CHAPTER -2

COMPETITION AND LAW – CONCEPTUAL DIMENSIONS

Concept of Competition

A dynamic competitive environment supported by effective competition policy and law is considered to be one of the essential elements of a successful market economy. The benefits of having competition in the market are lower prices, better products, wider choice and greater efficiency than would be there under conditions of monopoly. Many developing and transition economies that have undertaken significant market based reforms are also recognizing the need to implement rules to safeguard competition; the reason being, primarily to get the benefits like increased economic efficiency, innovation and consumer welfare that flow from competition. Well functioning competitive markets are key to rapid economic and social development of the country. Competitive markets are essential to ensure that the ownership and control of the material resources of the community are so distributed as to best serve the common good and that the operation of the economic system does not result in undue concentration of wealth and means of production. Word Competition is not exactly and precisely defined. Competition means an economic rivalry amongst economic enterprises to control greater market power.

For healthy competition to be maintained in the markets there must be rules that producers in the market should follow. Main objective of competition law and policy is to preserve and promote competition as a means of efficient allocation of resources in the society. Competition policy will include all measures adopted by the Government with the objective of creating and sustaining the appropriate market environment. Competition Law is the tool through which Government will control and regulate players in the market. Competition law has been applied to economic activities that were once regarded as natural monopolies or the preserve of the state i.e. telecommunications, energy, transport, broadcasting and postal services to name a few examples have become the subject of competition law scrutiny.

Competition Law and Policy

Competition means a struggle or contention for superiority and in the commercial world this means striving for the custom and business of people in the

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market place. In the UK, the Competition Commission has described competition as a process of rivalry between firms seeking to win customers business over time. Under perfect competition economic resources are allocated between different goods and services in such a way that it is not possible to make anyone better off without making someone else worse off. 

A system of competition law intended to protect the process of competition is likely to deal with at least the following four issues although the needs of any particular economy or state may vary. The first is the need to prevent firms from entering into agreements which have the effect of restricting competition either between themselves or between them and third parties and which do not have any beneficial features. Secondly, it will need to control attempts by monopolists or firms with market power to abuse their position and prevent new competition emerging. Thirdly it will need to ensure that workable competition is maintained in oligopolistic industries. Fourthly, it will need to prevent or modify mergers between independent undertakings which may concentrate the market and diminish the competitive pressures within it. Common to each of these phenomena is a single idea that competition law is concerned with the problem of one or more firms which individually or collectively possess market power over the market. Where this happens the firm or firms with market power will be able to restrict output and raise prices above the level that would prevail in a competitive market and profit from doing so. From the consumer’s perspective the benefits of competition are lost. Several different objectives including the maximization of consumer welfare can be ascribed to competition law. It’s essential purpose is to protect the interests of consumers by taking direct action against offending undertakings for example by requiring dominant firms to reduce their prices.

Another possible objective of competition law can be dispersal of economic power and the redistribution of wealth. Aggregations of resources in the hands of monopolists, multinational corporations or conglomerates could be considered a threat to the very notion of democracy, individual freedom of choice and economic opportunity. This argument was influential in the US for many years at a time when there was a fundamental mistrust of big business. It was under the US antitrust laws that the world’s largest corporation at the time AT&T was eventually dismembered. 

14 Bork The Antitrust Paradox(The Free Press,1993)
Overview of European Union Competition Law

In the European Community competition law plays a hugely important part in the overriding goal of single market integration. The very idea of the single market is that internal barriers to trade within the community should be dismantled and that goods, services, workers and capital should have complete freedom of movement. Firms should be able to outgrow their national markets and operate on a more efficient, transnational, scale throughout the community. The accession of ten new member states on 1 May 2004 meant that the single market imperative will continue to have an influential role in competition law enforcement for many years to come. Competition law has both a negative and a positive role to play in the integration of the single market. The negative one is that it can prevent measures which attempt to maintain the isolation of one domestic market from another for example national cartels, export bans and market sharing will be seriously punished. A fine of EUR 102 million was imposed on Germany’s car manufacturer Volkswagen16 where Volkswagen sought to prevent exports of its cars from Italy to Germany and Austria. At a time this was the largest fine to have been imposed in relation to a so called ‘vertical agreement’ between firms operating at different levels of the market however this was exceeded by the fines of EUR 167.8 million imposed on Nintendo17 where Nintendo was found to have taken action to prevent exports of game consoles and related products from the UK to the Netherlands and Germany. The positive role is that competition law can be modified in such a way as to encourage trade between Member states partly by leveling the playing fields of Europe. Horizontal collaboration between firms in different member states may be permitted in some circumstances and a producer in one Member state can be permitted to appoint an exclusive distributor in another and so penetrate a market which individually he could not have done.

In recent years the science of market definition has evolved considerably. In Europe the European Commission’s18 “Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law”19 attempts to capture the

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17 Commission Press Release IP/02/1584, 30 Oct 2002
18 The Director General of Competition Commission (DGCOMP) also known as ‘Commission’ is the competition watchdog of the European Community. The Commission can investigate into anti competitive agreements either on its own or can be approached by an aggrieved party.
Commission’s experience of market definition. The paragraph 2 of the Commission’s Notice explains why market definition is important. It says:

‘Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertaking’s behavior and of preventing them from behaving independently of effective competitive pressure.’

Thus market definition is not an end in itself. It is an analytical tool that assists in determining the competitive restraints upon undertakings and provides a framework within which to access the critical question of whether a firm or firms possess market power. The judgments of the European courts show that the definition of the market is essentially a matter of interchangeability. Where goods or services can be regarded as interchangeable they are within the same product market. The Commission at paragraph 13 of the Notice explains that firms are subject to three main competitive restraints i.e. demand substitutability, supply substitutability and potential competition. The Notice continues to say that for the purpose of the market definition it is demand substitutability that is of greatest significance. Para 15 of the Notice says that the assessment of demand substitutability entails a determination of the range of products which are viewed as substitutes by the consumer. It then purposes a test whereby it becomes possible to determine whether particular products are within the same market. The so called ‘SSNIP’ test which means a ‘Small but Significant Non transitory Increase in Price’ is also called a hypothetical monopolist test. This test is given a formal expression in paragraph 17 of the Notice where it is stated that:

‘The question to be asked is whether the parties customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small( in the range of 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitutions were enough to make the price rise unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.’ This formulation of the test takes the range of 5% to 10% to indicate significance within the SSNIP formula.
In Para 20-23 of the Notice on Market Definition the Commission explains the circumstances in which it considers that supply side substitutability is relevant to the market definition. At Para 20 the Commission says that where suppliers are able to switch production to other products and to market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices then the market may be broadened to include the products that those suppliers are already producing.

It is also necessary when determining whether a firm or firms have market power that the relevant product and geographic market should be defined. The European higher Courts have stated that when identifying the dominant position of an undertaking the delimitation of the relevant product market was of crucial importance. The delineation of the relevant geographic market helps to indicate which other firms impose a competitive constraint on the firm or firms under investigation. The cost of transporting products is an important factor as some goods are so expensive to transport in relation to their value that it would not be economic to attempt to sell them on distant market. The Commission at Para 28 of the Notice on Market Definition provides helpful guidance on the definition of the geographic market. It says:

‘it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors as well as preliminary analysis of pricing and price differences at national and community level. This initial view is used basically as a working hypothesis to focus the Commission’s inquiries for the purposes of arriving at a precise geographic market definition.’

The most important issue in competition assessment is whether a firm or firms have market power. Assessing market power in practice requires a number of issues to be taken into account. It is necessary to consider both the extent of competitive rivalry within the relevant market and competitive restraints upon firms from outside the market. Within the relevant market the market shares are of course relevant to an assessment of market power although they cannot be determinative in themselves, fluctuations in market share over a period of years may suggest that the market is in fact competitive even though in some year’s market share have been very high. Also of interest is the concentration of the market: the more concentrated a market is the more likely it is that it is uncompetitive.
The European Community was established by the Rome Treaty of 1957.20 The treaty as renumbered by the Amsterdam Treaty consists of 314 Articles. Article 2 of the European Community Treaty provides that:

'The Community shall have as its task by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 4 to promote throughout the community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and protection and improvement of the quality of the environment, the raising of the standard of living and quality of life and economic and social cohesion and solidarity among community members. '

European Communities Competition law is contained in Chapter 1 of Part 3 of the European Community Treaty which consists of Article 8121 now renamed as Article 10122 and Article 8223 now renamed as Article 10224 by the Treaty of Lisbon on the functioning of the European Union.

20 The Treaty of Paris of 1951 had earlier established a special regime for coal and steel which contained provisions dealing specifically with competition.

21 With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this research, references to Articles 81 of the Treaty on Establishing the Community should be understood as references to Articles 101, respectively, of the EC Treaty on functioning of the European Union.

22 Article 101 (ex Article 81 Treaty on Establishing the Community)

The full text of Article 101 of EC Competition Law is as follows:

(1) The following shall be prohibited as incompatible with the Common 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 common 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 source 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.

(2) Any Agreement or decisions prohibited pursuant to this Article shall be automatically void

(3) The provision of Article 101(1) may however be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any category of decision or category of decisions by association 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 which allowing consumers a fair share of the resulting benefit and which does not:
In general, actions in competition cases (including cases on state aid) are brought in a first instance before the European Commission and then before the Court of First Instance. Following the adoption of the Modernization Regulation, the Commission shares the competence to enforce Article 81 and Article 82 with the national competition authorities of the Member states and national courts. A key feature of the new enforcement system is the creation of a network of competition authorities consisting of the commission and the national competition authorities called the European Competition Network. Member states actions are taken to the European Court of Justice. If it happens that substantially similar matters are brought before both the CFI and ECJ simultaneously than most likely it is that the CFI will suspend its proceedings pending the judgment of the ECJ. The ECJ hears appeals from the CFI on points of law only. The ECJ has been strict about what is meant by an appeal on a point of law and it will not get drawn into factual disputes. The ECJ also deals with points of law referred to it by national courts under Article 234 EC

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(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

23 With effect from 1 December 2009, Article 82 of the EC Treaty has become Article 102 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this research, references to Articles 82 of the Treaty on Establishing the Community should be understood as references to Article 102, respectively, of the EC Treaty on functioning of the European Union

24 Article 102 (ex Article 82 Treaty on Establishing the Community)

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common 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;
(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.

25 The second highest appellate court in the European Union to which appeals are made against the decisions given by the commission. It is also known as CFI. Since 1 December 2009, the Court of First Instance (CFI) is named the General Court. However for the purposes of this research the term CFI should be understood as references to the General Court.


27 It is also known as ECJ. It is highest court of Appeal in the European Union to which appeals are made against the decisions of CFI.

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Most Member States now have systems of competition law modeled upon Article 81 and 82. It follows that many cases will have the same outcome whether they are investigated under EC or under domestic law. For example, a horizontal price fixing agreement would infringe Article 81 (1) and would normally also be caught by any domestic system of competition law in the community unless it occurred in a sector which is not subject to the domestic rules. However even though there is a high degree of convergence between EC and domestic law, 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 EC law, for example under UK competition law, horizontal agreements other than hard core cartels are generally not caught by the Chapter 1 prohibition in the Competition Act 1998 if the combined market share of the parties is less than 25% however EC law places the market share threshold at the lower level of 10%. In other cases, the possibility exists that domestic law could have stricter effect than the EC law. For example, under UK law it is possible for the Office of Fair Trading (OFT) to refer a market for investigation to the Competition Commission and the Commission has the power to adopt remedies in order to address any adverse effects on competition that it may identify but no such power exists under EC law. The German laws apply more strictly to oligopolistic markets than Article 81 and 82 EC and French law adopts a stricter approach to some refusals to supply than EC law.

The treaty does not define an ‘undertaking’. However it is a critically important term since only agreements between undertakings are caught by Article 81(1). Similarly Article 82 applies only to abuses committed by dominant undertakings. The ECJ has held in Hofner28 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


A dispute arose in a German Court, the Oberlandesgericht Munchen, between a company and the recruitment consultants it had employed to find it a sales director. In a dispute about fees the company claimed that the contract between the parties was void as it infringed the German law on the promotion of employment, the Arbeitsförderungsgesetz (the AFG). The AFG conferred on the Bundesanstalt, the Federal Office for Employment, the exclusive right to put prospective employees and employers in contact with one another. Nevertheless, to some extent the Bundesanstalt tolerated the existence and activities of independent recruitment consultants and it appeared that the Bundesanstalt was unable on its own to meet the demand for executive recruitment. The questions referred by the Oberlandesgericht raised the issue of whether there was an abuse of dominant market power and whether Article 86(1) was infringed by the exclusive rights. The Court first held that the Bundesanstalt was an undertaking for the purposes of Article 82 and 86.
it was financed’. In Wouters, the ECJ said that the competition rules in the treaty do not apply to activity which by its nature, 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. The idea in Hofner that any entity engaged in an economic activity regardless of legal status can qualify as an undertaking finds expression in numerous judgments of the community courts and decisions of the Commission. Companies and partnerships, of course, can qualify as undertakings as can agricultural cooperatives and a firm established by four independent companies whose function was to supervise a quota fixing agreement. A trade association that carries on an economic activity can be an undertaking. The fact that an organization lacks a profit motive or does not have an economic purpose does not disqualify it as an undertaking provided always that it is carrying on some commercial or an economic activity. On this basis, the Commission held in Distribution of Package Tours During the 1990 World Cup that FIFA the body responsible for the 1990 Football World Cup as well as the Italian Football Association and the local organizing committee were undertakings subject to Article 81. The ECJ in Hofner stated that the legal status of an entity does not determine whether it qualifies as an undertaking. Public authorities such as the Federal Employment Office in Hofner itself have been held to be engaged in activities of an economic nature with regard to employment procurement. Aeroports de Paris responsible for the planning, administration and development of civil air transport installations in Paris, the Portuguese Airports Authority and the Finnish Civil Aviation Administration were all found by the commission to constitute undertakings.

