



Faculty of Law

Lund University

**Master of European Affairs programme,
Law**

Master thesis

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**Comparison of EC and
Vietnamese Competition Laws:
Anti-Competitive Agreements**

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Field: Competition Law

Spring 2005

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Summary

The EC Competition Law has always played an important part in Community Law.¹ This law, with its two fundamental provisions known as Articles 81 and 82 governing anti-competitive behaviours, has made great contribution to the achievement of one of the objectives laid down in the EC Treaty: ensuring that “competition in the internal market is not distorted”. Among them, Article 81 EC is the principal legal tool for the control of anti-competitive agreements. It prohibits collusions between undertakings which may affect trade between Member States and which have the object or effect of restricting or distorting competition within the common market. Under this Article, Community Courts have developed many fundamental concepts and rulings as significant guidelines for national courts to settle cases related to anti-competitive agreements. These cover basic but important definitions of agreement, undertaking, restriction or distortion of competition, the principle of “de minimis”, etc., in order for Article 81 to catch, exclude or exempt collusions deemed to be anti-competitive. To support that role of Article 81, came out EC legislations such as Vertical Block Exemption Regulation, Horizontal Block Exemption Regulations covering agreements on specialization, research and development, and technology transfer, as well as Merger Regulation governing mergers including joint ventures. These regulations lay down conditions for agreements to be covered and exempted thereby, otherwise to fall outside their scope of application. Agreements escaping from the scope of those regulations are also assessed under Article 81. The assessment will be carried out to the extent whether the agreements fall outside, are prohibited or individually exempted by this article.

In Vietnam, the competition law has been recently promulgated and will become into force on 1 July 2005. This law also sets rules governing anti-competitive behaviours, particularly including: agreements in restraint of competition (anti-competitive agreements), abuse of dominant position, and economic concentration (mergers). In that, provisions catching anti-competitive agreements are laid down in Section 1, Chapter II of the law. However, joint ventures, which are deemed in certain cases as collaborative agreements, are governed by the provisions on economic concentration specified in Section 3 of the same Chapter.

In general, the VN Competition Law provides for issues which are also seen in the EC Competition Law such as: prohibition, non-prohibition, and exemption. Nevertheless, since it is a new law, inevitably it remains certain problems that this law has to deal with. Some of concepts and provisions set in the law are still vague or insufficient, so this will cause difficulty for the enforcement of the law afterwards. Therefore, this thesis on comparison of

¹ Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials*, 3rd edition 2003, page 936

the EC and Vietnamese Competition Laws will help to clarify the foregoing concepts as well as the law's scope of application and exemption for anti-competitive agreements.

Preface

Competition law has become an indispensable part of the legal system in many countries, especially in developed countries and international organizations (*e.g.* EU), for many decades. It has been used as a tool to control, ensure and maintain the environment of fair and effective competition in the markets, bringing in the increase of production, product quality as well as technology improvements which all will be beneficial to consumers to the end. As a result, it is considered as a momentum for socio-economic development.

With its aim at tending towards the integration into regional and global economy, Vietnam has made a lot of legal reforms for many years, in which the promulgation of the 2004 Competition Law is a significant progress. Nevertheless, the emergence of such a new law inevitably remains certain problems such as gaps and defects thereof. This has initiated my idea to write this thesis on “Comparison of the EC and Vietnamese Competition Laws: Anti-competitive Agreements” with the hope that I could contribute certain useful opinions to the future improvement of the Vietnamese Competition Law or at least to the coming drafting and issuance of secondary legislations governing the relevant issues.

I always think that in completing this Master thesis to end the Master of European Affairs Program provided by Lund University Faculty of Law, I have received a great assistance and contribution by professors and administrators from the Faculty and visiting professors from outside. Besides, encouragement and help from my friends in the Law Section of the Program, my family, colleagues and friends in Vietnam, have also given me an impetus to follow and complete this Program. Please accept my sincere gratitude from the bottom of my heart! Especially, first I sincerely thank Prof. Lars Goran Malmberg, who initiated my idea to participate in this Program. Then, I would like to express my deep gratefulness to: Prof. Henrik Norinder, my supervisor, who has given me very helpful advice and instructions for my thesis; Prof. Hans Henrik Lidgard, the Program Director and also a law professor, together with other professors from whom I have gained precious knowledge about the EC Law; Ms. Sandra Forsén, the Program Coordinator, and other faculty staffs who have been dedicated to administrative tasks and thus contributed to the success of the Program.

Finally, I understand that to some extent the thesis will not be able to avoid certain defects. I highly appreciate any critical comments and contributive ideas given to this thesis. Great thanks!

Lu Dong Tung

Lund, May 2005.

Abbreviations

CFI	Court of First Instance
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
VN	Vietnam
WTO	World Trade Organization

1 Introduction

1.1 General

Economic integration is an objective tendency indispensable for the development and enhancement of economies and thus advanced societies in countries all over the world. Along with such integration is the emergence and expansion of a great deal of companies as well as economic organizations, whether domestic or international. Competition between those firms is a certainty and one of the principles of the market economy. Competition gives pressure to and forces firms to carry out improvements to their products with high quality but low cost satisfying the demand of customers as well as end-users (consumers). In order to obtain that aim, they have to concentrate all their inherent competence and efforts in investment and development of scientific technologies for the process of production, resulting in that more advanced technologies would be created, contributing to the economic growth. However, several firms have, somehow, co-operated with each other under agreements or other similar forms, for the purpose of maximizing profits for their own regardless of the consequences and damages caused to the third parties. Such co-operations between those firms more or less prevent or distort competition in the market and are considered as anti-competitive agreements. The competition law has therefore come out with the aim at controlling and prohibiting those collusions.

In the EU, one of the fundamental objectives laid down in Article 2 of the EC Treaty is constituted by “a high degree of competitiveness and convergence of economic performance”. Article 3(1)g EC clarifies that this goal shall be achieved through “a system ensuring that competition in the internal market is not distorted”. Those provisions underline that “competition rules have been and continue to be at the core of the Treaty provisions creating dynamic tool that would modernize European trade and industry”.² Particularly, competition law is based on two fundamental Articles 81 and 82 of the EC Treaty, supplemented by additional procedural and substantive regulations and by the case-law of the European Court of Justice, the Court of First Instance and the Commission.³ Where Article 82 EC applies to abuses of market power by companies in a dominant position, Article 81 EC applies to agreements between companies which are likely to have an appreciable affect on competition. The agreements dealt with under Article 81 EC include “any form of coordination of commercial

² Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 1, page 21.

³ Treacy P., *Competition Law, Journal: Principles of Law for Engineers and Managers*, Part 1 (Digest No.: 1996/246), Page 4/2

behaviour”⁴, whether in the form of an agreement or a concerted practice or a decision of association of undertakings, which may affect trade between EU Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market.⁵

In Vietnam, the Vietnamese Competition Law is a new one. Formerly, during the period of the centrally-planned economy, competition was seen as capitalism’s attribute or ”big fish swallow small ones” or ”scrambling for buying or selling” behaviours.⁶ The State played a decisive role in managing and even directly interfering in business activities of enterprises through the country. With the thinking of controlling the national economy, the State entrusted significant economic sectors to State-owned enterprises which were also granted with a lot of privileges in terms of investment and capital. However, the economic effectiveness and profitability brought in by these enterprises were not high, even low. Before that situation, the State has made many noticeable economic reforms. There has been a transfer from the centrally-planned economy to the market economy in which the key role of competition has been also recognized by the State as the momentum for economic development and social progress. The rights to freely do business, to compete and to be equal in accordance with the law have been confirmed in the 1992 Constitution amended by the National Assembly in December 2001.⁷

With remarkable reforms of its mechanism and policies in the economic sectors, the Vietnamese State has loosened restrictions on private enterprises. A great deal of firms have come out in a variety of types such as: private, limited and joint-stock companies as well as joint ventures, and so on. The emergence of diversified firms requires a legal tool and a managing mechanism. This demand is also the impetus for the competition law to be born.

In fact, the Constitution 1992 (as amended in 2001) has initially built up the first legal framework providing for competition matters.⁸ Then, Ordinance

⁴ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, Chapter 20, Page 403.

⁵ See Article 81(1) EC

⁶ *Vietnam’s Competition Law and Policy Development in the Process of Integration into the World Economy*, by Nguyen Thanh Tu, Ministry of Trade, Vietnam.

<http://r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/en12.doc>

⁷ **Article 16** of Vietnam’s Constitution 1992 (amended 2001) states that “[...] *Individuals and organizations from different economic sectors may conduct production and business in industries and trades permitted by law; may jointly carry out long-term development and co-operation, and shall be equal and shall compete in accordance with the law.*”

Article 57 of the Constitution provides that “*Citizens have the right to freely do business in accordance with the law.*”

⁸ See **Article 16** stated above of the Vietnam’s Constitution; see also **Article 28**, providing: “*All illegal production and business activities, all acts that undermine the national economy, harm the legitimate interest of the State, collectives, and citizens shall be strictly punished in accordance with the law.*”

The State adopts policies aimed at protecting the interests of producers and consumers.”

on Goods Quality 1990 (replaced by the new one in 1999), Civil Code 1995, Commercial Law 1997, Law on Enterprises 1999, Ordinance on Protection of Consumer's Rights 1999, Law on Foreign Investments 1996 (amended in 2000), etc., have provided a number of general regulations on competition and therefore created legal corridors⁹ for it. These legal instruments have, in principle, introduced regulations on trade competition and protection of consumer rights; however, they are not "strong enough" to govern the seething and complicated operations in the market and in fact they need to be gathered in a separate legal framework.¹⁰ Consequently, the emergence of the substantive competition law for Vietnam is a certain and indispensable occurrence. The Vietnamese Competition Law, after a few years of being reviewed, discussed and amended under the draft law, was officially promulgated by the National Assembly on 3 December 2004. It will be effective on 1 July 2005. In deed, before and even after the promulgation of this law, rules on competition have given rise to many debates and questions. Would the new Competition Law deal well with competition matters in the context of the market economy of a developing country as Vietnam, and adapt to the process of the regional and global economic integration? This thesis with the aforementioned topic more or less will answer the question.

1.2 Purpose

On the basis of doing research on the EC and Vietnamese Competition Laws, I would like to clarify several competition rules in respect with anti-competitive agreements that have been much experienced by the EC for about five decades, so that in comparison with the Vietnamese Competition law I can find out shortcomings, *e.g.* legal gaps and defects, which the latter may be coped with since it is still very young and has not yet been enforced in Vietnam until 1 July 2005. The thesis will make clear the definition of and the law's application scope to anti-competitive agreements as well as their exemptions under the competition rules of both laws. In particular, the thesis will substantially focus on clarifying the part of the EC competition law to the extent how the Vietnamese one could avail itself of the progressive viewpoints of the former in order to apply them into it, especially into guidelines or regulations on implementation of the Vietnamese Competition Law which are being expected to emerge in the near future.

⁹ *Competition Environment and the Urgency of Competition Law in Vietnam*, by Trinh Anh Tuan, Competition Administration Agency, Ministry of Trade – Vietnam, page 4
http://www2.jftc.go.jp/eacpf/01/APEC_Policy_Vietnam.pdf

¹⁰ *Competition Law in Vietnam* by Vision & Associates, Hanoi, Vietnam, 19 September 2003,
http://www.vision-associates.com/Local_Publication/2003/Business_content_2003_5.htm

1.3 Method

On pursuing the aims set above, several methods such demonstration, analysis, interpretation and comparison have been approached in this thesis. By demonstrating, interpreting and analyzing case-law developed by the EC Community Courts together with legislations adopted by the EC Institutions as well as the text of VN Competition Law, the thesis is wanted to clarify fundamental concepts concerning anti-competitive agreements of the two different legal systems of both EC and Vietnam. Besides, the thesis has also taken advantage of these methods in order to demonstrate the application scope of the competition rules: to what conditions will anti-competitive agreements be caught by such rules, or will they escape or be exempted from the rules? Finally, through comparison combined with analysis of the competition rules in both systems, the thesis is aimed to point out legal gaps and defects which may exist in a young law like the VN Competition Law.

