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Consequences of voidness under
Article 81(2) of the EC Treaty
and Vietnamese law

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Summary

The creation of an internal market is one of the objectives of the EC Treaty, and the Competition provisions are crucial to the achievement of this goal. Article 81(1) EC Treaty prohibits agreements which may distort trade between the Member States. The consequence of violating such a prohibition is given by the Treaty itself in Article 81(2): voidness. However, the consequences of such voidness are not provided for under competition law; rather they follow from general Civil law rules. Further, according to Regulation 1/2003 and case-law, the consequences of infringing Articles 81 and 82 EC Treaty include not only voidness but also fines and damages. To research the consequences of voidness it would be better to compare it with other consequences under both civil and competition law. To achieve this, this thesis is divided into 7 parts:

In the first part, there are some general remarks concerning the rationale for the choice of topic, its purpose and the methods used for researching and delimiting it.

In the second and the third parts, unlawful agreements under European civil law and competition law are introduced. There is a very short introduction regarding general types of civil unlawful agreements in the second part. This serves as the basis for determining the types of unlawful competitive agreements in the third part.

Consequences are analysed in the fourth and fifth parts. Voidness is considered in the fourth. Here the consideration of rules regarding voidness in civil law is used to find out the corresponding consequences of voidness under Article 81(2). Other consequences such as fines and damages will be presented in the fifth.

Moving from the study of EU law, in the next part, I go on to study the consequences of voidness under Vietnamese law, the law of my country, in order to compare the two and find whether any lessons we can learned from the comparison.

The final part contains a general conclusion and my proposals relating to both the EU and Vietnam.

Preface

Article 81(2) EC provides for agreements to be voided as the consequence of infringement by way of prohibited anti-competitive agreements. The effects of such nullity are developed in both legislation and case-law. Voidness and other consequences such as fines and damages are good instruments for protecting the general interests of the EC as well as for ensuring the rights of individual who suffer damage from the anti-competitive behaviour of others.

In Vietnam, voidness is a Civil law concept. Competition law does not provide specifically that prohibited anti-competitive agreements are automatically void. However, that is stipulated under the Civil Code. Civil law is considered as the root and principle of private law so the principles and provisions of Civil Code can be applied to these agreements.

By studying the topic “Consequences of voidness under Article 81(2) EC law and Vietnamese law ”, I want to understand contents of voidness as expressed in competition law in EU as well as in Vietnam. I then want to compare the consequences of voidness in the two legal system with a view to learning and being able to give proposals contribute to improving comprehensive legal system.

During one year of studying in Lund, I have received much help and learned a great deal of useful knowledge. My thesis is the final work of the program. I would like to take the opportunity in this preface to express my warmest thanks to: Professor Hans Henrik Lidgard, my supervisor, who has given me so much helpful knowledge and advice during the program as well as while I was writing the thesis; Doctor Christoffer Wong for his precious teaching and help at all times. I would also like to thank the teachers and the staff of Lund University and Hanoi Law University who have given me the chance and impetus to follow and complete this Program. In particular, I wish to thank Ms. Sandra Forsén, the Program Coordinator, whose kindness and helpfulness have enabled me to be happy when living in Lund. I also owe thanks to my family for encouragement, support and understanding at all times. I would like to extend my thanks to everyone who has assisted and helped me in studying and writing as well.

Although I have tried my best while writing this thesis, because of the limits in time and of my capability, this thesis will surely contain defects. I am grateful for any critical comments and contributions that may be given in respect of it.

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Nguyen Minh Oanh

Abbreviations

EU	European Union
EC	European Community
EC Treaty	Treaty establishing the European Community
PECL	Principles of European Contract Law
ECJ	The European Court of Justice
CFI	The European Court of First Instance
CA	Competition Authorities
OJ	Official Journal of European Community
Ibid.	Ibidem
US	United States of America
PICC	UNIDROIT Principles for International Commercial Contracts
CISG	Convention relating to a Uniform Law on the International Sale of Goods

1 Introduction

1.1 Rationale

Competition is a basic mechanism of the market economy and is a simple and efficient means of guaranteeing consumers the best quality and price of products and services.¹ In the EU, competition law has always played an important part in Community law.² The EC Treaty is indeed considered as a legal tool ensuring that competition in the internal market is not distorted³. Article 81⁴(formerly Article 85) is the principle weapon for controlling anti-competitive behaviour. Paragraph 2 controls here and states that agreements between companies or ‘undertakings’ which lead to an appreciable restriction of competition are automatically void⁵. Beside such nullity, fines and damages are also potential consequences of the infringement of Article 81(1) that are provided in Regulation 1/2003⁶. So that these rules can make the potential perpetrators of illegal actions will think twice. However, the nature of the concept and the consequences of voidness are not clearly provided for by the Treaty or other competition legislation. This issue has been discussed some research materials but the content is rather limited. Therefore, to clarify the concept and analyse the consequences of breaching Article 81(1) is an important task.

In Vietnam, my country, voidness is not provided for in Competition law as such. The Constitution 1992 (as amended in 2001) initially set up the first legal framework providing for competition matters.⁷ Now, the Civil Code 2005 has provided a number of general regulations on competition as well as the consequences of voiding prohibited agreements.⁸ However, there is

¹ *European competition policy: a brief overview - Antitrust and Cartels* available at <http://europa.eu.int/comm/competition/antitrust/overview/> (9:15am, 2006-05-17)

² CRAIG, P. & DE BÚRCA, G., *EU Law text cases and materials*, 3rd edition, Oxford University press 2003, p.936

³ 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, Article 3(1)(g).

⁴ See Article 81 EC Treaty

⁵ See Article 81(2) EC Treaty

⁶ Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules laid down in Article 81 and 82 of the Treaty, OJ 2003 L11

⁷ See Article 16, 28 of Vietnam’s Constitution 1992 (amended 2001) :

Article 16 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 28 provides: “*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.*”

⁸ See Article 127, 128, and 410 Civil Code 2005 of Socialist Republic of Vietnam

an issue as to whether those consequences are suited for competition issues or not.

Because of my wish to understand the consequences of nullity under EC law, to contribute ideas to the making of a comprehensive legal system in Vietnam all combined with a general interest in both Civil law and Competition law, I chose “Consequences of voidness under Article 81(2) EC Treaty and Vietnamese law ” as the topic of my thesis.

1.2 Purpose

The purpose of this thesis is to study the consequences of infringement by anti-competitive agreements, such as voidness, fines and damages, in two different legal systems: EC and Vietnamese law. The main focus is the civil effects of the voidness as stated in Article 81(2) EC Treaty and the Vietnamese Civil Code respectively.

The thesis will also compare EC and Vietnamese law to find similarities and differences between the two legal system with a view to give some proposals for improving them.

1.3 Method

To achieve the ends set above, I have used analysis, interpretation, and the demonstration method to clarify some concepts and basic contents concerning the effects of voidness as well as other consequences of prohibited agreements under EC and Vietnamese law.

Besides, I have also used the comparison and analysis to point out legal gaps and defects which might need remedying.

1.4 Delimitation

As there already existed another thesis⁹ on my issue in Europe albeit from a business perspective, my thesis only focus on the latest legislation and case law with a view to clarifying the concept of voidness and the consequences of infringement from a civil law perspective.

⁹ Ha, Susana, “*The effects of nullity of Article 81(2)EC*” Master thesis at Faculty of Law, University of Lund, Spring 2003 available at [http://www.jur.lu.se/Internet/english/essay/Masterth.nsf/\(public.web.object\)/2eb7138c2eed30a1412569fb005a8d24?OpenDocument&Start=1&Count=1000&Expand=1](http://www.jur.lu.se/Internet/english/essay/Masterth.nsf/(public.web.object)/2eb7138c2eed30a1412569fb005a8d24?OpenDocument&Start=1&Count=1000&Expand=1) (9:15am, 2006-05-17)

To help the reader understand voidness and its consequence, I also study and analyse anti-competitive agreements themselves – which are void under EC and Vietnamese law. However, this is not the main purpose of my thesis so I only briefly introduce the key concepts of concern here.

I know that the US is the original home of competition law but because of limited time my thesis could not cover US law. I would like to study this field of US law and I hope that I will have a chance to thus extend my research in the near future.

1.5 Sources

The sources for this work are legislative material of the EU and Vietnam , case-law of the ECJ and the CFI, articles from journals, books, and other literature available at the University of Lund.

2 Unlawful agreements under Civil law

Civil law is considered the foundation for competition law. So analysing unlawful agreements with regard to civil law is basic to studying them under competition law. Nowadays, Europe have not had Civil Code yet. However, civil contracts have been set out in Principles of European Contract Law (PECL) that was published by the Commission. According to civil law, generally, there are three situations leading to unlawfulness of an agreement:

2.1 Mistake

Article 4:103 (1)¹⁰ (ex art. 6.103) of PECL provides that: “A party may avoid a contract for mistake of fact or law existing when the contract was concluded if....”

A contract may be prevented from coming into existence, or brought to an end as the result of a mistake by either or both of the parties. There are various ways in which a party may make a mistake in relation to the contract. It may, for example, relate to the subject matter, the identity of the other contracting party, or to specific terms of the contract. In the civil law, a division into common, mutual, and unilateral mistakes will be adopted.¹¹

2.1.1 Common mistake

The clearest type of common mistake which will be regarded as rendering a contract void for mistake is where the parties have made a contract about something which has ceased to exist at the time the contract is made. For example, the contract concerns the sale of specific goods, which, unknown to either party, had been destroyed the day before the contract was made: the agreement will be undoubtedly be void for common mistake.¹²

2.1.2 Mutual mistake

Mutual mistake refers to the situation where the parties are at cross-purposes. This may relate to the subject matter of the contract, or the identity of the other contracting party. If the mistake is sufficiently fundamental that it means in effect that there was no agreement between the parties, then there can be no contract, and any actions taken on the basis that there was a contract will have to be undone. For example, if two persons

¹⁰ See Article 4:103 of PECL

¹¹ Stone, R., *Principles of contract law*, Cavendish Publishing Limited, 1997, 3rd edition, p.188

¹² *Ibid.* p. 192

enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by similarity of name, had a different ship or person in his mind, no contract would exist between them.¹³

2.1.3 Unilateral mistake

In a situation there will often have been a misrepresentation which will provide the other party with a remedy. If there is no such misrepresentation, however, or the remedies available for misrepresentation are inadequate, there may be a remedy on the basis of a 'unilateral mistake'. Where one party knowingly takes advantage of the other's mistake, this will lead to the contract being held either void at common law, if it is a mistake which would otherwise be regarded as an operative common mistake, or non-existent if it is of a kind which would prevent a agreement arising on the basis of mutual mistake.¹⁴

2.2 Deceit and Duress

2.2.1 Deceit

Article 4:107 (1)¹⁵ (ex art. 6.107) of PECL provides that: "*A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.*"

Deceit is similar to mistake in that anyone deceived into entering a contract does so under a mistake; the difference is that in deceit the mistake is consciously caused by the other party. Thus deceit may be seen as a special case of 'caused mistake'¹⁶.

A person who has contracted under a mistake is well-advised to base his claim for avoidance not just on his mistake but also, if he can, on deceit, for then he can obtain damages as well. Sometimes, indeed, avoidance may be allowed for deceit when mistake alone would not suffice, as where the mistake is as to motive or not 'essential'. Also, the period allowed for avoidance is often longer for deceit than for mistake. Finally, a contractual term excluding avoidance for mistake does not apply to mistake due to deceit, since one can not contract out of liability for fraud.¹⁷

¹³ Case *Smith v Hughes* (1871) cited in Stone, R., *Principles of contract law*, Cavendish Publishing Limited, 1997, 3rd edition, p.193

¹⁴ Stone, R., *Principles of contract law*, Cavendish Publishing Limited, 1997, 3rd edition, p.194

¹⁵ See Article 4:107 of PECL

¹⁶ Kotz, Hein and Flessner Axel, *European Contract Law- zvol.1: Formation, Validity, and Content of Contracts; Contract and Third Parties*, Clarendon Press Oxford, 1997

¹⁷ *Ibid.* Pp 196-197

2.2.2 Duress

Article 4:108 (1)¹⁸ (ex art. 6:108) of PECL provides that: “A party may avoid a contract when it has been led to conclude it by the other party's imminent and serious threat of an act: ...”