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30 Supra note 28
31 Distribution of Package Tours During the 1990 World Cup OJ (1992) L 326/31,(1994) 5 CMLR 253 para 43 FIFA appointed the Italian football federation (FIGC) organizer of the 1990 Football World Cup, held in Italy in 1990. A local organizing committee was set up. This committee granted a joint venture, set up by two Italian travel agencies, exclusive worldwide rights for the sale of match tickets as part of package tours. Apart from this, tickets were sold through national football and other sports associations, the European Football Federation, the tournament sponsors and an Italian bank. The national associations and the bank were prohibited from selling their tickets to travel agents. As a consequence of these arrangements, travel agents outside the Italian joint venture could not put together package tours which included match tickets. Complaints were therefore lodged with the Commission alleging that the arrangements were contrary to Article 81(1). One question which arose was whether or not the football authorities were ‘undertakings’ within the meaning of Article 81(1).
Members of the liberal professions can be undertakings for the purpose of Article 81 (1). The ECJ has held that customs agents in Italy who offer for payment services consisting of the carrying out of custom 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 custom agents is intellectual and requires authorization and compliance with conditions meant that they were not undertakings. The ECJ further held that the National Council of Custom Agents was an association of undertakings relying on the proposition that its public law nature did not remove it from the application of Article 81.\textsuperscript{32} The Commission has concluded that industrial property agents were undertakings notwithstanding that they were members of the regulated profession, that their services were of an intellectual, technical or specialized nature and that they provided service on a personal and direct basis.\textsuperscript{33} A similar conclusion was reached in EPI code of conduct in relation to professional representatives before the European Patent Office. In another matter, the ECJ was concerned with a case where organizations representing employers and the employees collectively agreed to set up a single pension fund responsible for managing a supplementary pension scheme and requested the public authorities to make public affiliation to the fund compulsory. One of the issues in the case was whether an agreement between such organizations was an agreement between undertakings. The ECJ’s answer was that it was not. The ECJ’s view was that the social objectives pursued by collective agreements would be seriously undermined if they were subject to Article 81 (1) of the treaty and therefore they fall outside it.\textsuperscript{34}

Article 81(1) does not apply to agreements between undertakings that form a single economic activity. The most obvious example of this is an agreement between a parent and a subsidiary company. Firms within the same corporate group can enter into legally enforceable contracts with one another. However such an agreement will not fall within the terms of Article 81(1) if the relationship between them is so close that economically it would be realistic to regard them a single economic entity. Where this is the case the agreement is regarded as the internal allocation of functions within the corporate group rather than a restrictive agreement between independent undertakings. The ECJ has held that Article 81(1) would not apply to an agreement between a parent

\textsuperscript{32} Commission v Italy C-35/96 (1998) ECR I – 3851,(1998) 5 CMLR 889
\textsuperscript{34} Albany C-67/96 (1999)ECR 1-5751,(2000) 4 CMLR 446
and its subsidiary which although having separate legal personality enjoys no economic freedom.\textsuperscript{35} The ECJ stated that Article 81(1) would not apply if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.\textsuperscript{36} In \textit{Viho v Commission}\textsuperscript{37} Parker Pen had established an integrated distribution system for Germany, France, Belgium, Spain and Netherlands where it used subsidiary companies for the distribution of its products. The Commission concluded that Article 81(1) 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 81(1). The CFI and the ECJ upheld the decision of the commission that Article 81(1) had no application. At paragraph 15 of its judgment the ECJ noted that Parker Pen held 100\% 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.

In \textit{Gosme/Martell-DMP}\textsuperscript{38} DMP was a joint subsidiary of Martell and Piper-Hiedsieck. Each parent held 50\% 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 81(1) and attracted fines of EUR 300,000 in the case of Martell and EUR 50,000 in the case of DMP.

The policy of Article 81 is to prohibit cooperation between independent undertakings which prevents, restricts or distorts competition in particular it is concerned with the eradication of cartels and hard core restrictions of competition.

\begin{itemize}
\item \textsuperscript{35} \begin{quote} \textit{Belguelim Import v GL Import Export Case} -22/71 (1991)ECR 949 (1972) CMLR 81 \end{quote}
\item \textsuperscript{36} \begin{quote} \textit{Corinne Bodson v Pompes Funebres des Regions Liberees S4 Case} -30/87 (1988)ECR 2479 (1989) 4 CMLR 984 \end{quote}
\item \textsuperscript{37} \begin{quote} \textit{Case T-102/92} (1995)ECR-II-17 (1995) 4 CMLR 299 \end{quote}
\item \textsuperscript{38} \begin{quote} \textit{OJ 1991 L 185/23} (1992) 5 CMLR 586 \end{quote}
\end{itemize}
legally enforceable contract qualifies as an agreement including a compromise of litigation such as a trademark delimitation agreement or the settlement of a patent action. Gentleman’s agreements and simple understanding has been held to be agreements though neither is legally binding. A protocol which reflects a genuine concurrence of will between the parties constitutes an agreement within the meaning of Article 81(1). Guidelines issued by one person that are adhered to by another can amount to be an agreement and circulars and warnings sent by a manufacturer to its dealers may be treated as general agreement that exists between them. Undertakings cannot justify infringement of the rules on competition by claiming that they were forced into an agreement by the conduct of the other traders. Where an agreement is entered into unwillingly this may be significant in influencing the commission to mitigate the fine, not to impose a fine and not to institutes proceedings at all. The Commission may abstain from fining parties which had no input in the drafting of the agreements into which they have entered.

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 the cartel, some may drop out for a while but subsequently reenter, 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 and there may be few occasions on which all the members of cartels actually met or behave precisely in concert with one another. The Commission upheld by the Community Courts has addressed these problems in two ways: first be developing the idea that it is not necessary to characterize infringements of Article 81(1) specially as an agreement on the one hand or a concerted practice on the other and secondly by establishing the concept of single overall agreement for which all members of a cartel bear responsibility irrespective of their precise involvement from day to day.

In a series of decisions from the mid 1980’s, 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 operations on a day to day or a continuing basis. The Commission investigated a complex cartel agreement in the petrochemicals sector involving 15 firms for many years. It held that the detailed arrangements whereby the cartel operated were all part of a single overall agreement which 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 81 even though some had not attended every meeting of the cartel and had not been involved in every aspect of its decision making but 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. \(^{39}\)

Coordination between independent undertakings may be achieved through the medium of a trade association. The possibility that trade associations may play a part in cartel activity is explicitly recognized in Article 81(1) by the prescription of ‘decisions by associations of undertakings’ that could restrict competition. An association of water supply undertakings recommended its members not to connect dish washing machines to the main system which did not have a conformity label supplied by a Belgian association of producers of such equipment. The ECJ 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 EC. \(^{40}\) The ECJ has 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 has specified the public interest criteria to be taken into account by the Council. \(^{41}\)

The inclusion of concerted practices within the proscription of Article 81 means that conduct which is not attributable to an agreement or a decision may nevertheless

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\(^{39}\) *Polypropylene* OJ L230 (1988) 4 CMLR 347 This case concerned a cartel in the petrochemical industry which was found to have lasted for many years. Fifteen firms were held by the Commission to have infringed the competition rules by participating in the framework agreement to fix prices and sales volumes. The Commission considered that the cartel, which was based on a common and detailed plan, constituted a single continuing agreement for the purpose of Article 81(1). Some firms claimed that they were not liable as they had not participated in all aspects of the arrangements. The CFI held that the Commission was justified in treating the entire course of the collusion as one single agreement. In this case the undertakings had throughout the whole course of the arrangements, pursued the single economic aim of distorting the polypropylene market.


\(^{41}\) *Supra* note 29
Infringe Article 81(1). Parties to a cartel may do all they can to destroy incriminating evidence of meetings, e-mails, faxes and correspondence in which case the temptation of the competition authority will be to infer the existence of an agreement or concerted practice from circumstantial evidence such as parallel conduct on the market. In *ICI v Commission* usualy referred to as *Dyestuffs* case was the first important case on concerted practices to come before the ECJ. The Commission had fixed several producers of dyestuffs which it considered had been guilty of price fixing through concerted practices. Its decision relied upon various pieces of evidence including the similarity of rate and the timing of the rate increase 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 ECJ upheld the Commission’s decision. It said that the object of bringing concerted practices within Article 81 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.

In *Suiker Unie v Commission* (*the Sugar Cartel case*) the ECJ elaborated upon this test. The Commission had held that various sugar producers had taken part in concerted practices to protect the position of two Dutch producers on their domestic market. The producer denied this as they had not worked out a plan to this effect. The

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42 *ICI v Commission* usualy referred to as *Dyestuffs* case Cases 48/69 (1972) ECR 619,(1972),CMLR 557 In Dyestuffs, three general and uniform increases in the prices of dyestuffs had taken place within the common market over a period of years. The first in 1964 took place on the markets in Italy, Holland, Belgium and Luxembourg, the second in 1965 on the market in Germany and in 1967 uniform increases took place in Germany, Holland, Belgium, Luxembourg and France. In this case the question whether EC law had an effects doctrine was raised for the first time. The Commission investigated an alleged cartel among the producers of aniline dyes. It found inter alia that ICI, a company incorporated and having its headquarters in the UK which was not at that time a member of the Community, had engaged in concerted practices contrary to Article 81(1) by virtue of the instructions it had given to its Belgian subsidiary. It imposed a fine of 50,000 units on account of ICI. The ECJ upheld the decision of the Commission.

43 *Suiker Unie v Commission* Cases 40/73 (1975) ECR 1663,(1976) 1 CMLR 295 In Suiker Unie the ECJ compared the volume of sugar production in Belgium, Luxembourg and southern Germany to that of the Community production overall. It held that each of those markets was a substantial part of the common market. The ECJ also held that for the purpose of determining whether a specific territory is large enough to amount to a substantial part of the common market within the meaning of Article 82 of the Treaty the pattern and volume of the production and consumption of the said product as well as habits and economic opportunities of vendors and purchasers must be considered.
ECJ held that it was not necessary to prove that there was an actual plan. Article 81 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.' These two cases provide the legal test of what constitutes a concerted practice for the purpose of Article 81 that 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 judgment of the ECJ in Polypropylene cases deals with the question of whether a concerted practice must have been put into effect on order for there to be an infringement of Article 81(1). If the answer to this is yes it would follow that if competitors were merely to meet or to exchange information without actually producing any effects on the market by doing so this would not amount to a concerted practice the commission would therefore have to prove there to be an agreement the object or effect of which is to restrict competition.

The Commission has been keen not to allow there to be legalistic distinctions between the treatment of agreements and concerted practices in Article 81(1) and has received the support of community courts in this endeavor. The ECJ held in Huls one of the Polypropylene cases that a concerted practice is caught by Article 81(1) EC even in the absence of anti competitive effects on the market. In reaching its conclusion in Huls, the ECJ stated that as established by its own case law, Article 81(1) requires that each economic operator must determine its policy on the market independently. The ECJ acknowledged that the concept of a concerted practice implies that there will be common conduct on the market but there must be a presumption that by making contact with one another there is a presumed concerted practice and the Commission does not have to go further and actually prove those effects.

The scheme of the EC Competition rules is that Article 81 applies to conduct by two or more undertakings which is consensual and the Article 82 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 which is why in some cases claims of dominance has been

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44 Supra note 39
45 ibid
made. In *AEG-Telefunken v Commission*[^46], the ECJ rejected a claim that refusal to supply retail outlets which were objectively suitable to handle AEG’s goods were unilateral acts falling outside Article 81(1). The ECJ held that refusals arose out of the contractual relationships between the supplier and its established distributors and their mutual acceptance tacit or express of AEJ’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 modern channels of distribution.

In *Ford v Commission*[^47], the ECJ 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. The Ford judgment is an extension of AEG. In AEG there was an obvious community of interest between the distributors who received supplies from AEG so that cut price outlets should not be able to obtain goods and undercut their prices and in this case it was easy to see that certain assumptions might creep into the relationship between AEG and its usual customers. In Ford, however the German distributors with whom Ford had entered into contracts did not themselves benefit from refusal to supply right hand drive cars, in fact, the beneficiaries of this policy were distributors in the UK who would be shielded from parallel imports.

In several decisions after *AEG*[^48] and *Ford*[^49], the Commission has applied Article 81(1) to apparently unilateral conduct. The Commission characterized apparently unilateral action as an agreement in *Bayer AG/Adalat*[^50], however the CFI annulled the decision since in its view the Commission had failed to prove the existence of an agreement. In order to prevent its French and Spanish wholesalers from supplying...

[^46]: *AEG-Telefunken v Commission* Case 107/82 (1983) ECR 3151, (1984) 3 CMLR 325. AEG-Telefunken a developer and manufacturer of consumer electronic products notifies its selective distribution system to the Commission. The system provided that it would supply its products to all distributors/resellers that satisfied certain objective criteria e.g. on the suitability of its staff and trading premises. In this case the Commission indicated to AEG that the system did not infringe Article 81(1). Subsequently however the Commission received numerous complaints alleging that AEG was not operating the scheme in the manner notifies. AEG had refused to supply certain resellers which satisfied the stipulated objective criteria, but which would not adhere to a policy of charging minimum prices. Had the agreement contained a clause imposing resale price maintenance the agreement would have fallen within Article 81(1) and would have been unlikely to have received an exemption under Article 81(3). AEG argued that the acts complained of were not part of its agreement with resellers but were decisions that it had taken unilaterally. Article 81(1) did not apply since it caught only agreements between undertakings. Both the Commission and the Court rejected this argument.


