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What is the point of European Competition Law?

- An Evaluation of the Achievement of the Single
Market Goal through the use of Article 81 of the
EC Treaty

Master thesis

30 points

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Contents

SUMMARY	1
ABBREVIATIONS	4
1 INTRODUCTION	5
2 THE DEVELOPMENT OF COMPETITION LAW	7
2.1 The birth of competition law	7
2.1.1 The emergence of trusts and cartels in the United States	8
2.1.2 The Sherman Act	8
2.1.3 The Harvard School	9
2.1.4 The Chicago School and the traditional consumer welfare aim	10
2.1.5 The ‘post – Chicago’ developments	12
2.2 The historical development in Europe	13
2.2.1 Competition law in Germany	13
2.2.2 The Freiburg or Ordoliberal School	14
2.2.3 The existence of competition law in the early European Community	16
2.2.3.1 The European Coal and Steel Community	16
2.2.3.2 The European Economic Community	17
2.2.3.3 The original aim of European competition law	18
3 THE DEVELOPMENT OF THE SINGLE MARKET	19
3.1 General remarks	19
3.2 From the early years to the Single European Act	19
3.3 The Commission’s White Paper on Integration	21
3.4 Market integration post 1992	22
4 THE PROVISIONS OF ARTICLE 81 OF THE EC TREATY	25
4.1 Background	25
4.2 The provisions of Article 81	26
4.3 General remarks	27
4.4 The conditions of Article 81	27
4.4.1 Undertakings or association of undertakings	28
4.4.2 An agreement, decision or concerted practice	28
4.4.3 The effect on trade between Member States	28
4.4.4 Agreements with the prevention, restriction or distortion of competition within the Common Market as object or effect	30
4.5 The exemption under Article 81(3)	31
4.6 Art 81(2) – The consequence of an infringement	32
4.7 Conclusion	33

5	THE ROLE OF THE COURTS AND THE COMMISSION	34
5.1	The role of the Commission	34
5.2	The role of the Courts	37
5.3	The relationship between the Courts and the Commission	37
6	THE INTERPRETATION BY THE COURTS AND THE COMMISSION	40
6.1	General remarks	40
6.2	The conditions of Article 81(1)	41
6.2.1	Undertakings or associations of undertakings	41
6.2.2	An agreement, decision or concerted practice.	41
6.2.3	Agreements with the prevention, restriction or distortion of competition as object or effect	43
6.2.3.1	The relationship to Article 81(3)	44
6.2.3.2	The object or effect	45
6.2.3.2.1	Vertical Agreements	45
6.2.3.2.1.1	General remarks	45
6.2.3.2.1.2	Different types of vertical agreements	46
6.2.3.2.1.3	The main pros and cons of vertical agreements	46
6.2.3.2.1.4	The approach taken by the Courts and the Commission	48
6.2.3.2.1.5	The object of distorting competition	50
6.2.3.2.1.6	The effect of distorting competition	53
6.2.3.2.1.7	Conclusion	55
6.2.3.2.2	Horizontal agreements	56
6.2.3.2.2.1	The pros and cons of horizontal agreements	56
6.2.3.2.2.2	The approach taken by the Courts and the Commission	58
6.2.3.2.2.3	Conclusion	59
6.2.4	An effect on competition	60
6.2.5	An effect on trade between Member States	61
6.2.5.1	The concept of ‘trade between Member States’	62
6.2.5.2	The notion of ‘may affect’	62
6.2.5.3	The concept of ‘appreciability’	64
6.2.6	Conclusion	65
6.3	The exemption under Article 81(3)	65
6.3.1	The types of benefits falling under Article 81(3)	66
6.3.2	A fair share to consumers	67
6.3.3	An indispensable restriction	68
6.3.4	No elimination of competition	68
6.3.5	Block exemption regulations	69
6.3.5.1	Vertical agreements	69
6.3.5.2	Horizontal agreements	70
6.4	Article 81(2)	72

7	ANALYSIS	73
7.1	General remarks	73
7.2	The provisions and the subsequent application	74
7.3	The achievement of the single market aim	75
7.3.1	A vehicle for integration	75
7.3.2	The promotion of trade	76
7.4	The future of competition law in Europe	78
8	CONCLUSION	80
	LIST OF IMPORTANT CONCEPTS	81
	BIBLIOGRAPHY	83
	TABLE OF CASES	90

Summary

This thesis sets out to examine the relationship between integration of the Common Market of the EU and European competition legislation. More specifically, it aims to answer three questions. Firstly, whether competition law has succeeded in what it was set out to do, namely further integration of the markets of the Member States. Secondly, to what extent the aim of integration has helped shape the development of competition law, and lastly, I will throw a quick glance at what future developments that can be foreseen in this area. In answering these questions, I firstly evaluate how well the goal of furthering integration has been formulated in the provisions of the Treaty as such, and secondly, I assess the extent to which the interpretation of the treaty follows both the aim of the Member States as formulated in those provisions, and how well the interpretation in itself furthers integration.

I have started my evaluation by establishing that the founders of the EU indeed used integration as a reason to include competition legislation in the Treaties leading up to the EU. This has been established through looking at which historical and political factors, as well as legal theories, that led up to the existence of European competition law. I have also looked at the actual provisions of the Treaty to see to what extent the aim can be traced there. Additional aims with European competition legislation can also be seen, the most predominant being the protection of consumer welfare. However, this thesis focuses solely on the aim of furthering integration.

With that established, I have assessed how well the Member States managed in writing competition provisions that actually do further integration rather than just add complicated rules, which might work as disincentives for integration more than incentives. This assessment later forms the basis for a comparison of how well the European Courts and the Commission have pursued the integration aim. My starting hypothesis was that the Courts and the Commission to some extent went too far when interpreting the rules, and thereby beyond what the Member States intended concerning integration and sometimes even created disincentives. The comparison between the wording of the provisions and the application of them shows that the general application of the rules actually does lie rather close to the original intentions as formulated in the provisions. Furthermore, it shows that in most cases the interpretation does further integration to a large extent. Although some rulings, especially the *Consten and Grundig* ruling concerning territorial restrictions, may have gone too far, and in its eagerness to promote integration and the dismantling of barriers, it actually hinders integration instead. The evaluation shows that competition law has indeed played an important role in furthering integration, but also that the aim of furthering competition has to a great extent helped shape the development of competition law.

The Courts' and the Commission's focus on integration can be seen in several rulings, but also in the fact that the implementation focused initially on vertical agreements rather than horizontal. This is important since vertical agreements are seen to have adverse effects on integration more often than horizontal agreements, which are classically connected with severe negative effects on competition. However, as the single market has been completed through SEA, and the political will has allowed for more and more integration initiatives outside of the economic field, a change in focus towards horizontal agreements can be seen. During this time, the aims of the EU, as described in Article 2 and 3 of the Treaty, has changed to allow for more non-economic goals, thereby increasingly shadowing the aim of non-distorted competition. In the Reform Treaty of 2007, the Member States have even ratified a draft, removing competition entirely from Article 3. These recent developments lead me to conclude that as the creation of the Single Market through the Single Market Act reaches its end in 1992, the role of competition law in the EU is greatly reduced, as does the role of integration for competition law. In the future, we are therefore likely to see less competition rulings based so heavily on integration incentives as the *Consten and Grundig* case. We are also likely to see a development towards competition law becoming a legal field like any other under the jurisdiction of the EU, rather than one of its main aims.

To my family

Abbreviations

AG	Advocate General
BER	Block Exemption Regulation
CFI	Court of First Instance
EC	European Communities
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECT	Treaty establishing the European Community, (Treaty of Rome)
EEC	European Economic Community
EU	European Union
IGC	Intergovernmental Conference
NCA	National Competition Agencies
SMEs	Small and Medium Enterprises
SEA	Single European Act
SEM	Single European Market
TEU	Treaty establishing the European Union, (Maastricht Treaty)
US	The United States of America

1 Introduction

During 2007, the EU celebrates its 50th anniversary. It has been 50 years since the signing of the Treaty of Rome, where the foundations of what is now the EU were laid down. Since the very beginning, one of the main focuses of the EU has been to integrate the national markets of the Member States. With a stronger integration, Europe would, hopefully, be able to achieve what had never been achieved before: peace.

Due to the lack of political will in other areas, the European integration process initially focused mainly on financial aspects. First, through integration of the war-related coal and steel industry, and later more widely through a more general integration of the markets of the Member States. The financial focus has remained predominant, but as the political wills of the Member States have allowed for increased powers of the EU, the financial aspects have been complemented with, and to some extent shadowed by, other political aims.

The focus on integration of markets has placed great importance on competition rules, initially as a way of controlling the coal and steel industry, and subsequently as a way of ensuring that the boundaries that the EU was trying to dismantle did not get re-erected through the actions of the industry itself. This close relationship between integration and competition has helped make both integration and European competition law into what it is today. It has helped both to shape and develop the fields, and neither would have been what they are today with out the help of the other.

In this thesis, I will take a closer look at the integration aim of competition, and how it has affected both integration and competition. In particular, I will assess how well the aim of integration has been followed through in both provisions and subsequent implementation.

In order to do this, I will first look at the history of competition law. This will provide for a sound historical and theoretical ground upon which to assess the ideas behind competition law in Europe. This *exposé* will take us from the birth of competition law in the US, and the subsequent American theories, via the ordoliberalists in Germany in the 1940s and 1950s, to the ideas of competition and integration in the newborn EU.

After establishing that there existed a strong integrational aim in European competition law, I will examine how well this aim has been followed up; both the carry-through by the original Member States in the Articles of the EC Treaty dealing with competition, and the subsequent application by the Courts of the EU and by the Commission.

When assessing the carry-through by the Member States, I will initially ignore the subsequent applications of the Articles by the Courts and the

Commission. Rather, I will try to get close to the original the Member State's intentions that guided the drafting of the provisions. This will be done through assessing both the background to, and the wordings of the provisions, which will allow me to evaluate how close the subsequent interpretation has followed the aims.

Secondly, I will assess the fulfilment of the integrational aim. This will be done from two angles. Firstly, through looking at how well the implementation of the provisions follows the wordings of the provisions. Through this I will establish whether the Courts and the Commission have gone beyond, or deviated from, the intended aim, or if they have followed it. Secondly, I will look at if the interpretation of the provisions as such actually benefits integration. Together this will let me answer the question; does competition law, and the way it is implemented, further competition?

Lastly, I will throw a glance at the future of European competition law and whether it will remain at the centre of European integration. Conversely, I will analyse whether the integrational aim of competition law will remain as important for the implementation of competition law. In this analysis I will look some to the draft of the new Reform treaty, I will however not analyse in depth the full consequences of the new treaty as its future is still very uncertain when this essay is being written. It will mainly be taken into account as a show of future wills of the Member States. Nor will I look at the effects on competition law of the enlargement of the EU in this thesis.

For the purpose of this thesis, I will only deal with Article 81 of the EC Treaty, and thereby with anti-competitive agreement. Since this Article deals with the interactions between two or more companies, it provides many of the most interesting aspects regard to the integration of markets. I will therefore not discuss the other main areas of European competition law; abuse of dominant position under Article 82, mergers and state aid. Throughout this thesis, when referring to integration, I will refer to the integration of the domestic markets through the creation of a Common Market. A short description of some of the most important concepts can be found at the end of this thesis.

2 The development of competition law

2.1 The birth of competition law

Most legislation tries to mend or regulate a perceived problem in society, be it the unwanted murders of fellow citizens, how to conduct an election or, as in the case of competition law, the problem of unfair competition. With all substantive areas of law, the legislation will often be a patchwork of different statutes, amendments and case-law making up the current legal positions. The acts and cases will often be the mixed result of lobby-group pressure, historical events, political compromises, etc. It is therefore seldom possible to identify one unique aim of a legal field. It is, however, possible to cast some light on the main goals and aspirations.

To fully understand any legislation, it is necessary to look at its history and development. What were the main political and historical events that characterised the time period surrounding the adoption of the legislation? What were the problems that the specific provisions tried to solve? How has the legislation been used, and what amendments have been necessary?

The background and motives of the legislation do not only provide for an understanding of the law. They also provide a grounding for the question of legitimacy of the provisions. This thesis will therefore give a review of the main development and school of thoughts within the field of competition and anti-trust legislation.

Modern competition legislation has its origin in the United States, where it was formed during the end of the 19th century as a reaction to the more and more common formation of cartels and trusts.¹ It has been argued that the development of competition law in the European Union is directly attributable to the development in the United States due to the impact that the American views had in Germany, and the subsequent German impact on European legislation.² The directness of this link is the subject of extensive discussion.³ It is indisputable, however, that American anti-trust legislation has vastly influenced the development of anti-trust legislation in Europe, and it will therefore be examined as a background to the developments in the EU. Additional to the influence on the thoughts in Europe, it provides a good example of the developments in a federal system.

¹ Motta, 2004:1.

² Jones and Sufrin. 2004:30.

³ See e.g. Gerber 1998.

Throughout this section, I will use the American term for competition law, anti-trust. I will, however, use the term competition law when referring to EU legislation.⁴

2.1.1 The emergence of trusts and cartels in the United States

During the second half of the 19th Century, the rapid development of the American transport sector (eg, railways and shipping) enabled US companies to start competing in neighbouring states and even neighbouring countries. This created a single market where intensified competition in products could take place. Due to this, and to technical advancements, firms could expand production and start enjoying economies of scale and scope.⁵ Soon, however, companies started to experience overcapacity in production, which led to a reduction in prices in manufactured goods. This development was also apparent in the countries of Western Europe during the period from the mid-1870s to the end of the 19th century.⁶

In order to achieve lower production costs, extensive investments were needed, often at great cost. To cover the large fixed costs that these investments gave rise to, companies got involved in price wars in order to secure their costumers, and thereby their income. However, with the profits per unit decreasing due to the strong competition, companies found themselves with an incentive to collaborate in order to keep prices at a higher level. As a result, firms organised themselves into cartels, agreeing to collude rather than compete, thus guaranteeing an increase in profits for all firms within the cartel.

In addition to cartels, companies tried to control competition through owning stocks in rival firms. These stocks were transferred to trusts through which the companies could then control their competitors, and thereby the competition. This became a very common practice, and the fight against this practice was what gave the legal field the name anti-trust.⁷

2.1.2 The Sherman Act

The development of cartels and trusts led to stability, security and increased profits for the involved firms. However, it was also to the detriment of final consumers and second-line producers. The first acts of legislation in the area were not very efficient as they were limited to state regulations, and were thus not federal. Since the practices run across borders, this was not enough, and in 1890, the first federal legislation in the field came in the

⁴ See under 'List of important concepts'.

⁵ For a description of economies of scale and of scope see under 'Explanation of some important concept'.

⁶ Chandler, 1990:71.

⁷ Jones and Sufrin, 2004:19.

form of the Sherman Act.⁸ This Act has been described as a strongly populist instrument ‘... intended above all as a political message that the government recognised the damaging nature of the trusts and wanted to call a halt to them. It was thus a question of control and the redistribution of power and wealth.’⁹

The first important case concerning the law came in 1897 with the *Trans-Missouri Freight Association* case¹⁰, soon followed by the *Addyston Pipe and Steel* case¹¹ in 1898. In these cases the Supreme Court took a firm stand against all forms of price agreements, a view that with few exceptions stands to this day. The Supreme Court has confirmed its strict position on anti-competitive behaviour in numerous cases.¹²

The development during the 20th century in the United States has moved back and forth between stronger and weaker enforcement of the rules. During the initial years of the 20th century, the USA was strongly influenced by World War I, the Depression and the New Deal.¹³ The politics during World War I was shaped by a coalition between business and politics rather than anti-trust legislation, a view that stayed dominant throughout the inter-war period and the depression and can be seen, for example, in the case *Appalachain Coals v. US*.¹⁴

2.1.3 The Harvard School

During the mid-1900s, some theorists connected to Harvard University became more and more prominent in the doctrine. They proclaimed a more interventionist approach to anti-trust enforcement. Their thoughts were highly influential on both the general debate and in the rulings of the Supreme Court, which assumed a more activist approach from 1940 with the case *Socony-Vacuum Oil*.¹⁵

The Harvard School developed a paradigm to explain anti-competitive behaviour:

Structure → Conduct → Performance

⁸ This is one of the most famous anti-trust laws. However, there were examples of earlier legislation in Canada, albeit with less powerful enforcement than the American Sherman Act.

⁹ Slot and Johnston, 2006:3.

¹⁰ *United States v. Trans-Missouri Frieght Ass'n*, (1897).

¹¹ *United States v. Addyston Pipe & Steel Co.*, (1898).

¹² Some of the more famous cases are *Dr Miles Medical Co v. John D. Park & Sons*, (1911) concerning price restrictions on vertical agreements; *Standard Oil Co. of New Jersey v. United States*, (1911) where a trust were split up into 35 separate companies; *United States v. American Tobacco Co.* (1911) concerning a merger of five tobacco manufacturers and *Terminal Railroad* (1912).

¹³ The New Deal was a financial policy created under President Roosevelt in 1933 as a reaction to the unemployment after the depression.

¹⁴ Motta, 2004:6.

¹⁵ *United States v. Socony-Vacuum Oil Co.*, (1940).

This paradigm states that the structure of the market dictates the conduct of the companies and thereby also the performance of the market. One of the main representatives of the school, J.S. Bain, considered that most industries were more concentrated than necessary and he meant that monopoly prices could be seen already in industries with fairly moderate levels of concentration. He rejected the argument of benefits flowing from economies of scale in concentrated markets, saying that most factories in fact did not benefit from this.¹⁶ He also highlighted the problem of high barriers to entry, leading to new competitors struggling to enter the market.¹⁷ Since the structures were seen as the base for anti-competitive behaviour, the remedies should be structural rather than behavioural.¹⁸

This view ‘... led to a belief that markets were fragile and to an antitrust policy which intervened to protect small businesses against large firms.’¹⁹ The period from the 1940s to the mid-1970s was marked by these theories, and it has been described as ‘... a period of intense anti-trust activity, characterised probably more by the desire to restrain large firms than by the objective of increasing economic efficiency, an attitude which was consistent with the dominant economic thinking of the period.’²⁰ The interventionist view that the Harvard School gave rise to can be seen in the approach taken by the Court in several cases.²¹

The Harvard School ideas have been heavily criticised, and today less importance is given to the power of the market structure over behaviour. However, the ideas still remain a strong influence on anti-trust and competition law, which can be seen both in legislation and application of the laws.²²

2.1.4 The Chicago School and the traditional consumer welfare aim

A number of theorists connected to the University of Chicago reacted strongly against the Harvard School theories and criticised them for being inherently flawed. This movement became known as the Chicago School, and the theorists connected to it are often referred to as Chicagoans. In contrast to the Harvard School, which was mainly based on empirical facts, the Chicago School is heavily based on theoretical models.

¹⁶ For a description of economies of scale see ‘List of important concepts’.

¹⁷ For a description of barriers to entry see ‘List of important concepts’.

¹⁸ See Bain, 1956, see also Bain, 1968.

¹⁹ Jones and Sufrin, 2004:20.

²⁰ Motta, 2004:7.

²¹ *International Salt Co. v. US.*, 332 U.S. 392 (1947) prohibiting tie-in sales; *US. v. Arnold, Scwinn & Co.*, 388 U.S. 365 (1967) prohibiting territorial restraints; *Brown Shoe Co. v. U. S.* 370 U.S. 294 (1962), *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321 (1963) and *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967), all three concerning mergers.

²² Jones and Sufrin, 2004:22, see also Hovencamp, 1999:45.

The main idea of the Chicagoans is a firm belief in the market's self-regulatory powers. As a result of this, the market should be as deregulated as possible, and the *only* goal that antitrust legislation should pursue is productive but also, and foremost, allocative efficiency. This goal is sometimes described in terms of consumer welfare.²³ Bork has described it in the following way:²⁴

‘Consumer welfare is greatest when society’s economic resources are allocated so that consumers are able to satisfy their wants as fully as technical restraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation.’²⁵

The language seen in this paragraph illustrates the view of the Chicagoans, stressing the allocation of resources as the main way of increasing the wealth of a nation. As a consequence, they reject any pursuit by the courts of any other political goals.

