David Lightstone
Suiker Unie Abstract

Facts

This case involves the European sugar market. The entire sugar market faced heavy regulations from the European Union and Member States.[1] Under the umbrella of regulation, sugar producers in various member states participated in agreements and concerted practices of mutual cooperation that restricted the sale of sugar to other member states.[2] Even though the market was heavily regulated, there were still opportunities for competition to flourish.[3] The Commission found that the concerted action among the sugar producers was aimed at protecting the national markets of the producers.[4] The commission found the sugar producers partitioned the market and created borders throughout the common market, which is what the TFEU was aimed at prohibiting.[5]

Advocate General Mayras's Opinion

The Advocate General found the practices of the sugar producers in Europe were not justified by the market regulations, and could only be explained by coordinated policies that partitioned the internal market along national borders.[6] A concerted practice occurs when competitors knowingly substitute the risks of competition with cooperation, without reaching the level of an agreement.[7] The restricted deliveries of sugar among the producers showed strong evidence of a concerted practice having as its object the restriction of competition.[8] To determine the object of the concerted practice, the Advocate General said one must look at the actual effects on the market, because the effects cannot be severed from the concerted practice, therefore the effects on competition are critical.[9] This is similar to Advocate General Mayras's opinion in *ICI*. It is also critical to determine if the concerted practice is not the result of economic regulation.[10] The burden of proof fell on the Commission to show that a concerted

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[1] Cases 40–48, 50, 54–56, 111, 113, & 114–73, Suiker Unie v. Comm'n, 1975 E.C.R. 2045, AG 2047–2055 (Advocate General Mayra's Opinion).

[2] *Id.* at 2046.

[3] *Id.* at 2056.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 2059.

[7] *Id.* at 2060.

[8] *Id.* at 2059.

[9] *Id.* at 2060.

[10] *Id.*

practice occurred and it distorted competition. However, the concerted practice can be proven by presumptions that are "strong, precise and relevant."[11]

The Advocate General concluded that the concerted practice had the object of distorting competition in the common market because limiting deliveries of sugar to certain producers and maintaining national economic borders is anti-competitive. This had the effect of partitioning the common market along national borders, something the TFEU was created to prohibit.

The ECJ Opinion

The ECJ began by stating one must account for market regulations when determining if a concerted practice took place.[12] A concerted practice is coordination among companies, whereby they knowingly substitute the risks of competition with practical cooperation that does not correspond to the normal conditions of the market.[13] The cooperation rises to the level of a concerted practice when the parties establish positions that harm the free movement of goods within the common market.[14] For example, the ECJ found that there was no violation of the TFEU in Italy because the market regulations in that country prevented any type of competition from taking place, and the ECJ criticized the Commission for not properly considering the market conditions in Italy.[15] However, in the other sugar markets, the ECJ found that the companies removed any uncertainty in the market and distorted competition, because the companies did not determine their policies independent of each other.[16] The companies protected national markets through a concerted practice in violation of Article 101.[17] The burden of proof falls on the Commission to show a concerted practice distorted competition in the common market in light of the various regulations in the market.[18]

Overall, the ECJ found there was a violation of the TFEU in several European countries, but not in Italy. It is critical for the Commission to account for the various market regulations in place when they determine if the companies have replaced uncertainty and competition in the common market with practical cooperation.

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[11] *Id.* at 2061.

[12] Cases 40–48, 50, 54–56, 111, 113, & 114–73, Suiker Unie v. Comm'n, 1975 E.C.R. 1671, 1916.

[13] *Id.* at 1916.

[14] *Id.*

[15] *Id.* at 1923–24.

[16] *Id.* at 1942–45.

[17] *Id.* at 1947.

[18] *Id.* at 2022–23.

David Lightstone
Suiker Unie Abstract

ECJ Opinion Link: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61973CJ0040:EN:PDF

http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61973J0040

AG Opinion Link: http://curia.europa.eu/juris/celex.jsf?celex=61973CC0040&lang1=nl&lang2=EN&type=NOT&ancre=

David Lightstone
ICI Case Brief

Facts

This case concerns the European dyestuffs industry. From 1964 through 1967 there were uniform price increases in several countries throughout the European Union.[1] In 1964 there was a 15% price increase on most aniline dyes in Italy, the Netherlands, Belgium, and Luxembourg.[2] In 1965 the price increase was extended to Germany, and a 10% increase was placed on the price of dyes and pigments not covered by the original increase.[3] Finally in 1967 an 8% increase on all dyes was introduced in several countries except France, where the increase was 12%, and Italy, where no increase occurred.[4] There was a meeting with all of the companies in attendance in 1967, whereby information was shared, and this meeting preceded the price increase in 1967.[5]

On May 31, 1967, the European Commission commenced a proceeding against the dyestuff companies regarding an infringement of Article 85, now Article 101, of the TFEU.[6] The Commission did not find the companies made an agreement to raise the prices in a uniform manner; rather, the Commission found that the companies participated in a concerted practice that distorted competition in the common market.[7]

Advocate General Mayras's Opinion

Advocate General Mayras found there was a concerted practice that was anti-competitive.[8] He stated that Article 85 addresses concerted practices and agreements, which are two separate categories.[9] A concerted practice is a meeting of the minds that does not reach the level of an official agreement.[10] He stated that in determining whether or not a concerted practice violates Article 85, one must look at the actual effects on the market.[11] In examining the effects on the market, the Advocate General determined that the continuity in the uniform price increases leads to the conclusion that the increases

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[1] Case 48/49, ICI v. Commission, 1972 E.C.R. 621, 6522.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Case 48/49, ICI v. Comm'n, 1972 E.C.R. 665, 679 (Advocate General Mayras's Opinion).

[6] *Id.* at 667.

[7] *Id.*

[8] *Id.* at 682–87.

[9] *Id.* at 668–9.

[10] *Id.* at 671–72.

[11] *Id.* at 682–83.

proceeded from an overall plan.[12] The uniform price increases were found to have the effect of harming competition.[13] This action maintained a dyestuffs market that was centered on national borders, and this is precisely what Article 85 is meant to prevent.[14] While parallel conduct on the market alone is not enough to have a concerted practice, there was a meeting of the minds amongst the competitors, and therefore there was a concerted practice.

The effect on the common market of the uniform price increases was a restriction of competition, which violates Article 85 of the TEFU.

ECJ Opinion

The ECJ agreed with the advocate General. The ECJ held that a concerted practice is not the same as an agreement, and that a concerted practice does not have all the elements of an agreement or contract, but there is practical cooperation that substitutes for the risks of competition.[15] Parallel conduct alone will not show a concerted practice, but it is strong evidence of one.[16] It is important to take account of the market the companies participate in and look at the effects on the market. Here, the ECJ found the companies removed the risks of competition, and therefore violated Article 85.[17] The removal of uncertainty in the market was caused by a concerted practice.[18] It is hard to believe that the uniform actions by the parties were spontaneous.[19] Companies cannot act in such a way that eliminates uncertainty in the market.[20] A producer may choose his price, but they may not cooperate with competitors in deciding a price.[21]

For the ECJ, the main issue was that the companies eliminated uncertainty in the market by cooperating on the price increases. The parties did not act independently and therefore, harmed competition on the market.

ECJ Opinion Link: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61969CJ0048:EN:PDF

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[12] *Id.* at 683–87.

[13] *Id.* at 684.

[14] *Id.* at 685.

[15] Case 48/49, ICI v. Commission, 1972 E.C.R. 621, 655.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 659.

[19] *Id.*

[20] *Id.* at 660.

[21] *Id.*

David Lightstone
ICI Case Brief

http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61969J0048&lg=en

AG Opinion Link: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61969CC0048:EN:PDF

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61969CC0048:EN:NOT

David Lightstone
Object and Effect

I. Introduction

Article 101 of the Treaty on the Functioning of the European Union (TEFU) is one of the primary Articles concerning competition law in the European Union.[1] It prohibits any agreement, concerted practice, or decisions of undertakings that have as its "object or effect the prevention, restriction or distortion of competition within the internal market."[2] An agreement or concerted practice can violate Article 101 if it has the object *or* effect of harming competition in the internal market.[3] The European Court of Justice (ECJ) has held that object and effect are two distinct violations under Article 101.[4] Therefore, if there is a violation by object, it is unnecessary to look at the effects of the action on the market.[5]

The purpose of Article 101 is preventing anti-competitive activity and promoting economic integration within the European Union.[6] Market integration is critical for the success of the European Union, and must be protected from private actors establishing economic borders through agreements or concerted practices.[7] Market integration is compromised if companies are able to act anti-competitively by restricting where, how, and at what price products are sold. Consequently, Article 101 is not only central to an

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[1] Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU]

[2] TFEU art. 101.

[3] Cases 56 & 58/64, Consten and Grundig v. Comm'n, 1966 E.C.R. 301, 342; Case C-8/08, T-Mobile, 2009 E.C.R. I-04529, para 28.

[4] *Id.*

[5] *Id.*

[6] Paul Craig & Grainne de Búrca, EU LAW: TEXT, CASES AND MATERIALS 960, (5th ed. 2011).

[7] European Union, *Market Integration and Internal Market Issues*, EUROPA.EU, http://ec.europa.eu/economy_finance/structural_reforms/product/market_integration/index_en.htm (last visited Apr. 10, 2014).

understanding of competition law in the European Union; it is also a critical tool for maintaining market integration.

An Article 101 violation by object occurs when the action of the undertakings is by its very nature harmful to the functioning of competition in the common market.[8] The object is determined by looking at the content of the action and "the objectives it aims to pursue."[9] If the undertaking's exploits do not have the object of harming competition, the ECJ will then determine if they have negative effects on competition in the market. An effects analysis entails a deep factual investigation of the market, the economic consequences of the action, and the effect of partitioning the market.[10]

Overall, an undertaking can violate Article 101 by object, where by the agreement or concerted practice by its very nature is anti-competitive, or the undertakings can violate Article 101 because their actions have anti-competitive effects on the market. In the following sections, this article will address the ECJ's analysis of agreements and concerted practices by object and effect.

Violations by Object

There are agreements that by their very nature are anti-competitive. Examples of such agreements include price fixing arrangements, agreements that limit imports and exports, and agreements that divide the market.[11] One of the first ECJ cases examining an agreement that by its object harmed competition was *Consten and Grundig*.[12] In *Consten*,

[8] Case C-209/07, The Competition Auth. v. Beef Indus. Dev. Soc'y Ltd., 2008 E.C.R. I-08637, para. 17.