[^48]: Supra note 46.

[^49]: Supra note 47.

parallel exports to the UK and thereby protect its UK pricing strategy, Bayer had reduced supplies of the drug Adalat to France and Spain. Prices for pharmaceuticals in France and Spain were as much as 40% less 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 contrary to Article 81(1). In its view the agreement was evidenced by the wholesalers ceasing to supply the UK in response to Bayer’s tacit 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 and there was no common interest in this case between Bayer and its wholesalers whose respective needs were diametrically opposed. Bayer did not deny that it had reduced the quantities delivered to France and Spain but it argued that it has acted unilaterally rather than pursuant to an agreement.

The Commission’s decision was criticized and Bayer obtained a suspension of the decision pending judgment. In a very significant judgment, the CFI held that there was no agreement and annulled the Commission’s decision. After stressing that Article 81(1) applies only to conduct that is coordinated bilaterally or multilaterally, the court reviewed the case law and stated that the concept of the agreement centers 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. It acknowledged that there could be an agreement where one person tacitly acquiesces in practices and measures adopted by another however it concluded that the Commission had failed both to demonstrate that Bayer had intended to impose an export ban and to prove that the wholesalers had intended to adhere to a policy on the part of Bayer to reduce parallel imports. The CFI 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.

The CFI specifically said that the measure taken by a manufacturer that would hinder parallel imports is lawful provided that it is not adopted pursuant to a concurrence of wills between it and its wholesalers contrary to Article 81(1) and provided that it does not amount to an abuse of a dominant position contrary to Article 82. The importance of this judgment cannot be overstated. Had the CFI upheld the decision of the Commission the notion that an agreement for the purpose of Article
81(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 Community it would have done so at the expense and integrity of the competition rules which clearly apprehend unilateral behavior only where a firm has a dominant position in the sense of Article 82.

Article 81 is capable of application both to horizontal agreements i.e. between undertakings at the same level of the market and to vertical agreements i.e. between undertakings at different levels of market. It was one time thought that Article 81 might have no application at all to vertical agreements but that idea was firmly scotched by the ECJ’s judgment in Consten and Grunding v Commission. The application of Article 81 to vertical agreements has been one of the most controversial issues in EC competition law. As part of the Commission’s modernization of the competition rules major changes have taken place in relation to vertical agreements in particular the block exemption Regulation in 1999 which entered into force on 1st June 2000. This block exemption Regulation has expired and has since been replaced by a new Regulation. The Commission also published the Guidelines on Vertical Restraints in October 2000 which expired in May 2010 and has also been replaced by new Guidelines. The new Guidelines contain important guidance not only on the operation of block exemption but also on the analysis of vertical restraints under Article 101(1). A further step in Commission’s modernization program was adoption in November 2000 of two block exemptions for horizontal agreements for specialization and for research and development respectively and both of them entered into force on 1st January 2001. The Commission also published Guidelines on Horizontal Cooperation Agreements which contain guidance on the operation of those block exemptions and also set out a framework for the analysis of horizontal cooperation agreements under

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51 EtablissementsConsten SA & Grundig-Verkaufs- GmbH v. Commission Cases 56/54 and 58/64 (1966) ECR 299, (1966) CMLR (Common Market Law Reports) 418. In this case Grundig who was German Manufacturer of radios, tape recorders, dicta phones and television appointed Consten as its exclusive agent France. Consten agreed that he will not deal in competing products. Grundig imposed export restrictions on all the distributors.


53 Regulation 330/2010 Dated 20 April 2010


55 C 130/01/2010,Dated 19-5-2010


Article 81(1). Article 81(1) prohibits agreements which have as their object or effect the prevention, restriction or distortion of competition.

In *Societe Technique Miniere v Maschinenbau Ulm*\(^ {59}\), the ECJ stated that the words were to be read disjunctively so that it is first necessary to consider what the object of an agreement is and only if it is not clear that the object of an agreement is to harm competition it is necessary to consider whether it might have the effect of doing so. Where an agreement has as its object the restriction of competition it is unnecessary to prove that an agreement would have an anti-competitive effect in order to find an infringement of Article 81(1). This was repeated by ECJ in *Consten and Grunding v Commission*\(^ {60}\) immediately after the *Societe Technique Miniere v Maschinenbau Ulm*\(^ {59}\) judgment. The ECJ again stated that if the object of an agreement is to restrict competition, there is no need for the Commission also to show that it might have an anti-competitive effect.\(^ {61}\) The classification of an agreement as having its object the restriction of competition means that the parties to a price-fixing agreement for example cannot argue that the fixing of the prices does not restrict competition, the law has decided as a matter of policy that price fixing is considered to have as its object the restriction of competition but the parties can defend the practice only by proving in a particular case that it satisfies the criteria of Article 81(3). Where an agreement does not have its object the restriction of competition, it is necessary to demonstrate that it would have a restrictive effect a more onerous task for the commission or the undertaking wishing to establish an infringement of Article 81(1). The position was stated clearly by the CFI in *European Night Services v Commission*\(^ {63}\),

'It must be borne in mind that in assessing an agreement under Article 81(1) of the treaty account should be taken of the actual conditions in which it functions in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned unless it is an agreement containing

\(^ {59}\) *Societe Technique Miniere v Maschinenbau Ulm* Cases 56/65 (1966) ECR 235 CMLR 357 The parties entered into an agreement by which a French company was given exclusive rights to distribute in France the equipment (leveling machines) of a German manufacturer. The French company was free to re-export the equipment outside France. The parties fell out and in litigation in the French courts the French company claimed that the agreement was void under Article 81(2) because it infringed Article 81(1). The Cour d’Appel Paris asked the ECJ on a preliminary reference how it should assess the compatibility of this type of agreement with Article 81(1).

\(^ {60}\) Supra note 51

\(^ {61}\) Supra note 59


obvious restrictions of competition such as price fixing, market sharing or the control of outlets.

This passage of the CFI’s judgment indicates that in most cases it is necessary to demonstrate that an agreement will have an anti-competitive effect; however, there is a limited class of agreements that have as their object the restriction of competition and which therefore automatically fall within Article 81(1) provided that the other requirements for an infringement are satisfied, for example, that the restriction of competition is appreciable and there is an appreciable effect on trade between Member States, however, the parties to agreements of this kind will be able to proceed lawfully only if their agreement satisfies the criteria of Article 81(3). As a matter of law, where an agreement has its object the restriction of competition, the Commission does not have to prove that the agreement has an anti-competitive effect; the onus would be on the parties to the agreement to show that it satisfies Article 81(3).

Agreements that have as their object the restriction of competition involve an obvious infringement of Article 81(1) and they are the agreements most likely to attract a fine. There is clearly an analogy with the position under Section 1 of the Sherman Act 1890 in the US which characterizes some agreements as per se infringements of the Act whereas others are subject to so-called ‘rule of reason’ analysis. Where there is a per se infringement, this means that it is not open to the parties to the agreement to argue that it does not restrict competition as 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 EC law in that even if an agreement has its object the restriction of competition that is to say it infringes Article 81(1) per se, the parties can still argue that the agreements still satisfy the terms of Article 81(3). This possibility does not exist in the US law since there is no equivalent to Article 81(3) in the US.

In Visa International Multilateral Interchange Fee, participants in the Visa system agreed on the level of the multilateral interchange fee that acquiring banks acting for the merchants pay to issuing banks which issue Visa cards to consumers for each transaction with a Visa card. The Commission decided that this does not restrict the freedom of banks to decide their own pricing policies but this does not amount to restriction of competition by object but by effect and individual exemption was granted.

On few occasions, the ECJ has concluded that an export ban in the context of a specific type of agreement did not have its object the restriction of competition. In *Erauw-Jacquery Sprl v Hesbignonne Societe Cooperative* 66, the ECJ held that a provision preventing a licensee from exporting seeds protected by plant breeder's rights could fall outside Article 81(1) where it was necessary to protect the right of the licensor to select his licensees. In *Javico v Yves St Laurent* 67, where an export ban was imposed on distribution in Russia and Ukraine the ECJ 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 Community but as being designed to enable the producer to penetrate a market outside the Community by supplying a sufficient quantity of contractual products to that market.’

That interpretation is supported by the fact that in the agreements at issue, the prohibition of selling outside the contractual territory also covers other non-member countries. 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 effects on the market before it can be found to infringe Article 81(1). In *Delimitis v Henniger Brau AG* 68, the ECJ considered a provision in an agreement between a brewery whereby the licensee was required to purchase a minimum amount of beer each year. The concerned litigation in the German courts was the refusal by the brewery on termination to return the full deposit to the licensee that he had paid when entering into an agreement. The brewery had also deducted sums that it considered it was entitled to. The licensee claimed that the agreement was void and unenforceable under Article 81 and an appeal court in Germany referred the case to ECJ under Article 234EC.

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The ECJ said that the beer supply agreement of the type under consideration do not have as their object the restriction of competition. Instead it stressed that the agreement had to be considered in the context in which it occurred. To begin with, it was necessary to define the relevant product and geographic markets and 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 it was necessary to determine whether access to the market was impeded and can a new competitor enter the market by buying an existing brewery together with its network of sales outlets or by opening new public houses. If the answer was that the access to the market was impeded, it was necessary to ask whether the agreements entered into by Henniger Brau contributed to that foreclosure effect for example because of their number and duration. The analysis suggested in this case is 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. There have been many judgments in which community courts have concluded that agreements containing contractual restrictions did not result in a restriction of competition.

In *Societe Technique Miniere v Maschinenbau Ulm*\(^{69}\), the ECJ said that a term conferring exclusivity on a distributor might not infringe Article 81(1) where this seemed to be really necessary for the penetration of a new area by an undertaking. Two weeks later in 1966, the ECJ in *Consten and Grunding v Commission*\(^{70}\), reached the conclusion that an agreement conferring absolute territorial protection on a distributor had as its object the restriction of competition and was not eligible for exemption under Article 81(3). These two judgments are highly instructive. *Societe Technique Miniere v Maschinenbau Ulm* shows that simply granting exclusive rights to a territory without export bans may not infringe Article 81(1) whereas *Consten and Grunding* shows that where an agreement goes further imposing export bans and preventing the possibility of parallel trade it is considered by law to have its object the restriction of competition and furthermore to be ineligible for exemption. In *L.C. Nungesser KG v Commission*\(^{71}\), the

\(^{69}\) *Supra* note 59

\(^{70}\) *Supra* note 51

\(^{71}\) *L.C. Nungesser KG v Commission* Case 258/78 (1982) ECR 2015,(1983)1 CMLR 278 INRA, a French state research institute, developed new strains of hybrid maize seed of great importance in European agriculture. Acting through FRAESMA, a French company set up to deal with INRA’s seed varieties, it gave Kurt Eisele (later Nungesser KG) the exclusive right to produce and distribute INRA varieties in Germany. INRA agreed with Eisele not to import its seed into
ECJ held that an open exclusive license of plant breeders rights would not infringe Article 81(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 intrabrand competition. In *Coditel v Cine Vog Films SA (No.2)*72 , the ECJ held that an exclusive copyright license to exhibit a film in a Member state would not necessarily infringe Article 81(1) even where this might prevent transmission of that film by cable broadcasting from a neighboring member state where this was necessary to protect the investment of the licensee.

The ECJ in *Remia BV*73 recognized that in order to effect the sale of business together with its associated goodwill, it may be necessary that the seller should be restricted from competing with the purchaser and in the absence of such a covenant it may not be possible to sell the business at all. The *Remia*74 doctrine allows the purchaser of a business to be protected from its seller but it does not apply in the

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72 *Coditel v Cine Vog Films SA (No.2)* Case 262/81 (1982) ECR 3381, (1983) 1 CMLR 49 A Belgian cable company relaying in Belgium the transmission of a film shown in Germany for which Cine Vog had exclusive distribution rights in Belgium gave rise to this case in which the cable company claimed that the exclusive license granted to Cine Vog infringed Article 81(1). The ECJ held that exclusivity amounting in effect to absolute territorial protection did not in itself infringe Article 81(1).

73 *Remia BV* Case 42/84 (1985) ECR 2545, (1987) 1 CMLR 1 This case concerned proceedings brought by Remia BV and NV Verenigde Bedrijven Nutricia (hereinafter referred to as Nutricia) under Article 230 of the EC Treaty for a declaration that a Commission decision relating to an agreement between them was void. Broadly this case concerned the sale by Nutricia (a manufacturer of health and baby foods) of two of its subsidiaries, Remia and Luycks. The sales agreements contained non compete clauses designed to protect the purchasers from competition by the vendor on the same market for a period immediately after the transfer. Further, a provision in the sales agreements of Remia provided that neither Nutricia nor Luycks (engaged in the production of pickles and condiments) would engage directly or indirectly in the production of sales of sauces (Remia was principally engaged in sauce production) on the Nederland’s market. Further, Nutricia undertook to Luycks for a period of five years not to engage directly or indirectly in any production or sales of pickles or condiments in Europe. Campbell, the parent company of the undertaking purchasing Luycks considered that this clause infringed Article 81 of the Treaty and notified the two transfer agreements to the Commission requesting exemption. The Commission took the view that the duration and the scope of the non compete clauses were excessive and so restricted competition and were not eligible for exemption under Article 81(3). 