The courts have always keen to preserve freedom of contract. A necessary element of this freedom is that the agreement should be reached voluntarily. This means that no force or coercion should be used in order to secure the agreement.¹⁹ An agreement which results from duress will be voidable. Duress can be improper pressure of any kind. This may take the form of physical coercion or threats, economic pressure, or psychological influence.

2.3 Illegality and Immorality

Most or all western legal systems have rules broadly to the effect that illegality and immorality are grounds upon which a contract may be invalidated. However, the specific treatment of these topic varies from country to country, each having its own statutory and other provisions on when and which contracts are illegal and its own conception of what is immoral.²⁰

In 2002, the Commission on European Contract law published additional chapters of Part III of the PECL. In this part, illegality and immorality were recognised as linked to a principle. Under that principle, an agreement will be unlawful if it is contrary to fundamental principles or mandatory rules:

The first, Article 15:101 states: “A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union”²¹. Guidance as to these fundamental principles may be obtained from such European documents as the EC treaty, the European Convention on Human Rights, and the EU Charter on Fundamental Rights.²²

The second, Article 15:102 provides: “Where a contract infringes a mandatory rule of law applicable under Article 1:103 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.”²³. It is concerned with the

¹⁸ See Article 4:108 of PECL

¹⁹ Turner Chris, *Contract law Tort*, Hodder & Stoughton, 2000 p. 114

²⁰ MacQueen Hector, “*Illegality and Immorality in Contracts: Towards European Principles*” in *Towards a European Civil Code- Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004. See Chapter 23 pp.415-431

²¹ See Article 15:101 of PECL

²² MacQueen Hector, “*Illegality and Immorality in Contracts: Towards European Principles*” in *Towards a European Civil Code- Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004. See Chapter 23 pp.415-431

²³ See Article 15:102 of PECL

case where in some way a contract infringes a rule of positive law, and declares what the effects of such infringement may be. In determining the effects of an illegality upon a contract, regard is to be had first to what the mandatory rule in question lays down upon the matter. This provision arises from the need to respect the provisions of the applicable law, whether PECL is seen as essentially a soft law system available for use in cross-border transactions, or as a basis for a future European civil code. If the mandatory rule provides expressly for the effect of an infringement, then that effect follows. If, for example, the relevant rule expressly states that infringement invalidates a contract, then this consequence follows.²⁴

2.4 Brief conclusion

In conclusion, we have looked so far at requirements made on parties when entering into contracts. If the parties are not in line with the principles concerning mistake, deceit and duress and illegality and immorality, the agreement will be unlawful and it will be void or voidable.

These factors that make agreement be vitiated have been acknowledged in all domestic civil or common law systems. However, they are not understood uniformly in all the countries of the Community. Nowadays, these principles have been set out in PECL. Although the PECL do not bind the courts, the general principles of the law of contracts provided in PECL I-III will be integrated in what may eventually become a European Civil Code. Therefore it can be persuasive at least and agreements unlawful under PECL are also considered problematic when anti-competitive issues arise.

²⁴ MacQueen Hector, *“Illegality and Immorality in Contracts: Towards European Principles”* in *Towards a European Civil Code- Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004. See Chapter 23 pp.420

3 Unlawful agreements under Competition law

Article 81(1) EC²⁵ states that the following are 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 in the common market.

It can be seen the text that to infringe Article 81(1), three conditions must be satisfied. There must be:

- (1) a collusion²⁶ 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.

3.1 Undertaking

Article 81 refers to agreements between “undertakings” but the Treaty does not provide a definition of this term. The ECJ has developed this concept through the case-law.

In *Höfner*²⁷, the ECJ 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*”²⁸. 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*”²⁹. Paul Craig and Gráinne de Búrca³⁰ add that the term “undertaking” has been held to include: corporations, partnerships, individuals, trade associations, liberal professions, state-owned corporations, and co-operatives. State-owned corporations can qualify as undertakings for the purpose of Article 81 when operating in a commercial context; however, they will not so qualify if they exercise their public-law powers³¹ in such context.

²⁵ 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.

²⁶ A collusion between undertakings is construed as an agreement between undertakings, or

a decision of association of undertakings or a concerted practice

²⁷ C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979

²⁸ C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, para. 21

²⁹ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, page 405

³⁰ CRAIG, P. & DE BÚRCA, G., *EU Law text cases and materials*, 3rd edition, Oxford University press 2003, p.939.

³¹ *Ibid*, page 939.

In addition, the concept of “undertaking” within Article 81 does not include organizations that represent management and labour for concluding a collective agreement as in *Albany*³² or that are charged with the management of certain compulsory social security schemes based on the principle of solidarity as in *Poucet*³³.

In contrast, in *FFSA v Ministère de l'Agriculture et de la Pêche*³⁴, 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 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 81.³⁵

The concept of “undertaking” covered by the above case-law referred to as an entity acting alone. The question arose whether a parent company and its subsidiary should be considered as independent companies or as a single undertaking. In *ICI*³⁶, 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) may be considered inapplicable to the relationship between it and the parent company with which it forms one economic unit.³⁷

3.2 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 elements of “collusion” between independent undertakings.³⁸

3.2.1 Agreements

Article 81(1) EC makes no distinction as to whether the parties are at the same level in the economy (horizontal agreements) or at different levels (vertical agreements).³⁹

³² C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paras. 59-60.

³³ C-159 & 160/91 *Christian Poucet v Assurances Generals de France* [1993] ECR I-637, paras. 18-19.

³⁴ C-244/94, *FFSA v Ministère de l'Agriculture et de la Pêche*, [1995] ECR I-4013.

³⁵ *Ibid*, para. 22

³⁶ C-48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR-00619

³⁷ *Ibid*, para. 134

³⁸ Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition 2004, page 127.

³⁹ Case 56/65, *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, at p.249; Case 56 and 58/64, *Établissements Consten Sarl and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, at p.339.

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,⁴⁰ and whether binding or non-binding. A “gentleman’s agreement” will suffice.⁴¹ In *Sandoz*⁴², the ECJ held that “[i]n order to constitute an agreement within the meaning of Article 81 EC it is sufficient that a provision is the expression of the intention of the parties without it being necessary for it to constitute a valid and binding contract under national law”. Similarly, in the cases *Tepea*⁴³ and *Dunlop*⁴⁴ the Community Courts disregarded requirements as to “in writing”

A gentleman’s agreement constitutes an agreement within Article 81(1) EC where it amounts to a faithful expression of the joint intention of the parties to the agreement.⁴⁵ Unilateral action by one undertaking may constitute an agreement where it forms part of the contractual relations between that undertaking and other undertakings, in particular, where it reflects the acceptance, tacit or express, by the latter of a policy pursued by the former.⁴⁶

Competition may be distorted not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. For this purpose, it is irrelevant whether the parties to the agreement are or are not on a footing of equality as regards their position and function in the economy.⁴⁷

3.2.2 Decisions by associations of undertakings

Undertakings which operate on particular market often belong to an industry-wide or some other trade association. The term ‘association’ is not, however, limited to trade associations.⁴⁸ An ‘association’ includes other

⁴⁰Hans Henrik Lidgard, *Competition Classics, Material & Cases on European Competition Law and Practices 2005/2006*, Part 1, page 51.

⁴¹ Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8th edition 2003, page 406

⁴² Commission, Decision 8/409/EEC, *Sandoz Prodotti Farmaceutici SpA*, 13 July 1987, OJ 1987 L 222/28 cited in Hans Henrik Lidgard, *Competition Classics, Material & Cases on European Competition Law and Practices 2005/2006*, Part 1, page 51.

⁴³ Case 28/77, *Tepea BV v Commission*, [1978] ECR 1391, and CFI

⁴⁴ Case T-43/92, *Dunlop Slazenger International Ltd v Commission* (“*Dunlop*”), 7 July [1994] ECR II-441.

⁴⁵ Case 44/69, *Bucher & Co. v Commission* [1970] ECR 733, para 25.

⁴⁶ Case C-70/93, *Bayerische Motorenwerke AG v ALD Auto-Leasing D GmbH* [1995] ECR I-3439, para 16.

⁴⁷ Case 56 and 58/64, *Etablissements Consten Sarl and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, at p.339

⁴⁸ Jones, A. and Sufrin, B., *EC Competition Law Text, Cases, and Materials*, Oxford University press 2nd edition 2004, page 147.

bodies such as an agricultural cooperative⁴⁹, a body set up by statute and with public functions if it represents the trading interest of the members, even if there are some members appointed by the government or another public authority⁵⁰ or a professional body such as the Bar of the Netherlands⁵¹.

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 coordinate their actions. The conduct adopted by these members may be characterized as a decision or an agreement or a concerted practice which may have anti-competitive effects, without any need for actual agreement such as resolutions of the association, recommendations, the operation of certification schemes, or the association's constitution itself.⁵²

In short, 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, as in *NV IAZ International*⁵³, as well as regulations of a bar association as in *Price Waterhouse*⁵⁴.

3.2.3 Concerted practices

Even if there is no agreement, the undertakings will still be caught by Article 81 if there is a concerted practice. The “concerted practice” concept was defined in *ICI*⁵⁵ 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.*⁵⁶

It was held in *Suiker Unie*⁵⁷ that “the criteria of coordination and cooperation laid down by the case-law of the Court, which in no way requires the working out of an actual plan, must be understood in the light

⁴⁹ Case C 250/92, *Gøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvarereselskab AmbA*, [1994] ECR I-5641, [1996] 4 CMLR 191.

⁵⁰ Case 123/83, *BNIC v. Clair* [1985] ECR 391, [1985] 2 CMLR 430

⁵¹ 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-577.

⁵² Jones, A. and Sufrin, B., *EC Competition Law Text, Cases, and Materials*, Oxford University press 2nd edition 2004, page 148.

⁵³ Case 96/82, *NV IAZ International Belgium v Commission*, [1983] ECR -03369

⁵⁴ 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-577.

⁵⁵ Case 48/69, *Imperial Chemical Industries Ltd v EC Commission*, [1972] ECR – 00619

⁵⁶ *Ibid*, para. 64.

⁵⁷ 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.

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”.⁵⁸ 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 an idea was also reaffirmed in *Cimenteries*⁵⁹ 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 requests it or, at the very least, accepts it.⁶⁰

Therefore, the definition of concerted practice is intended to catch undertakings which have not formally 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 collusion whatever form it takes.⁶¹

3.3 Which may affect trade between Member States

The case of an agreement having effect on trade between Member States has been flexibly interpreted in the case-law. It may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.⁶² An agreement between undertakings within the same Member State may also have such effect on trade between Member States.

In *Cementhandelaren*,⁶³ 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 domestic production,⁶⁴ thus making the particular market subject to a higher barrier to entry of foreign competition. Here, there is no requirement that there must be an actual restraint on or

⁵⁸ Ibid, para. 174.

⁵⁹ Joined cases T-25 etc./95 *Cimenteries CBR SA et al. V Commission of the European Community* [2000] ECR II-491

⁶⁰ Ibid, para. 1849.

⁶¹ Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases, and Materials*, 2nd edition 2004, page 151.

⁶² Case 56/65, *Société La Technique Minière v. Maschinenbau Ulm GmbH*, [1966] ECR 235, P. 249.

⁶³ Case 8/72, *Vereeniging van Cementhandelaren v. Commission*, [1972] ECR 977,

⁶⁴ Ibid, para. 29

to trade between Member States. It will be sufficient if it is shown that there is a potential effect on trade.

