 537, paras 78–100; Case No 1027/2/3/04 *VIP Communications v OFCOM* [2009] CAT 28, [2010] CompAR 13, paras 17–27 (a judgment of the UK Competition Appeal Tribunal).

[492] See Case C-198/01 *CIF* [2003] ECR I-8055, [2003] 5 CMLR 829, paras 54ff.

[493] Cases 40/73 etc [1975] ECR 1663, [1976] 1 CMLR 295.

[494] Case T-325/01 [2005] ECR II-3319, [2007] 4 CMLR 559.

for a leasing contract: since it was a requirement of Spanish law that there should be an identified customer, the DaimlerChrysler agreements were not themselves restrictive of competition[495].

The law was helpfully summarised by the Court of Justice in *Deutsche Telekom AG v Commission*[496], where Deutsche Telekom argued (in an Article 102 case) that it was not guilty of an illegal margin squeeze because its behaviour was approved by the German regulator of the electronic communications sector. The Court rejected the defence because Deutsche Telekom ('DT') retained the right to adjust its prices for the retail sale of broadband internet access services and thereby bring the margin squeeze to an end: approval by the regulator did not deprive DT of its ability to behave autonomously. The Court of Justice summarised the law at paragraph 80 of its judgment[497]:

> According to the case-law of the Court of Justice, it is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles [101 TFEU and 102 TFEU] do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles [101 TFEU and 102 TFEU] may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings.

The Court's judgment cited several earlier judgments, in particular pointing out that there is no defence where national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct[498].

(H) Commission Notices

There are a number of Commission Notices in which it has provided guidance on the application of Article 101(1) to various types of agreement; it might be helpful to provide a checklist of these Notices, arranged chronologically.

(i) Notice on sub-contracting agreements[499]

Article 101(1) does not apply to some sub-contracting agreements.

(ii) Notice on the application of the competition rules to cross-border credit transfers[500]

This *Notice* has specific application in the banking sector.

(iii) Notice on the application of the competition rules to the postal sector[501]

This *Notice* has specific application in the postal sector.

(iv) Notice on the application of the competition rules to access agreements in the telecommunications sector[502]

This *Notice* has specific application in the telecommunications sector.

[495] Ibid, para 156.

[496] Case C-280/08 P [2010] ECR I-000, [2010] 5 CMLR 1495.

[497] The law is also usefully summarised in paragraph 22 of the Commission's *Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements* OJ [2011] C 11/1.

[498] The Court cites Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, [1976] 1 CMLR 295, paras 36–73 and Case C-198/01 *CIF* [2003] ECR I-8055, [2003] 5 CMLR 829, para 56 for this proposition.

[499] OJ [1979] C1/2.

[500] OJ [1995] C 251/3.

[501] OJ [1998] C 39/2; see ch 23, 'Post', pp 984–988.

[502] OJ [1998] C 265/2; see ch 23, 'Application of EU competition law', pp 982–983.

(v) Notice regarding restrictions directly related and necessary to the concentration[503]

Article 101(1) does not apply to ancillary restrictions; this *Notice* is specifically of relevance to the analysis of concentrations under the EUMR, but it provides useful insights into the Commission's thinking more generally[504].

(vi) Notice on agreements of minor importance[505]

This *Notice* is concerned with the *de minimis* doctrine and is examined below.

(vii) Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU][506]

These *Guidelines* are important in determining the jurisdictional scope of Article 101 and are examined below.

(viii) Guidelines on the application of Article [101(3) TFEU][507]

Although these *Guidelines* are predominantly concerned with the application of Article 101(3), paragraphs 13 to 37 contain useful discussion of the principles behind Article 101(1).

(ix) Guidelines on the application of Article [101 TFEU] to technology transfer agreements[508]

These *Guidelines* deal at length with the application of Article 101(1) and Article 101(3) to technology transfer agreements. They also examine matters such as technology pools.

(x) Commission Consolidated Jurisdictional Notice[509]

Article 101 does not apply to full-function joint ventures. Paragraphs 91 to 109 examine the concept of full-functionality.

(xi) Guidelines on the application of Article [101 TFEU] to maritime transport services[510]

These *Guidelines* set out the principles to be applied when assessing cooperation agreements in the maritime transport sector; in particular they consider the extent to which the exchange of information between competing undertakings may infringe Article 101.

(xii) Communication from the Commission on the application of Article 101(3) in the insurance sector[511]

This *Communication* has specific application in the insurance sector[512].

(xiii) Guidelines on vertical restraints[513]

These *Guidelines* deal with the application of Article 101(1) and Article 101(3) to vertical agreements. Paragraphs 12 to 21 of these *Guidelines* provide specific guidance on the application of Article 101(1) to agreements between principal and agent.

[503] OJ [2005] C 56/244.
[504] The Notice is discussed in ch 21, 'Jurisdiction', pp 833–844.
[505] OJ [2001] C 368/13. [506] OJ [2004] C 101/81. [507] OJ [2004] C 101/97.
[508] OJ [2004] C 101/2: see ch 19, 'Technology Transfer Agreements: Regulation 772/2004', pp 781–791.
[509] OJ [2008] C 95/1.
[510] OJ [2008] C 245/2. [511] OJ [2010] C 82/20.
[512] See ch 15, 'The Commission's *Guidelines on Horizontal Cooperation Agreements*', pp 588–591.
[513] OJ [2010] C 130/1; see ch 16, 'Vertical agreements: competition policy considerations', pp 623–628.

(xiv) Guidelines on horizontal cooperation agreements[514]

These *Guidelines* deal with the application of Article 101(1) and Article 101(3) to horizontal cooperation agreements, that is to say agreements other than hard-core cartels.

5. The *De Minimis* Doctrine

(A) Introduction

Some agreements that affect competition within the terms of Article 101(1) may nevertheless not be caught because they do not have an appreciable impact either on competition or on inter-state trade[515]. This *de minimis* doctrine was first formulated by the Court of Justice in *Völk v Vervaecke*[516]. A German producer of washing machines granted an exclusive distributorship to Vervaecke in Belgium and Luxembourg and guaranteed it absolute territorial protection against parallel imports. Volk's market share was negligible[517]. In an Article 267 reference the Court of Justice held that:

> an agreement falls outside the prohibition in Article [101(1)] where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question.

The Commission has provided guidance on the issue of whether an agreement does not have an appreciable effect on competition[518] in a series of Notices, the most recent of which appeared in 2001 and is discussed below[519]. This Notice will in many cases give a reasonably clear idea of whether an agreement is *de minimis*. However in some circumstances an agreement might be held to fall within Article 101(1) even though it is below the quantitative criteria established by it; and an agreement may be found not to have an appreciable effect on competition even where the thresholds in the Notice are exceeded[520].

(B) The Commission's Notice on Agreements of Minor Importance

(i) Part I of the Notice: introductory paragraphs

Part I of the Notice contains important statements on the application of the *de minimis* doctrine. Paragraph 1 refers to the case law of the Court of Justice on appreciability. Paragraph 2 states that the Notice sets out the market share thresholds for determining when a restriction of competition is not appreciable. It points out that this 'negative' definition of appreciability (that is to say the explanation of what is *not* an appreciable restriction of competition) does not imply that agreements above the thresholds are caught by Article 101(1): agreements above the thresholds may have only a negligible effect on

[514] OJ [2011] C 11/1; see ch 15, 'The Commission's *Guidelines on Horizontal Cooperation Agreements*', pp 588–591.

[515] Note that an agreement that does not infringe Article 101 may nevertheless infringe the law of one (or more) of the Member States.

[516] Case 5/69 [1969] ECR 295, [1969] CMLR 273.

[517] 0.2 per cent and 0.5 per cent of production in Germany in 1963 and 1966 respectively.

[518] The issue of whether an agreement produces an appreciable effect on trade between Member States is dealt with in the Commission's *Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU]* which are discussed below.

[519] *Notice on Agreements of Minor Importance* OJ [2001] C 368/13, [2002] 4 CMLR 699, replacing the previous Notice OJ [1997] C 372/13, [1998] 4 CMLR 192; on the 2001 Notice see Peeperkorn 'Revision of the 1997 Notice on Agreements of Minor Importance' (2001) (June) *Competition Policy Newsletter* 4.

[520] See the text below.

competition and so not be caught[521]; another way of putting this point is that the Notice establishes a 'safe harbour' for agreements below the thresholds, but does not establish a dangerous one for agreements above it. Paragraph 3 makes the important point that the *de minimis* Notice does *not* deal with the concept of an appreciable effect on trade between Member States: this is dealt with in the Commission's *Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU]*[522]. Paragraph 3 adds, however, that agreements between small and medium-sized enterprises ('SMEs') are unlikely to affect trade between Member States: such undertakings are currently defined as those having fewer than 250 employees and with an annual turnover not exceeding €50 million or an annual balance-sheet total not exceeding €43 million[523].

Paragraph 4 of the Notice is important: it states that the Commission will not institute proceedings either upon application or upon its own initiative in respect of agreements covered by the Notice; and that, where undertakings assume in good faith that an agreement is covered by the Notice, the Commission will not impose fines. Paragraph 4 of the Notice adds that, although not binding on them, it is intended to provide guidance to national courts and NCAs. Paragraph 5 explains that the Notice also applies to decisions by associations of undertakings and to concerted practices. Paragraph 6 states that the Notice is without prejudice to any interpretation of Article 101 by the EU Courts.

(ii) Part II of the Notice: the threshold

The main provision in the Notice is contained in Part II, at paragraph 7. It provides as follows:

> The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article [101(1)]:
>
> (a) if the aggregate market share held by the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings[524] which are actual or potential competitors on any of these markets (agreements between competitors); or
>
> (b) if the market share held by each of the parties to the agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors).
>
> In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 per cent threshold is applicable.

[521] The Notice refers to Cases C-215/96 etc *Bagnasco* [1999] ECR I-135, [1999] 4 CMLR 624, paras 34–35 in support of this proposition; the same point will be found in two General Court judgments, Case T-7/93 *Langnese-Iglo GmbH v Commission* [1995] ECR II-1533, [1995] 5 CMLR 602, para 98; Case T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141, [1998] 5 CMLR 718, paras 102–103; see also para 9 of the Commission's *Guidelines on Vertical Restraints* OJ [2010] C 130/1.

[522] See 'The Effect on Trade between Member States', pp 144–149 below.

[523] See Commission Recommendation 2003/361/EC, OJ [2003] L 124/36; note also para 11 of the Commission's *Guidelines on Vertical Restraints* OJ [2010] C 130/1 which says that vertical agreements between SMEs would rarely produce an appreciable restriction on competition or on trade between Members States and that where, exceptionally, they do so the Commission would be unlikely to take enforcement action unless those undertakings individually or collectively hold a dominant position in a substantial part of the internal market.

[524] Throughout the Notice the expression 'undertakings' includes 'connected undertakings' such as parents and subsidiaries: see para 12.

As can be seen the Notice treats vertical agreements more generously than horizontal ones, by providing a higher threshold.

A particular problem arises in some sectors where the cumulative effect of many vertical agreements may lead to foreclosure of the market[525]. The Notice provides guidance on appreciability in this situation (a) by indicating when a cumulative foreclosure effect is likely and (b) by providing a market share threshold indicating whether particular agreements contribute to that effect. Paragraph 8 provides that a cumulative foreclosure effect is unlikely to exist if less than 30 per cent of the relevant market is covered by parallel agreements having similar effects; where there is a foreclosure effect, individual suppliers or distributors will not be considered to contribute to that effect where their market share does not exceed 5 per cent.

A problem that may arise in application of the Notice is that firms may outgrow the market share thresholds established by paragraphs 7 and 8; marginal relief is provided by paragraph 9 where the thresholds (of 10 per cent, 15 per cent and 5 per cent respectively) are exceeded by no more than two percentage points during two successive years.

It is not clear what happens to an agreement when it has outgrown the Notice, including the provisions for marginal relief: one possibility is that it becomes retrospectively void; a second is that it becomes unenforceable from the moment that the Notice ceases to apply. The second suggestion appears to be consistent with the scheme of Article 101 TFEU. In the UK the Court of Appeal held in *Passmore v Morland plc*[526] that an agreement can infringe Article 101(1) at some times and at other times not do so, depending on the surrounding facts: in other words it can drift into and out of voidness.

Paragraph 10 of the Notice notes that guidance on market definition is provided by the Commission's *Notice on the Definition of Relevant Market for the Purpose of [EU] Competition Law*[527] and adds that market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data; where value data are not available, other criteria, including volume data, may be used.

A different point introduced in paragraph 44 of the Commission's *Guidelines on Horizontal Cooperation Agreements*[528] is the suggestion that, where the parties to a horizontal cooperation agreement have a high combined market share, but one of them has only an insignificant one and does not possess important resources, the agreement would be considered unlikely to have a restrictive effect on competition in the market.

(iii) Part II of the Notice: the treatment of 'hard-core' restrictions

The judgment of the Court of Justice in *Völk v Vervaecke*[529], that Article 101 applies only where competition is *appreciably* restricted, concerned a hard-core restriction: the distributor was granted absolute territorial protection; much more recently the Court said in *Pedro IV Servicios SL v Total España SA*[530] that a resale price maintenance provision would infringe Article 101 only if it 'perceptibly' restricts competition within the internal market. As a matter of law, therefore, it seems clear that even hard-core restrictions might fall outside Article 101 because they have no appreciable

[525] See ch 16, 'Factors to be considered in determining whether single branding agreements infringe Article 101(1)', pp 638–639.

[526] [1999] EWCA Civ 696, [1999] 1 CMLR 1129; see to similar effect para 44 of the Commission's *Guidelines on the application of Article [101(3) TFEU]* OJ [2004] C 101/97.

[527] OJ [1997] C 372/5, [1998] 4 CMLR 177; see ch 1, 'Market definition', p 27ff.

[528] OJ [2011] C 11/1; see ch 15, 'The Commission's *Guidelines on Horizontal Cooperation Agreements*', pp 588–591.

[529] See ch 3 n 516 above.

[530] Case C-260/07 [2009] ECR I-2437, [2009] 5 CMLR 1291, para 82, citing earlier case law.

impact. However the Commission specifically says in paragraph 11 of the Notice that the safe harbour provided by paragraph 7 does not apply to certain restrictions: horizontal agreements to fix prices, limit output or sales and to allocate markets or customers[531]; vertical agreements, for example to fix prices, impose export bans and to restrict sales within a selective distribution system[532]; and vertical agreements between competitors[533]. Thus there is no assurance that the Commission would not proceed against a hard-core cartel where the market share of the parties was less than 10 per cent; even SMEs might be investigated: in *Greek Ferries*[534] the Commission imposed fines on Marlines and Ventouris, which were SMEs as defined in an earlier Notice of 1997, since they were party to price-fixing agreements, a particularly serious infringement[535].

Of course the Commission is bound by the jurisprudence of the Court of Justice, and there would appear to be a conflict between judgments such as *Völk v Vervaecke* and *Pedro IV Servicios SL v Total España SA* and paragraph 11 of the Commission's Notice; furthermore the General Court has said that agreements that restrict competition by object infringe Article 101 only if they have an appreciable effect on competition and on trade between Member States[536]. Equally, however, it is understandable that the Commission does not wish to be seen to be giving a 'green light' to hard-core restrictions of any kind, irrespective of the market share of the undertakings that are party to an agreement. In practice the conflict is more apparent than real, since the Commission, as a matter of administrative priority, would be highly unlikely to proceed against hard-core restrictions below the thresholds set out in the Notice.

(C) Limitations of the Notice

It is important to note some limitations of this Notice. The Court of Justice has indicated that it is wrong to adopt a purely quantitative approach to the issue of *de minimis* agreements; in *Distillers Co Ltd v Commission*[537] it concluded that an agreement affecting the distribution of Pimms was of importance, notwithstanding the very small proportion of the market held by that drink, because Distillers was a major producer occupying an important position on the market for drinks generally. In *Musique Diffusion Française v Commission*[538] the Court of Justice held that a concerted practice was not within the *de minimis* doctrine where the parties' market shares were small but the market was a

[531] *De minimis Notice*, para 11(1).

[532] *De minimis Notice*, para 11(2); the list is the same as in Article 4 of Regulation 330/2010, as to which see ch 16, 'Article 4: hard-core restrictions', pp 663–669; on this point note *Volkswagen* OJ [2001] L 262/14, [2001] 5 CMLR 1309, para 79 (resale price maintenance could infringe Article 101(1) even where the parties' market share was below the *de minimis* threshold); see also para 10 of the Commission's *Guidelines on Vertical Restraints* OJ [2010] C 130/1 and the cases referred to in footnote 4 of the *Guidelines*.

[533] *De minimis Notice*, para 11(3).

[534] *Greek Ferry Services Cartel* OJ [1999] L 109/24, [1999] 5 CMLR 47, upheld on appeal Case T-59/99 *Ventouris Group Enterprises v Commission* [2003] ECR II-5257, [2005] 5 CMLR 1781, paras 167–170.

[535] OJ [1999] L 109/24, [1999] 5 CMLR 121, para 151.

[536] See eg Case T-199/08 *Ziegler SA v Commission* [2011] ECR II-000, [2011] 5 CMLR 261, paras 41–45 (one of the appeals in the *International Removal Services* case), see also Case T-49/01 *Brasserie Nationale v Commission* [2005] ECR II-3033, [2006] 4 CMLR 266, para 140.

[537] Case 30/78 [1980] ECR 2229, [1980] 3 CMLR 121; see similarly Case 19/77 *Miller International v Commission* [1978] ECR 131, [1978] 2 CMLR 334; Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, [1984] 3 CMLR 325, para 58.

[538] Cases 100/80 etc [1983] ECR 1825, [1983] 3 CMLR 221; see also *Yves Saint Laurent Parfums* OJ [1992] L 12/24, [1993] 4 CMLR 120.

fragmented one, their market shares exceeded those of most competitors and their turnover figures were high.

(D) Other examples of non-appreciability

The *de minimis* doctrine described in the preceding sections stems from the judgment in *Völk v Vervaecke*[539], which referred to the 'weak position' that the persons had on the market in question; this is why the Commission's Notice giving expression to the doctrine does so in terms of market share thresholds, which are used as a proxy for undertakings' market power, or rather lack of market power. It should be noted however that appreciability may be relevant to the application of Article 101(1) in a different way: judgments of the EU Courts and decisions of the Commission can be found in which it was concluded that a restriction of competition was not appreciable, not because the parties to an agreement lacked market power, but because the restriction itself was insignificant in a qualitative sense. For example in *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten*[540] the Court of Justice concluded that a decision by medical specialists to set up a pension fund entrusted with the management of a supplementary pension scheme did not appreciably affect competition within the common market: the cost of the scheme had only a marginal and indirect influence on the final cost of the services that they offered. This finding was not linked in any way to the market power of the specialists[541].

6. The Effect on Trade Between Member States

The application of Article 101 is limited to agreements, decisions or concerted practices *which may affect trade between Member States*. The scope of Article 102 is similarly limited. The inter-Member State trade clause is very important in EU competition law, since it defines 'the boundary between the areas respectively covered by [EU] law and the law of the Member States'[542].

> Historically both the Commission and the EU Courts have adopted a liberal interpretation of the inter-state trade clause, thereby enlarging the scope of Articles 101 and 102[543]. This was of particular significance at a time when many Member States had no competition laws

[539] See ch 3 n 516 above.

[540] Cases C-180/98 etc [2000] ECR I-6451, [2001] 4 CMLR 30, paras 90–97.

[541] Similar conclusions, where the non-appreciability of restrictions was not related to the parties' market power, can be found in *Irish Banks' Standing Committee* OJ [1986] L 295/28, [1987] 2 CMLR 601, para 16 (an agreement on the opening hours of Irish banks did not appreciably restrict competition); *Visa International* OJ [2001] L 293/24, [2002] 4 CMLR 168, para 65 (a rule of the Visa card system which required a bank to issue a certain number of Visa cards before contracting with retailers for processing credit card payments did not appreciably restrict competition since it improved the utility of the card system for traders and did not create significant barriers to entry: the same conclusion was reached in relation to the 'no-discrimination' rule: ibid, paras 54–58 and the principle of territorial licensing: ibid, paras 63–64); *UEFA's broadcasting regulations* OJ [2001] L 171/12, [2001] 5 CMLR 654, paras 49–58 (regulations preventing the live transmission of football matches at certain times on a Saturday or Sunday afternoon, in order to protect amateur participation in sport and to encourage live attendance at football matches, did not result in an appreciable restriction of competition); and *Identrus* OJ [2001] L 249/12, paras 54–55 (a prohibition on the members of Identrus selling their equity interest in it to third parties without first offering to sell the interest to Identrus itself or its other members did not amount to an appreciable restriction of competition).

[542] Case 22/78 *Hugin Kassaregister AB v Commission* [1979] ECR 1869, p 1899, [1979] 3 CMLR 345, p 373.

[543] Cf the position in the US where the inter-state commerce clause has also been construed flexibly: see eg *Manderville Island Farms v American Crystal Sugar Co* 334 US 219, 237 (1948); see also *United States v Lopez* 514 US 549, 560 (1995) and *United States v Morrison* 529 US 598, 610 (2000): these are not competition law cases, but each deals with the inter-state commerce clause.

of their own, or competition laws that were weak in terms of powers of investigation and sanctions. This point does not have the same significance today, since all the Member States have effective competition laws, and for the most part these are modelled upon Articles 101 and 102[544]. It follows that a cartel and/or abusive behaviour by a dominant firm will be illegal either under domestic or EU law, and to this extent it matters little whether the infringement occurs under one system or the other (or both). However the concept of inter-state trade is of central importance since the entry into force of Regulation 1/2003[545], and the creation of the European Competition Network. Determining whether an agreement or practice has an effect on trade between Member States is important for a series of reasons[546]:

- where there is an effect on trade between Member States, national courts and NCAs that apply national competition law to agreements or practices have an *obligation* to also apply Articles 101 and 102[547]
- where there is an effect on trade between Member States, national courts and NCAs cannot apply stricter national competition law to agreements, although they can apply stricter national law to unilateral conduct[548]
- NCAs that apply Articles 101 and 102 have an obligation to inform the Commission of the fact no later than 30 days before the adoption of the decision[549]. Clearly an NCA could avoid this obligation by reaching the conclusion that there is no effect on trade between Member States
- when the Commission is informed that an NCA intends to adopt a decision on the basis of EU competition law, the Commission has the power to initiate its own proceedings and thereby to terminate the proceedings of the NCA[550]
- the Commission and the NCAs have the right to exchange information for the purpose of applying Articles 101 and 102[551]
- there are cooperation provisions in place that facilitate the enforcement of Articles 101 and 102 by national courts, as well as an obligation for Member States to inform the Commission of court cases deciding on the application of those provisions[552]
- NCAs and national courts that apply Articles 101 and 102 must not take decisions that conflict with decisions adopted by the Commission[553].

Clearly these rules mean that it remains important to know whether an agreement or practice has an effect on trade between Member States. This is why the Commission has published *Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU]* ('the *Guidelines on inter-state trade*')[554]. They draw substantially on the case law of the EU Courts, going back to *Consten and Grundig v Commission* in 1966[555]. In the account of the *Guidelines on inter-state trade* that follows this case law will not be cited, but the reader should be aware that references to the relevant cases will be found in the footnotes of the *Guidelines*.

Part 1 of the *Guidelines on inter-state trade* contain a brief introduction explaining, in particular, that they deal with the issue of what is meant by an appreciable effect on inter-state trade, but not with the separate question of what is meant by an appreciable

[544] See ch 2, 'Modelling of domestic competition law on Articles 101 and 102', p 58.

[545] OJ [2003] L 1/1.

[546] For discussion of Regulation 1/2003 see ch 2, 'The modernisation of EU competition law', p 52 and ch 7 generally.

[547] Regulation 1/2003, Article 3(1).

[548] Ibid, Article 3(2). [549] Ibid, Article 11(4).

[550] Ibid, Article 11(6). [551] Ibid, Article 12.

[552] Ibid, Article 15. [553] Ibid, Article 16. [554] OJ [2004] C 101/81.

[555] Cases 56/64 and 58/64 [1966] ECR 299, [1966] CMLR 418.

restriction of competition[556]. Part 2 of the *Guidelines* explains the effect on trade criterion, and is divided into four parts: general principles, the concept of 'trade between Member States', the notion 'may affect', and the concept of appreciability. Part 3 considers the application of the effect on trade criterion to particular examples of agreements and practices.

(A) The effect on trade criterion

(i) General principles

Articles 101 and 102 are applicable only where any effect on trade between Member States is appreciable[557]. In the case of Article 101 the question is whether the agreement affects trade: it is not necessary that each part of the agreement does so[558]; and if the agreement affects trade between Member States it is irrelevant that a particular undertaking that is party to the agreement does not itself produce such an effect[559]. In the case of Article 102 the abuse must have an effect on trade between Member States, but this does not mean that each element of the behaviour must be assessed in isolation to determine its effect: the conduct must be assessed in terms of its overall impact[560].

(ii) The concept of 'trade between Member States'

The concept of 'trade' is not limited to traditional exchanges of goods and services across borders: it is a wider concept and covers all cross-border activity, including the establishment by undertakings of agencies, branches or subsidiaries in other Member States[561]. The concept of trade also covers situations where the competitive structure of the market is affected by agreements and/or conduct[562]. There can be an effect on trade between Member States where parts only of those States are affected: the effect does not need to extend to their entire territories[563]. The question of whether trade between Member States is affected is separate from the issue of the relevant geographical market: trade could be affected even though the geographical market is national or even smaller than national[564].

(iii) The notion 'may affect'

The Court of Justice has often said that the notion that an agreement or practice 'may affect' trade between Member States means that it must be possible to foresee, with a sufficient degree of probability on the basis of a set of objective factors of law or fact, that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States[565]. Subjective intent to affect trade is not required[566]; and it is sufficient that the agreement or practice is capable of having an effect: it is not necessary to prove that it actually will do so[567]. In determining whether the pattern of trade is influenced it is not necessary to show that trade is or would be restricted or reduced: an increase in trade also means that it has been influenced[568]: the effect on trade criterion is simply jurisdictional, determining whether an examination of an agreement or conduct under the EU competition rules is warranted[569].

The fact that the influence on trade may be 'direct *or indirect*, actual *or potential*' clearly means that the jurisdictional reach of Articles 101 and 102 can be extensive[570]. However, in the case of indirect and potential influence the analysis must not be based on remote

[556] *Guidelines on inter-state trade*, para 4.
[557] Ibid, para 13. [558] Ibid, para 14. [559] Ibid, para 15. [560] Ibid, para 17.
[561] Ibid, paras 19 and 30. [562] Ibid, para 20. [563] Ibid, para 21.
[564] Ibid, para 22. [565] Ibid, para 23, citing relevant case law. [566] Ibid, para 25.
[567] Ibid, para 26. [568] Ibid, para 34. [569] Ibid, para 35. [570] See ibid, paras 36–42.

or hypothetical effects: a person claiming that trade is affected in this way must be able to explain how and why this is the case[571].

(iv) The concept of appreciability

Any effect on trade must be appreciable. The stronger the market position of the undertakings concerned, the likelier it is that any effect will be appreciable[572]. An undertaking's market share, and the value of its turnover in the products concerned, are relevant to the appreciability of any effect[573]. An assessment of appreciability must be considered in the legal and economic context of any agreement or practice including, in the case of vertical agreements, the cumulative effect of parallel networks[574].

The *Guidelines on inter-state trade* do not provide general quantitative rules on when trade is appreciably affected; however they do provide two examples of situations where trade is normally *not* capable of being appreciably affected.

(A) Small and medium-sized businesses

The *Guidelines* state that agreements between small and medium-sized businesses, as defined in Commission Recommendation 2003/361/EC[575], would not normally affect trade between Member States; however they might do so where they engage in cross-border activity[576]. The point is repeated in paragraph 11 of the Commission's *Guidelines on Vertical Restraints*[577].

(B) A negative rebuttable presumption of non-appreciability

The *Guidelines* also set out a negative rebuttable presumption of non-appreciability. This arises where:

- the aggregate market share of the parties on any relevant market within the EU affected by the agreements does not exceed 5 per cent and
- the parties' turnover is below €40 million: turnover is calculated differently according to whether the agreement is horizontal or vertical[578].

The presumption continues to apply where the turnover threshold is exceeded during two successive calendar years by no more than 10 per cent and the market share threshold by no more than 2 per cent.

(C) A positive rebuttable presumption of appreciability

The *Guidelines* also set out a positive rebuttable presumption of appreciability in the case of agreements which 'by their very nature' are capable of affecting trade between Member States, such as agreements on imports and exports. This arises where:

- the turnover thresholds set out above are exceeded and
- the parties' market shares exceed 5 per cent.