74 *ibid*
reverse situation. In *Pronupita de Paris v Schillgalis* 75, the ECJ held that 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 falls outside Article 81(1). In *Erauw-Jacquery Sprl v La Hesbignonne Societe Cooperative* 76, the ECJ held that a provision preventing a licensee from exporting seeds protected by plant breeder’s rights could fall outside Article 81(1) where it was necessary to protect the right of the licensor to select his licensees. These judgments of the community 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 81(1). The legitimate commercial purposes include the penetration of a new market, the sale of a business and the successful establishment of a group purchasing association.

In *Wouters v Algemene Raad can de Nederlandse Orde van Advocaten* 77, the ECJ dealt with a different situation. In this case, Mr Wouters challenged a rule adopted by the Dutch Bar Council which prohibited lawyers in the Netherlands from entering into a partnership with non lawyers. Mr. Wouters wished to practice as a lawyer in a firm of accountants. A number of questions were referred to the ECJ as to the compatibility of such a rule with EC Competition law. In its judgment, the court stated that a prohibition of multi disciplinary partnerships is liable to limit production and technical development within the meaning of Article 81(1) of the Treaty. However at Paragraph 97, of the judgment the Court stated:

> 'However not every agreement between undertakings or any decision of an association of undertakings which restrict the freedom of action of the parties or of any one of them necessarily falls within the prohibition laid

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75 *Pronupita de Paris v Schillgalis* Case 161/84 (1986) ECR 353, (1986) 1 CMLR 414 A franchise agreement had been concluded between Pronupita de Paris and Mrs Schillgalis. The latter had the exclusive right to use the Pronupita de Paris trade mark in specific territories. Pronupita assisted Mrs Schillgalis with the commercial aspects of her business. In exchange Mrs Schillgalis had undertaken to equip her shop in accordance with the franchisor’s instructions, not to move its location, to purchase 80% of her wedding dresses and accessories from the franchisor and to pay royalty etc. Following a dispute between the parties the compatibility of the agreement with Article 81(1) was raised before the German courts. The Bundesgerichtshof considering that the outcome of the case depended on the interpretation of the Community law, made an Article 234 reference to the ECJ. The question it asked was whether Article 81(1) was applicable to franchise agreements such as the contract between the parties.

76 Supra note 66

77 Supra note 29
down in Article 81(1) of the treaty. For the purpose of application of that provision of a particular case account must first 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 organization, 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.

This is the most interesting and controversial judgment. The early part of the judgment reads as though the court would conclude that Article 81(1) was infringed whereas from paragraph 97 onwards it explains why Article 81(1) would not be infringed if the rule in question could reasonably be considered to be necessary in order to ensure the proper practice of the legal profession as it is organized in Nederland. 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 consequences that there is no infringement of Article 81 (1). The critics of Article 81(1) complain that the Community courts has applied the ‘rule of reason’ for example in Wouters\textsuperscript{78} to too many agreements which would result in fewer agreements being caught.

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 EC Competition law this seems to be misplaced as the EC law is different in many ways from the US law as it has bifurcation of Article 81(1) and Article 81(3) which does not exist under US law and that it is concerned with the promotion of a single market as well as with conventional competition concerns. In US law the rule of reason has a particular meaning. The Supreme Court defined the rule of reason as calling for a case by case evaluation and weigh all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing a unreasonable restraint on competition. In particular this means that when determining whether an agreement restrains trade in the sense of section 1 of the Sherman Act 1890 it is necessary to

\textsuperscript{78} ibid
balance the agreement’s pro and anti competitive effects and where the latter outweigh the former the agreement will be unlawful.\textsuperscript{79}

The fact that the ECJ has handed down reasonable judgments, does not mean that it has adopted the rule of reason in the sense in which this expression is used in US. The Commission in its ‘\textit{White Paper on Modernization}\textsuperscript{80}’ said that it did not see the adoption of the rule of reason as a solution to the problems of enforcement and procedure it has identified. In particular, it said that it would be paradoxical to cast aside Article 81(3) when that provision in fact contains all the elements of ‘rule of reason’ and that the adoption of the rule of reason under Article 81(1) would run the risk of diverting Article 81(3) from its purpose which is to provide a legal framework for the economic assessment of restrictive practices and do not allow application of the competition rules to be set aside because of political considerations.

In \textit{Metrople Television v Commission}\textsuperscript{81}, the CFI expressly rejected the suggestion that a rule of reason existed under Article 81(1). In this case, six television companies in France had established a joint venture, Television par Satellite(TPS) to devise, develop and broadcast digital 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 81(1), however, it concluded that a non competition clause preventing the parties of TPS from becoming involved in other digital pay TV satellite companies could be cleared and the clauses giving TPS rights of pre-emption in relation to certain channels infringed Article 81(1) but could be exempted under Article 81(3) for three years. Four of the shareholders in TPS appealed to the CFI 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 81(1) of the treaty if it has more positive than negative effects on competition on a given market, in particular, the clauses in the agreements giving TPS rights of pre-emption and exclusivity would enable to enter the market dominated by Canal+ and therefore would favor new competition. The CFI’s judgment rejected the applicants argument as to the rule of reason. The CFI held in the Para 72 of the judgment

\textsuperscript{79} \textit{Continental TV v GTE Sylvania} 433 US 36,49 (1977)

\textsuperscript{80} OJ (1999) C 132/1,(1999) 5 CMLR 208

\textsuperscript{81} Case T-112/99(2001) ECR II-2459,(2001) 5 CMLR 1236
‘According to the applicants, as a consequence of the existence of a rule of reason in Community Competition law, when Article 81(1) of the Treaty is applied it is necessary to weigh the pro and anti competitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in the 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 Instances have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful’.

The CFI said that the pro and anti competitive aspects of restriction of competition should be weighed whether an agreement satisfies the terms of Article 81(3). In the CFI’s view Article 81(3) would lose much of its effectiveness if such an examination had to be carried out already under Article 81(1) of the Treaty.

In some cases, undertakings accused of infringing Article 81 have argued that the market on which they were operating was so highly regulated by the state that there was no latitude left for competition, therefore, they could not be found guilty of agreeing to restrict competition. In *Suiker Unie v Commission*, such a plea succeeded. In Italy, the sugar industry was highly regulated in order that supply and demand be kept in balance for example the suppliers and customers were not allowed to negotiate with one another at all. The ECJ accepted that there was no competition capable of being distorted. On subsequent occasions, however, this defense has failed. The Commission refused to accept that the restriction of price competition in the Dutch cigarette market did not infringe Article 81(1) because Government regulations fixed the maximum price for retailing cigarettes and the regulations still left open the possibility of competing on price although within a narrow band. Indeed if anything the Governmental restriction of competition meant that it was all the more important to preserve what latitude of competition remained.

Some agreements which effect competition within the terms of Article 81(1) may nevertheless not be caught because they do not have an appreciable impact either on competition or on interstate trade. This de minimis doctrine was first formulated by

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82 Supra note 43
the ECJ in *Volk v Vervaecke*. There a German producer of washing machines granted an exclusive distributorship to Vervaecke in Belgium and Luxembourg and guaranteed its absolute territorial protection against parallel imports. Volk’s market share was negligible. On an Article 234 reference, the ECJ held that ‘an agreement falls outside the prohibition in Article 81 (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 de minimis doctrine applies both to agreements whose object and whose effect is to prevent competition which means that even horizontal restraints of a clearly anti-competitive nature or export bans in a vertical agreement could fall outside Article 81(1) because of their diminutive effect. The de minimis doctrine is in practice of considerable importance.

The Commission has given guidance on the de minimis doctrine in series of Notices the most recent of which appeared in 2001. This Notice gives a reasonably clear idea of whether an agreement is within the de minimis doctrine, although it must be treated with caution as it is not legally binding. In some circumstances, an agreement might be held to fall within Article 81(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 criteria in the Notice are exceeded. The Commission holds the view that agreements between undertakings which effect trade between Member states do not appreciably restrict competition within the meaning of Article 81(1):

> if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets effected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors) or if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets effected by the agreement, where the

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84 *Volk v Vervaecke* Case 5/69 (1969) ECR 295, (1969) CMLR 273 The case concerned an exclusive distribution agreement concluded between Mr. Volk, owner of the company, Erd & Co which manufactured washing machines and Vervaecke, a Belgian company which distributed household electrical appliances. Under the agreement, Vervaecke had the exclusive right to sell Volk’s products in Belgium and Luxembourg. According to the Commission, Erd & Co had only 0.08% of the market for the production of washing machines Community wide, 0.2% of the market in Germany and 0.6% of the market in Belgium and Luxembourg. Following a dispute which raised the validity of the agreement before the German courts, the Oberlandesgericht in Munich made an Article 234 reference to the ECJ. In particular it asked the Community Court whether in considering if an agreement fell within Article 81(1) regard had to be had to the proportion of the market that the grantor had.

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% threshold is applicable. The Notice does not provide a safe harbor for so-called ‘hard core restrictions’ of the kind blacklisted in Regulation 330/2010 on vertical agreements and Regulation 2658/00 on specialization agreements. The judgment of the ECJ in Volk v Vervaecke did concern a hard core restriction as the distributor was granted absolute territorial protection, for example, export ban but ultimately it is for the court to interpret and apply Article 81. However the Commission specifically says in paragraph 11 that the Notice does not apply to certain restrictions like horizontal agreements to fix prices, limit output or sales and to allocate markets or customers, vertical agreements for example to fix prices, impose export bans and to restrict sales within a selective distribution system and vertical agreements between competitors.

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%. It is important to note the limitations of the Notice. The Commission itself may consider it inappropriate where it is dealing with an agreement in a tightly oligopolistic market where competition is already severely limited. The ECJ has indicated that it is wrong to adopt a purely quantitative approach to the issue of de minimis agreements and the Court has held that a concerted practice was not within the de minimis doctrine where the parties’ market shares were small but the market was a fragmented one and their market shares exceeded those of most competitors and their turnover figures were high.

The concept of interstate trade is of particular importance in understanding how the Modernization Regulation will work in practice since national courts and National Competition Authorities have an obligation to apply Article 81 and Article 82 to agreements and conduct that have an effect on trade between member states. In Societe Miniere v Maschinenbau Ulm, the ECJ stated that for Article 81 to apply, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence.

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86. The main provision in the Notice as contained in Part ii at paragraph 7.
87. Supra note 84
89. Supra note 26
90. Supra note 59
direct or indirect, actual or potential on the pattern of trade between Member States. The Commission has held that if undertakings participated in an agreement which affects interstate trade they will be bound by Article 81(1) even if their conduct viewed independently does not have such an effect.  

In *AEG-Telefunken v Commission*, the ECJ held that the fact that there was little trade between Member States in the relevant goods did not mean there was no infringement of Article 81(1) since it could reasonably be expected that patterns of trade in future might change. An agreement whereby Scottish Power plc and Scottish Hydro Electric plc agreed to purchase all the electricity produced by Scottish Nuclear Ltd was held by the Commission to be likely to affect trade between Member States. In the Commission’s view there was an increasing interdependence of networks and an interconnection already linked the French electricity grid to that of England and Wales. So such developments meant that an agreement in the Scottish market would have a likely impact on interstate trade. The Commission also considered that a joint venture between Irish Telecom and Motorola Ireland Limited to provide a radio paging service in Ireland affected interstate trade as in the Commission’s view, the activities of Motorola Ireland Limited must be seen as part of the Motorola Group’s European operations and therefore they necessarily would have repercussions outside Ireland.

In *Compagnie Maritime Belge Transports SA v Commission*, the CFI upheld a Commission’s decision that various agreements between three liner conferences operating between northern Europe and west Africa breached Article 81 and 82. The agreements in question sought to exclude companies belonging to one conference from operating as independent shipping companies in the area of activity of the other two conferences. The appellants argued that as the condemned practices only relate to African and not to home ward transit to the Community they did not affect interstate trade. The Commission had disagreed with this reasoning that outbound and inbound transport markets being inter dependant could not be separated and that agreements concerned with outbound transport could therefore have an impact on trade between Member States. The CFI upheld this approach. It also reasoned that even if such

92 Supra note 33
93 Scottish Nuclear, Nuclear Energy Agreement OJ (1991) L 178/31
agreements did not directly affect competition between Community ports, the sort of market partitioning which the decision condemned might affect activities in the port’s catchment areas. The fact that the parties to an agreement are from the same Member State does not mean that there can be no effect on trade between Member States.

The ECJ in another matter refused to overturn the Commission’s decision that a price fixing scheme limited to the sale of cement on the Dutch market and which did not affect imports and exports infringed Article 81(1). The ECJ held that an agreement "extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentization of markets on a national basis thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production". In *Pronupita de Paris v Schillgalis*, the ECJ held that clauses in distribution franchise agreements which partition markets between franchisor and franchisee are per se capable of effecting interstate trade even if they are concluded between enterprises in the same Member State to the extent that they prevent the franchisees from setting themselves up in other Member States.

The fact that an agreement relates to trade outside the common market does not necessarily mean that it is not caught by Article 81. It is necessary to consider whether the agreement might produce effects on trade between the Member States of the EC. An agreement between firms within the common market as to their exports outside may be caught if it is clear that a necessary side effect of it will be to prevent, distort or restrict competition within the Community and this will affect interstate trade. An agreement between Rheinzink and Schlitz that Schlitz would export goods to countries in the Middle East and in particular to Egypt was held to have an effect on interstate trade as it was really a way of protecting the German market from parallel imports.