[9] *Id.* at para. 16, 21.

[10] Craig & de Búrca, *supra* note 5, at 977–78.

[11] *Id.* at 976.

[12] Cases 56 & 58/64, Consten and Grundig v. Comm'n, 1966 E.C.R. 301.

a German radio manufacturer and a French distributor agreed to make the French company the sole distributor of Grundig radios in France, and limited how the radios would be imported and exported.[13] Advocate General Roemer wrote an opinion for the ECJ stating the agreement did not violate Article 101.[14] He reasoned that the agreement allowed for the German producer to enter the French market and had the effect of furthering market integration since a German company now had access to France.[15] However, the ECJ did not agree with Advocate General Roemer, and held that the agreement violated Article 101 because it had the object of harming competition by limiting which distributors could sell the radios and how the radios could be imported and exported.[16] As a result, because the agreement had the object of restricting competition, there was no reason to examine the effects of the agreement on the market.[17] The ECJ held that when an agreement is found by its object to be anti-competitive, the analysis is complete and there is no need to examine the concrete market effects.[18] In other words, if an agreement has the object to harm competition, it does not matter if there are beneficial effects to market integration.

Consten and Grundig is the seminal case for agreements by object and has laid the analytical groundwork for future cases concerning agreements by object. It espouses

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[13] Cases 56 & 58/64, Consten and Grundig v. Comm'n, 1966 E.C.R. 352, 353 (Advocate General Roemer's Opinion).

[14] *Id.* at 358–63.

[15] *Id.* at 360–61.

[16] *Consten and Grundig*, 1966 E.C.R. at 343.

[17] *Id.* at 342.

[18] *Id.*

the traditional view on agreements by object. However, in a more recent case, *Allianz-Hungaria*, the ECJ added some effects analysis in examining the object of the agreement.[19] This case involved car insurance companies making agreements with car dealers concerning the hourly charges paid by the insurer for repairs.[20] The ECJ found that the agreements restricted competition by object.[21] The court examined the economic and legal context of the agreement, and some of the effects of the agreement on the market.[22] The ECJ found the potential effects and object of the agreement harmed competition in its object analysis.[23] This seems inconsistent with *Consten and Grundig* because in that case the ECJ found that an effects analysis is unnecessary in determining object.

It is clear that when examining an agreement one begins the analysis by looking at the agreement's object, which requires an inquiry into the objectives of the agreement. And except in *Allianz Hungaria*, it is clear one does not look at the actual market effects of the agreement when analyzing the object of an agreement under Article 101. Overall, when an undertaking makes an agreement, there must be no objective to distort competition, especially by dividing the market along national lines or restricting who has access to a product. Under the traditional object analysis, the actual economic effects of

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[19] CJEU, Allianz Hungaria v. Gazdasagi Versenyhivatal, CURIA.EUROPA.EU (Mar. 14, 2013), http://curia.europa.eu/juris/liste.jsf?num=C-32/11.

[20] *Id.* at paras. 6–12.

[21] *Id.* at para. 51.

[22] *Id.* at 38–43.

[23] *Id.* at 51

the agreement are not considered, even if they are beneficial like in *Consten and Grundig*.

The ECJ case law regarding concerted practices by object is not as consistent or straightforward as the case law concerning agreements by object. The first ECJ case regarding concerted practices was *ICI* v. *Commission*.[24] In *ICI* v. *Commission*, dyestuff manufacturers around Europe had three separate and identical price increases in various national markets within the common market.[25] There was no agreement to raise the prices, so the analysis had to be under the theory of concerted practices. All of the price increases were uniform.[26] Advocate General Mayras delivered an opinion analyzing the case and stated that in order to find a concerted practice by object, one must look at the actual market effects, because a concerted practice cannot be disassociated from the actual effects on competition.[27] Therefore, unlike agreements by object, analysis of concerted practices requires an examination of all of the effects on the market because those effects will be informative and serve as evidence as to whether there was a concerted practice that harmed competition. The facts have to be considered in light of the actual market in question, which in this case was the dyestuffs market.[28] In *ICI*, the effects showed a concerted practice harmed competition in the dyestuffs market.[29] There

[24]Case 48/49, ICI v. Comm'n, 1972 E.C.R. 621, 655.

[25] *Id.* at 622.

[26] *Id.*

[27] Case 48/49, ICI v. Comm'n, 1972 E.C.R. 665, 671 (Advocate General Mayras's Opinion).

[28] *Id.* at 673.

[29] *Id.* at 678.

was parallel conduct in raising prices in different geographic areas of the common market that could not be explained by the market structure.[30]

The ECJ agreed with Advocate General Mayras and found a concerted practice.[31] The court observed the actions by the undertakings had the effect of harming competition by removing uncertainty on the market, meaning companies knew what competitors were planning on doing and did not face a risk of raising prices while a competitor refused to raise prices.[32] The ECJ concluded that the effects demonstrated a concerted practice in violation of Article 101.

In *Suiker Unie*, the ECJ continued to analyze concerted practices by examining the effects on the market.[33] In this case, various sugar producers throughout the common market created systems whereby they refused to sell sugar to certain competitors in particular markets and limited sugar production.[34] However, the sugar market was heavily regulated in Europe and the market regulations had to allow for competition before the sugar producers could be found to violate Article 101.[35] The ECJ found that the regulations in Italy did not allow for competition to flourish, and, therefore, competition could not be restricted because one cannot restrict something that does not exist.[36] However, other markets permitted competition and the delivery and production

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[30] *Id.*

[31] Case 48/49, ICI v. Comm'n, 1972 E.C.R. 621, 655.

[32] *Id.* at 660.

[33] Cases 40–48, 50, 54–56, 111, 113, & 114–73, Suiker Unie v. Comm'n, 1975 E.C.R. 1671, 1916.

[34] *Id.* at 1678–79, 1923.

[35] *Id.* at 1917.

[36] *Id.*

limitations imposed by the sugar producers harmed competition in those markets resulting in a violation of Article 101.[37] The way the industry competitors acted had the effect of removing uncertainty in the market and therefore harmed competition.[38]

Taking into account the effects on the market was critical in these early cases. Unlike an analysis of agreements by object, concerted practices could not be examined without considering the effects on the market. In other words, effects are the essence of, and cannot be separated from, the concerted practice.

However, the analysis of concerted practices changed with the *Anic* decision.[39] In *Anic*, Advocate General Cosmas stated that there could be concerted practices that violate Article 101 by object without looking at the actual effects of the concerted practice on the market.[40] He determined that since one can have agreements by object or effect that violate Article 101, there must also be concerted practices by object *or* effect that violate Article 101.[41] In *Anic,* polypropylene producers throughout Europe set target prices for their products, had meetings to discuss strategy, and had quotas.[42] Advocate General Cosmas found there was a concerted practice by object on the polypropylene market because the companies attended meetings where information was shared among competitors.[43] It did not matter if a company did not share information at the meeting; all

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[37] *Id.* at 1942–45.

[38] *Id.*

[39] Case C-49/92 Comm'n v. Anic, 1999 E.C.R. I-04125.

[40] Case C-49/92, Comm'n v. Anic, 1999 E.C.R. I-4130, 4137–40 (Advocate General Cosmas's Opinion).

[41] *Id.*

[42] *Id.* at 4130–34.

[43] *Id.* at 4140–48.

that mattered was that the company attended the meeting where a participant shared information.[44] In so doing, the companies reduced independent action on the market through the sharing of information.[45] Autonomy on the market is critical for meaningful competition to flourish.[46] Uncertainty on the market cannot be replaced by certainty without effectively eliminating competition.[47]

The ECJ agreed with Advocate General Cosmas that there could be a concerted practice by object that violates Article 101 without any consideration of the effects on the market.[48] The ECJ stated that the polypropylene companies participated in collusion for the purpose of restricting competition and that collusion does not have to manifest itself on the market but rather is in and of itself a violation of Article 101.[49]

Anic created the new standard for concerted practices by object. The critical part of the analysis is that some sharing of information removed uncertainty on the market. This means that one no longer has to look at the effects a concerted practice has on the market, only that there was sharing of information that eliminated uncertainty on the market. This new analytical construct for concerted practices by object was evident in the *T-Mobile* decision.

The *T-Mobile* case involved five mobile carriers in the Netherlands that had a legal meeting where one company shared information about its commissions for

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[44] *Id.* at 4143.

[45] *Id.*

[46] *Id.* at 4140.

[47] *Id.* at 4143.

[48] Case C-49/92 Comm'n v. Anic, 1999 E.C.R. I-04125, para. 117–126.

[49] *Id.*

dealers.[50] The meeting was a one-time occurrence and the sharing of the information had no actual effect on the other companies' decision-making.[51] However, Advocate General Kokott found that the sharing of information by one carrier at a meeting was a concerted practice by object, even though no other company shared information.[52] He stated that there is no need to look at the effects of the concerted practice on the market.[53] For a concerted practice to violate Article 101 by its object the critical issue is whether uncertainty on the market was removed because that restricts competition.[54] Companies need to operate independently and if they receive information and remain on the market it is presumed they used the information in their decision-making, and are no longer acting independently.[55]

The ECJ agreed with the Advocate General and found a concerted practice that had the object of harming competition.[56] The concerted practice violated Article 101 because information was shared with competitors, the competitors remained on the market, and therefore, when they remained on the market it was presumed they reduced uncertainty and utilized the information in their decision-making.[57] The ECJ again

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[50] Case C-8/08, T-Mobile, 2009 E.C.R. I-04529, paras. 12–21 (Advocate General Kokott's Opinion).

[51] *Id.* at 42–62.

[52] *Id.*

[53] *Id.* at 45–6.

[54] *Id.* at 52.

[55] *Id.* at 52–90.

[56] Case C-8/08, T-Mobile, 2009 E.C.R. I-04529, para. 43.