This positive presumption does not apply where the agreement covers part only of a Member State[579].

[571] Ibid, para 43. [572] Ibid, para 45.
[573] Ibid, paras 46–47. [574] Ibid, para 49.
[575] OJ [2003] L 124/36: see 'Part I of the Notice: introductory paragraphs', p 140 above for the definition of SMEs in the Recommendation.
[576] *Guidelines on inter-state trade*, para 50. [577] OJ [2010] C 130/1.
[578] Ibid, para 52.
[579] Ibid, para 53.

(B) The application of the effect on trade criterion to particular agreements and conduct

The *Guidelines on inter-state trade* proceed to examine how the effect on trade criterion applies in relation to particular types of agreement and conduct. They do so by reference to three categories: first, agreements and abuse covering or implemented in several Member States[580]; secondly, cases covering a single, or only part of a, Member State[581]; and thirdly, cases involving undertakings located in third countries[582]. It is important to understand that Articles 101 and 102 are capable of application irrespective of where the undertakings concerned are located, provided that the agreement or practice is implemented or has effects within the EU[583]. It is also possible that an export ban imposed by an EU supplier on a distributor in a third country, which prevents the latter from re-importing into the EU, could have an effect on trade between Member States in certain circumstances, for example where there is a significant price differential between prices in the different territories, where that differential would not be eroded by customs duties and transport costs, and where significant volumes of a product could be exported from the third country to the EU[584].

There have been some judgments of the EU Courts since the *Guidelines* were published. The General Court held in *Raiffeisen Zentralbank Österreich AG v Commission*[585] that a banking cartel in Austria had an effect on trade between Member States. In that case there was a series of regional committees within Austria; the Court held that it was not necessary to consider whether each individual committee had an affect on trade: rather it was necessary to look at the cumulative effect of all the committees[586]. The overall cartel in Austria affected the entire country, and the Court said that this raised a strong presumption that trade between Member States was affected[587]. The Court noted that there had been cases in which this presumption had been rebutted[588], but held that it was not rebutted on the facts of this case[589]. In *Ziegler SA v Commission*[590] (one of the appeals in the *International Removal Services* case) the General Court rejected an argument that the Commission had failed to demonstrate an appreciable effect on trade between Member States[591].

In *Emanuela Sbarigia v Azienda USL RM/A*[592] Ms Sbarigia, who operated a pharmacy in a pedestrianised part of Rome heavily used by tourists in the summer season, was challenging legislation, on the basis of both the free movement and the competition rules of the TFEU, that limited the maximum number of hours that she could trade, required her to close on Sundays, to close one half day per week and on public holidays and to take a minimum number of holidays each year. The Court of Justice concluded, as far as the application of the competition rules was concerned, that it was 'quite obvious' that the legislation in question could not affect trade between Member States, with the result that

[580] Ibid, paras 61–76.

[581] Ibid, paras 77–99.

[582] Ibid, paras 100–109.

[583] See further ch 12, 'The Extraterritorial Application of EU Competition Law', pp 495–500.

[584] *Guidelines on inter-state trade*, paras 108–109.

[585] Cases T-259/02 [2006] ECR II-5169, [2007] 5 CMLR 1142.

[586] Ibid, para 177.

[587] Ibid, para 181.

[588] See eg Cases C-215/96 and C-216/96 *Bagnasco and others* [1999] ECR I-135; *Netherlands Bank II* OJ [1999] L 271/28.

[589] Case T-259/02 [2006] ECR II-5169, [2007] 5 CMLR 1142, paras 182–186; the appeal to the Court of Justice in this case was dismissed, Case C-125/07 P *Erste Bank der Österreichischen Sparkassen AG v Commission* [2009] ECR I-8681, [2010] 5 CMLR 443, paras 36–70.

[590] Case T-199/08 [2011] ECR II-000, [2011] 5 CMLR 261.

[591] Ibid, paras 51–74.

[592] Case C-393/08 [2010] ECR I-000.

the reference of the matter under Article 267 TFEU by the Tribunale amministrativo regionale per il Lazio was inadmissible[593]. It is noticeable in this case that the referring court had itself expressed dissatisfaction with the relevant legislation, as had the Italian competition authority[594]; however the lack of an effect on inter-state trade meant that this matter could not be addressed under the TFEU.

7. Checklist of Agreements That Fall Outside Article 101(1)

At the end of this chapter it may be helpful to set out a checklist of the circumstances in which an agreement might be found not to infringe Article 101(1): the list follows the order of the text of this chapter:

- Article 101(1) does not apply to an agreement that is not between undertakings[595]
- Article 101(1) does not apply to collective agreements between employers and workers[596]
- Article 101(1) does not apply to an agreement between two or more persons that form a single economic entity[597]
- Article 101(1) normally does not apply to agreements between a principal and agent[598]
- Article 101(1) normally does not apply to an agreement between a contractor and a sub-contractor[599]
- Article 101(1) does not apply to unilateral conduct that is not attributable to a concurrence of wills between two or more undertakings[600]
- Article 101(1) does not apply to an agreement that has neither the object nor the effect of preventing, restricting or distorting competition[601]
- Article 101(1) does not apply to contractual restrictions that enable undertakings to achieve a legitimate purpose and which are not disproportionate[602]
- Article 101 does not apply to full-function joint ventures[603]
- a realistic view must be taken of potential competition[604]
- Article 101(1) does not apply to an agreement if this would obstruct an undertaking or undertakings in the performance of a task of general economic interest entrusted to them by a Member State[605]
- Article 101(1) does not apply to an agreement which undertakings were compelled to enter into by law[606]

[593] Ibid, paras 29–33. [594] Ibid, paras 13–15.
[595] See 'Undertakings', pp 83–92 above.
[596] See 'Employees and trades unions', pp 90–91 above.
[597] See 'The "single economic entity" doctrine', pp 92–97 above.
[598] See p 92 above and ch 16, pp 621–623.
[599] See 'The single economic entity doctrine', p 92 above and ch 16, 'Sub-Contracting Agreements', pp 676–677.
[600] See ' "Unilateral" conduct and Article 101(1) in vertical cases', pp 105–110 above.
[601] See 'The Object or Effect of Preventing, Restricting or Distorting Competition', pp 115–130 above.
[602] See 'Regulatory ancillarity: the judgment of the Court of Justice in *Wouters*', pp 130–134 above.
[603] See ch 21, 'Joint ventures – the concept of full-functionality', pp 837–838.
[604] See 'Actual and potential competition', pp 127–128 above.
[605] See 'Article 106(2)', p 137 above and ch 6, 'Article 106(2)', pp 235–242.
[606] See 'State compulsion and high regulated markets', pp 137–138 above.

- Article 101(1) does not apply to an agreement in a market that is so highly regulated that there is no latitude left for competition[607]
- Article 101(1) does not apply to an agreement that has no appreciable effect on competition[608]
- Article 101(1) does not apply to an agreement that does not have an appreciable effect on trade between Member States[609]
- Article 101(1) does not apply to an agreement that satisfies the criteria of Article 101(3)[610].

[607] See 'State compulsion and highly regulated markets', pp 137–138 above.
[608] See 'The *De Minimis* Doctrine', pp 140–144 above.
[609] See 'The Effect on Trade between Member States', pp 144–149 above.
[610] See ch 4.

4

Article 101(3)[1]

1. Introduction

An agreement that falls within Article 101(1) of the Treaty is not necessarily unlawful. Article 101(3) provides a 'legal exception' to the prohibition in Article 101(1) by providing that it may be declared inapplicable in respect of agreements, decisions or concerted practices[2], or of categories[3] of agreements, decisions or concerted practices, that satisfy four conditions, the first two positive and the last two negative. To satisfy Article 101(3) an agreement:

- must contribute to improving the production or distribution of goods or to promoting technical or economic progress
- while allowing consumers a fair share of the resulting benefit.

Furthermore the agreement[4]:

- must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives nor
- afford such undertakings the possibility of eliminating competition in a substantial part of the products in question[5].

[1] For further reading on Article 101(3) readers are referred to Faull and Nikpay *The EC Law of Competition* (Oxford University Press, 2nd ed, 2007), ch 3, paras 3.395–3.460; Bellamy & Child *European Community Law of Competition* (Oxford University Press, 6th ed, 2008, eds Roth and Rose), ch 3.

[2] The reference to decisions is useful since it means eg that the rules of a trade association may satisfy Article 101(3); it will only be rarely that Article 101(3) is applied to a concerted practice, but this can happen: see eg *Re International Energy Agency* OJ [1983] L 376/30, [1984] 2 CMLR 186; renewed in 1994, OJ [1994] L 68/35; in *CISAC*, Commission decision of 16 July 2008, the Commission concluded that Article 101(3) was not applicable to a concerted practice between a number of copyright collecting societies which amounted to a systematic delineation of the market between them along territorial lines; the decision is on appeal Cases T-401/08 etc *Teosto v Commission*, not yet decided.

[3] The inclusion of 'categories' of agreements is important since it paves the way for block exemptions: see 'Block Exemptions', pp 168–172 below.

[4] The term 'agreement' should be taken to include decisions and concerted practices in the rest of this chapter.

[5] Note that the UK Competition Act 1998 contains a similar provision in s 9: see ch 9, 'The Chapter I prohibition: exemptions', pp 356–360.

Under Regulation 17 of 1962[6] the Commission had the exclusive right to grant so-called 'individual exemption' under Article 101(3) to agreements notified to it[7]. However the system of notification of agreements to the Commission and the grant of individual exemption was abolished with effect from 1 May 2004 by Council Regulation 1/2003[8]; since then Article 101(3) has been directly applicable[9], and the Commission shares the competence to apply Article 101(3) with the national competition authorities ('the NCAs')[10] and national courts[11]. It is no longer correct to say that agreements are given individual exemption: they either do, or do not, satisfy Article 101(3).

In order to provide guidance to national courts and NCAs, as well as to undertakings and their professional advisers, the Commission has published *Guidelines on the application of Article [101(3)] of the Treaty* ('the *Article [101(3)] Guidelines*' or 'the *Guidelines*')[12]. The *Guidelines* should be applied 'reasonably and flexibly' rather than in a mechanical manner[13]. The Commission has cited the *Guidelines* in several of its decisions since 2004[14]. Additional guidance on the application of Article 101(1) and (3) to agreements is provided by the Commission's guidelines on technology transfer agreements[15], on vertical restraints[16] and on horizontal cooperation agreements[17].

An alternative way of satisfying Article 101(3) is to draft an agreement to satisfy one of the so-called 'block exemptions' issued by the Council of the European Union ('the Council') or by the Commission under powers conferred on it by the Council; the system of block exemptions is unaffected by Regulation 1/2003.

After discussing the burden of proof under Article 101(3) and the implications of the General Court's important judgment in *Matra Hachette v Commission*, section 2 of this chapter will discuss the criteria in Article 101(3). It will then consider the implications of Regulation 1/2003 for undertakings and their professional advisers, and in particular their need to 'self-assess' the application of Article 101(3) to their agreements. The final section in this chapter describes the system of block exemptions.

(A) The burden of proving that the conditions of Article 101(3) are satisfied

Article 2 of Regulation 1/2003 confirms well-settled case law that the burden of proof is on the Commission, the NCAs or the person opposing an agreement in a national court to show that it infringes Article 101(1), but that it is on the undertaking or undertakings seeking to defend an agreement to demonstrate that it satisfies the four conditions in Article 101(3)[18]. The Commission must examine the arguments and evidence put forward by the undertakings relying on Article 101(3); if it is unable to refute them it may be that the undertakings will be taken to have discharged the burden of proof upon

[6] JO [1962] 204/62, OJ Sp Ed [1962] p 87. [7] Ibid, Article 9(1).

[8] OJ [2003] L 1/1; see 'Regulation 1/2003', pp 166–168 below for discussion of the implications of Regulation 1/2003.

[9] Ibid, Article 1(1) and (2). [10] Ibid, Article 5. [11] Ibid, Article 6.

[12] OJ [2004] C 101/97. [13] Ibid, para 6.

[14] See eg *MasterCard* Commission decision of 19 December 2007, paras 670–672 and 734; *Morgan Stanley/Visa* Commission decision of 3 October 2007, paras 311, 313 and 322–324.

[15] *Guidelines on the application of [Article 101 TFEU] to technology transfer agreements* OJ [2004] C 101/2.

[16] *Guidelines on Vertical Restraints* OJ [2010] C 130/1.

[17] *Guidelines on the applicability of [Article 101 TFEU] to horizontal co-operation agreements* OJ [2011] C 11/1.

[18] See similarly s 9(2) of the UK Competition Act 1998, see ch 9, 'Exemption criteria', p 357.

them[19]. National rules on the standard of proof apply in Article 101(3) cases before the NCAs and national courts[20].

All four of the conditions must be satisfied if an agreement is to benefit from Article 101(3): the Court of Justice has stressed this on a number of occasions[21], and paragraph 42 of the *Article [101(3)] Guidelines* contains a statement to the same effect. For example the General Court annulled a Commission decision that an agreement satisfied Article 101(3) in *Métropole télévision SA v Commission*[22] because the Commission had failed to demonstrate that restrictions in the agreement were indispensable[23]. Paragraph 35 of the *Article [101(3)] Guidelines* points out, however, that parties to an agreement covered by a block exemption do not have to show that each of the conditions of Article 101(3) is satisfied: there is a rebuttable presumption that agreements falling within the scope of a block exemption satisfy all four conditions.

Paragraph 44 of the *Article [101(3)] Guidelines* explains that Article 101(3) applies only for as long as the four conditions contained in it are satisfied; however when applying this rule due consideration must be given to the time that it will take, and the restrictions that may be needed, when firms make sunk investments to realise economic efficiencies.

(B) *Matra Hachette v Commission*

A very important point about Article 101(3) is that, as the General Court stated in *Matra Hachette v Commission*[24], there are no anti-competitive agreements which, *as a matter of law*, could never satisfy the four conditions set out in that provision: it is possible for the parties to any type of agreement to argue that the conditions of Article 101(3) are satisfied. Even an agreement that has as its *object* the restriction of competition in the sense of Article 101(1) is capable, in principle, of satisfying the conditions of Article 101(3): in this sense EU law differs from US law, since there are no agreements that are irredeemably, or '*per se*', illegal in the EU system[25]. An example of a case in which an agreement restrictive of competition by object satisfied the terms of Article 101(3) can be found in *Société Air France/Alitalia Linee Aeree Italiane SpA*[26] where the Commission authorised an extensive strategic alliance between those two airlines. Of course it would require extremely convincing evidence to satisfy the Commission, an NCA or a national court that restrictions of competition by object such as horizontal price-fixing and market-sharing satisfy Article 101(3)[27], but in exceptional circumstances even this may be possible: indeed

[19] Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, p 347, [1966] CMLR 418, p 478; Cases C-204/00 P etc *Aalborg Portland v Commission* [2004] ECR I-123, [2005] 4 CMLR 251, para 55; Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, [2010] 4 CMLR 50, paras 82–83.

[20] Regulation 1/2003, recital 5.

[21] See eg Cases 43/82 and 63/82 *VBVB and VVVB v Commission* [1984] ECR 19, para 61; Case C-238/05 *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125, [2007] 4 CMLR 6, para 65.

[22] Cases T-528/93 etc [1996] ECR II-649, [1996] 5 CMLR 386, para 93.

[23] The General Court did so again in Case T-185/00 *M6 v Commission* [2002] ECR II-3805, [2003] 4 CMLR 707, para 86, where it considered that the Commission had incorrectly concluded that an agreement would not substantially eliminate competition.

[24] Case T-17/93 [1994] ECR II-595, para 85; see also Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, [2006] 5 CMLR 29, para 233, and para 46 of the *Article [101(3)] Guidelines*.

[25] See further ch 3, 'Have the EU Courts embraced the "rule of reason"?', pp 134–136.

[26] Commission decision of 7 April 2004, OJ [2004] L 362/17.

[27] See the *Article [101(3)] Guidelines*, para 46.

for many years Articles 3 to 5 of Council Regulation 4056/86 on maritime transport[28] provided block exemption for horizontal price-fixing in the case of containerised cargo carried by international liner conferences due to the particular characteristics of that industry, though this exemption was ended in October 2008[29].

There have been two recent cases in which the possibility of an Article 101(3) defence for an agreement that restricted competition by object has been explored[30]. In *Competition Authority v Beef Industry Development Society Ltd* ('BIDS')[31] the Court of Justice concluded that an agreement between beef processors in Ireland to reduce capacity for beef processing there (some firms would stay in the market, and would pay other firms to exit and to agree not to re-enter for several years) had the object of restricting competition. Any justification for the agreement would have to be made out under Article 101(3)[32]. The Supreme Court of Ireland, which had referred the matter to the Court of Justice, subsequently asked the Irish High Court to consider whether the Society had produced evidence to support a finding on the basis of Article 101(3)[33]. However it was announced on 25 January 2011 that BIDS had withdrawn its claim under Article 101(3), with the result that the Court was not required to reach a conclusion on the matter.

In *GlaxoSmithKline Services Unlimited v Commission*[34] the Court of Justice considered that a term in a vertical agreement, whereby wholesale purchasers of pharmaceutical products from Glaxo in Spain were charged a higher price if the products were exported from Spain to higher-priced countries such as the UK, restricted competition by object; however the Court was not satisfied that the Commission was correct to dismiss Glaxo's arguments in support of the agreement under Article 101(3). Unfortunately the Commission did not subsequently give a view as to whether Article 101(3) was, in fact, satisfied, so that the parties must determine the issue for themselves.

There have been decisions in which the Commission was satisfied that the fixing of prices satisfied the requirements of Article 101(3). These were far from being classic cartel cases: rather they concerned network industries in which prices were 'fixed' between participants in a network that supplied services to one another (the price fixing was business to business, or 'B to B'), whereas 'hard-core' price fixing involves the fixing of prices to customers (business to customer, or 'B to C')). It is interesting to note that, in these decisions, the Commission considered that the agreements restricted competition *by effect* rather than *by object*: in other words it did not treat the restrictions as hard-core. In *Reims II*[35] the Commission considered that an agreement between the public postal operators in Europe as to the amount that one operator would pay to another for the onward delivery of letters in the latter's territory satisfied the terms of Article 101(3). The agreement did entail the 'fixing' of prices, in that participants in the scheme were committed to its principles; but this was price fixing of an 'unusual' nature[36], and the Commission could identify a number of economic efficiencies that would follow from it[37]. Similarly in *Visa International – Multilateral Interchange Fee*[38] the Commission stated that it is not the case that an agree-

[28] OJ [1986] L 378/1.

[29] The exemption was repealed by Article 1 of Regulation 1419/2006, OJ [2006] L 269/1: see ch 23, 'Legislative regime', pp 970–972.

[30] See also the Opinion of the UK Office of Fair Trading in *Newspaper and magazine distribution* OFT 1025, October 2008, paras 4.29–4.132, available at www.oft.gov.uk.

[31] Case C-209/07 [2008] ECR I-8637, [2009] 4 CMLR 310. [32] Ibid, paras 21 and 39.

[33] [2009] IESC 72. [34] Cases C-501/06 P etc [2009] ECR I-9291, [2010] 4 CMLR 50.

[35] OJ [1999] L 275/17, [2000] 4 CMLR 704. [36] Ibid, para 65.

[37] Ibid, paras 69–76; this was a decision where the Commission granted individual exemption under the old procedure in Regulation 17 of 1962: the exemption was renewed in 2003 and expired on 31 December 2006, OJ [2004] L 56/76, [2004] 5 CMLR 2.

[38] OJ [2002] L 318/17, [2003] 4 CMLR 283.

ment concerning prices is always to be classified as a cartel and therefore as inherently incapable of satisfying Article 101(3)[39]: in that decision, adopted under the old procedure in Regulation 17, the Commission granted individual exemption to a 'multilateral interchange fee' agreed upon between 'acquiring' and 'issuing' banks within the Visa system[40].

2. The Article 101(3) Criteria

Each of the four requirements of Article 101(3) will now be examined. It is essential to consider them in conjunction with the *Article [101(3)] Guidelines*. The text that follows will emulate the *Guidelines* by reversing the treatment of the second and third conditions set out in Article 101(3) (a fair share to consumers and indispensability): the Commission's view is that consideration of whether consumers would obtain a fair share of any resulting benefit does not arise in the event that any restrictions fail the indispensability test, so that it is logical to consider the latter first[41].

(A) First condition of Article 101(3): an improvement in the production or distribution of goods or in technical or economic progress

The 'benefit' produced by an agreement must be something of objective value to the EU as a whole, not a private benefit to the parties themselves; cost savings that arise simply from the exercise of market power, for example by fixing prices or sharing markets, cannot be taken into account[42]. Any advantages claimed of the agreement must outweigh the detriments it might produce[43]; the Commission has declined to accept that an agreement produces an improvement if, in practice, its effect is a disproportionate distortion of competition in the market in question[44]. An agreement must be examined in the light of all the factual arguments and evidence put forward by the parties in support of their argument that Article 101(3) is satisfied[45]. The Commission requires the parties to found their argument that Article 101(3) applies 'on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts': it will not be persuaded 'by economic theory alone'[46]. In *Groupement des Cartes Bancaires* the Commission concluded that the Groupement had provided no empirical evidence that the restrictive fees

[39] Ibid, para 79; the Commission's suggestion in this paragraph that some agreements are inherently incapable of satisfying Article 101(3) is clearly wrong given the judgment of the General Court in the *Matra Hachette* case.

[40] The individual exemption expired on 31 December 2008; subsequently the Commission accepted commitments from Visa Europe under Article 9 of Regulation 1/2003 that involved a significant reduction of the interchange fee for debit cards: see Commission Press Release IP/10/1684, 8 December 2010.

[41] *Article [101(3)] Guidelines*, para 39.

[42] See Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, p 348, [1966] CMLR 418, p 478; Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited* [2009] ECR I-9291, [2010] 4 CMLR 50, paras 89–96; and para 49 of the *Article [101(3)] Guidelines*.

[43] Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, p 348, [1966] CMLR 418, p 478; Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4563, para 139, upheld on appeal Case C-552/03 P *Unilever Bestfoods (Ireland) Ltd v Commission* [2006] ECR I-9091, [2006] CMLR 5 1494, paras 102–106.

[44] *Screensport/EBU* OJ [1991] L 63/32, [1992] 5 CMLR 273, para 71.

[45] Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited* [2009] ECR I-9291, [2010] 4 CMLR 50, paras 102–104.

[46] See *MasterCard*, Commission decision of 19 December 2007, para 690: see also paras 694–701; the decision is on appeal to the General Court, Case T/111/08 *MasterCard and others v Commission*, not yet decided.

for membership of the CB payment card system were necessary to prevent new entrants from free riding on investment by the other members[47].

The benefits that may be claimed are specified in Article 101(3): the restrictions in the agreement must either contribute to an improvement in the production or distribution of goods[48] or promote technical or economic progress. These concepts overlap, and in many cases the Commission has considered that more than one – or even that all – the heads were satisfied[49]. In other cases a particular type of benefit may be obviously appropriate for the agreement in question. When permitting specialisation agreements, which can lead to economies of scale and other efficiencies, the Commission has considered that there would be an improvement in the production of goods[50], while it has often held that research and development projects would lead to technical and economic progress[51]. Vertical agreements between suppliers and distributors naturally come under the head of improvements in distribution[52]. The Commission has recognised network externalities as contributing to technical and economic progress from which consumers derive a benefit[53].

An important question is to determine how broad the criteria in the first condition of Article 101(3) are: to use an analogy from many card games, in what circumstances can a 'benefit' under Article 101(3) 'trump' a restriction of competition under Article 101(1), with the result that an agreement which would have been prohibited under Article 101(1) is in fact permitted as a result of the legal exception provided by Article 101(3)? The issue of the breadth of Article 101(3) has attracted considerable attention in recent years for various reasons. First, the abolition of the Commission's 'monopoly' over decision-making in individual cases under Article 101(3) as a result of the adoption of Regulation 1/2003 means that Article 101(3) decisions can now be made by NCAs and national courts as well as the Commission: concern was expressed when Regulation 1/2003 was in gestation that the criteria in Article 101(3) were so broad that they were not appropriate to be decided upon by NCAs and national courts; and that there was a risk that the criteria would be applied inconsistently from one Member State to another. A second point is that Governments increasingly find that social policies that they would like to pursue – for example encouraging undertakings in the drinks industry to restrict the sale of 'cheap' alcohol to young people, or supermarkets to impose a charge for providing environmentally unfriendly plastic bags – may infringe competition law, in particular if a 'narrow' rather than a 'broad' view of Article 101(3) is taken. A third point is that the global financial crisis that erupted in 2008 led to many calls for undertakings to be allowed to enter into cooperative agreements to enable them to survive, supported by an indulgent application of Article 101(3). These factors have led to urgent and lively debate about the 'true meaning' of Article 101(3).

[47] Commission decision of 17 October 2008, on appeal to the General Court in Case T-491/07 *CB v Commission*, not yet decided.

[48] Note that services are not explicitly referred to here; however para 48 of the *Article [101(3)] Guidelines* states that Article 101(3) applies, by analogy, to services; in the UK s 9 of the Competition Act 1998 specifically includes improvements in the production or distribution of goods *or services*.

[49] See eg *Re United Reprocessors GmbH* OJ [1976] L 51/7, [1976] 2 CMLR D1.

[50] On specialisation agreements see ch 15, 'The application of Article 101(1) to production agreements', pp 600–603.

[51] On research and developments agreements see ch 15, 'Research and Development Agreements', pp 592–599.

[52] On vertical agreements see ch 16 generally.

[53] *Visa International – Multilateral Interchange Fee* OJ [2002] L 318/17, [2003] 4 CMLR 283, para 83; on network effects see ch 1, 'Network effects and two-sided markets', pp 11–12; see similarly, under UK law, *LINK Interchange Network Ltd*, OFT decision of 16 October 2001 [2002] UKCLR 59, available at www.oft.gov.uk.

(i) A narrow view of Article 101(3)

A narrow view of Article 101(3) is that it permits only agreements that would bring about improvements in economic efficiency: the very wording of Article 101(3), which speaks of improvements to production and distribution and to technical and economic progress, is clearly suggestive of an efficiency standard. Article 101(3), therefore, simply allows a balancing of the restrictive effects of an agreement under Article 101(1) against the enhancement of efficiency under Article 101(3); in striving to achieve the right balance the other criteria of Article 101(3) – a fair share to consumers, no dispensable restrictions and no substantial elimination of competition – are there to ensure that a reasonable outcome in terms of consumer welfare is achieved. The Commission's *White Paper on Modernisation*[54], which began the process that culminated in the adoption of Regulation 1/2003, explained Article 101(1) and (3) in precisely this way[55]; and the *Article [101(3)] Guidelines* are drafted explicitly in terms of economic efficiency[56]. An attractive way of thinking of Article 101 as a whole is that Article 101(1) is concerned to establish whether an agreement could lead to allocative inefficiency, and that Article 101(3) permits such an agreement where there would be a compensating enhancement of productive efficiency[57].

(ii) A broader approach to Article 101(3)

However an alternative, and broader, view of Article 101(3) is possible: that it allows policies other than economic efficiency to be taken into account when deciding whether to allow agreements that are restrictive of competition. There are many important policies in the Union, for example on industry[58], the environment[59], employment[60], the regions[61] and culture[62], which go beyond the simple enhancement of economic efficiency. According to a broad view of Article 101(3) a benefit in terms of any of these policies may be able to 'trump' a restriction of competition under Article 101(1)[63]; another way of putting the point is to suggest that *non*-economic criteria can be taken into account under Article 101(3) as well as economic ones[64].

Some of these broader considerations do seem to have had an influence on the application of Article 101(3) during the years when the Commission enjoyed a monopoly over decision-making under that provision[65]. For example industrial policy can be detected

[54] [1999] C 132/1, [1999] 5 CMLR 208. [55] Ibid, para 57.

[56] See 'The Commission's approach in the *Article [101(3)] Guidelines*', pp 160–162 below.

[57] See Odudu *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press, 2006), in particular ch 6; Odudu 'The Wider Concerns of Competition Law' (2010) 30 OJLS 1.

[58] On industry under the TFEU see Article 173 (ex Article 157 EC).

[59] On environmental protection under the TFEU see Article 11 (ex Article 6 EC) and Articles 191–193 (ex Articles 174–176 EC).

[60] On employment under the TFEU see Articles 145–159 (ex Articles 125–130 EC).

[61] On economic and social cohesion under the TFEU note Articles 174–178 (ex Articles 158–162 EC).