In its first application of the competition rules to maritime transport, the Commission applied both Article 81 and 82 to the provision of transport services between the European Community and third countries like France and parts of Central and Western Africa. The Commission held that agreements between ship-owners concerning cargo sharing on these routes did effect trade between Member states.

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96 *Vereeniging van Cementhandlaren (VCH) v Commission* Case 8/72 (1972) ECR 977, (1973) CMLR 7
97 Supra note 75
because firstly, French shipping lines thereby acquired privileged access to the routes and so gained a competitive edge in world trade over the lines of other Member States. Secondly, competition between French importers and exporters and those in other Member States was distorted and thirdly, trade could be deflected away from ports in France to those elsewhere in the Community.  

In Javico v Yves Saint Laurent, the ECJ was asked to consider whether export bans imposed upon distributors in the Ukraine and Russia infringed Article 81(1). The ECJ held that export bans in these circumstances did not have as their object the restriction of competition. However, the ECJ went on to say that there might be some cases in which the enforcement of restrictions on resale outside a non EC contractual territory might be found to infringe Article 81(1) where a) they produce an appreciable effect on trade between Member States and b) where they have an appreciable effect on competition within the EU.

To produce an appreciable effect on competition within the EU, the ECJ suggested that the EU market in the relevant products must be oligopolistic so that there is a limited competition there and that there should be a substantial difference in prices charged for the products inside the EU and in the countries from which the transshipments originate after allowing for relevant duties and transport costs. Further to produce an appreciable effect on trade between Member States, the volume of products put onto the market in non Member States must be more than a very small percentage of the total market for those products within the EU, although no figure was offered by the Court as to what constitutes a very small percentage.

An agreement which falls within Article 81 (1) of the Treaty is not necessarily automatically void as Article 81(2) states. Under Regulation 17/62, the Commission had the exclusive right to so called individual exemption under Article 81(3) to agreements notified to it. However the system of notification of agreements to the Commission has been abolished with effect from 1st May 2004 by Council Regulation 1/2003 also called the Modernization Regulation by which Article 81(3) becomes directly applicable and the Commission shares the competence to apply Article 81(3)

100 Supra note 67
102 Supra note 26
with national competition authorities and national courts. An alternative way of satisfying Article 81(3) is to draft an agreement to satisfy one of the block exemptions issued by the Commission under powers conferred on it by the Council of Ministers. The CFI has stated that there are no anti competitive agreements which as a matter of law could never satisfy Article 81(3).103

It is possible for the parties to any agreement to argue that Article 81(3) is applicable but it is also highly unlikely that hard core restrictions such as price fixing and market sharing agreements would satisfy Article 81(3) but in exceptional circumstances even this may be possible as Article 3 and 5 of Council Regulation 4056/86104 on maritime transport provides block exemption for horizontal price fixing in the case of International liner conferences. The Commission granted individual exemption to 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. The agreement did entail the fixing of prices but this price fixing was of an unusual nature and the Commission could identify a number of economic efficiencies that would follow from it.105 Similarly in Visa International-Multilateral Interchange Fee106, the Commission stated that it is not the case that an agreement concerning prices is always to be classified as a cartel and therefore as inherently incapable of satisfying Article81(3) and it granted individual exemption to a multilateral Interchange Fee agreed upon between acquiring and issuing banks within the Visa system.

Article 81(3) provides that the provisions of Article 81(1) may be declared inapplicable in respect of agreements, decisions or concerted practices which satisfies four conditions, the first two positive and the last two negative. To satisfy Article 81(3) an agreement must improve the production or distribution of goods or promote technical or economic progress and customers must receive a fair share of the resulting benefit. Furthermore the agreement must not contain dispensable restrictions nor substantially eliminate competition in the relevant market. The burden of proving that Article 81(3) is satisfied is on the undertaking or undertakings seeking to defend the agreement. An agreement must satisfy all four conditions mentioned in Article 81(3) if

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103 Matri Hachette v Commission Case T -17/93,(1994) ECR II -595 para 85
104 OJ (1986) L 378/1
106 Supra note 65
it is to benefit from Article 81(3) and the Community Courts have stressed this on a number of occasions. The four conditions for an agreement to fulfill the criteria laid down under Article 81(3) are:

a). An improvement in the production or distribution of goods or in technical or economic progress.

The benefit produced by the agreement must be something of objective value to the Community as a whole and not a private benefit to the parties themselves. Any advantages claimed of the agreement must outweigh the detriments it might produce. When permitting specialization 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 while it has often held that research and development projects would lead to technical and economic progress. Vertical agreements between suppliers and distributors come under the head of improvements and distribution and the Commission has recognized network externalities as contributing to technical and economic progress from which consumers derive a benefit.

In a case when considering whether an exemption might be given to a joint venture to produce a multipurpose vehicle in Portugal, the Commission took note of exceptional circumstances in that it would bring a large number of jobs, substantial foreign investment to one of the poorest regions of the Community, promoting harmonious development, reducing regional disparities and furthering European market integration. The Commission emphasized however that this would not be enough in itself to make an exemption possible unless the other conditions of Article 81(3) were fulfilled.

In its submissions to the CFI when the decision was challenged, the Commission argued that it was possible to take into account factors other than those expressly mentioned in Article 81(3) including for example the maintenance of employment. On appeal, the CFI 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. The Commission granted an individual exemption to an agreement between manufacturers of domestic appliances i.e. 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 referring specifically to the Community’s environmental policy in its decision. 108

b) Fair share to consumers

The parties must show that a fair share of the benefit that results from an agreement will accrue to the customers if Article 81(3) is to apply. For the purpose of this limb of Article 81(3), a consumer does not necessarily mean a member of the public who purchases goods or services for personal use and in many cases such a person may be too far removed from the level of market at which the agreement takes effect to be shown to receive any benefit but undertakings which acquire products in the course of their trade qualify as customers. The Commission did accept that the establishment of Euro sport, a transnational satellite television channel dedicated to sport might be beneficial to consumers in the short term but in the longer term it considered that the consumer might be better served by having a choice of channels differing in style, content and quality. 109

c) Any restrictions must be indispensible

Article 81(3) will not be applicable to an agreement if the restriction of competition is greater than is necessary to procure the benefit in question as there must not be any restrictions which are not indispensible. Price fixing or geographic market sharing would normally not be regarded as indispensible although the possibility of an exemption even for those practices cannot be entirely ruled out. Export and import bans will almost inevitably be considered not indispensible since they are so clearly contrary to the single market imperative. However, it has consistently been held that some measure of exclusivity for distributors and licensees may be an indispensible feature of distribution agreements and licenses of intellectual property rights that is why it is permissible under Regulation 2790/99 110 on vertical agreements to grant territorial and customer exclusivity and even to have a ban on active sales outside the territory or customer group provided that passive sales remains possible.

This is the compromise that is struck between the goal of market integration and the legitimate needs of producers and their distributors and licensees. In horizontal agreements, the Commission has accepted that various restrictions may be indispensible like in specialization agreements it is acceptable that each party agrees to

110 Supra note 52
forego production of the goods that the other is to produce. Similarly, in research and development agreements it may be necessary for parent companies to agree to refrain from research in an area in trusted to a jointly owned subsidiary.

In *Publishers Association v Commission*[^111], the ECJ annulled a decision of the Commission and set aside a judgment of the CFI for errors in relation to the indispensability of restrictions under Article 81(3). The Publisher’s Association had sought exemption for the Net Book Agreement under which publishers agreed that note books would not be sold to the public at less than the net published price. The Commission found that the agreement infringed Article 81(1) and that a collective system of fixed prices was not indispensible to the attainment of the objectives of the Publisher’s Association. The CFI upheld the Commission’s decision refusing exemption.

The ECJ however held that the CFI had erred in law doing so and it had wrongly failed to consider whether there existed a single language area forming a single market for books in UK and Ireland and without doing so it could not have carried out a detailed review of the indispensability of the restrictions arising from the agreement. Furthermore the Commission’s decision was found to have been insufficiently reasoned since it failed to show why the Publisher’s Association argument that the 1962 judgment of the Restrictive Practices Court in the UK upholding the Net Book Agreement was evidence of the benefits flowing there from for the purpose of Article 81(3) was unsound.

In *European Night Services*[^112], the CFI held that a condition attached to an individual exemption by the Commission that the operators of certain railway services should supply equivalent services to third parties on non discriminatory terms should be overturned since the Commission had failed to show that it was necessary to prevent the restrictions in the agreement from going beyond what was indispensible. In *Visa International-Multilateral Interchange Fee*[^113] the Commission was concerned to ensure that the level of fees charged by the bank were not unreasonably high or in the language of Article 81(3) that they were indispensible.

[^111]: Case C 360/92 ECR 1-23 (1995) 5 CMLR 33
[^113]: Supra note 65
d) No substantial elimination of competition

If the result of an agreement would be to substantially eliminate competition, it will not satisfy Article 81(3) for example the ECJ upheld the Commission’s decision that an agreement affecting over 80% of the market for cigarettes in Belgium failed under this head\textsuperscript{114} while the Commission refused exemption to an agreement which would effectively seal off the UK market.\textsuperscript{115} This part of Article 81(3) is important because it underpins the philosophy of Article 81 generally and the Commission will be skeptical of agreements which are entered into by firms with large market shares.

In deciding whether an agreement might substantially eliminate competition, it is necessary to define the relevant product and geographic market. In each case, the definition of the product and geographic markets must turn on the particular facts. The decision of the Commission in Re Ford Werke AG Agreement (No 2)\textsuperscript{116} revealed an additional and significant feature of its attitude to Article 81(3) against unilateral actions by the undertakings. In this case, Ford notified its standard distribution agreement to the Commission. The Commission refused to grant an exemption not because it objected to any particular clauses in the agreement but because Ford’s distribution policy as actually implemented produced effects which overall were inimical to the underlying objectives of the competition policy. Ford had ceased to supply right hand driven cars to the German market in the numbers it had formerly done. This was intended to protect the position of Ford of Britain and its dealers there and deprived consumers of the possibility of acquiring cars from the continent at considerably lower prices.

Viewed in its overall context, Ford was acting in a way which compartmentalized the common market and so its distribution agreement was ineligible for exemption. This decision which was upheld by the ECJ on appeal meant that when considering whether the provisions of Article 81(3) are satisfied, the practical operation of an agreement must be considered as well as actual provisions.

The relationship between conduct exempted from the prohibition of Article 81(1) under Article 81(3) and the application of Article 82 which forbids the abuse of dominant position can be problematic. The CFI has held that the prohibition of a substantial elimination of competition in Article 81(3) is narrower than the concept of

\textsuperscript{114} Van Landewyck v Commission Cases 209/78 etc (1980) ECR 3125,(1981) 3 CMLR 134
\textsuperscript{115} Re WANO Schwarzpulver GmbH OJ (1978) L 322 /26,(1979) 1 CMLR 403
\textsuperscript{116} OJ (1983) L 327/31,(1984) 1 CMLR 596
dominance so that an agreement that establishes a dominant position might not be regarded as substantially eliminating competition. The relationship between block exemptions and Article 82 was considered by the CFI in *Tetra Pak Rausing SA v Commission (Tetra Pak-l)* reviewing the Commission’s decision in *Tetra Pak-l(BTG License).* The Commission has held that Tetra Pak had abused a dominant position by acquiring through its purchase of another company an exclusive patent license. This license benefitted from block exemption under Regulation 2349/84. During the Commission’s administrative procedure, Tetra Pak offered to abandon all claims to exclusivity in the license. Nonetheless the Commission adopted a decision that until such time as the exclusivity was abandoned, Tetra Pak has been abusing its dominant position on the market rejecting Tetra Pak’s argument that it could not be guilty of abuse until such time as the Commission had withdrawn the block exemption in accordance with Regulation 2349/84. The CFI upheld the decision of the Commission. The mere fact that an agreement benefits from the block exemption does not mean that a dominant undertaking cannot be found to be abusing its dominant position by entering into or operating the agreement or becoming a party to it by acquisition. It would be wrong to require the Commission to always withdraw the benefit of block exemption by individual action in order to prevent dominant firms from abusing their dominant position in such circumstances. The CFI said that the fact of a dominant undertaking acquiring an exclusive license did not in itself constitute an abuse but the circumstances surrounding the acquisition and in particular, its effects on the competitive structure of the relevant market had to be taken into account. In this particular case, the acquisition of the license constituted an abuse because the right to use the technology protected by the licensed patent afforded the only opportunity that a competitor might have to effectively competing with Tetra Pak.

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118 *Tetra Pak Rausing SA v Commission (Tetra Pak-l)* Case T – 51/89 (1990) ECR II-309,(1991) 4 CMLR 334 Tetra Pak was held to be dominant in the market for aseptic liquid-food packaging.
119 Tetra Pak thereby acquired the exclusive license. A competitor of Tetra Pak, Elopak complained to the Commission that this acquisition constituted an infringement of Article 102. After the Commission issued a Statement of Objections Tetra Pak abandoned all claims to exclusivity. Nevertheless the Commission proceeded to a formal decision holding that Tetra Pak had infringed Article 82 as it wished to clarify the legal position. Tetra Pak appealed to the CFI. One issue in the case was whether a patent license which complied with the block exemption on patent licensing agreements, 2349/84 could be the subject matter of an Article 82 infringement.