3.4 Which have as their object or effect the prevention, restriction or distortion of competition

3.4.1 Object or effect

Article 81(1) EC applies to agreements or practices which have as their object or effect the prevention, restriction or distortion of competition. In order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire which of the contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common intent at the time when the agreement was concluded.⁶⁵ It is unnecessary to consider the actual effects of an agreement or decision once it appears that it has as its object the prevention, restriction or distortion of competition.⁶⁶ Where, however, an analysis of these clauses does not reveal the effect to be sufficiently deleterious, the consequences of the agreement should be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted.⁶⁷ Account must be taken not only of the immediate effects of an agreement but also of its potential effects and of the possibility that the agreement may be part of a long term plan.⁶⁸

3.4.2 Prevention, restriction or distortion of competition

In order to arrive at a true representation of the contractual position, the contract must be viewed in the economic and legal context in the light of which it was concluded by the parties.⁶⁹ An examination of the effects of an agreement must be based on an assessment of the agreement as a whole.⁷⁰ In particular, it may be doubted whether there is an interference with competition if the agreement seems really necessary for the penetration of a

⁶⁵ Case 29-30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* [1984] ECR 1679, para 26

⁶⁶ Case 56 and 58/64, *Etablissements Consten SARL v Commission of the EEC* [1966] ECR 299, at p.342.

⁶⁷ Case 56/65, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U)* [1966] ECR 235, at p.249.

⁶⁸ Case 142 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487, para 39.

⁶⁹ Case C-399/93, *H. G. Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA* [1995] ECR I-4515, para 10

⁷⁰ Case 142 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487, para 61

new area by an undertaking.⁷¹ The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in question.⁷² To that end, it is appropriate to take into account the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements.⁷³ In that regard, the existence of similar contracts may be taken into consideration to the extent to which the general body of contracts of this type is capable of restricting the freedom to trade.⁷⁴ Account must be taken of the cumulative effect of several similar agreements.⁷⁵

In determining whether competition is restricted, the correct product market must be identified.⁷⁶ However, a restriction imposed on one party to an agreement contrary to Article 81(1) EC not to manufacture certain goods is not rendered lawful merely because that undertaking was not in a position to manufacture the goods at the time the agreement was concluded, since it is entirely precluded by the restriction from taking up this activity.⁷⁷

The ‘De Minimis’ Principle

Competition must have been prevented, restricted or distorted to an appreciable extent.⁷⁸ For the purpose of determining whether an agreement may have an appreciable effect on the market, account must be taken of all relevant facts, such as alternative means of distribution of the products concerned or the fact that demand for the product is rigid inasmuch as it shows no substantial variations as a result of the entry into force or the termination of the agreement in question.⁷⁹

The product market must be correctly assessed.⁸⁰ In *Völk*⁸¹, The ECJ held that: An agreement falls outside the prohibition in Article 81(1) EC when it has only an insignificant effect on the market, taking into account the weak

⁷¹ Case 56/65, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, [1996] ECR 235, at p.250.

⁷² Case 56/65, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, [1996] ECR 235, at p.250

⁷³ Case 99/79, *SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV* [1980] ECR 2511, para 24.

⁷⁴ Case C-234/89, *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935, para19 ; case C-60/91, *Batista Morais*[1992] ECR I-2085, para 13.

⁷⁵ Case 243/89, *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I- 935, para 19.

⁷⁶ Case 19-20/74, *Kali und Salz AG and Kali-Chemie AG v Commission* [1975], ECR 499, para 7.

⁷⁷ Case 41/69, *ACF Chemiefarma NV v Commission* [1970] ECR 661, para 156.

⁷⁸ Case 56/65, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, [1996] ECR 235, at p.249.

⁷⁹ Case 126/80, *Maria Salonia v Giorgio Poidomani and Franca Baglieri, née Giglio* [1981] ECR 1563, para 17.

⁸⁰ See, for example, case 86/82, *Hasselblad (GB) Limited v Commission* [1984] ECR 883, para 21.

⁸¹ Case 5/69, *Völk v. Vervaeche*, [1969] ECR 295

position which the persons concerned have on the market of the product in question.

Based on the indications in the judgment in *Völk*, the Commission issued its first ‘de minimis’ notice⁸² 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 anti-trust rules entirely.⁸³ In 2001, the Commission revised the notice for the fifth time. The 2001 “De Minimis” Notice⁸⁴ eliminated the reference to turnover and the market share threshold has been split. Horizontal collaboration is regarded as *de minimis* up to a 10%⁸⁵ market share while vertical collaboration is up to 15%⁸⁶. The requirement for an agreement to be covered by this Notice is that it 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.⁸⁷

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/EC⁸⁸, 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,⁸⁹ and they are then entirely outside the application scope of Article 81.

3.5 Brief Conclusion

In short, competitive agreements that infringe prohibited provisions in Article 81(1) and not exempt under Article 81(3) are unlawful agreements. These anti-competitive agreements are unlawful because contrary to mandatory rules. This entails that if the mandatory rule provides expressly for an effect to follow from an infringement, then that effect follows. Thus, Article 81 of EC Treaty prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of

⁸² First version: JO 1970 C 84/1.

⁸³ Hans Henrik Lidgard, *Competition Classics, Material & Cases on European Competition*

Law and Practices 2005/2006, Part 1, page 74.

⁸⁴ 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)

⁸⁵ *Ibid*, Point 7(a)

⁸⁶ *Ibid*, Point 7(b)

⁸⁷ *Ibid*, see further in Point 11.

⁸⁸ 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.

⁸⁹ See the 2001 “De Minimis” Notice, Point 3.

competition within the common market but further declares such prohibited agreements to be 'automatically void'.

4 Anti- competitive agreements are void

4.1 The concept of voidness

Article 81(2) EC declares that any agreements or decisions prohibited pursuant to Article 81 are automatically void.⁹⁰ However, the concept of voidness (or nullity) is not defined in the Treaty nor in other competition legislation. The main reason for that is the concept of voidness also derives from civil law, in particular civil contract law.

According to civil law, a contract may be illegal because its tendency is to bring about a state of affairs which the law disapproves of on grounds of public policy. A contract is only illegal for this reason if its harmful tendency is clear, that is, if injury to public is its probable and not merely its possible consequence.⁹¹ The law may refuse to give full effect to a contract on the ground of illegality because the contract is contrary to public policy.⁹²

PECL avoids the national concepts of nullity (absolute or relative), voidness, voidability and unenforceability, and uses instead a concept of 'ineffectiveness'. Ineffectiveness extends to non-enforcement of the contract where enforcement (as distinct from the contract itself) would be contrary to principles regarded as fundamental in the laws of Member States of the EU.⁹³

The provision of Article 81 applies to restraints which have an effect on cross-border trade within the European Community. Contractual provisions which attempt to restrict the ways in which one of the parties may do business are *prima facie* void.⁹⁴ Contracts 'in restraint of trade' are those which unfairly restrict competition. Such agreement are thought to be contrary to public policy, and therefore liable to be treated as unenforceable.⁹⁵

Indeed, concept of voidness relates to contractual provision. Many infringements of Article 81(1) will arise by virtue of contracts (although

⁹⁰ Article 81(2)EC

⁹¹ Treitel, G.H., *The law of contract*, Stevens & Son 1966, 2nd edition, p.303

⁹² *Ibid.*, p.295

⁹³ MacQueen Hector, "*Illegality and Immorality in Contracts: Towards European Principles*" in *Towards a European Civil Code- Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004. See Chapter 23 pp.415-431

⁹⁴ Stone, R., *Principles of contract law*, Cavendish Publishing Limited, 1997, 3rd edition, p.239

⁹⁵ Stone, R., *Principles of contract law*, Cavendish Publishing Limited, 1997, 3rd edition, p.239.

some will arise by virtue of non-binding agreements or concerted practices). A contractual provision is normally enforceable in court. The effect of voidness is that it is unenforceable in the court. Therefore, if A enters into a contract with B, and B breaches a term of the contract, it is open to A to sue B in court for breach of contract; however, if the contractual term infringes prohibited provision like Article 81(1), B can raise the defence that it is not in breach of contract, because the contractual provision was void therefore cannot be enforced by A.⁹⁶

Generally, ‘illegality’ covers all contracts which are considered to be contrary to ‘public policy’⁹⁷. Therefore agreement which may affect trade between Member States, and has as the object or effect the prevention, restriction or distortion of competition within the common market is considered contrary to public policy and void. An agreement which is null and void by virtue of Article 81(2) has no effect as between the contracting parties and cannot be set up against third parties.⁹⁸

4.2 Severability

Article 15:103(1) PECL provides that: ‘*If only part of a contract is rendered ineffective under Articles 15:101 or 15:102, the remaining part continues in effect unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold it.*’⁹⁹. This Article restates a principle found in most European systems’ rules on illegality and immorality, the principle of severability. Consistently with the general intention of minimizing the impact of illegality and immorality upon transactions, the Article here provides that if a contract is tainted only in part the remainder of the contract continues to be valid and enforceable unless this would be unreasonable in all the circumstances.

Very often, where there is an infringement of one (or more) of the prohibitions, it will be the case that only a part of the contract breaches the prohibition, for example, if there is an exclusive dealing contract, it may be that only the clause granting exclusivity is in breach of the prohibition, while the other clauses are perfectly lawful.¹⁰⁰

In such cases, the question arises whether Article 81(2), which says that ‘Any agreements or decisions prohibited pursuant to this Article shall be automatically void’ means that the entire contract is void, or only that the particular clauses which infringe the prohibition are void. This question was

⁹⁶ Coleman, M and Crenfell, M, *The Competition Act 1998 Law and Practice*, Oxford University press, 1999, p 283

⁹⁷ Stone, R., *Principles of contract law*, Cavendish Publishing Limited, 1997, 3rd edition, p.251.

⁹⁸ Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export*[1971] ECR 949, para 29

⁹⁹ See Article 15:103 PECL(Article 3.16 Unidroit Principles is very similar)

¹⁰⁰ Coleman, M and Crenfell, M, *The Competition Act 1998 Law and Practice*, Oxford University press, 1999, p 284

answered clearly by ECJ in *Consten and Grundig v Commission*¹⁰¹; *STM v. Maschinenbau*¹⁰² and case *Société de Vente de Ciments et Bétons de l'Est v. Kerpen GmbH & Co KG* that despite its clear wording on nullity, Article 81(2) can apply to individual clauses in the agreement caught by Article 81(1).

In joined cases 56 and 58-64 *Consten and Grundig v Commission*, ECJ held that: “The provision in Article 85(2) (now Article 81(2)) that agreements prohibited pursuant to Article 85(now Article 81) shall be automatically void applies only to those parts of the agreement which are subject to the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the agreement itself.”¹⁰³.

Moreover, In *STM v. Maschinenbau*, the ECJ reconfirmed 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”.¹⁰⁴. 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).

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 automatic nullity decreed by article 85(2) of the Treaty applies only to those contractual provisions which are incompatible with Article 85(1). The consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not a matter for community law. Those consequences are to be determined by the national court according to its own law.”¹⁰⁵ The question whether any null 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.¹⁰⁶

¹⁰¹ Joined cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*.

¹⁰² Case 56/65, *Société La Technique Minière v. Maschinenbau Ulm GmbH*, [1966] ECR 235

¹⁰³ Joined cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, P.344

¹⁰⁴ Case 56/65, *Société La Technique Minière v. Maschinenbau Ulm GmbH*, [1966] ECR 235 P. 250

¹⁰⁵ Case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG*, [1983] ECR 4173, para 12

¹⁰⁶ Jones, A. and Sufrin, B., *EC Competition Law Text, Cases, and Materials*, Oxford University press 2nd edition 2004, page 179.