‘The distribution of ... wealth or the accomplishment of neoeconomic goals are the proper subjects of other laws and not within the competence of judges deciding antitrust cases.’²⁶

The goal of anti-trust legislation should instead be a market with perfect competition and thereby maximised efficiency, and regulations and case-law should aim to reach this through the most non-regulatory way possible.²⁷

The Chicagoans put great trust in the power of the market to achieve perfect competition, and they believe that monopolies or oligopolies are self-correcting, as are cartels.²⁸ If a market has only one, or a few, players, who will thereby have the possibility of rising prices and making high profits, soon new competitors will enter the market and the monopoly will be broken. The Harvard fear of high barriers to entry is not shared by the Chicagoans, who rather feel that those barriers are either created by the government or simply imagined.²⁹

One of the aspects that the Chicago School reacted on was the Harvard School’s ‘sentimentality’ for small businesses.

²³ Jones and Sufrin, 2004:22, see also Hovencamp, 1985:226-9. For a description of productive and allocative efficiency see ‘List of important concepts’ below.

²⁴ R.H Bork, together with R. Posner and G. Stigler, is the leading proponent of the Chicago School.

²⁵ Bork 1993:90.

²⁶ Bork, 1993:427.

²⁷ For a description of perfect competition see under ‘Explanation of some important concept’.

²⁸ For a description of oligopolies see under ‘Explanation of some important concept’.

²⁹ Hovencamp 1985:226-9.

‘The idea that there is some special virtue in small businesses compared to large is a persistent one, though the basis for the idea is obscure. ... Antitrust enforcement is not only an inefficient, but a perverse, instrument for trying to promote the interest of small businesses as a whole.’³⁰

Posner argues that even *if* the goal with antitrust had been the protection of small businesses, antitrust enforcement would lead to the detriment rather than the improvement of them. He refers to the prohibition against cartels, and remarks that if allowed to engage in a cartel, the small businesses would have a greater possibility of competing with the larger firms, but with the existing antitrust legislation that possibility is closed.

The thoughts of the Chicagoans, together with a declining competitiveness of American firms abroad, led to both the government and the courts being more and more inclined to adhere to a more *laissez-faire* attitude towards antitrust enforcement. The turning point came in 1977 in the case *GTE-Sylvania*, where the Supreme Court applied a so-called *rule of reason*.³¹ This meant that the Court weighed the pros and the cons of the agreement in order to determine whether it was legal or not. If the agreement entailed more positive than negative effects on the market, it should be allowed even if it had some anti-competitive aspects, and vice versa. The Court thereby moved away from the previous *per se* illegality of certain agreements.

2.1.5 The ‘post – Chicago’ developments

The thoughts of the Chicago School have been very influential for the development of anti-trust policies, and did also to a large part shape the American economic policy during the Reagan years.³² However, the theories have not been unchallenged.

The Chicagoans claim that their ideas are non-political, since they focus solely on economics and the market, and not on the politics. Several authors have challenged this notion.

‘The essential argument is that since antitrust policy is dictated only by micro-economics it is ideology-free. The adoption of such a policy is, however, in itself ideological.’³³

Additionally, the theories have been criticised by Fox and Sullivan, who held it to put too much believe in the robustness of the market. They also

³⁰ Posner 2001:25.

³¹ *Continental T.V., INC. v GTE Sylvania Inc.*, 433 U.S. 36 (1977).

³² Motta 2004:8.

³³ Jones and Sufrin, 2004:27, see also Fox and Sullivan, 1987:956-9.

criticised it for claiming to have the right prescription for efficiency, something they say cannot be proven.³⁴

The more recent development has been a move towards a less doctrinaire approach to the legislation, with a mixture of the views of the Harvard School and the Chicago School.³⁵ The Chicago School did lead to a considerable loosening-up of the approaches during the 1980s, something that can be traced in the application of anti-trust law today as well. However, American anti-trust law is still interventionist and contains aspects that relate more to the Harvard school of thought. This can be seen in, for example, the lack of exemptions in the legislation against restrictive agreements.³⁶ Even if the exemptions would have been able to produce benefits for the market, they are outlawed, contrary to what the Chicagoans would have advocated.

2.2 The historical development in Europe

The development of competition law in Europe during the late 19th century and first half of the 20th century has been very different from the one in the United States. I will focus on the development of competition law in Germany, which has had the most influence on the EU. Many of the developments are the same for several other countries like Austria, Czech Republic, Switzerland, Hungary and Holland. There were intense debates about competition law in both Austria and Germany around the turn of the century, but this did not result in any legislation. These debates have, however, helped to form the basis for subsequent European legislation.³⁷

2.2.1 Competition law in Germany

During the late 19th and early 20th century, cartels in Germany were seen as a stabilising factor in the economic life. Together with a strong belief in the freedom of contract, this led to legislation that encouraged the creation of cartels rather than prohibit them. In 1923, Germany had some 1,500 cartels. Against the backdrop of high inflation during the 1920's, Germany became the first country in Europe to legislate in the area. However, the legislation only required the registration of the cartels, and they would only be prohibited in extreme circumstances. Although this Act was eliminated during the 1930s, it was highly influential and helped to spread the ideas of competition law throughout Europe.³⁸

³⁴ Fox and Sullivan, 1987:956-9.

³⁵ Jones and Sufrin, 2004:29, see also Motta 2004:9

³⁶ Baimbridge, M., Harrop, J and Philippidis, G., 2004.

³⁷ Gerber, 1998:6-8.

³⁸ Ibid.

The Nazi regime encouraged the creation of cartels, since it wished to promote strong German companies that could compete with foreign companies. It was only after World War II that the occupational governments imposed restricting legislation, in order to keep the German companies from being too strong. Several other European governments also chose to enact various, albeit weak, acts of competition legislation after the war, in order to stimulate fragile post-war economies. These laws were however often part of larger economic policies and their effectiveness were limited. To a large extent, this is true for the national competition law enforcement in Europe to this day.³⁹

With the emerging threat from the Soviet Union and the Cold War, the British and American governments saw political advantages in a stronger Germany to counter-balance the strength of the Soviet Union, and thus the anti-trust legislation was weakened. However, in 1958, tighter legislation was passed in Germany as a result of the influence of the ideas of the ordoliberals.⁴⁰ Among other things, this Act created the *Bundeskartellamt* (the Federal Cartel Office).

Despite the American influence, the approach to competition law in Germany is still very different from the one in the United States. In Germany, the emphasis is still placed on the freedom of contract, making the scrutinizing of contracts dependent on their restrictive effect on competitors, rather than on the effects on consumer welfare.

2.2.2 The Freiburg or Ordoliberal School

During World War II, a group of neo-liberal thinkers started to meet regularly in order to discuss how to re-build Germany in a post-war scenario.⁴¹ Their ideas are known as *ordoliberal*, and they have been a great influence on the development of both the German and European competition law.⁴² Nevertheless, studies of their importance have often been overlooked in the intellectual discourses on competition law.⁴³

‘Without an appreciation of ordoliberal concepts and the architecture of ordoliberal thoughts, much of the discourse about economic policy in Germany – and to some extent in the European Community – cannot be understood and is likely to be misunderstood.’⁴⁴

³⁹ Ibid

⁴⁰ *Gesetz gegen Wettbewerbsbeschränkungen* (GWB), still in force today. Gerber 1998:8. See about the ideas of the ordoliberals in the next section.

⁴¹ The most important being W. Eucken, F. Böhm and H. Grossmann-Doerth.

⁴² For an account of the main thoughts of the Ordoliberal School see Gerber 2003:232-65

⁴³ Gerber, 1998:8, 232-2.

⁴⁴ Ibid p 265.

Indeed, the ordoliberal view strongly influenced the creation of the European Communities, especially through the influence of the German leaders who were active in the founding of the Community. One of the founders, and subsequently the first president of the European Commission, Walter Hallstein, was strongly influenced by those ideas, something that was reflected in his ideas for the Community. Additionally, Hans von der Groeben, one of the writers of the '*Spaak Report*'⁴⁵ on which the Treaty of Rome was based, had strong ties to the Ordoliberal School of thoughts.⁴⁶

The ordoliberals were inspired by what they saw in the Weimar and Nazi governments as institutional, political and intellectual failure.⁴⁷ Waiting for the war to end, they constructed a complete framework for societal development, with an integration of economic, legal and social ideas. With this framework, they sought a 'third way between democracy and socialism'.⁴⁸

The main pursuit for the ordoliberals was human dignity and personal freedom. They feared that strong personal interests (in the form of excessively concentrated markets and industries) would be able to threaten this, both by being able to influence a potentially weak government (like the Weimar regime), and by their dominance over smaller businesses. Instead, they preferred that both the political and the economic powers be spread among several private interests. Consequently, they opposed monopolies and embraced smaller businesses, although for very different reasons than the ones put forward by the Harvard School in the United States. This view led to a strong belief in competition as the basis of economic stability and freedom, and economic freedom as the basis of political freedom.

According to the ordoliberals, competition should provide the base of the society, but in contrast to the Chicagoans, the ordoliberals did not see deregulation as the best way to achieve a functioning competition on the market. On the contrary, they believed that only law could provide and maintain the conditions needed, and therefore the governmental officials should intervene in business life only in order to uphold the principles established by law.

All of the above examined schools of thoughts, the Harvard school, the Chicago school and the ordoliberals, have in different ways coloured the development of the European competition law.

⁴⁵ Comité Intergouvernemental Créé Par La Conférence de Messine, Rapport des Chefs de Délégation aux Ministres des Affaires Étrangères (1956) (The '*Spaak Report*').

⁴⁶ Gerber 1998:263.

⁴⁷ Gerber 1998:236.

⁴⁸ Gerber 1998:239, see also J.M Clark, 1948.

2.2.3 The existence of competition law in the early European Community

In order to examine the extent to which competition law has fulfilled the aims for which it was set up, I will start by looking at what those aims were. I will firstly focus on the aims that were originally intended by the Member States and how these aims were mirrored in the actual provisions of the relevant articles. Further on in this thesis, I will look at how the aims have evolved and changed over the years.

2.2.3.1 The European Coal and Steel Community

The embryo of the European Union was created in 1951 with the European Coal and Steel Community (ECSC). The six countries in the ECSC later became the founding countries of the EC.⁴⁹ Already in the ECSC, competition regulations had a prominent role and those provisions were subsequently mirrored in the competition provisions in the EC Treaty.⁵⁰ These early provisions and their birth thus deserve some attention.

The ECSC was born in the aftermath of World War II. It was of great importance to the founders that Germany would not resume the strong position in the coal and steel market that it had enjoyed before the war. In order to deal with this, the ECSC was established, creating a legal community where control over the industry was exercised within a single regime, and the services of those industries affected were placed in the hands of the community.

Since the ECSC existed to control industries, it was clear to the founders that it would be necessary to create some form of competition regulation. This was inserted through Articles 65 and 66 of the ECSC Treaty. Article 65 prohibited anti-competitive agreements, in the Treaty Rome mirrored by Article 85 (today Article 81), and Article 66 outlawing concentrations (mainly mergers) and ‘misuses’ of economic power, the latter aspects mirrored by Article 86 (today Article 82).

The reason for this early inclusion of competition law into EC law has been ascribed to the need to control powers of those key industrial sectors.

‘The reasons ... [for Art 65 and 66] are to be found only partly in the drafter’s adherence to competition as an economic way of life. More important, perhaps, was the concern of the drafters that cartels [and concentrations], if permitted to develop, might become the real political

⁴⁹ The Treaty establishing the European Coal and Steel Community (the Treaty of Paris) was signed by Italy, France, the Federal Republic of Germany, Belgium, Luxemburg and the Netherlands.

⁵⁰ For background in this area see Gerber 2003:334-58.

power of the Community and might constitute a challenge to the Community's sovereignty.⁵¹

It may still seem surprising that the Member States chose to accept the limitations on their companies' freedoms that the competition regulations imposed. However, seen in the historical context it is more understandable. The Member States (except perhaps for Germany) all had memories from the war as an incentive to control Germany. Germany, on the other hand, was highly influenced by the ordoliberal views, advocating strong competition regulations. The ordoliberal view can be seen in the fear of strong industries reflected in the above-quoted section by Raymond.

2.2.3.2 The European Economic Community

Besides the ECSC, there were also plans for the creation of both a European Defence Community and a European Political Community. However, after the creation of the ECSC there was a reluctance to develop these areas, especially demonstrated by France. For the pro-integration leaders, the economic field, and the creation of a Common Market for Europe, thus seemed like the only way to move forward in increasing European integration.⁵² The move towards a Common Market was done through the creation of the European Economic Community (EEC).

In 1955, a conference on the topic of economic integration was held in Messina in southern Italy. The resulting report, the *Spaak Report*, suggested two main goals for what would later become the EEC.⁵³ The first goal was mainly political; by linking the economies of Europe, the risk of conflicts and wars would decrease. The second goal is of greater importance for competition law as it is of a more economic nature. The writers of the *Spaak Report* had the Weimar regime and the Depression in fresh memory, reminding them of which disastrous results economic failure and poverty may lead to. Through reducing the barriers of trade between the Member States and thereby increase the wealth of Europe, it would benefit both consumers and business, but also provide stability and the means to avoid conflict and wars. In the subsequent treaty establishing the EEC, the Treaty of Rome, this view naturally led to the recognition of the importance of competition regulations.⁵⁴

Even if there was a common will to include competition law, there was no consensus on what the contents of the provisions should be, or for that matter, the level of importance that should be attached to them. The official records of the Messina conference are not released, but some guidance as to

⁵¹ Raymond, 1953:97 n.43.

⁵² These leaders were Jean Monnet and Robert Schuman of France, Paul-Henri Spaak of Belgium, Alcide de Gasperi of Italy, and Konrad Adenauer of Germany. Gerber, 2003:342, see also Craig and De Búrca 2003:5.

⁵³ Comité Intergouvernemental Créé Par La Conférence de Messine, Rapport des Chefs de Délégation aux Ministres des Affaires Étrangères (1956) ('*Spaak Report*').

⁵⁴ Gerber 2003:343.

the initial intentions can be found in commentaries made by the negotiators.⁵⁵ There were mainly two issues causing conflict between the states. Firstly, whether the competition provisions should be interpreted as *law* or as a mere *guidance* for national decision-making. Germany and France advocated two different views in this respect, Germany recommending a 'law' approach based on the ordoliberal views, whereas France advocated a 'guidance' approach. The second issue of conflict was the debate over how important the provisions should be. Again, Germany advocated a strong role in line with the views of the ordoliberals. In the other countries, however, competition law to that date had played a rather marginal role, and thus the general opinion was that this should be the case with the competition clauses in the Treaty of Rome as well.

2.2.3.3 The original aim of European competition law

As has been seen above, the original reasons for competition law were several, like the control of business, the prevention of wars, etc. However, regardless of the individual attitudes on the scope of competition law, it can be concluded that all the Member States saw competition law as a tool towards integration of the economies and the markets of the EC Member States.⁵⁶

‘This ‘unification imperative’ has shaped the institutional structures and competences within the system, supplied much of its legitimacy, and generated the conceptual framework for the development and application of its substantive norms.’⁵⁷

However, the other objectives envisaged by the original Member States must also be remembered, such as the capacity of the European industries to compete on the world market, especially with the American industries in mind. In addition, the goal of consumer welfare, so important in the anti-trust legislation in the United States, also played a role in the early objectives of European competition law. Additionally, the aims have not been static, and the shift of aims from the start until modern days will be addressed further on. This thesis will mainly deal with the aim of integration.

⁵⁵ See e.g. Küsters, 1982.

⁵⁶ Hawk, 1972:347.

⁵⁷ Gerber 2003:347.

3 The development of the Single Market

3.1 General remarks

As stated above, market integration was the *raison d'être* of the creation of the Community. Through integrated markets, the Member States would be able to achieve peace and prosperity. As we have seen, this was the argument also behind the insertion of competition law in the original treaty. The original reasoning behind this has been dealt with in the previous sections, and I will now turn my focus to how the single market has developed during the 50 years that has passed from the signing of the Treaty of Rome until to today. This brief *exposé* will deal with aspects of competition law, but it will mainly provide a general background to the development of the Common Market. This will give further ground for my analysis of the fulfilment of the single market aim through competition law.

For any accounts of the integration project in Europe it is important to keep in mind the base for the process, namely the four freedoms; free movement of goods⁵⁸, persons, services and capital.⁵⁹ This provides the base for an integrated market, and the measures taken in order to achieve those freedoms are thereby taken in order to promote integration.

3.2 From the early years to the Single European Act

The Common Market project has always faced many challenges. Among the first challenges was 'agreeing on a way to agree'. In order for the integration project to be successful, it has been necessary to find methods for the decision-making within the Council of Ministers (hereinafter the Council) that will enable progress to take place, while still staying within a sphere where the Member States are ready to give up their sovereign powers. During the last 50 years, this balancing act has proved difficult on more than one occasion.

In the early years after the signing of the Treaty of Rome, there were severe political disagreements on what shape the Community should take, with President de Gaulle of France advocating an intergovernmental rather than a supra-national decision-making process.⁶⁰ The conflict evolved around whether the voting in the Council of Ministers should be unanimous or by

⁵⁸ Under Title I in the EC Treaty.

⁵⁹ Under Title III in the EC Treaty.

⁶⁰ Craig and de Búrca 2003:13.

qualified majority. The tensions led to a crisis in 1965, when France opposed a proposal by the Commission and, as a result of failure to reach a compromise, France subsequently chose not to attend any Council meetings for seven months. The compromise that was finally reached was enshrined in the *Luxemburg Accords* and came to influence decision-making during the next two decades. The compromise held that even in situations where majority voting was prescribed, the discussion must go on until everybody agreed, at least in areas where ‘important national interests’ were at stake. This led to a situation where invoking an ‘important national interest’ in practice came to be treated as a veto.⁶¹

Many important judicial developments took place under this early period. Among the most important ones can be found the creation of the concept of *direct effect* through *van Gend et Loos*, leading to a stronger implementation of Community rules, and thereby a greater harmonization of the national rules.⁶² In the field of free movement of goods, the *Cassis de Dijon case* was very important, where the European Court of Justice (ECJ) established the principle of mutual recognition of goods.⁶³ It thus held that where a product had been lawfully marketed in one Member State, it had to be recognised by the other Member States as well. If it had not been recognised, it would be in conflict with the prohibition on quantitative import restrictions laid down in Article 28 (ex Article 30). The importance of this principle cannot be overstated, and it bears great implications in the field of competition law since it makes it possible for companies to compete in all Member States.

The case *Metro I* deserves a special remark due to its role in competition law.⁶⁴ In this case, the Court emphasised the market integration goal as one of the objectives of the Treaty and thus for European competition law. It also provided the first definition of the internal market; namely as a market with conditions similar to those of a domestic market:

‘The requirements contained in Articles 3 and [81] of the EEC Treaty that competition shall not be distorted implies the existence on the market of a workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.’⁶⁵

⁶¹ Ibid.

⁶² Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend and Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁶³ Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

⁶⁴ Case 26/76⁶⁴ *Metro-SB-Grossmärkte GmbH v. Commission* [1975] ECR 1875.

⁶⁵ Ibid, para 20.

Other important competition cases are the cases *Consten and Grundig* and *United Brands*.⁶⁶ In both these cases, the ECJ struck down agreements as anti-competitive due to their negative effect on the integration of markets, even when they entailed benefits for business as such. Seen from a purely competition aspect, these cases would be difficult to understand. However, assessed against the backdrop of the integrational aim, the rulings are more understandable. Had the competition regulations only aimed at achieving the best competition, the rulings probably would have come out very different from what they did, but since the Court assessed also the integrational aims of the provisions, it instead ruled in a way aimed at further integration rather than just competition. The cases thereby show the importance placed by the Courts on the integrational aim in competition.

3.3 The Commission's White Paper on Integration

Although some steps were taken towards integration during the 1960s and 1970s, especially by the ECJ, this time has been described as a period '... during which the supranational political EC institutions appeared to lose initiative and influence, and the interests of individual Member States ... dominated the process.'⁶⁷ In the beginning of the 1980s, however, the Community took back the initiative through the Commission's *White Paper on Integration*⁶⁸ and the subsequent Single European Act (SEA). These can be seen as the most important steps towards integration taken within the Community to this date, which can be illustrated by the Commission's opening statement: 'The time for talk has now passed. The time for action has come. That is what this White Paper is about.'⁶⁹

The White Paper emerged after a request from the European Council to the Commission, where the Council asked the Commission to draw up a program, and more importantly, a timetable for the achievement of the single market aim. The Commission was quick to respond, and the resulting White Paper created a thorough evaluation of the needed measures, suggesting no less than 279 legislative measures. It also suggested a timetable where the completion of the single market was set out for 31 December 1992.