The CFI judgment in *Tetra Pak* is of considerable importance. It eschews the two simplest answers to the question of the relationship of Article 81(3) with Article 82 that on the one hand, conduct exempt under Article 81(3) cannot infringe Article 82 until the Commission withdraws the exemption and on the other that being party to an exclusive agreement inevitably involves an abuse of a dominant position. In each case, one must analyze the market to determine the effect of the dominant firm's conduct. The Commission’s decisions on the application of Article 81(3) are subject to review by the CFI. In *Consten and Grading v Commission*, the ECJ indicated that it would not adopt an interventionist stance on applications for review as Article 81(3) involves complex evaluations of economic issues and the ECJ considered this task is essentially for the Commission. The Court will confine itself to examining the relevant facts and the legal consequences deduced therefrom and it will not substitute its decision for the Commission’s.

Before the advent of Modernization Regulation, the Community Courts have maintained this approach emphasizing the extent of the discretion available to the Commission when dealing with the exemption under Article 81(3) and its unwillingness to interfere with the exercise of this discretion. However, the Courts maintained that the Commission’s decision should be adequately reasoned and where there is a defect in this respect, the CFI will be prepared to annul the decision in question.

Similarly the CFI will annul the Commission’s decision where it has seriously misapprehended the facts of a particular case. In *Metropole v Commission*, a third party successfully persuaded the CFI that an individual exemption granted by the Commission to the European Broadcasting Union should be annulled due to error of law on the Commission’s part. The Commission had granted an individual exemption

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1. Supra note 118
2. Supra note 51
3. *Metropole v Commission* Cases T-528/93 ETC (1996) ECR II-649,(1996) 5 CMLR 386 In this case Antena 3, a TV service was refused admission to the EBU as an active member before the Commission adopted a decision exempting the EBU’s rules. Antena 3 brought an action to have the decision annulled. The Commission argued that it was not individually and directly concerned and had not submitted observations following the publication of the Article 19(3) notice. The CFI however held that taking part in the administrative proceedings was not a prerequisite for being accorded standing and that its application to join the EBU distinguished Antena 3 in the same way as if it were an addressee of the decision.
to the regulations of the European Broadcasting Union governing the joint negotiation, acquisition and sharing of television rights to sports events subject to conditions designed to permit third parties to have access to the television rights in question and to keep the Commission informed of the practical application of the regulations.

A number of television companies not members of the European Broadcasting Union sought the annulment of the Commission’s decision granting individual exemption. The CFI having decided that the applications were admissible, considered whether the restrictions on competition arising from the rules on membership of the European Broadcasting Union were indispensible in the sense of Article 81(3). The CFI considered whether the European Broadcasting Union membership rules were objective and sufficiently determinate so as to enable them to be applied uniformly and in a non discriminatory manner vis a vis all potential active members. The CFI said that unless this pre condition was satisfied, it would be impossible to be sure that the restriction of competition inherent in the rules was indispensible. The CFI found that the Commission had not carried out such an investigation and had consequently not considered whether the rules were indispensible. It had therefore committed an error of law warranting the annulment of the exemption. This judgment demonstrates that a third party may be able to successfully challenge a finding that the terms of Article 81(3) are satisfied or not.

Now with the advent of Modernization Regulation the system of notification for individual exemption to the Commission has ended as before the Commission had sole power but subject to review of the Community Courts to grant individual exemption under Regulation 17/62. This monopoly of the Commission to grant individual exemption had its drawbacks since the Commission never had sufficient staff to deal with the enormous volume of agreements that have been notified to it. The result been that severe delays had been experienced, considerable business time was being spent collecting data and preparing the Form A/B on which notifications had to be submitted. The Modernization Regulation was adopted on 1st May 2004, which changed the way in which Article 81 and 82 will be applied. Following the adoption of the Modernization Regulation, the Commission and the National Competition authorities of the Member states and National Courts of the European Union have the competence to enforce Article 81 and 82. Now there is no longer any such thing as an ‘individual exemption’ as the agreement will either infringe Article 81(1) or not and
competence to enforce Article 81 and 82. Now there is no longer any such thing as an ‘individual exemption’ as the agreement will either infringe Article 81(1) or not and the undertakings now must be self reliant and conduct their own self assessment of the application of Article 81(3) rather than awaiting the stamp of approval from the Commission that the criteria of Article 81(3) has been satisfied.

However the system of block exemptions remains in effect notwithstanding the abolition of individual exemptions as a result of the Modernization Regulation. Agreements within the terms of block exemption have never been notified to the Commission and they are valid without specific authorization. The typical format of most block exemptions begins with a series of recitals which explains 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 as Regulation 330/2010 block exempts vertical agreements as defined in Article 2(1) thereof. Regulation 330/2010 on vertical agreements, Regulation 2658/2000 on specialization agreements and Regulation 2659/2000 on research and development agreements contains a black list setting out provisions that must not be included if an agreement is to enjoy block exemption. The exclusion of white lists from these new regulations is a deliberate attempt on the part of the Commission to respond to the criticism that the block exemptions operate in too mechanical and legalistic manner.

Most block exemptions have market share thresholds for example under Regulation 330/2010 Article 3 provides that undertakings with a market share of more than 30% will not qualify for block exemption although they may still be able to satisfy the conditions of Article 101(3). Article 4 of the Regulation for specialization agreements has a market share cap of 20% while Article 4 of the Regulation for research and development has a market share cap of 25% to qualify for the block exemption. Each block exemption confers on the Commission a power to withdrawal in the event that a particular agreement has a detrimental effect on competition.

In order to benefit from a block exemption an agreement must be generally of the type as envisaged by the Commission when producing the regulation in question. This means that there is need to ensure that the agreement is within the spirit as well as
the letter of the particular regulation. On several occasions an agreement has failed at
the point of characterization. In *Delimitis v Henniger Brau* 124 the ECJ held that in
order to benefit from a block exemption an agreement must satisfy all the
requirements of the relevant regulation. Where an agreement fails to do so albeit only
in a marginal way block exemption will be unavailable and individual exemption
required.

Article 82 is an important companion of Article 81. Whereas Article 81 is
concerned with agreements, decisions and concerted practices which are harmful to
competition Article 82 is directed towards the unilateral conduct of dominant firms
which act in an abusive manner. Article 82 does not forbid dominance itself. Nor does
it contain an exhaustive list of the matters within its mischief and it has been applied to
many practices not specifically mentioned in it. Under the Modernization Regulation
125 national courts and national competition authorities have an obligation to apply
Article 82 where an abuse of a dominant position has an effect on trade between
Member States. 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 and is without prejudice to the application of provisions
of national law that predominantly pursue an objective different from those pursued by
Article 81 and 82.

Article 82 applies only where an undertaking has a dominant position. A finding
of dominance is a two stage procedure. The first is to determine the relevant market
and having defined the market it is necessary in an Article 82 case to determine what
is meant by dominant position. The ECJ in *United Brands v Commission* 126 laid down
the following legal test for finding of dominance.

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124 *Supra* note 68
125 *Supra* note 26
1 CMLR 429 Para 250. In this case United Brand a company from New York was supplying
bananas in Europe. It lay down that its distributor/ripeners in the Belgo-Luxembourg
Economic Union, Denmark, Germany, Ireland and the Netherlands cannot resell its bananas
while they were still green. Further in respect of its sales of 'Chiquita Bananas' (which was
its branded banana), charged other trading parties, namely distributor/ripeners other than the
scipio group in the member states, dissimilar prices for equivalent transactions; and imposed
unfair prices for the sale of Chiquita bananas on its customers in the Belgo-Luxembourg
Economic Union, Denmark, the Netherlands and Germany (other than the scipio group). It
also refused from 10 October 1973 to 11 February 1975 to supply Chiquita bananas to the
Olesen, one of the distributors in Denmark; this distributor had taken part in advertising and
promotion campaign of rival producer's bananas. Commission was of the view that United
Brand has abused its Dominant position.
The dominant position thus referred to by Article 82 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

The definition contains two elements—the ability to prevent competition and the ability to behave independently. It is suggested that the essential issue is the ability to act independently on the market which is the ability of a firm or firms to restrict output and thereby increase price above the competitive level thereby enjoying increased profits. The ability to restrict output and increase prices derive from independence or freedom from competitive restraint. Market shares are an important issue in assessing market power as far as Article 82 is concerned. It is obvious that larger the market share, the more likely there is finding of dominance. Some firms have been found to have very large market shares. In *Hoffman-La Roche v Commission* 127 the ECJ 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 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...’

The Court says here that large market shares may in themselves be evidence of a dominant position but this assertion is qualified in two ways; first by recognizing that in exceptional circumstances large market shares may not mean that a firm is dominant and secondly by referring to the notion that the market share must exist for some time. In assessing market power economists would argue that it is the exercise of the market power overtime which is of particular significance. A large market share held only briefly before the emergence of new competition would suggest that there

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127 *Hoffman-La Roche & Co AG v. Commission* Case 85/76 (1979) ECR 461, (1979) 3 CMLR 211. Hoffman-la Roche was a Swiss company and it appealed against the decision of the Commission given in 1976 that Roche had a dominant position within the common market, within the meaning of article 86 of the treaty, on the markets in vitamins A, B2, B3 (Pantothenic Acid ), B6, C, E and H (biotin). Further Commission was of the view that it has abused that position and has thereby infringed the article 86 by concluding, from 1964 onwards and in particular during the years 1970 to 1974, agreement, with 22 purchasers of these vitamins which contain an obligation upon purchasers to purchase from him, or by the grant of fidelity rebates offer them an incentive, to buy all or most of their requirements of vitamins exclusively or in preference from Roche. Commission decision enjoins Roche to terminate the infringement and ordered it to pay the fine.
was never any market power. This extract from *Hoffman La Roche* makes clear that a firm could argue that barriers to entry in an industry are low so that new competition might soon emerge or that it was charging only at a marginal cost so that its market share did not reflect true power over the market. In practice the Community Courts and the Commission habitually look to see what other factors indicate market power and they do not content themselves merely with quantifying market shares.

In *AKZO v Commission*\(^{129}\), the ECJ referred to the passage from *Hoffman-La Roche* and continued that a market share of 50% could be considered to be very large so that in exceptional circumstances pointing the other way an undertaking with such a market share will be presumed dominant and that undertaking will bear the burden of establishing that it is not dominant. Clearly this is a very significant rule which indicates 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. It is necessary to consider at what point, a firm’s market share is so small that it could not be considered to have a dominant position. Both the ECJ and the Commission held in *United Brands* that a firm with a market share in the 40-45% range was dominant. The case shows that a firm supplying less than 50% of the relevant products may be held to have a dominant position. Even an undertaking subject to competition on the market as *United Brands* was at certain periods of time may be held to be dominant for the purpose of Article 82. In *Hoffman La Roche v Commission*\(^{130}\), the ECJ quashed the Commission decision that Roche was dominant in the Vitamin B3 market where its market share was 43% as it was not satisfied that there were sufficient additional factors indicating dominance as decided by the Commission.

\(^{128}\) *ibid*

\(^{129}\) *AKZO v Commission* Case C-26/86(1991) ECR 1-3359,(1993) 5 CMLR 215

\(^{130}\) *Supra* note 127
The Commission has said that it takes the view that a dominant position can generally be taken to exist when a firm has a market share of 40-50% and even that one cannot be ruled out in the region of 20-40%. When looking at market shares, it is relevant to look at the largest firm’s share relative to its competitors as the smaller the shares of the competitors the likelier the Commission will be to hold that the largest firm is dominant. However where one firm has a market share of say 45% and the nearest rival has 35% this would open up the possibility of the Commission reaching a finding of collective dominance.

In its Notice on Market Definition, the Commission deals with the method of calculating shares at paragraph 53 to 55. Data on the market shares may be available from market sources for example trade association statistics or from studies commissioned within the industry. The Commission will normally then calculate market shares of a particular undertaking under investigation by reference to the sales figures of the firm operating on the market. However the sales figures are not the only data capable of revealing market shares. For example, paragraph 54 of the Notice on Market Definition the Commission indicates that in aviation it may be as informative to look at the relative size of the airlines fleets and in a sector such as mining the reserves held by different operators may be of importance. As for sales data themselves the Commission states in paragraph 55 of the Notice that both sales by volume and the sales by value are significant and in the case of differentiated products it considers that sales by value and their associated market share are more revealing.

Market shares are not the sole issue in determining whether a firm has market power. Market shares cannot indicate the competitive pressure exerted by firms not yet operating on the market but with the capacity to enter it. Another most obvious factor indicating dominance which helps to establish an undertaking’s position in the market is barriers to entry. A firm with a large market share will be in a much better position to earn monopoly profits if it knows that in doing so it will not attract new competition. In economic terms, the relevant question is whether there are barriers to entry which would prevent anyone else entering the market.

What constitutes a barrier to entry is controversial among economists. Some argue that in the absence of statutory regulation and provided that supplies of raw materials are available a barrier to entry exists only where a new entrant will face

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higher costs than those already in the industry. A less stringent view would be that anything which might make it particularly difficult for a firm to enter the market is a barrier. Clearly if the former narrow view of barriers of entry is adopted fewer firms will be found to be dominant than if the latter wide approach is taken. In practice, the position is more complicated than this as one has to distinguish between absolute barriers to entry such as ownership of intellectual property rights which may impede access to a market from strategic advantages that may accrue to a firm from having been the first to enter a market.

Where the first mover in a market incurs substantial sunk costs it may enjoy substantial advantage over firms that subsequently wish to enter. Also the provisions of national legal systems can operate as barriers to entry. In *Hugin v Commission*\(^{132}\), the ECJ accepted that Hugin was dominant in the market for spare parts for its cash registers because other firms could not produce spare parts for fear of being sued by Hugin in the UK under the Design Copyright Act 1968. In *Tetra Pak v BTG License*\(^{133}\) the acquisition by Tetra Pak of a company that had the benefit of an exclusive patent and know how license 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.