1.4 Delimitation

Within the limitation of the foregoing purposes pursued, this thesis is to seek for clarification of fundamental concepts in respect with anti-competitive agreements under the EC and Vietnamese Competition Laws. It is limited to the extent how such agreements may be assessed under the competition rules of both the EC and Vietnam and whether they are caught by or fall outside the competition rules. Even once those anti-competitive agreements fall within the prohibition of such rules, the question is raised whether they can be granted exemption from that prohibition under certain rules or legislation concerned of the two legal systems of the EC and Vietnam. Finally, on the basis of comparison in terms of competition rules between those legal systems governing anti-competitive agreements, the thesis is expected to point out shortcomings that the young competition law of Vietnam may be coped with when it is enforced in the near future. To the end, the comparison seeks for future amendments to that law or at least helps law-makers to think about filling such gaps in making secondary legislations related to the guidance to the implementation of the Vietnamese Competition Law.

Following the purposes and delimitation mentioned above, the thesis has been worked out and divided into five parts:

- Part 1: *Introduction* – generally introduces the topic, purpose, method and delimitation of the thesis.
- Part 2: *EC Competition Law* – develops fundamental concepts relating to anti-competitive agreements on the basis of the analysis of Article 81 of the EC Treaty through the case-law by the Community Courts. Moreover, this part also demonstrates how an

agreement deemed to be anti-competitive is assessed in terms of seizure, escape and exemption under this Article and the EC legislations concerned.

- Part 3: *Vietnamese Competition Law* – also presents basic concepts related to anti-competitive agreements as well as the law’s application scope over them, which are substantially based on the legislation without case-law.
- Part 4: *Comparative Analysis* – compares the competition rules governing anti-competitive agreements between the two legal systems of the EC and Vietnam, then pointing out defects and gaps of the Vietnamese Competition Law and giving some proposals which may be necessary for future consideration about the amendment of that law or drafting of its secondary legislations.
- Part 5: *Conclusion* – sums up the thesis with some proposals and conclusions.

2 EC Competition Law

Competition rules governing anti-competitive behaviours of public and private undertakings in the European Community are set out in Articles 81 and 82 (ex 85 and 86) of the EC Treaty¹¹. In that, Article 81 forbids, as incompatible with the common market, collusions between undertakings which may affect trade between Member States and which have the object or effect of restricting or distorting competition within the common market. Article 81 together with EC legislations concerned therewith holds the duty to control and prohibit anti-competitive collusions between undertakings engaged in a variety of agreements and concerted practices, ensuring that “competition in the internal market is not distorted”¹². It, therefore, contributes to the attainment of economic and legal integration as well as promotes economic efficiency throughout the Community by seeking to preserve effective competition, and hence contributes to the achievement of the goals set in the EC Treaty: to promote “a harmonious, balanced and sustainable development of economic activities [...], a high degree of competitiveness and convergence of economic performance [...]”¹³.

2.1 Article 81 EC

Article 81 EC provides that:

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 sources of supply;*
 - (d) *apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
 - (e) *make conclusion of contracts subject to acceptance by the other trading parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

¹¹ Consolidated version of the Treaty establishing the European Community (Treaty of Amsterdam 1997) as amended in accordance with the Treaty of Nice 1992, amending the former Treaties establishing the European Communities, [2002] OJ C325/1.

¹² The EC Treaty, [2002] OJ C325/1, Article 3(g).

¹³ *Ibid*, Article 2.

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

which contributes to improving the production or distribution of goods or to promoting technical economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

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

The purpose of Article 81 is to preclude restrictive agreements between independent market operators, whether “horizontal” (between parties operating at the same level of the economy, often actual or potential competitors) or “vertical” (between parties operating at different levels, for example, an agreement between a manufacturer and its distributor).¹⁴ In particular, Article 81(1) shall prohibit some forms of collusions assumed to be anti-competitive. Article 81(2) regulates that any agreement in breach of this Article shall be automatically void. Article 81(3) provides for exemptions from the prohibitions for certain collusions¹⁵ dealt with Article 81(1).

2.1.1 Article 81(1) – Prohibition

Article 81(1) contains three essential elements, or in other words, to infringe Article 81(1) three conditions must be satisfied. There must be:

- (1) a collusion¹⁶ between undertakings
- (2) which may affect trade between Member States, and
- (3) which has as the object or effect the prevention, restriction or distortion of competition within the common market.

¹⁴ Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition 2004, page 101.

¹⁵ Collusions entitled to the exemptions laid down under Article 81(3) EC must satisfy the conditions required thereby.

¹⁶ A collusion between undertakings is construed as an agreement between undertakings, or a decision of association of undertakings or a concerted practice.

Those three elements constitute the definition of anti-competitive agreements under Article 81.

2.1.1.1 Collusions between undertakings

Article 81(1) prohibits joint but not individual conduct. The reference to “agreements between undertakings, decisions by associations of undertakings and concerted practices” thus requires some element of “collusion” between independent undertakings.¹⁷ To define anti-competitive collusions caught by Article 81(1), it is necessary to clarify the following terms: undertakings and associations of undertakings (addressees of Article 81), agreements between undertakings, decisions by associations of undertakings, and concerted practices.

2.1.1.1.1 Addressees of Article 81

Undertakings

Article 81 refers to agreements between “undertakings”. In the absence of a Treaty definition of “*undertaking*”, the ECJ has developed this concept through the case-law. In *Höfner*¹⁸, an employment office owned and organized by the state was held to be an undertaking when headhunting for clients, even though it made no charges,¹⁹ since such activities can be carried out in the private sector. The ECJ has held that: “*The concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed*”²⁰.

Thus, the concept “undertaking” has been interpreted in a broad sense to include “*any legal or natural person engaged in some form of economic or commercial activity*”²¹. Paul Craig and Gráinne de Búrca²² add that the “undertaking” has been held to include: corporations, partnerships, individuals, trade associations, liberal professions, state-owned corporations, and co-operatives. For state-owned corporations, they can qualify as undertakings for the purpose of Article 81 when operating in a commercial context; however, they will not qualify so if they exercise their public-law powers²³ in such context.

¹⁷ Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition 2004, page 127.

¹⁸ C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979.

¹⁹ Valentine Korah, *An Introductory Guide to EC Competition Law and Practice*, 2004, page 40.

²⁰ C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, para. 21

²¹ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, page 405

²² Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials*, 3rd edition 2003, page 939.

²³ *Ibid*, page 939.

In addition, the “undertaking” concept for the purpose of Article 81 does not include organizations that represent management and labour to conclude a collective agreement as in *Albany*²⁴ or that are charged with the management of certain compulsory social security schemes based on the principle of solidarity as in *Poucet*²⁵. The ECJ held in *Poucet* that a French regional office administering a compulsory social security scheme was not an undertaking because the contributions were based on social solidarity and proportional to income. They bore no relationship to risk and could not have been carried on the private sector.²⁶

In contrast, in *FFSA v Ministère de l'Agriculture et de la Pêche*²⁷, the Court held that a non-profit-making organization which managed an old-age insurance scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalization in keeping with the rules laid down by the authorities in particular with regard to conditions for membership, contributions and benefits, was an undertaking within the meaning of Article 81 EC (ex 85).²⁸ The organization is deemed to carry on an economic activity in competition with life insurance companies since it operates in accordance with the principle of capitalization and the benefits to which it confers entitlement depend solely on the amount of contributions paid by the recipients and the financial results of the investments made by the managing organization.²⁹

The concept of “undertaking” demonstrated with the above case-law is referred to as an undertaking alone. The question is whether a parent company and its subsidiary should be considered as independent companies or as a single undertaking. In *ICI*³⁰, the Court held that: where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 81(1) EC (ex 85(1)) may be considered inapplicable to the relationship between it and the parent company with which it forms one economic unit.³¹ Paul Craig and Gráinne de Búrca³² add that the agreement between them is regarded as an internal allocation of function or role within that economic unit. The question is to

²⁴ C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paras. 59-60.

²⁵ C-159 & 160/91 *Christian Poucet v Assurances Generals de France* [1993] ECR I-637, paras. 18-19.

²⁶ Valentine Korah, *An Introductory Guide to EC Competition Law and Practice*, 2004, page 41.

²⁷ C-244/94, *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche*, [1995] ECR I-4013.

²⁸ *Ibid*, para. 22

²⁹ *Ibid*, para. 17

³⁰ C-48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR-00619

³¹ *Ibid*, para. 134

³² Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials*, 3rd edition 2003, page 939.

assess whether the subsidiary has any real autonomy or whether it merely carries out the instructions of its parent.

Associations of undertakings

Article 81 also refers to decisions of “*associations of undertakings*”. The concept of an association is similarly wide; in particular, it does not matter whether membership of the association is voluntary or compulsory.³³ In *Cimenteries*,³⁴ the CFI has ruled that it is not necessary for trade associations to have a commercial or economic activity of their own for Article 81(1) EC (ex Article 85(1)) to be applicable to them. Article 81(1) applies to them in so far as their activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress. To place any other interpretation on Article 81(1) would be to remove its substance.³⁵

In *Price Waterhouse*,³⁶ a professional body such as the Bar of the Netherlands, when adopting the 1993 Regulation regulating the activities of its members, is treated as an association of undertakings under Article 81(1), since it is neither fulfilling a social function based on the principle of solidarity, unlike certain social securities bodies (eg., *Poucet and Pistre*³⁷), nor exercising powers which are typically those of a public authority. It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.³⁸ To support its conclusion on the applicability of Article 81(1) to an association of undertakings such as the Bar of the Netherlands, the ECJ has added that first, the governing bodies of the Bar, as specified in the *Advocatenwet*³⁹, are composed exclusively of members of the Bar elected solely by members of the profession. The national authorities may not intervene in the appointment of the members of the Supervisory Boards, College of Delegates or the General Council.⁴⁰

³³ *Competition Law: Article 81 and Related Procedural Matters*, page 3 http://users.ox.ac.uk/~hert0101/ECCompetitionLaw/LectureHandout2-6.htm#_Toc529016602, 2005-04-02

³⁴ Joined cases T-25 etc./95 *Cimenteries CBR SA et al. V Commission of the European Community* [2000] ECR II-491.

³⁵ *Ibid*, para. 1320

³⁶ Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV and Algemene Raad van de Nederlandse Orde van Advocaten (“Price Waterhouse”)*, 19 February 2002, [2002] ECR I-1577.