In commentaries on the White Paper, the role of competition law has been highlighted:

⁶⁶ Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299 and Case 27/76 *United Brands & Co and United Brands Continental BV v. Commission* [1978] ECR 207.

⁶⁷ Craig and de Búrca, 2003:6.

⁶⁸ *Completing the Internal Market*, COM (85), 310.

⁶⁹ COM (85) 310, para 7.

‘The completion of the internal market could, if strongly reinforced by the competition policies of both the Community and Member States, have a deep and extensive impact on economic structures and performance. The size of this impact ... could be sufficient to transform the Community’s macroeconomic performance from a mediocre to a very satisfactory one.’⁷⁰

The European Council endorsed the Paper in June 1985. This was followed by intergovernmental meetings (IGC) where the SEA, comprising the measures of the White Paper, was drafted and subsequently signed on 17 February 1986. Thereby the Member States committed to the goal of the completion of the Common Market by the end of 1992. The SEA entered into force in 1987.

3.4 Market integration post 1992

The SEA was the single most important step towards the establishment of a Common Market, and it resulted in fast economic restructuring during the 1980s and early 1990s. Even if the single market was not entirely completed by the mid-1990s, most of the legal obstacles to the single market had been removed and to a large extent the Single European Market (SEM) was achieved. However, the efforts did not stop after 1992. Since then, a number of initiatives have been taken towards greater integration, and several reports have been produced to follow up on the development.⁷¹

The summit in Maastricht 1991, leading to the creation of the European Union, focused on continuing the integration, but during the summit the Member States also added new aims to the original economic aim of integration. Especially important in the field of competition law is the recognition in Article 130 of the Treaty of the European Union (TEU) concerning the importance of the competitiveness of the Community’s industry. Even if the Article states that no measures should be taken which may conflict with competition interests, the Article still indicates a shift in the Member States’ intentions towards a more liberal view on competition law.⁷² Additionally, environmental goals were added through the TEU.

Thereby, a shift in aims can be seen from the original, mainly economic, aims, to a Union where several aims are incorporated. A gradual

⁷⁰ Emerson, M., Aujean, Catinat, Goybet, Jaquemin, 1988:1-10.

⁷¹ *Making the Most of the Internal Market*, COM (93) 632 final, *The Impact and Effectiveness of the Single Market* COM (96) 520 final, *Communication of the Commission to the European Parliament and the Council, Mutual Recognition in the Context of the follow-up to the Action Plan for the Single Market* SEC (97) 1 final, *2000 Review of the Internal Market Strategy*, COM (2000) 257 final.

⁷² Gerber 1998:371.

development, marked by e.g. the *1997 Action Plan*⁷³ and in conclusions by the *Lisbon European Council*, led to placing a greater emphasis on consumer safety, social rights, labour policy and the environment, and when the EU faced the new millennium, the strategic goal for the Union was set out to be:

‘[Becoming] the most competitive and dynamic knowledge-based economy in the world, capable of sustaining economical growth with more and better jobs and greater social cohesion.’⁷⁴

The shift towards more social aims can be seen also in the field of competition law. When looking at the forewords to the annual reports on competition from the Commission, the focus on the integrational aim has gone from being predominant, to not even being mentioned. Recent examples can be the forewords by commissioner in charge of competition, Neelie Kroes, to both the 2004 and the 2005 report, where the importance of competition law for the social aims of the EU is mentioned, but its importance for integration is left out.⁷⁵ This can be compared with the forewords by the former commissioner, Mario Monti, who instead referred to competition policy as ‘form[ing] an essential building block in establishing a well-functioning single market in the EU.’⁷⁶

Important in the field of competition law is also the shift towards a stronger protection of consumer welfare, rather than the focus on integration. This was indicated e.g. at the Commission’s internal seminar on the internal market on 16 January 2007:

‘The focus of Single Market policies should not be the mere integration of markets but the maximisation of consumer welfare and productivity growth. In this sense, every potential policy should be assessed in terms of its impact on productivity growth and consumer welfare.’⁷⁷

Already through these factors, it can be seen that the importance of competition law for integration in Europe is reduced in comparison to its original importance, and vice versa. It is likely that this development will continue.

⁷³ *Communication of the Commission to the European Parliament and the Council, Mutual Recognition in the Context of the follow-up to the Action Plan for the Single Market* SEC (97) 1 final.

⁷⁴ Lisbon European Council, 23-24 Mar. 2000, para 5.

⁷⁵ Report on Competition Policy 2004, Volume 1. SEC (2005) 805 Final. Foreword by Neelies Kroes, and Report on Competition Policy 2005, Volume 1. SEC (2006) 761 Final. Foreword by Neelies Kroes.

⁷⁶ XXXIIIrd Report on Competition Policy, 2003. Foreword by Mario Monti.

⁷⁷ ‘*The Economic Policy for the Single Market of the Future*’ Bruegel – DG Internal Market seminar, 16 January 2007 – Conclusions. Para 1, available on the Commission’s webpage.

In June 2007, the EU held a top summit leading up to the signing of a draft of the Reform Treaty. The Treaty has not yet been ratified, and given the previous draw-backs concerning the ratification of the new constitution, the future of the Reform Treaty is far from certain. During the negotiations of the draft, the French president, in what has been described as a ‘coup’, succeeded in removing the mentioning of competition law from the Article that states the aims of the EU, Article 3.⁷⁸ Through the change, the Article no longer lists the aim of pursuing ‘an internal market where competition is free and undistorted’, rather it puts a full stop after ‘internal market’. This change is said to have no material meaning, as competition law is mentioned at thirteen other places in the Treaty, and since the Treaty is yet to be ratified, many things can happen before it takes effect. Be this as it may, the mere signing of the Treaty sends a clear signal that the importance of competition law, as one of the corner-stones of European competition law, is heavily reduced. The French officials also admitted during the meeting that the removal was of a more symbolic and political than legal value.⁷⁹ The fact that this move came from France comes as no surprise given the French attitude to competition law already from the beginning.

⁷⁸ See e.g., Parker, G., Buck, T. and Benoit, B., ‘*EU scraps free competition goal*’, Financial Times June 22, 2007. Notably a British newspaper.

⁷⁹ Castle, S., Bilefsky, D., ‘*Germany and Polen trade harsh words at EU summit*’, International Herald Tribune, June 22, 2007.

4 The Provisions of Article 81 of the EC Treaty

4.1 Background

Having concluded that one of the main objectives of competition law during the early years of the European Community was integration of the domestic markets, I will now turn my attention to how this objective was expressed in the actual provisions of the treaties. This analysis will focus solely on the wording of the provisions, and I will at this point not examine the subsequent interpretation or implementation of the provisions. This method serves several purposes. Firstly, the wording of the provisions creates the ground on which all subsequent European competition law rests and it therefore deserves individual attention. Secondly, the wording casts further light upon how the Member States intended the regulations to function. Finally, it will provide a ground for a comparison of the approach intended by the original Member States and the subsequent approach actually adopted by the Court and the Commission.

The view of the Common Market as the ‘motor of economic development’ is clear already in Article 2 of the ECT, where the main goals for the EEC are set out. The Article reads: ‘The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities...’⁸⁰

Article 3 addresses the fulfilment of the aims stated in Article 2, and by inserting competition law as one of the means to achieve those aims, the Member States are providing it with a prominent role. Article 3(f) states that one of the activities of the Community shall be ‘...the institution of a system ensuring that competition in the Common Market is not distorted’.

This provision clearly shows the intention of the original Member States to ensure the position of competition law, and the importance of it in relation to the creation of a Common Market. However, as was seen in the previous section, this was not the same as agreeing on the extent of the Community’s involvement in the implementation of the provisions.

⁸⁰ As the EEC has transformed into the EC and subsequently become a part of the EU, goals have been added, and the Article has been amended. However, still in the consolidated version of the Treaty the establishment of a Common Market is placed as a main way of reaching the aims, together with the implementation of common policies or activities.

Articles 2 and 3 were followed with two articles dealing specially with competition law, Articles 85 and 86, now Articles 81 and 82.⁸¹ Article 81 is concerned with agreements with an anti-competitive object or effect, whereas Article 82 deals with the abuse of a dominant position in the market. This thesis has as its focus the fulfilment of the single market integration goal through the fight against anti-competitive agreements, and I will therefore concentrate the following analysis on the provisions in Article 81. Some of the commentaries made on Article 81 will, however, have relevance for Article 82 as well.

4.2 The provisions of Article 81

Article 81 reads:

- ‘1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
 - a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - b) limit or control production, markets, technical developments, or investments;
 - c) share markets or sources of supply;
 - d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.
 - e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreement or decision prohibited pursuant to this Article shall be automatically void.
3. The provision or decision of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices which contributes to improving the production

⁸¹ Following the Amsterdam Treaty, signed in 1997, these were renumbered to Arts 81 and 82. However, the material scope of the articles was not altered. Throughout this thesis I will refer to them as Article 81 and 82.

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

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

Many aspects of the article deserve attention, and in the following section I will examine them in turn.

4.3 General remarks

The idea of realising the Common Market can be read from the Article in several ways. The first and foremost is the repeated explicit references made to it in the initial sections of the Article. Although the aim of consumer welfare can also be seen in the Article, the first sentence stating that ‘[t]he following shall be prohibited as incompatible with the Common Market: ...’ clearly places the Common Market integration aim as the first and foremost aim.

The Article is also concerned with the improvement of business conditions in general, albeit with a community dimension as a base. This can be seen e.g. in the exemplifying list of prohibited agreements and in the conditions guarding the exception set out in Art 81(3). As has been seen above, the strengthening of the economies of the Member States has been seen as a way of stabilising the countries and the relations between them, and thereby also furthering integration.

All of the above-mentioned reflections are true for the application of Article 82 as well.

4.4 The conditions of Article 81

Looking more closely on the conditions of the Article, several aspects deserve attention. The following analysis will examine the conditions one by one. Both the ECJ and the Court of First Instance (CFI)⁸² have interpreted the various conditions slightly different, as will be shown later in this thesis. However, as mentioned above, this initial presentation will focus only on the initial wordings and the intentions by the Members States which can be read from them.

⁸² Together they will hereinafter be referred to as the Courts.

4.4.1 Undertakings or association of undertakings

The first condition that can be read from the Article is that it will apply only to undertakings or concentrations of undertakings. This concentrates the application to businesses that have actual economic relevance. It thereby reflects the idea of the EEC being mainly an economic project, where the integration shall use the economic path in order to move forward. By not expanding the concept to include non-economic activities, it shows the unwillingness of the Member States to move into areas not affected by economy and the integration of markets.

4.4.2 An agreement, decision or concerted practice

The second condition is that the provisions will be applicable only on agreements, decisions or concerted practices.⁸³ By drawing the condition so broadly, the Member States clearly demonstrate their intent to catch conducts between undertakings no matter which legal form they take. This is strengthened by the existence of Art 82, where the Member States made sure that even if the conduct is unilateral, it will not escape the ambit of European competition law.

4.4.3 The effect on trade between Member States

The third condition that can be read from the Article is that the agreement must have an effect on trade between Member States. This requirement is two-fold. Firstly, there has to be an 'effect on trade', and secondly this effect has to take place between Member States. It is not sufficient for the effect to take place in only one Member State, no matter how grave the consequences for competition law are in that specific state. At the same time, the condition expresses the existence of a lower threshold of an anti-competitive effect in order for Article 81 to be applicable. Both of these aspects are of importance for the Common Market goal, and they clearly show the intent of the Member States to focus on effective competition's influence on integration. However, the Treaty itself provides no further guidance on how either of them should be interpreted. Of special interest is the Italian version of the Treaty, where it is suggested that the effect on trade should be harmful or prejudicial to be relevant, thus indicating that just any effect on trade is not enough.⁸⁴ Knowing that Italy is one of the original

⁸³ In the following analysis I will use the term agreement to cover all forms of agreements, decisions and concerted practices.

⁸⁴ Jones and Sufrin, 2004:170.

Member States, it is likely that this reflects the view of the Member States when drafting the provision.

As has been seen above, there have been extensive discussions on how *regulatory* competition law should be in order to achieve the best result.⁸⁵ In applying a threshold, the Member States imply an inclination towards the Chicago view on competition regulations, and thereby they tend to step away from the *per se* view advocated by the Harvard School. This implies that the provision should be applied only when the negative consequences are grave enough, something that is emphasised by the construction of the exemption expressed in paragraph 3 of the Article. As has been expressed by the Chicagoans, in certain circumstances competition law may severely inhibit the growth of business. Differing between situations when competition law further business from situations where it restricts it is one of the more difficult tasks of competition legislation. Having a threshold, together with the possibility of exemption, enables the weighing of pro and anti-competitive effects of an agreement. This enables for an assessment where business motives are allowed to override anti-competitive effects. By keeping this window open, the possibility of guarding the positive effects of stable and prosperous economies, and their general pro-integrational effects, remains.

However, this is somewhat taken aback by the rather explicit listing of prohibited agreements. By listing the prohibitions, the Treaty guides the interpretation of the courts in a way which might limit their application of the Article. This also implies a more *per se* approach than the initial paragraph, which might be detrimental for a pro-integration application. At the same time, from the view of the concerned companies, a list will help the companies to interpret the Article, thus providing for a greater legal certainty and security when writing agreements. This might benefit the market and lead to more business initiatives than a less-specific Article would have done.

The term 'trade' is also broad and seemingly includes products, services and other financial transactions. This interpretation is strengthened by the general goal given by the four fundamental freedoms on which the European integration project rests, as mentioned above.

The second aspect of the requirement, that the effect must concern intra-state trade, again highlights the intention to create a Common Market. By adding this requirement, the Member States both exempt internal competition issues from the ambit of the Article, but also, and more importantly, emphasise the core of market integration; the removal of barriers to trade between Member States.

⁸⁵ See discussions on the Harvard, Chicago and ordoliberal School of thoughts in sections 2.1.3-2.2.2.

4.4.4 Agreements with the prevention, restriction or distortion of competition within the Common Market as object or effect

A fourth requirement is that the agreement must have as its object or effect the prevention, restriction or distortion of competition within the Common Market. This requirement can also be taken apart, and at least three aspects of it deserve commenting upon.

Firstly, the Member States have chosen to prohibit both the object and effect of an agreement. The inclusion of ‘object’ implies a *per se* view on illegality, and leaves little scope for allowing agreements which do not actually lead to an anti-competitive effect. Nevertheless, agreements which do not lead to any effect on competition or on trade will be stopped through the previously discussed requirement of effect on trade. However, by adding ‘object’ to the scope of illegality, the Member States seem to wish to include agreements that are not followed through, that could not be followed through or that will not actually lead to an anti-competitive effect even if they are followed through, just because there is an anti-competitive *intent* behind. The placing of ‘object’ before ‘effect’, also suggests that the object of an agreement is more important than its effect. Not only does this lead to mere intent being illegal, which in my view always will be an unjust violation of individual freedom, but also, and more importantly, it may lead to detrimental effects for integration. Competition law is a balancing act, and taken too far, I fear it might rather harm than benefit the market, as was illustrated by the Chicagoans.

Secondly, by using the phrase ‘the prevention, restriction or distortion’, the Member States again try to ensure that all unwanted behaviour is caught, and that application of the Article will not fall on a too technical interpretation of the term. It is, however, noteworthy that all those three words are negatively charged, implying that the object or effect cannot concern an effect on competition which can be perceived as pro-competitive. This might seem self-evident, but still, when mere intent is outlawed, it is of great importance to limit the scope of which intents that will be outlawed. This also sends a signal to the concerned companies about what type of agreements that are intended in the provision, which may increase the legal certainty.

Finally, the requirement ends with a reference to competition within the Common Market, and it thereby restates that the Article is only concerned with intra-community trade.

Looking more specifically at the list of prohibited agreements, both the integration aim and the consumer welfare aim can easily be spotted. The list is non-exhaustive, which can be seen through the phrase ‘in particular’. I

will briefly comment on some of the mentioned agreements and their possible effect on integration.

81(1)(b) limit or control production, markets, technical developments, or investments;

This makes a clear reference to the removal of barriers to trade. Limiting any of these aspects will have obvious anti-integrational effects. As has been seen with the American example, technical developments often lead to pro-competitive advantages, both product-wise and concerning e.g. distribution possibilities between Member States. Cross-border investments also lead to more intertwined national economies, and thus a higher level of integration.

81(1)(c) share markets or sources of supply;

This is a reference to the dividing up of territory, something that, if allowed, would have very harmful effects on both competition and integration, since it leads to the erection of geographical barriers to trade. Dividing up territories for sales, or purchases, is a common way to avoid competition. By creating separate markets where the producer (or more uncommonly, the buyer) can determine the conditions of the market, the very concept of competition is disrupted. For evident reasons, this type of market partitioning will risk having highly negative consequences for integration. However, certain positive aspects may also flow from agreements of this kind. These will be discussed further when assessing the approach taken by the Courts and the Commission on this matter.

81(1)(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

Through these types of agreements it is possible to reach the same type of results as by explicit territorial restraints, and thus the same type of reasoning as above will apply to these agreements.

4.5 The exemption under Article 81(3)

As mentioned above, the possibility of an exemption from the Article provided by Article 81(3) adds to the leeway given to the Courts in deciding the case. By this, they are given a possibility to weigh possible pro and anti-competitive aspects, this is thereby a step away from a *per se* view on the prohibition.

The two positive conditions – firstly, that the agreement must improve production or distribution of goods, or promote technical or economic progress, and secondly, that the consumers must get a fair share of the resulting benefit – again shows the balancing act between the main aims of competition; market integration and consumer welfare. It is, however, relevant to ask whether these two aims are fully compatible. Some agreements, which might be detrimental for the consumer, might lead to benefits for integration. If an undertaking is allowed to protect its interest or

collude with competitors this is likely to increase the competitor's incentives to invest. This might increase single market integration, though it might happen at the expense of the consumer. This will be examined further when discussing the interpretation of the Courts and the Commission.

The two negative conditions require that the competitive restriction is not indispensable to the attainment of the beneficial objective and that the agreement will not lead to the elimination of competition. The requirement that the agreement must not lead to the elimination of competition suggests that a *decrease* in competition will be accepted, as long as not all other competitors, or all other competition, are eliminated. This reflects a view more in line with the Harvard School of thoughts than the Chicago School. It is questionable if the protection of the competing firms, if they are not able to compete on their own merits, really should take precedence over an agreement which otherwise should have been cleared by Art 81(3). This opens up for the protection of small companies at the expense of both competition goals (if we follow the Chicagoans thoughts) and over integrational goals.

4.6 Art 81(2) – The consequence of an infringement

Art 81(2) prescribes that all agreements conflicting with Art 81(1) shall be void. Against the conflict concerning the implementation of the provisions between in particular France and Germany, it is surprising that this consequence was so explicitly placed in the provision, since it implies that the provision shall be given direct legal consequences in the Member States. It thus implies a supra-national aspect to the Article, but also the existence of a body with the power to enforce the provision. Due to the ambiguity concerning whether the European competition law was to serve as a guideline for the internal implementation of competition law or as actual law, this provision is interesting. It is important to keep in mind, however, that at this time there was no direct effect of treaty provisions, and it is unlikely that the Member States at the point of drafting the Article envisaged a supra-national implementation of this provision. Rather, they most likely intended the enforcement body to be the national courts rather than the European Courts. Additionally, the specific competition provisions would, at least in the eyes of e.g. France, serve more as guidelines for the Court, or even for the legislator, rather than as actual, directly enforceable, provisions.

The enforceability of the provisions, and the issue of a supra-national or national enforcement, of course highly affects the level of integration. National implementation will lead to different interpretations, which might lead to a double burden on the companies involved in cross-border trade, who then have to comply with several interpretations of competition law.

However, despite the positive aspects of harmonisation of legislation, with the European Community still at such an early stage, it is hard to imagine that the Member States envisaged an implementation as centralised as then came to be the case.