[57] *Id.* at 27 – 40, 61–2.

reiterated that the actual effects on the market are irrelevant in determining if there is a concerted practice by object that harms competition in the common market.[58]

Based on the new ECJ interpretation of concerted practices by object under Article 101, the critical issue is whether information is shared by competitors and thereby reduces uncertainty on the market. This interpretation opens the door to companies violating Article 101 simply because a competitor unilaterally chooses to share proprietary information. It does not matter if the other company uses the information. It does not matter if the other company also shares information. As long as one competitor shares information one time and everyone who receives that information remains on the market, there is a violation of Article 101 for all who participated in the meeting. The result is that the ECJ has made it very easy for the European Commission to prove violations of Article 101. Companies must never share any information among competitors and if material information is actually shared, the companies will have participated in a concerted practice that by its object restricts competition if they remain on the market.

Violations by Effect

If an agreement or concerted practice does not have the object of harming competition, it can still violate Article 101 if it has the effect of harming competition in the common market. To determine the effects on competition, the ECJ must look at the factual circumstances surrounding the action, which includes not only the legal and

[58] *Id.* at 28–9.

economic context of the actions, but also requires an economic analysis of what happened to the market once the action occurred.[59]

In *John Deere*, tractor manufacturers in the United Kingdom established a registry whereby they shared information on tractors previously sold in the United Kingdom.[60] The Advocate General found that this registry had the effect of reducing uncertainty on the market and therefore violated Article 101.[61] The ECJ agreed, and stated that the effect of the agreement limited competition because it reduced uncertainty and had the effect of preventing manufacturers from entering the market because of concerns of participating in the registry.[62] The ECJ did not examine how the agreement would have helped the market; all that mattered was that it had the effect of reducing uncertainty on the market.[63] Only the negative effects of the agreement were deemed relevant.

In *Equifax*, banks in Spain shared information on borrowers in order to help facilitate loans.[64] The Advocate General found this sharing of information about customers was acceptable, because it had many beneficial effects by helping banks determine the hazards of lending to particular customers.[65] It was critical that the banks did not share information about their businesses and that it was open to all banks on the

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[59] Craig & de Búrca, *supra* note 5, at 977.

[60] Case C-7/95, John Deere Ltd. V. Comm'n, 1998 E.C.R. I-3115, 3115–16 (Advocate General Ruiz-Jarabo Colomer's Opinion).

[61] *Id.* at 3131–33.

[62] Case C-7/95, John Deere Ltd. V. Comm'n, 1998 E.C.R. I-3138, 3161–64 & 3171.

[63] *See, e.g.*, *Id.* at 3166.

[64] Case C-238/05, Asnef-Equifax v. Ausbanc, 2006 E.C.R. I-11125, 11133 (Advocate General Geelhoed's Opinion).

[65] *Id.* at 11139–44.

Spanish market.[66] The Advocate General determined that this information sharing was necessary for the banking system and actually had beneficial effects.[67] The ECJ agreed, finding the sharing of customer information did not harm competition.[68] The effects of the information sharing were beneficial to the banking industry because it helped prevent bad loans to borrowers who could not satisfy the loans.[69] This case is interesting because the ECJ examined beneficial effects and did not have an issue with the sharing of information like other ECJ cases have found. This makes one wonder if this case is an outlier. However, it does demonstrate that when looking at the effects of a concerted practice, the ECJ will consider a great amount of factual information surrounding the actions.

The effects analysis is not common because it is relatively easy for the ECJ to find a violation by object in agreement and concerted practice cases. Effects can be beneficial if a company gets passed the low bar for proving object, because the company can argue all of the factual circumstances surrounding the agreement or concerted practice.

Conclusion

It is clear that object and effect are separate violations under Article 101. If one has an agreement that by its very nature harms competition, it will violate Article 101, even if there are no negative effects on competition, or even if there are beneficial effects for market integration. A concerted practice by object no longer requires an analysis of

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[66] *Id.*

[67] *Id.*

[68] Case C-238/05, Asnef-Equifax v. Ausbanc, 2006 E.C.R. I-11145, 11167–68.

[69] *Id.* at 11163–64.

the effects on the market; the critical point is that information was shared by competitors regarding their businesses and the competitors remained on the market. The competitors cannot remove uncertainty and independent decision making from the market. If a company survives the object scrutiny, then the actual market effects will be examined by the ~~ECJ~~ to determine if there was a violation under Article 101.

The violation by object test seems overly harsh, especially when considering concerted practices, but the European Union is based on a common market and if competition is hindered, private borders can be established and prevent the market integration that is important for the existence of the European Union. Therefore, Article 101 is critical to the existence of the European Union, and requires strict tests to enforce it. However, a strict test can remain that takes into account the factual circumstances relevant to the market, especially where the agreement or concerted practice benefits market integration.

Malvina Mardirosyan
Content for NYLS Website on EU Competition Law
4/23/2014

The Differences Between Horizontal and Vertical Cooperation in EU Competition Law

The content below examines the differences between horizontal and vertical cooperation in European Union (EU) competition law. To better understand the approach of the Court of Justice of the European Union (CJEU), the analysis also compares the differences that the United States Supreme Court (US SC) makes between horizontal and vertical cooperation. The analysis leads to the conclusion that the CJEU is substantially driven by the principles of market integration and in most instances does not make as strong of a distinction when compared to the distinction made by the US SC.

The analysis below is based on 14 leading EU competition law cases in the area of concerted practices. The majority of the cases look into horizontal type cooperation as opposed to vertical cooperation.

Background:

Article 101 prohibits "all agreements, decisions of associations of undertakings and concerted practices which may affect trade between Member States..." Restraint of competition may take place at different levels of economic activity in the Common Market; in a vertical or horizontal type of arrangement.[1]

Definitions:

EU caselaw defines horizontal as "cooperation between two or more actual or potential competitors" and vertical as "cooperation between companies operating at different levels of the production or distribution chain.[2]" At this point in the analysis, the US and EU courts define horizontal and vertical cooperation very similarly. In US, horizontal cooperation is also generally defined as restraints imposed by agreements between competitors and vertical as restraints imposed by agreement between firms at different levels of distribution chain.[3]

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[1] '*Société Technique Minière (L.T.M.)* v. *Société Maschinenbau Ulm GmbH (M.B.U.)*. Case 56/65. Decision of June 30, 1966' (1967) 4 *Common Market Law Review*, Issue 2, pp. 197–202.
[2] Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L102, 23.4.2010, p. 2
[3] *Bus. Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730, 108 S. Ct. 1515, 1522, 99 L. Ed. 2d 808 (1988).

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Some of the most common horizontal cooperation in the market includes information exchange, purchasing agreements and research and development agreements.[4] In contrast some of the most common vertical cooperation includes exclusive distribution, franchising and resale price restrictions.[5]

CJEU Distinction between Horizontal and Vertical Cooperation:

The CJEU makes less of a distinction between horizontal and vertical cooperation than the US SC. This is most likely because the CJEU is influenced by strong principles of market integration.

One way to reveal the CJEU's distinction between horizontal and vertical cooperation is when looking at the caselaw. For example, in *Consten and Grundig*[6], a vertical restraints case, the CJEU declined to follow the Advocate General's (AG) opinion and stated that both horizontal and vertical restraints are included in Article 101(1). Specifically, the AG argued that Article 101 TFEU would not apply to vertical agreements between a producer and his distributor because they are not each other's competitors. However, the CJEU did not agree with the AG and reasoned that the wording of Article 101 does not suggest that a distinction between horizontal and vertical agreements should be drawn. Instead, the court stated that the Article applies to all agreements, which may distort competition within the Common Market. It should also be emphasized that the CJEU generally follows the opinion of the AG and the fact that the CJEU is taking a different approach than the AG shows the CJEU's firm decision that the language of the statute does not suggest a distinction between horizontal and vertical agreements.

Another way revealing that the CJEU does not make a strong distinction between horizontal and vertical cooperation is that the Commission focuses on the economic benefit of vertical agreements but the CJEU does not look at the effect on the market if there is object of restraint on competition. Specifically, the Commission states in the Guidelines on Vertical Agreements: "Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution ...they can lead to a reduction in the transaction and distribution costs of the parties and to an optimization of their sales and investment levels. [This] will outweigh any anti-competitive effects due to restrictions..."[7] However, the CJEU does not look at the

[4] Official Journal of the European Union on the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, 1.14.2011
[5] Guidelines on Vertical Restraints available at: http://europa.eu/legislation_summaries/competition/firms/cc0007_en.htm
[6] *Consten Grundig v. Commission*, 1966, ECR 299
[7] Guidelines on Vertical Agreements [2010] OJ C 330/10, Para. 6,7

effect of restraint on competition when object is present. In *Grunding*, the CJEU states "...for the purpose of applying Article 101(1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition."[8]

US SC Makes a Stronger Distinction Between Horizontal and Vertical Cooperation than the CJEU:

Competition law in the United States is primarily defined by Section 1 of the Sherman Act,[9] which prohibits any agreement that unreasonably restraints competition and affects interstate commerce. In US, violations primarily fall into two categories:

(1) Per Se Violation - requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice (i.e. horizontal agreements to divide the market or allocate customers).

(2) Violations of the Rule of Reason - a totality of the circumstances test, asking whether the cooperation promotes or suppresses market competition (i.e. vertical non-price restraints such as where a reseller can sell).

Therefore, compared to the CJEU distinction of horizontal and vertical cooperation, the US SC makes a stronger distinction where horizontal arrangement is more readily condemned as per se illegal and vertical arrangement is generally subject to the rule of reason.

Case References:

The table below points to specific text in European caselaw and AG opinions on the differences between horizontal and vertical agreement.