³⁷ Joined cases C-159/91 and 160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon*, [1993] ECR I-00637. In this case, the associations, such as sickness funds and the organizations involved in the management of the public social security system, fulfill an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. (see para. 18)

³⁸ Case C-309/99, “*Price Waterhouse*”, [2002] ECR I-1577, para. 58

³⁹ The Law on the Bar was adopted on 23 June 1952 establishing the Bar of the Netherlands and laying down the internal regulations and the disciplinary rules applicable to advocaten and procureurs. (C-309/99, “*Price Waterhouse*”, para. 4)

⁴⁰ Case C-309/99 “*Price Waterhouse*”, para. 61

Second, when it adopts measures such as the 1993 Regulation, the Bar of the Netherlands is not required to do so by reference to specified public-interest criteria. Article 28 of the *Advocatenwet*, which authorizes it to adopt regulations, does no more than require that they should be in the interest of the proper practice of the profession.⁴¹ Lastly, having regard to its influence on the conduct of the members of the Bar of the Netherlands on the market in legal services, as a result of its prohibition of certain multi-disciplinary partnerships, the 1993 Regulation does not fall outside the sphere of economic activity.⁴² In light of the foregoing considerations, it appears that a professional organization such as the Bar of the Netherlands must be regarded as an association of undertakings within the meaning of Article 81(1) EC where it adopts a regulation such as the 1993 Regulation.⁴³

2.1.1.1.2 Agreements

Article 81 (1) applies to agreements concluded between two or more undertakings. The notion “agreement” is interpreted broadly under EC competition law. It covers any written or oral agreement between two or more undertakings, whether legally enforceable or not,⁴⁴ whether binding or non-binding. A “gentleman’s agreement” will suffice.⁴⁵

The court has ruled in *ACF Chemiefarma NV*⁴⁶ that a “gentlemen’s agreement” constitutes a measure which may fall under the prohibition contained in Article 81(1) (ex 85(1)) if it contains clauses restricting competition in the common market within the meaning of that article and its clauses amount to a faithful expression of the joint intention of the parties.⁴⁷

In *Polypropylene*,⁴⁸ the Commission states that it is not necessary, in order for a restriction to constitute an 'agreement' within the meaning of Article 81(1) (ex 85(1)) for the agreement to be intended as legally binding upon the parties. An agreement exists if the parties reach a consensus on a plan which limits or is likely to limit their commercial freedom by determining the lines of their mutual action or abstention from action in the market. *No contractual sanctions or enforcement procedures are required. Nor is it necessary for such an agreement to be made in writing.*⁴⁹ This statement of the Commission was supported by the ECJ in *SA Hercules Chemicals NV*⁵⁰

⁴¹ Ibid, para. 62

⁴² Ibid, para. 63

⁴³ Ibid, para. 64

⁴⁴ Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 1, page 50.

⁴⁵ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, page 406

⁴⁶ Case 41/69, *ACF Chemiefarma NV v EC Commission*, [1970] ECR -00661

⁴⁷ Ibid, Summary para. 9

⁴⁸ Commission Decision of 23 April 1986 relating to a proceeding under Article 81 (ex 85) of the EC Treaty (IV/31.149 - Polypropylene), [1986] OJ L230/0001

⁴⁹ Ibid, para. 81

⁵⁰ Case T-7/89, *SA Hercules Chemicals NV v EC Commission*, [1991] ECR II-1711.

where it held that *"the Commission was entitled to treat the common intentions existing between the applicant and other polypropylene producers ... as agreements within the meaning of Article 81(1) (ex 85(1)) of the EC Treaty."*⁵¹ Thus, the reciprocal expression of a joint intention between undertakings is sufficient to constitute an agreement caught by Article 81(1).

In *Sandoz*,⁵² the ECJ affirmed the Commission's view that Sandoz's⁵³ policy of sending invoices to customers with the words "export prohibited" printed thereon was not a unilateral conduct falling outside the scope of Article 81(1) on the grounds that the invoices contained other important terms and so were not merely accounting documents. The ECJ held that they *"formed part of the general framework of commercial relationships which the firm undertook with its customers"*.⁵⁴ It further held that *"in order to constitute an agreement within the meaning of Article 81 (ex 85) of the EC Treaty it was sufficient that a provision was the expression of the intention of the parties without its being necessary for it to constitute a valid and binding contract under national law"*.⁵⁵ Similarly, in *Dunlop*⁵⁶ the CFI ruled that *"a contractual provision which is contrary to Article 81(1) of the Treaty does not have to be recorded in writing, but may form a tacit part of the contractual relations between an undertaking and its commercial partners"*.⁵⁷

In general, to prove whether there is an agreement between undertakings, competition authorities have often tried to seek any possibility demonstrating the collusion between them. However, where competition authorities fail to show an agreement, they will be able to prove the existence of concerted practices. In view of the wide scope of "concerted practices"⁵⁸, the precise extent of the concept of "agreement" is of less significance.⁵⁹

2.1.1.1.3 Decisions of associations of undertakings

Associations, particularly trade associations, perform functions which may promote the competitiveness of the industry as a whole. However, membership of an association may also tempt the members to meet within its auspices to conclude together and to coordinate their action. The conduct adopted by these members may be characterized as a decision or an

⁵¹ Ibid, para. 256

⁵² C-277/87, *Sandoz Prodotti Farmaceutici Spa v EC Commission* [1990] ECR I-00045

⁵³ Sandoz: a major pharmaceutical producer.

⁵⁴ Valentine Korah, *An Introductory Guide to EC Competition Law and Practice*, Eighth edition, 2004, page 47

⁵⁵ C-277/87, *Sandoz Prodotti Farmaceutici Spa v EC Commission* [1990] ECR I-00045, Summary para. 2

⁵⁶ T-43/92, *Dunlop Slazenger International Ltd v. Commission*, [1994] ECR II-441.

⁵⁷ Ibid, para. 54

⁵⁸ See 2.1.1.1.4 below

⁵⁹ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, page 406

agreement or a concerted practice which may have anti-competitive effects, without any need for actual agreement.⁶⁰

The concept “decisions by associations of undertakings” is widely interpreted and is not confined to binding decisions. These decisions may include even non-binding recommendations from a trade association, for instance in *NV IAZ International*⁶¹, as well as regulations from a bar association as in *Price Waterhouse*⁶².

In *NV IAZ International*, the Belgium National Association of Water Supplies (ANSEAU) made the recommendations under the agreement⁶³ to the effect that its member undertakings were to take account of the terms and of the purpose of the agreement and were to inform consumers thereof. Those recommendations therefore determined the conduct of a large number of ANSEAU’s members and consequently exerted an appreciable influence on competition, thus constituting a decision within Article 81(1).⁶⁴

In *Price Waterhouse*, as stated above, a regulation such as the 1993 Regulation by the Dutch Bar Association was held to be the same kind of such decision because it related to the economic activity of its members (barristers) rather than to the social function or to the exercise of powers of a public authority, although finally it was held not to fall within Article 81(1) because the Regulation, though being capable of restricting competition, was necessary for the proper practice of the legal profession.

2.1.1.1.4 Concerted practices

The term “concerted practice” provides a safety-net. It aims to forestall the possibility of undertakings evading the application of Article 81 by colluding in a manner falling short of agreement.⁶⁵ The “concerted practice” concept was defined in *ICI*⁶⁶ as *a form of coordination between undertakings which, without having reached the stage where an agreement properly so called had been concluded, knowingly substitutes practical cooperation between them for the risks of competition.*⁶⁷

⁶⁰ Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition 2004, page 148.

⁶¹ Case 96/82, *NV IAZ International Belgium v Commission*, [1983] ECR -03369

⁶² See 2.1.1.1.1 above

⁶³ The agreement concerning the use of label for washing machines and dishwashers was concluded between certain trade associations in Belgium including AZSEAU.

⁶⁴ See Case 96/82, *NV IAZ International Belgium v Commission*, para. 21

⁶⁵ Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition 2004, page 150.

⁶⁶ Case 48/69, *Imperial Chemical Industries Ltd v EC Commission*, [1972] ECR – 00619.

⁶⁷ *Ibid*, para. 64.

It was held in “*Suiker Unie*”⁶⁸ that “the criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that *each economic operator must determine independently the policy* which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells”.⁶⁹ It is clear in this case that there can be a concerted practice even though there is no actual plan which is operative between the undertakings. The significant idea is that each undertaking should operate independently on the market. Such idea was also reaffirmed in *Cimenteries*⁷⁰ in which the CFI pointed out that the concept of concerted practice does in fact imply the existence of reciprocal contacts. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter request it or, at the very least, accepts it.⁷¹

Therefore, the definition of concerted practice by the Community Courts is to catch undertakings which have not agreed but which determine their market policy in cooperation with other undertakings through direct or indirect conduct and not independently. Article 81(1) is aimed at explicit collusion whatever form it takes.⁷²

In *ICI* as stated above, a concerted practice arose from undertakings (major producers of dyestuffs) cooperating on the exchange of advance information on intended price increases. *ICI* (one of the leading producers of dyestuffs) argued that the price increases were merely examples of parallel increases common in oligopolistic situations. However, against this argument the ECJ held that although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market.⁷³ On analyzing the facts in this case, the ECJ has revealed that the evidence of a concerted practice appeared expressly that:

- There was a dividing-up of the market in the community;⁷⁴
- The undertakings came to meetings where they notified in advance their intention of making price increases.⁷⁵ By

⁶⁸ Joined cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73, *Cooperatieve Vereniging Suiker Unie UA v. Commission* (European Sugar Cartel), [1975] ECR-1663, [1976] 1 CMLR 295.

⁶⁹ *Ibid*, para. 174.

⁷⁰ Joined cases T-25 etc./95 *Cimenteries CBR SA et al. V Commission of the European Community* [2000] ECR II-491.

⁷¹ *Ibid*, para. 1849.

⁷² Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition 2004, page 151.

⁷³ Case 48/69, “*ICI*”, [1972] ECR – 00619, para. 66

⁷⁴ *Ibid*, para. 76

⁷⁵ *Ibid*, paras. 92-100

means of these advance announcements, the various undertakings eliminated all uncertainty between them as to their future conduct and, in doing so, also eliminated a large part of the risk usually inherent in any independent change of conduct on one or several markets;⁷⁶ and

- The increased prices related to the same products (dyestuffs).⁷⁷

In contrary, the ECJ held in *Wood Pulp II*⁷⁸ that the concertation regarding announced prices has not been established by the Commission in the absence of a firm, precise and consistent body of evidence.⁷⁹ It explained that the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. The parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.⁸⁰

In short, the Community Courts have shown through the case-law that the parallelism of prices could be satisfactorily explained by the oligopolistic tendencies of the market; however, the parties' agreements, at meetings within their trade association, to fix recommended prices and to notify members in advance of any proposed deviation from these prices was held to restrict competition within Article 81(1).⁸¹

2.1.1.2 Which may affect trade between Member States

To be caught by Article 81, an agreement, decision or concerted practice (hereinafter generally referred to as "agreement") must have effect on the pattern of trade⁸² between EU Member States; otherwise, Article 81 has no role to cover such agreement and national competition laws will take that role instead. The agreement having effect on trade between Member States

⁷⁶ Ibid, para. 101

⁷⁷ Ibid, para. 90

⁷⁸ Joined cases C-89/85, C-104/85, C-114/85, C-116-117/85 and C-125 to 129/85, *Wood Pulp II*, [1993] ECR I-1307, [1993] CMLR-407.

⁷⁹ Ibid, para. 127.

⁸⁰ Ibid, para. 126.

⁸¹ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, Chapter 20, Page 408

⁸² The concept of trade is very broad, and covers all economic activities relating to goods and services, even the right of a trader in one Member State to set up business in another (Valentine Korah, *An Introductory Guide to EC Competition Law and Practice*, 2004, page 59).

has been flexibly interpreted through the case-law. It may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.⁸³ An agreement between undertakings within the same Member State may also have such effect on trade between Member States.

In *Cementhandelaren*,⁸⁴ the ECJ ruled that an agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting the domestic production,⁸⁵ thus making the particular market a higher barrier to entry of foreign competition. Here, there is no requirement that there must be an actual restraint on or hindrance to trade between Member States. It will be sufficient if it is possibly shown that there is a potential effect on trade.

2.1.1.3 Which have as their object or effect the prevention, restriction or distortion of competition within the common market

As with the question of effect on trade between Member States, EC competition law is not concerned with the question of increase in trade between Member States but with whether there is a distortion of the 'normal' competition which should exist within the common market.⁸⁶ Article 81(1) requires that the agreement has as its object or effect the prevention, restriction or distortion of competition in the common market. This article is applicable to horizontal agreements (between competing distributors or manufacturers) which expressly restrict competition as well as vertical agreements (between manufacturers and distributors) which are frequently beneficial to consumers since they may lead to improvements in the promotion and distribution of products.