4.7 Conclusion

It is evident from the wording of the provisions, that originally the Member States placed the creation of a Common Market as one of the main reasons for competition law. This can be seen through both the opening articles, Articles 2 and 3, and through the formulations used in the specific competition articles, Articles 81 and 82. To a large extent, this goal is mirrored in the way that the provision is shaped. However, given the balancing of consumer welfare with market integration concerns, Article 81 is open for an interpretation focusing on both aspects, and at some points the Member States seem rather indecisive, both concerning this, and whether to adhere to the more regulatory attitudes of the Harvard School and the ordoliberalists or the more *laissez-faire* attitude of the Chicago School. The weighing between the integration aim, consumer welfare and the promotion of business also creates for possible conflicts when the different aims cannot be achieved simultaneously. The balancing done by the Courts and the Commission in this respect will be dealt with further on in this thesis.

5 The role of the Courts and the Commission

The role of the Courts and the Commission in European competition law cannot be overestimated. Undoubtedly, they have been ‘the motor of development’ from the initial years to today. The initial competition provisions have not changed since the initial wording in the Rome Treaty, but the application of them by both the Courts and the Commission has led to a more extensive interpretation than was initially both intended and anticipated by the Member States. The development of Community law, and especially of principles such as supremacy⁸⁶, direct effect⁸⁷ and state liability⁸⁸, has increased the importance of European law in general, and thereby also of European competition law. It thereby also shows the great importance of the ECJ in the development of the European legislation and of the role of the EU.

Due to both procedural provisions and a lack of interest and experience from the Member States, the development in the field of European competition law has been focused on the Courts and the Commission. Although European case-law soon allowed for private firms to sue in national courts on the basis of European competition law⁸⁹, the initiative and knowledge have in most cases stayed with the European Courts and the Commission rather than with the NCA or national courts. This section will briefly examine the respective roles of the Courts and the Commission before in the next section looking at the material substance of their decisions.

5.1 The role of the Commission

The Courts’ and the Commission’s respective roles in the implementation of competition law were not entirely clear when the Community was created. However, due to the above-mentioned lack of both experience and much interest among the Member States, they agreed in 1962 to transfer enforcement powers to the Commission through the co-called Regulation 17.⁹⁰ This Regulation has been highly important when shaping European competition law. It places great emphasis on the Commission’s central role as superior to the national competition agencies (NCAs). The Regulation

⁸⁶Case 26/62, *van Gent and Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, also Case 6/64, *Costa (Flaminio) v. ENEL* [1964] ECR 585, CMLR 425.

⁸⁷ Case 26/62, *van Gent and Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁸⁸ Cases C -6 & 9/90, *Francovich & Bonafaci v. Italy* [1991] ECR I-5357.

⁸⁹ Case 127/73, *Belgische Radio en Televisie v. SV Sabam* [1974] ECR 51.

⁹⁰ Council Regulation (EC) No. 17/62 of 13 March 1963 implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

has recently been replaced by Regulation 1/2003.⁹¹ The procedural rules are not the focus of this thesis, and it is sufficient to point out a few main features of the two regulations which will help us to understand the important role of the Courts, but especially of the Commission.

The two regulations both place the main initiative and enforcement powers with the Commission, although somewhat less in Regulation 1/2003. Regulation 17 stated that a Member State must cease an investigation if the Commission was pursuing the same subject (Article 9(3)). Furthermore, Article 9(1) provided that the Commission had sole jurisdiction over granting exemptions under article 81(3). The Commission was also given extensive decision-making, investigatory and enforcement powers. The combined effect of these provisions was to marginalise the roles of the NCAs and national courts.

A prominent feature of Regulation 17 was also the notification procedure, which provided that agreements which *might* conflict with Articles 81 or 82 of the Treaty should be notified to the Commission before entry into force. The Commission could then choose to clear them, either under Article 82, Article 81(1), or under Article 81(3). The Commission had a monopoly over the NCA in the application and interpretation of Article 81(3). This practice gave the Commission a great role in the implementation of competition legislation, since almost all agreements have aspects which might conflict with Article 81 or Article 82. Through the notification system, the Commission founded its role in broadly determining which agreements that were lawful or not in 'business Europe'.

The practice of notification proved very time-consuming and the Council soon gave the Commission powers, and even encouraged the Commission, to issue *block exemptions* regarding entire classes of agreements and concerted practices. These could be issued without previously consulting the Council.⁹² These block exemption regulations (BERs) became a kind of 'semi-legislation', which although not being formal legislation, still highly influenced the application of competition law in Europe, especially due to the important role of the Commission and their interpretations. Through the possibility to issue block exemptions, the Council provided the Commission with wide-engaging powers, which have not been awarded to the Commission in any other field.

Even with the possibilities of block exemptions, the system was unwieldy and cumbersome, and with the increasing emphasis on the principle of subsidiarity, the need for a system which involved the Member States to a greater degree was evident. This was addressed by Regulation 1/2003, which aims to decentralise the implementation and give the NCAs a greater

⁹¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules laid down in Articles 81 and 82 of the Treaty. [2004] OJ L1/1.

⁹² Regulation No 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, [1965] OJ 533.

importance for the implementation of competition law. Regulation 1/2003 was followed up by a number of notices.⁹³ The main features of the Regulation and the notices were the removal of the notification process and an increasing importance for the NCAs and the national courts. This is especially seen in the removal of the sole jurisdiction for the Commission to grant exemptions under Article 81(3). These changes decreased the importance of the Commission, since there are now several other instances which will interpret the provisions. However, the main initiative is still with the Commission, and it has not actually lost much of its powers. The new provisions still prescribe superiority to the Commission, e.g. in cases where both the Commission and the NCA initiate investigations into the same conduct. The notices given by the Commission will be guiding for the national implementation, since the NCAs are not allowed to go against the Commission's decisions or interpretation of the provision.

Additional to the investigatory, decisional and enforcement powers, the Commission greatly influences the path of European competition law through its notices. These provide guidance to both national courts and companies on how competition law will be interpreted by the Commission in its rulings. They are not legally binding, but they are often based upon previous court rulings and thus binding in those aspects. They will also provide guidance on how the Commission would decide a case. Due to the vast number of matters that never reach the Court, and are instead decided finally by the Commission, they are of great importance. The Commission also aims to cover most of the areas which may come up in the interpretation of the competition regulations. For natural reasons, not all of these will have been dealt with by the Courts, and some gaps will be filled by the Commission. In many areas, the Commission does also go 'far beyond that which the European Court wanted to approve'⁹⁴ and will thus develop the area of law.⁹⁵ Since many of the Commission's decisions do not go to Court, due to the unwanted cost and time delays for the involved companies, much of what the Commission says will in fact be the final decision. Since the Commission relies on its notices in making the decisions, the entire notices, and not just the parts based on previous case-law, becomes the 'effective law' for the concerned companies. This is strengthened by the recent practice that the companies should assess their agreements themselves, rather than notifying them to the Commission. When the companies do the assessment, the notices will be one of the most important tools.

⁹³ Commission Notice on Immunity from Fines and reduction of fines in cartel (2002/C 45/03), Commission notice on Co-operation within the Network of Competition Authorities (2004/c 101/03), Commission Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC (2004/C 101/04), Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004/C 101/05), Commission notice on Informal Guidance relating to Novel Questions concerning Articles 81 and 82 of the EC Treaty that arises in individual cases (guidance letters) (2004/C 101/06).

⁹⁴ For more information see Niederleithinger, 1990.

⁹⁵ For an example of this see the reasoning under section 6.4.2 with regards to the case *Völk* and the Commission's De Minimis Notice.

5.2 The role of the Courts

The role of the Courts within the European Union has not been defined so much by regulations and directives as by the Courts themselves, especially by the ECJ. The importance of the ECJ for the development of the EU has already been seen in cases such as *van Gend et Loos*.⁹⁶

In defining its role, the Court relied heavily on competition law cases. As put by Gerber:

‘Viewing itself as the principle ‘motor of integration’, the court took advantage of the special circumstances offered by competition law and made that system an important ‘vehicle’ of integration whose strength would, in turn, further amplify the Court’s power.’⁹⁷

The role of the ECJ had no equivalence in the role of the national courts of the Member States, and the timing of the first cases was very relevant to the success of the Court. The first important competition cases reached the court during the mid-1960s, i.e. during the conflict leading up to the *Luxemburg Accords*.⁹⁸ In those times of political turmoil, the Court was the only institution that managed to continue the process of integration.⁹⁹ This was a position it subsequently held also when other political circumstances made political progress towards integration difficult, e.g. the oil and financial crisis during the 1970’s.

The opportunity given was seized by the Court, which took it upon itself to not only give a ruling in the actual cases, but to expand and also provide additional guidance to the Commission for the development of this field. The Court here established its *teleological interpretation method* and placed integration as the central goal for the Community.¹⁰⁰

5.3 The relationship between the Courts and the Commission

Especially during the initial phases, the Court and the Commission was very dependent of each other. The Commission relied on the Court’s position as a ‘non-political’ motor for development, and the Court relied on the Commission to bring forward cases on which it could give its ‘non-political’, but still politically highly important rulings. A decision declaring

⁹⁶ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend and Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁹⁷ Gerber 1998:351.

⁹⁸ Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

⁹⁹ Gerber 1998:352.

¹⁰⁰ *Ibid.*

the EU's supremacy over national legislation is undoubtedly very political, and if it were to be passed by a political forum, it would most likely have been the object of great scrutiny. However, when instead the 'non-political' Court decides on it, it will face less scrutiny, and therefore stand a greater chance of being adopted. It is questionable if this approach to policy-making is really the best way, especially due to the fact that the Court is an entirely undemocratic forum. Indeed, the Council has also been accused of suffering from a democratic deficit since the decision-making is too many steps away from the voting public. Still, in the case of the Council, at least there is some kind of democratic appointment system in the background.

If looking beyond the fact that the decision-making is undemocratic, it is doubtful if the EU would have come even close to what it is today if the Court had not been as eager to pass principal rulings as it has been. This is especially true since the EU consists out of Member States that each have national interests to protect, and therefore do not always see to the best interest of the EU. The role of the Court as policymaker might thus be necessary if the EU is to do what the Member States wanted it to do, to further integration and prevent war.

During the 1980s, the Court slowly moved away from its original activist position where it had focused on giving principled rulings on substantial matters, to instead giving rulings concerning more procedural issues and rulings *developing* previously established case-law. During this period, the Court also moved towards a more effect-based view on interpretation, which replaced its previous formal view. This led to a continued co-dependence with the Commission, as the Court relied on it to provide the material foundation for the evaluation.¹⁰¹ The Court has commented on its own role in reviewing the Commission's evaluation of the complex economic matters in the *Remia* case:

'The Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated, and whether there has been any manifest error of appraisal or misuse of powers.'¹⁰²

In 1989, the Court of First Instance was established. This court was established mainly to deal with competition law, and its existence has reduced the role of the ECJ to mainly being a court of appeal in competition cases. The ECJ is thus provided it with fewer opportunities to rule on competition cases, naturally leading to fewer important rulings.

The CFI, being a first instance court, does not have the same possibilities to make bold statements, and thereby the role of the Courts in relation to the

¹⁰¹ Gerber 1998:373.

¹⁰² Case 42/84 *Remia and Nutricia v. Commission* [1985] ECR 2545, 75.

Commission is further decreased. This adds to the reduction of the influence of the ECJ's rulings on the interpretation of competition law.

When the Court's influence was reduced, the Commission's political power grew in comparison, and it was therefore able to act more independently from the Courts. The Courts have the final decision in all European legal issues and their case-law will always be the highest source of interpretation. However, given the lengthy proceeding and the massive costs involved for a company that wants to initiate legal proceedings, the opinion of the Commission is often of a greater practical importance for the concerned company. Thus, it will often be more economic for the company to comply with a decision of the Commission than appeal against it in court, both due to the cost, but also since in many cases, the agreement will not be relevant anymore if it cannot be carried out until after lengthy proceedings.

Throwing a glance at the possible future developments, there has been put forward arguments that the role and the power of the Commission will lessen due to the removal of competition from the aims of the EU in the Reform Treaty.

‘This will probably not change the direction of individual cases tomorrow. But there is a risk that it will weaken the actions of the Commission in relation to competition, particularly in its approach to Member States on issues such an energy market liberalisation.’¹⁰³

What this change will result in is yet to be seen. A possible development might also be that the Commission is forced to fight harder to defend its strong position in the field of competition law. However, regardless of the result of the change, both the recent and the future role of the Commission in implementing the European competition policy cannot be overstated.

¹⁰³ Bavasso, A., *The Reform Treaty: bad news for the European economy and bad news for consumers.*, 26 June, 2007. Available on www.allenoverly.com.

6 The interpretation by the Courts and the Commission

The purpose of this thesis is to determine how well competition law, with special focus on Article 81, has succeeded in pursuing the market integration aim. The extent to which the Member States succeeded when drafting the original provisions has already been dealt with.¹⁰⁴ However, as will be shown below, the subsequent rulings of the Courts and the decisions and notices by the Commission of great, if not superior, importance for the practical application of competition law. The following examination of the practical application of the rules will follow the conditions of Article 81 as formulated by the Courts.

6.1 General remarks

The Courts have often used a teleological method of interpretation of the conditions of the Article, trying to bring the application as close to the intended aims in Articles 2 and 3 as possible.

As will be seen, the Courts have dealt with the Article as comprised of five conditions rather than four. This has been done by interpreting the condition that the agreement should have an effect on trade between Member States as two separate conditions. Firstly, that the agreements should have an effect on competition as such, and secondly, that the agreement should have an effect on cross-border trade between Member States.

Additionally, the Court has chosen to interpret some of the conditions as more procedural than material. In doing so, it has often used a broad interpretation in order to expand the area in which the EU has jurisdiction. This creates a greater harmonisation, creating many benefits from an integrationist point of view, which have been discussed above.

A broad application also leads to fewer agreements that would escape the ambit of the Article. This will provide for a great number of cases falling under the European regulations rather than under the national regulations, thus leading to a greater harmonisation. With the procedural regulations leading to the NCAs being subordinate to the Commission and the Courts, the fact that a matter falls under the EU's jurisdiction will mean that the company only will have to follow the Community regulations, instead of the double burden of following both the national and the European rules. This will be beneficial especially in cases where a company operates in several countries, which is one of the main ideas of an integrated market. A broad

¹⁰⁴ See section 4.4.1-4.4.4.

application may also serve the purpose of increased legal certainty, which may benefit the efficiency of the market.

However, it may be questioned if the Member States originally intended the ECJ's jurisdiction to be as broad as it is today. Even if they wanted the application to be broad, it is likely that the Member States, as previously discussed, were planning to apply the provisions in their national courts rather than through the ECJ.

6.2 The conditions of Article 81(1)

6.2.1 Undertakings or associations of undertakings

Generally, the condition that the parties to the agreement must be undertakings, or associations of undertakings, has been interpreted very broadly, and it may be suggested that the Court has viewed it as mainly jurisdictional. The main definition is given in the case *Höfner and Elser* as 'every entity engaged in economic activity', no matter if the entity is pursuing to gain profit or not.¹⁰⁵ Entities may even fall under the Article even if only parts of its activities are of an economic nature.¹⁰⁶ Already this interpretation is broad enough to catch most organisations, and it has been made even broader through decisions made by the Commission. An example is *FIFA*¹⁰⁷, where it was established that the legal form of the entity was irrelevant.

The broad application, and the emphasis on economic activity, follows the wording of the Article and thereby the likely intentions by the original Member States. It is also in line with the focus on economic integration that was a main aim for the Member States.

6.2.2 An agreement, decision or concerted practice.

The condition that it must be an agreement, decision or concerted practice has also been interpreted broadly, in order to cover all types of collaboration between companies. The Commission and the Court have even ruled unilateral conducts without consent from one of the parties as an 'agreement'.¹⁰⁸ Recently, however, the Courts have focused more on the

¹⁰⁵ Case -41/90, *Höfner and Elser v. Macotron* [1993] ECR I-1979, see also Case C-199/92 *P, Hüls AG v. Commission (Polypropylene)* [1999] ECR I-4287.

¹⁰⁶ Case C-475/99, *Ambulanz Glöckner v. Landkreis Südwestpfalz* [2001] ECR 8089. For a more thorough analysis of the condition see Jones and Sufrin, 2004:106-127.

¹⁰⁷ *The Distribution of Package Tours During the 1990 World Cup* [1992] OJ L326/31.

¹⁰⁸ Case 107/82, *AEG-Telefunken v. Commission* [1983] ECR 3151.

actual existence of a concurrence of wills. The main definition of an agreement can be found in the CFI ruling in *Bayer*, later upheld by the ECJ.¹⁰⁹

‘It follows that the concept of an agreement within the meaning of Article 81(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form of which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention.’¹¹⁰

The application of the Article is made even broader than the interpretation of ‘agreement’, due to the insertion of the term ‘concerted practices’ in the Article. ‘Concerted practices’ provides a fall-back alternative to agreement, and allows for conducts which fall short of being an agreement to still fall under the scope of the Article.

The main definition of concerted practices is given in *ICI* as:

‘... co-ordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.’¹¹¹

The ruling suggests that at least common intention is necessary in order for the conduct to amount to a concerted practice. However, given the broad interpretation of ‘agreement’, the stage where an ‘agreement, properly so called’, has not been concluded should include most similar conducts on the market, many of these conducts will be the result of similar business strategies, and are not the result of a concerted practice. In the case *Polypropylene*¹¹², the Court added that, in difference to agreements, the concerted practice must be followed up by action, while mere intentions do not suffice.

Conclusively, the Court has adopted a broad application on those agreements and concerted practices, which can be said to be in line with the wording and thereby the intention of the Member States.¹¹³ However, this broad application gives rise to a complicated balancing between normal unilateral business behaviour and concerted practices. In concentrated

¹⁰⁹ Case T-41-96, *Bayer AG v. Commission* [2000] ECR II-3383, para 69, and Cases C-2 and 3/01 P, *Bundesverband der Arzneimittel-Importeure EV and Commission v. Bayer AG* [2004] ECR 23.

¹¹⁰ Case T-41-96, *Bayer AG v. Commission* [2000] ECR II-3383, para 69.

¹¹¹ Cases 48, 49, 51-7 – 7/69, *ICI v. Commission*, [1972] ECR 619, paras. 64 and 65.

¹¹² Case C-199/92 P, *Hüls AG v. Commission (Polypropylene)* [1999] ECR I-4287.

¹¹³ The current case-law has been summed up by the Commission in their *Belgian Beer* decision. *Interbrew and Alken-Maes* [2003] OJ L200/1.

markets, it will often be natural for companies to adopt similar business strategies, and their prices and conditions will often resemble those of their competitors. This might rather be the result of strong competition than an anti-competitive behaviour, and when applying the criteria it is crucial that the Courts and the Commission are careful not to cause an application which will be detrimental rather than beneficial for the market, and thereby the European integration.

Conclusively, the application of this condition is very broad, catching a wide range of behaviours. From an integrational perspective this lead to both positive and negative consequences. Among the positive aspects are the vast number of cases falling under the Article and the harmonisation that this lead to. On the negative side is the possible outlawing of normal, competitive behaviour and the damage that this may cause the market. This highlights the importance of a balanced interpretation under the other conditions of Article 81.

6.2.3 Agreements with the prevention, restriction or distortion of competition as object or effect

The condition that the agreements should have the prevention, restriction or distortion of competition within the Common Market as object or effect is at the core of the implementation of competition legislation. It is when assessing this that the main material examination takes place. The interpretation of this condition is also the area that has attracted the most debate and criticism during the years. In particular, the Courts and the Commission have been criticised for adopting a very formalistic approach to the interpretation¹¹⁴, and for not doing a thorough enough analysis of the effect of the agreement. Instead, they have concluded that since the agreement poses an infringement on the parties' freedom of action, this is enough to amount to an infringement of competition. This reasoning risks outlawing most agreements since an agreement often aims to restrict the parties' freedom in one respect or the other.¹¹⁵ The notification system provided by Regulation 17 also attracted criticism for being unwieldy both from external commentators and from the Commission itself.

To some extent, the Courts and especially the Commission have listened to this criticism, and have adopted a more economic approach in recent years. This can be seen through e.g. the adoption of the Vertical Regulation,

¹¹⁴ See e.g. Hawk, B.E. *'System Failure: Vertical Restraints and EC Competition Law'*, (1995) 32, CMLRev 973. This article have had great importance, and have been seen as the 'straw which broke the camel's back' and made the Commission re-evaluate its position on vertical restraints. Jones and Sufrin, 2004:620.

¹¹⁵ See e.g. Jones and Sufrin 2004:619. For further reading see Deacon, D., *'Vertical Restraints under EU Competition Law: New Directions'*, (1995), Fordham Corp Las Inst.

followed by the Vertical Guidelines, and then by the Horizontal Guidelines. These will be discussed further under section 6.2.3.2.