[62] On culture under the TFEU see Article 167 (ex Article 151 EC); several appellants in the *CISAC* case are relying on Article 167: see Cases T-392/08 etc *AEPI v Commission*, not yet decided.

[63] For powerful argument as to why these broader issues should not be brought within the internal regime of competition law see Odudu *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press, 2006), ch 7; see also Kjolbye 'The new Commission guidelines on the application of Article 81(3): an economic approach to Article 81' (2004) 25 ECLR 566.

[64] For an interesting review of the issues see the OFT's discussion note 'Article 101(3) – A discussion of narrow versus broad definition of benefits' and the notes of the roundtable discussion held at the OFT on 12 May 2010, available at www.oft.gov.uk.

[65] For discussion of the policies under consideration in this section see Monti *EC Competition Law* (Cambridge University Press, 2007), ch 4; Jones and Sufrin *EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 4th ed, 2010), pp 244–247.

in some competition law developments[66]: Amato suggests that the block exemption for specialisation agreements, with its acceptance that rationalisation in production fulfils the Article 101(3) criteria, reflects industrial policy rather than competition thinking[67]. In *Metro v Commission*[68] the Court of Justice considered that employment was a relevant factor under the first condition in Article 101(3), saying that the agreement under consideration was 'a stabilising factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to Article [101(3)]'. When considering whether an exemption might be given to a joint venture to produce a 'multi-purpose vehicle' in Portugal in *Ford/Volkswagen*[69] the Commission 'took note' of 'exceptional circumstances' in that it would bring a large number of jobs and substantial foreign investment to one of the poorest regions of the EU, promoting harmonious development, reducing regional disparities and furthering European market integration[70]. The Commission emphasised, however, that this would not be enough in itself to make an exemption possible unless the other conditions of Article 101(3) were fulfilled[71]. In its submissions to the General Court when the decision was unsuccessfully challenged by a third party on appeal, the Commission argued that it was possible to take into account factors other than those expressly mentioned in Article 101(3) including, for example, the maintenance of employment[72]. The General Court concluded that, since the Commission would have granted an individual exemption anyway, its decision could not be impugned for having taken into account improper criteria[73].

In *UEFA*, when granting an individual exemption to the sale of the media rights to the UEFA Champions League, the Commission took note of the financial solidarity that supports the development of European football (citing the Court of Justice's judgments in *Metro* and *Remia*)[74]. In *Laurent Piau v Commission*[75] the General Court seems to have accepted that rules of FIFA, the body that controls football worldwide, that required football players' agents to comply with a mandatory licensing system, could contribute to economic progress by raising professional and ethical standards for players' agents in order to protect football players who have a short playing career[76]. In *Stichting Baksteen*[77] the Commission considered that the restructuring of the Dutch brick industry, involving coordinated closures 'carried out in acceptable social conditions, including the redeployment of employees', promoted technical and economic progress[78]. In *CECED*[79] the Commission granted an individual exemption to an agreement between manufacturers

[66] Note however that Article 173 TFEU provides that the Union's industrial policy is to be conducted 'in accordance with a system of open and competitive markets'; see further OECD Roundtable on Competition Policy, 'Industrial Policy and National Champions' (2009), available at www.oecd.org/competition.

[67] Amato *Antitrust and the Bounds of Power* (Hart Publishing, 1997), pp 63–64; the relevant block exemption is now Regulation 1218/2010, OJ [2010] L 335/43.

[68] Case 26/76 [1977] ECR 1875, [1978] 2 CMLR 1, para 43; see similarly Case 42/84 *Remia BV and Verenigde Bedrijven Nutricia NV v Commission* [1985] ECR 2545, [1987] 1 CMLR 1, para 42.

[69] OJ [1993] L 20/14, [1993] 5 CMLR 617.

[70] OJ [1993] L 20/14, [1993] 5 CMLR 617, paras 23, 28 and 36; see also the Commission Press Release IP/92/1083, 23 December 1992.

[71] OJ [1993] L 20/14, [1993] 5 CMLR 617, para 36.

[72] Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, para 96; on this case generally see Swaak (1995) 32 CML Rev 1271.

[73] [1994] ECR II-595, para 139.

[74] *Joint selling of the commercial rights of the UEFA Champions League* OJ [2003] L 291/25, [2004] 4 CMLR 9.

[75] Case T-193/02 [2005] ECR II-209, [2005] 5 CMLR 42, upheld on appeal Case C-171/05 P *Piau v Commission* [2006] ECR I-37.

[76] Ibid, paras 100–106.

[77] OJ [1994] L 131/15, [1995] 4 CMLR 646.

[78] Ibid, paras 27–28.

[79] OJ [2000] L 187/47, [2000] 5 CMLR 635.

of domestic appliances (washing machines etc) which would lead to energy efficiencies, and in doing so noted not only individual economic benefits to consumers from lower energy bills but also the 'collective environmental benefits' that would flow from the agreement[80], referring specifically to the Union's environmental policy in its decision. The Commission reached a similar conclusion when it informally settled cases relating to 'environmental' agreements for water heaters and dishwashers[81].

It is clear, therefore, that a number of factors appear to have been influential in decisions under Article 101(3), not all of which can be considered to be 'narrow' improvements in economic efficiency. There are significant proponents of the view that Article 101(3) does admit broad, non-competition considerations[82], and the General Court, in *Métropole télévision SA v Commission*[83], said that 'in the context of an overall assessment, the Commission is entitled to base itself on considerations *connected with the pursuit of the public interest* in order to grant exemption under Article [101(3)]' (emphasis added)[84]. It is also worth mentioning in passing that 'public interest' criteria may also be relevant when deciding whether Article 101(1) is infringed in the first place, as the Court of Justice's judgment in *Wouters*[85] has demonstrated: indeed the suppression of non-economic considerations under Article 101(3) might result in their re-emergence under the *Wouters* case law. Public interest issues are also relevant when deciding whether Article 106(2) permits a derogation from the application of Article 101(1)[86].

(iii) Comment

This discussion shows that, over a number of years, there has been uncertainty – even confusion – as to the proper application of Article 101(3). As long as the Commission enjoyed a monopoly over decision-making under Regulation 17 this may not have been too serious a problem: the Commission undoubtedly enjoyed a 'margin of appreciation' when applying Article 101(3)[87] under Regulation 17 and it would hardly be surprising if, when making decisions in individual cases over the period from 1962 to 2004, it was influenced, at least sometimes, by issues other than 'pure' economic efficiency. However Regulation 1/2003 makes it necessary to decide on the true content of Article 101(3) be-

[80] Ibid, paras 55–57; see similarly paras 268–271 of the Commission's decision in *ARA, ARGEV* Commission decision of 17 October 2003, upheld on appeal Case T-419/03 *Altstoff Recycling Austria AG v Commission* [2011] ECR II-000.

[81] Commission Press Release IP/01/1659, 26 November 2001; see also the Commission's *Competition Policy Newsletter*, February 2002, 50.

[82] See eg Siragusa in *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing, 1998, eds Ehlermann and Laudati), p 39; Ehlermann 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 CML Rev 537; Wesseling 'The Draft Regulation Modernising the Competition Rules: the Commission is Married to One Idea' (2001) 26 EL Rev 357; Monti 'Article 101 EC and Public Policy' (2002) 39 CML Rev 1057; Faull, giving the Burrell Lecture in London, 21 February 2000, said that social policy can 'reasonably credibly' be brought within Article 101(3); Lugard and Hancher 'Honey, I shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3)' (2004) 25 ECLR 410; Townley *Article 81 and Public Policy* (Hart Publishing, 2009); for discussion of the issues see Sufrin 'The Evolution of Article 81(3) of the EC Treaty' (2006) 51 Antitrust Bulletin 915, pp 952–967.

[83] Cases T-528/93 etc [1996] ECR II-649, [1996] 5 CMLR 386; see similarly Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, [2006] 5 CMLR 29, para 244.

[84] Ibid, para 118.

[85] Case C-309/99 [2002] ECR I-1577, [2002] 4 CMLR 27; see also Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991, [2006] 5 CMLR 1023; this case law is discussed in ch 3, 'Regulatory ancillarity: the judgment of the Court of Justice in *Wouters*', pp 130–133.

[86] See ch 6, 'Article 106(2)', pp 235–241.

[87] See Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, p 347, [1966] CMLR 418, p 477.

cause decisions since 1 May 2004 can be made by NCAs and national courts as well as by the Commission itself. These institutions, and the undertakings that enter into agreements that might be challenged under Article 101, need to know the limits of what can be justified under Article 101(3); and the NCAs and national courts, unlike the Commission, are not well placed to balance a restriction of competition under Article 101(1) against a variety of European Union policies ranging from industrial and environmental policy to social and cultural issues under Article 101(3). It seems reasonable to suppose that NCAs and national courts would have less difficulty in applying a 'narrow' interpretation of Article 101(3), limited to a consideration of economic efficiencies. These considerations suggest that, in the post-Regulation 1/2003 world, Article 101(3) should be interpreted in a narrow rather than a broad manner, according to standards and by reference to principles that are justiciable in courts of law. This is borne out by the Commission's report of April 2009 on the functioning of Regulation 1/2003 during its first five years[88], in which it noted that 'neither the case practice of the Commission and the national enforcers, nor the experience reported by the business and legal community, indicate major difficulties with the direct application of Article [101(3)] which has been widely welcomed by stakeholders'[89].

(iv) The Commission's approach in the Article [101(3)] Guidelines

It is absolutely clear from the Commission's *Article [101(3)] Guidelines* that it intends Article 101(3) to be applied according to the narrow approach based on economic efficiency[90]. Paragraph 11 of the *Guidelines* states that Article 101(3) allows 'pro-competitive benefits' to be taken into account under Article 101(3), and that these may outweigh any 'anti-competitive effects' under Article 101(1). Paragraph 32 of the *Guidelines* again speaks of the 'positive economic effects' of agreements that can be taken into consideration under Article 101(3). Paragraph 33 refers to the achievement of 'pro-competitive effects by way of efficiency gains', explaining that efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. Significantly paragraph 42 of the *Guidelines* explicitly states that '[g]oals pursued by other Treaty provisions can be taken into account only to the extent that they can be subsumed under the four conditions of Article 101(3)'. When the *Guidelines*, at paragraphs 48 to 72, reach the point of discussing the first condition of Article 101(3) – an improvement in production or distribution or in technical or economic progress – they do so specifically under the heading of 'efficiency gains', thereby removing any lingering doubt that might still remain that the Commission considers that other, non-economic, considerations could be relevant to the assessment. Similarly paragraph 20 of the Commission's *Guidelines on Horizontal Cooperation Agreements*[91] says that Article 101(3) asks whether any pro-competitive effects of an agreement outweigh its restrictive effects on competition.

It would not be unreasonable to expect that NCAs and national courts will take – and will be happy to take – a strong lead from the *Article [101(3)] Guidelines*, although it is obviously open to undertakings to argue that they do not fully reflect the jurisprudence

[88] Regulation 1/2003, Article 44.

[89] *Report on the functioning of Regulation 1/2003* COM(2009) 206 final, para 12.

[90] It is also noticeable that the recitals to the various block exemptions (as to which see 'Block Exemptions', pp 168–172 below) explain the reasons for permitting certain agreements under Article 101(3) purely in terms of economic efficiency; and that the approach taken in the *Guidelines* is consistent with the Commission's *Guidelines on the assessment of horizontal mergers* OJ [2004] C 31/5, paras 76–90 and its *Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings* OJ [2009] C 45/7, paras 28–31, 46, 62, 74 and 89–90.

[91] OJ [2011] C 11/1.

of the General Court and the Court of Justice. There may be litigation in the future in which those Courts will have to reconsider some of the statements in cases such as *Metro*[92] and *Remia and Nutricia*[93] (both decided when the Commission had a 'monopoly' over decision-making under Article 101(3)) and to decide whether to allow a broader approach to Article 101(3) than the *Guidelines* envisage; or whether to adopt the narrower, and more justiciable, approach suggested by the Commission. In *GlaxoSmithKline Services Unlimited v Commission* the General Court's analysis of whether GSK had satisfied the first condition of Article 101(3) was conducted under the heading 'Evidence of a gain in efficiency', suggesting that it was comfortable with a narrow approach to that provision[94].

Paragraph 51 of the *Article [101(3)] Guidelines* stresses that all efficiency claims must be substantiated in order to verify:

- the *nature* of the claimed efficiencies, so that it is possible for the decision-maker to verify that they are objective in nature[95]
- the *link* between the agreement and the efficiencies which, as a general proposition, should be direct rather than indirect[96]
- the *likelihood* and *magnitude* of each claimed efficiency and
- *how* and *when* each claimed efficiency would be achieved.

The decision-maker must be able to verify the value of the claimed efficiencies in order to be able to balance them against the anti-competitive effects of the agreement[97]. The Commission's requirement that undertakings must substantiate their claims is an important feature of the *Article [101(3)] Guidelines* and its decisional practice since May 2004. Mere speculation or conjecture will be insufficient: there must be 'convincing arguments and evidence'[98] that the agreement will lead to the efficiencies claimed, the burden being on the parties seeking to defend it.

The Commission identifies two broad categories of efficiencies in the *Guidelines*, while acknowledging that it is not appropriate to draw clear and firm distinctions between the various categories[99].

(A) Cost efficiencies

Paragraphs 64 to 68 consider cost efficiencies which may result, for example, from the development of new production technologies and methods[100], synergies arising from the integration of existing assets[101], from economies of scale[102], economies of scope[103] and from better planning of production[104].

(B) Qualitative efficiencies

Paragraphs 69 to 72 consider qualitative efficiencies as opposed to cost reductions: research and development agreements are particularly cited in this respect[105], as are

[92] Case 26/76 [1977] ECR 1875, [1978] 2 CMLR 1.

[93] Case 42/84 [1985] ECR 2545, [1987] 1 CMLR 1.

[94] Case T-168/01 [2006] ECR II-2969, [2006] 5 CMLR 29, paras 247–308; the General Court's judgment in relation to Article 101(3) was upheld on appeal to the Court of Justice, Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, [2010] 4 CMLR 50, paras 68–168.

[95] *Article [101(3)] Guidelines*, para 52.

[96] Ibid, paras 53 and 54. [97] Ibid, paras 55–58.

[98] See Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, [2006] 5 CMLR 29, para 235, upheld on appeal Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, [2010] 4 CMLR 50, para 82.

[99] *Article [101(3)] Guidelines*, para 59. [100] Ibid, para 64. [101] Ibid, para 65.

[102] Ibid, para 66. [103] Ibid, para 67. [104] Ibid, para 68. [105] Ibid, para 70.

licensing agreements and agreements for the joint production of new or improved goods or services[106]; there is also a reference to the possibility of distribution agreements delivering qualitative efficiencies[107].

(B) Third condition of Article 101(3): indispensability of the restrictions

The *Article [101(3)] Guidelines* deal with the indispensability of restrictions before the question of a fair share for consumers, since the latter issue would not arise if the restrictions are not indispensable[108]. Paragraph 73 of the *Guidelines* states that the indispensability condition implies a two-fold test: first, whether the restrictive agreement itself is reasonably necessary in order to achieve the efficiencies; and secondly whether the individual restrictions of competition flowing from the agreement are reasonably necessary for the attainment of the efficiencies. Paragraph 30 of the *Guidelines* explains that the requirement of indispensability in Article 101(3) is conceptually distinct from the ancillary restraints doctrine: Article 101(3) involves a balancing of pro- and anti-competitive effects, which is not the case when determining whether a restraint is ancillary.

(i) The efficiencies must be specific to the agreement

Paragraphs 75 to 77 consider the first part of the two-fold test: the requirement that the efficiencies are specific to the agreement or, to put the point another way, that there are no other economically practicable and less restrictive means of achieving them[109]. The parties should explain, for example, why they could not have achieved the same efficiencies acting alone[110].

(ii) The indispensability of individual restrictions

Paragraphs 78 to 82 consider whether any individual restrictions of competition flowing from the agreement are indispensable. The parties must demonstrate both that the nature of any restriction and that its 'intensity' are reasonably necessary to produce the claimed efficiencies[111]. A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise; restrictions of the kind 'blacklisted' in any of the block exemptions – for example horizontal price-fixing and market-sharing and the imposition of export bans in vertical agreements – would be unlikely to be considered indispensable[112]. A restriction may be indispensable only for a certain period of time; once that time has expired, it will cease to be so[113].

(C) Second condition of Article 101(3): fair share for consumers

The undertakings concerned must show that a fair share of the benefit that results from an agreement will accrue to consumers if Article 101(3) is to apply: it is helpful to think

[106] Ibid, para 71. [107] Ibid, para 72. [108] Ibid, para 39.

[109] Ibid, para 75; note that under para 85 of the Commission's *Guidelines on the assessment of horizontal mergers* OJ [2004] C 31/5 efficiencies are recognised in the assessment of mergers only where they can be shown to be merger-specific.

[110] *Article [101(3)] Guidelines*, para 76. [111] Ibid, para 78.

[112] Ibid, para 79; for 'blacklisted' clauses in block exemptions see ch 15, 'Article 4: hard-core restrictions', p 602 (specialisation agreements) and 'Article 5: hard-core restrictions', pp 597–598 (research and development agreements); ch 16, 'Article 4: hard-core restrictions', pp 663–669 (vertical agreements); and ch 19, 'Article 4: hard-core restrictions', pp 786–789 (technology transfer agreements).

[113] Ibid, para 81.

of this as the 'pass-on' requirement. Paragraph 84 of the *Article [101(3)] Guidelines* states that the concept of consumers in Article 101(3) encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers; 'undertakings', in the competition law sense of the term[114], can be consumers for this purpose just as much as a natural person who purchases as a consumer in the lay sense. It is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration under this part of Article 101(3), not the effect on each member of that category of consumers[115]. Negative effects on consumers in one geographic or product market cannot normally be balanced against and compensated by positive effects for consumers in unrelated markets, although this may be possible where markets are related provided that the consumers affected by the restriction and benefiting from the efficiency gains are substantially the same[116].

If an agreement would leave consumers worse off than they would otherwise have been the pass-on condition of Article 101(3) will not have been satisfied[117]; however consumers do not have to gain from each and every efficiency achieved provided that they receive a fair share of the overall benefits[118]. It could be the case that an agreement, for example to produce a new product more quickly than if the parties had proceeded alone, might also lead to greater market power and therefore higher prices; the Commission does not rule out that early access to the new products might amount to a 'fair share' for consumers, notwithstanding the higher prices[119]. In its *MasterCard* decision the Commission said that if an agreement is likely to lead to higher prices, consumers must be compensated through increased quality or other benefits[120]. The greater the restriction of competition under Article 101(1), the greater must be the efficiency and the pass-on under Article 101(3)[121]; and where an agreement has substantial anti-competitive and substantial pro-competitive effects paragraph 92 of the *Guidelines* states that the decision-maker should take into account that competition is an important long-term driver of efficiency and innovation. The *Guidelines* proceed to discuss the pass-on requirement in relation to cost efficiencies and qualitative efficiencies respectively.

(i) Cost efficiencies

Paragraphs 95 to 101 consider pass-on and the balancing of cost efficiencies. Paragraph 96 notes that cost efficiencies may lead to increased output and lower prices for consumers: in assessing whether this is likely the following factors should be taken into account:

- the characteristics and structure of the market
- the nature and magnitude of the efficiency gains
- the elasticity of demand and
- the magnitude of the restriction of competition.

Paragraph 98 points out that consumers are more likely to benefit from a reduction in the parties' variable costs than in their fixed costs, since pricing and output

[114] See ch 3, 'Undertakings and Associations of Undertakings', pp 83–99.

[115] Case C-238/05 *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125, [2007] 4 CMLR 6, para 70.

[116] *Article [101(3)] Guidelines*, para 43.

[117] Ibid, para 85. [118] Ibid, para 86. [119] Ibid, para 89.

[120] Commission decision of 19 December 2007, para 734, on appeal Case T-111/08 *MasterCard v Commission*, not yet decided; see further Repa, Malczewska, Teixeira and Martinez Rivero 'Commission prohibits MasterCard's multilateral interchange fees for cross-border card payments in the EEA' (2008) 1 *Competition Policy Newsletter* 1.

[121] *Article [101(3)] Guidelines*, para 90.

decisions are determined predominantly by variable costs and demand conditions. Paragraph 99 explains that the actual rate of any pass-on to consumers will depend on the extent to which consumers will expand their demand in response to a lowering of price; this will depend, among other things, on the extent to which sellers are able to discriminate in price between different categories of customers. Paragraph 101 cautions that any reduction in costs, and therefore any prospect of lower prices for consumers, must be balanced against the fact that an agreement being considered under Article 101(3) must necessarily involve a restriction of competition under Article 101(1), which in itself is likely to mean that the parties have the ability to raise their prices as a result of their increased market power: these 'opposing forces' must be balanced against one another.

(ii) Qualitative efficiencies

Paragraphs 102 to 104 consider pass-on and the balancing of other types of efficiencies: for example the emergence of a new and improved product might compensate for the fact that an agreement leads to higher prices. Paragraph 103 concedes that this involves a value judgment and that it is difficult to assign precise values to a balancing exercise of this nature. Paragraph 104 acknowledges that new and improved products are an important source of consumer welfare; it continues that, where prices will be higher as a result of the restrictive effect of the agreement on competition, it is necessary to consider whether the claimed efficiencies will create 'real value' for consumers that will compensate for this.

(D) Fourth condition of Article 101(3): no elimination of competition in a substantial part of the market

Paragraph 105 of the *Article [101(3)] Guidelines* states that ultimately the protection of rivalry and the competitive process is given priority over pro-competitive efficiency gains that result from restrictive agreements.

(i) The relationship between Article 101(3) and Article 102

Paragraph 106 of the *Guidelines* explains that the concept of elimination of competition in a substantial part of the market is an autonomous EU concept specific to Article 101(3). Paragraph 106 then considers the relationship between Article 101(3) and Article 102. It refers to case law that establishes that Article 101(3) cannot prevent the application of Article 102[122] and that Article 101(3) cannot apply to agreements that constitute an abuse of a dominant position[123]. Paragraph 106 goes on to explain, however, that not all restrictive agreements concluded by a dominant undertaking necessarily constitute an abuse of a dominant position. The fact that most block exemptions contain market share caps means that dominant firms will rarely be in a position to rely on them[124].

[122] See Cases C-395/96 P etc *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365, [2000] 4 CMLR 1076, para 130.

[123] Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309, [1991] 4 CMLR 334, para 28, and Cases T-191/98 etc *Atlantic Container Line v Commission* [2003] ECR II-3275, [2005] 4 CMLR 20, para 1456; in *Decca Navigator System* OJ [1989] L 43/27, [1990] 4 CMLR 627, para 122, the Commission refused individual exemption to an agreement that involved an abuse of a dominant position.

[124] See 'The format of block exemptions', pp 171–172 below.

(ii) Determining whether competition will be substantially eliminated

Paragraphs 107 to 116 explain how to assess whether an agreement will substantially eliminate competition. Paragraph 107 states that it is necessary to evaluate the extent to which competition will be reduced as a result of the agreement: the more that competition is already weakened in the market before the agreement, and the more that the agreement will reduce competition in the market, the more likely it is that the agreement will be considered to eliminate competition substantially. Both actual and potential competition should be taken into account when making the assessment[125]. The degree of actual competition in the market should not be assessed on the basis of market shares alone, but should be based on more extensive qualitative and quantitative analysis[126]. The *Article [101(3)] Guidelines* set out a series of factors that should be taken into account when assessing entry barriers and the possibility of entry into the market on a significant scale, including, for example, the cost of entry including sunk costs, the minimum efficient scale within the industry and the competitive strengths of potential entrants[127].

(E) Judicial review by the General Court[128]

The Commission's decisions on the application of Article 101(3) are subject to judicial review by the General Court and (on a point of law) by the Court of Justice. In *Consten and Grundig v Commission*[129] the Court of Justice indicated that it would not adopt an interventionist stance on applications for review; Article 101(3) involves complex evaluations of economic issues, and the Court of Justice considered that this task is essentially one for the Commission: the Court would confine itself to examining the relevant facts and the legal consequences deduced therefrom; it would not substitute its decision for the Commission's. The EU Courts have maintained this approach, emphasising the extent of the margin of appreciation available to the Commission when applying Article 101(3) and (by implication) their unwillingness to interfere with the exercise of this appreciation[130]. However it is essential that the Commission's decision should be adequately reasoned[131], and where there is a defect in this respect the Courts will be prepared to annul the decision in question[132]. Similarly the General Court will annul a Commission decision where it has seriously misapprehended the facts of a particular case[133]. The General Court summed up the position in *GlaxoSmithKline Services Unlimited v Commission*[134] as follows:

> 241 …the Court dealing with an application for annulment of a decision applying Article 101(3) EC carries out, in so far as it is faced with complex economic assessments, a review confined, as regards the merits, to verifying whether the facts have been accurately stated, whether there has been any manifest error of appraisal and whether the legal consequences deduced from those facts were accurate.
>
> 242 It is for the Court to establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether it contains all the information which

[125] *Article [101(3)] Guidelines*, paras 108 and 114.

[126] Ibid, para 109.

[127] Ibid, para 115.

[128] See generally Bailey 'Scope of Judicial Review under Article 81 EC' (2004) 41 CMLRev 1327.

[129] Cases 56/64 and 58/64 [1966] ECR 299, [1966] CMLR 418.

[130] See eg Case 26/76 *Metro SB-Grossmärkte v Commission* [1977] ECR 1875, [1978] 2 CMLR 1, paras 45 and 50; Case T-7/93 *Langnese-Iglo GmbH v Commission* [1995] ECR II-1533, [1995] 5 CMLR 602, para 178.

[131] Article 296 TFEU provides that decisions by the Commission shall state the reasons on which they are based.

[132] See eg Case C-360/92 P *Publishers' Association v Commission* [1995] ECR I-23, [1995] 5 CMLR 33.

[133] Cases T-79/95 R etc *SNCF and BRB v Commission* [1996] ECR II-1491, [1997] 4 CMLR 334.

[134] Case T-168/01 [2006] ECR II-2969, [2006] 5 CMLR 29.

must be taken into account for the purpose of assessing a complex situation and whether it is capable of substantiating the conclusions drawn from it.

243 On the other hand, it is not for the Court to substitute its own economic assessment for that of the institution which adopted the decision the legality of which it is requested to review.

In the *Glaxo* case the General Court annulled the Commission's decision that GSK's standard conditions of sale, which were intended to prevent parallel trade from the low-priced Spanish pharmaceutical market to the higher-priced UK one, did not satisfy the criteria of Article 101(3): GSK argued that the restriction of trade was necessary to promote investment into research and development in the sector. The General Court held that the Commission had failed to carry out a proper examination of the factual arguments and evidence put forward by GSK or to refute its arguments[135]. On appeal the Court of Justice held that the General Court had stated the position accurately and dismissed the Commission's argument that it had misapplied the case law on the burden and standard of proof in an Article 101(3) case[136].

Despite their recognition of the margin of appreciation enjoyed by the Commission, the Courts have intervened on some occasions, as in the *Glaxo* case just discussed. Other cases in which the Commission's findings under Article 101(3) have been overturned include the Court of Justice's judgment in *Publishers' Association v Commission*[137] and the judgments of the General Court in *Métropole télévision SA v Commission*[138], *European Night Services v Commission*[139], and *Métropole télévision SA (M6) v Commission*[140].

3. Regulation 1/2003

(A) The Commission's former monopoly over the grant of individual exemptions

Under Regulation 17 of 1962 the Commission had sole power (subject to review by the General Court and the Court of Justice) to grant individual exemptions to agreements on the basis of the criteria in Article 101(3)[141]. This monopoly over the grant of individual exemptions meant that the Commission had the opportunity to develop its policy towards various types of agreement over a period of time, and in some cases to give expression to this policy in its block exemption regulations. However the monopoly had many drawbacks: the Commission never had sufficient staff to deal with the enormous volume of agreements that were notified to it: the result was that severe delays were experienced; considerable business time was spent collecting the data and preparing the so-called 'Form A/B' on which notifications had to be submitted; substantial expense was incurred, not least on legal and other professional fees; and businesses faced a long period of uncertainty as to the lawfulness of their agreements. The Commission was overburdened with notifications, many of which concerned agreements that had no seriously anti-competitive effect, with the consequence

[135] Ibid, paras 247–308.

[136] Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, [2010] 4 CMLR 50, paras 78–88.

[137] Case C-360/92 P [1995] ECR I-23, [1995] 5 CMLR 33.