In *Consten and Grundig*,⁸⁷ Grundig, a German manufacturer of electronic equipment, and Consten SA in France entered into an exclusive dealership agreement. Grundig appointed Consten as its sole distributor in France. As part of the agreement, Consten also had exclusive rights to Grundig's trade mark (GINT) in France. Consten agreed not to re-export Grundig's products to any other EC Member State; and Grundig agreed to obtain similar assurances from its dealers in other Member States. As a result, there was a total ban on parallel imports and exports in Grundig products, reinforced by

⁸³ Case 56/65, *Société La Technique Minière v. Maschinenbau Ulm GmbH*, [1966] ECR 235, P. 249.

⁸⁴ Case 8/72, *Vereeniging van Cementhandelaren v. Commission*, [1972] ECR 977,

⁸⁵ *Ibid*, para. 29

⁸⁶ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, Chapter 20, Page 413.

⁸⁷ Joined cases 56&58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, [1966] ECR 00299.

the GINT trade mark. In this case, the undertakings argued that a vertical sole distributorship agreement such as the agreement in question is not harmful to competition but has increased the competition between similar products of different makes.⁸⁸ The effect of their agreement was not to reduce trade between Member States but to increase it. The agreement served to concentrate and streamline the distribution of Grundig products in France, and trade in Grundig products had in fact increased.⁸⁹ Moreover, the undertakings added that the prohibition in Article 81(1) applies only to so-called horizontal agreements.⁹⁰ The ECJ rejected this argument and held that the agreement between Grundig and Consten could affect trade between Member States and harm the attainment of the objectives of a single market between Member States.⁹¹ The object of the agreement was to eliminate any possibility of competition at the wholesale level in Grundig products⁹², or in other words, to eliminate intra-brand competition. Moreover, the undertakings could not rely on their trade-mark rights in these circumstances. Article 81(1) does not allow the improper use of rights under any national trade-mark law in order to frustrate the Community's law on cartels.⁹³ To use them merely to partition the market constituted an abuse of such rights.

The *Consten and Grundig* case has revealed that the undertakings often avail themselves of the reason that vertical agreements may carry economic benefits and therefore enter into such agreements containing restrictions on intra-brand competition to partition the market along national lines with the aim at insulating the distributor in each State from competition from parallel imports from States where price levels are low.⁹⁴ However, the ECJ has held in this case that both horizontal and vertical agreements are covered by Article 81.

In contrary to *Consten and Grundig*, the exclusive distribution agreement between the undertakings (MU, a German manufacturer and STM, a French distributor) in *STM v Maschinenbau*⁹⁵ contained no restrictions on parallel imports or exports, and no abusive use of trade-marks. STM sought this agreement to be in breach of Article 81(1) (ex 85(1)). However, the agreement was found on the facts not to breach that provision. The ECJ held that:

⁸⁸ Ibid, P.342

⁸⁹ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, Chapter 20, Page 413.

⁹⁰ Joined cases 56&58/64 “Consten and Grundig”, [1966] ECR 00299, P. 339

⁹¹ Ibid, P. 341

⁹² Ibid, P.342

⁹³ Ibid, P.346

⁹⁴ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, Chapter 20, Page 414.

⁹⁵ Case 56/65, *Société La Technique Minière v. Maschinenbau Ulm GmbH*, [1966] ECR 235.

*“In order to decide whether an agreement containing a clause ‘granting an exclusive right of sale’ is to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation”.*⁹⁶

Josephine Steiner and Lorna Woods⁹⁷ explain further the above ruling of the ECJ regarding an agreement capable (having its object or effect) of preventing, restricting or distorting competition, as follows:

- (a) *The nature and quantity of the products concerned (i.e., the product market, and the parties’ combined market share in that market):* The greater the market share held by the parties, the more damaging its impact on competition.
- (b) *The position and size of the parties concerned (i.e., their position in the market):* The bigger they are, in terms of turnover and relative market share, the more likely it is that competition will be restricted.
- (c) *The isolated nature of the agreement or its position in a series of agreements:* This is particularly relevant in the case of distribution agreements, which in themselves many appear insignificant, but which often form part of a network of similar agreements.
- (d) *The severity of the clauses:* The more severe the clauses, the more likely they will be deemed in breach of Article 81(1). However, any clause that is more than is necessary to achieve the desired (beneficial) result will risk infringing Article 81(1).
- (e) *The possibility of other commercial currents acting on the same products by means of re-imports and re-exports (i.e., parallel imports and exports):* any agreement which attempts to ban or even limit parallel imports and exports will normally breach Article 81(1).

⁹⁶ Ibid, P.250

⁹⁷ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, Chapter 20, Page 414 - 415.

The “De Minimis’ Principle

However, not any agreement having its effect on trade between Member States will fall within Article 81(1). Once the anti-competitive object of the agreement has been established, there appears to be little need to consider the effects of such an agreement.

In *Völk*,⁹⁸ there was an exclusive distribution agreement concluded between Mr Völk, a German manufacturer of washing machines, and Vervaecke, a Belgian distributor of electrical appliances. Under the agreement, Vervaecke had the exclusive right to sell Völk’s products in Belgium and Luxembourg. According to the Commission,⁹⁹ Völk 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. The ECJ held that:

*“If an agreement is to be capable of affecting trade between Member States it must be possible to foresee with a higher 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, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States. Moreover, the prohibition in Article 81(1) is applicable only if the agreement in question also has as its object or effect the prevention, restriction or distortion of competition within the common market. Those conditions must be understood by reference to the actual circumstances of the agreement. Consequently an agreement falls outside the prohibition in Article 81(1) when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question [...]”.*¹⁰⁰

Thus, an agreement even having its anti-competitive object can also fall outside Article 81(1) because of the “de minimis” principle, to wit, it has only an insignificant effect on the market or no noticeable effect on competition.

Based on the indications in the judgment in *Völk*, the Commission issued its first ‘de minimis’ notice¹⁰¹ in 1970, in which it announced that agreements under which the parties have a turnover which did not exceed 100m EUR and where their share of the market was less than 5% escaped the European

⁹⁸ Case 5/69, *Völk v. Vervaeche*, [1969] ECR 295

⁹⁹ See Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition, 2004, page 159.

¹⁰⁰ Case 5/69, *Völk v. Vervaeche*, [1969] ECR 295, para. 5/7

¹⁰¹ First version: JO 1970 C 84/1.

anti-trust rules entirely.¹⁰² In 2001, the Commission revised the notice for the fifth time. The 2001 “De Minimis” Notice¹⁰³ has shown that the turnover reference has been eliminated and the market share threshold has been split. Horizontal collaboration is regarded as *de minimis* up to a 10%¹⁰⁴ market share while vertical collaboration is up to 15%¹⁰⁵. The requirement for an agreement to be applied by this Notice is that such agreement does not contain any of the hard-core restrictions laid down in the Notice such as fixing of prices, limitation of outputs or sales (production quotas), allocation of markets or customers.¹⁰⁶

The 2001 “De Minimis” Notice also refers to small and medium-sized undertakings. These undertakings, as defined in the Annex to Commission Recommendation 96/280/EC¹⁰⁷, are rarely capable of appreciably affecting trade between Member States. Therefore, the Notice is applicable to such undertakings if they have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million,¹⁰⁸ and they are entirely outside the application scope of Article 81.

2.1.2 Article 81(2) – Nullity

Article 81(2) provides that “any agreements or decisions prohibited pursuant to this Article shall be automatically void”. Despite its clear wording on nullity, Article 81(2) only applies to individual clauses in the agreement caught by Article 81(1). In *STM v. Maschinenbau*,¹⁰⁹ the ECJ held that “*the automatic nullity only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the treaty, fall outside community law*”.¹¹⁰ It means that only contracting clauses affected by Article 81(1) shall be declared to be void under Article 81(2). In addition, an agreement will cease to be void if the agreement itself ceases to restrict competition or to affect trade within the meaning of Article 81(1).

¹⁰² Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 1, page 74.

¹⁰³ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (2001 “De Minimis” Notice), OJ 2001/C 386/07. This notice replaces the 1997 “De Minimis” Notice (OJ C 372, 9.12.1997)

¹⁰⁴ Ibid, Point 7(a)

¹⁰⁵ Ibid, Point 7(b)

¹⁰⁶ Ibid, see further in Point 11.

¹⁰⁷ OJ L 107, 30.4.1996, p.4. This recommendation will be revised. It is envisaged to increase the annual turnover threshold from EUR 40 million to EUR 50 million and the annual balance-sheet total threshold from EUR 27 million to EUR 43 million.

¹⁰⁸ See the 2001 “De Minimis” Notice, Point 3.

¹⁰⁹ Case 56/65, *Société La Technique Minière v. Maschinenbau Ulm GmbH*, [1966] ECR

235

¹¹⁰ Ibid, P. 250

In case 319/82, *Société de Vente de Ciments et Bétons de l'Est v. Kerpen GmbH & Co KG*, the ECJ has held that the question whether any null clause or clauses in an agreement can be severed from the rest of the agreement must be decided by national, not Community, law. Each national court will, therefore, have to apply its own national rules on severance to determine the impact of Article 81(2) on the agreement before it.¹¹¹

2.1.3 Article 81(3) – Exemption

If an agreement falls within the prohibition of Article 81(1), it can be also entitled to exemption from such prohibition under Article 81(3) provided that it must satisfy four conditions laid down under Article 81(3); particularly:

- (1) It must contribute to improving the production or distribution of goods or to promoting technical economic progress;
- (2) It must allow consumers a fair share of the resulting benefit;
- (3) It must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- (4) It must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Exemption can be granted on an individual basis, or there can be block exemptions which exempt categories of agreement.¹¹²

2.1.3.1 Individual Exemption

Article 81(3) of the EC Treaty empowered the European Commission to grant individual exemption from Article 81(1) to agreements satisfying the above conditions. A guidance to the application of such Article was first specified in the Regulation¹¹³ No. 17/62. Under this Regulation, agreements, to the exclusion of vertical agreements and those falling within the terms of the block exemptions, must be notified¹¹⁴ to the Commission. The Commission, in making its decisions on individual exemption, must respect the rights guaranteed by the Community legal order in administrative procedures, and this includes a duty to consider all the

¹¹¹ Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition, 2004, page 179.

¹¹² Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials*, 3rd edition 2003, page 964.

¹¹³ EEC Council Regulation No. 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 (ex 85 and 86) of the Treaty, OJ P 013, 21/02/62, P. 0204-0211.

¹¹⁴ *Ibid*, Article 4(1).

relevant aspects of an individual case.¹¹⁵ In the absence of notification in accordance with the Regulation, exemption shall not be granted.¹¹⁶

On 16th December 2002 the EC Council adopted Regulation¹¹⁷ No. 1/2003, which replaces the Regulation No. 17/62 and has been applied as of 1st May 2004. Under this Regulation, the system of clearance for individual exemptions under Article 81(3) has been abandoned. It means that notifications to the Commission for exemption under Article 81(3) from the prohibition of Article 81(1) have been abolished. Instead, agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.¹¹⁸ To wit, Article 81(3) will apply automatically to exempt from Article 81(1) all agreements falling within its scope, without the need for an official decision to be adopted by the Commission or any other authority.¹¹⁹ However, the undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.¹²⁰

2.1.3.2 Block Exemptions

Article 81(3) allows the Commission to declare the provisions of Article 81(1) inapplicable to some categories of agreements. The Commission, acting under delegated authority from the Council, has issued several regulations to cover respective categories of agreements that are generally beneficial rather than anti-competitive. Such regulations have been known as Block Exemption Regulations providing exemptions for a number of areas, including:

- *Vertical agreements*: Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (the 1999 Vertical Regulation).¹²¹

¹¹⁵ Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials*, 3rd edition 2003, page 965.

¹¹⁶ Case 30/78, *Distillers Co. Ltd v Commission*, [1980] ECR 02229, para. 24

¹¹⁷ Council Regulation No. 1/2003/EC of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

¹¹⁸ *Ibid*, Article 1(2).