6.2.3.1 The relationship to Article 81(3)

Both the condition of the distortion of competitions and Article 81(3) in itself, require an analysis of the contents and the anti-competitive object and effects of an agreement, and they are therefore closely linked. The ECJ has, however, struck down the attempts by the Commission to substitute a thorough analysis under Article 81(1) for an analysis under Article 81(3). Instead, it held that before looking at Article 81(3), an infringement of Article 81(1) must be established.¹¹⁶

Following the outline of the Article, the methodology of the Article would be to first establish whether the agreement has infringed Article 81(1). If so, one looks to Article 81(3) in order to see if the agreement can be exempted. If this is the case, the agreement is caught by Article 81, and the consequence of this infringement is given by Article 81(2). This is, however, not the methodology prescribed by the Commission. In its guidelines on vertical restraints, the Commission suggests a methodology where the companies first assess whether the agreement may fall under the Vertical Regulation, i.e. if it falls under Article 81(3). Only if it does not fall under an exemption is it necessary to examine if it actually infringes Article 81(1) in the first place.¹¹⁷ Even if it is easy to understand the practical benefits of this method, as the block exemption in the Vertical Regulation is easier to apply than the assessment under Article 81(1), it does give rise to some legal concerns since it presumes illegality rather than legality – a rather dubious method.

The focus this places on assessment under Article 81(3) over Article 81(1), is, its legally dubious aspects aside, not necessarily negative for integration. Article 81(3) provides a more extensive possibility to weigh the positive and negative effects of the agreement.¹¹⁸ Given the Courts' teleological approach to the interpretation of the Article, with the integration goal close in mind, the Courts and the Commission have an opportunity to clear agreements which are over-all beneficial to integration.

¹¹⁶ Case T-374-375, 384 and 388/94, *European Night Services v. Commission* [1998] ECR II-3141.

¹¹⁷ Regulation 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. [1999] OJ L336/21. (Hereinafter referred to as the Vertical Regulation.) Para 120.

¹¹⁸ See more under section 6.3.

6.2.3.2 The object or effect

Article 81(1) catches both agreements with the object and the effect of distorting competition. The drawbacks of such a broad application have already been discussed above, and a narrowing by the Courts and the Commission, in terms of the scope of ‘object to distort competition’ would have been welcomed. However, rather than focusing on the effect of distorting competition, the interpretation has gone in the other direction, emphasising the object over the effect. Already in its early case-law, the Court established that an object to distort competition is enough to be caught by Article 81(1), even where there can be seen no actual effect on competition.¹¹⁹ The ECJ has even stated that the object should be examined first, and the effect is only necessary to assess if an object cannot be found.¹²⁰

This interpretation is probably in line with the original Member States intention as it has been phrased in the Article. However, as has been discussed above, the detrimental effects of this approach, both from a legal and an integrational point of view, are grave, and it is regrettable that the Courts have not taken the chance to limit this approach.¹²¹

6.2.3.2.1 Vertical Agreements

6.2.3.2.1.1 General remarks

Agreements can be divided into vertical and horizontal. A horizontal agreement is an agreement between actors operating on the same level of the market; most often this will mean an agreement between competitors.¹²² Classically, a cartel would be an example of a horizontal agreement. Correspondingly, a vertical agreement is an agreement between non-competitors working on different levels on the market, e.g. between a distributor and a supplier.¹²³

In the early case *Consten and Grundig*, the ECJ established that Article 81 applies to both horizontal and vertical agreements, and during the early phases the main focus of the Courts and the Commission was vertical agreements rather than horizontal.¹²⁴ This might seem strange, since cartels have more obvious anti-competitive effects. However, it makes more sense

¹¹⁹ Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

¹²⁰ See e.g. Case 56/65, *Société La Technique Minère v. Maschinenbau Ulm GmbH* [1966]

¹²¹ For further discussion see e.g. AG Roemer in Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299. See also Amato, 1997.

¹²² For a definition see Guidelines on Vertical Restraints, [2000] OJ C219/01. (Hereinafter referred to as the Vertical Guidelines), Para 1.1.

¹²³ For a definition see Vertical Regulation, Article 2(1).

¹²⁴ Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

when bearing in mind the objectives of competition law – single market integration. As will be seen below, vertical agreements, which often deal with distribution over state borders, were seen as a way of re-establishing the borders that the Commissions had fought so hard to remove, and therefore they were forcefully addressed during the initial phases of implementation.¹²⁵ This is especially true before the SEA was signed and the SEM was completed, when the political will did not allow for integration to move forward in the same speed as the Court could do through their rulings.

6.2.3.2.1.2 Different types of vertical agreements

The classical vertical agreement is conducted between a distributor and a supplier, but it can also be conducted between e.g. a producer and a second-line producer. What is relevant for the purpose of competition is that the parties to the agreement are not competitors, and that they act on different levels of the distribution chain. The early implementation of competition regulations mainly focused on distribution agreements, since they were considered to be able to restrict competition and integration the most, but there has subsequently been a shift towards horizontal agreements.

There are many types of distribution agreements, all with different benefits for the parties, and different complications for the purpose of competition and integration.

6.2.3.2.1.3 The main pros and cons of vertical agreements

Vertical agreements are common on the market, and they bring with them both positive and negative consequences for competition and market integration. There has been much discussion on how severe the consequences on competition of these agreements really are, often with the Chicagoans on the one side, advocating the benefits of the vertical restraints, and the ‘rest of the world’ on the other side.¹²⁶ The main argument of the Chicagoans is based on their view of the self-correcting nature of the market. They argue that since these agreements give rise to benefits for the producers and the buyers, this will spread to become benefits for the consumers. If the benefits do not spread downwards to the consumers, the consumers will choose another product. The producers will be forced to share their benefits, through e.g. lowering the prices, in order to maintain their costumers.¹²⁷ According to leading Chicagoans, vertical restrictions are *per se* efficient, since they produce efficiency gains for the companies. The truth, and especially the simplicity, of this argument can be, and has been, questioned. The assumption that costumers always will change given a lower price alternative, or that indeed price comparison is the main method of choosing, has been criticised, as have the statement that the

¹²⁵ See e.g. Jones and Sufrin 2004:619.

¹²⁶ See e.g. Scherer and Ross, 1990:541

¹²⁷ For further information on the Chicagoans views see e.g. Bork, R.H, ‘*The Rule of Reason and the per se Concept: Price Fixing and Market Division*’ (pt. 2) 75 Yale LJ, 373 (1966)

restrictions by necessity leads to efficiencies.¹²⁸ However, in the case of European competition law, the main focus when analysing the effects of vertical agreements has been the effect on integration, even if consumer welfare and other aims also have been given attention, especially recently.

There are many positive aspects of vertical agreements, both for the producers and for competition and integration. These are discussed both in the doctrine and in the Vertical Guidelines.¹²⁹

Firstly, the vertical agreements may help to solve the so-called ‘free-rider’ problem¹³⁰, i.e. when a reseller has put in investments to introduce a new product into the market, through e.g. advertising campaigns, and another reseller also starts selling the product, taking advantage of the investments without paying for them. The second reseller thereby has lower costs than the first, and may attract costumers by offering lower prices. The fear of ‘free-riders’ may work as a disincentive for buyers to invest money promoting a new product, and in order to solve this, distributors may want to guarantee that no other buyers may sell the product in the particular territory. This can be done through various types of limited distribution or market partitioning agreements, where the distributor agrees to sell to only one reseller in a certain area. In this way, the agreements may help open up a market for a new product which might not otherwise have been introduced. The new market may for instance be a new Member State, in which case the agreement in an effective way would help integration and cross-border trade. As will be seen, this issue has been dealt with by the Court in several important cases.¹³¹

Secondly, having a selective distribution agreement, whereby a distributor only sells to a certain type of buyers, may also be an effective way of promoting a new product. This can be the case for instance where a product requires a special kind of knowledge from the reseller or where a product is associated with a particular type of reseller, e.g. luxurious products. Also in this case, the agreement may help open up new markets and thus further integration.

Thirdly, having quantitative restrictions in agreements may facilitate the planning of production for the distributor, and thereby give rise to economies of scale. This may create efficiencies for the distributor, which will thus further business and may in longer terms further integration.

Fourthly, restrictions in vertical agreements are common in franchising agreements to protect the know-how of the business. Without this

¹²⁸ See e.g. Comanor, W.S., ‘Vertical Price-fixing, Vertical Market Restrictions, and the New Antitrust Policy’, (1985), 98 Harv LR, 983. See also above in section 2.1.5.

¹²⁹ See Vertical Guidelines, paras. 115-118. See also Craig and DeBúrca, 2004:604 f.f.

¹³⁰ Vertical Guidelines, para. 116(1).

¹³¹ Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299, see also Case 56/65, *Société La Technique Minère v. Maschinenbau Ulm GmbH* [1966].

protection, the expansion of franchising businesses would most likely be more difficult, causing detrimental effects on integration.

As can be seen, restrictions in vertical agreements are many times very beneficial, both for the parties and for integration. However, there are negative aspects as well, and the agreements have been an object of concern for both the Courts and the Commission on numerous occasions.

The main fear that vertical agreements give rise to concerns *market partitioning*, and that the agreement will help reinstall the national barriers that the Common Market project sets out to dismantle.

‘In the Community, there is a unique concern that agreements which impose territorial restrictions on dealers whilst restricting only intra-brand competition lead to the division of markets on national lines in contravention of the single market objective.’¹³²

The partitioning of the market through vertical agreement, even with the benefits of possibly introducing new products, often re-erects the same state line barriers to trade that the Community aims to eliminate.

Secondly, the Commission refers to the cost of the non-integrated Europe that these types of agreements contribute to. This refers to the benefits that Europe would access given a greater integration.

Thirdly, the agreements may help foreclosure the market for other competitors, since the resellers might be bound not to resell any other brands. This has a detrimental effect on integration since the second brand might not find a way in on the market. Thus, an entire territory, e.g. a Member State, might be impossible for the new company to enter.

Fourthly, vertical agreements may facilitate the creation of horizontal collusion between the resellers, i.e. cartels. The effects on this will be dealt with in connection with the issue of horizontal agreements below.

Conclusively, there are many reasons for a closer look at these types of agreements, and they have often been scrutinized by the Courts and the Commission.

6.2.3.2.1.4 The approach taken by the Courts and the Commission

As has been said before, the Courts’, but especially the Commission’s, approach to Article 81 have been heavily criticised. In 1996, the Commission adhered to the criticism and issued a Green Paper on Vertical Restraint urging for a debate on the issue. This led to the adoption of the

¹³² Jones and Sufirin, 2004:609. For a description of intra-brand competition see ‘List of important concepts’.

Vertical Regulation.¹³³ In 2002, the Regulation was followed by the Vertical Guidelines, dealing with the assessment of vertical agreements, both under the regulation, but also outside of it.¹³⁴ Through these, the Commission adopted a new approach where it pledged to adhere to a more economic and more flexible approach when interpreting the Article.

The Vertical Regulation functions as a Block Exemption under Article 81(3), under which all agreements can be assessed. This will further be addressed under section 4.3, where Article 81(3) is discussed. However, the Regulation serves a purpose also for the interpretation of Article 81(1), since it gives guidance on how the Commission values certain agreements. The Regulation also shows a new approach by the Commission in dealing with issues under Article 81.

The Commission acknowledges the benefits of vertical agreements in both the Regulation and the Guideline. Especially it mentions the economic efficiency that they can give rise to.

‘Vertical agreements ... can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings; in particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.’¹³⁵

The Commission also points out that vertical agreements may help to open up new markets, and facilitate for new companies entering the market. In the pursuit of this, it may even be necessary to allow territorial protection during the initial phases of an agreement.¹³⁶

In the following section, I will look at how the Courts and the Commission have interpreted the ‘object or effect the distortion of competition’. The change of attitude by the Commission has led to a loosening up of the interpretation in certain cases, but I will examine the main cases ruled on both before and after the enactment of the Vertical Regulation and Guidelines.

The methodology adopted by the Courts and the Commission has been to look at the object of the agreement before looking at the effect. Through the case-law, it has been established that certain types of vertical restrictions tend to be seen as having the object of restricting competition, whereas other are rather assessed under the ‘effect’ condition.

¹³³ Regulation 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21.

¹³⁴ Commission’s Guidelines on the Application of Article 81 of the EC Treaty on horizontal agreements, 2001/C, 3/02. Hereinafter referred to as Horizontal Guidelines.

¹³⁵ Vertical Regulation, para 6.

¹³⁶ Vertical Regulation, Article 5.

6.2.3.2.1.5 *The object of distorting competition*

Two types of agreements have been said to restrict competition by object; namely territorial restraints and price restraints. These types of restrictions are often called ‘hard-core’ restraints, and they are referred to in guidelines, block exemptions and Notices from the Commission.¹³⁷

The first important case in the field of territorial restraint is the case of *Consten and Grundig*.¹³⁸ In this case, a German manufacturer, Grundig, appointed the French reseller, Consten, as its exclusive agent in France. Through the agreement, Consten agreed among other things not to sell any of Grundig’s competing products and to order a minimum amount of Grundig products. In return, Grundig agreed to give Consten territorial protection in France, i.e. not to sell to any other resellers in France, and impose restrictions on resellers outside of France not to sell to customers in France. The agreement intended to give absolute territorial protection to Consten through the distortion of all parallel trade of Grundig’s products in the territory. The Commission concluded that this agreement had as its object the prevention of intra-brand competition. The parties appealed to the ECJ on several accounts, mainly arguing that without the agreement the French market would not have been penetrated at all, since no reseller would have risked the sunk costs involved without territorial protection.¹³⁹ Thus, the agreement led to positive effects on trade and integration, which could not be achieved without the restrictive agreement.

In the case, Advocate General Roemer argued that all cases require an examination of the market in order to determine if the agreement was likely to promote or restrict competition (i.e. an assessment of whether the agreement had an anti-competitive effect) regardless of the object. The analysis should, according to him, be between the situation on the market which the agreement gives rise to, and the situation which would have been without the agreement. He also argued that intra-brand competition should have been assessed as well, and that Article 81(1) should not be applied if Grundig would not have been able to penetrate the market without the agreement.

The Court did, however, not accept these arguments, and the agreement was outlawed based on having the object to distort competition. Through this case, the Court established as a firm policy that all absolute territorial restraints are infringements of Article 81(1), even when they lead to an increase in cross-border trade. In this case, the Court therefore seems rather to protect single market integration than fair competition as such. Even if the agreement could be economically justified, and indeed lead to increased

¹³⁷ See e.g. Commission Regulation 2659/2000 on the Application of Research and Development agreements, OJ L304/7, Commission Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ L304/3, Vertical Guidelines, Horizontal Guidelines, etc.

¹³⁸ Joined cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299, [1966] CMLR 418

¹³⁹ For a description of sunk costs see under ‘List of important concept’.

cross-border trade, it meant the dividing up of territories within, or between, Member States, which could not be tolerated.¹⁴⁰

It can be questioned if the Court did not go too far in this case, and whether the consequence of the ruling is not more harmful than beneficial for integration. The Article would probably allow for a more generous interpretation. Even if the Article outlaws object without effect, it also states that the object needs to be the prevention, restriction or distortion of competition. In line with that statement, it may be argued that the object of this argument was not that, but rather the introduction of a new product. Outlawing this type of agreements might make resellers reluctant to engage in new markets, since it often requires large investments costs. This might severely harm cross-border trade and investments.

Although still upholding the prohibition on *absolute* territorial restraints, the Court opened up for a somewhat more flexible interpretation in the case *STM*.¹⁴¹ The circumstances in this case were similar to those in *Consten and Grundig*, but with the difference that the resellers were not offered *absolute* territorial protection. Still, some parallel trade was allowed. This was enough for the Court to distinguish it from *Consten and Grundig*, and rather than assessing it under having the object, the Court assessed whether it had the effect of distorting competition. This important distinction resulted in a very different outcome, since when assessing the effect, the Court has adopted a much less formalistic approach where it stresses the importance of an economic analysis of the effects.¹⁴² Rather than the *per se* view in assessing the object of an agreement, the agreement should be examined based on the amount of competition that would have occurred if the agreement had not existed, much like AG Roemer suggested in *Consten and Grundig*. This led to a very different result, since in this case, the competition would not have taken place at all had the parties not been able to penetrate the market. In *STM* therefore, the Court accepted the argument that the restrictions were necessary in order to penetrate the market, and the agreement did therefore not infringe Article 81(1).

‘The Competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition law if the said agreement seems really necessary for the penetration of an area by an undertaking.’¹⁴³

Through this ruling, the Court lessened the effects of *Consten and Grundig*, and made it possible to construe agreements which give resellers some of

¹⁴⁰ For further information see Jones and Sufrin, 2004:198, see also Amato, 1997:48-9.

¹⁴¹ Case 56/65, *Société La Technique Minère v. Maschinenbau Ulm GmbH* [1966].

¹⁴² This will be examined further in the next section.

¹⁴³ Case 56/65, *Société La Technique Minère v. Maschinenbau Ulm GmbH* [1966] ECR 234, page 250.

the guarantees they need when engaging into a new, and possibly risky, market.

The Courts and the Commission have in numerous cases upheld the prohibition against absolute territorial restraints and parallel import bans, as well as agreements to that effect.¹⁴⁴ However, in the Commission's more recent approach, it has given voice to a more flexible and economic view, more in line with the views expressed in *STM*. In its Vertical Guidelines, it recognises the advantages of territorial restraints when approaching new markets, and thus opens up for limited territorial restraints.

‘Where a manufacturer wants to enter a new geographic market, for instance by exporting to another country for the first time, this may involve special ‘first time investments’ by the distributor to establish the brand in the market. In order to persuade a local distributor to make these investments it may be necessary to provide territorial protection to the distributor so that he can recoup these investments by temporarily charging a higher price.’¹⁴⁵

This does, however, not allow for absolute territorial restraints. The Commission also makes a distinction between ‘active sales’ and ‘passive sales’. It has been more generous in accepting territorial restraints when the resellers are allowed to do so-called ‘passive sales’, but are refrained from ‘active sales’. An ‘active sale’ appears when the reseller approaches the customer, e.g. through marketing or offers, whereas in a passive sale the customer seeks out the reseller on his own.¹⁴⁶ All marketing on internet is seen as passive sales.¹⁴⁷ Normally, restraints on active sales will be accepted, whereas restraints on passive sales are not accepted.¹⁴⁸

Even with the loosening up for ‘passive sales’, the Courts’ and the Commission’s strictness in this field, albeit in the pursuit of integration, may severely danger the very same object that it pursues. The risks with the interpretation are that there might be less cross-border trade and investment, whereas the risks with a practice of territorial restraints are less certain.¹⁴⁹

¹⁴⁴ For Commission decisions see e.g. *Konica* [1988] OJ L78/34, *Mercedes-Benz* [2002] OJ L257/1. For Court rulings see e.g. Case C-227/87 *Sandoz Prodotti Farmaceutici SpA v. Commission* [1990] ECR I-45, Case T-77/92, *Parker Pen v. Commission* [1994] ECR II-559, Case T-41/96, *Bayer AG v. Commission*, [2000] ECR II-3383. See, however, Case 27/87 *Erauw-Jacquéry Sprl v. La Hesbingonne Société Coopérative* [1988] ECR 1999 where absolute territorial protection was accepted under certain situations for concerning intellectual property rights.

¹⁴⁵ Vertical Guidelines, para 116(2).

¹⁴⁶ See e.g. Case T-208/01 *Volkswagen AG v. Commission* [2004] ECR 5141.

¹⁴⁷ Vertical Guidelines, para. 51.

¹⁴⁸ See Vertical Regulation Article 4.

¹⁴⁹ See Bork, R.H., ‘*The Rule of Reason and the per se Concept: Price Fixing and Market Division*’ (pt. 2) 75 *Yale LJ*, 373 (1966). For an opposing view see Comanor, W.S.,

Former Commissioner in charge of competition, Mario Monti, concludes that there is no economic evidence stating that territorial restraints are per se either beneficial or detrimental for the efficiency, and thus they should be ruled on a case-to-case basis. However, since this would lead to delay and uncertainty, he instead advocates a method with a *rule of thumb* differing lawful territorial restrictions from unlawful.¹⁵⁰

With the distinction between ‘active’ and ‘passive’ sales, the Courts and the Commission have created such a *rule of thumb* for when an agreement is unlawful, still, it is questionable if this is the correct line in the sand if their aim is to fully promote integration.¹⁵¹ When not allowing restrictions, the rules of competition may instead work as a disincentive for the companies to make cross-border investments.