[138] Cases T-528/93 etc [1996] ECR II-649, [1996] 5 CMLR 386.

[139] Cases T-374/94 etc [1998] ECR II-3141, [1998] 5 CMLR 718 at paras 205–221.

[140] Cases T-185/00 etc [2002] ECR II-3805, [2003] 4 CMLR 707.

[141] Regulation 17, Article 9(1).

that it was distracted from other tasks, such as the pursuit of cartels and abusive behaviour, which are of much greater significance for the public interest: as recital 3 of Regulation 1/2003 says, 'the system of notification . . . prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.' The problems associated with the process of notification for individual exemption were ameliorated to some extent, for example by the adoption of block exemption regulations and by the informal settlement of some cases. However the 'problem' of the monopoly over the grant of individual exemptions was a real one, and this led the Commission, in the White Paper of 1999, to propose abolition of the process of notification altogether; this policy was carried into effect by Regulation 1/2003.

(B) The end of the system of notification for individual exemption

Regulation 1/2003 ended the system of notification for individual exemption with effect from 1 May 2004. Previous editions of this book explained in detail how the system of individual exemptions operated[142].

(C) Self-assessment

The fact that undertakings and their lawyers can no longer notify agreements to the Commission and await an administrative 'stamp of approval' certifying that the criteria of Article 101(3) are satisfied means that they must now be self-reliant and conduct their own 'self-assessment' of the application of that provision. This caused some consternation in the business and legal communities at the time that Regulation 1/2003 was being debated. However, since Regulation 1/2003 entered into effect, there has been nothing to suggest that the direct applicability of Article 101(3) is causing difficulties in practice: it would appear to be the case that lawyers and their business clients are able to deal with self-assessment. This was the conclusion reached by the Commission in its *Report on the functioning of Regulation 1/2003*[143]. A helpful Report, *Practical methods to assess efficiency gains in the context of Article [101(3) of the TFEU]*[144], provides a structured framework on how to conduct a self-assessment of efficiency claims under Article 101(3); and DG COMP's *Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases* set out best practices concerning the generation as well as the presentation of relevant economic and empirical evidence that may be taken into account in the assessment of competition cases.

Of course there may be cases in which there is genuine uncertainty whether an agreement infringes Article 101(1) and/or satisfies Article 101(3). Regulation 1/2003 provides three ways in which cases might be resolved following Commission intervention: the acceptance of legally-binding commitments under Article 9; a finding of inapplicability under Article 10; and the provision of informal guidance. Each of these possibilities is discussed in chapter 7[145]. The provisions on findings of inapplicability and informal guidance in certain cases of uncertainty, have

[142] See the fourth edition, ch 4, pp 136–141; see also Bellamy and Child *European Community Law of Competition* (Sweet & Maxwell, 6th ed, 2008, eds Roth and Rose), paras 13-004–13-016.

[143] COM(2009) 206 final, para 12; see further the accompanying Staff Working Paper, SEC(2009) 574 final, para 11; both documents are available at www.ec.europa.eu.

[144] Available at www.ec.europa.eu/enterprise/library/lib-competition/doc/efficiency_guidance.pdf; note that this Report was commissioned by DG Enterprise and Industry rather than DG COMP.

[145] See ch 7, 'Article 9: commitments', pp 255–262; in the UK the OFT has issued an Opinion in relation to the distribution of newspapers and magazines, and it has also introduced a practice of providing 'short-form Opinions': see ch 10, 'Opinions', p 404.

yet to be used[146]. However there have been Article 9 decisions in cases concerning the possible application of Article 101. A notable example is *British Airways, American Airlines and Iberia*[147] where the Commission accepted commitments, in particular to make landing and take-off slots available at Heathrow, Gatwick and JFK-New York airports, in order to facilitate entry and/or expansion by competitors on various aviation routes from and to the US.

Article 9 decisions lead to the Commission closing the case, without any finding that Article 101 (or Article 102) has been infringed, and as such are conceptually different from individual exemption decisions of the kind that used to be adopted under Regulation 17: under that Regulation the Commission would find that Article 101(1) was inapplicable because Article 101(3) was satisfied. Nevertheless there is a certain resemblance between an Article 9 decision, where the parties formally commit to change their behaviour and could be punished if they were to deviate from that commitment, and an individual exemption under the old system granted subject to conditions and obligations. Another important Article 9 commitment decisions was *Visa Europe*[148].

(D) Notification and individual exemptions under domestic law

Regulation 1/2003 does not *require* Member States to abolish systems of notification for exemption under *domestic* law; however it would seem in principle to be undesirable to maintain a domestic system of notification following the reforms at EU level. The provisions in the UK Competition Act 1998 on notification and individual exemption were repealed by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004[149]; and paragraph 36 of the Staff Working Paper accompanying the Commission's *Report on the functioning of Regulation 1/2003*[150] stated that more than 20 Member States now operate without a system of notification.

4. Block Exemptions[151]

(A) Role of block exemptions

Article 101(3) foreshadowed the advent of block exemptions by providing that the prohibition in Article 101(1) could be declared inapplicable both in relation to agreements and to *categories* of agreements; in other words the Treaty itself envisaged the generic authorisation of agreements as well as pursuant to individual assessment. Most block exemptions are adopted by the Commission, acting under powers conferred upon it by regulations of the Council[152].

[146] On findings of inapplicability and informal guidance see ch 7, 'Article 10: finding of inapplicability' and 'Informal guidance', p 261; in the UK the OFT has issued an Opinion in relation to the distribution of newspapers and magazines, and it has also introduced a practice of providing 'short-form Opinions': see ch 10, 'Opinions and Informal Advice', pp 403–404.

[147] Commission decision of 14 July 2010.

[148] See ch 7, 'Article 9: commitments', pp 255–261.

[149] SI 2004/1261; see ch 10, 'Opinions and Informal Advice', pp 403–404.

[150] See ch 4 n 143 above.

[151] The terms 'bloc' and 'group' exemptions are also used: the expression 'block exemption' is used here as it is the most common one, and the one normally used by the Commission.

[152] See '*Vires* and block exemptions currently in force', pp 169–171 below. There have been two exceptions to this, where the Council itself granted the block exemption: the block exemption for certain agreements in the road and inland waterway sectors was originally provided by Article 4 of Council Regulation 1017/68, OJ [1968] L 175/1, and is now to be found in Article 3 of Council Regulation 169/2009; and block exemption

Agreements within the terms of a block exemption have never needed, and do not need to be, notified to the Commission: they are valid without specific authorisation. The block exemptions therefore provide desirable legal certainty for firms and their professional advisers. In practice there is much to be said for drafting, for example, a vertical agreement or a transfer of technology licence so that it satisfies the terms of the relevant block exemption as this provides a 'safe harbour' for it; if an agreement satisfies a block exemption, there may be little point is determining whether it infringes Article 101(1) in the first place[153]. In the days of notification for individual exemption the block exemptions were also important from the Commission's point of view since, without them, there would have been hundreds, if not thousands, of notifications for individual exemption[154].

As paragraph 2 of the Commission's *Article [101(3)] Guidelines* points out, the system of block exemptions remains in effect, notwithstanding the abolition of individual exemptions as a result of Regulation 1/2003. Paragraph 2 of the *Guidelines* also points out that an agreement that is covered by a block exemption cannot be declared invalid by a national court. Article 29 of that Regulation provides the Commission and NCAs, in certain circumstances, with a power to withdraw the benefit of a block exemption in an individual case[155]. However paragraph 31 of the *Guidelines* explains that a national court cannot withdraw the benefit of a block exemption.

(B) Vires and block exemptions currently in force

The Commission requires authority from the Council to issue block exemptions[156]. The Council has published a number of empowering Regulations; these are listed below, along with the Commission Regulations currently in force (if any) under each Council Regulation.

(i) Council Regulation 19/65

Regulation 19/65[157], as amended by Regulation 1215/99[158], authorises the Commission to grant block exemption to vertical agreements and to bilateral licences of intellectual property rights. The following Commission Regulations are in force under Council Regulation 19/65:

- Regulation 772/2004 on technology transfer agreements[159]; Regulation 772/2004 is discussed in chapter 19[160]
- Regulation 330/2010 on vertical agreements[161]; Regulation 330/2010 is discussed in chapter 16[162]

for various agreements in the containerised shipping segment of the maritime transport sector was granted by Articles 3 to 6 of Council Regulation 4056/86, OJ [1986] L 378/1: this block exemption was repealed with effect from October 2008 by Regulation 1419/2006, OJ [2006] L 269/1.

[153] See Case C-260/07 *Pedro IV Servicios SL v Total España SA* [2009] ECR I-2247, [2009] 5 CMLR 1291, para 36.

[154] Indeed the adoption of block exemptions was a device used by the Commission to overcome the flood of notifications that it received pursuant to the notification provisions of Regulation 17 of 1962: for discussion see Goyder and Albors *Goyder's EC Competition Law* (Oxford University Press, 5th ed, 2009), pp 59–60.

[155] See 'The format of block exemptions', pp 171–172 below.

[156] The Council has power to confer such *vires* by virtue of Article 103(2)(b) TFEU.

[157] JO [1965] p 533, OJ [1965–66] p 35.

[158] OJ [1999] L 148/1.

[159] OJ [2004] L 123/11; this Regulation replaced Regulation 240/96, OJ [1996] L 31/2.

[160] See ch 19, 'Transfer Technology Agreements: Regulation 772/2004', pp 781–791.

[161] OJ [2010] L 102/1; this Regulation replaced Regulation 2790/99, OJ [1999] L 336/21.

[162] See ch 16, 'Vertical Agreements: Regulation 330/2010', pp 649–672.

- Regulation 461/2010[163] on vertical agreements in the motor vehicle sector; Regulation 461/2010 is discussed in chapter 16[164].

(ii) Council Regulation 2821/71

Regulation 2821/71[165] authorises the Commission to grant block exemption in respect of standardisation agreements, research and development agreements and specialisation agreements. The following Commission Regulations are in force under Council Regulation 2821/71:

- Regulation 1217/2010[166] on research and development agreements; Regulation 1217/2010 is discussed in chapter 15[167]
- Regulation 1218/2010[168] on specialisation agreements; Regulation 1218/2010 is discussed in chapter 15[169].

(iii) Council Regulation 1534/91

Regulation 1534/91[170] authorises the Commission to grant block exemption in the insurance sector. In March 2010 the Commission adopted Regulation 267/2010[171], replacing Regulation 358/2003[172], under the powers conferred upon it by Regulation 1534/91. Regulation 267/2010 is discussed in chapter 15[173].

(iv) Council Regulation 169/2009

Council Regulation 169/2009[174] itself provides block exemption for certain agreements between small and medium-sized undertakings in the road and inland waterway sectors[175]. There are no Commission Regulations granting block exemption under Regulation 169/2009.

(v) Council Regulation 246/2009

Council Regulation 246/2009[176] authorises the Commission to provide block exemption to consortia between liner shipping companies. In September 2009 the Commission adopted Regulation 906/2009[177], under the powers conferred upon it by Regulation 246/2009.

(vi) Council Regulation 487/2009

Regulation 487/2009[178] authorises the Commission to grant block exemptions for certain agreements in the air transport sector. There are no Commission Regulations currently in force under Regulation 487/2009[179].

[163] OJ [2010] L 129/52; Regulation 461/2010 replaced Regulation 1400/2002, OJ [2002] L 203/30.

[164] See ch 16, 'Regulation 461/2010 on Motor Vehicle Distribution', pp 674–676.

[165] JO [1971] L 285/46, OJ [1971] p 1032.

[166] OJ [2010] L 335/36; this Regulation replaced Regulation 2659/2000, OJ [2000] L 304/7.

[167] See ch 15, 'The block exemption for research and development agreements: Regulation 1217/2010', pp 595–599.

[168] OJ [2010] L 335/43; this Regulation replaced Regulation 2658/2000, OJ [2000] L 304/3.

[169] See ch 15, 'The block exemption for specialisation agreements: Regulation 1218/2010', pp 601–603.

[170] OJ [1991] L 143/1. [171] OJ [2010] L 83/1. [172] OJ [2003] L 53/8, [2003] 4 CMLR 734.

[173] See ch 15, 'Insurance sector', pp 220–221.

[174] OJ [2009] L 61/1; this Regulation replaced Council Regulation 1017/68, OJ [1968] L 175/1.

[175] See Article 3.

[176] OJ [2009] L 79/1; this Regulation replaced Regulation 479/92, OJ [1992] L 55/3.

[177] OJ [2009] L 256/31; this Regulation replaced Regulation 823/2000, OJ [2000] L 100/24; on Regulation 906/2009 see Prisker 'Commission adopts new block exemption regulation for liner shipping consortia' (2010) 1 *Competition Policy Newsletter* 8.

[178] OJ [2009] L 148/1; this Regulation replaced Regulation 3976/87, OJ [1987] L 374/9.

[179] See ch 23, 'Air transport', pp 974–977.

(C) The format of block exemptions

The typical format of block exemptions is that they begin with a series of recitals which explain the policy of the Commission in adopting the regulation in question; these recitals may themselves be of legal significance, as they may be referred to for the purpose of construing the substantive provisions of the regulation itself where there are problems of interpretation. Each regulation will then confer block exemption upon a particular category of agreements: for example Article 2 of Regulation 330/2010 block exempts vertical agreements, as defined in Article 1(1)(a) thereof. The older block exemptions were very specific as to the clauses that could benefit from block exemption: only those set out in the so-called 'white list' would do so. This was considered by many critics to be too prescriptive and formalistic, and the current block exemptions do not contain white lists. They do, however, contain black lists (as did all earlier regulations), setting out provisions that must not be included if an agreement is to enjoy block exemption.

Most block exemptions have market share thresholds. For example Article 3 of Regulation 330/2010 provides that an agreement will not qualify for block exemption where the supplier's or the buyer's market share exceeds 30 per cent; however where the parties' market shares exceed this threshold, an agreement may still be able to satisfy the conditions of Article 101(3) when assessed individually. Article 4 of the Regulation for research and development agreements has one of 25 per cent and Article 3 of the Regulation for specialisation agreements one of 20 per cent. Article 3 of the Regulation for technology transfer agreements has a 20 per cent cap for agreements between competitors and a 30 per cent cap for those between non-competitors.

Article 29(1) of Regulation 1/2003 confers power on the Commission to withdraw the benefit of a block exemption where it finds, in a particular case, that an agreement covered by a block exemption regulation has certain effects that are incompatible with Article 101(3). Block exemption has been withdrawn from an agreement on only one occasion, in *Langnese-Iglo GmbH v Commission*[180]; the Commission's decision to do so was upheld on appeal by the General Court[181].

Article 29(2) of Regulation 1/2003 gives to each NCA a power to withdraw the benefit of a block exemption from agreements which have effects incompatible with the conditions of Article 101(3) within its territory or a part thereof, where that territory has all the characteristics of a distinct geographical market. Paragraph 36 of the *Article [101(3)] Guidelines* explains that in such a situation the Member State must demonstrate both that the agreement infringes Article 101(1) and that it does not fulfil the conditions of Article 101(3). Withdrawal of the benefit of a block exemption applies only from the date of the decision.

Article 6 of Regulation 330/2010 gives power to the Commission, by regulation, to withdraw the benefit of the block exemption from an entire sector, where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market; Article 7 of Regulation 772/2004 contains a similar provision. These provisions have yet to be used.

(D) Expiry of block exemptions

Each block exemption regulation contains an expiry date. For example, Regulation 330/2010 will expire on 31 May 2022. This means that a vertical agreement that will endure

[180] OJ [1993] L 183/19, [1994] 4 CMLR 51.

[181] Case T-7/93 [1995] ECR II-1533, [1995] 5 CMLR 602.

beyond that date cannot be said, with certainty, to be exempt from 1 June 2022 onwards. Clearly this may present the parties with difficulty. The Commission is well aware of the need for legal certainty and so, if it subsequently adopts a new regulation, it will normally include transitional provisions for agreements already in force. Obviously it is necessary to examine the provisions of each particular regulation to find out what the position is on transition. It is also possible that, even if an agreement does not satisfy the terms of a new block exemption that replaces an old one, the agreement may either fall outside Article 101(1) or satisfy Article 101(3) on an individual basis.

Typically the Commission reviews and consults on the functioning of a block exemption regulation which is about to expire. When so doing the Commission goes back to 'first principles' and will ask whether a block exemption is necessary and, if it is, on what terms it should be renewed. There is no presumption in favour of renewing a block exemption. The Commission will consider possible alternatives to renewal, including the publication of guidelines; the provision of informal guidance[182]; and/or the adoption of Commission decisions pursuant to Article 9 or Article 10 of Regulation 1/2003[183]. The Commission decided not to renew the block exemptions for certain agreements in the insurance, maritime and motor vehicle sectors in the light of changed market conditions, considering that it would be more appropriate that they be subject to 'self-assessment'. At the same time the Commission has published sector-specific guidance on certain agreements in each of these sectors[184]. The block exemptions on vertical agreements and horizontal cooperation agreements were found to have worked well in practice and should be retained; however they were both updated to take account of recent market developments, such as, in the case of the block exemption for vertical agreements, the evolution of sales via the Internet[185].

[182] See ch 7, 'Informal guidance', pp 261–262.

[183] See ch 7, 'Article 9: commitments', pp 255–261.

[184] *Guidelines on the application of Article [101 TFEU] to maritime transport services* OJ [2008] C 245/2; *Explanatory Communication on the application of Article 101(3) to certain agreements in the insurance sector* OJ [2010] C 82/20; *Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles* OJ [2010] C 138/16.

[185] See ch 16, 'Article 4(b): territorial and customer restrictions', pp 665–668.

5

Article 102[1]

1. Introduction

Article 102 TFEU is an important companion of Article 101. Whereas Article 101 is concerned with agreements, decisions and concerted practices which are harmful to competition, Article 102 is directed towards the unilateral conduct of dominant firms which act in an abusive manner. Article 102 provides as follows:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;

[1] For further reading on Article 102 readers are referred to O'Donoghue and Padilla *The Law and Economics of Article 82* (Hart Publishing, 2006); *European Competition Law Annual: What is an Abuse of a Dominant Position?* (Hart Publishing, 2006, eds Ehlermann and Atanasiu); Faull and Nikpay *The EC Law of Competition* (Oxford University Press, 2nd ed, 2007), ch 4; Bellamy and Child *European Community Law of Competition* (Oxford University Press, 6th ed, 2008, eds Roth and Rose), ch 10; *Article 82 EC: Reflections on Its Recent Evolution* (Hart Publishing, 2009, ed Ezrachi); Rousseva *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing, 2010); Nazzini *The Foundations of European Union Competition Law: Objectives and Principles of Article 102* (Oxford University Press, 2011); Niels, Jenkins and Kavanagh *Economics for Competition Lawyers* (Oxford University Press, 2011), ch 4; see also *Dominance: the regulation of dominant firm conduct in 35 jurisdictions worldwide* (Global Competition Review, 2011, eds Janssens and Wessely).

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The purpose of this chapter is to describe the main features of Article 102. Section 2 introduces the Commission's *Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings* ('the *Guidance on Article 102 Enforcement Priorities*' or 'the *Guidance*')[2], an important document that will be referred to at several points in the text that follows and in later chapters of this book. Section 3 briefly discusses the meaning of undertaking and section 4 examines the requirement of an effect on trade between Member States: concepts that have already been discussed in the context of Article 101. Section 5 considers what is meant by a dominant position under Article 102. Section 6 looks at the requirement that any dominant position should be held in a substantial part of the internal market. Section 7 makes the point that quite small firms might find themselves the subject of an Article 102 investigation; not least because of the possibility that relevant markets might be narrowly defined. Section 8 looks at the central – and most complex – issue in this chapter, the meaning of abuse: more detailed analysis of individual abusive practices will be found in later chapters of this book, in particular chapters 17, 18 and 19, which examine, first, non-pricing abuses, then pricing abuses, and finally abuses that can arise in relation to the exercise, or sometimes the non-exercise, of intellectual property rights. Section 9 considers defences to allegations of abuse, and section 10 briefly considers the consequences of infringing Article 102.

2. The Commission's *Guidance on Article 102 Enforcement Priorities*

(A) Introduction

Many of the most controversial competition law decisions of the Commission have been taken under Article 102, the most notable being the finding in 2004 of two abuses on the part of Microsoft, a refusal to supply interoperability information to competitors and the tying of a media player with its operating software, for which Microsoft was fined €497.2 million[3]. Another controversial decision involved the imposition by the Commission in 2009 of a fine of €1.06 billion on Intel for various exclusionary practices including the offering of loyalty rebates to customers who purchased all or most of their microprocessor chips from that undertaking; this decision is currently on appeal to the General Court[4].

[2] OJ [2009] C 45/7.

[3] *Microsoft* Commission decision of 24 March 2004, upheld on appeal Case T-201/04 *Microsoft Corpn v Commission* [2007] ECR II-3601, [2007] 5 CMLR 846; the *Microsoft* decision is discussed at various places in this book: see in particular ch 17, '*Microsoft*', pp 693–694 on the tying abuse and ch 19, 'The *Microsoft* case', pp 800–802 on the refusal to provide interoperability information; for further reading on the *Microsoft* case see Beckner and Gustafson *Trial and Error: United States v. Microsoft* (Citizens for a Sound Economy Foundation, 2nd ed, 2002); McKenzie *Trust on Trial: How the Microsoft case is reframing the rules of competition* (Perseus Publishing, 2000); *Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case* (Edward Elgar Publishing, 2010, ed Luca Rubini).

[4] *Intel* Commission decision of 13 May 2009, on appeal Case T-286/09 *Intel v Commission*, not yet decided; the decision is discussed in ch 18, 'The *Intel* case', pp 732.

A frequent complaint against the Commission has been that it tends, when applying Article 102 in cases such as *Microsoft* and *Intel*, not to concern itself with the maintenance of the competitive process but, instead, with the protection of competitors, a quite different matter. To put the point another way, in any competition, whether economic, sporting or of some other kind, the most efficient or the fittest person will win: this is an inevitable part of the competitive process. This would suggest that, if a firm ends up as a monopolist simply by virtue of its superior efficiency, this should be applauded, or at the very least not be condemned. A more specific criticism of the Commission (and of the EU Courts) has been that they adopt a formalistic (as opposed to an economics-based) approach to the application of Article 102 and that as a consequence business practices of dominant firms have been condemned that did not have, or could not have, any harmful effect on consumer welfare; and which, indeed, may have been pro-competitive. Clearly it would be a strange paradox if it were to transpire that the application of competition law resulted in the condemnation of competitive behaviour that benefits consumers.

(B) DG COMP's Discussion Paper on exclusionary abuses

Aware of these concerns, in 2004 the Commission launched a review of the law and practice of Article 102 as it applied to exclusionary (as opposed to exploitative) abuses (this distinction is discussed later in this chapter[5]), leading to the publication, in December 2005, of a *Discussion Paper on the application of Article [102] of the Treaty to exclusionary abuses*[6]. This was a working paper produced by the staff of DG COMP: it was **not** an official document of the Commission itself, nor was it a set of draft guidelines on the application of Article 102, although many commentators erroneously treated it as such. The *Discussion Paper* led to feverish debate as to the proper application of Article 102, in which a broad spectrum of views was expressed, ranging from a staunch defence of the status quo, on the one hand, to demands, on the other, for a radical reorientation of the law of Article 102 that would leave dominant firms substantially freer from the risk of surveillance by competition authorities and hostile litigation in domestic courts. Between these extremes there was a fair degree of consensus that Article 102 ought not to be applied simply to protect competitors as such; that a dominant firm that is able to defeat its rivals as a result of its greater efficiency ought not to be condemned as acting abusively; that the economics of abuse are sufficiently complex that this is not an area in which formalistic, or '*per se*', rules are appropriate; and that (to put the point another way) behaviour should be condemned as abusively exclusionary under Article 102 only where it could be demonstrated that the conduct in question has had, or was likely to have, a seriously anti-competitive effect on the market.

However, even if there was some consensus in favour of a 'more economic approach' or an 'effects-based approach' to the application of Article 102 to exclusionary abuses, this still left the Commission with a formidable problem of how to 'operationalise' such a consensus: how could the principle of an effects-based approach to Article 102 be converted into administrable rules, capable of being applied by competition authorities, courts, lawyers and economists and their business clients? The task was not made easier by the fact that it was clear that there were disagreements as to the best way forward at several levels: within the Commission; between Member States and different competition authorities; at the private bar; and among undertakings, some of which considered themselves to be the victims of outrageously abusive behaviour, on the one hand, and others of which believed that they were the subject of outrageous accusations of abuse,

[5] See 'Exploitative, exclusionary and single market abuses', pp 201–202 below.

[6] Available at www.ec.europa.eu/competition/antitrust/art82/index.html.

on the other. A further difficulty lay in the fact that, even if the Commission were to consider that the law of Article 102 needed to change, this was not within its prerogative: the EU Courts determine what is and what is not an abuse of a dominant position, and the Commission cannot contradict established jurisprudence (although it can hope to shape its future development, a quite different matter).

(C) **Adoption of the Commission's *Guidance on Article 102 Enforcement Priorities***

The outcome of this process was that, in February 2009, the Commission published its *Guidance on Article 102 Enforcement Priorities*. It is important to understand that this document is **not** a set of guidelines on the law of Article 102; the document is what it says it is: guidance on the Commission's enforcement priorities. The *Guidance* does not purport to state the law of exclusionary abuse under Article 102: for that, interested stakeholders must consult the jurisprudence of the EU Courts. Some commentators consider that this gives rise to legal uncertainty, the Commission apparently taking a more lenient (less interventionist) approach to the application of Article 102 to exclusionary abuses than the case law: an example of this is the Court of Justice's judgment in *Konkurrensverket v TeliaSonera Sverige AB*[7], where its interpretation of the abuse of margin squeeze is clearly stricter than the Commission's approach in paragraph 80 of the *Guidance*[8]. It has even been suggested that this dissonance between the jurisprudence of the EU Courts and the *Guidance on Article 102 Enforcement Priorities* is so serious that the Commission should withdraw it[9]; a less extreme view is that the Commission's *Guidance* fails to establish priorities, and may leave undertakings more confused about the law in this area than they were before[10].

To the authors of this book these criticisms are unconvincing. To repeat: the *Guidance* is not a set of guidelines that slavishly describe the existing law. Rather it explains why the Commission, with its finite resources, would have a greater interest in prosecuting some cases than others; in particular it explains that it is the likelihood that particular conduct could cause seriously anti-competitive foreclosure effects on markets, thereby, ultimately, causing harm to consumers, that legitimates intervention by the Commission[11].

[7] Case C-52/09 [2011] ECR I-000, [2011] 4 CMLR 982.

[8] For discussion see ch 18, 'The Commission's decisional practice', p 757.

[9] See Gormsen 'Why the European Commission's enforcement priorities on Article 82 EC should be withdrawn' (2010) 31(2) ECLR 45.

[10] See Akman 'The European Commission's Guidance on Article 102 TFEU: From *Inferno* to *Paradiso*?' (2010) 73(4) Modern Law Review 605; for further commentary on the debate leading to the *Guidance* and the *Guidance* itself see *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, 2008, eds Ehlermann and Marquis); Ezrachi 'The European Commission Guidance on Article 82 EC – The Way in Which Institutional Realities Limit the Potential for Reform' [2009] Oxford Legal Research Paper Series (No 27/2009), available at www.ssrn.com; Petit 'From Formalism to Effects? – The Commission's Communication on Enforcement Priorities in Applying Article 82 EC' (2009) 32 World Competition 485; Kellerbauer 'The Commission's New Enforcement Priorities in Applying Article 82 EC to Dominant Companies' Exclusionary Conduct: A Shift Towards a More Economic Approach?' (2010) 31(5) ECLR 175 (the author is a member of the Commission's Legal Service); Geradin 'Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful?', available at www.ssrn.com; *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar, 2011, ed Pace).

[11] An interesting question is what the legal position would be if the Commission were to refuse to consider a complaint about conduct that clearly infringes Article 102 according to the jurisprudence of the EU Courts on the basis that it does not comply with the *Guidance on Article 102 Enforcement Priorities*: see Wils 'Discretion and Prioritisation in Public Antitrust Enforcement' (2011) 34(3) World Competition 353.

The *Guidance* does not 'rewrite' the law of Article 102; it does not and cannot bind the EU Courts, nor the domestic courts of the Member States. On the other hand it is not unreasonable to suppose that competition authorities and courts, faced with competing arguments as to the proper scope of Article 102, will, at the least, be aware of the Commission's approach to certain business behaviour – for example pricing below cost, refusals to supply, the offering of discounts and rebates – and that, over a period of time, the *Guidance* will have an influence on the future orientation of Article 102 in its application to exclusionary behaviour. In his Opinion in *TeliaSonera*[12] Advocate General Mazák said that the *Guidance* could not bind the Court, but that it did provide a 'useful point of reference'[13]. The relationship of the *Guidance* to the existing law, and its potential for influencing future enforcement of the law, will be discussed throughout this book[14].