¹¹⁹ Frank Montag/Andreas Rosenfeld, *A Solution to the Problems? Regulation 1/2003 and the Modernization of Competition Procedure*, ZWeR 2/2003, page 108, <http://www.freshfields.com/practice/comtrade/publications/pdf/Regulation12003.pdf#search='A%20Solution%20to%20the%20Problems?%20Regulation%201/2003%20and%20the%20Modernization%20of%20Competition%20Procedure'>.

¹²⁰ Council Regulation No. 1/2003/EC, OJ 2003 L1/1, Article 2.

¹²¹ Vertical Regulation 2790/1999, [1999] OJ L336/21

- *Specialization agreements*: Commission Regulation (EC) No. 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements (the 2000 Specialization Regulation).¹²²
- *Research and development agreements*: Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (the 2000 R&D Regulation).¹²³
- *Technology transfer (licensing) agreements*: Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (the 2004 Technology Transfer Regulation).¹²⁴

The foregoing categories of agreements can be classified into two groups: vertical agreements and horizontal agreements (including specialization agreements, research and development agreements, technology transfer agreements). These two groups of agreements will be further discussed below.

Although the contents of the block exemptions differ, they possess certain structural features in common. Agreements that come within the terms of a block exemption do not need to be notified to the Commission.¹²⁵ Indeed, the block exemptions were passed in order to avoid the need for individual appraisal by the Commission, in the hope that parties would tailor their agreements to fit within their confines.¹²⁶

2.2 Vertical Agreements and Block Exemption

The 1999 Vertical Regulation became operational on 1 June 2000. It covers all kinds of vertical agreements such as: “*exclusive dealing, exclusive purchasing, exclusive supply, franchising, selective distribution and non-genuine agency agreements*”¹²⁷, except¹²⁸ those falling within the scope of any other block exemption regulation.

¹²² Specialization Regulation 2658/2000, [2000] OJ L304/3

¹²³ R&D Regulation 2659/2000, [2000] OJ L304/7

¹²⁴ Technology Transfer Regulation 772/2004, [2004] OJ L123/11

¹²⁵ Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials*, 3rd edition 2003, page 968.

¹²⁶ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, Chapter 20, Page 430.

¹²⁷ Rainer Roniger and Lukas Flener, *A Guide to Vertical Restraints*, the European Antitrust Review 2005, Global Competition Review
<http://www.globalcompetitionreview.com/ear/vertical.cfm>

See also Commission Notice: Guidelines on Vertical Restraints of 13 October 2000 (Vertical Guidelines), [2000] OJ C291/1, paras. 13 et seq.

The 1999 Vertical Regulation applies to all kinds of vertical agreements and concerted practices, to the exclusion of decisions¹²⁹ by associations of undertakings, provided that the market share held by the supplier¹³⁰, or by the buyer¹³¹ in case of exclusive supply obligations, does not exceed 30% of the relevant market¹³²; and the agreement does not contain, as their object, restrictions¹³³ laid down in the Regulation.

Paragraph 1 of Article 2 of the Regulation states that “*Article 81(1) shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (‘vertical agreements’)*”. Thus, according to this paragraph, for the Regulation to be applied, the following criteria must be satisfied:

- There is existence of an agreement or concerted practice;
- The parties, for the purposes of the agreement, operates at different levels of the production or distribution chain; and
- The agreement relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

According to the above definition, the exemption applies to vertical agreements between undertakings. Does the exemption apply to those between an association of undertakings and its members? The answer is yes if they satisfy certain conditions. Paragraph 2 of Article 2 provides that the exemption shall apply to vertical agreements concluded between an association of undertakings and its members, or between such an association and its suppliers, only if:

¹²⁸ Article 2(5) of the 1999 Vertical Regulation, [1999] OJ L336/21

¹²⁹ The 1999 Vertical Regulation only refers to agreements and concerted practices between undertakings (Article 2(1)), or agreements between an association of undertakings and its member or suppliers (Article 2(2)).

¹³⁰ See the 1999 Vertical Regulation, [1999] OJ L336/21, Article 3(1)

¹³¹ Ibid, Article 3(2).

¹³² The concept of “**relevant market**” is defined as the combination of the relevant product and geographic markets. A **relevant product market** comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use. The **relevant geographic market** comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.

(See Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997], OJ C372/5, points 7, 8 & 9.)

¹³³ See the 1999 Vertical Regulation, [1999] OJ L336/21, Article 4.

- All of its members are retailers of goods; and
- No individual member of the association has a total annual turnover exceeding EUR 50 million.

The exemption also applies to vertical agreements containing provisions on intellectual property rights, provided that:¹³⁴

- Those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers; and
- They do not contain restrictions of competition having the same object or effect as vertical restraints which are not exempted under the Regulation.

Nevertheless, the exemption of the Regulation shall not apply to vertical agreements entered into between competing undertakings¹³⁵. These agreements will be considered under the Horizontal Guides¹³⁶ since their effects on the market and the possible competition problems can be similar to horizontal agreements¹³⁷. Yet, the exception for those vertical agreements between the competitors is also given if the parties conclude a non-reciprocal agreement and if they satisfy one of the following criteria:¹³⁸

- The buyer has a total annual turnover not exceeding EUR 100 million; or
- The supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods; or
- The supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services.

Finally, for vertical agreements to be covered by this Regulation and then exemption to be granted, the foregoing agreements must contain restrictions of competition falling within the scope of Article 81(1).¹³⁹ It means that those agreements are ‘vertical restraints’. However, where an agreement does not infringe Article 81(1), it follows that, no matter how generous and flexible the Regulation is, it will not be necessary to bring the agreement in

¹³⁴ Ibid, Article 2(3).

¹³⁵ Ibid, Article 2(4)

¹³⁶ Commission Notice: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements of 6 January 2001 (Horizontal Guidelines), [2001] OJ C003/2.

¹³⁷ Ibid, para. 11.

¹³⁸ See the 1999 Vertical Regulation, [1999] OJ L336/21, Article 2(4).

¹³⁹ Ibid, Article 2(1).

question within its terms.¹⁴⁰ In its Vertical Guidelines¹⁴¹, the Commission states that vertical agreements falling outside the block exemption will not be presumed to be illegal but may need individual examination, and in such cases the burden would be on the Commission to show that the agreement violates Article 81(1); in the case of such a violation, the parties could argue that the conditions of Article 81(3) are satisfied. However, where a vertical agreement is not exempted by the Regulation, the parties to the agreement may, of course, no longer seek an individual exemption.¹⁴²

2.3 Horizontal Agreements and Block Exemptions

In its Horizontal Guidelines, the Commission defines horizontal agreements as agreements or concerted practices (hereinafter referred to as "agreements") entered into between two or more undertakings operating at the same levels (competitors) in the market, e.g. at the same level of production or distribution,¹⁴³ whether those competitors are actual and potential. Horizontal agreements are divided into distinctive groups each of which is covered by a block exemption regulation respectively. Groups of horizontal agreements and their block exemptions will be discussed below. The common feature attributable to the horizontal agreements caught by the block exemption regulations is that such agreements must contain restrictions of competition falling within the scope of Article 81(1).

2.3.1 Research and Development Agreements

Research and development agreements (R&D agreements) often are generally beneficial collaborations that can “promote technical and economic progress by increasing the dissemination of technical knowledge, helping to rationalize production and avoiding duplication of research and development”¹⁴⁴. R&D agreements are covered by the 2000 R&D Regulation¹⁴⁵.

Whereas the Vertical Regulation apply to only agreements and concerted practices other than decisions by associations of undertakings, the R&D

¹⁴⁰ Richard Whish, *Regulation 2790/1999: The Commission’s “New Style” Block Exemption for Vertical Agreements*, [2000] 37 CMLR 897.

¹⁴¹ Vertical Guidelines, [2000] OJ C291/1, para. 26.

¹⁴² Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition, 2004, page 624.

¹⁴³ Horizontal Guidelines, [2001] OJ C003/2, para. 9.

¹⁴⁴ Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 1, page 147.

¹⁴⁵ Regulation 2659/2000, [2000] OJ L304/7

Regulation covers all such agreements¹⁴⁶ as implied under Article 81(1). The R&D Regulation covers agreements in respect of:¹⁴⁷

- Joint research and development of products or processes and, or excluding, joint exploitation of the results of that research and development; or
- Joint exploitation of the results of research and development of products or processes jointly carried out pursuant to a prior agreement between the same parties.

An R&D agreement being sought for exemption must not contain hard-core restrictions¹⁴⁸; in other words, it must not have its object as to create a disguised cartel or to arrange price fixing, output limitation or market allocation,¹⁴⁹ otherwise it will fall under the prohibition of Article 81(1).

In R&D agreements, the undertakings can be competitors or non-competitors. The period of exemption granted to them will be the same (during the period of research and development and seven subsequent years beyond R&D phase in case of including joint exploitation); however, the agreements concluded between competitors must be subject to a further condition that the combined market shares of the participating undertakings do not exceed 25% of the relevant market¹⁵⁰, and the exemption shall continue to apply after the above-mentioned period if their combined market shares do not exceed 25%.

Besides, where R&D agreements falls outside the block exemption specified in the Specialization Regulation, such agreements can be sought for individual exemption¹⁵¹ under Article 81(3) provided that they meet the criteria laid down therein.

2.3.2 Specialization Agreements

The Commission has emphasized that agreements on specialization in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply.¹⁵² According to the Commission, similar improvements are also created by agreements on specialization in the provision of services. Consumers will receive a fair share of the resulting

¹⁴⁶ Ibid, Article 2(1): “Agreement” means an agreement, a decision of an association of undertakings or a concerted practice.

¹⁴⁷ Ibid, see Article 1(1)

¹⁴⁸ Ibid, see Article 5(1)

¹⁴⁹ See Horizontal Guidelines [2001] OJ C003/2, para. 59

¹⁵⁰ Ibid, see Article 4(2)

¹⁵¹ See Horizontal Guidelines [2001] OJ C003/2, para. 74

¹⁵² See Specialization Regulation No. 2658/2000, [2000] OJ L304/3, recital 8.

benefits if competition can be effectively maintained. Therefore, such agreements generally do not fall within the scope of Article 81(1).

The 2000 Specialization Regulation is the latest one that has been so far applicable to agreements concerning unilateral or reciprocal specialization as well as joint production. Unilateral or reciprocal specialization agreements are those whereby the parties agree unilaterally or reciprocally to cease production of a product and to purchase it from the other party, whereas joint production agreements are those whereby the parties agree to produce certain products jointly.¹⁵³ Those agreements shall be granted exemption provided that they do not contain hard-core restrictions (such as price-fixing, output limitation or allocation of markets or customers)¹⁵⁴ and that they are concluded between the participating undertakings with a combined market share¹⁵⁵ not exceeding 20% of the relevant market.

It should be noted that in respect of unilateral specialization agreements, the application of the Specialization Regulation is limited to those concluded between competitors since the same agreements but entered into between non-competitors may benefit from the block exemption provided by the 1999 Vertical Regulation.¹⁵⁶

2.3.3 Technology Transfer Agreements

The 2004 Technology Transfer Regulation is the new block exemption one which replaces the 1996 Technology Transfer Regulation¹⁵⁷ and which has entered into force since 1 May 2004. The new Technology Transfer Regulation covers technology transfer agreements (licensing agreements) where one party, who possesses intellectual property rights or know-how (the licensor), permits another company (the licensee) to exploit the right under the licence.¹⁵⁸

Licensing agreements generally have the pro-competitive potential that may promote innovation, leading to a dissemination of technologies, which may reduce the production costs of the licensee or enable him to produce new or improved products.¹⁵⁹ To be exempted under the new Technology Transfer Regulation, the combined market share of the parties does not exceed 20% on the affected relevant technology and product market¹⁶⁰ for the

¹⁵³ Ibid, see Article 1(1); see also Horizontal Guidelines [2001] OJ C003/2, para. 79

¹⁵⁴ Ibid, see Article 5

¹⁵⁵ Ibid, see Article 4.