The second type of agreements which have been ruled to have as their object the distortion of competition are resale price-maintenance agreements. These agreements have many benefits for the distributor, as a means of restricting the reseller from raising or lowering prices too much, and thereby protecting the brand, but also as a means to control the amount of service etcetera given to the producers.¹⁵² However, in the case *Metro I* the Court established that ‘price competition is so important that it can never be eliminated’, and therefore ruled that these types of agreements were unlawful.¹⁵³ This was emphasised by the ruling in *SA Binon*.¹⁵⁴ Resale price maintenance agreements do not provide for as many integrational aspects, and the more flexible approach taken by the Court and the Commission when assessing these types of agreements, also makes it less likely that the interpretation will hinder integration.¹⁵⁵

6.2.3.2.1.6 The effect of distorting competition

Only if the agreement does not have an anti-competitive *object* it is necessary to look at its *effect*.¹⁵⁶ As has been shown, a fairly limited number of agreements fall under the criteria of having as their object the distortion of competition, and many agreements will instead be examined in order to find if they have as the effect the distortion of competition. When assessing the effect of an agreement, the Court has clearly stated that it does

‘Vertical Price-fixing, Vertical Market Restrictions, and the New Antitrust Policy’, (1985), 98 Harv LR, 983.

¹⁵⁰ Monti, G. ‘Article 81 EC and Public Policy’ (2002) CMRev 1057-99.

¹⁵¹ For commentators who have, too, recognised the difficulty in combining the single market aim with the pursuit of undistorted competition in this field see e.g. Deacon, 1995.

¹⁵² See further Telsler, L., ‘Why Should Manufacturers Want Fair Trade?’, 3 J.L &E. 86 (1960).

¹⁵³ Case 27/76, *MetroSB-Grossmärkte GmbH v. Commission* (No 1) [1977] ECR 1875, para 25.

¹⁵⁴ Case 243/85 *SA Binon & Cie v. SA Agence et Messageries de la Presse* [1985] ECR 2015.

¹⁵⁵ For examples of a more flexible interpretation see e.g. Case 161/84, *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

¹⁵⁶ Case 56/65, *Société La Technique Minère v. Maschinenbau Ulm GmbH* [1966] ECR 234.

not wish to pursue the same formalistic approach as it has done when assessing the object. Instead, the agreement should be assessed in their market context and an economic approach should be adopted.¹⁵⁷ Now, this may seem to suggest that an approach should be adopted where the Court takes into account the positive effects that may flow from a certain agreement. And indeed, when assessing the agreements, the Court has accepted some economic justifications. A discussion therefore arose if this amounted to the Court accepting a ‘*rule of reason*’ approach to the application of Article 81(1), much like the approach in the US in the *Sylvania* case.¹⁵⁸ A ‘*rule of reason*’ would imply that when Article 81(1) is applied it would be necessary to weigh the pro and anti-competitive effects of the agreement in order to establish whether it infringed Article 81(1). This approach has also been advocated in the debate on the interpretation of the Article.¹⁵⁹ The Court, however, has rejected this notion in both *Métropole* and *Van den Bergh Foods*.¹⁶⁰

‘It should, however, be observed, first of all, that ... such a rule has not, as such, been confirmed by the Community Courts. Quite to the contrary, in various judgements the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful.’¹⁶¹

The CFI also refers to the existence of Article 81(3), and states that this is where the weighing of pros and cons should come in, and not under Article 81(1), since otherwise Article 81(3) would lose much of its meaning.¹⁶² The Commission has concluded that a rule of reason is not necessary under Article 81(1), since Article 81(3) ‘contains all the elements of a “rule of reason”’.¹⁶³ Thus, although the ECJ has in a few cases accepted a limited ‘rule of reason’ analysis under Article 81(1)¹⁶⁴, the main principle is that when assessing the fulfilment of the criterion of having as effect the

¹⁵⁷ Stated in Case 56/65, *Société La Technique Minère v. Maschinenbau Ulm GmbH* [1966], but restated in several subsequent cases. See e.g. Case T-374-375 84 and 388/94 *European Night Train Services*. [1998] ECR II-3141.

¹⁵⁸ See above.

¹⁵⁹ See e.g. Advocate General Roemer in Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299..

¹⁶⁰ Case T-528/93, *Métropole Télévision SA v. Commission* [1996] ECJ II-649, Case T-65/98, *Van Den Bergh Foods v. Commission* [2004] ECR II-649. See also Case-235/92 *P Montecatini v. Commission* [1999] ECR I-4539 and Case T-14/89 *Montedipe v. Commission* [1992] ECR II-1155.

¹⁶¹ Case T-528/93, *Métropole Télévision SA v. Commission* [1996] ECJ II-649, para. 72.

¹⁶² Case T-528/93, *Métropole Télévision SA v. Commission* [1996] ECJ II-649, para. 74.

¹⁶³ Commission’s White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty [1999] OJ C132/1, paras. 56-7.

¹⁶⁴ See e.g. Case 258/78 L.C. *Nungesser and Kurt Eisele v. Commission* [1982] ECR 2015 and Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis* [1986] ECR 353.

distortion of competition, positive effects on competition may not be used to counter-balance negative effects.

This leaves open the question of what types of assessments that needs to be done at this stage, if the weighing of positive and negative effects should be left for Article 81(3).

In the previously discussed case, *STM*, the ECJ established that a non-formalistic economic analysis should be carried out, where the agreement is assessed in the light of the competitions that would have occurred had the agreement not taken place.¹⁶⁵ The Court has further stated that the analysis should take into account the whole market context, including the existence of other, similar agreements active in the market.¹⁶⁶

An example of how the ECJ has interpreted cases in this respect, and the methodology used, is given by its approach concerning so-called ‘beer-ties’.¹⁶⁷ The methodology used by the Court was to first establish the relevant market, and secondly, to assess if there was an actual possibility to penetrate the market. Thirdly, the ECJ assessed to what extent the agreement contributed to this. This case emphasises the importance of an economic analysis, and even though it deals with ‘beer-ties’, it is useful for guidance in other cases as well.

6.2.3.2.1.7 Conclusion

Conclusively, the Courts have taken a very strict approach when assessing if an agreement has as its object the distortion of competition, whereas they have been more generous when examining the effect of an agreement. Since the Courts have only ruled on absolute territorial restraints and retail price maintenance as having an *object* the distortion of competition, most agreements will be examined based on their *effect*, with the possibility of weighing economic factors in the assessment. This creates for more opportunities to clear agreements which might on a first look seem anti-competitive, but can be seen to give rise to benefits for both competition and integration, when examined more closely. These effects can take place through, for instance, the increase of cross-border trade. This approach is likely to be in line with the Member State’s original intention, as it follows rather closely the exemplifying list in Article 81(1)(a-c).

¹⁶⁵ Case 56/65, *Société La Technique Minère v. Maschinenbau Ulm GmbH* [1966] ECR 234.

¹⁶⁶ Case 23/67 *Brasserie de Haecht SA v. Wilkin (No 1)* [1967] ECT 407, see also Case 56/65, *Société La Technique Minère v. Maschinenbau Ulm GmbH* [1966] ECR 234.

¹⁶⁷ Case C-234/89 *Delimitis v. Henninger Bräu* [1991] ECR I-935. A beer tie is when a brewer help a reseller, often a pub, with investments and equipment in exchange for exclusivity for the brewers product. The practice is very common among brewers.

6.2.3.2.2 Horizontal agreements

Horizontal agreements are agreements concluded between competitors. The agreement can pursue many different goals, e.g. to collaborate on a specific research project, to sell parts of a business to a competitor, to set standards within a certain industry etc. These types of agreements may have several beneficial outcomes for the surrounding society and indeed for the efficiency and integration of the Common Market.

Some horizontal agreements, however, aim to regulate and minimize competition between the competitors through e.g. establishing a standard price, higher than what it would have been without the agreement, or through dividing sales territories between different actors on the market. Those types of agreements are often referred to as *cartels*, and are seen as very detrimental for competition. They have therefore attracted attention both from the Courts and the Commission.

6.2.3.2.2.1 *The pros and cons of horizontal agreements*

The benefits for companies engaging in cartels can be explained through several economic theories.¹⁶⁸ Somewhat simplified, via a cartel, the companies have the possibility of jointly raising prices to a level above the competitive level. Through cartels, the competition in the concerned field is partially or entirely wiped out, and typically, the participating companies do not try to achieve any counteracting benefits which would weight out the detrimental effects of the cartel. The resulting increased prices will therefore occur at the expense of costumers, and consumer welfare. Additionally, there is a risk that the lack of competition inhibits the companies from developing more efficient productions and distribution methods, etc.¹⁶⁹ The detrimental effects of cartels have even caused Mario Monti to describe cartels as ‘cancers on the open market economy’.¹⁷⁰

However, some benefits may also arrive from the emergence of cartels. As was pointed out by the Chicago School, a cartel might help several smaller companies to, together, compete with one dominant, big firm. This competition might not be possible without the smaller firms collaborating. Taken in a larger perspective, this applies on firms which might be large in Europe, but small compared to the world market, when they compete with larger world-wide companies. If allowing European firms to collaborate, they might gain a competitive advantage towards e.g. American or Chinese firms. This leads to the issue of whether to protect the competition within Europe or the competitiveness of Europe towards the rest of the world. A few very large European firms might help Europe to compete better with

¹⁶⁸ See e.g. the ‘Prisoners Dilemma’ in Nash, J., 1950. *Equilibrium Points In N-Person games*. Proceedings of the National Academy of Sciences 36(1): 48-49.

¹⁶⁹ See e.g. ‘*Hard Core Cartels, Recent Progress and Challenges Ahead*’, OECD, 2003, available in the OECD’s website.

¹⁷⁰ Monti, M., ‘*Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?*’ 3rd Nordic Competition Policy Conference, Stockholm, 11-12 Sept. 2000.

other large firms in the rest of the world, but it might at the same time reduce the competitiveness of the markets within Europe, since there would only be a few actors on each market.

It should also be pointed out that in a market with few actors, the companies might align their behaviour due to normal market forces. The result will sometimes be very similar to a market where the actors have actively agreed to collude in a cartel. All the companies may however singularly have realised the benefits that would come to them all, if all raise the above competitive prices. If they do this without an explicit agreement to do so, it is referred to as ‘tacit collusion’¹⁷¹, which does not fall under Article 81(1).¹⁷²

When discussing the dangers of a cartel, it is also important to remember the Chicago School’s arguments concerning the inherent instability of cartels. As will be remembered, the Chicago theorists claimed that market forces will almost always break up a cartel, since other actors will see a possibility to under-cut the prices raised by the cartel. This argument is, however, somewhat undermined by the proved existence of long-term running cartels¹⁷³, and even the Chicagoans agree that some cartels need to be addressed by legislation.¹⁷⁴

The application of competition law has focused on so-called hard-core cartels. These have been defined as:

‘an anti- competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.’¹⁷⁵

Certain areas are seen to be more prone to the emergence of cartels than others. The factors often seen in markets with a larger frequency of cartels are inelastic demands, high barriers to entry, a highly concentrated market with few actors, homogenous goods in the market, high transparency in the market etc.¹⁷⁶

¹⁷¹ See e.g. Bishop and Walker, 2002, para. 5.08.

¹⁷² Case C-89, 104, 114, 166-17, and 125-129/85, *Re Wood Pulp Cartel: Ahlström Oy v. Commission (Wood Pulp II)* [1993] ECR I-1307.

¹⁷³ See e.g. *Peroxygen Products* [1985] OJ L230/1 CMLR 457, where the Commission fined a cartel which had been in operation for over 20 years. See also *Soda Ash* [1991] OJ L152/1, where the cartel is believed to have been active since the 19th century.

¹⁷⁴ Bork, 1978:67. See also Posner, 1967.

¹⁷⁵ OECD Publication C(98)35, FINAL, of May 1998, available on OECD’s website.

¹⁷⁶ For further information see Jones and Sufrin, 2004:776. See also Monti, M., ‘*Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?*’ 3rd Nordic Competition Policy Conference, Stockholm, 11-12 Sept. 2000.

From having focused on vertical agreements during the initial years of European integration, the main interest of the Commission is now aimed at cartels. This can be seen e.g. through the increased number of cases dealing with cartels, both from the Courts and the Commission.¹⁷⁷ It can also be seen through notices by the Commission¹⁷⁸, through the modernisation of procedural rules and through the new so-called *leniency program*.¹⁷⁹ These all represent a shift in focus, from vertical agreements to horizontal.

However, not all horizontal agreements are cartels which have as their aim to distort competition. Some horizontal agreements will be of great benefit for both the market and integration. Such agreements may for instance be agreements concerning joint research or other joint projects, concerning industrial standards, or concerning joint distribution. The benefits of these types of agreements are recognised by the Courts and the Commission, and they are often exempted under Article 81(3), e.g. through different block exemption regulations (BERs).¹⁸⁰ These will be dealt with below when discussing Article 81(3).

6.2.3.2.2 The approach taken by the Courts and the Commission

The distinction between object and effect is less important when discussing cartels, than it is with vertical agreement, as cartels will almost always have as their object the distortion of competition.¹⁸¹ The effect will only have to be evaluated if the agreement is not ‘naked’, i.e. if it does not contain provisions concerning price-fixing¹⁸², bid-rigging¹⁸³, market-sharing¹⁸⁴ or restriction of production output.¹⁸⁵ These grounds can be found in the text

¹⁷⁷ See Jones and Sufrin, 2004:781.

¹⁷⁸ See e.g. Commission's notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3, ('The Leniency programme') see also Notice Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation 17 and Article 65(5) of the ECSC Treaty, [1998] OJ C9/3.

¹⁷⁹ See more about the 'leniency program' below.

¹⁸⁰ See e.g. Commission Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ L304, P.3/6 Commission Regulation No 2659/2000 on the application of Article 81(3) of the Treaty to Categories of Research and Development agreements, OJ L304 P7/12.

¹⁸¹ See e.g. Case 246/86, *Re Roofing Felt Cartel: BELASCO v. Commission* [1986] ECR 2117, see also Case 96/82, *IAZ International Belgium NV v. Commission* [1983] ECR 3369.

¹⁸² See e.g. Cases 48, 49 and 51-7/69, *ICI v. Commission (Dyestuffs)* [1972] ECR 619, and Case 8/7, *Vereeniging Cementhandelaren v. Commission* [1972] ECR 977 on the fixing of selling prices. See also the Commission's decision in *Zinc Producer Group* [1984] OJ L220/7, for an example of the more uncommon fixing of buying prices.

¹⁸³ See e.g. *Re The European Sugar Cartel* [1973] OJ L140/17.

¹⁸⁴ See Commission's 1st Report on Competition Policy (Commission 1971), para. 2. See also *Cement* [1995] OJ L343/1, and *SAS/Maesk* [2001] OJ L265/15.

¹⁸⁵ These types of agreements are sometimes exempted under Article 81(3) if there is serious over-production, see XXXIst Report on Competition Policy (Commission 1991), 207 ff.

of Article 81(1)(a-c) and also in the Commission's guidelines on horizontal agreements.¹⁸⁶

In the guidelines on the interpretation of horizontal agreements, the Commission has exempted certain types of agreements which, 'because of their very nature', fall outside of the application of the Article.¹⁸⁷ The Article does not apply to co-operation between non-competitors, cooperation between companies which could not carry out the project without cooperating, and cooperation in areas which do not influence the 'relevant parameters of competition'.¹⁸⁸

For agreements that do not fall clearly under the prohibited area, nor under the exempted area, it is necessary to carry out a more thorough examination. This analysis has its starting point in the aggregated market power of the companies, together with the structure of the surrounding relevant market. If the market share is insignificant, the cartel is unlikely to have negative effects on the market. However, the Commission is reluctant to establish a specific threshold for situations when the market share can be seen as 'insignificant'.¹⁸⁹

The legal assessments that need to be done for horizontal agreements are not as intricate as the ones carried out for vertical agreements. Instead, the problematic issue for the Commission will often be discovering and proving the existence of the cartels. This has recently been made easier through the Commission's *leniency program*, allowing reduced fines for the first member of a cartel blowing the whistle on the cartel.¹⁹⁰

6.2.3.2.3 Conclusion

Cartels are very detrimental to competition, and are therefore forcefully fought by the Commission. This approach is most likely in line with the approach intended by the Member States, as it follows rather closely the exemplifying list in Article 81(1)(a-c).

However, not all horizontal agreements, and indeed not all cartels, are harmful, and many may instead lead to beneficial effects for both competition and integration. The integration may be furthered if companies are allowed to collaborate across state borders. Also, to give some smaller companies the ability to better compete with larger ones, may increase both competition and integration.

¹⁸⁶ Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal agreements. [2001] OJ C3/2. Hereinafter referred to as the Horizontal Guidelines. Para. 25.

¹⁸⁷ Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal agreements. [2001] OJ C3/2. Para. 24. Hereinafter referred to as the Horizontal Guidelines.

¹⁸⁸ Horizontal Guidelines, para. 24.

¹⁸⁹ Horizontal Guidelines, paras. 26-9.

¹⁹⁰ See Commissions notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3, ('The Leniency programme').

The balancing of the pros and the cons is not always easy, but the Commission and the Courts have shown an adherence to the importance of allowing certain types of agreements, as can be seen in e.g. the Commission's Horizontal Guidelines. This balancing is further emphasised by the approaches taken under Article 81(3) and the block exemption regulations issued under that Article. This will be further analysed when discussing Article 81(3).

6.2.4 An effect on competition

Like the first two conditions, the condition that the agreement must have an effect on competition is broadly construed and is by the Court mainly seen as a jurisdictional matter, deciding whether the ECJ and CFI or the national courts should rule on the matter. The text of the Article does not state the extent to which there must be an effect on competition. Nor does it explicitly differ between effect on competition and effect on trade between Member States.

The ECJ has developed the concept and established that the affect must be 'appreciable'.¹⁹¹ In its case-law, the Court has set out a threshold for companies which hold a too weak position on the market in order to be able to make an impact on the competition. The level of insignificance on the market must stand in proportion to the restrictiveness of the agreement; the more restrictive the agreement, the more insignificant the effect must be.

The *Völk* case clarifies that even so-called hard-core restraints are exempted if they fall under the 'appreciability' threshold.¹⁹² Hard-core restraints are elements in an agreement with the *object* of restricting competition.

The concept of appreciability has been further developed by the Commission in a number of notices; the latest is called the *De Minimis* notice.¹⁹³ The Notice focuses on market shares, which is a central concept within competition law, especially for the purpose of Article 82 and abuse of dominant position. The concept is defined in a number of cases, and the definition used is the same for both Article 81 and 82. The definition has been the subject for vast discussion in doctrine and will not be dealt with in detail in this thesis.¹⁹⁴ Briefly put, to establish a companies market shares, it is first necessary to identify the relevant market based on both the product

¹⁹¹ Case 5/69, *Völk v. Verveacke* [1969] ECR 259. The first case establishing the concept of appreciability. See also Case 22/71, *Béguelin Import v. GL Import-Export SA* [1971] ECR 949, [1972].

¹⁹² Case 5/69, *Völk v. Verveacke* [1969] ECR 259.

¹⁹³ Commission notice on Agreements of Minor Importance [2001] OJ C368/13. (Hereinafter referred to as the *De Minimis* Notice)

¹⁹⁴ See e.g. Jones and Sufrin, 2004:278-369. See also Bishop and Walker, 2002, para 4.70. and Korah, V., 1982. '*The Michelin Decision of the Commission*'. (1982) 7 ELRev. 130, 131.

market and the geographical market.¹⁹⁵ When the relevant market has been identified, the concerned companies' aggregated market share of the market is defined in percentage. The Notice then stipulates that in order for the exemption to apply, the aggregated market share for competitors must not exceed 10%. The relevant level for non-competitors is 15%.¹⁹⁶

By providing such a threshold, the Commission allows for some leeway in the interpretation of the Article, and thus makes it possible to clear agreements which might in fact have an anti-competitive *object* but are too small to have an *effect* on the Common Market. Since a formalistic application of competition law and the pursuit of market integration is not always the same applied in an individual case, this provides for a possibility in some cases to choose the integrational benefits over the competition. This will also lessen the risk of over-regulating the market, which could have the detrimental effects as envisaged by the Chicago School.