Whatever the merits of the criticism that has surrounded Article 102 over the years, it is undoubtedly the case that a dominant firm (or one that fears that it might be characterised as dominant) must behave on the market with great caution. A transgression of Article 102 may have serious consequences. Not only can the Commission (or a national competition authority) impose a very large fine, as occurred in *Microsoft* and *Intel*; an injured third party may also bring an action for an injunction and/or damages in a national court[15]. Furthermore the Commission has explicit power to impose structural remedies, albeit subject to limitations, as a result of Article 7 of Regulation 1/2003; it has yet to impose such a remedy in an infringement decision, although several cases have been closed as a result of undertakings offering structural commitments under Article 9 of Regulation 1/2003[16].

3. Undertakings

The term 'undertaking' has the same meaning in Article 102 as in Article 101, and reference should be made to the relevant section of chapter 3[17]. It may be worth pointing out in passing that several of the cases on the meaning of an undertaking have arisen in the context of Article 102, for example where complaints were made to the Commission about the monopsonistic power of the Spanish Health Service[18] or the standard-setting power of Eurocontrol[19]: it was held that neither of those entities was acting as an undertaking, with the consequence that the competition rules did not apply to them.

[12] See ch 5 n 7 above.

[13] In Case T-201/11 *Si.mobil v Commission*, not yet decided, an applicant to the General Court is complaining that the Commission failed to apply its *Guidance* when rejecting a complaint of abuse of dominance contrary to Article 102.

[14] See in particular 'Recent case law and decisions do require effects analysis', pp 200–201 below and chs 17 and 18 generally.

[15] It was reported in the media that out-of-court settlements were reached between Microsoft and various of the complainants against it for the payment of damages: a report in the *Financial Times* of October 2005 suggested that Microsoft had paid a total of $3.73 billion; it was similarly reported that Intel had agreed to pay damages to AMD, the complainant in that case, amounting to $ 1.25 billion: see *Financial Times*, 13 November 2009.

[16] See ch 7, 'Article 9: commitments', pp 255–261.

[17] See ch 3, 'Undertakings and Associations of Undertakings', pp 83–91.

[18] Case T-319/99 *FENIN v Commission* [2003] ECR II-357, [2003] 5 CMLR 34, upheld on appeal to the Court of Justice Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, [2006] 5 CMLR 559.

[19] Case T-155/04 *SELEX Sistemi Integrati v Commission* [2006] ECR II-4797, [2007] 4 CMLR 372, upheld on appeal to the Court of Justice Case C-113/07 P *SELEX Sistemi Integrati v Commission* [2009] ECR I-2207, [2009] 4 CMLR 1083.

The issue of the application of the competition rules to public undertakings or to undertakings entrusted with exclusive or special rights will be discussed in chapter 6[20]; a few particular points about Article 102 and the public sector should, however, be noted here. First, the fact that an undertaking has a monopoly conferred upon it by statute does not, in itself, remove it from the ambit of Article 102[21]. Secondly, Member States have a duty under Article 4(3) TEU not to do anything 'which could jeopardise the attainment of the Union's objectives', one of which is expressed in Protocol 27 to the Treaties to be the institution of a system ensuring that competition is not distorted[22]. This means that a Member State cannot confer immunity on undertakings from Article 102, except to the limited extent provided for in Article 106(2)[23]. Thirdly, the provisions in Article 106(2) permitting derogation from the competition rules to the extent that their application would 'obstruct the performance, in law or in fact, of the particular tasks assigned to them' have consistently been interpreted narrowly by both the Commission and the EU Courts[24]. Lastly, it is important in this context to bear in mind Article 37 TFEU, the function of which is to prevent Member States from discriminating in favour of their own state monopolies of a commercial character. This provides the Commission with a useful alternative weapon for dealing with some monopolies in the public sector[25].

4. The Effect on Inter-State Trade

The meaning of this phrase was analysed in chapter 3, to which reference should be made[26]. For the purpose of Article 102 particular attention should be paid to the Court of Justice's judgment in *Commercial Solvents v Commission*[27] in which it held that the requirement of an effect on trade between Member States would be satisfied where conduct brought about an alteration in the structure of competition in the common market[28]. This test, which has been applied by both the EU Courts and the Commission on subsequent occasions[29], is of particular importance in Article 102 cases: Article 102 can be applied only where

[20] See ch 6, 'Article 106 TFEU – compliance with the Treaties', pp 222–244.

[21] Case 311/84 *Centre Belge d'Etudes de Marché Télémarketing v CLT* [1985] ECR 3261, [1986] 2 CMLR 558, para 16; see also Case 26/75 *General Motors v Commission* [1975] ECR 1367, [1976] 1 CMLR 95; Case 41/83 *Italy v Commission* [1985] ECR 873, [1985] 2 CMLR 368; Case 226/84 *British Leyland v Commission* [1986] ECR 3263, [1987] 1 CMLR 185; Case C-41/90 *Höfner v Macrotron* [1991] ECR I–1979, [1993] 4 CMLR 306, para 28; Case C-18/93 *Corsica Ferries* [1994] ECR I–1783, para 43; Case C-242/95 *GT-Link v De Danske Statsbaner (DSB)* [1997] ECR I-4349, [1997] 5 CMLR 601, para 35; see also the Commission's decision in *French-West African Shipowners' Committees* OJ [1992] L 134/1, [1993] 5 CMLR 446, para 64.

[22] See eg Case C-260/89 *Elliniki Radiophonia Tiléorassi-Anonimi Etairia (ERT) v Dimotiki Etairia Pliroforissis (DEP)* [1991] ECR I-2925, [1994] 4 CMLR 540, para 27; note also that, under Article 119(1) TFEU, Member States (and the EU) are required to observe the principle of an 'open market economy with free competition'.

[23] Case 13/77 *INNO v ATAB* [1977] ECR 2115, [1978] 1 CMLR 283; see ch 6, 'Article 4(3) TEU – duty of sincere cooperation', pp 216–222.

[24] See ch 6, 'Article 106(2)', pp 235–242.

[25] See ch 6, 'Article 37 TFEU – state monopolies of a commercial character', pp 245–246.

[26] See ch 3, 'The Effect on Trade between Member States', pp 144–149.

[27] Cases 6/73 and 7/73 [1974] ECR 223, [1974] 1 CMLR 309, para 33; see also Cases T-24/93 etc *Compagnie Maritime Belge v Commission* [1996] ECR II-1201, [1997] 4 CMLR 273, para 203.

[28] The Commission refers to the 'competitive structure' test at para 20 of its *Guidelines on the effect on trade concept contained in Articles [101] and [102] of the Treaty* OJ [2004] C 101/81.

[29] See eg Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429; *Tetra Pak 1 (BTG Licence)* OJ [1988] L 272/27, [1988] 4 CMLR 881, para 48; *Napier Brown – British Sugar* OJ [1988] L 284/41, [1990] 4 CMLR 196, paras 77–80; *London European – Sabena* OJ [1988] L 317/47, [1989] 4 CMLR 662, para 33.

there is already a dominant position – that is to say substantial market power – and it is unsurprising that the Commission will be concerned with the structure of the market in such cases. In the *Soda-ash* decisions under Article 102[30] the Commission held that rebates offered by ICI and Solvay in their respective markets had the effect of reinforcing the structural rigidity of the EU market as a whole and its division along national lines. What is of interest about these decisions is that it was US exporters who were excluded from the EU market, but the Commission still held that there was an effect on inter-state trade: imports would have helped to undermine the dominant positions of ICI and Solvay in their respective markets.

The Commission's *Guidelines on the effect on trade concept contained in Articles [101] and [102] of the Treaty*[31] contain paragraphs that give specific consideration to the circumstances in which abusive behaviour – for example exploitative abuses that harm downstream trading partners and exclusionary abuses that harm competitors – might have an effect on trade between Member States[32].

Under Regulation 1/2003[33] national courts and national competition authorities have an obligation to apply Article 102 where an abuse of a dominant position has an effect on trade between Member States[34]. This, however, does not preclude them from adopting or applying on their own territories stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings[35]; and the obligation is without prejudice to the application of provisions of national law that predominantly pursue an objective different from those pursued by Articles 101 and 102[36].

5. Dominant Position

Article 102 applies only where one undertaking has a 'dominant position' or where two or more undertakings are 'collectively dominant'[37]. The Court of Justice in *United Brands v Commission*[38] laid down the following test of what is meant by a dominant position:

> 65 The dominant position thus referred to by Article [102] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to

[30] *Soda-ash/Solvay* OJ [1991] L 152/21 and *Soda-ash/ICI* OJ [1991] L 152/1; these decisions were annulled on procedural grounds by the General Court: Cases T-30/91 etc *Solvay SA v Commission* [1995] ECR II-1775, [1996] 5 CMLR 57; the Commission's appeal to the Court of Justice failed, Cases C-286/95 P etc [2000] ECR I-2341, [2000] 5 CMLR 413 and 454; the Commission readopted the decisions in December 2000: OJ [2003] L 10/1, which were substantially upheld in Case T-57/01 *Solvay SA v Commission* [2009] ECR II-4621, [2011] 4 CMLR 9, and Case T-66/01 *Imperial Chemical Industries Ltd v Commission* [2010] ECR II-000, [2011] 4 CMLR 162, the second *Solvay* judgment is now on appeal to the Court of Justice, Case C-109/10 P *Solvay SA v Commission*, not yet decided.

[31] OJ [2004] C 101/81.

[32] Ibid, paras 73–76 (dealing with abuses covering several Member States); paras 93–96 (abuses covering a single Member State); paras 97–99 (abuses covering part only of a Member State); and paras 106–109 (abuses involving undertakings located in third countries).

[33] OJ [2003] L 1/1.

[34] Regulation 1/2003, Article 3(1); see ch 2, 'Obligation to apply Articles 101 and 102', pp 76–77.

[35] Regulation 1/2003, Article 3(2). [36] Ibid, Article 3(3).

[37] The issue of whether any dominance is *collective* is discussed in ch 14 of this book, which considers in general terms the issues of oligopoly and tacit coordination between independent undertakings.

[38] Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429; it has used the same formulation on several other occasions, eg in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR 211, para 38.

an appreciable extent independently of its competitors, customers and ultimately of its consumers[39].

The expression 'dominant position' will not be found in textbooks on economics; economists would ask whether a firm or firms have substantial market power. Paragraph 65 of the Court's judgment in *United Brands* can be understood to equate dominance with substantial market power; the Commission does so in paragraph 10 of its *Guidance on Article 102 Enforcement Priorities* where it says that the notion of independence referred to by the Court is related to the degree of competitive constraint exerted on the undertaking under investigation. Where competitive constraints are ineffective, the undertaking in question enjoys 'substantial market power over a period of time'; in paragraph 11 of the *Guidance* the Commission considers that an undertaking has substantial market power if it is 'capable of profitably increasing prices above the competitive level for a significant period of time'[40]. The same definition of dominance is used in the ICN's *Unilateral Conduct Workbook*[41].

An important point to bear in mind about Article 102 is that, as a matter of economics, there are degrees of market power: at one end of the spectrum would be a firm with no or only imperceptible market power; at the other end a firm which is a true monopolist. Between these two extremes could be found firms with 'some', or 'appreciable', or 'significant', or 'substantial' market power. However the legal expression 'dominant position' is a binary term: either an undertaking is dominant and therefore subject to Article 102 and the 'special responsibility' that this entails; or it is not, in which case its unilateral behaviour is not subject to competition law scrutiny at all. This is why a finding of dominance is so important; and why some commentators would like there to be a fairly generous 'safe harbour' for market shares below a certain percentage[42].

A finding of dominance – whether individual or collective – involves a two-stage assessment. The first is to determine the relevant market: market definition has been discussed in detail in chapter 1, in particular the 'hypothetical monopolist' or 'SSNIP' test; the problem of the 'Cellophane Fallacy' in Article 102 cases which might lead to the inclusion of false substitutes in the market definition; and the types of evidence that may be of assistance when defining relevant product, geographical and temporal markets[43].

Having defined the market, it is necessary in an Article 102 case to determine what is meant by a dominant position. This cannot be determined purely by reference to an

[39] This definition does not adequately reflect (what is undoubtedly true) that Article 102 also applies to market power on the buying as well as the selling side of the market, since that was not in issue in *United Brands*; a powerful purchaser may be able to behave independently of its sellers who are not 'customers' in the normal sense of that word; for action taken against undertakings with buyer power see *Re Eurofima* [1973] CMLR D217; *Re GEMA* OJ [1971] L 134/15, [1971] CMLR D35; Case 298/83 *CICCE v Commission* [1985] ECR 1105, [1986] 1 CMLR 486; *UK Small Mines* Commission's XXIst *Report on Competition Policy* (1991), point 107; *Virgin/British Airways* OJ [2000] L 30/1, [2000] 4 CMLR 999, upheld on appeal to the General Court, Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008: the Court stated specifically at para 101 of its judgment that Article 102 can apply to undertakings with a dominant position on either side of the market; see also ch 1, 'Procurement markets', p 38.

[40] The Commission goes on in this paragraph to explain that 'increase in prices' is a short-hand term which includes other ways of influencing competition to the advantage of the dominant undertaking, for example by decreasing output, innovation, variety or quality of goods or services; on the same point see ch 1, 'Market Definition and Market Power', pp 25–48.

[41] Chapter 3 of the *Workbook* on the 'assessment of dominance' is available on the ICN website at www.internationalcompetitionnetwork.org.

[42] See 'Findings of dominance below the 50 per cent threshold', p 183 below.

[43] See further ch 1, 'Market definition' and following sections, pp 27–42.

undertaking's market share. Rather it is necessary to examine three issues, as set out in paragraph 12 of the *Guidance*:

- constraints imposed by the existing supplies from, and the position on the market of, *actual competitors* (the market position of the dominant undertaking and its competitors)
- constraints imposed by the credible threat of future expansion by actual competitors or entry by *potential competitors* (expansion and entry)
- constraints imposed by the bargaining strength of the undertaking's customers (*countervailing buyer power)* (emphasis added).

Each of these three criteria has already been discussed in chapter 1[44]. Some additional commentary will be provided here based on the judgments of the EU Courts and the decisional practice of the Commission in Article 102 cases. In paragraph 11 of its *Guidance* the Commission, citing case law of the EU Courts such as *United Brands*, points out that a finding of a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.

(A) Actual competitors

True monopoly is rare, except where conferred by the state. The majority of cases are therefore concerned with the problem of deciding at what point an undertaking, though not a true monopolist, has sufficient power over the market to fall within the ambit of Article 102.

(i) Statutory monopolies

Various cases have concerned undertakings with a statutory monopoly in the provision of goods or services[45]. The Court of Justice has rejected the argument that, because a monopoly is conferred by statute, this immunises the undertaking from Article 102[46]; where an undertaking has a statutory monopoly it must comply with Article 102, its only special privilege being that conferred by Article 106(2)[47]. A different point is that the fact that an undertaking has a dominant position as a result of rights derived from national legislation does not in itself mean that it has exclusive rights in the sense of Article 106[48].

(ii) The relevance of market shares

In cases where there is no statutory monopoly, market shares provide valuable information about the structure of the market and of the relative importance of the undertakings active on it; however, as the Commission says in paragraph 13 of its *Guidance on Article 102 Enforcement Priorities*, market shares are only a 'useful first indication', and an assessment of market power requires that market conditions generally should be taken into account, including the dynamics of the market, the extent to which products are differentiated and the trend or development of market shares over time.

As far as Article 102 is concerned, it is obvious that the larger the market share, the more likely a finding of dominance. A market share of 100 per cent is rare in the absence

[44] See ch 1, 'Market power', pp 42–45.
[45] See eg Case T-229/94 *Deutsche Bahn AG v Commission* [1997] ECR II-1689, [1998] 4 CMLR 220, para 57.
[46] See the cases cited at ch 5 n 21 above.
[47] See ch 6, 'Article 106(2)', pp 235–241.
[48] See ch 6, 'Exclusive rights', pp 224–225.

of statutory privileges, although not unheard of[49]. However some firms have been found to have very large market shares. For example in *Tetra Pak 1 (BTG Licence)*[50] Tetra Pak's market share in the market for machines capable of filling cartons by an aseptic process was 91.8 per cent; and in *BPB Industries plc*[51] BPB was found to have a market share in plasterboard of 96 per cent, although the Commission had excluded wet plastering from the market definition. In the *Microsoft* decision[52] the Commission concluded that Microsoft had over 90 per cent of the market for personal computer operating software systems and at least 60 per cent of the market for work group server operating systems[53].

(A) The Court of Justice's judgment in Hoffmann-La Roche v Commission

In *Hoffmann-La Roche v Commission*[54] the Court of Justice said:

> 41…Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time…is by virtue of that share in a position of strength…

(B) The AKZO *presumption of dominance where an undertaking has a market share of 50 per cent or more*

In *AKZO v Commission*[55] the Court of Justice referred to the passage from *Hoffmann-La Roche* quoted above and continued that a market share of 50 per cent could be considered to be very large so that, in the absence of exceptional circumstances pointing the other way, an undertaking with such a market share will be presumed dominant; that undertaking will bear the evidential burden of establishing that it is not dominant. The General Court applied this test in *Hilti AG v Commission*[56]. Clearly this is a very significant rule, which means that firms are at risk of being found to be dominant where they fall considerably short of being monopolists in the strict sense of that term. Some critics of Article 102, who believe that it is applied in too intrusive a manner, would like to see the 50 per cent threshold in *AKZO* raised: perhaps to 75 per cent; the binary effect of Article 102, whereby conduct that is legal when practised by a non-dominant firm becomes illegal when the firm is dominant, would be less pronounced if the presumption of dominance was set at a higher market share threshold. However the EU Courts have shown no inclination to discard or revise the *AKZO* presumption; recent judgments of the General Court such as *France*

[49] In *GVL* OJ [1981] L 370/49, [1982] 1 CMLR 221 that body had a 100 per cent market share in the market in Germany for the management of performing artists' rights of secondary exploitation; see also *Amministratzione Autonoma del Monopoli di Stato ('AAMS')* OJ [1998] L 252/47, [1998] 5 CMLR 786, para 31, where the Commission found AAMS held a *de facto* monopoly of the Italian market for the wholesale distribution of cigarettes, upheld on appeal to the General Court Case T-139/98 *AAMS v Commission* [2001] ECR II-3413, [2002] 4 CMLR 302, para 52.

[50] OJ [1988] L 272/27, [1988] 4 CMLR 881, para 44, upheld on appeal to the General Court Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-539, [1991] 4 CMLR 334.

[51] OJ [1989] L 10/50, [1990] 4 CMLR 464, upheld on appeal to the General Court Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389, [1993] 5 CMLR 33 and to the Court of Justice Case C-310/93 P *BPB Industries Plc and British Gypsum Ltd v Commission* [1995] ECR I-865, [1997] 4 CMLR 238.

[52] *Microsoft* Commission decision of 24 March 2004.

[53] Ibid, paras 430–435 and 473–499.

[54] Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211; the Commission specifically referred to this paragraph in *Van den Bergh Foods Ltd* OJ [1998] L 246/1, [1998] 5 CMLR 530, para 258.

[55] Case C-62/86 [1991] ECR I-3359, [1993] 5 CMLR 215, para 60.

[56] Case T-30/89 [1991] ECR II-1439, [1992] 4 CMLR 16, para 92; see similarly Cases T-191/98 etc *Atlantic Container Line v Commission* [2003] ECR II-3275, [2005] 4 CMLR 1283, para 907.

Télécom v Commission[57], *Solvay SA v Commission*[58] and *AstraZeneca AB v Commission*[59] have continued to stress that high market shares can in themselves be indicative of dominance and to cite the *AKZO* presumption of dominance; indeed in *AstraZeneca* the Court went so far as to say that the Commission could not disregard the importance to be attached to AZ's very large market share throughout the relevant period of alleged abuse[60].

Interestingly the Commission does not refer to the *AKZO* presumption in its *Guidance on Article 102 Enforcement Priorities*, perhaps suggesting that it is not keen on a legal presumption that attaches such weight to a market share figure. Instead it notes at paragraph 15 that the higher the market share, and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position; however the Commission concludes the paragraph by saying that it would come to a final conclusion on dominance only after examining all the relevant factors that may be relevant to constraining the behaviour of the undertaking under investigation.

(C) Findings of dominance below the 50 per cent threshold

The Court of Justice held in *United Brands* that that firm, with a market share in the range of 40 per cent to 45 per cent, was dominant. In that case other factors were considered to be significant: the market share alone would not have been sufficient to sustain a finding of dominance; however the case shows that a firm supplying less than 50 per cent of the market may be held to have a dominant position. In *United Brands* the Court said that, even though there was lively competition on the market at certain periods of the year, United Brands could still be held to be dominant for the purposes of Article 102; the Commission notes this point in paragraph 10 of its *Guidance*.

The decision in *Virgin/British Airways*[61] marked the first (and only) occasion on which an undertaking with a market share of less than 40 per cent has been found by the Commission to be in a dominant position under Article 102. BA was held to be dominant in the UK market for the procurement of air travel agency services with a market share of 39.7 per cent. When the Commission's decision was challenged before the General Court the Court agreed that BA was dominant, noting that its market share was considerably larger than its rivals, and that this was reinforced by the world rank held by BA in terms of international scheduled passenger-kilometres flown, the extent of the range of its transport services and its hub network; the General Court also considered that BA was an obligatory business partner for travel agents[62]. The General Court stated specifically that the fact that BA's market share was in decline could not, in itself, constitute proof that it was not dominant[63].

Some commentators would like there to be a 'safe harbour' below which a firm could not be found to be dominant. However the case law of the EU Courts does not provide one, and the Commission is not in a position to create one in the absence of jurisprudence enabling it to do so. In paragraph 14 of its *Guidance on Article 102 Enforcement Priorities* the Commission says that dominance is 'not likely' if the undertaking's market share is below 40 per cent; however it goes on to say that there could be some cases below that figure that may deserve its attention. Clearly this falls short of a safe harbour.

[57] Case T-340/03 [2007] ECR II-107, [2007] 4 CMLR 919, paras 99–101.

[58] Case T-57/01 [2009] ECR II-4621, [2011] 4 CMLR 9, paras 275–305.

[59] Case T-321/05 [2010] ECR II-000, [2010] 5 CMLR 1585, paras 242–254.

[60] Ibid, para 245.

[61] OJ [2000] L 30/1.

[62] Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008, paras 189–225, upheld on appeal to the Court of Justice Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331, [2007] 4 CMLR 982.

[63] Ibid, para 224.

(B) Potential competitors

As was stressed in chapter 1 and earlier in this chapter, market shares do not in themselves determine whether a firm has a dominant position; in particular they cannot indicate the competitive pressure exerted by firms not yet operating on the market but with the capacity to enter it in a timely manner. Paragraphs 16 and 17 of the Commission's *Guidance on Article 102 Enforcement Priorities* explain the importance of the impact of expansion by existing competitors and entry by potential ones to any assessment of dominance. In particular paragraph 17 provides examples of various barriers, such as legal barriers; economic advantages enjoyed by the dominant undertaking; costs and network effects that impede customers from switching from one supplier to another; and the dominant firm's own conduct.

(i) Legal barriers

The ownership of patents, trade marks and other intellectual property rights may constitute barriers to entry, depending on their strength and duration[64], although they do not, in themselves, confer dominance. In *Tetra Pak 1 (BTG Licence)*[65] the acquisition by Tetra Pak of a company that had the benefit of an exclusive patent and know-how licence was regarded as a factor indicating dominance, as it made entry to the market more difficult for other firms that would be unable to gain access to the licensed technology. In *Hugin v Commission*[66] the Court of Justice seems to have accepted that Hugin was dominant in the market for spare parts for its cash registers because other firms could not produce spares for fear of being sued by Hugin in the UK under the Design Copyright Act 1968. Other obvious legal barriers to entry are Government licensing requirements and planning regulations, governmental control of frequencies for the transmission of radio signals[67], statutory monopoly power[68] and tariffs and non-tariff barriers.

(ii) Economic advantages

Various economic advantages have been considered to be barriers to entry or expansion:

- the Court of Justice considered economies of scale to be a relevant factor in *United Brands v Commission*[69], and the Commission referred to this matter specifically in *BPB Industries plc*[70]; economies of scope would no doubt be treated in the same way[71]
- the control of an essential facility could confer an economic advantage on an incumbent undertaking[72], as could preferential access to natural resources, innovation or R&D

[64] See eg *Eurofix-Bauco v Hilti* OJ [1988] L 65/19, [1989] 4 CMLR 677, para 66; *Magill TV Guide/ITP, BBC and RTE* OJ [1989] L 78/43, [1989] 4 CMLR 757, para 22 (copyright protection of TV listings relevant to finding of dominance), upheld on appeal to the General Court Cases T-69/89 etc *RTE v Commission* [1991] ECR II-485, [1991] 4 CMLR 586, and further on appeal to the Court of Justice Cases C-241 and C-242/91 P [1995] ECR I-743, [1995] 4 CMLR 718.

[65] OJ [1988] L 272/27, [1988] 4 CMLR 881, para 44, upheld on appeal Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309, [1991] 4 CMLR 334.

[66] Case 22/78 [1979] ECR 1869, [1979] 3 CMLR 345.

[67] *Decca Navigator System* OJ [1989] L 43/27, [1990] 4 CMLR 627.

[68] Case 311/84 *Centre Belge d'Etudes de Marché Télémarketing v CLT* [1985] ECR 3261, [1986] 2 CMLR 558; see Marenco 'Legal Monopolies in the case law of the Court of Justice of the European Communities' [1991] Fordham Corp L Inst (ed Hawk), pp 197–222.

[69] Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429.

[70] See ch 5 n 65 above, para 116.

[71] Economies of scale and scope are discussed in ch 1, 'Economies of scale and scope and natural monopolies', pp 10–11.

[72] On essential facilities see ch 17, 'Is the product to which access is sought indispensable to someone wishing to complete in the downstream market?', pp 701–707.

- the Court of Justice has considered an undertaking's superior technology to be an indicator of dominance in several cases, including *United Brands v Commission*[73], *Hoffmann-La Roche v Commission*[74] and *Michelin v Commission*[75]
- in *Continental Can*[76] the Commission regarded that firm's access to the international capital market as significant, and this factor was stressed in *United Brands v Commission*[77]
- in *United Brands v Commission*[78] the Court of Justice described the extent to which UBC's activities were integrated – it owned banana plantations and transport boats and it marketed its bananas itself – and said that this provided that firm with commercial stability which was a significant advantage over its competitors
- in *Hoffmann-La Roche v Commission*[79] the Court of Justice pointed to Roche's highly developed sales network as a relevant factor conferring upon it commercial advantages over its rivals. The Commission has treated both vertical integration and the benefit of well-established distribution systems as a barrier to entry in several other decisions[80], since this could impede access for a would-be entrant to the market
- in *United Brands v Commission*[81] the Court of Justice considered that United Brand's advertising campaigns and brand image were significant factors indicating dominance: it had spent considerable resources establishing the Chiquita brand name which was well protected by trade marks. In its second *Michelin* decision the Commission relied upon the 'indisputable' quality and reputation of the Michelin tyre brand in its finding of dominance[82]. The Commission has often noted (in cases under the EU Merger Regulation ('the EUMR')) that advertising expenditure could make entry difficult into the market for fast-moving consumer goods such as soft drinks[83], sanitary protection[84], and toilet tissue[85].

(iii) Costs and network effects

Network effects may be a barrier to expansion or entry[86]. This was a relevant consideration in *Microsoft*[87]: the Commission said that the ubiquity of Microsoft in the personal computer operating systems market meant that nearly all commercial applications software was written first and foremost to be compatible with the Microsoft platform. This gave

[73] Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429, paras 82–84.

[74] Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211, para 48.

[75] Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282; see also *Eurofix-Bauco v Hilti* (ch 5 n 64 above), para 69 and *Tetra Pak 1 (BTG Licence)* (n 65 above), para 44; *Michelin* OJ [2002] L 143/1, [2002] 5 CMLR 388, paras 182–183.

[76] JO [1972] L 7/25, [1972] CMLR D11.

[77] Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429, para 122.

[78] Ibid, paras 69–81, 85–90.

[79] Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211, para 48; see similarly Case 322/81 *Michelin v Commission* [1983] ECR 3461, [1985] 1 CMLR 282, para 58.