Based on legislation and cases analysed above, it could be concluded that the agreements which breach Article 81(1) can be void entirely or partially depend on contents of clauses that contrary to fundamental principles or mandatory rules.

4.3 Absoluteness

As mentioned above, the concept and consequence of nullity are not provided for in the EC Treaty. This has led to certain misunderstanding by courts and scholars. Conor Quigley claimed that ‘this nullity *is absolute* ...’¹⁰⁷. However, Jones and Sfrin wrote that ‘The English Court of Appeal has taken the view that the nullity imposed by Article 81(2) *is not absolute*.’¹⁰⁸ So the question arose whether nullity under Article 81(2) is absolute or not? And what is the difference between absolute and not absolute?

Absoluteness is also a concept of the civil law. So to determine whether nullity in Article 82(2) is absolute or not, we need to consider this concept under civil law.

According to civil law theory, there are two fundamental types of invalidity: ‘relative invalidity’ or avoidability on the one hand, and ‘absolute’ nullity on the other.¹⁰⁹ This distinction is based on the type of interest protected by the invalidating rule, reserving the penalty of absolute nullity to those cases where public policy, and not just the interests of private parties, is at stake.

The fundamental difference between these two categories is that *in cases of relative nullity, the protected party may waive its right to invalidate the contract*, whereas this option is excluded in cases of absolute nullity.

The first difference is that the possibility of avoidance (but not absolute nullity) is excluded ‘if the party who is entitled to avoid the contract expressly or impliedly confirms it after he knows or ought to have known of the ground for avoidance, or becomes capable of acting freely’¹¹⁰ Unreserved voluntary performance must be equated with implied confirmation, according to the fundamental rules on interpretation.

The second difference is that the possibility of avoidance is limited in time, whereas the period in which absolute nullity may be relied upon is in itself

¹⁰⁷ Quigley, Conor, *European Community Contract Law –Volume1-The Effect of EC legislation on contractual Rights, Obligations and Remedies*, Kluwer Law International 1997, p.70.

¹⁰⁸ Jones, A. and Sfrin, B., *EC Competition Law Text, Cases, and Materials*, Oxford University press 2nd edition 2004, page 179.

¹⁰⁹ Storme, Matthias E. ‘*The Validity and content of contracts*’ in Hartkamp, A.S. et al (editors), *Towards a European Civil Code*, Martinus Nijhoff Publishers, 1994, pp. 159-199

¹¹⁰ Article 6.205 PECL. Compare Article 3.12 Unidroit, which is very similar. Cited in Storme, Matthias E. ‘*The Validity and content of contracts*’ in Hartkamp, A.S. et al (editors), *Towards a European Civil Code*, Martinus Nijhoff Publishers, 1994, pp. 159-199

not limited (although actions for restitution, etc., will be subject to time limits). In the PICC and PECL proposals, this limitation is construed as a 'Verwirkungsfrist' rather than as a prescription, and a precise length of time is not provided:¹¹¹

Stating that a contract is absolute (some authors call it just a void contract) is in many ways the same as stating that the contract does not exist. This is because identifying a contract as absolutely void means it has no validity and therefore no enforceability in law. On the other hand, a party who has entered a contract that is relatively void (some authors call this a voidable contract) due to a vitiating factor can continue with the contract if that is to his or her benefit. That party can indeed avoid their responsibilities under the contract and in effect set the contract aside.¹¹² In a more general sense, it could be said that 'relative voidness' does not in itself render a contract invalid, 'relative voidness' being void in relation to the person of the promisor or the debtor, which is not, however 'absolute' in the sense that no-one could lawfully perform the obligation.¹¹³

Absolutely void agreement can be understood as those that breach public interest; the time to declare voidness is not limited and it is void in itself. It is clear that an anti-competitive agreements falling under Article 81(1) causes harm for the Community economy and therefore it should be automatically void according to Article 81(2) without time limitation. That principle of automatic nullity can be relied on by anyone. So the confirmation that nullity under Article 81(2) is absolute is fully reasonable.

Moreover, in Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export*, the ECJ held that: "Since the nullity referred to in Article 85(2) is **absolute**, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and can not be set up against third parties"¹¹⁴. And the ECJ also reconfirmed this rule in case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG*.¹¹⁵

There is no doubt that an agreement between undertakings which may affect trade between Member States, and which has as the object or effect the prevention, restriction or distortion of competition within the common market is illegal and void. And that voidness is absolute.

¹¹¹ A similar period is used in several provisions concerning the remedies for nonperformance compare also Article 39 CISG. Cited in Storme, Matthias E. 'The Validity and content of contracts' in Hartkamp, A.S. et al (editors), *Towards a European Civil Code*, Martinus Nijhoff Publishers, 1994, pp. 159-199

¹¹² Turner Chris, *Contract law Tort*, Hodder & Stoughton 2000, pp. 95-96

¹¹³ Storme, Matthias E. 'The Validity and content of contracts' in Hartkamp, A.S. et al (editors), *Towards a European Civil Code*, Martinus Nijhoff Publishers, 1994, p. 170

¹¹⁴ Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export*[1971] ECR 949, para 29

¹¹⁵ Case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG*. [1983] ECR 4173, para 11.

4.4 Retroactivity

Although all of the PECL, PICC and CISG do not mention ‘retroactivity’, it could be considered as a common principle of contract law that nullity and avoidance takes effect retroactively.¹¹⁶

This principle has also upheld by case law in case 48/72, *SA Brasserie de Haecht v Wilkin-Janssen*¹¹⁷. In this case, the Court held that: “*It follows from the general considerations above that Article 85(2) renders agreements and decisions prohibited pursuant to that article automatically void. Such nullity is therefore capable of having a bearing on a; the effects, either past or future, of the agreement or decision. Consequently, the nullity provided for in article 85(2) is of retroactive effect.*”¹¹⁸

Therefore, anti-competitive agreements that are void upon Article 81(2) are not enforced from the conclusion of the contract. In the other word, it is invalid from the outset..

4.5 Restitution

A person who find that he can not enforce an illegal contract may instead try to recover back money paid or property transferred by him under the contract.¹¹⁹

The general principle which applies in the area of recovery of money or property is expressed in the Latin maxim *in pari delicto potior est condition defendantis*. This maxim, which is generally referred to in the abbreviated form ‘*in pari delicto*’, roughly translates as ‘where there is equal fault the defendant is in the stronger position’. Thus, where money or other property has been transferred under an illegal contract, which is regarded as void, the court will not in general assist the plaintiff to recover.¹²⁰

General rule: No recovery

The general rule is that money paid or property transferred under an illegal contract cannot be recovered back.¹²¹

Exceptions to the general rule¹²²

¹¹⁶ Article 3.17(1) Unidroit Principles: ‘avoidance takes effect retroactively’ Cited in Storme, Matthias E. ‘*The Validity and content of contracts*’ in Hartkamp, A.S. et al (editors), *Towards a European Civil Code*, Martinus Nijhoff Publishers, 1994, pp. 159-199

¹¹⁷ Case 48/72, *SA Brasserie de Haecht v Wilkin-Janssen* [1973] ECR 77

¹¹⁸ Ibid. para 25, 26, 27.

¹¹⁹ Treitel, G.H., *The law of contract*, Stevens & Son 1966, 2nd edition, p.341

¹²⁰ Stone, R., *Principles of contract law*, Cavendish Publishing Limited, 1997, 3rd edition, p.245

¹²¹ Treitel, G.H., *The law of contract*, Stevens & Son 1966, 2nd edition, p.341 and 1995, 9th edition p.447.

The court have developed and recognized a number of exceptions to this rule, and there are therefore several situations where recovery of money or property will be allowed despite the illegality:

- ***Illegal purpose not yet carried out***: If the contract is still executory, the plaintiff should have the chance to have a change of mind or heart, resile from the contract, and recover property transferred.

This exception will not operate, however, where there has been substantial performance of the contract. Note also that the withdrawal must be genuine. If the purpose of the contract is simply frustrated by the refusal of the other party to play his or her part, this exception will not apply.

- ***Oppression***: In the case of oppression, if the plaintiff was in a weak bargaining position, so that there was virtually no choice regarding entering into the agreement, recovery may be possible

The rationale of this exception is that the parties while both *in delicto* are not in fact *in pari delicto*, that is are not equally at fault.

- ***Fraud***: If one party entered into the contract as a result of the other's fraudulent misrepresentation that it was lawful, recovery will be allowed. Again the parties are not regarded as being equally at fault.

- ***No reliance on the illegal transaction***: If the plaintiff can establish a right to possession of the property without relying on the illegal contract, then recovery will be allowed.

- ***Class-protecting statutes***: Some statutes expressly provide that a member of a protected class shall be entitled to recover back money paid or property transferred under an illegal contract. For example, the Rent Restriction Act, 1920, is designed to protect tenants. The underlying principle again seems to be that in this situation the parties are not equally at fault.

A much more radical departure from the conventional response to restitution in illegality and immorality is Article 15:104 of PECL. This Article provides that:

(1) *When a contract is rendered ineffective under Articles 15:101 or 15:102, either party may claim restitution of whatever that party has supplied under the contract, provided that, where appropriate, concurrent restitution is made of whatever has been received.*

(2) *When considering whether to grant restitution under paragraph (1), and what concurrent restitution, if any, would be*

¹²² Stone, R., *Principles of contract law*, Cavendish Publishing Limited, 1997, 3rd edition, p.248

(3) An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness.

(4) If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received.

From the text, it can be seen that if the national systems of Europe commenced their analysis of this problem from the traditional basis of Roman law, Article 15:104 provides for restitution in appropriate cases of performances rendered under the ineffective contract. Nevertheless the rule or principle rendering the contract ineffective is to be examined to see whether or not it requires denial of restitution.¹²³

Coming back to Article 81, if traditional civil law can be applied to an agreement void under Article 81(2), the parties may only recover if they can base their case on exceptions. However, if ‘modern’ civil law under PECL is applied, restitution may be denied because the parties to that agreement are considered to have known of the illegality in question.¹²⁴

Therefore, if a European civil code is to develop, these aspects of the unwinding of illegal transactions will require further work.

4.6 Damages

Restitution will not be necessary in every case, since benefits will not necessarily have been transferred between the parties when the invalidity takes effect; yet one of the parties may be unfairly out of pocket as a result of entry into the ineffective contract.¹²⁵ If a contract is found to be void for illegality, then this will, in general, mean that specific performance will be refused. If there is no contract, the court can not order it to be performed. They may, however, in some circumstances be prepared to award damage. This may be done by allowing the action to be framed in tort.¹²⁶ Article 15:105 PECL provides that:

(1) A party to a contract which is rendered ineffective under Articles 15:101 or 15:102 may recover from the other party damages putting the first party as nearly as possible into the same position as if the

¹²³ MacQueen, Hector, ‘*Illegality and Immorality in Contracts: Towards European Principles*’ in *Towards a European Civil Code*, Martinus Nijhoff Publishers, 1994, p.424

¹²⁴ Article 15:104 (3) further enables the judge or arbitrator to refuse restitution to a party who knew or ought to have known of the illegality in question.

¹²⁵ MacQueen Hector, “*Illegality and Immorality in Contracts: Towards European Principles*” in *Towards a European Civil Code- Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004.p.425

¹²⁶ Stone, R., *Principles of contract law*, Cavendish Publishing Limited, 1997, 3rd edition, p.244

contract had not been concluded, provided that the other party knew or ought to have known of the reason for the ineffectiveness.

(2)When considering whether to award damages under paragraph (1), regard must be had to the factors referred to in Article 15:102(3).

(3) An award of damages may be refused where the first party knew or ought to have known of the reason for the ineffectiveness.

Indeed, PECL considered damages as a consequence of rendered ineffective agreements. However, as with nullity, damages is also considered as another consequence of infringement of Article 81 and is currently a hot topic¹²⁷. Therefore, I want to research this issue in the next section.