¹⁵⁶ Ibid, see Recital 10 and also Article 1(1)(a)

¹⁵⁷ Regulation 240/96, [1996] OJ L31/2

¹⁵⁸ Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 1, page 237; see further the definition in Article 1(1) of the 2004 Technology Transfer Regulation, [2004] OJ L123/11.

¹⁵⁹ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, [2004] OJ C101/2, para. 17

¹⁶⁰ **The relevant technology market** includes technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of

agreements between competitors, and 30% on that market for those between non-competitors; and such agreements do not have the following restrictions:

- hardcore restrictions¹⁶¹ (blacklisted clauses): for agreements between competitors¹⁶² such as restrictions on determination of selling price, output limitations except those imposed on the licensee in a non-reciprocal agreement, certain market or customer allocation, and the licensees' ability to exploit their own technology or on the parties' ability to carry out R&D; for agreements between non-competitors¹⁶³ such as restrictions on determination of a fixed or minimum sale price, certain restrictions on passive sales by licensees in the territory or to their customers, restrictions on active and passive sales by a licensee as a selective distributor operating at the retail level; or
- excluded restrictions¹⁶⁴ (greylisted clauses): inclusion of exclusive grant-back obligations in the agreement or assignment obligations imposed on the licensee regarding the rights of its own severable improvements to the licensed technology or its own new application of that, and so on.

According to Maurits Dolmans¹⁶⁵, where a licence contains a clause included in the list of excluded restrictions, there is no presumption for the illegality of such a clause. Such a restriction requires an individual assessment of its pro- and anti-competitive effects. So, although "excluded restrictions" listed in Article 5 of the Regulation does not benefit from the block exemption, they must be assessed on an *ad hoc* basis and their inclusion does not prevent possible block exemption of the remainder of the agreement.¹⁶⁶

As mentioned above, licensing agreements allow the licensees to exploit the rights under the licence. The exploitation under such agreements may take the form of manufacture, use or sale or any combination thereof. Hans

the technologies' characteristics, their royalties and their intended use. (see the 2004 Technology Transfer Regulation, [2004] OJ L123/11, sub-para. ii of Article 1(1)(i)(j))

The relevant product market implies the relevant product and geographic market (see the definition concerned *above*, footnote 120)

¹⁶¹ The 2004 Technology Transfer Regulation, [2004] OJ L123/11, Article 4

¹⁶² Ibid, Article 4(1).

¹⁶³ Ibid, Article 4(2).

¹⁶⁴ Ibid, Article 5.

¹⁶⁵ Maurits DOLMANS, Anu OILOLA, *the New Technology Transfer Block Exemption: A Welcome Reform, After All*, World Competition 27(3): 351-363, 2004, footnote 6, page 352.

<http://elin.lub.lu.se/elin?func=record&resid=b2e23a8690324ed694ec0bf0ddec87ad&lang=en&query=all%3A%22horizontal%20agreements%22&start=2&sessionId=DDCA5E4A1F57A1A15A3F01B8893D1B11&orgFunc=basicSearch&ftxtOnly=>

¹⁶⁶ Ibid, page 353.

Henrik Lidgard¹⁶⁷ notes that in terms of competition law, it is not self-evident whether the licence agreement shall be categorized as vertical or a horizontal collaboration. He further explains that where the licensor combines the sale of products produced by it with a grant of right to use or sell the products to an independent middleman, the license has features of a vertical agreement and the Vertical Regulation shall be applicable. However, if production is transferred to the licensee, the agreement will have much of the character of a horizontal agreement and is therefore covered by the Technology Transfer Regulation.

2.3.4 Joint Venture Collaboration

A joint venture is distinguished from mere ownership by the fact that the parties maintain the control over the joint assets and is often characterized by the fact that the parties add other assets to the venture in addition to the capital.¹⁶⁸ As referred to in the foregoing parts, joint ventures such as joint research and development in R&D agreements or joint production in specialization agreements often bring in significant benefits of improving technical and economic progress, reducing the costs, producing products with low prices, etc. Therefore, those agreements are granted block exemptions if they meet the conditions laid down in the respective block exemption regulations.

However, joint venture collaborations are not limited to those agreements. They often combine elements of concentration, on the one hand, and of cooperation between competitors on the other.¹⁶⁹ Thus, a joint venture has two forms: collaborative venture and concentrative venture. As referred to by Hans Henrik Lidgard¹⁷⁰, the 1989 Merger Regulation originally made a distinction between such two forms of joint venture. A collaborative venture was assessed under Article 81 EC and the procedural regime of implementing regulations of this Article whereas the concentrative venture followed the procedure and the substantive rules of the Merger Regulation.

The 2004 Merger Regulation¹⁷¹ has made another distinction: only “full function” joint ventures are covered by this Regulation. Article 3(4) of the same Regulation defines a “full function” joint venture as the one which performs on a lasting basis all the functions of an autonomous economic entity. To what extent can a joint venture be considered as an autonomous

¹⁶⁷ Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 1, page 237

¹⁶⁸ Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 2, page 133

¹⁶⁹ Izzet M Sinan and Jonathan NT Uphoff, *Review of Joint Ventures under the new EC Merger Regulation*, the European Antitrust Review 2005, Global Competition Review <http://www.globalcompetitionreview.com/ear/jointvent.cfm>

¹⁷⁰ Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 2, page 134

¹⁷¹ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the 2004 Merger Regulation), [2004] OJ L024/1.

economic entity? It must have a management dedicated to its day-to-day business and sufficient resources to carry out all functions required.¹⁷²

Consequently, joint ventures which are so called “partial function” joint ventures¹⁷³ comparable to forms of collaborative agreements¹⁷⁴ or even which are qualified with “full function” but do not meet the criteria¹⁷⁵ of the Merger Regulation, will fall outside the scope of the Merger Regulation. They can be assessed either under the block exemption regulations (R&D Regulation and Specialization)¹⁷⁶ if they only perform specific tasks such as joint R&D or production, or then under Article 81 if they fall outside the block exemptions. In this case, joint ventures are likely deemed as cartels which may affect the trade. Therefore, they will be assessed under Article 81(1) whether they meet the conditions laid down therein and then they are caught by the prohibition of this Article. However, they may also be entitled to individual exemption under Article 81(3) if they can satisfy the criteria laid down therein.

Finally, if a joint venture, which is qualified to have “full function” and meets the criteria¹⁷⁷ for a Community-dimensioned concentration laid down by the Merger Regulation, shall be covered by this Regulation. It must be notified to the Commission in accordance with the procedure set in the Regulation.

¹⁷² Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 2, page 135

¹⁷³ Izzet M Sinan and Jonathan NT Uphoff, *Review of Joint Venture under the new EC Merger Regulation*, the European Antitrust Review 2005, Global Competition Review <http://www.globalcompetitionreview.com/ear/jointvent.cfm>

¹⁷⁴ Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 1, page 145.

¹⁷⁵ The criteria for a joint venture to be caught by the 2004 Merger Regulation:

- The joint venture results in two or more entities sharing “joint control”;
- The parties’ aggregate and individual turnovers exceed the thresholds specified in this Regulation;
- The joint venture is “full function”

(see Izzet M Sinan and Jonathan NT Uphoff, *Review of Joint Venture under the new EC Merger Regulation*, the European Antitrust Review 2005, Global Competition Review <http://www.globalcompetitionreview.com/ear/jointvent.cfm>)

¹⁷⁶ Hans Henrik Ligard, *Competition Classics, Material & Cases on European Competition Law and Practices 2004/2005*, Part 1, page 146.

¹⁷⁷ The 2004 Merger Regulation, [2004] OJ L024/1, see Article 1

3 Vietnamese Competition Law

The emergence of the Vietnamese Competition Law (VN Competition Law)¹⁷⁸ is a certainty, deriving from the demand of economic integration and development. The law is deemed to be very indispensable to gather, into a comprehensive uniform legislation, several existing legal rules governing competition matters which have been scattered in different legal documents. It seeks to control and eliminate anti-competitive behaviours including collusions between undertakings which normally restrict or distort competition. Such restrictions on competition causing the ineffectiveness of economy often result in reducing diversity and quality of products but increasing prices, finally harming the benefits of end-users (consumers). Although the objectives of the VN Competition Law has not been specified therein, it is sought to ensure an equal and legal competitive environment and to protect the national interest and the interests of enterprises and consumers, contributing to promotion of socio-economic development¹⁷⁹ as well as regional and global economic integration of Vietnam.

Provisions governing anti-competitive agreements are laid down in Chapter II of the VN Competition Law. Section 1 of the same Chapter covers all agreements in restraint of competition, whereas economic concentrations, some forms of which are deemed as anti-competitive collusions according to the EC Competition Law, are specified in Section 3 thereof. This thesis mainly focuses on anti-competitive agreements and some forms of collusions as characterized similarly.

3.1 Agreements in restraint of competition

3.1.1 Scope of application

3.1.1.1 Anti-competitive Agreements

¹⁷⁸ Articles of the Vietnamese Competition Law adduced or extracted herein are to be read from the official legislation thereof that was promulgated on 03 December 2004, No. 27/2004/QH11, by the National Assembly of Vietnam, and reference are also taken from the English version translated from the 10th draft of the same law by Phillips Fox, one of the largest law firms in Vietnam and in Australasia <http://www.vietnamlaws.com/home.aspx>. This English version is acquired by the US-Vietnam Trade Council <http://www.usvtc.org/updates/legal/PhillipsFox/CompetitionLaw.pdf>. **Noting** that the English version was not translated from the official legislation; it is therefore used only for reference to English language.

¹⁷⁹ These goals have ever been set forth in Article 1 of the 10th draft of the VN Competition Law <http://www.usvtc.org/updates/legal/PhillipsFox/CompetitionLaw.pdf>.

The term of “anti-competitive agreements” is included in the concept of “anti-competitive behaviours” that are defined as “those of ‘enterprises’¹⁸⁰ which reduce, falsify or hinder competition in the market, including anti-competitive agreements, abuses of dominant market position and monopoly position, and economic concentrations”¹⁸¹.

In particular, anti-competitive agreements are defined under Article 8 of the VN Competition Law (Article 8 VN), including those which:

1. directly or indirectly fix prices of goods and services;
2. share consumer markets or sources of supply of goods and services;
3. limit or control the quantity or output of production, sale or purchase of goods, or provision of services;
4. restrain technical developments or investments;
5. impose on other enterprises conditions for the signing of contracts on purchase or sale of goods and services, or force them to accept obligations not directly related to the subject of the contract;
6. prevent, impede or not allow other enterprises to participate in the market or to develop business;
7. exclude from the market other enterprises which are not parties to the agreement; or
8. are characterized as arrangements for one or more parties to the agreement to win a tender for supply of goods and services.

3.1.1.2 “Enterprises”

The concept of “enterprise” is specified in Article 2 VN. This Article provides in general that the VN Competition Law shall apply to:

1. organizations and individuals conducting business (hereinafter referred to as “enterprises”) including enterprises engaged in production or supply of public utility products and services as well as those conducting business in State monopoly sectors and branches, and overseas enterprises operating in Vietnam; and

¹⁸⁰ The concept of “enterprise” will be discussed *infra*.

¹⁸¹ The VN Competition Law, Article 3(3)

2. industry associations¹⁸² conducting activities in Vietnam.

Therefore, according to Article 2 VN, the Competition Law applies to enterprises, in the present time, including:

- Domestic enterprises in private sectors comprising: limited companies, joint-stock companies, partnerships, cooperatives, private enterprises,¹⁸³ individual business households¹⁸⁴;
- State-owned enterprises: state-owned companies, joint-stock companies, and limited companies;¹⁸⁵
- Foreign invested enterprises in Vietnam: joint-venture enterprises and 100% foreign owned enterprises;¹⁸⁶
- Overseas enterprises operating in Vietnam;
- Trade and professional associations.