Case	Agreement Type	CJEU found violation	AG found violation	Court Analysis
1. Consten Grundig	**Vertical** (German Manufacturer of Electronics and French	Yes	No	CJEU: "There is a presumption that vertical sole distributorship agreements are not harmful to competition and in the present case there is nothing to invalidate that presumption. On the contrary, the contract in question has increased

[8] Parag. 342 of *Grunding*
[9] Sherman Antitrust Act, Ch. 647, 26 Stat. 209, *codified at* 15 U.S.C. §§1-7

	Distributor)			the competition between similar products of different makes. Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article 85 (1) merely because it might increase the former. Besides, for the purpose of applying Article 85 (1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition. Therefore the absence in the contested decision of any analysis of the effects of the agreement on competition between similar products of different makes does not, of itself, constitute a defect in the decision." Parag. 342
2. ICI (Dyestuffs case)	**Horizontal** (Competitors at the Dyestuff Industry)	Yes	Yes	CJEU: "The citations from American case-law included in the defense allegedly prove that the question whether a given business action is taken pursuant to a common will is a question of evidence, and that a uniform action constitutes a sufficient indication of the existence of such a common will when that conduct is not the necessary consequence of the structure of the market." p. 643 CJEU: "[A]lthough parallel conduct in respect to prices may well have been an attractive and risk-free objective for the undertakings concerned, it is hardly conceivable that the same action could be taken spontaneously at the same time, on the same national markets and for the same range of products." p.659
3. Suiker Unie	**Horizontal** (Sugar Producers)	Yes	No	CJEU: Regulations in Italy did not allow for competition to flourish, and, therefore, competition could not be restricted because one cannot restrict something that does not exist. p.1917 CJEU: The undertakings' activity in the market had the effect of removing uncertainty in the market and therefore harmed competition. p. 1942-45
4. T-Mobile	**Horizontal** (5 Major Phone Carriers in The	Yes	Yes	AG: "According to the Court's case-law, the rebuttable presumption must be that the undertakings taking part in the concerted action

	Netherlands)			and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market; it is for the undertakings concerned to prove the contrary." Parag. 75
5. Rhone-Poulenc	**Horizontal** (Polypropylene Producers)	No	No	CJEU: "It is necessary...for action to be taken with the knowledge and the awareness that results from the concentration." Parag. 942 CJEU: "[T]he applicants admitted...that the information obtained during the meeting was useful." Parag. 943
6.Ahlstrom (Woodpulp case)	**Horizontal** (Wood pulp Producers)	No	No	AG: "[The conclusions] establish beyond doubt that at the date of the Statement of Objections, the Commission had no objective evidence whatsoever that the announced prices and the prices charged were the same for all the producers." Parag. 119 AG: "The most elementary common sense shows that there had been, at the very least, a material alteration in the evidence of the infringements: it is sufficient to note that the Commission did not have at its disposal, by the date of the Statement of Objections, the information to compile Table 7..." Parag. 125
7. CRAM and Rheinzink	**Horizontal (possible Vertical element)** (Zinc Producers/Importers)	Yes	No	CJEU: "[t]he undertakings...do not just relate cases of 'force majeure' and comparable situations, but to all cases of 'serious disruption', of whatever kind and from whatever source... [T]he conditions for the application of the contract are so wide and so vague as to serve as a restriction of competition." Note: The contract was enforced by undertakings to mitigate the effects of an employee labor-strike." p. 1706
8. Allianz Hungaria	**Vertical** (Car Repairers and Insurers)	Yes	No	CJEU: "While vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, they can, nevertheless, in some cases, also have a particularly significant restrictive potential." Parag. 43 CJEU: Moreover, it is necessary to take account of the fact that such an agreement is likely to affect not only one, but two markets, in this case those of car insurance and car repair services, and that its object must be determined with respect to the two markets concerned." Parag.

				42 CJEU: "It is not disputed that, if there was a horizontal agreement or a concerted practice between those two companies designed to partition the market, such an agreement or practice would have to be treated as a restriction by object and would also result in the unlawfulness of the vertical agreements concluded in order to implement that agreement or practice." Parag. 45 AG: "Unlike horizontal agreements, where it is clearly easier to identify an object or effect restrictive of competition, vertical agreements are considerably more complex." Parag. 69 AG: Since the repair shops are not customers of the insurance companies and the hourly repair charges cannot be regarded as consideration for the sale of insurance, it is not possible in the present case to talk about a genuine 'vertical relationship." Parag. 70
9. ANIC	**Horizontal** (Polypropylene Producers)	Yes	No	AG: " The Court of First Instance therefore rightly held, despite faulty legal reasoning that since the Commission had established to the requisite legal standard that Anic had participated in collusion for the purpose of restricting competition, it did not have to adduce evidence that the collusion had manifested itself in conduct on the market. Parag. 126
10. Irish Beef Industry (BIDS)	**Horizontal** (Beef Producers)	Yes	Yes	AG: "The present situation is also not comparable with the circumstances underlying the judgment in *GlaxoSmithKline Services* v *Commission*. In that case – which by the way concerns vertical price regulation – prices were determined largely by statutory rules at the stage of sale to the end consumer and were thus largely removed from the effects of supply and demand. In such a case, there may be doubts as to whether vertical price regulation can restrict competition within the meaning of Article 81(1) EC. However, the present case is not comparable because there are no statutory provisions which might prevent benefits stemming from competition between stayers being passed on to consumers." Parag. 74

11. British Sugar	**Horizontal** (British Sugar Manufacturers and Traders)	n/a	Yes	AG: "Pricing cartels normally serve to safeguard particularly high prices, and are therefore, in principle, liable rather to cause or increase imports than adversely to affect them. Accordingly, in the case-law, it is assumed only in the case of market-sharing cartels that they screen off the relevant markets from competitors from other Member States and thus *per se* have an effect on trade between Member States." Parag. 25
12. John Deere	**Horizontal** (Manufacturers and Importers of Agricultural Tractors)	Yes	Yes	CJEU: "in considering that the Commission and correctly found that the information exchange system necessarily influences the volume of imports into the United Kingdom, the Court of First Instance took into account the characteristics of the relevant market, and the fact that the main suppliers on that market also operated throughout the common market, and the large share (88%) of the relevant market controlled by the undertakings which were members of the agreement." Parag. 119
13. Societe Technique Miniere	**Vertical** (German and French Companies)	n/a	n/a	CJEU: "[In] the type of agreement under consideration, competition is restricted at the level of distribution. For in reality all dealers and consumers can only obtain supplies from the concessionaire who alone receives the goods directly from the grantor. Furthermore, the concessionaire may not purchase or sell competing products. Restriction on competition is particularly appreciable when the products in question are different from others of their kind because of special attributes. It is usually for the national court to decide whether the restriction on competition is appreciable." p. 250
14. ASNEF-Equifax	**Horizontal** (Spanish Financial Institutions exchange credit information)	No	No	CJEU: Information sharing between the banks was beneficial to the industry because it helped prevent bad loans to borrowers who could not satisfy the loans. p. 11163

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TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION
ARTICLE 101
CONCERTED PRACTICES BY OBJECT

The contemporary European Competition Law violation of Article 101 concerted practices by anticompetitive object is a product of fifty-seven years of legal analysis. In that time, businesses have seen courts interpret and apply the legal classification of the violation in progressively restrictive ways. At first, the view was that *de facto* joint conduct in the market was a *sine qua non* of concertation for an infringement. Today, however, the standard may have market participants asking, "have they cracked us without *actus*?"

Since the signing of the Treaty of Rome in 1957, the letter of the law governing competition within the Common Market of the European Union has remained unchanged. However, the Court of Justice of the European Union ("CJEU", "ECJ", or, the "Court") has modified - as Advocate General Cosmas put it in 1997 - the "legal classification" or "spirit of the rules on competition," throughout more than a half-century of the Court's Judgments.

Within that case law, paramount decisions have established precedents and carved out exceptions. CONSTEN AND GRUNDIG V COMMISSION (1966) ("C&G"), was the first judgment by the ECJ to acknowledge the existence of six separate offences prohibited under Article 101. Simply, the Court held that the drafters of Article 101 included three distinct acts, i.e., "agreements", "decisions", and "concerted practices", and each act could be coupled with either an anticompetitive "object", *or* an anticompetitive "effect". This necessarily meant that there were six separate violations caught by Article 101. More precisely, the Court held that "*for the purpose of applying Article [101](1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.*" See *Grundig*, Joined Cases 56 and 58/64, E.C.R. 299 at 342 (1966). Once it had been established that a violative act had an anticompetitive object, analysis of whether the act had an anticompetitive effect on the market was irrelevant and unnecessary.

C&G is an essential decision pertaining to the legal classification of a concerted practice with an anticompetitive object. While the case's merits did not involve concerted practices, the Court's decision fundamentally established Article 101 violations by object, and thus, requires as matter of legislative intent and legal principle, that there be some legal distinction between concerted practices with anticompetitive objects, and concerted practices with anticompetitive effects.

At the time of the C&G decision, July 1966, Article 101 concerted practices had never been subjected to judicial scrutiny. The first Article 101 concerted practice case the Court had to consider was ICI V COMMISSION (1972) ("ICI"). In his preliminary discussion, the Court's Advocate General ("AG")[1] Mayras stated, "*Up till now, the Court has only had to consider the application or interpretation of Article*

[1] See attached curriculum vitae of all named Justices. http://curia.europa.eu/jcms/jcms/Jo2_7014/

[101] in relation to agreements") (emphasis in original). See *Imperial Chem. Indus. v. Comm'n*, Case 48/69, 18 E.C.R. 619, at 669 (1972).

In relevant part, ICI involved the investigation of ten dyestuffs producer-distributors, who then controlled approximately eighty percent of the European dyestuffs market. There were three uniform price increases occurring in the internal dyestuffs market between January 1964 and October 1967, culminating in the European Commission's Decision imposing fines on the undertakings for the violation of today's equivalent of Article 101(1). See *Id. passim.*

Factually, the Commission established that in October 1967, representatives of the undertakings met at the headquarters of Sandoz SA, in Basel, Switzerland. AG Mayras founded, "*We clearly do not have the verbatim report of the meeting, but one thing is certain: [J. R. Geigy SA]'s representative announced the intention of that undertaking to increase prices of soluble dyestuffs based on aniline before the end of the year, and it appears from the documents on the Court file that this intention was stated in precise terms: there was to be an increase of 8% with effect from 16 October 1967.*" It was also established that representatives of two other undertakings at the meeting "*were also considering an increase.*" See *Id.* at 679. What followed the 1967 meeting was, in fact, a general and uniform price increase in the Common Market on those products.

Ultimately, and upon the recommendation of AG Mayras, the ECJ held that "*although parallel conduct in respect of prices may well have been an attractive and risk free objective for the undertakings concerned, it is hardly conceivable that the same action could be taken spontaneously at the same time, on the same national markets and for the same range of products.*" See *Imperial Chem. Indus. v. Comm'n*, Case 48/69, 18 E.C.R. 619, at ¶ 109 (1972). Thus, a concerted practice to increase prices existed, and the undertakings were found in violation of Article 101.

What is most essential about the ICI decision is that the Court established the first legal standard pertaining to what evidence is required to demonstrate a concerted practice either exists or had existed.