4.7 Brief conclusion

‘Void’ appears in Articles 81(2) EC Treaty as a sanction on unlawful competitive agreements. However, the consequences of voidness are not obvious given under the heading ‘competition law’. General principles of law show that as anti-competitive agreement are illegal so the consequences of that nullity will be based on Civil law. The consequences of voidness under Article 81(2) also include issues such as severability, absoluteness, retroactivity, restitution and damages.

Experience across Europe suggests that illegality and immorality are areas in which satisfactory general rules are difficult to formulate in any detail, and even harder to apply. It is perhaps worthy of note that in at least some of the world’s mixed legal systems there has been a recent trend towards a more discretionary and flexible approach to the subject, based upon a recognition of the primacy of public policy concerns in all respects.¹²⁸ As far as possible, a proper balance between Competition law and Civil law needs to be achieved in Europe. A European Civil Code approach seems to have important advantages not only for the validity of civil contracts, but also to the effects of anti-competitive agreements. A proposal given here is that both EC treaty and European Civil Code should use the same concept for the same subject. This avoids certain misunderstandings in practice.

¹²⁷ There is a Conference on Private Enforcement in EC Competition Law in Brussels on 9 March 2006

¹²⁸ See H.L. MacQueen and A.Cockrell, ‘Illegal contracts’, in R.Zimmermann, D. Visser, and K. Reid (eds.), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*. Cited in MacQueen Hektor, “*Illegality and Immorality in Contracts: Towards European Principles*” in *Towards a European Civil Code- Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004.p.427

5 Fines and damages

Besides nullity, fines and damages are also consequences of the infringement of Article 81(1) EC Treaty.

5.1 Fines and penalties

5.1.1 Basic legislation

The EC Treaty does not contain specific rules on imposing fines. However, Article 86 of the EC Treaty gives the European Commission a specific duty to monitor public undertakings and undertakings.

Under Regulation 17/62¹²⁹ the Commission was authorized to address decisions to undertakings or associations of undertakings for the purpose of bringing to an end infringements of Article 81. Such decisions could impose periodic penalties, fines and specific conditions. Fines could be up to a maximum level of 10% of the turnover of the companies involved in the proceeding business year. Initially, the fines established were modest, but they gradually increased over the years both in terms of percentage of turnover and in amount.¹³⁰

Much of this system is retained in Regulation 1/2003¹³¹ and the Commission still has a wide discretion in deciding on the consequences of an infringement. This includes Article 23 and 24 on when a company intentionally or negligently infringes Article 81 or disobeys an order by the Commission. The system also allows for interim measures according to Article 8 and any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end. The fact that structural remedies can be imposed under Article 7 is a new and potentially powerful remedy. Point 12 of the preamble to the Regulation clarifies that changes to the pre-existing structure of an undertaking would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking and if there is no equally effective behavioural remedy.

If the Commission does not impose pecuniary remedies, under Article 9 it can accept commitments made by the company and by decision make such commitments binding on it without prejudice to the powers of the competition authorities and courts of the Member States.

¹²⁹ Council Regulation 17/62/EEC of 6 February 1962, First Regulation implementing Article 81 and 82 EC#, JO 1962 13/204 (amended by Regulations 59/62, 118/63/EEC and 2822/71/EEC)

¹³⁰ Hans Henrik Lidgard, *Competition Classics Material & cases on European Competition Law and Practices 2005/2006*, p.478

¹³¹ Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules laid down in Article 81 and 82 of the Treaty, OJ 2003 L11

Article 23 of Regulation 1/2003 explicitly states that fines shall be fixed in regard both to the gravity and to the duration of the infringement, but shall not be of a criminal law nature.¹³² A limitation period of three years applies for disregarding obligations to supply information whereas, according to Article 25, five years is the ordinary limitation period for infringement. Any procedural step taken by the Commission or national competition authorities may interrupt the limitation period.¹³³

In 1998 the Commission elaborated a guideline for the calculation of fines.¹³⁴ This guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty. Now, Regulation No 17 was replaced by Regulation 1/2003 however, Article 23(3) of Regulation 1/2003 still provides that, in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement. Therefore, the 1998 Guidelines can be applied to help determine the amount of the fine.

In 2002, the Commission issued a Notice on Immunity from Fines and reduction of fines in Cartel cases¹³⁵: According to this Notice, an undertaking may be granted immunity from any fine or a reduction of any fine if such undertaking meets the conditions under this Notice.

By issuing this Notice, the European Commission took another important step to uncover and suppress price-fixing pacts and other hard-core cartels. The Commission unanimously adopted a new leniency policy that creates greater incentives for companies to blow the whistle on the most serious violations of the antitrust rules.¹³⁶

5.1.2 Illustrated Cases

5.1.2.1 SAS case¹³⁷

The European Commission decided to fine Scandinavian airlines SAS and Maersk Air €39.375 million and €13.125 million respectively for operating a secret agreement that led to the monopolisation by SAS of the Copenhagen-Stockholm route to the detriment of over one million

¹³² See Article 23 (5) Regulation 1/2003

¹³³ Hans Henrik Ligard, *Competition Classics Material & cases on European Competition Law and Practices 2005/2006*, pp.478- 479

¹³⁴ Guidelines of on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ 1998 C 9/3

¹³⁵ OJC 45, 19/02/2002, p.3-5 <http://europa.eu.int/comm/competition/antitrust/leniency/>

¹³⁶ Press release IP/02/247, Date: 13/02/2002 : *Commission adopts new leniency policy for companies which give information on cartels*

¹³⁷ Press release, IP/01/1009 Date: 18/07/2001, *Commission fines SAS and Maersk Air for market-sharing agreement*

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/01/1009&format=HTML&aged=0&language=EN&guiLanguage=en> (9:15am, 2006-05-17)

passengers that use that major route every year, as well as to the sharing out of other routes to and from Denmark.

SAS (Scandinavian Airlines System) is a consortium partly owned by the Swedish, Danish and Norwegian states. Maersk Air A/S is a Danish company owned by the A.P. MØller group. Together, they are the two main airlines that operate flights to and from Denmark, the country most concerned by the investigation.

The two companies concluded a cooperation agreement in October 1998 which they notified to the European Commission for regulatory approval. The notification, however, focused on code-sharing provisions, under which SAS could market Maersk Air's flights as SAS flights, and the extension of SAS's frequent flyer programme to Maersk's clients.

The airlines carefully committed what amounts to a broad market-sharing agreement, the most visible part of which led to the withdrawal by Maersk Air from the Copenhagen-Stockholm and SAS's exit from the Copenhagen-Venice and Frankfurt-Billund routes. Billund is Denmark's second airport in the western province of Jutland.

Suspicious that the cooperation agreement was of a greater and more restrictive scope, the Commission carried out inspections at the companies' headquarters in June 2000, where it gathered evidence that SAS and Maersk Air had agreed to an overall non-compete clause, according to which Maersk Air would not launch any new international routes from Copenhagen without approval from SAS. Conversely, the parties agreed that SAS would not operate on Maersk Air's routes out of Jutland's Billund. The parties also agreed to respect the share-out of the domestic routes.

This secret agreement between SAS and Maersk Air is a very serious violation of European Union competition law and very damaging for Scandinavian passengers who were left with reduced choice or no choice at all, and potentially higher prices. Before the agreement, the Copenhagen-Stockholm route was operated by SAS, Maersk Air and Finnair. Maersk's withdrawal from the route caused the exit of Finnair, as the two airlines previously had a code-sharing agreement. Currently, SAS has close to 100 percent of the traffic between the Danish and the Swedish capitals.

The companies were also fully aware that the agreement was illegal as they deliberately tried to conceal it. A meeting of the project managers' group of 26 June 1998 "*ordered*", in a written record, "*to maintain strict confidentiality and not to keep documents in the office*", while another record of a meeting of the same managers' group two months later stated that "*The parts of the documents that infringe Article 85(1)...(will have) to be put in escrow in the offices of the lawyers from both sides*".

The Commission established that the infringement lasted between September 5, 1998, which is the date of one of the documents that recorded

the parties' agreement, and 15 February 2001, when the parties regained their freedom to compete following the receipt of the Commission's statement of objections.

To establish the amount of the fines, the Commission took into account, among other elements, the difference between the size of the two airlines, the fact that the agreement in effect extended the market power of SAS, the need to set the fines at a level which ensured that they have a sufficiently deterrent effect, and the degree to which the parties cooperated with the Commission after the on-site inspections.

5.1.2.2 Figure

Since taking office in October 1999 to September 2004, the Commission have been active in public enforcement. The recent adoption of the decision in the copper plumbing tubes cartel brings to €4.55 billion the total amount of fines imposed by the present Commission for antitrust violations.¹³⁸ Below is the list of the 10 largest cartel decisions:

List of the 10 largest cartel decisions, in terms of total fines¹³⁹

Year	Case	Total amount per case (€ million)
2001	Vitamins	855.23
2002	Plasterboard	478.32
2001	Carbonless Paper	313.69
1998	TACA	272.94
2001	Graphite Electrodes	218.8
2001	Citric Acid	135.22
2002	Methionine	127
2002	Lombard Club/Austrian banks	124.26
1994	Cartonboard*	119.38
2000	Lysine	109.990
*Fines reduced by Court judgments.		

¹³⁸ Speech by Mario MONTI, *European Commissioner for Competition matters Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation IBA* – 8th Annual Competition Conference Fiesole, 17 September 2004 Reference: SPEECH/04/403 Date: 17/09/2004 available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=HTML&aged=0&language=EN&guiLanguage=en> (9:15am, 2006-05-17)

¹³⁹ Press release, IP/02/1744 Date: 27/11/2002 available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/1744&format=HTML&aged=0&language=EN&guiLanguage=en> (9:15am, 2006-05-17)

In short, with regard to public enforcement, both the Commission and the competition authorities of the Member States (NCAs) apply Community competition law in individual cases. Under Regulation 1/2003, the Commission and NCAs constitute a network of competition authorities responsible for public enforcement of the applicable Community antitrust rules. As part of their enforcement activities, these authorities adopt, among other things, decisions finding that an undertaking has infringed antitrust law as well as decisions imposing fines. Public enforcement is indispensable for effective protection of the rights conferred and the obligations imposed by the Treaty.¹⁴⁰

5.2 Damages

Action for damages is one form of private enforcement. Damages actions are brought against the infringer of the law to seek a monetary award to compensate the victim for the harm he has suffered.¹⁴¹ Whereas nullity as a sanction for infringements of Article 81 EC has been explicitly foreseen by the EC Treaty itself (Article 81(2) EC), damages actions can not be seen directly from the Treaty.

5.2.1 Basic legislation and case-law ¹⁴²

The decentralisation of the enforcement of Community antitrust law set in place by Regulation 1/2003 (Regulation) envisages enforcement as coming not only from the competition authorities of the Member States, but also sees a complementary role by way of litigation between private parties before the national courts. Indeed, recital 7 of the Regulation explicitly foresees the possibility of private actions for damages for breach of Community competition law.¹⁴³ Moreover, Article 3 of the Regulation provides that national courts shall apply Community competition law to anticompetitive behaviour which may affect trade between Member States

¹⁴⁰ GREEN PAPER- *Damages actions for breach of the EC antitrust rules* (presented by the Commission)

http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf (9:15am, 2006-05-17)

¹⁴¹ COMMISSION STAFF WORKING PAPER, *Annex to the GREEN PAPER -Damages actions for breach of the EC antitrust rules*. p.9 Available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp_en.pdf (9:15am, 2006-05-17)

¹⁴² HENNEBERRY EDWARD P., *Green Paper on Private Enforcement Enforcement – The green paper on damages actions the passing-on defense and standing for indirect purchases, representative organizations and other groups*, Report at ERA Conference, Brussels, ERA Conference, Brussels, 9 March 2006 9 March 2006. See http://www.era.int/web/en/resources/5_2341_2394_file_en.3235.pdf (9:15am, 2006-05-17)

WOODS Donncadh, SINCLAIR Ailsa and ASHTON David, *Private enforcement of Community competition law: modernisation and the road ahead*. Available at

http://europa.eu.int/comm/competition/publications/cpn/cpn2004_2.pdf (9:15am, 2006-05-17)

¹⁴³ See recital 7 of Regulation 1/2003

where they apply national competition law to such behaviour. Article 6 of the Regulation states that national courts shall have the power to apply Articles 81 in their entirety. The elimination of the exemption monopoly and the related abolition of the notification system will stimulate private parties to have more frequent recourse to national courts in actions for damages.