In some regards, the Notice goes against the *Völk* case, as it does not include hard-core restraints in the threshold exemption, but instead lists a number of agreements that are not exempted.¹⁹⁷

This interpretation by the Courts and the Commission may be said to comply with the intentions set out by the Member States, both concerning the threshold, and the exemption for hard-core restraints. However, the compatibility with the market integration goal deserves further comments. The possibly detrimental effect of outlawing both effect and object has been discussed previously and will not be dealt with again here. It may, however, be noted that the Commission did not here make use of the possibility provided by the Court in *Völk* to limit the condition. Rather it allows anti-competitive *effects* in agreements that are so insignificant that they do not have an appreciable effect, but it does not allow for the mere anti-competitive *intent*. This formalistic approach does not only go against the case law of the ECJ, but it is also in danger of causing more harm than gain to the market and integration.

6.2.5 An effect on trade between Member States

This condition requires a minimum level of cross-border trade in order for the Article to be applicable. The Court has stated that this level, too, must

¹⁹⁵ See Notice on the Definition of the Relevant Market for the purposes of Community Competition Law [1997] OJ C372/5 (Hereinafter referred to as the Market Definition Notice.) See also Case 85/76, *Hoffman-La Roche & Co AG v. Commission* [1979] ECR 461, [1979] 3 CMLR 211. See also Case 27/76, *United Brands & Co and United Brands Continental BV v. Commission* [1978] ECR 207, [1978] 1 CMLR 429. See also Case 322/82, *Nederlandsche Banden-Industrie Michelin v. Commission* [1983] ECR 3461.

¹⁹⁶ Para. 7 of the De Minimis Notice.

¹⁹⁷ De Minimis Notice para. 11.

be ‘appreciable’.¹⁹⁸ The concept has then been further elaborated on by the Commission in its notice on the effect on trade.¹⁹⁹ The condition consists of three parts:²⁰⁰

- The concept of ‘trade between Member States’
- The notion of ‘may affect’
- The concept of ‘appreciability’.

6.2.5.1 The concept of ‘trade between Member States’

The concept of trade between Member States is broadly interpreted, as it is seen mainly as a jurisdictional matter.

‘The concept of an agreement ‘which may affect trade between Member States’ is intended to define ... the boundary between the areas respectively covered by Community law and national law. It is only to the extent to which the agreement may affect trade between Member States that the deterioration in competition caused by the agreement falls under ... Article [81(1)]; otherwise it escapes the prohibition.’²⁰¹

The condition ‘...cover[s] all cross-border economic activity including establishment.’²⁰² As stated by the notice on horizontal agreements, by keeping this condition as broad as this, the interpretation is in line with the fundamental objectives of the Treaty - the promotion of free movement of goods, services, persons and capital- and thereby with the intentions of the Member States.

The term ‘*trade*’ is here broadly construed and includes all agreements which can affect the structure of the market.²⁰³

6.2.5.2 The notion of ‘may affect’

An agreement may affect the pattern of trade if it is

‘... possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law

¹⁹⁸ See e.g. Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

¹⁹⁹ Guidelines on the Effect on Trade concept contained in Articles 81 and 82 of the Treaty. [2004] OJ C101/81.

²⁰⁰ *Ibid* para. 18.

²⁰¹ Cases 56 & 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299, 341.

²⁰² *Ibid* para. 19, based on case-law, e.g. Case 172/80, *Züchner v. Bayerische Vereinsbank* [1981] ECR 2021 and Case C-303/99, *Wouters v. Algemene Raad van de Nederlandse Order van Advocaten*. [2002] ECJ 611.

²⁰³ Guidelines on effect on trade. Para 19.

or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.’²⁰⁴

The Court has ruled that it is enough that the pattern of trade might change in the future, even if the change is insignificant now.²⁰⁵ In the case *Delimitis*, the ECJ also stated that the effect does not have to be apparent at first sight.²⁰⁶ In this case, a beer brewer had a contract with a café, stipulating that the café must purchase a certain amount from the beer brewer each year. The Court established that if the contract led to the café not being practically able to purchase from any other brewer it would constitute an ‘effect’ for the purpose of the Article. However, according to the Commission, this may not be taken as far as to include hypothetical or speculative effects.²⁰⁷

The Article is only applicable if the agreement is capable of affecting trade in more than one Member State.²⁰⁸ It is, however, possible to affect trade even if the contract is concluded between companies within one Member State, or between a company in one Member State and a company in a third state.²⁰⁹ For this to happen, it is required that the agreement still affects the ability of companies in the concerned Member States to trade with companies another Member State. The effect in a Member State does not have to include the whole Member State. It is sufficient that a relatively small part of the Member State is concerned.²¹⁰

It has been argued that the influence on trade should be harmful in order to be caught by the Article, and that an agreement leading to an actual increase in trade therefore should escape the ambit. As mentioned above, the words chosen in the Italian translation of the Treaty seems to suggest this. However, this notion was rejected by the ECJ in the previously discussed case *Consten & Grundig*.²¹¹

‘... what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States. Thus the fact that the agreement encourages an increase, even a large one, in the volume

²⁰⁴ Case 56/65, *Société LA Technique Minière Ulm v. Maschinenbau* [1966] ECR 234, 249, [1966] CMLR 357, 375, see also case 5/69 *Völk v. Vervaecke* [1969] ECR 295, 302.

²⁰⁵ Case 107/82, *AEG v. Commission*, [1983] ECR 3151, para. 430, see also Commission decision *AEI/REyrolle Parsons re Vacuum Interrupters* [1977] OJ L48/32.

²⁰⁶ Case C-234/89, *Delimitis v. Henninger Bräu* [1991] ECR I-935.

²⁰⁷ Commission’s Guidelines on the Effect on Trade, para 43.

²⁰⁸ Case 22/78, *Hugin v. Commission* [1979] ECR 1869.

²⁰⁹ Case 246/86, *BELASCO v. Commission* [1989] ECR 2117, [1991] CMLR 96, para 3.

²¹⁰ Case 193/83, *Windsurfing International Inc v. Commission* [1986] ECR 611.

²¹¹ Cases 56 & 58/64, *Etablissements Consten SA & Grundig-Verfaufs-GmbH v. Commission* [1966] ECR 299, [1966] CMLR 418.

of trade between States is not sufficient to exclude the possibility that the agreement may ‘affect’ such trade in the abovementioned manner.’²¹²

When interpreting the provision as such, it is arguable if the Court followed the original intentions of the Member States, since it expressively interpreted the Article in the light of integration rather than by its wording.²¹³ However, as been discussed above, it can be discussed whether this case was a step back or forward for market integration.

The benefits of a broad interpretation, leading to an extensive application of Community rules and therefore greater harmonisation with its positive sides on integration, have been discussed above. Since an increase in cross-border trade is an important part of market integration, it is important that this aspect must be assessed at some point during the application, unless the application will risk being harmful for integration. With the *Consten and Grundig* case, the Court states that this assessment will not fall under this requirement, and as has been seen above, it did not fall under the condition of having as its object or effect the restriction of competition either, where it might otherwise assume to fall. If the agreement would be assessed under the condition of having as object or effect the distortion of competition, or possibly under Article 81(3), rather than under the condition of having an effect on trade, the beneficial aspects of a harmonized legislation would remain, while still allowing for an analysis where a pro-integrational agreement might be allowed to persist. However, in this case, the agreement was not cleared under Article 81(1), nor under Article 81(3), and thereby the cross-border trade that the agreement led to, was stopped. It is questionable if the Court thereby did not take this one step too far and in its eager to promote integration actually hindered it.

6.2.5.3 The concept of ‘appreciability’

As mentioned above, for an agreement to fall under Article 81, the affect on trade must be ‘appreciable’.²¹⁴ The appreciability is based on the companies’ position on the market, and according to the Commission, this is measured in market shares. Although stressing that the assessment will always be individual, the Notice on effect on trade sets out guidelines for when an agreement normally can be said to affect trade (the so-called NAAT-rule).²¹⁵ For an agreement to escape the ambit of the Article the aggregated market share of the companies must be less than 5% of the relevant market. This is a rather low threshold, and most agreements will fall above it.

²¹² Cases 56 & 58/64, *Etablissements Consten SA & Grundig-Verfaufs-GhbH v. Commission* [1966] ECR 299, 341.

²¹³ Jones and Sufrin, 2004:170.

²¹⁴ Guidelines on effect on trade, para. 44. See also Case 5/69, *Völk v. Verveacke* [1969] ECR 259.

²¹⁵ The Commission’s Notice, para 52. For an agreement to escape the ambit of the article the aggregated market share of the companies must be less than 5% of the relevant market.

6.2.6 Conclusion

As has been seen, the effect on Member State trade condition is broadly interpreted and catches a wide range of agreements. The benefits of this can be found in the harmonization that this leads to. However, since most agreements are caught, it is important that the interpretation of ‘object and effect’, and of Article 81(3), takes into account the beneficial effects that an agreement increasing trade may lead to, even if there is an ‘effect on trade’. As was seen above, and will be shown when assessing Article 81(3) below, this was not the case with, for instance, the judgement in *Consten and Grundig*.

The interpretation by the Courts and the Commission complies in large parts with the one intended by the original Member States. The broad definition of trade, the requirement for cross-border trade and the threshold provided by the NAAT-rule are all in line with what can be read from the wordings of the provisions. What is more uncertain, however, is the application in *Consten and Grundig*, where all effects on trade, harmful or not, are caught. Given the Italian version of the Treaty, it is unlikely that this was what the Member States intended. Instead, they probably wanted to see interventions only when the practice was harmful for trade, and not, as in this case, beneficial.

6.3 The exemption under Article 81(3)

If an agreement is caught by Article 81(1), there is a possibility that it will be exempted under Article 81(3). This does not, however, guarantee that it will escape actions under Article 82, the Merger Regulation, State Aid regulations or through national regulations.

Simply put, Article 81(3) aims to clear agreements which are more beneficial than harmful for competition. As has been seen, the ECJ has rejected a notion of a *rule of reason* under Article 81(1), and both the CFI and the Commission refer to Article 81(3) for these types of assessments. Article 81(3) therefore serves as the balancing point for pro- and anti-competitive aspects of agreements.

As put by the Commission:

‘When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objects of the Community competition rules. ... [Article 81(3)] expressly acknowledges that restrictive agreements may

generate objective economic benefits so as to outweigh the negative effects of the restriction of competition.’²¹⁶

Article 81(3) comprises an exhaustive list of four cumulative requirements, two positive and two negative.²¹⁷ The Commission has stated that under Article 81(3), only economic benefits may be taken into account, and no other aims can be pursued.

‘Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3).’²¹⁸

Through this view, the Commission clearly shows how economic efficiency gains stands above all other aims when applying Article 81(3). Arguably, this view was upheld by the CFI in *Matra Hachette*, where the CFI stated that ‘any adverse effects on competition resulting from the project must be proportionate to the contribution made by it to technical or economic progress.’²¹⁹

Through adopting such a limited view on which benefits that may come under the application of Article 81(3), the CFI and the Commission risk closing the opportunities of taking into account the integrational aspect of an agreement. It is important to remember, however, that the Commission’s recently less formalistic approach also applies to the interpretation of Article 81(3), especially through the new block exemption regulations.

6.3.1 The types of benefits falling under Article 81(3)

The Commission has issued a number of block exemption regulations (BER) regarding certain types of agreements which will generally be exempted. These will be discussed further below. If an agreement does not fall under a BER, it is necessary to make an individual assessment of how well the agreement fulfils the conditions of Article 81(3).

According to the first criterion, the agreement must contribute to improving the production or distribution of goods, or contribute to promoting technical or economic progress. The ECJ has established that the improvement must be proportionate to the competitive harm that the agreement causes.²²⁰ It

²¹⁶ Commissions Notice, Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C101/8. para. 33. (Hereinafter referred to as Guidelines on Article 81(3))

²¹⁷ The requirements are cumulative, Case T-528/93, *Métropol Télévision SA v. Commission* [1996] ECR II-649.

²¹⁸ Guidelines on Article 81(3). para. 42.

²¹⁹ Case T-17/93 *Matra Hachette v. Commission* [1994] ECR II-595. Para 135. For further information see van Bael and Bellis 2005:507.

²²⁰ Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

must also take place in the same market as the breach did.²²¹ When assessing this condition, only objective factors can be taken into account²²², and benefits that only the companies gain from are not taken into account.²²³

The Commission has established a checklist for what needs to be assessed in order to fulfil this condition:

- ‘(a) The *nature* of the claimed efficiency
- (b) The *link* between the agreement and the efficiencies
- (c) The *likelihood* and the *magnitude* of each claimed efficiency; and
- (d) *How* and *when* each claimed efficiency would be achieved.’²²⁴

The causal link, mentioned in (b), must be direct, since otherwise the Commission fears that the effect will be too uncertain to take into account.²²⁵ By adopting such a strict interpretation, the Commission chooses to rather outlaw than approve agreements which could prove beneficial in the future. I argue that instead of doing this, it would have been sufficient to place a high demand on proof for non-direct links rather than ignore them entirely. This would maintain the possibility of assessing more remote gains. Instead, the Commission chooses to maintain a formalistic view in this field, and it thereby risks outlawing agreements which might actually lead to great benefits, even if they are indirect.

6.3.2 A fair share to consumers

The second positive condition of Article 81(3) is that the consumers must be allowed a ‘fair share’ of the benefit flowing from the agreement. The ‘fair share’, must at least compensate for the anti-competitional effect of the agreement for the consumer.²²⁶

This criterion has been interpreted broadly, since the real test of Article 81(3) is rather to satisfy criteria one and four, and the Commission has accepted various types of benefits, as well as both present and future, under this requirement.²²⁷

²²¹ Case T-131/99 *Shaw v. Commission*, [2002] ECR II-2023

²²² Cases 56 and 58, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

²²³ Case T-65/98 *Van Den Bergh Foods v. Commission* [2004] ECR II-649.

²²⁴ Guidelines on Article 81(3). para. 51.

²²⁵ Guidelines on Article 81(3). para. 54.

²²⁶ Guidelines on Article 81(3). para. 85.

²²⁷ Guidelines on Article 81(3). para. 83-94. See also *Synthetic Fibres* [1984] OJ L207/17.

6.3.3 An indispensable restriction

In order for the restriction to be cleared under Article 81(3), it must be a restriction which is indispensable to the achievement of the benefit. According to the Commission's Guidelines on Article 81(3), this requirement is two-folded; firstly, the *agreement* must be 'reasonably necessary in order to achieve the efficiencies', and secondly, the *individual restriction* must be reasonably necessary.²²⁸ If it can be shown that the same efficiency could be reached in any other way that would be less restrictive, the restriction will be held to be too restrictive, and vice versa.²²⁹ When assessing how restrictive a provision in an agreement may be, it is necessary to take into account the justification for it. The more justified the provision is, the more likely it is that it will be deemed indispensable.²³⁰

Certain types of restrictions are unlikely to ever fulfil this condition. These are restrictions which are held to be restrictive by object, and those listed in the Commission's block exemption regulations as 'hard-core' restraints.²³¹ This means that e.g. vertical territorial restraints, as those concerned in *Consten and Grundig*, will not be able to be cleared under Article 81(3), since they would often be seen to go too much against the single market aim²³², and indeed the agreement in *Consten and Grundig* was not cleared. The Commission has held the same position concerning resale price maintenance, but in those cases, the ECJ has stated that it may be necessary for the Commission to consider an exemption under Article 81(3).²³³

6.3.4 No elimination of competition

The last condition of Article 81(3) is that the agreement must not be able to substantially eliminate competition between the parties. When assessing this, the Commission will consider the market shares and the conduct of the parties, the structure of the market, the previous competition in the market, the incentives for potential competitors to compete, the possible barriers to entry, etc.²³⁴ The Commission has interpreted elimination of competition as meaning rather the reduction of competition than the actual elimination.²³⁵ For the purpose of Article 81(3), the reduction is dependant on how strong competition was prior to the agreement, in comparison to after.

²²⁸ Guidelines on Article 81(3), para 73.

²²⁹ See e.g. *P&O Stena Line* [1999] OJ L163/61.

²³⁰ Guidelines on Article 81(3), para 79.

²³¹ Guidelines on Article 81(3), para 79. The block exemptions regulations will be discussed further below.

²³² See Commission's decision in *Nintendo* [2003] OJ L255/33, see also Faull, J. and Nikpay, A., (eds) 1999.

²³³ Case 234/85 *SA Binon & Cie v. SA Agence et Massagerie de la Presse* [1985] ECR 2015.

²³⁴ Guidelines on Article 81(3), paras 105-15.

²³⁵ Guidelines on Article 81(3), para 107.

6.3.5 Block exemption regulations

The Commission has issued a number of block exemptions (BERs) under Article 81(3). Before Regulation 1/2003, it was very common with block exemption in different fields. However, with the Commission's new approach, the practice of BERs for each field has been replaced, in large, by a few main regulations. In difference to the previous BERs, which exempted only a special category of agreements, the new regulation aims to have a broader scope and exempt all types of agreements capable of falling under Article 81(3).²³⁶

Traditionally, a BER consisted of a 'white list' of allowed restrictions and a 'black list' containing the prohibited restrictions. These are also referred to as 'hard-core' restrictions. In its attempt to move away from its formalistic approach towards a more economic view, the Commission only specifies the 'hard-core' restrictions in the new BERs, and all restrictions not falling under that list will normally be allowed.²³⁷

To come under the ambit of a BER, the companies often have to have an aggregated market share under a certain threshold, normally c:a 30% of the relevant market. The thresholds are a part of the new economic approach of the Commission. Through them, it tries to exempt agreements which do not concern a large part of the market, and therefore stand little risk of distorting competition.

6.3.5.1 Vertical agreements

The main BER for vertical agreements is the Vertical Regulation, which replaced many of the previous BERs.²³⁸ The Guidelines stipulate a presumption for legality²³⁹ where the aggregated market share does not exceed 30%²⁴⁰, and the agreement does not contain any of the 'hard-core' restrictions, such as territorial restraints or resale price maintenance.²⁴¹ It also provides for an exemption for certain 'non-compete' obligations, as long as they do not exceed five years of duration.²⁴² The market threshold was not part of the old regulations, which instead applied to all agreements regardless the market share of the companies.

The interpretation of the Vertical Regulation is aided by the Vertical Guidelines. The Guidelines provide further explanation and examples of the

²³⁶ See the Vertical Regulation, followed by the Vertical Guidelines. See also Horizontal Guidelines and Guidelines on Article 81(3).

²³⁷ See e.g. Vertical Regulation, recital 6-7.

²³⁸ It replaced regulation 1983/83 on exclusive distribution agreements, Regulation 1984/83 on exclusive purchasing agreements and Regulation 4087/88 on franchising agreements. Still in place alongside the Vertical Regulation is Regulation 1400/02 on motor vehicle distribution.

²³⁹ Vertical Regulation Article 2.

²⁴⁰ Vertical Regulation, Article 3.

²⁴¹ Vertical Regulation, Article 4.

²⁴² Vertical Regulation, Article 5.

provisions of the Regulation. Concerning territory partitioning, the Guidelines provide that they may be allowed under certain circumstances²⁴³, which occur when a selective distribution system is used, although, only so far as the system only prohibits active sales and still permits passive sales.²⁴⁴ This is also in line with the Courts' reasoning. A territorial restraint which would normally fall outside of Article 81(3), may also be accepted if there are objective justifications for it. According to the Commission, these can be e.g. health or safety reasons.²⁴⁵ The ECJ has also accepted other justifications. When assessing a selective distribution agreement in *Metro I*, it considered that the agreement might lead to stability in the market, and thereby took socio-economic aims into account in the assessment.²⁴⁶ Probably, it will also be possible to argue for integrational benefits under the objective justifications that are accepted under Article 4 of the Regulation.

6.3.5.2 Horizontal agreements

As with vertical agreements, the Commission has reviewed its stand on horizontal agreements. This has resulted in a set of Guidelines together with two new BERs.²⁴⁷ In its new approach, but also to some extent in previous decisions, the Commission has looked favourably upon certain types of horizontal agreements which are seen to have an overall beneficial effect. Those are often agreements on joint ventures, where the companies decided to put a certain part of the operations under joint control for the purpose of a special project. This can for instance be to carry out joint research or to allow for one company to specialise in a certain areas whereas the other specialises in another.