3.1.2 Prohibition

The VN Competition Law sets forth two ranges of prohibitions against anti-competitive agreements: absolute prohibition and conditional prohibition. Article 9 VN provides that:

1. Anti-competitive agreements specified in paragraphs 6 - 8 of Article 8 VN of this law shall be prohibited.
2. Anti-competitive agreements specified in paragraphs 1 - 5 of Article 8 VN of this law shall be prohibited if the combined market share of the parties to the agreement is 30% or more of the relevant market¹⁸⁷.

¹⁸² Industry associations are construed as trade and professional associations.

¹⁸³ These types of enterprises are set in the Law on Enterprises 1999, No. 13/1999/QH10 of 12 June 1999.

¹⁸⁴ This type of business has been covered not by the Law on Enterprises 1999, but by Decree No. 66/HĐBT of 2 March 1992, and now by Government's Decree No. 109/2004/NĐ-CP of 2 April 2004 regarding business registration, Chapter 5.

¹⁸⁵ These types of state-owned enterprises are covered by the Law on State-owned Enterprises No. 14/2003/QH11 of 26 November 2003.

¹⁸⁶ Foreign invested enterprises are covered by the Law on Foreign Investments in Vietnam promulgated on 12 November 1996, amended on 9 June 2000; and by Government's Decree No. 27/2003/NĐ-CP of 19 March 2003 amending some articles of the 31-July-2000 Decree No. 24/2000/NĐ-CP providing the detailed provisions on the implementation of the Law on Foreign Investments in Vietnam.

¹⁸⁷ The concept of "relevant market" is defined in Article 3(1) of the VN Competition Law. The **relevant market** includes the relevant product and geographical markets. The **relevant product market** means a market comprising goods or services which may be substituted for each other in terms of characteristics, use purpose and price. The **relevant**

According to the foregoing provisions, the VN Competition Law strictly prohibits agreements related to impediment to the market participation, boycotts, or tender collusions.¹⁸⁸ There is no threshold of the combined market share laid down for those agreements. However, for other agreements in terms of price-fixing, market allocation, limitation of outputs or sales, restraint of technical development and investment, and imposition of contracting conditions,¹⁸⁹ the prohibition shall be inapplicable if the combined market share is less than 30% of the relevant market.

3.1.3 Exemption

The VN Competition Law does not set forth any provisions of exemption for the agreements falling within the absolute prohibition under Article 9(1). Agreements qualified as impediment to the market participation, boycotts, or tender collusions shall be absolutely prohibited and therefore granted no exemption by the law.

An agreement, which is categorized in ranges from paragraphs 1 – 5 of Article 8 and which is prohibited under Article 9(2), may be granted exemption from such prohibition for a definite period, provided that such an agreement satisfies one of the following criteria aimed at reducing costs or benefiting consumers:¹⁹⁰

- It rationalizes an organizational structure or a business process, raising the business efficiency;
- It promotes technical progress, improving the quality of goods and services;
- It promotes uniform applicability of quality standards, technical ratings of certain types of products;
- It unifies conditions on trading, delivery of goods and payment but does not relate to price or any pricing factors;
- It increases the competitiveness of small and medium-sized enterprises; or
- It increases the competitiveness of Vietnamese enterprises in the international market.

geographic market means a specific geographical area in which goods or services may be substituted for each other with the same competitive conditions as each other, and which is significantly distinctive from neighbouring areas.

¹⁸⁸ VN Competition Law, see paras. 6-8 of Article 8

¹⁸⁹ Ibid, see paras. 1-5 of Article 8

¹⁹⁰ Ibid, See Article 10(1)

Accordingly, in the VN Competition law, small and medium-sized enterprises are also noticeably concerned and classified into the range of exemption. These enterprises are encouraged to develop since they also play a significant role in increasing the competitiveness in the market, greatly contributing to the system of distribution and even production throughout the country. However, the concept of “small and medium-sized enterprise” is not defined in this law but in another legal instrument (Decree¹⁹¹ No. 90/2001/ND-CP). Under this Decree, an enterprise shall be regarded as a small and medium-sized one if its registered capital must not exceed VND 10 billion or the yearly average number of its labours must not exceed 300.¹⁹²

In addition, the VN Competition Law lays down exemption for anti-competitive agreements as specified above but the exemption is limited to a definite period. However, the duration of exemption is not set in this law.

If an anti-competitive agreement falling within the prohibition by the law is sought for exemption, it must be notified to the competition authorities¹⁹³ in accordance with the procedures specified in Article 28 VN and other provisions set in Section 4 of Chapter II providing the procedures for acquisition of exemptions.

3.2 Joint Ventures

3.2.1 Definition

Joint ventures between enterprises are covered by the provisions governing economic concentrations specified in Section 3, Chapter II of the VN Competition Law. Beside joint ventures, there are other kinds of economic concentrations such as: merger, consolidation, acquisition of enterprises, and other similar forms provided by the law.¹⁹⁴

The concept of “joint venture” is defined in the law as meaning that “two or more enterprises together contribute a portion of their assets, rights, obligations and legal interests to form a new enterprise”¹⁹⁵.

In principle, a joint venture is some kind of collusion between enterprises. However, because they share some of their assets and interests to form a new enterprise which will operate in its own system, it is therefore assessed under the provisions governing economic concentrations. Yet, the law does

¹⁹¹ Government’s Decree No. 90/2001/ND-CP of 23 November 2001 regarding assistance to the development of small and medium-sized enterprises.

¹⁹² Ibid, see Article 3 (definition of small and medium-sized enterprises)

¹⁹³ Minister of Trade shall be the authority granting exemptions to anti-competitive agreements.

¹⁹⁴ VN Competition Law, see Article 16

¹⁹⁵ Ibid, see Article 17(4)

not make any distinction showing to what extent the joint venture will depend on its participating enterprises from which it has been created.

3.2.2 Prohibition

Like other economic concentrations, a joint venture is possibly potential or actual to be anti-competitive and therefore shall be prohibited by this law if the combined market share of its participating enterprises exceeds 50% of the relevant market.¹⁹⁶ The market share threshold will be applied in the same to all economic concentrations¹⁹⁷ regardless of whatever the form of a concentration is.

However, the law¹⁹⁸ shall not prohibit a joint venture if after the result of the economic concentration, it still falls within the category of small and medium-sized enterprises¹⁹⁹ as provided.

3.2.3 Exemption

The prohibition mentioned above shall be inapplicable to a joint venture provided that it satisfies one of the following conditions:²⁰⁰

- One or more of the participating parties to the joint venture are at risk of being dissolved or of becoming insolvent;
- The joint venture has the effect of export extension or of contributing to socio-economic development, technical progress.

Like anti-competitive agreements, a joint venture which falls within the prohibition by the law and is sought for exemption, must be notified to the competition authorities in accordance with the procedures specified in Article 29 VN and other provisions set in Section 4 of Chapter II providing the procedures for acquisition of exemptions.

However, joint ventures falling outside the scope of prohibition must be also notified to the competition authorities²⁰¹ unless the combined market share of the participating parties to such joint ventures is less than 30% of

¹⁹⁶ Ibid, see Article 18.

¹⁹⁷ The VN Competition Law shall apply in the same VN manner to joint ventures as well as other kinds of economic concentrations.

¹⁹⁸ VN Competition Law, see Article 18.

¹⁹⁹ See para. discussing about small and medium-sized enterprises in **3.1.3 above**

²⁰⁰ VN Competition Law, Article 19.

²⁰¹ **Minister of Trade** shall grant exemption to joint ventures to which one or more of the participating parties are at risk of being dissolved or of becoming insolvent. **The Government Prime Minister** shall grant exemption to joint ventures which have the effect of export extension or of contributing to socio-economic development, technical progress.

the relevant market.²⁰² The notification procedure shall be performed pursuant to Article 21 VN.

²⁰² Ibid, see Article 20.

4 Comparative Analysis

On the basis of comparing the two legal systems of the EC and Vietnam governing matters respective of anti-competitive agreements, I thereby point out some significant comparative issues that will be discussed hereinafter.

4.1 Fundamental Concepts

4.1.1 “Undertaking”

The concept of “undertaking” defined in the EC Competition Law is referred to as “enterprise” in the VN Competition Law. The concept “enterprise” comprises organizations and individuals conducting business including enterprises engaged in production or supply of public utility products and services as well as those conducting business in State monopoly sectors and branches, overseas enterprises operating in Vietnam; and industry associations conducting activities in Vietnam. However, the term of “individuals conducting business” is still vague and not explained in the VN Competition Law. According to the current 1997 Commercial Law²⁰³ and the 9th amendment draft of this law, only business individuals having business registration with the competent authorities are covered by this law, but other individuals such as vendors who are often supposed to gain low incomes fall outside the law. So, the question is whether or not the VN Competition Law includes such business individuals as vendors.

However, the EC Competition Law makes a clearer and broader definition of “undertaking” to encompass *any entity (legal or natural person) engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed (see Höfner²⁰⁴)*. Therefore, any person deemed to carry on an economic activity shall fall within the concept of “undertaking”.

In addition, in the EC Competition Law, a parent company and its dependent subsidiary without real autonomy are together regarded as a single undertaking. The agreement between them will be regarded as an internal allocation of function or role within that economic undertaking and therefore falls outside the prohibition of Article 81(1) EC. Yet, the VN Competition Law does not foresee so.

²⁰³ See the Commercial Law of Vietnam of 10 May 1997, Article 2; also see the 9th amendment draft of this law, Article 3.

²⁰⁴ See further in 2.1.1.1.1

4.1.2 “Agreement” between undertakings

Forms of agreement

The definition of “agreement” between parties in the VN Competition Law is vague enough that it does not specify the forms of agreement, whereas the “agreement” is broadly interpreted under the EC Competition law to cover any written or oral agreement between two or more undertakings, whether legally enforceable or not, whether binding or non-binding. As the Commission stated in *Polypropylene*²⁰⁵, an agreement will exist if the parties reach a consensus on a plan. No contractual sanctions or enforcement procedures are required. Nor is it necessary for such an agreement to be made in writing. The ECJ further has held in *SA Hercules Chemicals*²⁰⁶ that the joint intention between undertakings is sufficient to constitute an agreement.

In the VN Competition Law, trade and professional associations are also covered. However, this law only refers to agreements between those associations or between them and other enterprises but ignores their internal decisions. In the EC Competition Law, a decision, whether in form of a recommendation, decision or regulation, given by an association may restrict the competition even though such an association does not carry out a commercial activity. The reason is that an association’s decision will affect the activities of its members on the relevant market. In *Price Waterhouse*²⁰⁷, although the Netherlands Bar Association only acts as the regulatory body of a profession, its practice of adopting a decision like the 1993 Regulation is deemed to constitute an economic activity and to be capable of restricting competition on the market in legal services because of its influence on the conduct of the Bar’s members on that market.

The vagueness of the definition of “agreement” in the VN Competition Law further gives rise to the question whether a “concerted practice” as a form of coordination between parties without concluding a contracting agreement would be covered by this law. The EC Competition Law covers not only agreements concluded but also collusions between undertakings which have not agreed but which cooperate with each other to determine their market policy, for instance the cooperation on the exchange of advance information on intended price increases in *ICI*²⁰⁸. In this case, by means of the advance announcements on intended price rises, the various undertakings will eliminate all uncertainty between them as to their future conduct and also a large part of the risk usually inherent in any independent change of conduct on one or several markets. This expressly distorts competition because it leads to conditions of competition which do not correspond to the normal market.

²⁰⁵ See further in 2.1.1.1.2

²⁰⁶ Ibid.