In his 1972 Opinion, AG Mayras introduced a concept related to the legal classification of concerted practices that future a Advocate General, AG Vesterdorf, would call: the doctrine of attempt. AG Mayras established that, "*an objective criterion, which is basic to the concept of a concerted practice [...] is that the participating undertakings must in fact have acted in the same way.*" See *Imperial Chem. Indus. v. Comm'n*, Case 48/69, 18 E.C.R. 619, at 671 (1972). This factor would remain a requirement of law for almost twenty years, but progressively, the Court would dismiss it as an incorrect application of Article 101.

Surely, Advocate General Mayras deserves the benefit of doubt, so to speak, as not only was ICI the first European Community case pertaining to concerted practices, but also, the deliverance of his Opinion in ICI was Mayras' first before the Court.

A distinguished Justice, AG Mayras seems to contradict himself throughout his Opinion while attempting to forge the precedent established in C&G with the concept of illicit concertation amongst undertakings. When AG Mayras attempted to announce precisely when a violation of Article 101 occurred, the AG established that two factors must be evidenced to demonstrate a concerted practice: (1) there must be actual, or *de facto* parallel conduct; and (2) "origin of and reasons for the parallel conduct." AG Mayras states that the second element may be established by "the existence of a certain common will." See *Imperial Chem. Indus. v. Comm'n*, Case 48/69, 18 E.C.R. 619, at 673 (1972).

Perhaps what was troubling to AG Mayras was that without requiring that *de facto* parallel conduct be established, an undertaking could potentially be fined for anticompetitive conduct simply by coming in contact with information that inherently lessened free market competition. In other words, the AG may have thought it overly restrictive to permit a violation to be established without requiring a demonstration

that undertakings, in fact, *acted* in some anticipative way. This standard contradicted C&G as the Court effectively made concerted practices by object a legal impossibility.

As alluded to above, in 1991, AG Vesterdorf would become the first member of the Court to review the doctrine proposed by AG Mayras almost 20 years prior. In his RHONE-POULENC V COMMISSION (1991) ("R-P") Opinion, AG Vesterdorf analyses Article 101 relating to an appeal of a disputed Commission Decision that imposed heavy fines on fifteen chemical industry undertakings. The undertakings in R-P were alleged to have "formed a price cartel and introduced quota arrangements and other measures supporting the price cartel." See *Rhône-Poulenc v. Comm'n*, Case T-1/89, E.C.R. at 875 (1991).

AG Vesterdorf began his review of the Court's precedent stating, "*Mr. Advocate General Mayras tries to introduce a doctrine of attempt into the concept of concerted practice [...]. However, the theory ventured by him has not been supported or commented upon in later judgments of Court of Justice or its Advocates General*"). See *Id.* at 934.

AG Vesterdorf progresses his analysis in a way that still requires *de facto* subsequent conduct, while also introducing new language to the legal standard for evidencing concerted practices by object. He wrote, "*In my opinion, it can therefore be maintained that in principle concertation will automatically trigger subsequent action on the market that will be determined by the concertation, whether the undertakings do one the thing or the other with regard to their market policy[.]*" See *Id.* at 941. Though the case would later be adjudicated on other grounds, AG Vesterdorf began the elimination of the doctrine of attempt. In other words, the 1991 Court was starting to announce that actual conduct might not be necessary to establish an Article 101 concerted practice by object violation.

In 1993, the Court again decided a case regarding concerted practices, this time pertaining to the exchange of pricing information within the internal woodpulp market, and again the Court began to remove the factor of *de facto* identical conduct. AHLSTRÖM OSAKEYHTIÖ AND OTHERS V COMMISSION (1993) ("AO&O"), involved a European Commission Decision issuing fines to more than twenty producer-supplier undertakings within the bleached sulphate woodpulp market.

In his Opinion, AG Darmon progressed AG Vesterdorf's announcement from two years earlier, writing, *"[...] to take the view that* de facto *identical conduct forms part of the concept of concerted practices would lead to a particularly restrictive conception of the Treaty, which is contrary to Article [101]."* The case would ultimately be decided on factors relating to the structure of the woodpulp market. Oversimplifying the crux of AO&O, substantial and compelling expert testimony of economists established that the natural, and necessarily occurring transparent woodpulp market structure, made the fines against the undertakings inappropriate. More importantly for European Competition Law, the 1972 Mayras legal standard of an Article 101 violation by concerted practice by object was issued yet another criticism.

In COMMISSION V ANIC (1999) ("ANIC"), the Court decided a case precisely on the merits of an Article 101 concerted practice by object violation. See *Comm'n v Anic Partecipazioni SpA.*, Case C-49/92 E.C.R. 1999 at I-4125 (1999). ANIC, concernedly, again involved the polypropylene market. The case pertained to an appeal lodged by the European Commission seeking the dismissal of a Court of First Instance ("CFI" or "trial court") Judgment that declared invalid a portion of a Commission Decision that determined Anic Partecipazioni SpA ("Anic") was engaged in a concerted practice of exchanging commercially sensitive information and effectively fixing prices with ten other producers within the internal polypropylene market. See *Id. passim.* In a prevailing argument before the trial court, Anic claimed that the Commission had not established the requisite legal standard for a violation because the Commission did not evidence Anic's attendance at various meetings. Putting the argument another way, Anic claimed that because they did not attend certain meetings during a five-year period, the Commission's evidence was

too weak to sustain a claim against them during the later periods of the anticompetitive concerted practice. See *Id.* at ¶22.

AG Cosmas went about overturning the CFI's judgment methodically. In an Opinion the Court would later endorse, AG Cosmas effectively determined that a concerted practice by object was, and effectively still is, a violation when the spirit of the rules on competition are offended.

First, he recognized that, "*[the legal classification of concerted practices by object] ha[d] been dealt with only peripherally by the Court, in Opinions of its Advocate Generals.*" Then, using more pointed language, he wrote, "*In those Opinions it appears that initially the view was taken that de facto joint conduct in the market was a* sine qua non *of concertation for an infringement of Article [101] of the Treaty to be established. [...] However, in recent years there has been a discernable distancing from that position as is highlighted by the Opinion of AG Darmon in the Woodpulp cases.*" See *Id.* at ¶21.

It what might be an effort to justify issuing fines to undertakings with primarily presumptive facts, AG Cosmos wrote, "*What constitutes a concerted practice whose 'object' is anticompetitive must in the end be determined on the basis of a reading of Article [101] as a whole which is such as to safeguard the rational coherence of that provision and, above all, with reference to the objective which the rules on competition seek to serve both generally and with specific regard to Article [101] (systematic and teleological interpretation).*" See *Id.* at ¶23.

In what is today the substantive standard of an Article 101 violation by concerted practice with an anticompetitve object, AG Cosmas announced, "*Consequently, the spirit of the rules on competition [are] broken once there has been contact between undertakings with a view to disclosure of the course of conduct which they contemplate adopting on the market.*" See *Id.* at ¶23.

Perhaps pleonastically, AG Cosmas elaborated, adding, "*At that point one is faced with a breakdown of the free-competition model upheld by the Community provisions under which each undertaking individually plans the policy which it will adopt on the market following its own appraisal of market conditions.*" See *Id.*

Not surprisingly, the Courts Judgment in ANIC effectively eradicated the requirement of *de facto* parallel conduct from the requisite legal standard for establishing a violation of an Article 101 concerted practice.

However, in T-MOBILE NETHERLANDS BV AND OTHERS (2009) ("T-Mobile"), the Court expanded the already very restrictive standard above, holding that undertakings actually not need to even contemplate an anticompetitive adaptation on the market to violate Article 101.

T-Mobile involved five mobile telephone network operators in the Netherlands. Representatives of the five operators held a lawful meeting on 13 June 2001. At that meeting they discussed, inter alia, the reduction of standard dealer remunerations for postpaid subscriptions, which were to take effect in September 2001. "*In those circumstances[,]*" the Press Service of the CJEU summarized, "*what matters most is [if undertakings have had] the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition.*" Press Release 47/09, Judgment of the Court of Justice in Case C-8/08, 4 June 2009.

Presently, all that an undertaking need do to violate Article 101 is engage in anticompetitive contact that "has the potential to have a negative impact on competition." See *T-Mobile Netherlands BV and Others*, Case C-8/08 at ¶31 (2009). The Court, referencing the Opinion of AG Juliane Kokott, wrote, "*as pointed out by the [AG,] in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be* capable *[...]* of resulting *in the prevention, restriction or distortion of*

competition within the common market. Whether, and to what extent, in fact, such anticompetitive effects result can only be of relevance for determining the amount of any fine[.]" (Emphasis added). See *Id.* at ¶31.

The Court went on to further announce, "*this requirement of independence [...] does [...] strictly preclude and direct or indirect contact between such by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions[.]*" See *Id.* at ¶33.

How times have changed. In a world where information seems ubiquitous, its hardly conceivable that, as a standard of law, an undertaking can be fined for indirectly coming in contact with anything that could potentially distort the free market. Or is it?

Prior to evaluating deterrence initiatives, it is essential to recognize the distinction between felonious antitrust violations in the United States, and the civil nature of punishments for Article 101 violations under European Competition Law.

A violation of Section 1 of the Sherman Antitrust Act, the analogous American statute to Article 101, will carry harsh, federal prison sentences, intended to deter very easily concealable, and *very* highly lucrative crimes. See *United States v. Archer-Daniels-Midland Co. and Minn. Corn Processors LLC*, 272 F.Supp2d 1 (2003)(a case made infamous by pop culture, involving international price fixing in the animal-feed-additive-lysine market, over $105 million in criminal fines, and decade long federal prison sentences).

There is no such deterrent in European Competition Law. Instead, the EU chooses to pursue the objective of preventing massively lucrative, inherently secret, anticompetitive behavior, by implementing a sort of, "*don't even think about it*," standard. More precisely, the Court now unequivocally does not require the demonstration of any such actual anticompetitive conduct. See *T-Mobile*, at ¶43 (holding, "It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices.")

Anticompetitive contact is essentially all that is required to be demonstrated to enforce a Commission Decision imposing a fine for violation of Article 101. Put more elaborately, any contact between competitors that may influence decisions or intentions on the market, and any contact that is capable of distorting normal market conditions, is presumptively violative as matter of European Union Law.

The contact need not even be inchoate, or in anticipation of an anticompetitive result. If contact is more likely than not to have the potential to be anticompetitive, those undertakings in contact may be fined. Everything else, that is all other facts and circumstances and actual effects, are to be taken into consideration when determining the amount of the fine. See *Id.* at ¶ 31.