[80] See eg *Eurofix-Bauco v Hilti* OJ [1988] L 65/19, [1989] 4 CMLR 677, para 69; *Napier Brown – British Sugar* OJ [1988] L 284/41, [1990] 4 CMLR 196, para 56; *PO-Michelin* OJ [2002] L 143/1, [2002] 5 CMLR 388, paras 191–195.

[81] Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429, paras 91–94.

[82] *Michelin* OJ [2002] L 143/1, [2002] 5 CMLR 388, para 184.

[83] See eg Case M.190 *Nestlé/Perrier* OJ [1992] L 356/1, [1993] 4 CMLR M17.

[84] See eg Case M.430 *Procter & Gamble/VP Schickendanz* OJ [1994] L 352/32.

[85] See eg Case M.623 *Kimberly-Clark/Scott Paper* OJ [1996] L 183/1.

[86] On network effects see ch 1, 'Network effects and two-sided markets', pp 11–12.

[87] Commission decision of 24 March 2004.

rise to a self-reinforcing dynamic: the more users there were of the Microsoft platform, the more software was written for it, and vice versa[88].

(iv) Conduct

The Court of Justice in *United Brands v Commission*[89] agreed with the idea that the conduct of an alleged dominant firm could be taken into account in deciding whether it is dominant. This means, for example, that it might be legitimate to take into account the fact that a firm has offered discriminatory rebates to certain customers in deciding whether it is dominant: the rebates may themselves prevent competitors entering the market and so constitute a barrier to entry. In *Michelin v Commission*[90] the Commission had relied on Michelin's price discrimination as an indicator of dominance. Michelin argued before the Court of Justice that this approach was circular: the Commission was saying that because it had offered discriminatory prices, it was dominant, and because it was dominant its discriminatory prices were an abuse. The Court of Justice did not explicitly deal with this issue in its judgment, but in affirming the Commission's decision there is at least tacit approval of considering conduct as a factor indicating dominance.

Despite criticism of the circularity of this approach, the Commission has continued to regard conduct as a relevant factor indicating dominance: for example in *Eurofix-Bauco v Hilti*[91] it regarded that firm's behaviour as 'witness to its ability to act independently of, and without due regard to, either competitors or customers…'[92]; in *AKZO* it found that that undertaking's ability to weaken or eliminate troublesome competitors was an indicator of dominance[93]; and in *Michelin II* it considered that Michelin's conduct was strong evidence that a dominant position existed[94]. There is increasing recognition that there are types of behaviour that may deter entry[95], and it would be wrong to discount such conduct from the consideration of whether an undertaking is dominant.

(v) Evidence of managers

In *BBI/Boosey and Hawkes: Interim Measures*[96] the Commission regarded internal documents of Boosey and Hawkes, in which it had described its instruments as 'automatically first choice' of all the top brass bands, as significant in its finding that Boosey and Hawkes was dominant. In *Prokent-Tomra*[97] the Commission referred to several documents found during its inspection of Tomra's premises containing statements such as that Tomra's overall goal was to 'maintain market dominance and market share'[98]. Statements of this

[88] Ibid, paras 448–459.

[89] Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429, paras 67–68.

[90] Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282.

[91] OJ [1988] L 65/19, [1989] 4 CMLR 677.

[92] Ibid, para 71; the objection to the 'circularity' argument may be met if the Commission uses conduct as an indicator only in clear cases, and provided that it is not relied on exclusively to support a finding of dominance.

[93] *ECS/AKZO* OJ [1985] L 374/1, [1986] 3 CMLR 273, para 56, upheld on appeal Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, [1993] 5 CMLR 215, para 61.

[94] *PO-Michelin* OJ [2002] L 143/1, [2002] 5 CMLR 388, paras 197–199.

[95] See eg Ordover and Salonen 'Predation, Monopolisation and Antitrust' in *The Handbook of Industrial Organisation* (North-Holland, 1989, eds Schmalensee and Willig); OFT Research Paper 2 *Barriers to Entry and Exit in UK Competition Policy* (London Economics, 1994) and *Assessment of Market Power* OFT 415, December 2004, paras 5.23–5.28.

[96] OJ [1988] L 286/36, [1988] 4 CMLR 67, para 18.

[97] Commission decision of 29 March 2006, upheld on appeal to the General Court Case T-155/06 *Tomra Systems ASA v Commission* [2010] ECR II-000, [2011] 4 CMLR 416.

[98] Commission decision of 29 March 2006, para 91; see also *Wanadoo Interactive* Commission decision of 16 July 2003, paras 229–230 (referring to Wanadoo's stock exchange listing prospectus noting the synergies it derived from being part of the France Télécom group).

kind could not be probative of dominance in themselves. However it is clearly advisable for in-house lawyers to exercise restraint over hawkish commercial personnel, given to describing their position in the global widget market in memoranda and advertising copy as 'world-beating', 'the strongest' or 'clearly the dominant player'. Whilst shareholders might like to hear this, and whilst no doubt individuals' bonuses may be linked to their performance, it is not always easy to convince Commission officials that one's market power is insignificant in the face of such assertions.

(C) Countervailing buyer power

As has been explained in chapter 1, a further issue of significance is whether a supplier or suppliers are confronted with buyer power[99].

(D) Previous findings of dominance

In *Coca-Cola Co v Commission*[100] the General Court held that, whenever the Commission adopts a decision applying Article 102 (or the EUMR), it must define the relevant market and make a fresh analysis of the conditions of competition within it on the basis of the available evidence at the appropriate time; this may lead to a determination of the market which is different from a previous finding[101]. Furthermore a national court (or a national competition authority) would not be bound in a later case by a previous finding of dominance by the Commission in a different case[102]. However the actual decision in an Article 102 case may serve as a basis for an action for damages brought by a third party before a national court in relation to the same facts, even where the Commission's decision did not impose a fine[103].

(E) The emergence of super-dominance

It may be the case[104] that the responsibility of a dominant firm becomes greater, so that a finding of abuse becomes more likely, where the firm under investigation is not merely dominant, but rather 'enjoys a position of dominance approaching a monopoly'[105]. The Court of Justice has said that the scope of the special responsibility of a dominant firm must be considered in the light of the special circumstances of each case[106]. It follows that behaviour may be considered not to be abusive when carried out by some dominant firms but to be abusive when carried out by others. An example of the distinction is afforded by the practice of a dominant firm which selectively cuts its prices to some customers, but

[99] See ch 1, 'Countervailing buyer power', p 45.

[100] Cases T-125/97 etc [2000] ECR II-1733, [2000] 5 CMLR 467; the Commission defined the relevant product and geographic market afresh in its second *Michelin* decision: OJ [2002] L 143/1, [2002] 5 CMLR 388, paras 109–171.

[101] [2000] ECR II-1733, [2000] 5 CMLR 467, para 82. [102] Ibid, para 85.

[103] Ibid, para 86; see also Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, [2001] 4 CMLR 449 and Article 16(1) of Regulation 1/2003, discussed in ch 8, 'Article 16: uniform application of EU competition law', pp 304–305 and ch 8, 'Article 16(1) of Regulation 1/2003', pp 313–314.

[104] Note that the Court of Justice's judgment in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-000, paras 78–82 casts some doubt on the text that follows: see 'The emergence of super-dominance', pp 187–189 below.

[105] See para 136 of the Opinion of Advocate General Fennelly in Cases C-395/96 P etc *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365, [2000] 4 CMLR 1076.

[106] Case C-334/94 P *Tetra Pak v Commission* [1996] ECR I-5951, [1997] 4 CMLR 662, para 24; Cases C-395/96 P etc *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365, [2000] 4 CMLR 1076, para 114.

not to below cost in the sense of the law on predatory pricing[107], whilst charging higher prices to others. There are strong arguments for not condemning this practice: if the dominant firm is not losing money, it would appear to be competing on the basis of efficiency, which competition law should encourage[108]. In *Compagnie Maritime Belge Transports SA v Commission*[109] the Court of Justice refrained from deciding generally on the practice of selective price cutting[110]; however, at paragraph 119 it said that:

> It is sufficient to recall that the conduct at issue here is that of a conference having a share of over 90 per cent of the market in question and only one competitor. The appellants have, moreover, never seriously disputed, and indeed admitted at the hearing, that the purpose of the conduct complained of was to eliminate G&C from the market.

On this basis the Court of Justice upheld the finding that there had been an abuse of a dominant position, whilst leaving open the possibility that the same conduct on the part of an undertaking with less than 90 per cent of the market and facing more competition would not have been found to be unlawful.

The idea that the obligations on dominant firms become more onerous depending on the special circumstances of the case (to use the language of the Court of Justice in *Tetra Pak II*), finds expression in decisions and judgments that seem to have turned on the degree of market power that the dominant undertaking enjoys. For example Tetra Pak's market share in the market for aseptic cartons and carton-filling machines was in the region of 90 to 95 per cent, and it was found to have abused a dominant position where its conduct did not take place in the market in which it was dominant, and was not intended to benefit its position in that market[111]. In *Compagnie Maritime Belge* the conference's market share was 90 per cent or more[112], and in the *IMS* case[113] the Commission, when ordering IMS to grant a licence of its copyright to third parties on the market on a non-discriminatory basis, noted that IMS was in a 'quasi-monopoly situation'[114].

In *Deutsche Post AG – Interception of cross-border mail*[115] the Commission noted that:

> [t]he actual scope of the dominant firm's special responsibility must be considered in relation to the degree of dominance held by that firm and to the special characteristics of the market which may affect the competitive situation[116].

In *Microsoft*[117] the Commission said that Microsoft, with a market share above 90 per cent, had an 'overwhelmingly' dominant position'[118]. The Commissioner for Competition said after the General Court's judgment upholding the Commission's decision that the Court's judgment 'sends a clear signal that super-dominant companies cannot abuse

[107] See ch 18, 'Selective price cutting but not below cost', pp 748–752.

[108] It is possible that this pricing policy may amount to a different type of abuse, namely price discrimination (see ch 18, 'Price Discrimination', pp 759–764), but the issue here is whether the selective price cutting, but not to below cost, *in itself* amounts to an abuse.

[109] Cases C-395/96 P etc [2000] ECR I-1365, [2000] 4 CMLR 1076.

[110] Ibid, para 118.

[111] See 'The dominant position, the abuse and the effects of the abuse may be in different markets', pp 205–208 below.

[112] See similarly, on the responsibility of a monopolist, Case 7/82 *GVL v Commission* [1983] ECR 483, [1983] 3 CMLR 645, para 56; this was cited by the Commission in *1998 Football World Cup* OJ [2000] L 5/55, [2000] 4 CMLR 963, para 85.

[113] *NDC Health/IMS Health: Interim Measures* OJ [2002] L 59/18, [2002] 4 CMLR 111; see also *Deutsche Post AG – Interception of cross-border mail* OJ [2001] L 331/40, [2002] 4 CMLR 598, paras 103 and 124.

[114] OJ [2002] L 59/18, [2002] 4 CMLR 111, para 58; this decision was subsequently withdrawn by the Commission: see Commission Press Release IP/03/1159, 13 August 2003.

[115] OJ [2001] L 331/40, [2002] 4 CMLR 598.

[116] Ibid, para 103, citing the *Tetra Pak II* case.

[117] Commission decision of 24 March 2004.

[118] Ibid, para 435.

their position to hurt consumers and dampen innovation by excluding competition in related markets'[119].

The idea that firms with a position of dominance approaching a monopoly may be subject to particularly onerous responsibilities would also help to explain why firms that control 'essential facilities' have an obligation in certain circumstances to provide access to them, since their market power is particularly strong[120]. It may be helpful, therefore, to identify a concept over and above dominance, that we might call 'super-dominance', where the risks of being found to be acting abusively are correspondingly higher: if a dominant undertaking has a 'special' responsibility, a super-dominant has one that is even greater.

The Commission does not use the expression 'super-dominance' in its *Guidance on Article 102 Enforcement Priorities*. However in paragraph 20, discussing factors that it will take into account when deciding whether to intervene on the basis that certain conduct may be having an anti-competitive foreclosure effect on the market, it says that the stronger the dominant position of the undertaking under investigation, the higher the likelihood that conduct protecting that position would have such an effect. Interestingly the Court of Justice's judgment in *Konkurrensverket v TeliaSonera*[121] seems to endorse this approach: whilst acknowledging that some of its judgments had referred to 'super-dominance' and 'quasi-monopoly', it said that, as a general rule, the degree of market strength of a dominant firm was relevant to the assessment of the effects of its conduct rather than to the question of whether an abuse as such exists[122].

6. A Substantial Part of the Internal Market

Once it has been established that a firm has a dominant position on the market, one further jurisdictional question must be answered before going on to the issue of abuse: is that dominant position held in the whole or a substantial part of the internal market? If not Article 102, by its own terms, does not apply. This issue is not the same as the delimitation of the relevant geographic market: that concept is used as part of the investigation into a firm's market power. The requirement that market power should exist over a substantial part of the internal market is in a sense the equivalent of the *de minimis* doctrine under Article 101, according to which agreements of minor importance are not caught[123].

Obviously there is no problem with the issue of substantiality where it is decided that an undertaking is dominant throughout the EU. The position may be less obvious where dominance is more localised than this. Suppose that a firm is dominant in just one Member State, or even in a part of one Member State: when will that area be considered to constitute a substantial part of the EU? Four points must be noted.

The first is that the issue is not solely a geographic one. In *Suiker Unie v Commission*[124] the Court of Justice said that for this purpose:

> the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered[125].

[119] See SPEECH/07/539, 17 September 2007.

[120] On essential facilities see ch 17, 'Is the product to which access is sought indispensable to someone wishing to complete in the downstream market?', pp 701–707.

[121] Case C-52/09 [2011] ECR I-000, [2011] 4 CMLR 982.

[122] Ibid, paras 78–82.

[123] See ch 3, 'The *De Minimis* Doctrine', pp 140–144.

[124] Cases 40/73 etc [1975] ECR 1663, [1976] 1 CMLR 295.

[125] Ibid, para 371.

This indicates that substantiality is not simply a question of relating the *physical* size of the geographic market to the EU as a whole. In *Suiker Unie* the Court of Justice considered the ratio of the volume of Belgian and South German production of sugar to EU production overall and concluded on this basis that each of those markets could be considered to be substantial.

The second point is that it is likely that each Member State would be considered to be a substantial part of the internal market, in particular where an undertaking enjoys a statutory monopoly[126], and *Suiker Unie* further established that parts of a Member State can be[127].

The third point is that neither the EU Courts nor the Commission have laid down that any particular percentage of the internal market as a whole is critical in determining what is substantial. In *BP v Commission*[128] Advocate General Warner took the view that sole reliance should not be placed on percentages in such cases and was of the opinion that the Dutch market for petrol, which represented only about 4.6 per cent of the EU market as a whole, could be considered substantial. The Court of Justice did not comment on this issue, as it quashed the Commission's finding of abuse on other grounds.

There are numerous examples of the test of substantiality having been satisfied in relation to a single facility: in each of *Merci Convenzionali Porto di Genova v Siderugica Gabriella*[129], *Sealink/B and I – Holyhead: Interim Measures*[130], *Sea Containers v Stena Sealink – Interim Measures*[131], *Flughaven Frankfurt/Main*[132], *Corsica Ferries*[133], *Portuguese Airports*[134], *Ilmailulaitos/Luftfartsverket*[135] and *Spanish Airports*[136] ports or airports have been found to be sufficiently substantial. Furthermore the Court of Justice has held that, where national law confers a contiguous series of monopolies within a Member State which, taken together, cover the entire territory of that State, that law creates a dominant position in a substantial part of the internal market[137].

The fourth point is that, in the event that an undertaking is found not to be dominant in a substantial part of the internal market, the possibility remains that it might be guilty of infringing the domestic equivalent of Article 102, a variant of which will be found in all the Member States of the EU.

7. Small Firms and Narrow Markets

(A) Small firms

It might be assumed that Article 102 is applicable only to large undertakings. It is certainly true that the Commission has used it to investigate some of the industrial giants of the world such as Roche, Commercial Solvents, United Brands, IBM, Microsoft and

[126] Case 127/73 *BRT v SABAM* [1974] ECR 313, [1974] 2 CMLR 238, para 5; Case T-229/94 *Deutsche Bahn AG v Commission* [1997] ECR II-1689, [1998] 4 CMLR 220; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, [1999] 5 CMLR 1300, para 99.

[127] It is important to remember however that the abuse must also have an effect on trade between Member States to fall within Article 102: see 'The Effect on Inter-State Trade', pp 178–179 above.

[128] Case 77/77 [1978] ECR 1513, [1978] 3 CMLR 174.

[129] Case C-179/90 [1991] ECR I-5889, [1994] 4 CMLR 422, para 15.

[130] [1992] 5 CMLR 255, para 40.

[131] OJ [1994] L 15/8, [1995] 4 CMLR 84.

[132] OJ [1998] L 72/30, [1998] 4 CMLR 779.

[133] Case C-18/93 [1994] ECR I-1783.

[134] OJ [1999] L 69/31, [1999] 5 CMLR 103, upheld on appeal Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, [2002] 2 CMLR 1319.

[135] OJ [1999] L 69/24, [1999] 5 CMLR 90.

[136] OJ [2000] L 208/36, [2000] 5 CMLR 967.

[137] Case C-323/93 *La Crespelle* [1994] ECR I-5077, para 17; this reasoning was applied by the Commission in, for example, *Portuguese Airports* OJ [1999] L 69/31, [1999] 5 CMLR 103, paras 21–22.

Intel. However it would be wrong to suppose that only firms such as these fall within the risk of Article 102. The significant issue under Article 102 is market power, not the size of an undertaking. Given that the relevant market may be drawn very narrowly, small firms may be found guilty of an abuse of Article 102. In *Hugin*[138] that firm was fined by the Commission for refusing to supply its spare parts to Liptons, the market for these purposes being spare parts for Hugin machines; Hugin's share of the cash register market was 12 to 14 per cent, but its share of the spare parts market for its machines was 100 per cent. On appeal[139] the Court of Justice quashed the Commission's decision because it considered there to be no effect on inter-state trade, but it upheld the finding on dominance. A vivid illustration of the vulnerability of small firms under Article 102 is afforded by *BBI/Boosey and Hawkes: Interim Measures*[140]. Boosey and Hawkes was found by the Commission, in an interim decision, to have abused its dominant position when it refused to supply musical instruments to customers who were threatening to enter into competition with it. Boosey and Hawkes' worldwide sales in all products were worth £38 million in 1985, and the market it was accused of dominating was defined as instruments for British-style brass bands, in which its market share was 80 to 90 per cent.

(B) **Narrow markets**

In the *Hugin* case a small part of Hugin's activities, the supply of spare parts, constituted the relevant market within which it was dominant. Similarly in *General Motors v Commission*[141], where the Belgian Government had given General Motors the exclusive power to grant test certificates to second-hand imports of Opel cars, this function was held to constitute a separate market, and General Motors' exclusive right meant that it was in a dominant position. The decision in *British Leyland v Commission*[142] was similar, that firm being held to have a dominant position in the provision of national type-approval certificates for its vehicles. Two further cases illustrate how narrowly a market can be defined. In *Porto di Genova v Siderurgica Gabrielli*[143] the Court of Justice held that the organisation of port activities at a single port could constitute a relevant market; and in *Corsica Ferries*[144] it reached the same conclusion in relation to the provision of piloting services at the same port. Similarly narrow markets have been found by the Commission in a series of decisions on services linked to access to airports[145].

The *1998 Football World Cup*[146] decision epitomises the possibility of narrow market definitions. The Commission proceeded on the basis of abuse in the market for 574,300 'blind pass' tickets to matches at the 1998 World Cup, a blind pass consisting of a ticket where the consumer does not know, at the time of purchase, what game he or she will be seeing[147]. The CFO, responsible for the ticketing arrangements, was found to have abused its dominant position by selling tickets only to customers having a postal address in

[138] OJ [1978] L 22/23, [1978] 1 CMLR D19.

[139] Case 22/78 *Hugin v Commission* [1979] ECR 1869, [1979] 3 CMLR 345.

[140] OJ [1987] L 286/36, [1988] 4 CMLR 67.

[141] OJ [1975] L 29/14, [1975] 1 CMLR D20; the decision was quashed by the Court of Justice on the issue of whether General Motors was guilty of excessive pricing issue: Case 26/75 *General Motors Continental NV v Commission* [1975] ECR 1367, [1976] 1 CMLR 95: see ch 18, '*General Motors* and *United Brands*', pp 721–722.

[142] Case 226/84 [1986] ECR 3263, [1987] 1 CMLR 185.

[143] Case C-179/90 [1991] ECR I-5889, [1994] 4 CMLR 422.

[144] Case C-18/93 [1994] ECR I-1783.

[145] See 'A Substantial Part of the Internal Market', pp 189–190 above.

[146] OJ [2000] L 5/55, [2000] 4 CMLR 963.

[147] For example, the third place play-off between, as yet, unidentified teams.

France: this had caused complaints, not surprisingly, that it was guilty of discrimination in favour of French nationals. A token fine of €1,000 was imposed.

8. Abuse

(A) Introduction

It is not controversial to say that Article 102 is controversial. In the case of Article 101 undertakings are liable only where they enter into agreements or concerted practices that restrict competition; a great deal of the Commission's (and of the national competition authorities') attention is focused on the deliberate and secret cartelisation of markets, and there are few apologists today for this kind of behaviour[148]. Article 102, on the other hand, bears upon the individual behaviour of dominant firms[149]; by its nature the application of Article 102 involves a competition authority or a court having to decide whether that behaviour deviates from 'normal' or 'fair' or 'undistorted' competition, or from 'competition on the merits', none of which expressions is free from difficulty. It should be added that the controversy surrounding Article 102 is not unique to the EU: all systems of competition law contain provisions on the unilateral conduct of firms with substantial market power, and competition authorities and courts worldwide have had to grapple with the issues under consideration in this chapter. Significant work has been undertaken under the auspices of the International Competition Network on this topic: in particular in May 2007 the Unilateral Conduct Working Group produced a *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies* which contains a useful discussion of this complex area[150].

(i) The 'special responsibility' of dominant firms

It is clear that it is not an offence in itself for a firm to have a dominant position; what is offensive is to abuse the position of dominance. However the Court of Justice in *Michelin v Commission*[151] stated that a firm in a dominant position has a 'special responsibility not to allow its conduct to impair undistorted competition' on the internal market[152]. This statement is routinely repeated in the judgments of the EU Courts and the decisions of the Commission on Article 102[153]. In a sense it is a statement of the obvious: it is clear that Article 102 imposes obligations on dominant firms that non-dominant firms do not bear. Unilateral behaviour is not controlled under Article 101, which applies only to conduct which is attributable to a concurrence of wills; unilateral

[148] See ch 13 generally on cartels.

[149] Article 102 can also apply to the abuse of collective dominance, although this is not a concept that has been explored in much detail in the case law: see ch 14, 'Abuse of collective dominance under Article 102', pp 579–582.

[150] Available at www.internationalcompetitionnetwork.org; many other interesting work products on unilateral conduct laws will be found on this site, along with the current and long-term work plans of the ICN in this area; see also the OECD Roundtable on *Competition on the Merits* of 2005, available at www.oecd.org.

[151] Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282.

[152] Ibid, para 57.

[153] For recent statements to the same effect see Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-000, [2010] 5 CMLR 1495, para 176 and Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-000, [2011] 4 CMLR 982, para 24.

acts can however amount to an infringement of Article 102[154]. However the conundrum for anyone interested in Article 102 is to determine what, precisely, is meant by an abuse of a dominant position.

(ii) Article 102 does not contain an exhaustive list of what amounts to abusive behaviour

Article 102 gives examples of conduct that is abusive – such as charging unfair prices, limiting production and discrimination that places certain trading parties at a competitive disadvantage – but this list is not exhaustive[155]; the Commission's decisions and the case law of the EU Courts have applied Article 102 to numerous practices not specifically mentioned in it. A recent example of this is the General Court's judgment in *AstraZeneca AB v Commission*[156] in which it held that a pattern of making misleading misrepresentations to national patent offices in various Member States that led to the extension of patent protection for pharmaceutical products to which AZ was not, in fact, entitled amounted to an abuse of a dominant position; the same was true of the submission of requests to public authorities to deregister market authorisations for particular drugs, thereby impeding entry to the market by generic manufacturers. A reading of the list of examples of abusive behaviour in Article 102 would not prepare any but the most imaginative reader to suppose that these practices were abusive; but the Court appears to have had no hesitation in finding them to be illegal. Examples of practices found to be abusive will be given later in this chapter and will be considered in depth in chapter 17 (non-pricing abuses) and chapter 18 (pricing abuses).

(iii) False positives and false negatives

A difficulty with Article 102 is that the line between pro- and anti-competitive conduct is not always an easy one to draw, and there is an obvious danger that, if Article 102 is applied too aggressively, firms might refrain from conduct that is in fact pro-competitive. Clearly it would be the ultimate paradox if a law designed to promote competition in fact were to have the effect of diminishing it[157].

A more stylised way of presenting this problem is to consider the difference between what are sometimes referred to as 'false positives' and 'false negatives'[158].

A **false positive** occurs where a competition authority incorrectly concludes that pro-competitive behaviour is abusive: a harm to the firm(s) found guilty, and also to consumers, since the pro-competitive behaviour will be prohibited. The problem here is that the law is over-inclusive.

A **false negative** occurs where a competition authority incorrectly concludes that anti-competitive behaviour is not illegal and therefore permits it: a harm to consumers. Here the law is under-inclusive.

[154] The respective roles of Articles 101 and 102 are spelt out particularly clearly in the judgment of the General Court in Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, [2001] 4 CMLR 126, paras 175–176.

[155] Case 6/72 *Continental Can v Commission* [1973] ECR 215, [1973] CMLR 199, para 26; Cases C-395/96 P etc *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365, [2000] 4 CMLR 1076, para 112; Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-000, [2010] 5 CMLR 1495, para 173.

[156] Case T-321/05 [2010] ECR II-000, [2010] 5 CMLR 1585; the judgment is on appeal to the Court of Justice, Case C-457/10 P *AstraZeneca AB v Commission*, not yet decided.

[157] A series of essays on the question of whether (mis)application of laws dealing with unilateral conduct have a chilling effect on competition, by Bougeois, Fingleton and Nikpay, Lewis and Lugard respectively, will be found in chs 15–18 of [2008] Fordham Corporate law Institute (ed Hawk).

[158] Economics literature sometimes uses the expressions 'Type I errors' and 'Type II errors', but the tendency to confuse which error is of which type (sometimes referred to jocularly as a 'Type III' error) argues in favour of the language of false positives and false negatives.

Given the inherent difficulty of determining which unilateral acts are anti-competitive and which are pro-competitive, it is inevitable that competition authorities will sometimes make errors; a policy question when framing rules on unilateral behaviour is to decide which of the two errors is preferable. There is an undoubted perception that the enforcement authorities and the courts in the US today are more concerned about false positives than false negatives: that is to say that they err on the side of non-intervention under section 2 of the Sherman Act 1890, which forbids the monopolisation of markets[159], whereas the Commission and the EU Courts perhaps tend the other way[160]. In *Verizon Communications Inc v Law Offices of Curtis Trinko*[161] the US Supreme Court, in a refusal to supply case, was explicit about its fear of false positives:

> Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs … Mistaken inferences and the resulting false condemnations are 'especially costly, because they chill the very conduct the antitrust laws are designed to protect' … The cost of false positives counsels against an undue expansion of s. 2 liability[162].

The same attitude helps to explain the conclusion of the Supreme Court in *Pacific Bell v linkLine*[163], where it held that a margin squeeze is not an independent infringement of section 2 of the Sherman Act[164]. In contrast one might note that on many occasions when the EU Courts have been invited to expand Article 102 liability they have done so: for example when apparently establishing *per se* infringements[165]; when establishing that Article 102 could apply to mergers[166]; when deciding that there did not need to be any causation between the market power held by a dominant firm and its abusive behaviour[167]; when accepting that the dominance, abuse and effects of the abuse can be in different markets[168]; when extending the application of Article 102 to collective, as well as to individual, dominance[169]; and when acknowledging the possibility of an individual abuse of a collective dominant position[170]. This record does not suggest the same reticence as that of the Supreme Court in *Verizon*.