The recent case law of the Community courts has also emphasised the importance of enforcement by private parties of Community competition law. In its ruling in *Courage v Crehan*¹⁴⁴, the European Court of Justice established that some form of remedy should be made available to victims where a breach of Community competition law has occurred.

*“The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages caused to him by a contract or by conduct liable to restrict or distort competition.”*¹⁴⁵

Under the holding in *Courage*, national courts, under the appropriate circumstances, must allow individuals to seek damages for violations of competition law committed by others. Indeed, the court in *Courage* was firm in its conceptual support of private enforcement, indicating that private claims are integral to effective competition.

*“[T]he existence of such a right strengthens the working of the Community competition rules and discourages agreements, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”*¹⁴⁶

Not only does a private right of action serve to compensate those consumers that have been harmed, but as stated above, the ability of individuals to seek damages can carry substantial deterrent value.

5.2.2 Conditions

5.2.2.1 Damage¹⁴⁷

Damages are traditionally considered to compensate a victim for the loss suffered because of an antitrust infringement. It seems, however, that pure compensation of the loss does not always constitute a sufficient incentive

¹⁴⁴ Case C-453/99, *Courage v Crehan*, [2001] ECR I-6297.

¹⁴⁵ *Id.* at para 26.

¹⁴⁶ *Id.* at para 27

¹⁴⁷ COMMISSION STAFF WORKING PAPER, *Annex to the GREEN PAPER -Damages actions for breach of the EC antitrust rules*. p.34 Available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp_en.pdf (9:15am, 2006-05-17)

bring a case before the court. As a result, thought should be given to other methods of approaching damages. In fact, the Member States have taken different approaches to calculate the basis of the damage in a way that makes it more attractive for claimants to file a damages claim. In doing so, the award may have as its purpose not only the compensation of the victim's individual loss but also the recovery of benefits gained by the defendant as a consequence of the tortious act. In addition, some Member States pursue beyond the mere deterrent *effect* of compensation, a distinct *aim* of punishing or deterring the wrongdoer by the grant of punitive or exemplary damages.

Apart from defining the basis of the damage, difficulties often arise with regard to the calculation of damages. The methods of quantification of Member States show various models for the calculation of damages with some tendency towards a more equity based approach. Independent from the quantification method chosen, the risk remains that the mere fact that damages have to be quantified may serve as a disincentive for potential claimants. That is why the Commission needed to give a basis for defining and calculating damages in their Green paper.

5.2.2.2 Fault¹⁴⁸

Member States take diverse approaches as to the interaction between competition law and the general rules of liability, in particular on the question of fault. A first group of Member States does not require any fault element whatsoever for a damages claim based on the infringement of competition law, or provide that the infringement constitutes, on its own, the fault. In these countries fault does not need to be proven¹⁴⁹. A second group of States appears to require fault in addition to illegality, but fault is presumed (rebuttably or irrebuttably) if illegality is shown. Therefore, these legal systems seem to facilitate private enforcement of competition law since fault does not present a hurdle to the claimant in these countries.¹⁵⁰

In EC competition law, there is no requirement of fault to show that there has been a violation of Article 81. In the case of Article 81 EC, this flows as much from the text of the provision itself (which condemns agreements having the "*object*" or "*effect*" of restricting competition) as from the case law of the Community courts. Under Article 23 of Regulation 1/2003, the Commission may impose fines on undertakings or associations of undertakings only where they acted intentionally or negligently. However, it must be recalled that the provisions and case law are only relevant for the imposition of fines by a public authority (and not for the finding of the infringement). The question remains to what extent these provisions and

¹⁴⁸ COMMISSION STAFF WORKING PAPER, *Annex to the GREEN PAPER -Damages actions for breach of the EC antitrust rules*. p.31 Available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp_en.pdf (9:15am, 2006-05-17)

¹⁴⁹ The Czech Republic, Ireland, Cyprus, Slovakia and the UK belong to this group.

¹⁵⁰ Belgium, Germany, Estonia, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria and Slovenia belong to this group.

of damages for violation of the EC antitrust rules. This question is also considered in the Green paper by Commission staff.

5.2.2.3 Causation¹⁵¹

The requirement of causation is a necessary element of any damage claim. In principle, recovery will be ordered where infringing behaviour has caused a damage. Causation links damages to infringing acts, thus ensuring that the defendant will only be liable for those damages which are the consequence of his illicit action.

With regard the legal notion of causation, the legal systems of the Member States adopt diverse approaches. Legal systems refer to such concepts as “foreseeability”, “direct cause” or “adequate cause”. In the absence of Community legislation, the detailed conditions for the claim remain covered by national law. However, the application of national law in this matter depends on the double principle of equivalence and effectiveness. These principles, particularly the latter, can influence notions of causation as existing in national civil law. It should be considered whether a clarification of the legal requirement of causation is necessary in order to further facilitate damages actions.

5.2.3 Advantages of private enforcement¹⁵²

It is anticipated that greater private enforcement of Community competition law would bring clear benefits for the functioning of the internal market and the competitiveness of the European economy:

- The threat of such litigation has a strong deterrent effect and would lead to a higher level of compliance with the competition rules.
- Increased private action would further develop a culture of competition amongst market participants, including consumers, and raise awareness of the competition rules, and
- Private litigants may take action against infringements which the Commission and the national competition authorities would not pursue, or do not have sufficient resources to deal with.

¹⁵¹ COMMISSION STAFF WORKING PAPER, Annex to the GREEN PAPER -Damages actions for breach of the EC antitrust rules. p.77 Available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp_en.pdf (9:15am, 2006-05-17)

¹⁵² Speech by Mario MONTI, *European Commissioner for Competition matters Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation IBA* – 8th Annual Competition Conference Fiesole, 17 September 2004 Reference: SPEECH/04/403 Date: 17/09/2004 available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=HTML&aged=0&language=EN&guiLanguage=en>

Private action would not only be beneficial in optimising the impact of EC competition policy; it also would have a number of significant advantages for private parties:

- The victims of illegal anticompetitive behaviour are compensated for loss suffered.
- National courts may apply civil sanctions of nullity in contractual relationships.
- National courts can order the unsuccessful party to pay the successful party's legal costs.
- It is possible to combine a claim before a national court with national competition law or use entirely separate heads of claim.
- National courts are obliged to hear cases brought before them, while an administration has discretion to pursue other priorities.
- National courts are usually better placed than the Commission to award interim relief.

5.3 Interaction between public and private enforcement

Private enforcement and public enforcement are the two pillars of enforcement of EC antitrust rules. Private enforcement differs from public enforcement, whereby the public authorities (the Commission at EU level and the NCAs at the Member State level) investigate suspected violations of competition law and can impose certain measures and sanctions such as fines on infringing undertakings. Fines are paid into the public budget and the activities of the public enforcer are paid for by the state. Private enforcement actions are paid for by the individual bringing the action, and that individual can recoup the money paid out as part of the award of compensation if the action is successful.¹⁵³

The recent Commission Notice on complaints emphasises the complementary nature of public and private enforcement of the competition rules¹⁵⁴. The Notice states that 'the Commission holds the view that the new enforcement system established by Regulation 1/2003 strengthens the possibilities for complainants to seek and obtain effective relief before the national courts.'¹⁵⁵ Moreover, the notice states that 'public enforcers cannot investigate all complaints'.¹⁵⁶

¹⁵³ COMMISSION STAFF WORKING PAPER, *Annex to the GREEN PAPER -Damages actions for breach of the EC antitrust rules*. p.6 Available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp_en.pdf (9:15am, 2006-05-17)

¹⁵⁴ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, pp 65-77, part II A and B (paras 7 to 18). Cf. in particular para 9: 'Regulation 1/2003 pursues as one principal objective that Member States' courts and competition authorities should participate effectively in the enforcement of Articles 81 and 82'.

¹⁵⁵ *Ibid*, para 18

¹⁵⁶ *Ibid*, para 8.

Indeed, private actions before national courts are to a large extent a complement to public enforcement of EC antitrust rules. Private litigation can in particular deal with cases which the public authorities will not deal with, in particular due to resource constraints and other prioritisation needs. Conversely, the role of the public authorities will continue to be of critical importance in detecting anti-competitive practices such as cartels, where the special investigation powers vested in the public authorities and leniency programs are indispensable for efficient enforcement of competition law. Also, competition authorities will continue to play a strong role in cases in which a full economic analysis is necessary.¹⁵⁷

5.4 Brief conclusion

The antitrust rules of the Treaty are enforced both by public and private enforcement. Both forms are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool for creating and sustaining a competitive economy.¹⁵⁸

Nowadays, the Commission has performed effectively in public enforcement as shown by the figures given above. But there have been very few successful actions in the private field.¹⁵⁹ Claiming for damages for breach of Community law to date is limited because there are many substantive as well as procedural obstacles such as calculation of damages, proving the infringement, causation, burden of proof, standing and so on. So there is no longer for the EU to have specific rules on facilitating private enforcement.

¹⁵⁷ *GREEN PAPER- Damages actions for breach of the EC antitrust rules* (presented by the Commission) available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp_en.pdf (9:15am, 2006-05-17)

¹⁵⁸ *GREEN PAPER- Damages actions for breach of the EC antitrust rules* (presented by the Commission) http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf (9:15am, 2006-05-17)

¹⁵⁹ Donncadh WOODS, Ailsa SINCLAIR and David ASHTON, *Private enforcement of Community competition law: modernisation and the road ahead*. Available at http://europa.eu.int/comm/competition/publications/cpn/cpn2004_2.pdf

6 The consequences of voidness under Vietnamese Law in comparison with EC law

6.1 Unlawful agreements

Vietnam is a country that is ruled by a civil law system. This means that only legislative enactments are considered to be legally binding, case law is not a binding precedent.

6.1.1 Unlawful agreements under Civil Code

The first Civil Code of Socialist Republic of Vietnam was passed on 28th October 1995. After 10 year enforcement, this Code revealed many defects that led to a need to amend and modify it. That is why a new Code has been approved on June 14, 2005, by the XIth National Assembly. The Civil Code is considered as the foundational document for private law. In this document, unlawful agreements are provided for in Chapter VI- civil transactions

Article 122 of Civil Code provides¹⁶⁰:

1. A civil transaction shall be effective when it meets all the following conditions:

a/ The persons participating in the transaction have the civil act capacity;

b/ The purpose and contents of the transaction do not violate prohibitory provisions of law and are not contrary to social ethics;

c/ The persons participating in the civil transaction act completely voluntarily;

2. The forms of civil transactions shall be the conditions for such transactions to be effective in cases where it is so provided for by law.

And according to Article 127: *Civil transactions which fail to satisfy one of the conditions specified in Article 122 of this Code shall be void.*¹⁶¹

From the text, unlawful agreements can be divided into the following types:

¹⁶⁰ Civil Code used in this thesis is non official translation

¹⁶¹ See Article 127 of Civil Code. In the translated version, the author use 'invalid' instead of 'void'. But in this context, use 'void' is fiter.

6.1.1.1 Incapacity¹⁶²

When an agreement is established or performed by a minor or by a person who has lost his/her civil act capacity or whose civil act capacity is restricted, the Court shall, at the request of the representative of that person, declare such transaction invalid, if it is provided for by law that such transaction must be established and performed by the representative of that person.