‘Cooperation can be a means to share risk, save cost, pool know-how and launch innovation faster. In particular for small and medium-sized enterprises cooperation is an important means to adapt to the changing market place.’²⁴⁸

For specialisation agreements and research and development agreements, the Commission has issued special BERs exempting them from the ambit of Article 81.²⁴⁹ They both follow the same system as the Vertical Regulation, with a market share threshold and a black list for hard-core restraints. These types of agreement are deemed to have more beneficial than harmful results and are therefore often considered to fall under Article 81(3). For hard-core

²⁴³ Case 56/65, *Société La Technique Minère v. Maschinenbau Ulm GmbH* [1966].

²⁴⁴ See Vertical Regulation Article 4, see also Guidelines para 50-5.

²⁴⁵ Vertical Guidelines, para 49.

²⁴⁶ Case 26/76 *Metro-SB-Grossmärkte GmbH v. Commission* [1975] ECR 1875.

²⁴⁷ Horizontal Guidelines, specialisation regulation, research and development regulation.

²⁴⁸ Horizontal Guidelines, para 3.

²⁴⁹ Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements. (Hereinafter referred to specialisation regulation). Regulation 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements. (Hereinafter referred to as R&D regulation).

cartels, the Commission is not so generous, though. Generally, it will be difficult for any cartel to meet all four, or even one, of the conditions of Article 81(3). There are, however, examples of when the Commission has cleared even hard-core cartels. In both *Uniform Eurocheques*²⁵⁰ and *Visa International–Multilateral Interchange Fee*²⁵¹, the Commission cleared agreements regulating the fees for certain monetary transactions, since they were seen to improve the payment methods, benefit consumers, did not eliminate competition and were an indispensable part of the agreement.

Mutual for the recent approach towards both vertical and horizontal agreements, is that the Commission opens up for a much more flexible interpretation of Article 81(3) and thereby makes it easier for agreements to be exempted under the Article. The previous BERs often had the effect that companies chose to design their agreements to fit a certain BER, making many type of agreements in a field very similar. However, with this new approach, it is easier to diversify the agreements and tailor them more to fit the purpose they are aimed for, rather than a special BER.

A drawbacks of the new approach is that the legal certainty that the old system, however rigid, gave rise to is reduced. Previously it was easier to know that if the companies followed a certain BER, the agreement would be cleared. Arguably, the BERs concerning the horizontal agreements still have several formalistic aspects, thus retaining some of the benefits of legal certainty, but also losing some of the benefits of flexibility. Additionally, the new approach focuses more on the economic aspects, allowing other aims to be assessed only if they can fit under Article 81(3). This implies that integrational aims are not seen as equally important, though a more flexible approach to the application of the Article will at least give the *possibility* of clearing a greater variety of agreements than previously, and when doing this, also assess integrational aspects.

The interpretation of Article 81(3) can be said to fall within the intentions of the Member States to a large extent, with one main exception; that the agreement is not allowed to eliminate competition. Since the Member States chose the strong word ‘eliminate’, it is likely that the Commission’s interpretation, prohibiting agreements which lead to the mere lessening of competition, means taking the provision a bit too far. Especially since this condition is to be interpreted in conjunction with the other three conditions of Article 81(3). With a too broad definition of one of the (cumulative) conditions, it makes it very difficult for any agreement to meet the requirements of Article 81(3).

²⁵⁰ *Uniform Eurocheques* [1985] OJ L35/43.

²⁵¹ *Visa International –Multilateral Interchange Fee* [1985] OJ L318/43.

6.4 Article 81(2)

The consequences of an infringement of Article 81 are set out in Article 81(2). The consequences for the participating companies are nullity of the contract and possible fines, often severe. In a cartel, the threat of nullity, and thereby unenforceability in court, might not be as deterring as it may be in a vertical agreement. However, for both types of agreements, the risk of fines is often more deterring. Additionally, the possibility of being sued by third parties which have suffered from the agreements should be mentioned. In the case *Courage*, the ECJ stated that under certain circumstances, even parties of the agreement might be eligible to sue for damages.²⁵²

What is interesting with regard to this Article is the supra-national implementation given to it. As has been discussed above, it is unlikely that the original Member States envisaged a supra-national application of competition law, or of most of the European legislation at all. History has showed, though, that much of European law, and especially competition law, has been given a forceful supra-national implementation.

²⁵² Case C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-234/89.

7 Analysis

7.1 General remarks

This thesis sets out to answer the question of whether or not European competition law has reached its original aim of integrating the European national markets into a Common Market for Europe. I believe that the extent to which competition law is justified depends on the answer to that question. If competition law does not achieve its aim, or even has negative effects in relation to the aim, the justification is greatly reduced. It is important to keep in mind, however, that both the European Union and European competition law have added aims to their original ones, and these, together with the original aim of consumer welfare, also need to be taken into account when making a more general assessment of the legitimacy of competition law and its implementation. For the purpose of this thesis, however, I have focused on the original aim of furthering European integration through the use of competition law.

Throughout the history of the European Communities, the Courts and the Commission have expanded various parts of Community legislation beyond the wording of the competition provisions. This has played a major part in making the EU what it is today, and has opened up the possibility for developing areas of the EU which would otherwise be paralysed by political differences among the Member States. However, when this expansion takes place, it is in my view relevant that the expansion does not go beyond the aims of the provisions, or it might be argued that the Courts and the Commission have taken the interpretation too far. I will therefore assess how well the application by the Court and the Commission follows the original aims of the competition provisions, with a sole focus on the integrational aim. This will be done in two ways.

Firstly, I will evaluate the aim through analysing how the original provisions were formulated, and how close to that the subsequent application by the Courts and the Commission falls. There is little guidance other than the wording of the provisions as to what the original Member States intended with the legislation. Therefore, if the application does not follow the wording, I will argue that the Courts and the Commission to some extent have taken the application of the provisions too far, and gone beyond the original intent of the Member States.

Secondly, I will make an individual evaluation of whether the interpretation and application by the Court and the Commission have benefited or harmed European integration, regardless of how closely they follow the wording of the provisions.

When evaluating this I will look at two aspects. Firstly, how competition law was used as a 'vehicle for integration', both during the birth of the

European Communities, and subsequently when political opinions have clashed, creating a deadlock on integration, and secondly, how competition law has affected business life and created incentives or disincentives for trade in general, and cross-border trade in particular.

7.2 The provisions and the subsequent application

A first observation concerning the interpretation by the Courts, and indeed also by the Commission, is that they do aim to follow the intention of the Member States. In *Metro I* the ECJ made an explicit reference to Article 3 and the aims for the Community stated in them. The teleological method of interpretation that the Courts and the Commission have adopted strengthens this notion.

Looking more closely at the individual conditions of Article 81, the general conclusion is that the subsequent application by the Courts and the Commission does to a large extent lie close to the wording of the provision. All of the conditions of Article 81 have been dealt with individually in the previous sections, and an analysis of how well the conditions follow the provision has been presented there. For this more general analysis, I will mention only aspects where the application may cause some concern.

It might be questioned whether the Member States initially intended an application by a supra-national court at all. The debate between France and Germany on the matter implies that this was far from certain.

A condition causing some concern is the requirement that the agreement must have an effect on trade. As has been seen, this has been interpreted by the Court in *Consten and Grundig* as meaning that *any* effect on trade is enough, be it a positive or a negative effect. However, both the Italian version of the treaty, which implies that the effect must be harmful, and the fact that the whole provision aims at agreements which can prevent, restrict or distort competition, imply that the effect should be of a negative kind. *Any* effect on trade should not suffice. In this regard, it is likely that the interpretation has gone further than the Member States intended, and, as will be discussed further, has also gone further than is beneficial for integration.

Additionally, it is likely that the Commission went too far in the interpretation of the condition under Article 81(3), that there should be no elimination of competition. Rather than reading the condition as 'no elimination of competition', it read it as meaning 'no reduction of competition', thus leading to the condition being very difficult to fulfil for most agreements.

7.3 The achievement of the single market aim

7.3.1 A vehicle for integration

Competition law has played a prominent role for the creation of a single market in many ways during the fifty years since the Treaty of Rome was signed. Its role was acknowledged already in the '*Spaak Report*', which stressed its role in the dismantling of barriers to trade. Indeed, its importance for the single market is highlighted by the fact that the first definition of the single market came in the competition case of *Metro I*.

Initially, it will be recognised that the mere existence of common competition law will increase, and emphasise, the integration of the Common Market. This is imbedded in the idea as such of creating common competition legislation. Common competition law serves a purpose only in the context of a common market, and any common provisions on the subject would add to the functions of that market. Harmonisation of legislation throughout the Member States, both in the context of competition law but also in other fields, will make it easier for companies to escape the double burden of complying with the laws in the different countries, and thereby to act on the different markets.

One of competition law's important roles has been to keep integration moving forward even when the political will is less prone to do so. There are several examples of this. During the initial phases of ECSC, the political will of the Member States made integrational development possible only in the economic field, aiming to create a common market. In this development, competition law became an important weapon in the fight of power over the concerned industry. During the crisis of the *Luxemburg Accords*, integration through classical, political means was greatly limited, however, through the important competition case of *Consten and Grundig* the wheels of integration could keep moving forward. During the 1970s and 1980s, the international political situations made many Member States turn their attention nationally, inhibiting the move towards integration. Again during this time, the ECJ, through the help of the Commission, kept pushing development further through rulings in important competition cases. However, with the completion of the SEM, the role of competition law, as a motor when the political will failed, is diminished. This can be seen also in the Courts' move in focus from vertical agreements, which are seen as detrimental mainly for integration, to horizontal agreements, which are detrimental more for competition in itself, regardless of the effects on integration.

Today the EU faces new challenges, especially with the enlargement and the new Reform treaty, and new political situations are likely to arise from this. As competition law has proved a very useful tool in past political situations, it is possible the Courts and the Commission will re-use this tool in future

situations as well. This, however, falls somewhat outside the scope of this essay.

As can be seen, the ECJ and the Commission have played important roles in the integration process. Competition law has been important also for the creation of their roles as such. Due to the lack of interest among the Member States, competition law created a good base upon which the Court could develop its role. Through several competition cases, the Court established its role as a 'motor for development' in the EU, and it also established its teleological method of interpretation. Without the roles of the Court and the Commission, it is unlikely that integration would have come remotely as far as it has come today.

7.3.2 The promotion of trade

One of the main ideas of competition law is that healthy competition strengthens the market. Within the EU, competition law has also been used to help and strengthen integration. It may be questioned, however, if these aims really always go hand in hand. Are measures promoting business also automatically promoting integration of the European markets?

To some extent, the answer to this question is simple - a healthy business life will lead to a furthered integration, as will further integration lead to a healthier business life. As could be seen above, one of the reasons for integration mentioned by, for example, the Commission, was the cost of a non-integrated Europe. Europe would simply have too much to lose financially from not integrating. An integrated Europe will lead to the opening up of new markets and enlargement of old markets for the companies, much like it did during the development in 19th century USA.

Conversely, a healthy business life is a basic condition for further integration. Generally, companies are not altruistic, and will instead make decisions based on what will benefit them the most. This will of course be the case also concerning decisions to start trading across state borders. If cross-border trade is not financially beneficial, companies will refrain from entering into it, which will thus impede integration of the markets. This means that when competition law generates rules, which hold integrational aspects higher than business aspects, this might be contra-productive for integration itself. I argue that this is the case with territorial restraints in vertical agreements. This is especially clear in the important case of *Consten and Grundig*, where cross-border trade was actually stopped in the name of integration. As was seen above, the ruling has helped integration in other aspects, but it is questionable if the material outcome did not inhibit integration more than improve it. The division of active and passive sales reduces the restriction and the opening up provided by *STM*, and it may be argued that this was a step back from the *Consten and Grundig* case by the ECJ, realising that it had gone too far.

The possibilities for passive sales are greater today than they were at the time of the ruling. Since advertising via a website is considered as 'passive sales', the internet has opened an opportunity for something that seems to be between active and passive sales. The restriction in *Consten and Grundig* still stands, however, and although the consequences of it are reduced, it still provides a good example of a counter-productive integrational decision.

When looking at decisions based more on competition than on integrational reasons, there are several other examples of when the decisions have had contra-productive effects on both competition and integration.

Firstly, I will argue that the Courts' and the Commission's formalistic approach to competition law has impeded business life and integration, and that an approach more like the one in the US, with room for a *rule of reason* assessment already under Article 81(1), would be more beneficial. This would allow for pro-competitive agreements to be assessed already under Article 81(1), and thereby not be forced into the conformity of complying with the BERs. The limitation to the agreement's possibilities of being cleared under a BER risk severely inhibits business life. The recently more economic approach by the Court, and especially by the Commission, has to a large extent reduced this 'straight jacketing'. Still, no matter how much the Commission argues around economic views, the application of especially Article 81(1), but also and 81(3), still shows a considerable inclination towards a formalistic view. In Article 81(3), this can be seen through the existence of threshold values in the BER, and also through the lists of restraints that may never fall under Article 81(3). In Article 81(1), it can be seen e.g. in the assessment of the object of an agreement before assessing its effect.

The approach of outlawing agreements with an object to distort competition, without assessing its effect, or even the future effect, is not only a legally dubious approach, but it might also take place at the expense of market integration. Most agreements made by businesses will have some form of anti-competitive effect, as they will try to further the company's business. Since customers are limited, the benefit of one company is often at the expense of the competitors. The same urge to expand and further the business will often be what makes companies expand across borders, and thereby increase market integration. If not assessing this condition carefully, many agreements that could be beneficial for integration might be caught under Article 81(1), simply because the rational behind the agreement is the very natural urge to do better than the competitors. If outlawing the intent to win over the competition, this would severely damage the companies' motor for expanding into other Member States, and thereby the motor for market integration. Bearing the single market in mind, it is remarkable that this formalistic approach has been adopted, and indeed been strengthened by the approach of the Court and the Commission, and it is arguable if this does not also go far beyond the rational for the legislation.

Another example of contra-productive decisions is the more or less total ban on hard-core cartels, no matter the companies' market share or sizes. As has been argued by the Chicago School, a loosening up of the restrictions for cartels would open for a possibility for smaller companies to join together in order to better compete with bigger companies. This could improve both competition and business, and might lead to furthering integration since a cartel might be better positioned to initiate and increase cross-border trade than the individual companies. The business connection that the cartel gives rise to, might also help further competition. The Commission's fear of raised prices and consumer loss, would not be so significant since there still would be at least one other large player on the market, the dominant firm, and instead the situation would be similar to that of a (legal) oligopoly. The strictness of the prohibition also seems strange in comparison to the protection of SMEs that the Commission otherwise shows. By keeping the prohibition as strict as it does, the Commission risks both impeding competition and lessen the competitive force of the SMEs. This approach also risks severely limiting the possibility of the European companies to compete on a world-wide market, against e.g. the US and China. Since, for example, the different threshold values for exemptions are often based on relative markets confined within the EU, companies that try to compete outside of the EU will find it difficult to benefit from them. This risk lessens the competitiveness of Europe, something that the original founders instead had envisaged would increase with the creation of a union.

There are definite benefits with a formalistic view as well. It provides for clarity and a legal certainty that a more flexible approach would not be able to provide to the same extent. It also helps to speed up the process of decision-making. Both of these aspects are beneficial for business and for integration. However, I argue that the price to pay for these benefits is high, and both business and integration would benefit more from a more flexible view by the Courts and the Commission.

7.4 The future of competition law in Europe

It is difficult to exaggerate the role that competition law has played in the formation of a single market for Europe, and through that, also for the formation of the EU. This has been seen through both the emphasis that the Member States placed on competition law in the original version of Article 3, where they stated the aims of the EU, and in the role that competition law has taken in the subsequent application of the provisions. This has helped to shape and develop the internal market, and indeed the single market was first defined in relation to competition law.

Conversely, the integration aim has played a great role for the development and direction of European competition law. This interaction can explain some of the features found in European competition law, which might not

be as prominent in competition law outside of Europe, or for that matter in the national legislation of the individual Member States. Examples of this would be the early focus on vertical agreements and on territorial restraint. These restraints would not have been seen as equally important if there had not been a focus on integration in the Common Market.

However, fifty years have passed since the signing of the Treaty of Rome, and I argue that both the role that competition law has for integration, and the role that integration has for competition law, have been greatly reduced, and the focus of both fields have gradually shifted.

The new role that competition law has for integration, and for the EU, can be illustrated by the changes in Article 3, stating the aims of the EU. Initially, the aims focused on economic integration, and competition law was given a prominent role in the Article, in connection with the aim of the internal market. Through various changes in the Treaty, the Article has changed, and new goals have been as the political will has allowed for an extension of the EU's powers. Through these changes, the concentration on competition law has naturally lessened, illustrating the changed focus of the Member States. On 21 June of this year, the participants of the IGC in Brussels agreed to a draft of the new Reform Treaty. In this draft, Article 3 is revised and no longer mentions competition law at all. The sentence referring to the internal market ends with a full stop, not with the aim that competition should be free and undistorted. The change is said to have no effect on the role of competition law in the EU, as competition law will still be mentioned in 13 other places in the Treaty. Be that as it may, the change still sends a clear signal that competition law no longer is seen as one of the cornerstones of the Common Market and thereby of the EU, but rather as any other area of law falling under the jurisdiction of the EU.

This change, surprising as it seems at first, is a natural step in the development of the roles of competition and integration. With the completion of the single market in 1992, the need for interventionist competition law, based on integrational reasons, was reduced. This can also be seen in how integrational reasons were dealt with in the implementation of competition law. The focus of both the Courts and the Commission has moved from vertical agreements, with negative effects mainly on integration, to horizontal agreements with detrimental effect more on business than on integration.

The general shift in aims, from a more economic to a more social view within the EU, is apparent in the field of competition law as well. In the annual reports from the Commission, the opening statements by the Commissioner in charge has moved from focusing on the interaction between integration and competition, to the role of competition for the development of social rights. Through this, the Commission accepts a step towards other main aims than integration, and thereby a diminished role for competition.

8 Conclusion

European competition law has, to a large extent, done what it set out to do – to further integration of the Common Market. The application by the Courts and the Commission generally follows the intentions found in the wordings of the provision, and to most parts, this application has helped further integration. Although the application at some point has been a bit too eager, with somewhat contra-productive results, the role that competition law has played for integration on the internal market, and vice versa, is immense, and has shaped both to a considerable extent.

It is difficult to assess what the change of the Treaty will lead to, and if the current draft will even be ratified by all countries. Nonetheless, the fact that it was passed by the IGC shows that in the future, competition law is unlikely to remain one of the corner-stones of integration.

List of important concepts

Allocative efficiency

The market condition where all resources are allocated in the most efficient way as to maximise the usage that can be gained from them.

Anti-trust/Competition law

The term anti-trust is the American term for competition law. The term is commonly used in European competition legislation as well, however, the Commission now uses the term only for the areas of competition law under Articles 81 and 82. It does thereby not include mergers or state aid.

Barriers to entry

Different factors preventing new competitors to enter the market. It can be high investment cost, state regulations, etc.

Common Market/Single market

In the original Treaty, the integrational project was referred to as the creation of a Common Market. Through the signing of the Single European Act (SEA), the term changed to the creation of a Single European Market (SEM). Throughout the thesis, I will refer to them alternatively.

Economy of scale

Economy of scale is reached when the cost for the production of one unit falls, the more of the product that is produced.

Economy of scope

Economy of scope is when the same production equipment can be used for the production of several products.

Intra-brand competition

Competition within the same brand, e.g. through competition between different branches.

Inter-brand competition

Competition between different brands.

Marginal cost

Marginal cost is the increase in a firm's total cost caused by producing one extra unit.

Monopoly

A monopoly is market with only one actor.

Oligopoly

An oligopoly is a market with few actors, where no one is independently dominant. The firms will therefore be dependant of each other.

Perfect competition

A perfectly competitive market is a market where the consumer welfare is maximised and the market therefore cannot be improved by the application of competition laws. A perfectly competitive market must have several components; a large number of buyers and sellers on the market; a homogenous product making it easy for costumers to switch between producers; both buyers and sellers must have perfect information; and no barriers to entry, making it possible for companies to freely enter and exit the market. The result of perfect competition will be that the price will never exceed the marginal cost and the allocative and productive efficiencies will thus be maximised.

Productive efficiencies

The most efficient production of goods.

Sunk cost

Sunk costs are irrecoverable costs, e.g. often investment costs.

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