[159] For discussion of section 2 of the Sherman Act see Sullivan and Harrison *Understanding Antitrust and Its Economic Implications* (LexisNexis, 4th ed, 2003), ch 6; Sullivan and Hovenkamp *Antitrust Law, Policy and Procedure: Cases, Materials, Problems* (LexisNexis, 5th ed, 2004), ch 6; Fox, Sullivan and Peritz *Cases and Materials on US Antitrust in Global Context* (Thomson/West, 2nd ed, 2004), ch 3; Hovenkamp *Federal Antitrust Policy: The Law of Competition and Its Practice* (Thomson/West, 3rd ed, 2005), chs 6–10; Kovacic 'The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix' (2007) Columbia Business Law Review 1; for a critique of the 'vacuous standards and conclusory labels that provide no meaningful guidance about which conduct will be condemned as exclusionary' under section 2 of the Sherman Act see Elhauge 'Defining Better Monopolization Standards' (2003) 56 Stanford Law Review 253.

[160] For an interesting discussion of the differences in approach in the US and the EU, suggesting that the position in the US can lead to anti-competitive behaviour escaping sanction, see Fox 'A Tale of Two Jurisdictions and an Orphan Case: Antitrust, Intellectual Property, and Refusals to Deal' (2005) 28 Fordham International Law Journal 952.

[161] 540 US 398 (2004). [162] Ibid, p 414. [163] 555 US 438 (2009).

[164] See ch 18, 'The economic phenomenon', p 756.

[165] See 'Are there or should there be any *per se* rules under Articles 102?', pp 199–201 below.

[166] See '*Continental Can v Commission*', p 203 below.

[167] See 'Causation', pp 203–204 below.

[168] See 'The dominant position, the abuse and the effects of the abuse may be in different markets', pp 205–208 below.

[169] See ch 14, 'Article 102 and Collective Dominance', pp 571–579.

[170] See ch 14, 'Abuse of collective dominance under Article 102', pp 579–582.

(B) What is the purpose of Article 102?

Before considering the jurisprudence of the EU Courts and the practice of the Commission on the meaning of abuse of dominance, it is necessary to give some consideration to the underlying purpose of Article 102. The various possible objectives of competition law have been discussed in chapter 1 of this book[171]. There it was pointed out that competition authorities today stress the central importance of consumer welfare when applying competition law, but that other matters such as the redistribution of wealth and the protection of small firms against more powerful rivals have also been influential at various points in time.

(i) Protection of competitors or protection of competition?

A specific criticism of Article 102 is that it is used to protect competitors, including inefficient ones, rather than the process of competition, which is a quite different matter. According to this view Article 102, in effect, subjects dominant firms to a handicap: competitive acts, such as price reductions or the bundling of different products, that are perfectly legal for non-dominant firms, become illegal when a firm is dominant. The complaint is that this means that firms that possess superior efficiency are restrained in order to provide a place in the competitive arena for less efficient ones. This characteristic of Article 102 would be exacerbated if it is, indeed, the case that institutions in the EU have a tendency to be more concerned about false negatives than false positives.

The criticism that Article 102 protects competitors rather than competition brings to mind Robert Bork's attack on the antitrust rules as they were applied in the US in the 1960s and 1970s, and in particular what he regarded as the 'uncritical sentimentality in favour of the small guy' of the enforcement authorities and the courts there at that time[172]. The most high-level accusation of the EU's supposed predilection for protecting competitors rather than competition came from the Assistant Attorney General for Antitrust at the US Department of Justice in response to the judgment of the General Court of the EU in September 2007 upholding the European Commission's decision that Microsoft had abused its dominant position[173]. After expressing 'concern' about the standard applied to unilateral conduct in Europe, Mr Barnett said that:

> In the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors[174].

Without saying more, his meaning could hardly have been clearer: that in the EU the prime concern is not with the protection of consumers through competition, but with the protection of competitors.

Some commentators lay the blame for what they see as an unduly interventionist application of Article 102 at the door of the school of ordoliberalism which, through its concern to protect economic freedom, including the right of access to markets unconstrained by barriers such as exclusive agreements or rebating and discounting practices having analogous effects, led to the adoption of formalistic rules capable of having perverse consequences[175].

[171] See ch 1, 'Goals of competition law', pp 19–24.

[172] Bork *The Antitrust Paradox* (The Free Press, 1993).

[173] Case T-201/04 *Microsoft Corpn v Commission* [2007] ECR II-3601, [2007] 5 CMLR 846.

[174] See Press Release of 17 September 2007, available at www.justice.gov.atr.

[175] For a discussion of ordoliberalism see ch 1, 'Protecting competitors', pp 21–22; for an example of criticism of the impact of ordoliberalism see eg Kallaugher and Sher 'Rebates Revisited: Anti-Competition Effects and Exclusionary Abuse Under Article 82' (2004) 25 ECLR 263; Venit 'Article 82: The Last Frontier – Fighting Fire with Fire' (2005) 28 Fordham International Law Journal 1157; Ahlborn and Padilla 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in

However, in the opinion of the authors of this book the assertion that the fingerprints of the ordoliberal school are to be found on the case law of Article 102, and that this has led to a systematic bias in favour of competitors and against efficient dominant firms, is at best a misdescription of the true position and at worst little more than a slogan by protagonists of minimalist intervention. One commentator has examined the *travaux préparatoires* of Article 102 and suggested that its drafters were mainly concerned with increasing economic efficiency; their intention was not to protect competitors, but their customers[176]. This explains why the language of Article 102 is predominantly focused on exploitative behaviour, such as the imposition of unfair selling prices, terms and conditions and the limitation of markets to the prejudice of consumers, rather than exclusionary abuses[177]. It also tends to refute the widely-held belief in the English-language literature that Article 102 is based on ordoliberal foundations.

(ii) Article 102 protects competition; and competition is for the benefit of consumers

Numerous statements to the effect that Article 102 is actually concerned with the protection of competition rather than the protection of competitors can be found. Many of these come from the Commission (or from Commission officials), but they can also be found in judgments of the EU Courts, particularly in recent years in judgments such as *Deutsche Telekom* and *TeliaSonera* (see below).

A clear statement to this effect was made by Neelie Kroes, the former Commissioner for Competition, when discussing the Commission's review of exclusionary abuses at the annual conference at Fordham in September 2005[178]:

> My own philosophy on this is fairly simple. First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to avoid consumers harm.
>
> I like aggressive competition – including by dominant companies – and I don't care if it may hurt competitors – as long as it ultimately benefits consumers. That is because the main and ultimate objective of Article 102 is to protect consumers, and this does, of course, require the protection of an undistorted competitive process on the market.

That was a statement by one individual, but the same idea is stated more formally at several points in the Commission's *Guidance on Article 102 Enforcement Priorities*[179]. A few examples illustrate the point. In paragraph 5 the Commission says that:

> The Commission . . . will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.

In paragraph 6 it says that:

> [T]he Commission is mindful that *what really matters is protecting an effective competitive process and not simply protecting competitors.* This may well mean that competitors

European Competition Law Annual 2007: A Reformed Approach to Article 82 EC (Hart Publishing, 2008, eds Ehlermann and Marquis).

[176] See Akman 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29(2) OJLS 267.

[177] See 'Exploitative, exclusionary and single market abuses', pp 201–202 below on the distinction between exploitative and exclusionary abuses.

[178] SPEECH/05/537, 23 September 2005; numerous statements to the same effect can be found: see eg speech by Lowe 'Innovation and Regulation of Dominant Firms', 23 September 2008 and speech by Commissioner Alumnia 'Converging paths in unilateral conduct', 3 December 2010, available at www.ec.europa.eu.

[179] OJ [2009] C 45/7.

> who deliver less to consumers in terms of price, choice, quality and innovation will leave the market (emphasis added).

The Commission adds, in paragraph 23, that:

> [T]he Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors *which are considered to be as efficient* as the dominant undertaking (emphasis added).

Sceptics might argue that these are merely statements of the Commission that lack the force of law, and that the *Guidance* simply sets out its enforcement policy: it does not describe the jurisprudence of the EU Courts. However judgments of the Court of Justice themselves stress the importance of protecting the process of competition for the benefit of consumers[180]; and in both *Deutsche Telekom AG v Commission*[181] and *Konkurrensverket v TeliaSonera Sverige AB*[182] it seemed to go out of its way to stress that Article 102 protects only 'as efficient' competitors, and not inefficient ones. At paragraph 177 of its judgment in *Deutsche Telekom* the Court said that:

> Article [102 TFEU] prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect *on its equally efficient actual or potential competitors* (emphasis added)[183].

The same language occurs repeatedly throughout the judgment[184]; the same is true of the *TeliaSonera* judgment[185].

Collectively these various utterances reveal a consistent tendency on the part of both the Court of Justice and the Commission, at least in recent times, to stress competition, efficiency and consumer welfare as the key objectives of Article 102. It is difficult, therefore, to sustain the argument that the EU institutions today have an active policy of protecting competitors rather than the process of competition.

(C) Jurisprudence on the meaning of abuse

As already noted, Article 102 does not contain an exhaustive list of all the practices that can amount to an abuse. Nor is there one particular judgment of the Court of Justice or the General Court that provides an all-encompassing definition of what is meant by abuse. This is understandable: cases on abuse of dominance very much turn on their own particular facts – a point stressed on numerous occasions[186] – and the EU Courts have refrained from broad theoretical statements, preferring instead to decide each case on

[180] See eg (in a case on Article 101 rather than Article 102) the Court of Justice in Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, [2010] 4 CMLR 50, para 63; see also the General Court in Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, [2007] 4 CMLR 919, para 266 and Case T-321/05 *AstraZeneca AB v Commission* [2010] ECR II-000, [2010] 5 CMLR 1585, para 353.

[181] Case C-280/08 P [2010] ECR I-000, [2010] 5 CMLR 1495; note also that the Court's judgment in Case C-7/97 *Oscar Bronner GmbH* [1998] ECR I-7791, [1999] 4 CMLR 112 presaged the 'as efficient competitor' test: see ch 17, 'Is the product to which access is sought indispensable to someone wishing to compete in the downstream market?', pp 701–703.

[182] Case C-52/09 [2011] ECR I-000, [2011] 4 CMLR 982.

[183] Case C-280/08 P [2010] ECR I-000, [2010] 5 CMLR 1495, para 177.

[184] Ibid, paras 203, 234, 236, 240, 252–255 and 259.

[185] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-000, [2011] 4 CMLR 982, paras 31–33, 39–40, 43, 63–64, 67, 70 and 73.

[186] See eg Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331, [2007] 4 CMLR 982, para 64; see also para 68 of the Opinion of Advocate General Jacobs in Case C-53/03 *Syfait* [2005] ECR I-4609, [2005] 5 CMLR 7.

its merits (albeit taking into account earlier judgments). As Philip Lowe, at the time the Director General of DG COMP, said in his remarks on unilateral conduct in Washington in September 2006:

> [J]ust as physicists strive to find the theory that unifies Newtonian physics and quantum mechanics, so economists strive to find the theory that unifies the various aspects of anti-competitive unilateral conduct. And the economists, just as the physicists, have not yet found it[187].

One paragraph that is regularly cited on the meaning of abuse of dominance will be found in the judgment of the Court of Justice in *Hoffmann-La Roche v Commission*[188]. At paragraph 91 it said that abuse is:

> An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

This is an important paragraph, but it does not provide an overarching definition of abuse. For example it does not capture the idea of exploitative, as opposed to exclusionary, practices of a dominant firm, such as charging customers excessively high prices: such conduct cannot be said to *hinder* competition, and yet it can undoubtedly amount to an abuse of a dominant position, as Article 102 explicitly states. However the Court's judgment in *Hoffmann-La Roche* does introduce the idea that dominant undertakings must refrain from 'methods different from those which condition normal competition'. Of course this begs the question: what is 'normal' competition, a vague and indeterminate word[189]. However the idea of 'normal' competition comes more clearly into focus if slightly different language is used: namely that dominant firms should 'compete on the merits', and that competition that is not on the merits is 'abnormal' competition. The EU Courts do use the language of competition on the merits, noticeably so in recent judgments. For example in *Deutsche Telekom v Commission*[190] it said, after quoting from paragraph 91 of *Hoffmann-La Roche*, that a dominant firm must not strengthen its dominant position:

> By using methods other than those which come within the scope of competition on the merits[191].

It used the same language in paragraph 43 of its judgment in *TeliaSonera*[192], as did the General Court in two judgments in 2010, *AstraZeneca AB v Commission*[193] and *Tomra*

[187] See speech of 11 September 2006, available at www.ec.europa.eu.

[188] Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211; for a more recent statement to the same effect see eg Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-000, [2010] 5 CMLR 1495, para 174 and the case law cited therein.

[189] In *National Grid Plc v Gas & Electricity Markets Authority* [2010] EWCA Civ 114, [2010] UKCLR 386, the English Court of Appeal said that 'normal' competition is not 'a sufficiently hard-edged concept that it can be determined as a matter of law'; it is a 'question of expert appreciation': ibid, para 41.

[190] Case C-280/08 P [2010] ECR I-000, [2010] 5 CMLR 1495.

[191] Ibid, para 177; see similarly Case T-201/04 *Microsoft Corpn v Commission* [2007] ECR II-3601, [2007] 5 CMLR 846, para 1070.

[192] Case C-52/09 [2011] ECR I-000, [2011] 4 CMLR 982.

[193] Case T-321/05 [2010] II-ECR 000, [2010] 5 CMLR 1585, paras 354–355, 672 and 824.

Systems ASA v Commission[194]. There are a number of Article 102 cases pending before the EU Courts at the moment[195], and it will be of interest to see if they continue to use the language of 'competition on the merits', and whether they will attempt to explain in greater depth what this term means.

The Commission has given examples of what it considers to be competition on the merits in paragraph 5 of its *Guidance on Article 102 Enforcement Priorities*: offering lower prices, better quality and a wider choice of new and improved goods and services. When compared to business behaviour of this kind, it is not difficult to see that other acts – such as a margin squeeze, the misleading of patent authorities leading to the award of additional patent protection from generic producers of pharmaceutical products and the grant of rebates in return for exclusivity or near-exclusivity – do not amount to competition on the merits, and are therefore capable of being found to be abusive.

(D) Are there or should there be any *per se* rules under Article 102?

The discussion so far suggests that Article 102, as applied today, is concerned to protect consumer welfare; it does not protect competitors as such; and that dominant firms should compete on the merits and refrain from 'abnormal' competition. However, even if this is the case, there remains a problem: can these ideas be expressed in administrable rules capable of being applied by competition authorities, courts, professional advisers and dominant undertakings themselves? More specifically, is it possible to avoid the problem of false positives and false negatives, both of which are undesirable in principle?

One of the most common complaints about Article 102 is that the Commission and the EU Courts apply it in too formalistic a manner. This criticism can be articulated in various ways. One is the argument that some practices appear to be unlawful *per se*, but that *per se* rules are inappropriate for behaviour such as price cutting and refusals to deal which may, depending on the facts of a particular case, be pro-competitive, anti-competitive, or neutral. Another way of voicing the same criticism is to argue that the Commission and the Courts often fail to demonstrate how a particular practice could have significant effects on the market: too often they fail to articulate a convincing theory of economic harm and/or to produce evidence that adverse effects would follow from the practice under investigation.

(i) Are there any per se rules under Article 102?

Historically there has been a tendency on the part of both the Courts and the Commission to apply *per se* rules, at least to some abuses; however the undoubted trend, which the authors of this book expect to continue, is away from a *per se* standard towards effects-based analysis. There is no doubt that language can be found in some judgments that suggests that at least some unilateral practices are *per se* illegal. A few extracts from the General Court's judgment in *Michelin v Commission*, summarising earlier case law, illustrate this[196]:

> [I]t is apparent from a consistent line of decisions that a loyalty rebate, which is granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, is contrary to Article [102 TFEU][197].

[194] Case T-155/06 [2010] ECR II-000, [2011] 4 CMLR 416, paras 206 and 241.

[195] See eg Case T-336/07 *Telefónica v Commission*; Case T-286/09 *Intel v Commission*; Case T-201/11 *Si.mobil v Commission*; Case C-209/10 *Post Danmark A/S v Konkurrencerådet*; Case C-549/10 P *Tomra ASA v Commission*; Case C-109/10 P *Solvay SA v Commission*.

[196] Case T-203/01 [2003] ECR II-4071, [2004] 4 CMLR 923; for comment see Waelbroeck 'Michelin II: A *per-se* rule against rebates by dominant companies?' (2005) 1 Journal of Competition Law and Economics 149.

[197] Case T-203/01 [2003] ECR II-4071, [2004] 4 CMLR 923, para 56.

Later the General Court says that:

> [I]t may be inferred generally from the case law that any loyalty-inducing rebate system applied by an undertaking in a dominant position has foreclosure effects prohibited by Article [102 TFEU][198].

Later again the General Court says that:

> [D]iscounts granted by an undertaking in a dominant position must be based on a countervailing advantage which may be economically justified[199].

If these statements are correct, then it would seem that there are, indeed, *per se* rules under Article 102, at least for some types of rebates and discounts. In particular it is noticeable that the General Court says here that foreclosure effects can be *inferred*: that is to say that they do not need to be proved; in the language of Article 101(1), this would suggest that a loyalty-inducing rebate system abuses *by object*, so that there is no need to prove effects.

The General Court has repeated this kind of language on several occasions: recent examples are its judgments in *Solvay v Commission*[200] and *ICI v Commission*[201]. A further illustration can be found in *Tomra Systems ASA v Commission*[202] in which the General Court seemed to regard the rebates and exclusive agreements under consideration as unlawful *per se*[203]; however the General Court went on to accept a finding of the Commission that Tomra's practices were capable of having anti-competitive effects[204], suggesting an ambiguity on its part as to the desirability of *per se* rules in this area.

(ii) Recent case law and decisions do require effects analysis

Judgments of the kind just discussed make it difficult to say that the Courts have never tolerated *per se* rules under Article 102. However, as noted earlier in this chapter, there is an increasing intellectual consensus against the application of *per se* rules in the law and practice on unilateral behaviour; the Commission in its *Guidance on Article 102 Enforcement Priorities* considers that it should concentrate its enforcement activity on practices likely to have seriously anti-competitive effects on the market; and, in its recent decisions under Article 102, the Commission has sought evidence of anti-competitive effects, even where it considered that it was not legally obliged to do so. For example in *Microsoft*[205] the Commission decided that Microsoft was guilty of tying the provision of its Windows Media Player to its operating software only after demonstrating that the tying would restrict competition[206]. Similarly, in *Telefónica*[207] the Commission noted that, although it was not formally obliged to do so, it had demonstrated that Telefónica's pricing practices would harm competition and consumers[208]. The Commission adopted the same approach in its *Intel* decision[209]. When

[198] Ibid, para 65.

[199] Ibid, para 100.

[200] Case T-57/01 [2009] ECR II-4621.

[201] Case T-66/01 [2010] ECR II-000, [2011] 4 CMLR 162.

[202] Case T-155/06 [2010] ECR II-000, [2011] 4 CMLR 416, on appeal to the Court of Justice, Case C-549/10 P, not yet decided.

[203] Ibid, para 208–210.

[204] Commission decision of 29 March 2006, paras 331–346, upheld on appeal Case T-155/06 *Tomra Systems ASA v Commission* [2010] ECR II-000, [2011] 4 CMLR 416, paras 215–230.

[205] Commission decision of 24 March 2004.

[206] Ibid, paras 835–954, upheld on appeal to the General Court, Case T-201/04 *Microsoft Corpn v Commission* [2007] ECR II-3601, [2007] 5 CMLR 846, paras 1031–1090.

[207] Commission decision of 4 July 2007, on appeal to the General Court, Case T-336/07 *Telefónica v Commission*, not yet decided and Case T-398/07 *Spain v Commission*, not yet decided.

[208] Ibid, paras 543–618.

[209] Commission decision of 13 May 2009, paras 1597–1616; the Commission carried out an extensive 'as efficient competitor' analysis in paras 1002–1576 of its decision; this decision is on appeal Case T-286/09 *Intel v Commission*, not yet decided.

adopting its *Guidance on Article 102 Enforcement Priorities* the Commission stressed that it now adopts an effects-based approach to its decision-making under Article 102[210]. Of course the Commission does not establish what the law is (although it can help to influence it): the law is determined by the EU Courts. As pointed out, some judgments have applied Article 102 in a formalistic manner. However it is noticeable that other judgments have stressed the need for a demonstration of anti-competitive effects. For example in two recent judgments, *Deutsche Telekom v Commission*[211] and in *TeliaSonera*[212], the Court of Justice stated that potential anti-competitive effects must be demonstrated before a margin squeeze is condemned as unlawful[213]. For example in *TeliaSonera* it said that:

> in order to establish whether [a margin squeeze] is abusive, that practice must have an anti-competitive effect on the market.[213a]

It has been noted above that these same judgments stressed that Article 102 protects 'as efficient' competitors, rather than competitors as such; and that they both invoked the idea that dominant undertakings should compete 'on the merits'. These ideas, together with the insistence that anti-competitive effects should be demonstrated in these cases, are consistent with the position outlined in the Commission's *Guidance on Article 102 Enforcement Priorities*. It is for these reasons that the authors of this book consider that the trend towards effects analysis under Article 102 is clearly established, both on the part of the Courts and the Commission, and is unlikely to be reversed. It may be that the task of 'improving' the application of Article 102 remains 'work-in-progress', but the direction of travel seems to be clear and consistent.

(E) Exploitative, exclusionary and single market abuses

When reviewing the decisional practice of the Commission and the jurisprudence of the EU Courts, it is possible to identify at least two, and perhaps three, types of abuse. The first consists of **exploitative abuses**. The most obvious objection to a monopolist is that it is in a position to reduce output and increase the price of its products above the competitive level, thereby exploiting customers[214]. However in the absence of barriers to entry a monopolist earning monopoly profits would be expected to attract new entrants to the market: in other words exploitation of a monopoly position may in itself increase competition over time.

Of greater long-term significance is behaviour by a dominant firm designed to, or which might have the effect of, preventing the development of competition, and much of the case law of the EU Courts and the decisional practice of the Commission has been concerned with **exclusionary abuses** of this kind. The Commission's *Guidance on Article 102 Enforcement Priorities* recognises the distinction between exploitative and exclusionary abuses, and paragraph 7 explicitly states that it is limited to exclusionary conduct. Neelie Kroes, the former Commissioner for Competition, said in September 2005 that:

> We think that it is sound for our enforcement policy to give priority to so-called exclusionary abuses[215].

[210] Commission Press Release IP/08/1877, 3 December 2008.

[211] Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-000, [2010] 5 CMLR 1495.

[212] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-000, [2011] 4 CMLR 982.

[213] Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-000, [2010] 5 CMLR 1495, paras 250–261; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-000, [2011] 4 CMLR 982, paras 60–77.

[213a] Ibid, para 64.

[214] See the analysis of price theory in ch 1, 'The Theory of Competition', pp 3–7.

[215] SPEECH/05/537, 23 September 2005, available at www.ec.europa.eu.

In order to illustrate the kind of behaviour which falls within the mischief of Article 102 it is therefore helpful to consider exploitative and exclusionary abuses separately, although this is not to suggest that there is a rigid demarcation between these two categories: the same behaviour may exhibit both characteristics. For example a dominant firm that refuses to supply may have an exploitative purpose (for example where it is threatened or effected in order to make a customer pay a higher price) and/or an exclusionary one (where it is intended to remove a competitor from the market).

A possible third category of cases under Article 102 is concerned with **single market abuses**. For example excessive pricing, as well as being exploitative, may be a ploy to impede parallel imports and to limit intra-brand competition, as in the case of *British Leyland v Commission*[216].

(F) Exploitative abuses

It is clear from its very wording that Article 102 is capable of application to exploitative behaviour: Article 102(2)(a) gives as an example of an abuse the imposition of unfair purchase or selling prices or other unfair trading conditions. Exploitative pricing practices are considered further in chapter 18[217]. There have also been cases on the activities of collecting societies in which their rules have been scrutinised in order to ensure that they do not act in a way that unfairly exploits the owner of the copyright or the would-be licensee of it; collecting societies are considered in chapter 19[218]. Unfair trading conditions were condemned by the Commission in *AAMS*[219] and in *1998 Football World Cup*[220], where it considered that the arrangements for the sale of tickets were unfair to consumers resident outside France.

In its colloquial sense, exploitation suggests the earning of monopoly profits at the expense of the customer. One of the other 'benefits' of the monopolist is the 'quiet life' and the freedom from the need to innovate and improve efficiency in order to keep up with or ahead of competitors[221]. This raises the question whether inefficiency or inertia could be considered to be an abuse under Article 102. Article 102(2)(b) gives as an example of abuse the limitation of production, markets or technical development to the prejudice of the consumer, and in *British Telecommunications*[222] the Commission objected to behaviour on BT's part which, among other things, meant that the possible use of new technology was impeded. This is dealt with in chapter 6[223].

(G) Exclusionary abuses

Article 102 has most frequently been applied to behaviour which the Commission and EU Courts consider to be exclusionary. The Commission's *Guidance on Article 102 Enforcement Priorities* contains useful insights into the considerations that it considers

[216] Case 226/84 [1986] ECR 3263, [1987] 1 CMLR 185; see 'Abuses that are harmful to the single market', pp 205–206 below and ch 18, 'Pricing Practices That are Harmful to the Single Market', pp 764–766.

[217] See ch 18, 'Exploitative Pricing Practices', pp 718–728.

[218] See ch 19, 'Collecting societies', pp 803–804.

[219] OJ [1998] L 252/47, [1998] 5 CMLR 786, paras 33–46, upheld on appeal to the General Court Case T-139/98 *Amministratzione Autonoma dei Monopoli di Stato v Commission* [2001] ECR II-3413, [2002] 4 CMLR 302, paras 73–80.

[220] OJ [2000] L 5/55, [2000] 4 CMLR 963, para 91; see also paras 99–100.

[221] See ch 1, 'The harmful effects of monopoly', pp 6–7.

[222] OJ [1982] L 360/36, [1983] 1 CMLR 457, upheld on appeal Case 41/83 *Italy v Commission* [1985] ECR 873, [1985] 2 CMLR 368.

[223] Ch 6, 'Manifest inability to meet demand', pp 231–232.

to be important when deciding whether to investigate a possible exclusionary abuse; however the reader is reminded that this document does not contain a statement of the law, but rather an indication of the Commission's enforcement priorities.

(i) *Continental Can v Commission*[224]

The Court of Justice established in *Continental Can v Commission* that Article 102 was capable of application to exclusionary abuses as well as exploitative ones. The specific question before the Court was whether mergers could be prohibited under Article 102. One argument against this was that Article 102 was concerned only with the direct exploitation of consumers and not with the more indirect adverse effects that might be produced by harming the competitive process[225]; according to this argument structural changes in the market could not be caught. The Court of Justice rejected this. It was not possible to draw a distinction between direct and indirect effects on the market; instead it was necessary to interpret Article 102 in the light of the spirit of the Treaty generally. Article 3(3) TEU provides that the EU shall establish an internal market which, as explained in Protocol 27 to the Treaties, includes 'a system ensuring that competition is not distorted'[226]. Articles 101 and 102 had to be interpreted with this aim in mind: it would be futile to prevent agreements which distort competition under Article 101 but then to allow mergers which resulted in the elimination of competition. The adoption in 1989 of the EUMR means that Article 102 is now largely redundant in respect of mergers[227]; however *Continental Can* remains immensely important to the law on Article 102, since it confirmed that it could be applied to exclusionary abuses as well as to exploitative ones.

(ii) Causation

One of the arguments raised by Continental Can was that, even if mergers were caught by Article 102, it had not *used* its market power to effect the merger in question; thus there was a break in the chain of causation between its position on the market and the behaviour alleged to amount to an abuse. It had not, for example, threatened to drive the target firm out of the market by predatory price cutting if it refused to merge. The Court of Justice rejected this argument as well. It was possible to abuse a dominant position without actually exercising or relying on market power. It was an abuse simply for a dominant firm to strengthen its position and substantially to eliminate competition by taking over a rival. Abuse is an objective concept, and the conduct of an undertaking may be regarded as abusive in the absence of any fault and irrespective of the intention of the dominant undertaking. The scope of Article 102 would obviously be reduced if the Commission could apply it only to practices which were attributable to the exercise of

[224] Case 6/72 *Europemballage Corpn and Continental Can Co Inc Commission* [1973] ECR 215, [1973] CMLR 199; the impact of the judgment is discussed in Vogelenzang 'Abuse of a Dominant Position in Article 86: the Problem of Causality and Some Applications' (1976) 13 CML Rev 61.

[225] See eg Joliet *Monopolisation and Abuse of Dominance* (Martinus Nijhoff, 1970); it was also argued in *Continental Can* that mergers were not caught by Article 102 as Article 66(1) of the former ECSC Treaty dealt with them explicitly so that, by inference, the EC Treaty (now TFEU), which was silent on the issue, could not apply to them; and that anyway behaviour could not be abusive unless it was attributable to and caused by the use of the position of dominance (see below).