Other obvious barriers to entry are Government licensing requirements and planning regulations, Governmental control of frequencies for the transmission of radio signals, statutory monopoly power and provisions of domestic law which shields producers on the home market from foreign competition. Legal provisions such as these give the incumbent firm an absolute advantage so that a new entrant to the market cannot gain access to an asset or resource at all or only at considerable cost for example by paying for a license of the intellectual property right. Vertical integration which may give incumbent undertakings a strategic advantage over new entrants is

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\(^{132}\) *Hugin v Commission* Case 22/78 (1979) ECR 1869,(1979)3 CMLR 345 In Hugin it was shown that not all abusive conduct in the common market affects trade. This case concerned the supply of cash register spare parts by a Swedish undertaking to a servicing and repair firm in south east England at a time prior to Sweden joining the EU. The servicing firm’s activities were confined to the London area and there was no inter state trade in the spare parts. The ECJ quashed the Commission’s decision on the ground that there was not an effect on trade between Member States.

regarded as a significant indicator of dominance. In *United Brand v Commission*\textsuperscript{134}, the ECJ described the extent to which UBC’s activities were integrated as it owned banana plantations and transport boats and it marketed its bananas itself. This provided that firm with commercial stability has a significant advantage over its competitors. In *Hoffman-La Roche v Commission*\textsuperscript{135} the ECJ pointed to Roche’s highly developed sales network as a relevant factor conferring upon it commercial advantages over its rivals.

The Commission has often treated vertical integration and the benefit of well established distribution systems as a factor indicating dominance since this could impede access for a would be entrant to the market. In United Brands the ECJ considered that United Brand’s advertising campaigns and brand image were significant factors indicating dominance. United Brands had spent considerable resources establishing the Chiquita brand name which was well protected by trademarks. In Hoffman –La Roche the ECJ rejected the Commission’s argument that the fact that Roche produced a wider range of products than its rivals and that it was largest producer of vitamins in the world were relevant for the purpose of establishing dominance. In *British Midland v Aer Lingus*\textsuperscript{136}, the Commission considered that opportunity costs which are the value of something that has to be sacrificed in order to achieve something else could act as a deterrent to potential entrants to the market in question. In this case, the Commission was looking at the air route from Heathrow to Dublin. An airline operating from Heathrow is allowed a certain number of slots for taking off and landing. If it were to compete on the London-Dublin route, it would have to sacrifice slots currently used for other destinations. As the Dublin route was not very profitable, the Commission considered that the opportunity costs involved in switching to it from other lucrative ones were high and acted as a deterrent.

The ECJ in *United Brands v Commission*\textsuperscript{137} 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 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 and rebates may themselves prevent competitors from entering the market.

\textsuperscript{134} Supra note 126

\textsuperscript{135} Case 85/76 (1979) ECR 461, (1979) 3 CMLR, 211.


\textsuperscript{137} Supra note 126
and so constitute a barrier to entry. In *Michelin v Commission*\(^{138}\), the Commission relied on Michelin’s price discrimination as an indicator of dominance. Michelin argued before the ECJ that this approach was circular as 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 ECJ 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. In *BBI/Boosey and Hawkes: Interim Measures*\(^{139}\), the Commission regarded internal documents of Bossey and Hawkes in which it had described its instruments as ‘automatically first choice’ of all the top brass brands was significant in its finding that Boosey and Hawkes was dominant. It is not an offence for a firm to have a dominant position but what is offensive is to abuse the position of dominance. The ECJ in *Michelin v Commission* stated that a firm in a dominant position has a special responsibility not to allow its conduct to impair undistorted competition in the common market. In *Compagnie Maritime Beige Transports SA v Commission*\(^{140}\), the ECJ stated that:

> ‘It is sufficient to recall that the conduct at issue here is that of a conference having a share of over 90% 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 ECJ 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

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Michelin supplied heavy vehicle new replacement tyres to tyre dealers who sold both Michelin tyres and competing brands. It ran a fixed invoice discount and a cash discount for early payment which were the same for all dealers. These were not found to infringe Article 82. Michelin also offered a discount linked to an annual sales target which was personal to each dealer. A proportion of this variable discount was paid in advance initially every month and then every four months as an advance on the annual sum. The full sum became payable only if the dealer attained a predetermined sales target. The target was fixed for each dealer by a Michelin sales representative at the beginning of each year. The discount was basically geared to turnover and to the proportion of Michelin tyres sold and the aim was to ensure that the dealer sold more Michelin tyres than he had in the year before although if times were hard it might be sufficient to equal the previous year. Towards the end of each sales year Michelin’s sales representative would urge the dealer to place an order big enough to obtain the full discount. The Commission held that the scheme infringed Article 82. This finding was upheld by the ECJ.


\(^{140}\) *Supra* note 95
of an undertaking with less than 90% of the market and facing more competition would not have been found to be unlawful.

Once it has been established that a firm has a dominant position on the market, one has to see whether the dominant position is held in the whole or a substantial part of the common market. The requirement that market power should exist over a substantial part of the common market is in a sense similar to the de minimis doctrine under Article 81 according to which agreements of minor importance are not caught. There is no issue of substantiality where it is decided that an undertaking is dominant throughout the European Community.

In Suiker Unie v Commission \(^{141}\), the ECJ said that 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. This indicates that substantiality it is not simply a question of relating the physical size of the geographical market to the EC as a whole. In Suiker Unie the ECJ considered the ratio of the volume of Belgian and South German production of sugar to Community production overall and concluded on this basis that each of those markets could be considered to be substantial. It is also likely that each Member State would be considered to be a substantial part of the common market in particular where an undertaking enjoys a statutory monopoly and Suiker Unie further established that parts of Member States can be considered to be a substantial part of the common market. It is assumed that Article 82 is applicable only to large undertakings. However it would be wrong to suppose that only firms such as these fall within the risk of Article 82. The significant issue under Article 82 is market power and 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 82.

In Hugin \(^{142}\), the firm was fined by the Commission for refusing to supply its spare parts to Liptons. The market for these purposes were spare parts for Hugin machines and Hugin’s share of the spare part market was 12-14% but its share of the spare parts market for its machines was 100%. On appeal, the ECJ quashed the Commission’s decision because it considered there to be no effect on interstate trade but it upheld the finding on dominance. In Boosey and Hawkes/BBI: Interim measures

\(^{141}\) Cases 40/73 (1975) ECR 1663,(1976) 1 CMLR 295

\(^{142}\) Supra note 132
the Commission found the abuse of 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 pounds in 1985 and the market it was accused of dominating was defined as instruments for British style brass brands in which its market share was 80-90%.

The Football World Cup 1998 decision epitomizes the possibility of very narrow market definition. 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. The Chief Financial Officer responsible for the ticketing arrangement was found to have abused its dominant position by selling tickets only to customers having a postal address in France and the practice was pronounced guilty of discrimination in favor of French nationals.

Once it has been decided that a firm has a dominant position in a substantial part of the common market, it is necessary to consider what constitutes an abuse of that position. It is not an offence for a firm to have a dominant position but a firm in a dominant position has a special responsibility not to allow its conduct to impair undistorted competition on the common market. The most obvious objection to a monopolist is that he is in a position to reduce output and thereby increase the price of his products above the competitive level. A dominant firm which charges discriminatory prices may be both exploiting its position by earning the maximum profit it can at the expense of customers and harming competition by making it harder for other firms to enter the market.

Article 82(2) (a) gives as an example of an abuse the imposition of unfair purchase or selling prices or other unfair trading practices. However as general proposition, the competition authorities are not keen to establish themselves as price regulators but they are keener to apply Article 82 to prohibit anti competitive abuses which are harmful to existing competitors or which deter new entrants to the market. Thus there has been relatively little examination of high prices or other exploitative behavior by the Commission and the case law of the Community Courts has not authoritatively defined what is meant by excessive pricing.

143 Supra note 139
Article 82 (2)(b) gives as an example of abuse the limitation of production, markets or technical development to the prejudice of the consumer and in a particular case the German Federal Employment Office (the FEO) had a statutory monopoly in respect of the recruitment of executive personnel but in practice private agencies also provided this service albeit unlawfully as the FEO itself was being incapable of satisfying the market demand. The ECJ held that it could be an abuse for the FEO to prevent private agencies from offering recruitment services where it was unable to offer them sufficiently itself.  

The ECJ’s judgment in *Continental Can v Commission* is a classic example of EC jurisprudence. The question before the ECJ was whether mergers could be prohibited under Article 82. One argument against this was that Article 82 was designed to prevent the direct exploitation of consumers and not to deal with more indirect adverse effects that might be produced by harming the competitive process. The ECJ rejected this argument and said that it was not possible to draw a distinction between direct and indirect effects on the market instead it was necessary to interpret Article 82 in the light of the spirit of the Treaty generally. Article 3(1)(g)(exArticle 3 (f) of the Treaty required the institution of a system ensuring that the competition in the market is not distorted and Article 2 of the Treaty called for the promotion of a continuous and balanced expansion in economic activities. Articles 81 and 82 had to be interpreted with these aims in mind and it would be futile to prevent agreements which distort competition under Article 81 but then to allow mergers which resulted in the elimination of the competition.

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145 Supra note 28
146 *Continental Can v Commission* Case 6/72 (1973) ECR 215,(1973) CMLR 199 Continental Can Co. Inc was an American company which manufactured metal packaging. It acquired an 85.8% share in a German metal can manufacturer, SLW. It then set about forming under Belgian law a wholly owned subsidiary, Europemballage, through which it planned to acquire a controlling interest in various other European can manufacturers. Only one of these transactions finally proceeded, the acquisition of a Dutch company, TDV. The Commission adopted a decision holding that this was contrary to Article 82 on the grounds that through SLW Continental Can held a dominant position in a substantial part of the Common Market in the markets for light packaging for preserved meat, fish and crustacean and for metal caps for glass jars and that by Europemballage’s purchase of a majority shareholding in TDV Continental Can has abused this dominant position by practically eliminating competition in the relevant market.
The adoption in 1989 of the EC Merger Regulation means that Article 82 is now largely redundant in respect of mergers however the Continental Can remains immensely important to the law of Article 82 since it confirmed that it could be applied to anti competitive abuses as well as exploitative ones. Another argument rejected by the ECJ in Continental Can was that an argument raised by Continental Can that even if mergers were caught by Article 82 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 behavior alleged to amount to an abuse. The ECJ held that it was possible to abuse a dominant position without actually exercising or relying on market power. It is 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 firm. The scope of Article 82 would obviously be reduced if the Commission could apply it only to practices which were attributable to the exercise of market power that a dominant firm enjoys.

It has also become clear from the jurisprudence of the Community Courts and from the decisional practice of the Commission that it is not necessary for the dominance, abuse and the effects of the abuse all to be in the same market. In Commercial Solvents, Commercial Solvent supplied a raw material in which it was dominant to a customer which used it to make an anti tuberculosis drug. Commercial solvent decided to produce the drug itself and ceased to supply the customer. Commercial Solvent was found to have abuse its dominant position as 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. In Sealink/B and Holy Head: Interin measures, Sealink which owned and operated the port at

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147 (1990) CMLR 314
148 Supra note 146
149 Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp. v. Commission Case 6/73 & 7/73 (1974) ECR 223, (1974) 1 CMLR 309. Commercial Solvent supplied amino butanol raw material from which ethambutanol was produced. Commercial Solvents subsidiary supplied this raw material to Zoja. However commercial solvent subsidiary stopped supplying the raw material amino butanol to Zoja on the orders of Commercial Solvent, as Zoja was competing with the subsidiary of Commercial Solvent. Zoja complained to the Commission about the refusal to supply by Commercial Solvent, with out which Zoja will fail to function.
150 (1992) CMLR 255
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 downstream ferry operations and to the disadvantage of its competitor B&I at that level of the market.

Many of the Commission’s decisions under Article 82 in recent years have involved two rather than one market. The ECJ condemned requirements contracts in *Hoffman –La Rochhe v Commission*¹⁵¹ whereby customers were required to purchase all or most of the requirements of vitamins from Roche because the effect could be to foreclose opportunities to other competitors. The Commission decided in *Van den Bergh Foods*¹⁵² that it could be abusive for a firm in a dominant position in relation to the market for impulse ice-cream to induce retailers to take free on loan freezer cabinets in which only the dominant undertaking’s ice creams but not those of its competitors could be stored. The Commission rejected an argument that such a finding would unreasonably interfere with the property rights of Van Der Bergh stating that whilst the Treaty respected the existence of property rights it could in certain circumstances be improper to exercise those rights in a way that would lead to a detriment to competition.

The ECJ upheld the Commission’s decision in *Commercial Solvents v Commission*¹⁵³ that Commercial Solvents has abused its dominant position by refusing to supply nitro propane to Zoja. The Court agreed that it was an abuse to refuse to supply an existing customer which would result as a result be eliminated from the downstream market. In *Hugin v Commission*¹⁵⁴ the ECJ did not comment on the Commission’s decision that Hugin had abused its dominant position by refusing to supply spare parts to Liptons because it held there was no effect on interstate trade.

Refusal to supply as a technique for dividing markets may be an abuse. Even a refusal to supply a new customer as opposed to the existing one may be an abuse where it is based on the nationality of the customer. Predatory pricing that is to say selling at less than cost may be an abuse of a dominant position. In certain circumstances a dominant undertaking that adopts a policy of selective price cutting

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¹⁵¹ *Supra* note 127
¹⁵³ *Supra* note 149
¹⁵⁴ Case 22/78 (1979) ECR 1869,(1979)3 CMLR 345
though at prices above costs may be guilty of an abuse where the pricing strategy is part of a determined policy to eliminate a competitor and where the dominant firm has a large market share.