²⁰⁷ See further in 2.1.1.1.1 and 2.1.1.1.3

²⁰⁸ See further in 2.1.1.1.4

Classification of Horizontal and vertical agreements

The anti-competitive agreements²⁰⁹, to the exclusion of agreements falling within the meaning of paragraphs 6-8 of Article 8 VN, are equally treated by the VN Competition Law whether they are horizontal or vertical restraints. There is no distinction between these two categories of restraints. As in Article 9(2) VN, agreements, whether horizontal or vertical, shall be prohibited if the combined market share of the participating parties takes account of 30% or more of the relevant market. Indeed, vertical agreements (between parties operating at different levels: *e.g.* agreement between a manufacturer and its distributor) frequently carry an economic benefit: that is beneficial to consumers since they may lead to improvements in the promotion and distribution of products. In contrast, horizontal agreements (between parties operating at the same levels: *e.g.* agreement between competing distributors or manufacturers) are explicitly restrictive to competition.

In fact, vertical restraints are often found in the form of imposing on other undertakings (usually non-competitors) certain conditions binding upon their participation in the system of distribution (*e.g.* exclusive distribution agreements) resulting in impediment to parallel imports²¹⁰ and exports, or forcing those undertakings to accept some obligations irrespective of the object of the contract. Horizontal restraints are often agreements between competitors in terms of price-fixing,²¹¹ output limit,²¹² market allocation, boycotts,²¹³ and etc. Normally, horizontal restraints will cause more negative effects on the market than those induced by vertical restraints. Where vertical agreements are performed in the same chain (*e.g.* distribution system) between non-competitors, the fact that to what extent these agreements affect the market will still depend on the competitive capacity from their competitors on the relevant market. In contrary, if several competitors collude with each other, for instance, to fix selling price

²⁰⁹ Only referred to those which fall within paragraphs 1-5 of Article 8 of the VN Competition Law. Agreements falling within paragraphs 6-8 of Article 8 VN shall be totally prohibited.

²¹⁰ Joined cases 56&58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, [1966] ECR 00299.

²¹¹ See Case 48/69, *Imperial Chemical Industries Ltd v EC Commission*, [1972] ECR – 0061

²¹² See Commission Decision 84/405/EEC, *Zinc Producer Group*, [1984] OJ L220/27, [1985] 2 CMLR 81. In this case, the members of Zinc Producer Group (ZPG) agreed not to build any new zinc production capacity without first informing the ZPG. They undertook to submit their production figures (tones of zinc produced) to the full ZPG meeting for approval, and agreed to make an across-the-board 20% cut in their production.

²¹³ See Case T-31/99, *ABB Asea Brown Boveri Ltd v EC Commission (Insulated Pipes-ABB)*, [2002] ECR II-1881. In this case, the CFI upheld the Commission Decision stating that the collusion between members of ABB Group qualified as a cartel to allocate national markets to particular producers and to boycott Powerpipe (their competitor in heating business) by adopting and implementing concerted measures such as recruiting key employees of Powerpipe and making a project of collective boycott of Powerpipe's customers and suppliers.

of a product, the effect on the relevant market of such an agreement will be very critical since that product can be sold at very low price to the extent that other competitors, especially those having low competitive capacity, will be easily put at stake or even in solvency and be therefore eliminated from the market.

For the above reasons, the EC Competition Law makes a clear distinction between horizontal and vertical agreements when setting block exemptions to cover them. The threshold of the combined market share of the parties to the agreement will be different subject to what kind of agreement it belongs to. Vertical agreements between non-competitors are entitled to the threshold of 30%,²¹⁴ whereas horizontal agreements between competitors are entitled to that of 20% to 25%.²¹⁵ Even in the same block exemptions, there is also a difference in thresholds provided for agreements concluded subject to what kind of undertakings: between competitors or non-competitors. The threshold in such block exemptions will be higher for agreements between non-competitors than those between competitors (*e.g.* in technology transfer agreements: 20% for those between competitors but 30% for those between non-competitors, and even in R&D agreements there is no threshold set for those between non-competitors).

4.2 Joint Venture Collaboration

Joint Venture collaboration qualifies as an economic concentration provided in Section 3 of Chapter II in the VN Competition Law. However, there is no any provision setting the distinction between full-function joint ventures and those with so called partial-function.

As stated above, in the EC Competition Law, a full-function joint venture enjoys a real autonomy where it can perform all functions of an autonomous economic entity. A full-function joint venture will be covered by the 2004 Merger Regulation if the criteria laid down therein are satisfied. In contrary, a partial-function joint venture does not have such real autonomy because its business management is subject to the control by its participating undertakings (or so called “parent” undertakings). A partial-function joint venture will not be covered by that Regulation but will be assessed under Article 81 and other block exemption regulations if it meets the conditions required.

The non-distinction between these two kinds of joint ventures in the VN Competition Law may lead to the fact that enterprises can avail themselves of this legal gap to disguise their collaborative agreements or cartels under the form of joint ventures which are not characterized as full-function but are still subject to looser conditions set for economic concentration than

²¹⁴ See the 1999 Vertical Regulation 1999, Article 3.

²¹⁵ See the 2000 R&D Regulation, Article 4(2); the 2000 Specialization Regulation, Article 4; the 2004 Technology Transfer Regulation, Article 3(1).

those set for anti-competitive agreements. Particularly, the threshold of the combined market share of the parties to anti-competitive agreements is less than 30% of the relevant market, whereas that of the parties to economic concentrations is 50%. Clearly, such collaborations disguised under forms of joint ventures, if having restrictions of competition and having the threshold of from 30% to 50%, should have been assessed under the provisions governing anti-competitive agreements under Section 1 of Chapter II in this law.

4.3 Exemption Matters

As stated above, different from the EC Competition Law where exemptions will be granted to anti-competitive agreements subject to various conditions under respective block exemption regulations on the basis of division between horizontal and vertical agreements, there is no such distinction in the VN Competition Law. Exemption will be treated in the same level for all kinds of anti-competitive agreements²¹⁶, to the exclusion of agreements falling within the meaning of paragraphs 6-8 of Article 8 VN. It is possibly said that there are two steps for exemption. First, anti-competitive agreements shall not be prohibited if the combined market share of the participating parties is less than 30%, and for joint ventures that does not exceed 50%. Second, prohibited agreements where they do not satisfy the required thresholds may also be entitled to exemption if they meet conditions²¹⁷ laid down in respective provisions. As regards non-prohibition as referred to in the first step, when an agreement satisfies the threshold condition, there is no further test required to determine whether that agreement has hardcore restrictions to competition or not. Such non-examination of hardcore restrictions shall omit the possibility where enterprises may actually enter into an agreement only for purposes such as price-fixing, market or customer allocation, output limitation, etc. This seriously restricts competition.

In contrary, in the EC Competition Law, where an agreement satisfies the threshold required under the block exemption but has its hardcore restrictions of competition, it will be not granted exemption. However, such an agreement falling outside the block exemption may be assessed under Article 81 EC and may be entitled to individual exemption if it satisfies conditions laid down under Article 81(3), or may fall outside the prohibition of Article 81 if it satisfies the principle of “de minimis”. So, individual exemption in this case under the Competition Law of the EC can be compared with the second-step exemption under that of Vietnam.

²¹⁶ Only referred to those which fall within paragraphs 1-5 of Article 8 of the VN Competition Law. Agreements falling within paragraphs 6-8 of Article 8 VN shall be totally prohibited.

²¹⁷ See above, 3.1.3 and 3.2.3

Finally, Article 10 VN provides that anti-competitive agreements, which fall within paragraphs 1-5 of Article 8 and which are prohibited under Article 9(2), may be granted exemption from such prohibition for a *definite period*, provided that such an agreement satisfies one of the criteria required thereby. However, the term “*definite period*” is not demonstrated in specific figures under Article 10 VN as well as other provisions of the VN Competition Law.

4.4 Proposals for the Vietnamese Competition Law

On the basis of the foregoing comparative analysis of the EC and Vietnamese Competition Laws, I thereby set forth some proposals hereunder for amendment to the VN Competition Law:

1. “Agreement” specified in Article 8 VN should be clarified to the extent that it includes “*any written or oral agreement between two or more enterprises, whether legally enforceable or not, whether binding or non-binding*”. This definition will cover all kinds of collusion including contracting agreements, concerted practice without concluding agreements. Moreover, decisions by trade and professional associations should be regarded as “agreement” in this concept, since such decisions also affect the conduct of association members.
2. The concept of “enterprise” according to the definition in Article 2 VN should be defined to include “*any entity engaged in an economic activity in the territory of Vietnam, regardless of the legal status of the entity and the way in which it is financed*”, so that the concept can cover all legal and natural persons conducting economic activities.
3. There should be distinction between vertical and horizontal agreements to the extent that exemption conditions are reasonably set corresponding to each category of agreements. The threshold of the combined market share provided for vertical agreements should be set lower than that of horizontal agreements which normally cause more negative effects on the market than those induced by vertical agreements.
4. There should be distinction between full-function joint ventures and partial-function joint ventures. The former ones are still governed by the provisions on economic concentration laid down in Section 3, Chapter II, but the latter ones should be assessed under the provisions governing

anti-competitive agreements laid down in Section 1 of the same Chapter since they appear to be likely collaborative agreements rather than concentrations.

5. Hardcore restrictions should be also considered where an agreement meets the threshold condition. If the agreement actually has hardcore restrictions (*e.g.* price-fixing, output or investment limit, and so on) which seriously affect competition, it should be prohibited unless such agreement falls within the category of agreements of minor importance between small and medium-sized enterprises in accordance with Decree No. 90/2001/ND-CP.
6. Duration of exemption for anti-competitive agreements specified in Article 10(1) VN should be provided in particular figures. The term of “definite period” is vague in that Article. Exemption duration can be granted subject to each category of agreements and in as far as the agreement still satisfies conditions for exemption.

5 Conclusion

The matter of competition and the law governing it has become, for a long time, one of the most interests to those who want to do business. Competition is a two-sided factor. On the one hand, it helps to enhance the economic development, bringing in the increase of production, product quality as well as technology improvements. On the other hand, due to the competition for their existence and expansion, firms seeks to cooperate with each other in many ways with the aim at strengthening their position or eliminating other competitors from the markets; and in turn, this results in adverse effect: restricting competition, then decreasing the economic efficiency. Consequently, there need to be a legal corridor to control competition: the competition law.

Nowadays, in the common tendency of regional and international economic integration, competition between firms appears to be harder and more complicated. The role of competition law becomes much more important. In the EU, the competition law has been established and developed for many decades. Case-law and secondary legislations have been developed by Community Institutions on the basis of Articles 81 and 82 of the EC Treaty: two fundamental provisions governing competition issues. In that, Article 81 together with EC legislations concerned has become an effective legal system to control and forbid anti-competitive agreements as incompatible with the common market, whether they actually or potentially restrict or distort competition, and therefore to achieve one of the goals laid down in the EC Treaty: “ensuring that competition in the internal market is not distorted”.

In Vietnam, the competition law has been recently promulgated and has not yet been enforced until 1 July 2005. Nevertheless, the late birth of such a new law inevitably remains certain problems that this law has to deal with. Some of concepts and terms set in the law are still vague²¹⁸ or insufficient²¹⁹, so this will cause difficulty for the enforcement of the law afterwards. Moreover, provisions on exemption for anti-competitive agreements remain inappropriate where they apply in the same way to all agreements whether those agreements are characterized as horizontal or vertical ones.

In short, in the process of the regional and global economic integration, especially in its accession to WTO in the future, Vietnam will face the rush of foreign companies into its market. The challenge is that the existence of current companies together with the mass mergence of new ones will lead to the disturbance on the Vietnamese market. Competition between enterprises

²¹⁸ Would oral and writing agreements be included? How long is a “definite period” for exemption granted to anti-competitive agreements?

²¹⁹ Non-distinction between full-function and partial-function joint ventures, concerted practices without a concluded agreement are not specified in the law.

will get more severe and complicated. Consequently, Vietnam needs to have an effective competition law to control such diversified and complex environment of competition. To attain this goal, Vietnam should clarify some concepts and provisions that still remain problematic in the competition law, as discussed above. This will be indispensable for effective enforcement of a new and “young” law as such of Vietnam.

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