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EU Competition Law

The Use of Presumptions in European Union Competition Law

I. Introduction

In general, a presumption can be defined as a belief that something is true even though it has not been proven. To put it in a formal logic sense, think about it as "If A → B", where 'A' is a given fact, and proof of 'A' leads to the proposition of 'B'. When discussing the topic of presumptions, it is important to distinguish the difference between legal presumptions and factual presumptions. A legal presumption is accepting that something is true until it is proved not true. The most commonly known legal presumption, at least from a U.S. law point of view is that someone accused of a crime is presumed to be innocent until proven guilty. It is from this presumption that the legal standard "beyond a reasonable doubt" is deduced. Factual presumptions on the other hand, are not so clear cut. The best way to define a factual presumption is an inference drawn regarding an unknown fact based upon a known fact. To help understand this concept, I can use you, the reader to presume that you are interested in this subject matter (unknown fact), based on the known fact that you are currently reading this article. For the basis of the discussion on European Union competition law, factual presumptions are the type of presumptions at issue.

II. Why Presumptions are used

In European competition law, presumptions of proof are generally accepted for reasons of effectiveness and efficiency. Without using presumptions, it would likely be very difficult to

terms, the CJEU is perfectly fine with the potential of convicting an innocent party if it results in continued protection of the integrity of the EU.

III. Presumption Standards

While it is clear that the use of presumptions in CJEU decision making is acceptable, what is unclear is why there is no bright-line standard that governs how presumptions may be used. The various language used by the AG's and the CJEU throughout cases where presumptions are present is often inconsistent, which begs the question of whether they should be used at all. While it is agreed that parallel conduct alone cannot furnish proof of concertation (cite), the CJEU has used contradictory language stating that they may be used if concertation is the only plausible explanation for such conduct (cite). Here, we have what may be considered a bright line standard, that parallel conduct alone is not enough to prove an infringement, however, this standard contains a carve out allowing for the sole use parallel conduct to determine an infringement. Throughout the various cases focusing on concerted practices, language such as "Firm, precise, consistent"(Ahlstrom), "Strong, Precise, Relevant" (Suiker), "Sufficiently Precise and Coherent Proof" (CRAM) have all been used when discussing the amount of evidence needed for a presumption to be valid. It may be conceded that although this language differs, the overall goal of requiring some sort of requiring some sort of concrete evidence to support the presumption remains the same. However, if this is taken to be true, the problem remains that these words are not held to a defined standard (for example, beyond a reasonable doubt or a preponderance of the evidence). Not having a bright line standard for what kinds of evidence will produce a valid presumption ultimately leaves open the subjective opinion of the AG or CJEU.

The lack of a true standard ultimately leads to uncertainty, both for the companies involved and for the court. In terms of uncertainty for companies, not having a strict standard leads companies uncertain as to when a situation will arise where they will be deemed in violation. It is impossible for a company to know whether the violation occurs when they agree to attend a meeting; when they actually attend the meeting; once they listen to what is disclosed at the meeting; once they leave that meeting; or when they continue to operate on the market following the meeting.

For the court, the lack of a bright line standard creates uncertainty in applying the presumptions. There have been varying forms of language, as mentioned above, that the courts have used in applying presumptions, but how are they supposed to be properly applied when there is not a single set of rules? Additionally, this differing language is not governed by any statute and is ultimately up for interpretation depending on who is hearing the case. All these factors lead to the possibility of inconsistent results and inadvertently create what can be considered a legal standard of guilty until proven innocent.

IV. Relationship between Presumptions and Burden of Proof/Evidentiary Standards

In dealing with cases that involve a concerted practice, three elements must be present: collusion between undertakings, market conduct of these undertakings and a causal connection between those two former elements. The CJEU uses presumptions of proof as a way to link the element of causal connection. In European competition law, a general rule of proof is that the competition commission ~~who~~ bears the burden of proof, having to prove a fact, in order to find an infringement of Article 101. A presumption of proof, if expressed in terms of shifting the burden of proof between parties, generally shifts the burden of proving a certain fact directly to

the other party. This may mean for example, that if the commission proves that one fact has happened, another fact is legally presumed to have been proven as well (if A → B). The CJEU seems to use the presumption of proof of causality in this exact manner. This type of presumption would mean that if the elements of collusion and market behavior have been proven by the commission, the causal connection between these two elements is presumed to have been proven as well. The burden of proof which initially rests on the commission is then viewed to be fulfilled for each of the three elements. The burden then shifts to the other party to rebut any or all of these elements.

The facts in a concerted practice case usually involve issues of collusion and market activity which need to be proven to the required legal standard of proof in order for the presumption to hold true. The standard of proof generally relates to the level of certainty a judge has to be convinced of the facts so as to rely on them (example of the U.S. law presumption of innocent until proven guilty → standard of proof is beyond a reasonable doubt). The AG in the T-Mobile case indicates that the presumption of proof of causal connection does not concern the burden of proof, but rather the standard of proof. It is apparent that there is a connection between the burden of proof and the standard of proof. The standard of proof may be expressed in terms of the burden of proof in that the burden may be heavier for a high standard of proof, making it more difficult to dismiss the burden of proof, and a lighter burden for a low standard of proof. These types of presumptions may be rebutted by a showing of evidence to the contrary as well as a showing of the intention of the parties (Anic).

V. Substantive vs Procedural Law

An important issue when discussing European competition law is the distinction between substantive and procedural law. This difference is vital to understand because the CJEU is supposed to provide the final interpretation of substantive law, while procedural law issues are left for that of the member state courts. However, after the T-Mobile decision, it becomes unclear as to whether procedural law is still exclusive to the member state courts. Presumptions of proof are an evidentiary matter, which falls into the realm of procedural law. It is clear that, in general, procedural rules are directly related to substantive law, in that their purpose is to allow claims that are based on substantive law to be decided. It is also clear that rules of proof and evidence correlate to substantive law in that they are formed and influenced by the substantive law provisions to which they are deduced. When thought about in this context, it seems apparent that the CJEU does have the authority to bind the member state courts on this issue, but the question still remains as to whether they are overstepping their boundaries and creating an extremely slippery slope.

VI. The Problems with Presumptions

The issue of whether presumptions are useful is hotly debated subject. When the evidence proffered is heavily skewed in favor of an infringement, it is hard to argue that using a presumption to determine illegal conduct is not useful. However, the problem lies with circumstances in which presumptions are used even when there is minimal evidence that leads to a conclusion. Taking the T-Mobile case for an example, there was virtually no evidence to support that the companies were colluding in any way. A presumption of illegal conduct was based on the fact that they attended a meeting in which only one party announced pricing, and

because they continued to operate on the market, were found to be infringing on Article 101. In cases like this, it is virtually impossible for a company to prove that they were not engaging in a concerted practice by any way other than exiting the market. Giving a company an ultimatum of either exiting the market or continuing to operate, but being found in violation of Article 101 can be considered both unfair and unreasonable. Granted, there will be instances where presumptions lead to false results, but when the bar is set so low in presuming illegal conduct, companies are basically left for dead with no chance to defending themselves.

Another problem with presumptions is the argument that they may serve as a disincentive to market integration, a contradiction of the goal of the EU. If presumptions are ultimately used to find companies to be in violation of Article 101, this may create skepticism when exploring new ventures. Companies will be more careful when deciding whether to attend industry events, merging with an existing company, or entering new markets. Because the threat of such heavy fines will always be in the back of the mind of an undertaking, they may find it more beneficial to simply avoid what could potentially be a successful endeavor just to avoid any actions that may be construed the wrong way by the competition commission and subsequently the CJEU.

VII. Conclusion

In closing, the use of presumptions in European Union competition law plays an integral role in CJEU decision making. This concept is of particular importance in concerted practice by object cases, which continue to be a gray area in the law due to the lack of presence of an agreement and short of conduct that has an anti-competitive effect on the market. While the use of presumptions are controversial by their very nature, they are a necessary function in ensuring that the market operates in a manner that is unimpeded by unfair practices that create restrictions

on competition or boundaries to entry. With that said, it also cannot go unnoticed that there are numerous problems with how and why presumptions are used by the court. After the T-mobile case and going forward, it will be interesting to follow how the court applies presumptions in cases where the facts lead to little evidence of collusion in determining whether there has been a violation. One thing that is certain not to change however, is the fact that the goal of the court will ~~forever~~ be to protect the interest in promoting market integration by ensuring that goods and services continue to move freely across borders.

Proofread carefully!

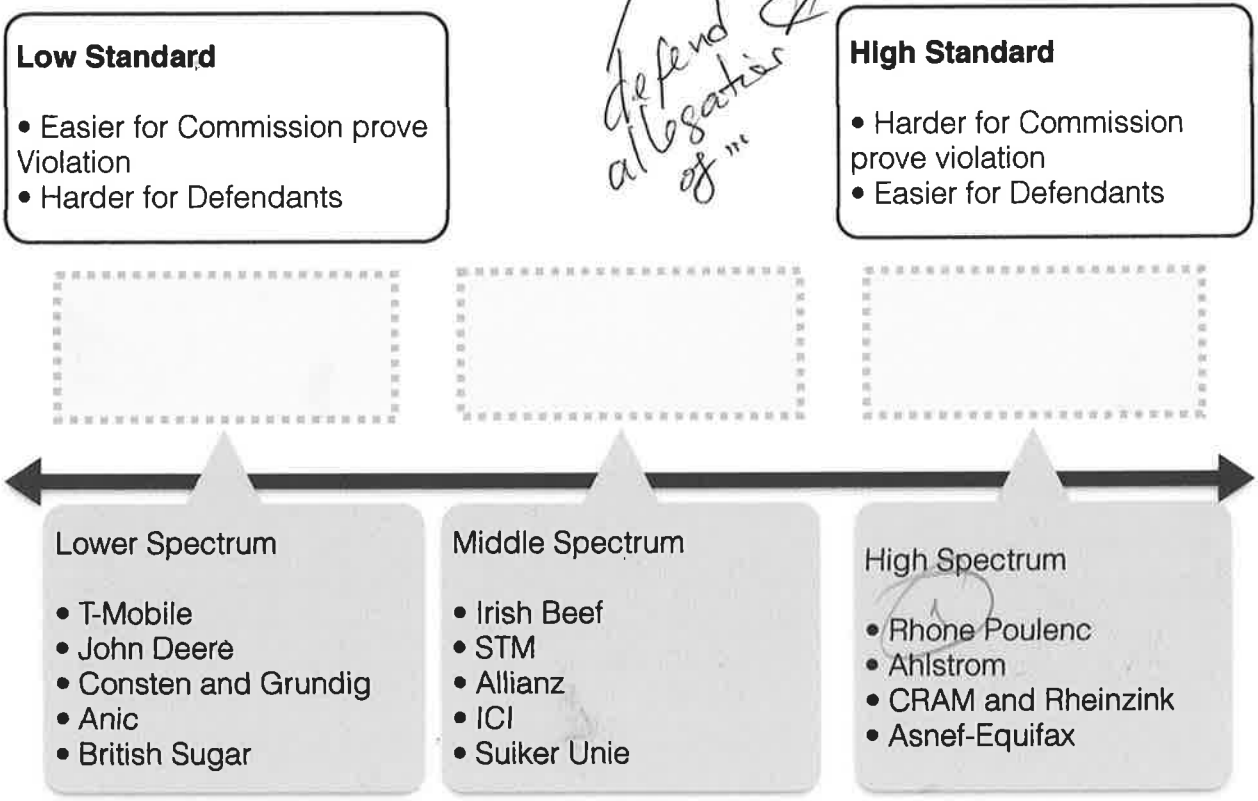
Jan Gabriel Hisugan
April 10, 2014
European Union Competition Law