6.1.1.2 Illegality and immorality¹⁶³

Agreement whose purposes and contents violate prohibitory provisions of law or contravening social ethics shall be invalid.

Prohibitory provisions of law mean the provisions of law which do not permit subjects to perform certain acts.

Social ethics are common standards of conduct among people in social life, which are recognized and respected by the community.

6.1.1.3 Without voluntariness

Agreements which are invalid due to lack of voluntariness include:

Agreements invalid due to falsity¹⁶⁴

When the parties falsely establish a civil transaction in order to conceal another transaction, the false transaction shall be invalid. In cases where a false transaction is established with a view to shirking responsibility toward a third person, such transaction shall also be invalid.

Agreements invalid due to mistakes¹⁶⁵

When a party has established a transaction due to its misunderstanding of the contents of the transaction due to unintentional mistakes made by the other party, it shall have the right to request the other party to change the contents of such transaction; if the other party does not accept such request, the mistaken party shall have the right to request the Court to declare the transaction invalid.

Agreements invalid due to deception or intimidation¹⁶⁶

When a party participates in a civil transaction due to being deceived or intimidated, it shall have the right to request the Court to declare such civil transaction invalid.

¹⁶² See Article 130 of Civil Code

¹⁶³ Ibid. Article 128

¹⁶⁴ Ibid. Article 129

¹⁶⁵ Ibid. Article 131

¹⁶⁶ Ibid. Article 132

Deception in a civil transaction means an intentional act of a party or a third person, aiming to induce the other party to misunderstand the subject, the nature of the object or the content of the civil transaction and thus to agree to enter into such transaction.

Intimidation in a civil transaction means an intentional act of a party or a third person, compelling the other party to perform the civil transaction in order to avoid damage to the life, health, honor, reputation, dignity and/or property of his/her own or of his/her father, mother, wife, husband or children.

Agreements invalid due to establishment by persons incapable of being aware of and controlling their acts¹⁶⁷

A person who has civil act capacity but established a civil transaction at a time he/she was incapable of being aware of and controlling his/her acts shall have the right to request the Court to declare such civil transaction invalid.

6.1.1.4 Unprescribed form¹⁶⁸

In cases where it is provided for by law that the forms of civil transactions are conditions for civil transactions to be valid but the parties fail to comply therewith, the Court or another competent state agency shall, at the request of one or all of the parties, compel the parties to comply with the provisions on forms of transactions within a given period of time; past that time limit, and, if they still fail to comply with such provisions, the transactions shall be invalid.

6.1.2 Unlawful agreements under Competition Law

The Competition Law¹⁶⁹ was passed on December 3, 2004 by the XIth National Assembly of the Socialist Republic of Vietnam at its 6th session. Although its objectives has not been specified therein, it sought to ensure an equal and legal competitive environment and to protect the national interest and the interests of enterprises and consumers, contributing to the promotion of socio-economic development¹⁷⁰ as well as the regional and global economic integration of Vietnam.

Provisions governing anti-competitive agreements are laid down in Chapter II of the Vietnamese Competition Law. Section 1 of the same Chapter covers all agreements in restraint of competition. In particular, anti-competitive agreements are defined under the Vietnamese Competition Law, to cover:

¹⁶⁷ Ibid, Article 133

¹⁶⁸ Ibid. Article 134

¹⁶⁹ The Vietnamese competition law used in this thesis is non official translation.

¹⁷⁰ These goals have ever been set forth in Article 1 of the 10th draft of the VN Competition Law

*1. Agreements on directly or indirectly fixing goods or service prices;*¹⁷¹

*2. Agreements on distributing outlets, sources of supply of goods, provision of services;*¹⁷²

*3. Agreements on restricting or controlling produced, purchased or sold quantities or volumes of goods or services;*¹⁷³

*4. Agreements on restricting technical and technological development, restricting investments;*¹⁷⁴

*5. Agreement on imposing on other enterprises conditions on signing of goods or services purchase or sale contracts or forcing other enterprises to accept obligations which have no direct connection with the subject of such contracts;*¹⁷⁵

*6. Agreements on preventing, restraining, disallowing other enterprises to enter the market or develop business;*¹⁷⁶

*7. Agreements on abolishing from the market enterprises other than the parties of the agreements;*¹⁷⁷

*8. Conniving to enable one or all of the parties of the agreement to win bids for supply of goods or provision of services.*¹⁷⁸

Moreover, those anti-competitive agreement are prohibited by Article 9. According to this Article:

1. Competition restriction agreements prescribed in Clauses 6, 7 and 8 of Article 8 of this Law are prohibited.

*2. Competition restriction agreements prescribed in Clauses 1, 2, 3, 4 and 5, Article 8 of this Law the parties of which have combined market share of 30% or more on the relevant market are prohibited.*¹⁷⁹

¹⁷¹ Para. 1, Article 8 of Vietnamese competition law.

¹⁷² Ibid. para. 2

¹⁷³ Ibid. para. 3

¹⁷⁴ Ibid. para. 4

¹⁷⁵ Ibid. para. 5

¹⁷⁶ Ibid. para. 6

¹⁷⁷ Ibid. para. 7

¹⁷⁸ Ibid. para. 8

¹⁷⁹ The concept of “relevant market” is defined in Article 3(1) of the Vietnamese 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 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.

Thus, anti-competitive agreements are unlawful agreements under competition law. They are also considered illegal under Civil law.

6.2 Anti-competitive agreements are void

According to Vietnamese competition law, anti-competitive agreement can be subject to sanctions under Article 117. They include:

1. For each act of violation of competition legislation, violating organizations or individuals shall be subject to one of the following principal sanctioning forms:

a/ Warning;

b/ Fine.

2. Depending on the nature and seriousness of their violations, the organizations or individuals violating competition legislation may be subject to one of the following additional sanctioning forms:

a/ Revocation of the business registration certificates, deprivation of licenses and practicing certificates;

b/ Confiscation of exhibits and means used for commission of violations of competition legislation.

3. In addition to the sanctioning forms prescribed in Clause 1 and Clause 2 of this Article, organizations or individuals violating competition legislation may be subject to the application of one or more than one of the following consequence-remedying measures:

a/ To restructure the enterprises having abused their dominant position on the market;

b/ To divide or split the merged or consolidated enterprises; to force the resale of the acquired enterprise parts;

c/ To make public corrections;

d/ To remove illegal provisions from the business contracts or transactions;

e/ Other necessary measures to overcome the competition restriction impacts of the violation acts.

If organizations or individuals violating competition legislation cause damage to the interests of the State, legitimate rights and interests of other organizations or individuals, they must pay compensation therefor according to law provisions.

From the text of Article 117, it can be seen that competition law does not provide ‘voidness’ as a consequence of breach of competition law. However, an unlawful competitive agreement is also unlawful under Civil law. Therefore, it shall be void on the ground of *violating prohibitory provisions of law* under Article 122, 127 and 410 of Civil Code. And according to Civil Code, the consequences of voidness are also determined:

6.2.1 Severability

According to Article 135 of Civil Code: *A civil transaction shall be partially invalid when one part of the transaction is invalid, provided that such part does not affect the validity of the remaining parts of the transaction.*

Therefore, anti-competitive agreement may be entirely void if the whole agreement is contrary to a prohibited provision or one part of such agreement is void and such part affects the validity of the rest. However, anti-competitive agreements may be partially void if only one part is invalid and such part does not affect the validity of the remaining part of the agreement.

6.2.2 Absoluteness

Paragraph 2 of Article 136 of Civil Code states that: For civil transaction which are invalid due to violation of prohibitory provisions of law or contravention of social ethics civil transactions, the statute of limitations for requesting the Court to declare such civil transactions invalid shall not be restricted.

Indeed, such an agreement is declared void based on illegality under Vietnamese Civil law that any body can rely on and the time for requesting the appropriate declaration is not limited. This voidness is absolute.

6.2.3 Retroactivity

Paragraph 1 of Article 137 provides: *Invalid civil transactions shall not give rise to, change or terminate any civil rights and obligations of the parties from the time of establishment thereof.*

Therefore, the nullity of anti-competitive agreement is retroactive.

6.2.4 Restitution

Paragraph 2 of Article 137 provides: *When a civil transaction is invalid, the parties shall be restored to the original status and shall return to each other what they have received; if the return cannot be made in kind, it shall be made in money, except for cases where the transacted property, gained yields and/or profits are confiscated under the provisions of law.*

Generally, money paid and property transferred must be recovered in any case. There is one exception: when the concerned property is confiscated. Normally, the property subject anti-competition agreement can not be confiscated. Therefore, there has to be restitution.

In my opinion, this provision is not suitable for competition law because agreements involve an economic relationship. Business opportunity and benefit are always regarded as the principal matter. Moreover, when parties enter into anti-competitive agreements contrary to rules, both sides are normally at fault. Therefore, when one party can not perform and want to recover money or property based on a void agreement, this should not be allowed. For this issue, we should learn from civil European law the general rule of no recovery except in specific exceptional cases.

6.2.5 Damages

Damages is also a consequence of invalidated anti-competitive agreements under civil and competition law:

According to Article 117 of competition law: *If organizations or individuals violating competition legislation cause damage to the interests of the State, legitimate rights and interests of other organizations or individuals, they must pay compensation therefor according to law provisions.*

It can be seen that, according to competition law, only a third party who suffers damages can be awarded compensation. What about the party to the agreement? The competition law does not mention this. We look at the Civil Code.

Article 137(2) of Civil Code provides: *When a civil transaction is invalid The party at fault, which caused damage, must compensate therefor.*

As said above, in a void agreement based on illegality, usually both parties are fault. So that claiming for damages is difficult to accept.

By study of European law, especially the Crehan case, I know that private enforcement, like damages, is a necessary instrument to protect the fair competition environment and benefit parties as well as customers. The competent Vietnamese agency should consider this issue and give a like remedy for competition law.

Moreover, because an anti-competition agreement is void the compensation here is based on non-contractual liability. And according to civil law, a liability to compensate shall arise if the four following conditions are met:

- Damages have happened;
- The behaviour that causes damages is illegal;
- There is a causal relation between illegal behaviour and damages happened;
- The person who causes damage is at fault.

6.3 Brief conclusion

Vietnamese competition law does not provide that anti-competitive agreements shall be void. However, competitive agreements are civil transactions under Civil Code. We can confirm that prohibited anti-competitive agreements can be automatically void under Civil Code because they are illegal civil transactions. Void competitive agreements also suffer consequences under this Code such as severability, absoluteness, retroactivity, restitution and damages.

The Civil law of Vietnam is a legal tool to enhance civil transactions and to create a favorable environment for the socio-economic development of the country¹⁸⁰. General provisions on civil transaction in the Civil code are a foundation for competition law. However, the competent agency of Vietnam should cover all issues within competition law, as is done in the EU. Further, as competitive relationships have special characteristics, Vietnam need to have specific provisions regarding the consequences of voidness. Suitable provisions would then be the legal basis which the courts would apply.

¹⁸⁰ Preamble of Civil Code

7 Conclusion

7.1 General conclusion

Nowadays, with a tendency towards regional and international economic integration, the maintaining of free competition appears to be becoming harder and more complicated. Competition law remains a indispensable tool in each country.

In the EU, the competition law has been established and developed for many decades. Articles 81 and 82 of the EC Treaty are considered as two fundamental provisions governing competition issues. In that, Article 81 together with other relevant EC legislation has become an effective legal system for controlling and prohibiting anti-competitive agreements as incompatible with the common market. In particular, paragraph 2 of this Article provides that those prohibited anti-competitive agreements shall be automatically void. This sanction is explained by civil law as including consequences such as severability, absoluteness, retroactivity, restitution and damages. These consequences, together with the other consequences of competition law, have a great impact on EC competition policy and have a number of significant advantages not only for private parties but also for the Community as a whole.