The Commission held that it is an abuse for an undertaking in a dominant position to enter into an agreement with an actual or potential competitor with the intention of sharing markets or stunting the efforts of competitors. In the course of a case, the Commission stated that entering into litigation which is the expression of the fundamental right of access to a judge is not an abuse however where a firm brings an action which cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party and which is conceived in the framework of a plan whose goal is to eliminate competition this could be abusive. The CFI's judgment in which it upheld the decision of the Commission not to proceed against Belgacom following a complaint from Promedia confirmed the Commission's view that vexatious litigation could amount to an abuse in the circumstances envisaged by it. 156

In order to distinguish abusive behavior caught by Article 82 from legitimate behavior outside it, the Community Courts and Commission uses two tools of objective justification and proportionality as a way of distinguishing legitimate commercial behavior from conduct which is within the mischief of Article 82. The language of objective justification and proportionality can be found in many judgments and decisions of the Community Courts and Commission. The Commission in Eurofix-Bauco v Hilti157 considered at length whether there was any objective justification such as safety consideration and the prevention of false and misleading advertising for Hilti's practice of requiring purchasers of Hilti nail cartridges to also purchase Hilti's nails but concluded that there was no such justification. When dismissing Hilti's appeal, the CFI concluded that there are laws in the UK attaching penalties to the sale of dangerous products and to the use of misleading claims as to the characteristics of the products as well as authorities vested with powers to enforce

157 Eurofix-Bauco v Hilti OJ 165 (1989) 4 CMLR 677, (1988) FSR 473 In this case the Commission found that the dominant undertaking, Hilti had lowered its prices in order to tie customers for its nail guns into buying its consumables also. In this case the Commission was not concerned with the relationship between the undertaking's prices and its costs.
such laws and it was not for Hilti to take steps on its own initiative to eliminate products which rightly or wrongly it regarded as dangerous or inferior to its own.

Where the Commission finds an abuse of a dominant position, it has power pursuant to Article 23 of the Modernization Regulation to impose a fine and to order the dominant undertaking to cease and desist from the conduct in question and where necessary, it may also order a dominant undertaking to adopt positive measures in order to bring an infringement to an end. It is also possible for the Commission to order the divesture of an undertaking’s assets or to break an undertaking up under the powers conferred by Article 7 of the Modernization Regulation provided it is proportionate and necessary to bring an infringement to an end and provided that there is no equally effective behavioral remedy or that such a remedy would be more burdens.

The Commission is keen to see more enforcements of Article 81 and 82 in national courts and the possibility of obtaining damages would encourage litigants to sue, however, the Commission itself has no power to award damages. However it should be added that the cost of litigation and the fact that in many legal systems an unsuccessful litigant must pay the other side’s costs can be a powerful deterrent to bringing an action against the uncompetitive undertaking. The availability of damages is an important feature of the enforcement process in US antitrust laws. Approximately 90% of all antitrust cases in the US involve private rather than public action and as many as 2000 cases have been brought in a single year. To the extent that the victims of anti competitive behavior can bring an action for damages the enforcement mechanism is privatized and the burden on public institutions is correspondingly diminished. In US law the award of damages is in many cases trebled and this acts as an inducement to private parties to take the enforcement initiative themselves. The right to negotiate contingency fees to the effect that the claimant’s lawyers will recover fees only if a case is successful adds to this inducement.

However it should be acknowledged that if the incentive to litigate is excessively generous this in itself may have a distorting effect on economic behavior. It may have as its consequence that defendants agree to out of court settlements not because they are guilty of anti competitive behavior or because a court is likely to make such a finding but because it is the cheapest way of avoiding expensive court proceedings. Partly because of this danger there are various limitations in US law upon
the rights of the claimants to bring private actions. The limitations includes that direct injury must have been sustained, that the firms that are harmed only incidentally cannot sue, that the damages can be awarded only for injury to business or property. The courts have also developed a series of principles relevant to the quantification of the damages including whether a claimant can recover damages for losses that have been passed on to customers and/or consumers.

Until 2001, there had not been a judgment of the ECJ dealing with the question of whether Member States have an obligation as a matter of EC law to provide a remedy in damages where there has been an infringement of the competition rules. The position in EC has been considerably clarified by the ECJ’s judgment in *Courage Ltd v Crehan*. Crehan was the tenant of two public houses ‘The Cock Inn’ and ‘The Phoenix’ in Staines West London and was required to purchase a fixed minimum quantity of beer from the brewer Courage Ltd. Courage sued Crehan for 15,266 Pounds for unpaid deliveries of beer. These simple facts led to the leading case on damages under Article 81 and 82. Crehan complaint was that Courage sold beer to the other public houses at lower prices thereby reducing his profitability so much that his business failed. He argued that the agreement he had entered into infringed Article 81 EC and had caused him economic harm.

The ECJ was asked by the Court of Appeal in the UK whether and in what circumstances Community law would allow a person in Crehan’s position to recover damages. The ECJ said that the full effectiveness of Article 81 would be put to risk if it were not open to any individual to claim damages for loss caused by a contract or conduct liable to restrict or distort competition but such rights strengthen the working of competition rules and can make a significant contribution to the maintenance of effective competition in the Community. It followed that there should not be an absolute bar to a person in the position of Crehan bringing an action and the national court should take into account matters such as the economic and legal context in which the parties find themselves and the respective bargaining power and conduct of the two parties to the contract. Of particular importance would be whether a person in the position of Crehan found himself in a markedly weaker position than a brewer such as Courage so as to seriously compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent.

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Unfortunately for Crehan when the case reverted to the Chancery division in the UK, Park J held that the agreement did not infringe Article 81 anyway and therefore dismissed his claim. The only reason for any doubt about the availability of damages in Courage Ltd v Crehan was that Crehan was a co-contractor and so arguably in pari delicto i.e. they are equally responsible for the wrong doing with the consequence that neither can bring an action against the other that would have the effect of enforcing an illegal contract.

But the ECJ judgment in *Courage Ltd v Crehan*\(^\text{159}\) is of great importance as not only does it deal with the particular issue of whether one co-contractor can sue another but more generally it is unequivocal in its support for damages actions as an important feature of giving full effectiveness to the competition rules. The ECJ in this case says quite clearly that there may be circumstances in which one co-contractor might be able to sue another for damages. Even before Courage Ltd v Crehan, the UK courts had addressed the issue of whether damages were available for infringement of the competition rules on a number of occasions. The leading case in the UK is the House of Lord’s judgment in *Garden Cottage Foods v Milk Marketing Board*.\(^\text{160}\) The case arose out of the appellants complaint that the Milk Marketing Board’s refusal to supply it with bulk butter was an abuse of a dominant position. The appeal in the House of Lords was specifically concerned with the appellant’s application for an interlocutory injunction. However Lord Diplock with whom three other Law Lords agreed concluded that an interlocutory injunction should not be given since damages would be an adequate remedy when the matter came on for final trial. The frustrating aspect of the judgment was that it did not formally decide that damages are available but proceeded on the basis that if damages were available they would provide for an adequate remedy. Lord Wilberforce powerfully dissented in Garden Cottage Foods on this issue which in his view required further consideration. He considered that it was possible that Community rights could adequately be protected by injunctions without also conferring on complainants a right to damages which involved an extension of those rights.

**India’s Approach towards a Competition Policy and Law**

\(^{159}\) *ibid*

\(^{160}\) (1984) AC 130,(1983) 3 CMLR 43
In India, first competition law was the Monopolies and Restrictive Trade Practices Act, 1969. But this law was rigid and it was adopted when India was not following the policy of free trade and privatization. After Globalization and Liberalization, need was felt for changing the existing legislation. As a result, new Act Competition Act, 2002 has been passed. Horizontal and Vertical agreements that can restrict competition are laid down in section 3 of the Competition Act, 2002. Dominant

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161 Monopolies and Restrictive Trade Practices Act was enforced on 1 June 1970 by Act No. 54 of 1969.
162 The Competition Act, 2002 was enacted by Act No. 12 of 2003 and was published in official Gazette of India on 14th January, 2003.
163 Section 3(1) of Competition Act, 2002 provides that: ‘No enterprise or association of enterprises or persons or association of persons shall enter into agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or likely to cause appreciable adverse effect on competition in India (2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.
3(3) Any agreement entered into between enterprise or association of enterprises or persons or association of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprise or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-
(a) directly or indirectly determine purchase or sale price;
(b) limit or control production, supply, markets, technical development, investment or provision of services;
(c) share the market or source of production or provision of services by way of allocation of geographical area of the market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly result in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:
Provided that nothing contained in this sub section shall apply to any agreement entered into by way of joint venture if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.
3(4) Any agreements amongst enterprises or persons at different levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale of price of, or trade in goods or provision of services, including-
(a) tie-in agreements;
(b) exclusive supply agreement;
(c) exclusive distribution agreement;
(d) refusal to deal;
(e) resale price maintenance,
Shall be an agreement in contravention of sub-section (1) if such agreement causes or likely to cause an appreciable adverse effect on competition in India.
Explanation- For the purposes of this sub-section,
(a) “tie-in arrangement” includes any agreement requiring the purchase of the goods, as a condition of such purchase, to purchase some other goods;
(b) “exclusive supply agreement” includes any agreement restricting the purchaser in any manner the purchaser in the course in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller of any other person;
(c) “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
(d) “refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
position and abuse of dominant position by undertakings have been laid down in section 4\textsuperscript{164} of the same Act. The Competition Act was enacted in 2002 keeping in view the economic development that resulted in opening up of the Indian economy, removal of controls and consequent economic liberalization which required that the Indian economy be enabled to allow competition in the market from within the country and outside. The Competition Act, 2002 provided for the establishment of a Competition Commission, to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to

\begin{verbatim}
(e) "resale price maintenance" includes any agreement to sell goods on the condition that prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

3(5) Nothing contained in this sub-section shall restrict-

(1) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-

(a) the Copyright Act, 1957 (14 of 1957);
(b) the Patent Act, 1970 (39 of 1970);
(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1998 (48 of 1998);
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
(e) the Designs Act, 2000 (16 of 2000);
(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
(2) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export'.

164 Section 4(1) of the Competition Act, 2002 provides that: 'No enterprise shall abuse its dominant position.
4(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise-
(a) directly or indirectly imposes unfair or discriminatory-

(1) condition in purchase or sale of goods or services; or
(2) price in purchase or sale (including predatory price) of goods or services,

Explanation- For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-section (1) and unfair or discriminatory price in purchase or sale (including predatory price) of goods or services referred to in sub-section 2 shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts-

(1) production of goods or provision of services or market therefore; or
(2) technical or scientific development relating to goods or services to the prejudice of consumers; or
(c) indulge in practice or practices resulting in denial of market access; or
(d) makes conclusion of contract subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subjects of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation- For the purposes of this section, the expression-

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-

(1) operate independently of competitive forces prevailing in the relevant market; or
(2) affects its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by the regulation, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors'.
\end{verbatim}
ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith or incidental thereto.

The Competition Commission of India was established on the 14th October, 2003 but could not be made functional due to filing of a writ petition before the Hon’ble Supreme Court. While disposing of the writ petition on the 20th January, 2005, the Hon’ble Supreme Court held that if an expert body is to be created by the Union Government, it might be appropriate for the Government to consider the creation of two separate bodies, one with expertise for advisory and regulatory functions and the other for adjudicatory functions based on the doctrine of separation of powers recognized by the Constitution. Keeping in view the judgment of the Hon’ble Supreme Court, the Competition (Amendment) Bill, 2006 was introduced in Lok Sabha on the 9th March, 2006 and the same was referred for examination and report to the Parliamentary Standing Committee. Taking into account the recommendations of the Committee, the Competition (Amendment) Bill, 2007 was being introduced.

*The Competition (Amendment) Bill, 2007,* inter alia, provided for the following:-

(a) The Commission shall be an expert body which would function as a market regulator for preventing and regulating anti-competitive practices in the country in accordance with the Act and it would also have advisory and advocacy functions in its role as a regulator;

(b) For mandatory notice of merger or combination by a person or enterprise to the Commission within thirty days and to empower the Commission for imposing a penalty of up to one per cent. of the total turnover or the assets, whichever is higher, on a person or enterprise which fails to give notice of merger or combination to the Commission;

(c) For establishment of the Competition Appellate Tribunal, which shall be a three member quasi judicial body headed by a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission;

(d) For adjudication by the Competition Appellate Tribunal of claims on compensation and passing of orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provisions of the Act:
(e) For implementation of the orders of the Competition Appellate Tribunal as a decree of a civil court;

(f) For filing of appeal against the orders of the Competition Appellate Tribunal to the Supreme Court;

(g) For imposition of a penalty by the Commission for contravention of its orders and in certain cases of continued contravention a penalty which may extend to rupees twenty-five crores or imprisonment which may extend to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit, may be imposed.

The Bill also aimed at continuation of the Monopolies and Restrictive Trade Practices Commission (MRTPC) till two years after constitution of Competition Commission, for trying pending cases under the Monopolies and Restrictive Trade Practices Act, 1969 after which it would stand dissolved. The Bill also provided that MRTPC would not entertain any new cases after the Competition Commission was duly constituted. Cases still remaining pending after this two year period would be transferred to Competition Appellate Tribunal or the National Commission under the Consumer Protection Act, 1986 depending on the nature of cases. All the statement of objects and reasons as mentioned in the Bill were incorporated in The Competition (Amendment) Act, 2007.