Standards of Proof

The standard of proof is the quantity and quality of the evidence that is sufficient to prove a legal violation. Article 101 of the Treaty on the Functioning of the European Union clearly states that agreements and concerted practices that prevent, restrict or distort competition are prohibited. There are activities that would be considered in clear violation of this provision. For example, agreements with the object of affecting competition are prohibited, as demonstrated by a contract for exclusive dealership rights between Grundig, a German electronics manufacturer, and Consten, a French distributor. However, such clarity is rare and there are a range of activities whose lawfulness is difficult to define. Relevant case law is the best guide to navigate what is considered a violation but there is a wide range of definitions and standards.

This range is best presented as a scale to show, compare and contrast the standards that each case applies to determine whether an actor or action has compromised competition. Similar to the rational basis scrutiny, intermediate scrutiny and strict scrutiny standards of American Constitutional law, cases will fall into categories indicative of the quantity and quality of evidence necessary to show a violation. A low standard, as portrayed to the left of the spectrum, allows a wide range of actions to fall within a broad definition of the concepts to be considered a violation, making it harder for the defendants to fight an anti-competition lawsuit. A high standard will require clear and specific actions to match a precise definition of the concepts in the law in order to be considered a violation, making it easier for defendants to dispel an anti-competition law suit.

defend allegations of "



Lower Spectrum

The Commission is required to show less to prove a violation. The Defendants have few to no defenses available.

T-Mobile

This case is about the single communication of one cellular provider to the other cell companies in the market.

- **It doesn't matter that there was only one event.** Its clear if there are continuous events but the subject matter of the concerted action, market conditions, the number, frequency and form of meetings determine what is considered a violation. The concerted practice must simply be capable in an individual case of resulting in the prevention, restriction or distortion of competition in order for the Article 101 EC to be triggered.
- **No link to retail prices necessary.** Even an exchange of information can suffice; especially one which removes the uncertainties in the market pursues anti-competitive object.
- **The only defense is to leave the market.** The only defense against such a violation is to leave the market, to remain is to continue the concerted practice.

John Deere

This case is about the compilation of tractor market data which is available to the public.

- **Reduction or removal of uncertainty regarding the operation of the market restricts competition.** Traders may adapt and make intelligent decisions but Article 101 precludes any direct or indirect contact which has the object or effect to change normal conditions of competition in the relevant market. That contact may include the exchange of information regarding the nature of the products or services offered, the size and number of undertakings and the volume of that market.
- **If independence is effected by direct or indirect action, it is in violation of Article 101.** If the effect of the agreement was to increase the transparency of that market and reduce uncertainty regarding the strategies of competing undertakings then it is in violation
- **Increased barriers to the market constitute a violation.**
- **Analysis of the effects on the market is not necessary.**

Consten Grundig

This cases is about an exclusive distribution agreement between a French distributor and a German manufacturer. Need to refer to the territorial restraints

- **If the agreement explicitly states an anti-competitive object, it is in violation of Art 101.** An agreement for exclusive distribution rights is in clear violation of Article 101 and there is no need to consider effect on the market. The decision is based solely on the words of the agreement. They do not look at the effects on the market which may actually be favorable competition

Anic

This case is about the setting of target prices through price initiatives and annual volume control in the polypropylene industry

- **Lawfulness of business activity continues to be the autonomy of each undertaking.** The concerted practice by object is influencing the conduct of an undertaking in correspondence to a increased certainty as to the future conduct of its competitors, though actual certainty is not required. It is particularly doubtful whether a an undertaking may acquire certainty as to the conduct of its competitors even if it has entered into an

agreement with them on the matters concerned. The relevant criterion continues to be whether the object of the meetings is to influence the conduct on the market of a given undertakings by lessening uncertainty as for the conduct of the competitors.

• **It is theoretically impossible to participate in a meeting which other participants agree on an unlawful course of conduct without participating in the unlawful conduct itself.** However, this must be applied differently to each case.

British Sugar

This case is about the pricing structure between two sugar manufacturers as evidenced by written correspondence.

• **Potential effect must be taken into account without showing actual effect.** The written correspondence shows a concurrence of wills and while the actual effect on the market was nonexistent, it was deemed a violation due to the possible negative effects on the market.

Middle Spectrum
No Particular party is favored.

Irish Beef
This case is about how the Irish Beef Industry set up regulations to limit the meat industry output.

- **If theres an object, theres no need for effect.** The notion of restriction by competition refers primarily to the object of the agreement; if a necessary consequence of the agreement is the restriction of competition then its a violation. There are no limitation on what actions could be considered a restriction
- **Intent is not taken into account.**
- **Must consider the legal and economic context.** There are three categories where assumptions of restrictions can be rejected: limitations on freedom that have no effect, the agreement is ambivalent in terms of its effects, and ancillary agreements which are necessary to pursue the lawful primary arrangement (if primary is not restricted then the ancillary cant be considered violation).

Societe Technique Miniere
This a case about the vertical agreement between a French and German company to sell goods in Germany.

- **There is a restriction on competition when the position of parties in agreement are altered to an appreciable extent as shown with quantitative evidence.** The alteration to trade must appear directly from the facts or must appear directly from the facts or must be reasonably foreseeable and that the influence on trade must be of some importance.

Allianz
This case is about the agreements between insurance companies and auto repair shops. regarding insurance sales and repair prices

- **Concerted practice by object is enough to prove violation.** An anti-competitive object by assessing the context and provisions of the under takings. May take intent into account but not necessary. If competitors decide to replace risk with coordination through direct/indirect contact or if subsequent conduct shows a cause/ effect relationship then it constitutes a violation.
- **Parallel Conduct is not enough to prove existence of concerted practice.**

ICI Dyestuffs
This case is about three general and uniform price increases of dyestuffs and constitute concerted practice among the undertakings

- **Parallel conduct that can't be explained by market conditions constitue a violation.**
- **Removal of the risks of competition constitute a violation.** This can be shown the price announcements.
- **Parallel conduct alone is not sufficient and that there needs to be a will to act in common.** It is important to look at the effects on the market in order to determine if there is a concerted practice in violation of Article 101.

Suiker Unie
This case is about the activity of the sugar market in the EU, specifically which companies they were and weren't selling to.

- **In order to show a violation the totality of the facts must be considered.**
- **It is important to examine the market regulations in the industry.** To show if a undertaking's actions were lawful or unlawful, documents used by the the companies was found to be very good evidence.

Higher Spectrum
The Commission is required to show more evidence to prove a violation. The Defendant has ample defenses to respond.

Rhone-Poulenc
This case is about whether or not the polypropylene company was part of the secret meetings, price setting, output restriction and quota designations.

• **A concerted practice relates to a form of cooperation between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation for the risks of competition.** The continuing cooperation and collusion of the producers in the implementation of the overall agreement may display the characteristics of a concerted practice. It is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way.

Ahlstrom
This case is about the quarterly price announcements of Woodpulp producer.

• **Concerted practice must be the only plausible explanation.** In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 101 prohibits any form of collusion which distorts competition, it does not deprive economic operators of the ~~right~~ freedom to adapt themselves intelligently to the existing and anticipated conduct of their competitors.

• **Unlawful concertation must lessen uncertainty and give participants assurance as to the conduct expected of the competition to the point where they can foresee actions.**

• **Parallel conduct is lawful as long as knowledge of that conduct is obtained solely by lawful market conduct.** Take caution in accusing "price fixing"; mere price announcement are not concerted practice. However, if certain price changes are irrational in comparison to the market they're more likely to be concerted practice.

• **Evidence must be "sufficient coherent and precise to view that parallel behavior was concerted practices".**

CRAM and Rheinzink
This case is about the seemingly parallel and cause/effect actions occurring in the zinc markets.

• **Parallel conduct without explanation or evidence of object does not constitute a violation.** If t a restrictive effect on competition is not demonstrated there is no violation. Furthermore, an error of fact resulting in parallel conduct does not show concerted practice.