In line with the global common tendency, Vietnam has participated into ASEAN¹⁸¹, AFTA¹⁸², ASEM¹⁸³, APEC¹⁸⁴ and the conclusion of the Vietnam – US BTA¹⁸⁵. As the result of the integration process, Vietnam has to open its market for goods and services to foreign companies. Companies from economic powers like the US, EU, Japan... are competing with Vietnamese enterprises on the Vietnamese market. To stipulate and ensure fair competition environment, the competition law of Vietnam has been promulgated and enter in force on 1 July 2005. This law also defines anti-competitive agreements as well as giving the consequences of breach, including both public and private measures. This rule together with the Civil Code of Vietnam and other relevant legislation creates a legal corridor to contribute to restrict unfair competitive behaviour; stimulate economic development and bring relief for competitors, customers and for society as a whole

¹⁸¹ Association of Southeast Asian Nations

¹⁸² Asean Free Trade Area

¹⁸³ The Asia Europe Meeting

¹⁸⁴ Asia- Pacific Economic Cooperation

¹⁸⁵ The Vietnam- US Bilateral Trade Agreement.

7.2 Proposals

7.2.1 European law

7.2.1.1 Making a European Civil Code

As mentioned above, Article 81(2) of EC provides a sanction of voidness but the Treaty does not define the concept or specify its consequences. We can apply civil law to solve this issue, however, civil law in EU is not uniform. There is no Civil Code of the EU and although there are some laws related to contract such as PECL, PICC, CISG, the PECL only covers the general part of the law of contracts, and does not contain rules which go into details; PICC cover almost the same subjects as the PECL Parts I-III and most of the rules are also similar to those of CISG.¹⁸⁶ The European Union of today is an economic community. Differences between the contract laws cause great difficulties. Moreover, the existing variety of contract laws in Europe may be regarded as a non-tariff barrier to trade. It is the aim of the Union to do away with restrictions of trade within the Communities, and therefore differences of law which restrict this trade should be abolished. The effect of national frontiers is disappearing and will do so more and more. So the EU needs one Code.

In fact, although several of EC Communications showed how urgent the need is for such a Code many lawyers claim that the EC treaty does not provide a legal base for a binding Code, and the majority of law professors, judges and practicing lawyers, and also many non-lawyers oppose the idea of unification by codification. Many do not like the trouble it takes to familiarize oneself with a new body of law. Some consider the national law to be part of the nation's cultural heritage. It reflects the spirit of the people. The truth about contract law, they argue, is not the same for a Swede and a Greek, for an Englishman and for a German.¹⁸⁷

However, the law is not folklore. It is based on ethics, economics and technique. The common economic, cultural and political background of the Europeans has made it possible to draft common principles which are both favourable for the economy and technically expedient. Moreover, we should consider the great advantages that will be brought by a Civil Code. Such a Code is necessary in order to better serve the official goals of the European Union, in order to provide the necessary general background for future private law enactments of the European Union and for the future case law of

¹⁸⁶ Professor Dr.Dr.h.c.mult. Ole Lando, *Contract law in the EU The Commission Action Plan and the Principles of European Contract Law*, p.8
http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature/Lando/Response%2016%20May%2003.doc (25/4/2006)

¹⁸⁷ Professor Dr.Dr.h.c.mult. Ole Lando, *Contract law in the EU The Commission Action Plan and the Principles of European Contract Law*
http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature/Lando/Response%2016%20May%2003.doc (25/4/2006)

the European courts; and in order to prepare European law students already at university for their tasks in European businesses and law firms. And for Europe's scholars and practising lawyers it would serve as a very welcome stimulus to broaden their view, to give up the purely national flavour of their field of study: in brief to open their eyes to the outside world which so many of them lost sight of since the great codifications of the 19th century¹⁸⁸ Because of the great general advantages of Community, each State should relinquish its own small interest.

For all the reasons given above, especially for the application of Article 81(2) EC Treaty on voidness, one European Civil Code is an actual need.

7.2.1.2 Using a uniform concept

There are many concepts concerning effects of contract such as invalidity, voidness, nullity, voidability, unenforceability and so on. Although 'void' is used in Article 81(2) EC Treaty, the PECL does not use this concept. It uses instead a concept of 'ineffectiveness'. Similarly, we do not find this concept in any other documents: CISG and PICC use the concept of 'avoid'¹⁸⁹. Are those concepts intended to be different or similar?

To create unified understanding and applicability in Europe, if the European Civil Code is promulgated, it should use the same concepts (with the same meaning) already used in other documents like the EC Treaty but in a consistent manner.

7.2.1.3 Rules on private enforcement

Compensation liability is a consequence of voidness as well as a consequence of breach of Article 81(1) of the EC Treaty. Actions for damages and actions for nullity are forms of private enforcement. As stated above, private enforcement of the Community competition rules would act as an additional deterrent to anticompetitive behaviour, as well as compensating the victim for losses suffered. However, private enforcement has some obstacles both in substance and procedure. So the EU needs special rules to facilitate actions for damages and actions for nullity either in the form of 'soft law' or in the form of regulations or directives.

Soft law can be introduced more quickly and is more flexible and adaptable, but it is not binding (except on the Commission). Guidelines would be particularly welcome regarding the method used to calculate the level of

188 Arthur Hartkamp*, Perspectives for the Development of a European Civil Law
http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature/hartkamp/perspectives_trento.htm

¹⁸⁹ See section III of Chapter V of CISG, Chapter 3 of PICC

damages, as well as regarding proving infringement, causation, burden of proof and standing.

Hard law would also be requires to harmonize national laws in respect of private enforcement in antitrust proceedings. Regulations are binding and directly applicable, but perhaps too rigid to fit into the existing 25 civil and procedural legal systems without causing major problems. Directives are a better choice. They allow the objectives of European legislation to be moulded to fit the contours of national law, and in this way national experts can better match those objectives with Member States' different national legal environments.¹⁹⁰

In fact, on 19 December 2005, the Commission published for public consultation a Green Paper and a Commission staff working paper on damages actions for breach of EC antitrust rules. The purpose of the Green Paper, which sets out a number of possible options for facilitating private damages actions, is to stimulate debate and facilitate feedback from stakeholders. Facilitating such claims would not only strengthen the enforcement of competition law, but will also make it easier for consumers and firms who have suffered damage due to an infringement of competition law rules to recover their losses from the infringer¹⁹¹

In short, the Commission should begin working at all levels: exhausting current possibilities, exploring soft law and proposing directives to encourage private action. To ensure harmonization, the Commission should base the contents on international or European documents of concern such as CISG, PICC, PECL.¹⁹²

7.2.2 Vietnamese law

The Competition law of Vietnam was born later. It inherited experience from the countries that have had effective competition law already. Notwithstanding, this law still contains some defects that need to be remedied.

7.2.2.1 Competition law should provide void

As analysed in section 6, Vietnamese competition law does not provide that anti-competitive agreements shall be void. However, under Vietnamese

¹⁹⁰ Speech by Luis Ortiz Blanco, Garrigues Abogados y Asesores Tributarios and Universidad Complutense De Madrid, 9 March 2006. Available at http://www.era.int/web/en/resources/5_2341_2418_file_en.3265.pdf (9:15am, 2006-05-17)

¹⁹¹ Commission, *Green Paper* available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/index_en.html

¹⁹² In particular, Section IV B of CISG provides quite clear about damages where contract is avoided.

Civil Code, prohibited anti-competitive agreements are automatically void because they breach mandatory rules.

The Competition law of Vietnam is the first law comprehensively governing competition in the market. So, when applying the competition law to settle competition disputes, the courts or parties should only concentrate on the competition law. If that law does not provide for voidness, this consequence of infringement of prohibited competition provision might easily be forgotten or ignored .

Therefore, to strengthen the effective enforcement of competition law, and to create unanimous understanding and application, voidness should be provided in Vietnamese competition law just as it is in the EU.

7.2.2.2 Consequences of voidness

Competitive agreement are business relationship so they are not exactly the same as other civil transactions. They may have some typical characteristics eg the parties are normally business entities, one party may have a dominant position in the market. Therefore, some consequences of void competitive agreements should be provided for separately, especially restitution and damages:

Restitution

The Civil Code of Vietnam provides that when a civil transaction is invalid, the parties shall be restored to the original status and shall return to each other what they have received, except for cases where the transacted property, gained yields and/or profits are confiscated under the provisions of law.¹⁹³

That provision is not suited for void competitive agreements. This rule seems to lead to protect the party who has infringed but wants to recover money back. Moreover, this rule is also too rigid in some cases especially when agreements are concluded by mistake, deceit or duress. So the lawmakers of Vietnam should consider and give more reasonable provisions. The best solution here is that the general rule should be no recovery except in specified situations.

Damages

As analysed in section 6 of this thesis ¹⁹⁴, according to civil law of Vietnam, a party who concludes an agreement can not be compensated for the damages that they suffer if that agreement is void due to illegality.

Currently, competition between enterprises in Vietnam is more and more diversified and complex and there are many dominant companies.

¹⁹³ See Article 137 of Civil Code of Vietnam

¹⁹⁴ See 6.2.5

Therefore, to protect weak parties in their relationships with such dominant party, allowing a claimant to be awarded damages is really necessary.

In Europe, it has been shown that private enforcement has brought many advantages not only for private parties who are the victims of illegal anti-competitive behaviour but also for functioning of the internal market and the competitiveness of the European economy. Such a remedy should also be considered in Vietnam.

In short, relaying on the learning experiences of Europe in making a comprehensive competition law and assessing all the consequences of voidness will be indispensable for the effective enforcement of a new “young” competition law such as Vietnam’s.

Supplement

THE PRINCIPLES OF EUROPEAN CONTRACT LAW - additional chapters of Part III - 2002.

CHAPTER 15. Illegality

ARTICLE 15:101: CONTRACTS CONTRARY TO FUNDAMENTAL PRINCIPLES

A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.

ARTICLE 15:102: CONTRACTS INFRINGING MANDATORY RULES

(1) Where a contract infringes a mandatory rule of law applicable under Article 1:103 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the contract may be declared to have full effect, to have some effect, to have no effect, or to be subject to modification.

(3) A decision reached under paragraph (2) must be an appropriate and proportional response to the infringement, having regard to all relevant circumstances, including:

- (a) the purpose of the rule which has been infringed;
- (b) the category of persons for whose protection the rule exists;
- (c) any sanction that may be imposed under the rule infringed;
- (d) the seriousness of the infringement;
- (e) whether the infringement was intentional; and
- (f) the closeness of the relationship between the infringement and the contract.

ARTICLE 15:103: PARTIAL INEFFECTIVENESS

(1) If only part of a contract is rendered ineffective under Articles 15:101 or 15:102, the remaining part continues in effect unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold it.

(2) Articles 15:104 and 15:105 apply, with appropriate adaptations, to a case of partial ineffectiveness.

ARTICLE 15:104: RESTITUTION

- (1) When a contract is rendered ineffective under Articles 15:101 or 15:102, either party may claim restitution of whatever that party has supplied under the contract, provided that, where appropriate, concurrent restitution is made of whatever has been received.
- (2) When considering whether to grant restitution under paragraph (1), and what concurrent restitution, if any, would be appropriate, regard must be had to the factors referred to in Article 15:102(3).
- (3) An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness.
- (4) If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received.

ARTICLE 15:105: DAMAGES

- (1) A party to a contract which is rendered ineffective under Articles 15:101 or 15:102 may recover from the other party damages putting the first party as nearly as possible into the same position as if the contract had not been concluded, provided that the other party knew or ought to have known of the reason for the ineffectiveness.
- (2) When considering whether to award damages under paragraph (1), regard must be had to the factors referred to in Article 15:102(3).
- (3) An award of damages may be refused where the first party knew or ought to have known of the reason for the ineffectiveness.

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