[226] This objective was previously contained in Article 3(1)(g) of the EC Treaty and, at the time of the *Continental Can* judgment, in Article 3(f) of the EEC Treaty: see ch 2, 'The competition chapter in the TFEU', pp 50–51.

[227] See ch 21 n 127, p 845.

market power that a dominant undertaking enjoys[228]. In *Hoffmann-La Roche* the Court of Justice said that:

> The interpretation suggested by the applicant that an abuse implies that the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted[229].

In *Tetra Pak II*[230] the Court of Justice stated at paragraph 27 of its judgment that 'application of Article [102] presupposes a link between the dominant position and the alleged abusive conduct'. This may appear to contradict the causation point in *Continental Can*. However, the issue in *Tetra Pak* was whether it is possible for the abuse to take place in a market different from the one in which an undertaking is dominant[231]; the Court was not concerned with the issue of whether the market power had to have been used in order to bring about the abuse.

It is interesting to note in passing that some systems of law – for example Australia and New Zealand – do require a causal connection between the position of dominance and the abusive behaviour: the majority judgment of the UK Privy Council in *Carter Holt Harvey Building Products Group Ltd v The Commerce Commission*[232] contains an interesting discussion of the case law in those two countries. Clearly such an approach will result in fewer findings of abuse; however the *Continental Can* judgment is clear that causation is not required under Article 102. The General Court relied on the judgments of the Court of Justice in *Continental Can* and *Hoffmann-La Roche* in *AstraZeneca AB v Commission*[233], where it said that 'an abuse of a dominant position does not necessarily have to consist in the use of the economic power conferred by the dominant position'[234].

(iii) Horizontal and vertical foreclosure

The concern about exclusionary abuses is that a dominant firm is able to behave in a way that forecloses competitors in an anti-competitive way[235] from entering the market, or prevents existing competitors from growing within it. The foreclosure might occur 'upstream' or 'downstream' in the market. Suppose that a firm is vertically integrated: it extracts a raw material, widgets, from its widget mines and processes widgets into widget dioxide: the upstream market is raw widgets, the downstream one is widget dioxide. Harm to competition could occur at either level of the market:

- **horizontal foreclosure**[236] arises where the dominant firm takes action to exclude a competitor that supplies widgets.

[228] See Vogelenzang 'Abuse of a Dominant Position in Article [102]: the Problem of Causality and Some Applications' (1976) 13 CML Rev 61; the Commission relied specifically on this aspect of the *Continental Can* judgment in para 46 of its decision in *Tetra Pak 1 (BTG Licence)* OJ [1988] L 272/27, [1988] 4 CMLR 881.

[229] Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211, at para 91; note the suggestion by Advocate General Reischl at para 7c of his Opinion in *Hoffmann-La Roche* that causation might be treated differently according to the nature of the abuse in question.

[230] Case C-333/94 P *Tetra Pak International v Commission* [1996] ECR I-5951, [1997] 4 CMLR 662.

[231] See 'Horizontal and vertical foreclosure', pp 204–205 below.

[232] [2004] UKPC 37.

[233] Case T-321/05 [2010] ECR II-000, [2010] 5 CMLR 1585.

[234] Ibid, para 354.

[235] If a competitor is foreclosed by the superior efficiency of the dominant firm, the foreclosure would not be anti-competitive or abusive.

[236] The language of 'horizontal' and 'vertical' foreclosure is taken from paras 69–73 of DG COMP's *Discussion paper on the application of Article [102] of the Treaty to exclusionary abuses*; the Commission's *Guidance on Article 102 Enforcement Priorities* does not use the same language, while the Commission's *Guidelines on the assessment of non-horizontal mergers* OJ [2008] C 265/6, paras 30–59, distinguish between 'customer' and 'input' foreclosure, which are synonymous for horizontal and vertical foreclosure respectively.

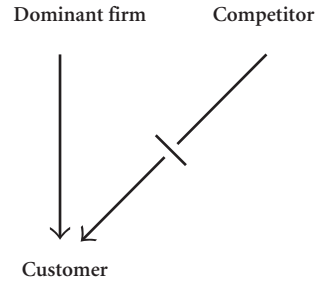

Fig. 5.1 Horizontal foreclosure

- **vertical foreclosure** arises where the dominant firm takes action to exclude a competitor in the downstream market for widget dioxide.

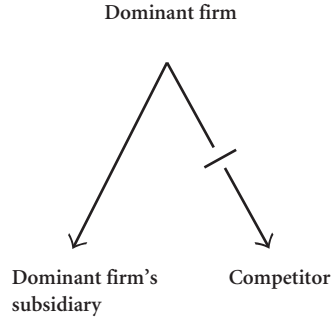

Fig. 5.2 Vertical foreclosure

Many exclusionary abuses are concerned with horizontal foreclosure: for example exclusive purchasing agreements, rebates and predatory pricing. Others however, for example refusal to supply and margin squeezing, are predominantly[237] concerned about harm to competition in the downstream market.

(iv) The dominant position, the abuse and the effects of the abuse may be in different markets

It is not necessary for the dominance, the abuse and the effects of the abuse all to be in the same market. In a simple case, X may be dominant in the market for widgets and charge high prices to exploit its customers or drop its prices in order to eliminate competitors from the widget market: clearly Article 102 can apply to this behaviour. However more complex situations may occur. X might be present on both the widget market and the downstream widget dioxide market, and may act on one of those markets in order to derive a benefit in the other: as we have just seen, there may be a horizontal or a vertical foreclosure of the market.

Some examples will illustrate the range of possibilities.

[237] A refusal to supply may sometimes have a horizontal effect: see ch 17, 'Horizontal foreclosure', p 708.

(A) Michelin v Commission[238]

Michelin was dominant in the market for replacement tyres and committed various abuses in order to protect its position in that market.

(B) Commercial Solvents[239]

Commercial Solvents supplied a raw material in which it was dominant to a customer which used it to make an anti-tuberculosis drug. The raw material was the upstream product; the drug was the downstream product. Commercial Solvents decided to produce the drug itself and ceased to supply the customer. Commercial Solvents was found to have abused its dominant position: it refused to supply the raw material in relation to which it was dominant, but this was done to benefit its position in the drug market, where it was not yet present at all.

(C) De Poste-La Poste[240]

The Belgian Post Office, dominant in the market for the delivery of 'normal' letters, abused its dominant position in that market in order to eliminate a competitor in the neighbouring market for business-to-business mail services.

(D) Télémarketing[241]

The dominant undertaking, a broadcasting authority with a statutory monopoly, decided to enter the downstream telemarketing sector. It ceased to supply broadcasting services to the only other telemarketer, thereby eliminating it from the market and effectively reserving the telemarketing business to itself.

(E) Sealink/B&I – Holyhead: Interim Measures[242]

Sealink, which owned and operated the port at Holyhead, was considered to have committed an abuse on the market for the provision of port facilities for passenger and ferry services, in which it was dominant, by structuring the sailing schedules there to the advantage of its own downstream ferry operations and to the disadvantage of its competitor at that level of the market, B&I. The same point can be noted in *Sea Containers v Stena Sealink – Interim Measures*[243].

(F) British Gypsum v Commission[244]

British Gypsum was dominant in the plasterboard market, but not dominant in the neighbouring plaster market (these markets were horizontally, rather than vertically, related). Among its abuses, British Gypsum gave priority treatment to customers for plaster who remained loyal to it in relation to plasterboard. This differs from the above examples, since in *British Gypsum* the abuse was committed in the non-dominated market in order to protect British Gypsum's position in its dominated market.

[238] Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282.
[239] Cases 6/73 etc [1974] ECR 223, [1974] 1 CMLR 309.
[240] OJ [2002] L 61/32, [2002] 4 CMLR 1426, paras 36–51.
[241] Case 311/84 *Centre Belge d'Etudes de Marché Télémarketing v CTL* [1985] ECR 3261, [1986] 2 CMLR 558.
[242] [1992] 5 CMLR 255.
[243] OJ [1994] L 15/8, [1995] 4 CMLR 84.
[244] Case C-310/93 P [1995] ECR I-865, [1997] 4 CMLR 238.

(G) Tetra Pak II[245]

The Court of Justice concluded that Tetra Pak had infringed Article 102 by tying practices and predatory pricing in the market for non-aseptic liquid repackaging machinery and non-aseptic cartons. It was not dominant in this market, but the abusive conduct was intended to benefit its position in that market. Tetra Pak was dominant in the (horizontally) associated market for aseptic machinery and cartons. The Court of Justice, after citing *Commercial Solvents*, *Télémarketing* and *British Gypsum*, held that 'in special circumstances'[246], there could be an abuse of a dominant position 'where conduct on a market distinct from the dominated market produces effects on that distinct market'[247]. The Court of Justice then went on to describe the 'close associative links' between the aseptic and non-aseptic markets which amounted to sufficiently special circumstances to engage Article 102: for example Tetra Pak had or could have customers in both markets, it could rely on having a favoured status in the non-dominated market because of its position in the dominated one, and it could concentrate its efforts on the non-aseptic market independently of other economic operators because of its position in relation to the aseptic market. This case extends the scope of application of Article 102 beyond, even, *British Gypsum*.

A table may help to explain the propositions set out in this paragraph.

5.3 Dominance, abuse and neighbouring markets

Case	Market A	Market B
Michelin v Commission	Dominance Abuse Benefit	
Commercial Solvents *Télélemarketing* *De Poste-La Poste* *Sealink decisions*	Dominance Abuse	Benefit
British Gypsum	Dominance Benefit	Abuse
Tetra Pak v Commission	Dominance	Abuse Benefit

[245] Case C-333/94 P [1996] ECR I-5951, [1997] 4 CMLR 662; the Court of Justice's approach to the issue of abuse was different from that of the Commission's in its decision.

[246] Case C-333/94 P [1996] ECR I-5951, [1997] 4 CMLR 662, paras 25–31.

[247] Ibid, para 27.

Many of the Commission's decisions under Article 102 in recent years have involved two rather than one markets[248]. Obvious examples are *Deutsche Telekom v Commission*[249], *Microsoft v Commission*[250] and *Konkurrensverket v TeliaSonera*[251]; in the latter judgment the Court said that Article 102 gives no explicit guidance as to the market in which the abuse takes place: each case must be decided in the light of its specific circumstances[252]. Footnote 39 of the Commission's *Guidance on Article 102 Enforcement Priorities* says that the Commission may pursue predatory practices by dominant firms on markets on which they are not yet dominant.

The Commission could presumably apply the reasoning just described in the context of neighbouring product markets to dominance, abuse and benefits in neighbouring geographical markets[253].

(v) Effects analysis

It was pointed out above that there has been much criticism that the law and practice of Article 102 has been insufficiently aligned with sound economic principles. In recent years there have been several occasions on which the Commission has accepted that, where unilateral behaviour of a dominant firm is in issue, something more than proving the existence of that behaviour is needed to determine whether it is abusive[254]. There is much to be said for condemning alleged exclusionary conduct as abusive only where it can convincingly be demonstrated that there have been or will be adverse effects on the market[255]. Judgments such as *Deutsche Telekom* and *TeliaSonera* endorse this approach.

An important issue to consider is the standard of proof required: if every case were to require the demonstration of anti-competitive effects, to a high standard of proof, the enforcement of Article 102 might become all but impossible, which would bring one back to the problem of false negatives (as opposed to false positives)[256]. The text that follows will consider how the Commission seeks to deploy a realistic effects analysis when deciding which cases to bring under Article 102.

The Commission's *Guidance on Article 102 Enforcement Priorities* explains, at paragraph 19, that the aim of its enforcement activity in relation to exclusionary abuses is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way: the concern is that such behaviour would have an adverse effect on consumer welfare, whether in the form of higher price levels than would otherwise have prevailed, or in some other form such as limiting the quality of goods or services or reducing consumer choice. 'Anti-competitive foreclosure' differs from 'mere foreclosure', which occurs where the dominant undertaking wins business on the merits as a result of its superior efficiency. Paragraph 20 of the *Guidance* sets out a series of factors which the Commission will take into account when deciding whether to intervene in relation to an alleged exclusionary abuse under Article 102: these factors will enable it to determine whether the conduct in question is likely to lead to an anti-competitive foreclosure

[248] Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008, paras 127–135.

[249] Case C-280/08 P [2010] ECR I-000, [2010] 5 CMLR 1495.

[250] Case T-201/04 [2007] ECR II-3601, [2007] 5 CMLR 846.

[251] Case C-52/09 [2011] ECR I-000, [2011] 4 CMLR 982.

[252] Ibid, paras 84–89.

[253] See eg *Interbrew* in the Commission's XXVIth *Report on Competition Policy* (1996), point 53, where Interbrew was considered to have acted in non-dominated geographical markets to protect its dominant position in Belgium.

[254] See 'Recent case law and decisions do require effects analysis', pp 200–201 above.

[255] Ibid.

[256] See 'False positives and false negatives', pp 193–194 above.

of the market. The Commission adds that it would want there to be cogent and compelling evidence before it would intervene. The factors include:

- **the position of the dominant undertaking**: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure
- **the conditions on the relevant market**: these include the conditions of entry and expansion, such as the existence of economies of scale and/or scope and network effects
- **the position of the dominant undertaking's competitors**: even a fairly small competitor may play a significant competitive role where it is the closest competitor to the dominant undertaking, is particularly innovative or has the reputation of systematically cutting prices
- **the position of the customers or input suppliers**: this may include the possible selectivity of the conduct in question, for example where the dominant undertaking applies the practice only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors, thereby enhancing the likelihood of anti-competitive foreclosure
- **the extent of the allegedly abusive conduct**: in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely anti-competitive foreclosure effect
- **possible evidence of actual foreclosure**: where the conduct in question has already been taking place, there may be actual evidence of the dominant undertaking's market share having increased, or of competitors having exited the market; and
- **direct evidence of any exclusionary strategy**: there may be direct evidence – for example internal documents – of a strategy to exclude competitors, and this may be helpful in interpreting the dominant undertaking's conduct.

Paragraph 21 of the *Guidance* explains that, when pursuing a case, the Commission will develop its analysis, that is to say whether particular conduct is likely to have an anti-competitive foreclosure effect, using the general factors set out in paragraph 20, and the specific factors set out in later sections of the *Guidance*. This is a very important point to note. Later paragraphs of the *Guidance* discuss particular issues that are relevant to the assessment of the likelihood of anti-competitive foreclosure arising from individual practices. These specific points should always be understood within the broader context of the general factors discussed in paragraph 20 of the *Guidance*: they are a complement to, and not a substitute for, that paragraph.

The effects analysis described in the *Guidance* can be expected to have a positive influence on the future application of Article 102 to exclusionary behaviour. One must assume that the Commission will, in practice, apply its *Guidance* when deciding which cases to bring. This will mean that future cases brought by the Commission will concern conduct which it considers to have had, or to be likely to have, a significant anti-competitive foreclosing effect. It remains to be seen whether, over time, the EU Courts will follow the lead suggested by the Commission for a more detailed effects analysis under Article 102. What will also be interesting to observe is the extent to which the *Guidance* in practice has an influence on the decisions reached by national competition authorities and national courts. While they, of course, are bound by the jurisprudence of the EU Courts, it is not impossible to imagine that there might be occasions when, faced with an 'old' judgment lacking in sophisticated economic analysis, and analysis in the Commission's

Guidance that seems to be more convincing, the *Guidance* will play some part in the final decision[257].

(vi) Examples of exclusionary abuses

The Commission and the EU Courts have condemned many practices which could have anti-competitive effects. These will be examined in detail in chapters 17 to 19, which will consider in turn the following abuses:

- exclusive dealing agreements[258]
- tying[259]
- refusals to supply[260]
- miscellaneous other non-pricing abuses[261]
- rebates and other practices having effects similar to exclusive dealing agreements[262]
- bundling[263]
- predatory pricing[264]
- margin squeezing[265]
- price discrimination[266]
- refusals to license intellectual property rights or to provide proprietary information[267].

(H) Abuses that are harmful to the single market

As one would expect, abuses that are harmful to the single market are condemned[268]. Examples will be found later in this book of non-pricing[269] and pricing[270] abuses in which this was an obvious concern.

9. Defences

The term 'abuse' bears great intellectual strain, particularly as there is no equivalent in Article 102 to Article 101(3) whereby an agreement that restricts competition can nevertheless be permitted because it produces economic efficiencies. Over a number of years the Commission and the EU Courts came to recognise that there was some conduct which, although presumptively abusive, in fact did not amount to a violation of Article 102 because

[257] See eg in the UK *Alleged abuse of a dominant position by Flybe Limited* OFT decision of 5 November 2010, OFT 1286 (relying on the *Guidance* in support of its approach to predatory pricing).
[258] Ch 17, 'Exclusive Dealing Agreements', pp 682–688. [259] Ch 17, 'Tying', pp 688–696.
[260] Ch 17, 'Refusal to Supply', pp 697–711.
[261] Ch 17, 'Miscellaneous Other Non-Pricing Abuses', pp 712–714.
[262] Ch 18, 'Rebates That Have Effects Similar to Exclusive Dealing Agreements', pp 728–737.
[263] Ch 18, 'Bundling', pp 737–739. [264] Ch 18, 'Predatory Pricing', pp 739–754.
[265] Ch 18, 'Margin Squeezing', pp 754–759. [266] Ch 18, 'Price Discrimination', pp 759–764.
[267] Ch 19, 'Article 102 and Intellectual Property Rights', pp 796–803.
[268] See ch 1, 'The single market imperative', pp 23–24 and ch 2, 'The single market imperative', p 51.
[269] See ch 17, 'Non-Pricing Abuses That are Harmful to the Internal Market', pp 711–712.
[270] See ch 18, 'Pricing Practices That are Harmful to the Single Market', pp 764–766.

it had an 'objective justification'[271]. For example in *Sot. Lélos*[272] the Court of Justice stated that the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked; however the Court added that such behaviour cannot be allowed if its purpose is to strengthen the dominant position and thereby abuse it. In its *Guidance on Article 102 Enforcement Priorities*, from paragraphs 28 to 31, the Commission says that it will take into account claims put forward by a dominant undertaking that its behaviour is objectively necessary or produces substantial efficiencies that outweigh any anti-competitive effects on consumers.

This section will examine what is meant by objective justification; it will briefly consider the question of whether a defence can be based on the principle of non-interference with property rights; and will conclude with a discussion of the burden of proving a defence.

(A) **Objective justification**[273]

The language of objective justification can be found in many judgments and decisions, coupled with the proposition that, to be objectively justified, the conduct in question must be proportionate. For example in *Centre Belge d'Etudes de Marché Télémarketing v CLT*[274] the Court of Justice held that an undertaking in a dominant position in television broadcasting which entrusted 'telemarketing' to its own subsidiary, thereby excluding other firms from entering this market, would be guilty of an abuse where there was no objective necessity for such behaviour[275]. The principles of objective justification and proportionality have been invoked on other occasions[276] and are firmly part of Article 102 analysis.

At paragraph 29 of the *Guidance on Article 102 Enforcement Priorities* the Commission says that a claim to objective necessity would have to be based on factors external to the dominant undertaking: for example, health or safety considerations. The Commission points out that it is normally the task of the public authorities to set and enforce public health and safety standards: this is based on judgments of the General Court in the *Hilti*[277] and *Tetra Pak II*[278] cases.

At paragraph 30 of the *Guidance* the Commission says that it will also consider arguments to the effect that conduct which apparently forecloses competitors can be defended

[271] For an interesting discussion of the concept of objective justification see the Opinion of Advocate General Jacobs in Case C-53/03 *Syfait* [2005] ECR I-4609, [2005] 5 CMLR 7, paras 71–72.

[272] Cases C-468/06 etc *Sot. Lélos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proionton* [2008] ECR I-7139, [2008] 5 CMLR 1382, para 50.

[273] For discussion see Loewenthal 'The Defence of "Objective Justification" in the Application of Article 82 EC' (2005) 28(4) World Competition 455; Albors-Llorens 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC' (2007) 44 CML Rev 1727; Rousseva 'Objective Justification and Article 82 EC in the Era of Modernisation' in *EC Competition Law: A Critical Assessment* (Hart Publishing, 2007, eds Amato and Ehlermann).

[274] Case 311/84 [1985] ECR 3261, [1986] 2 CMLR 558.

[275] Ibid, para 26; see also Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331, [2007] 4 CMLR 982, para 69.

[276] See eg *BBI/Boosey and Hawkes* OJ [1987] L 286/36, [1988] 4 CMLR 67; *BPB Industries plc* OJ [1989] L 10/50, [1990] 4 CMLR 464, para 132, upheld on appeal Case T-65/89 *BPB Industries plc and British Gypsum v Commission* [1993] ECR II-389, [1993] 5 CMLR 32 and further on appeal to the Court of Justice Case C-310/93 P *BPB Industries plc and British Gypsum v Commission* [1995] ECR I-865, [1997] 4 CMLR 238; *Napier Brown – British Sugar* OJ [1988] L 284/41, [1990] 4 CMLR 196, paras 64 and 70; *NDC Health/IMS Health: Interim Measures* OJ [2002] L 59/18, [2002] 4 CMLR 111, paras 167–174; *Portuguese Airports* OJ [1999] L 69/31, [1999] 5 CMLR 103, para 29; *Prokent-Tomra* Commission decision of 29 March 2006, paras 347–390.

[277] Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439, [1992] 14 CMLR 16, paras 102–119.

[278] Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755, [1997] 4 CMLR 726, paras 136–140, upheld on appeal to the Court of Justice Case C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951, [1997] 4 CMLR 662, para 37.

on efficiency grounds. The Commission explains that four cumulative conditions would have to be fulfilled before an efficiency 'defence' could succeed:

- the efficiencies would have to be realised, or be likely to be realised, as a result of the conduct in question
- the conduct would have to be indispensable to the realisation of those efficiencies
- the efficiencies would have to outweigh any negative effects on competition and consumer welfare in the affected markets; and
- the conduct must not eliminate all effective competition.

In its decision in *Wanadoo de España v Telefónica*[279] the Commission included a lengthy discussion of possible defences including, from paragraphs 641 to 663, efficiencies, which it rejected on the facts of the case. In the opinion of the authors the Commission's approach seems reasonable, in that efficiency considerations can be taken into account under Article 101(3)[280] and in EU merger control[281]: it would seem odd if efficiency had no part to play in Article 102 analysis.

(B) **Abuse of dominance and property rights**

In a number of cases under Article 102 a particular issue has been the extent to which a dominant undertaking could be held to have acted abusively in relation to the way in which it chose to use, or not to use, its own property. Article 345 TFEU provides that:

> The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

If it is possible for the Commission, under Article 102, to order the owner, for example, of an essential facility to provide access to it to a third party[282], this clearly affects that undertaking's property rights; but has it affected them to the point where the rules on property ownership in Member States have been prejudiced? The issue arose in relation to *Frankfurt Airport*[283] where the Commission required FAG, the owner and operator of that airport, to allow competition in the market for ground-handling services there. The Commission rejected the argument that this would interfere with the property rights of FAG. The Commission noted that the Court of Justice in *Hauer v Land Rheinland Pfalz*[284] had acknowledged the existence of a fundamental right to property in the EU legal order; however it had also noted that the constitutions of the Member States recognised that the exercise of property rights may be restricted in the public interest. In the *Frankfurt Airport* decision the Commission said that it followed from the *Hauer* judgment that the competition rules in the Treaty may be considered to constitute restrictions on the right of property which correspond to objectives of general interest pursued by the EU[285]. In the Commission's view, allowing the provision of ground-handling services within the airport would not constitute an excessive or intolerable interference

[279] Commission decision of 4 July 2007, on appeal to the General Court Case T-336/07 *Telefónica v Commission*, not yet decided and Case T-398/07 *Spain v Commission*, not yet decided.

[280] See ch 4, 'First condition of Article 101(3): an improvement in the production or distribution of goods or in technical or economic progress', pp 155–162.

[281] See ch 21, 'Efficiencies', pp 874–876.

[282] See ch 17, 'Refusal to Supply', pp 697–708.

[283] *Flughafen Frankfurt* OJ [1998] L 72/30, [1998] 4 CMLR 779.

[284] Case 44/79 [1979] ECR 3727, [1980] 3 CMLR 42, para 17.

[285] OJ [1998] L 72/30, [1998] 4 CMLR 779, para 90.

with FAG's rights as owner of the airport; it would not interfere with FAG's own ability to provide these services, and FAG could charge a reasonable fee to third parties for their right to do so.

In his Opinion in *Masterfoods Ltd v HB Ice Cream Ltd*[286] Advocate General Cosmas had no doubt that:

> it is perfectly comprehensible for restrictions to be placed on the right to property ownership pursuant to Articles [101 and 102 TFEU], to the degree to which they might be necessary to protect competition[287].

In *Van den Bergh Foods Ltd v Commission*[288] the General Court rejected an argument that the Commission's decision in *Van den Bergh Foods Ltd*[289], requiring that space be made available in Van den Bergh's freezer cabinets for the ice-cream of competitors, amounted to a disproportionate interference with its property rights[290]. In *Microsoft v Commission* the General Court rejected the argument that Microsoft was entitled to refuse to supply interoperability information to competitors because it was protected by intellectual property rights: this would be inconsistent with the rule, derived from the *Magill* and *IMS Health* cases, that, in exceptional circumstances, there can be an obligation to grant licences to third parties[291].

(C) Burden of proof

In *Microsoft v Commission*[292] the General Court stated that:

> it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification cannot be accepted[293].

The General Court went on to state that it was not sufficient for the dominant undertaking to put forward 'vague, general and theoretical arguments' in support of its objective justification[294]. Paragraph 31 of the Commission's *Guidance on Article 102 Enforcement Priorities* adopts the same approach to the burden of proof.

[286] Case C-344/98 [2000] ECR I-11369, [2001] 4 CMLR 449; see also Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, [2002] 2 CMLR 1319, paras 58–59.

[287] Ibid, para 105.

[288] Case T-65/98 [2003] ECR II-4653, [2004] 4 CMLR 14.

[289] OJ [1998] L 246/1, [1998] 5 CMLR 530.

[290] Case T-65/98 [2003] ECR II-4653, [2004] 4 CMLR 14, paras 170–171.

[291] Case T-201/04 [2007] ECR II-3601, [2007] 5 CMLR 846, paras 690–691; see ch 19, '*Microsoft*', pp 800–802.

[292] Case T-201/04 [2007] ECR II-3601, [2007] 5 CMLR 846.

[293] Ibid, para 688; the General Court adopted the same approach in Case T-301/04 *Clearstream Banking AG v Commission* [2009] ECR II-3155, [2009] 5 CMLR 2677, para 185.

[294] Ibid, para 698; for discussion of proof generally in Article 102 cases see Paulis 'The burden of proof in Article 82 cases' [2006] Fordham Corporate Law Institute (ed Hawk), ch 20; Nazzini 'The wood began to move: an essay on consumer welfare, evidence and burden of proof in Article 82 EC cases' (2006) 31 ELRev 518.

10. The Consequences of Infringing Article 102

(A) Public enforcement[295]

Where the Commission finds an abuse of a dominant position it has power, pursuant to Article 23 of Regulation 1/2003, to impose a fine[296], and to order the dominant undertaking to cease and desist from the conduct in question[297]; where necessary, it may also order a dominant undertaking to adopt positive measures in order to bring an infringement to an end[298]. It is even possible for the Commission to order the divestiture of an undertaking's assets, or to break an undertaking up, under the powers conferred by Article 7 of the Regulation 1/2003[299], provided it is proportionate and necessary to bring the infringement to an end and provided that there is no equally effective behavioural remedy or that such a remedy would be more burdensome[300]. The Commission has not, to date, imposed a structural remedy under Article 7, although such remedies have been accepted as legally-binding commitments under Article 9 of that Regulation[301].

(B) Private enforcement

The civil law consequences of infringing Article 102 are discussed in chapter 8[302].

[295] See the OECD Roundtable on *Remedies and Sanctions in Abuse of Dominance Cases* of 2006 for a general discussion of this topic, available at www.oecd.org.

[296] See ch 7, 'Article 23: Fines', pp 275–282.

[297] See ch 7, 'Behavioural remedies', p 253.

[298] See ch 7, 'Behavioural remedies', pp 253–254.

[299] OJ [2003] L 1/1; see ch 7, 'Structural remedies', p 254.

[300] See ch 7, 'Past infringements', pp 254–255.

[301] See ch 9, 'Article 9: commitments', pp 255–261.

[302] See ch 8, 'Article 102', p 324.