• **It is sufficient to show facts in a different light and allow another explanation of the facts to be substituted.**

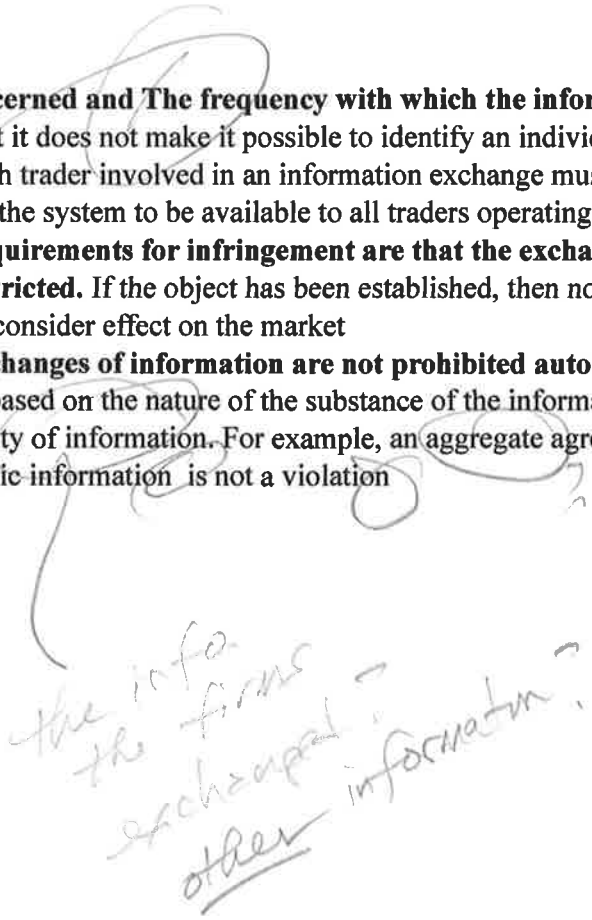
Asnef-Equifax
This case is about the exchange of information between credit institutions.

• **The distinction between a lawful and an unlawful exchange of information depends on the following two factors: the nature and substance of the information exchanged, the structure of the**

market concerned and The frequency with which the information. Aggregate market information is lawful, provided that it does not make it possible to identify an individual competitor or become aware of its business strategy. Each trader involved in an information exchange must act independently and autonomously. It is also essential for the system to be available to all traders operating in that field.

• **Requirements for infringement are that the exchange affects member states and that competition must be restricted.** If the object has been established, then no need to go into effect. If the object is not established, consider effect on the market

• **Exchanges of information are not prohibited automatically.** Whether an exchange is lawful or unlawful is based on the nature of the substance of the information, the structure of the market concerned and the availability of information. For example, an aggregate agreement between most to all parties in an industry to share public information is not a violation



The burden of proof li

Case	Year	Facts
ICI (Dyestuffs)	1972	Based on information supplied through trade associations, the Dyestuffs industry simultaneously increased prices on nine difference occasions.
Suiker Unie	1975	The sugar market is heavily regulated but competitive. The sugar producers partitioned the market. Regulation included limiting production based on surplus within the market, the creation of an intervention price, and production refund.
CRAM and Rheinzink	1984	CRAM, a French company and Rheinzink and German company were fined for Art. 101 violations in 1982. Both companies, jointly sought to have the judgment vacated. The first decision was based on parallel behavior between the two companies. The most recent decision focused on three issues: 1. Adequacy of evidence to establish the existence of a concerted practice? 2. Contractual obligations requiring territorial restraints and 3. Reciprocal assistance among the two companies as a violation of Art 101.
Rhone-Poulenc	1991	Rhone-Poulenc abandoned the polypropylene business in 1980 by selling its business to BP Chimie. Rhone-Boulenc was charged with violating 85(1) because 1. Meet regularly with competitors in secret meetings 2. Set prices 3. Limited output and 4. designated quotas. The charges were dismissed because Rhone-Poulenc was not in business during the time period of the alleged violations.
Ahlstrom (Woodpulp)	1993	Woodpulp producers released prices every quarter. The releasing of prices was a well-established trading practice. The producers stressed that there was no anti-competitive effect and that it was rational response to limit risk within the market.
ANIC	1999	The Western European polypropylene market was supplied exclusively by 10 producers. After the expiration of patents, seven new producers entered the market. Anic is one of the original 10 producers in the market. ANIC had violated Art. 85(1) from 1977-1982 because producers 1. held secret meetings to discuss and determine prices 2. set target prices 3. agreed on measures to implement target prices (limited output) 4. simultaneously increased prices, and 5. allocated market share
British Sugar	2003	During a four year period, defendants coordinated price fixing policy by informing each other of price fluctuations nationally. The end goal for sugar producers was to maintain prices nationally.
T-Mobile	2009	Five Dutch cellular companies meet once to discuss the reduction of standard dealer remunerations. The case is referred to CFI.

es on the Commission.

Was the burden met?	How the burden was met
Yes	Information exchanged + Simultaneous price increases = Concerted Practice
Yes	Limiting Production + Surplus within the market + Intervention + Production refund = Concerted Practice
Sort of	Defendants showed that there were alternative explanations for their conduct.
No	Defendant was not in business at time of the alleged violations.
Sort of	Defendant's proved parallel conduct was based on oligopolistic market. Parallel conduct by itself is not a sufficient basis to prove a concerted practice.
Yes	Secret meetings + Set target prices + Limited output + Simultaneously increased prices + Allocated market share = Concerted practice
Yes	Information exchange + Coordinated prices = Concerted Practice
Yes	1 meeting + information exchange = Concerted Practice

disclosure

Error Type

Jihad Hakamy

The Role of Error Analysis in Antitrust Cases and Why Antitrust Cases are Vulnerable to Erroneous Decision

The Error Type concept has been borrowed by antitrust scholars from the field of behavioral sciences, where it is commonly used to define possible errors. It is used to determine whether there is a relationship between variables and potential error in certain population from which sample data are drawn.

Error analysis is important because it enables more accurate scrutiny of facts. It is as well important in the field of antitrust to ensures that cases do not lead to a high amount of false convictions (Type I errors) or false acquittals (Type II errors).
But first, what are Error Types? (Type I and Type II errors)?

Type I error is defined as a rejection of a null hypothesis when it is true. It is also known as a false positive or an error of the first kind. For example, a fire alarm goes off indicating a fire breaking out when in fact there is no fire. Or a blood test result that shows a patient has a certain disease when in reality the patient does not have that disease.

In antitrust cases, Type I error represents a false conviction, *i.e. a* case in which the court condemns a conduct that was not anticompetitive. Type I error reflects an over enforcement or over regulation.

Type II error is defined as accepting of a null hypothesis when in fact it is false. It is also known as a false negative or an error of the second kind. For example, a fire breaking out and the fire alarm does not go off. Or a blood test failed to indicate that a patient has a certain disease.

In antitrust cases, Type II error represents a false acquittal, *i.e.* a case in which the court fails to condemn a conduct, which was anticompetitive. Type II error reflects under enforcement or under regulation.

Table 1-1 is a matrix illustrating potential outcomes of the Type I and Type II Errors and correct outcome.

Table 1-1

	Null hypothesis is True	Null hypothesis is False
Rejecting null hypothesis	Error Type I	Correct outcome
Accepting null hypothesis	Correct outcome	Error Type II

Why Error Types analyses are important in the antitrust field?

Error Types are important for competition law enforcement and policy because both Error Types have a negative impact on consumers' well being and market integration. Type I errors force industries to act precautionary when facing the risk of being falsely accused of anticompetitive violations. As a result, companies will be less inclined to engage in business

products and services to consumers, and hurdle market integration overall. Similarly, Type II error has its negative impact. It has the potential of harming consumers by allowing monopoly which results in control prices and products availability.

European Commission always attempts to balance market integration policy with consumers' protection. Antitrust cases, however, are extremely complex because it presents agreements and conducts that are not clearly anticompetitive. As a consequence of such complexity, antitrust enforcement errors may harm genuine competition. Error Type analysis helps enforcement agencies to avoid erroneous outcomes.

Error Types Analysis for agreements and concerted practices cases studied

The main objective of this analysis is to determine whether the CJEU committed an error when examining parties' conduct under Article 101. In addition, the analysis will determine whether CJEU has an error preference when deciding antitrust violations.

The first step is to create a table containing all the cases and the different variable such as: parties' relationship whether vertical or horizontal, type of conduct whether agreement or concerted practice, what was the CJEU decision and the AG's opinion, and what error types the CJEU or AG preferred.

Once the table is populated with data, the second step is to look at CJEU decision and AG's opinion. If the AG agreed with the CJEU decision, then there is a low probability of an error. On the other hand if the AG disagreed with the CJEU decision, then there is a high probability of an error.

Table 1-2 illustrates the above analysis.

Table 1-2[1]

Case Name	Relationship Type	Agreement or Concerted Practice	CJEU decision	AG decision	Chance of error	Suggested CJEU Error preference	Suggested AG Error preference
Consten Grundig	V	A	Y	N	High	I	II
ICI (Dyestuffs case)	H	CP	Y	Y	Low	I	I
Suiker Unie	H	CP	Y	N	High	I	II
T-Mobile	H	CP	Y	Y	Low	I	I
Rhone-Poulenc	H	A/CP	N	N	Low	II	II
Ahlstrom	H	CP	N	N	Low	II	II
CRAM and Rheinzink	H	CP	N	N	Low	II	II
Allianz Hungaria	V	A	Y	N	High	I	II
ANIC	H	CP	Y	N	High	I	II
Irish Beef Industry	H	A	Y	Y	High	I	I
John Deere	H	A	Y	Y	Low	I	I
ASNEF-Equifax	H	A		Y			

Error Type

Jihad Hakamy

Method to measure probability of an error

The following formula is created to represent the variables which are deemed to be important when examining the probability of error committed by the CJEU or AG. It is important to highlight that this formula is mainly for illustrative purposes and has not been examined by our team due to limited resources. Future competition law and Article 101 studied with more resources and time might consider developing empirical data and examine this formula to prove its accuracy.

The proposed formula is:

$$P = \alpha + \beta X + \beta Y + \beta Z$$

α = (51% more likely than not) to (90% beyond reasonable doubt)
X = Agreement or Concerted Practice
Y = Presumption
Z = Standard proof
β = coefficient

Findings and Conclusions

The table demonstrates that the CJEU error preference is Type I Error. Out of the twelve cases we studied, eight cases which the court preferred to commit Type I Error. That is, the court would rather find an agreement or concerted practice in violation of Article 101 even if there is not anticompetitive object or effect.

On the other hand, the AG prefers Type II Error. From the twelve cases we studied, there are seven cases in which the AG preferred to commit Type II Error. This means the AG would rather find an agreement or concerted practice not in violation of Article 101 even if there is an actual anticompetitive object or effect.

This is also evidence from the cases were the CJEU and AG disagreed on the outcome. For example, in Consten Grundig the CJEU clearly preferred to commit Type I Error by finding a vertical agreement between electronic manufacture in Germany and distributor in France in violation of Article 101. No facts supported such finding. The AG argued for Type II Error by stating that the agreement did not have any restriction on competition by either object or effect. In fact, there was support that the agreement help the German distribute to enter the French market and made electronics available for France consumers.