Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions

Final Report

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Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions

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Abstract
This Report provides advice to the European Commission on the delineation between restrictions of competition by object on the one hand and by effect on the other in the context of joint purchasing agreements. It examines judgments, decisions and guidance on buyer cartels and joint purchasing and negotiation agreements, both within the EU and in third countries around the world. The Report defines what is meant by a 'buyer cartel' and by 'joint purchasing', and makes a number of suggestions for the framework of analysis for determining whether such agreements restrict competition by object or by effect.

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Executive summary

The European Commission is reviewing the block exemptions for horizontal co-operation agreements and the guidance provided by the Commission's Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements of 2011.

This Report provides expert advice commissioned as part of the Commission's Impact Assessment of its review of chapter 5 of the Horizontal Guidelines of 2011 on purchasing agreements. In particular, it provides advice on the delineation between 'joint purchasing agreements' that must be assessed as a restriction of competition by effect under Article 101 TFEU and those arrangements that qualify as a restriction of competition by object, that is to say as a 'buyer cartel'. This is an important issue, in particular because of the perceived lack of clarity on how joint purchasing differs from a buyer cartel.

Chapter 2 of the Report provides some general comments about the application of Article 101 TFEU and, more specifically, on the distinction between restrictions of competition by object and restrictions of competition by effect. Annex 1 to the Report contains pages 121 to 145 of chapter 3 of the tenth edition of Whish and Bailey, *Competition Law*, in which we set out our thoughts on the subject in the light of the most recent case-law of the EU Courts on this topic.

Chapter 2 also includes a discussion of whether the pursuit of sustainability objectives (using that term broadly to include matters such as environmental protection, animal health, or social protection) by a joint purchasing agreement may influence its characterisation as being restrictive of competition by object or effect. It acknowledges that, in principle, certain joint purchasing arrangements can make a positive contribution to sustainability objectives. It points out, however, that certain agreements between competing purchasers might be regarded as restrictions of competition by object. Chapter 2 argues that a distinction should be made between 'anti-competitive horizontal restraints' that harm competitors at the same level of the market as the parties to the agreement, such as a group boycott, and 'vertical purchasing restraints', where, for example, a group of purchasers agree not to purchase from a supplier or suppliers at a different level of the market. An example of a vertical purchasing restraint would be what we describe as a 'sustainable products purchasing agreement', for example where a group of competing purchasers agree to buy timber only from sustainable sources. We consider that a sustainable products purchasing agreement should not be considered to be restrictive of competition by object, but should instead be analysed on an effects basis.

Chapter 3 explains the terminology that we use in this Report and discusses different structures and activities of buyer groups. In particular, it explains the important distinction between a buyer cartel, on the one hand, and joint purchasing, on the other. In the case of a buyer cartel, undertakings agree with one another on how they will individually interact with suppliers, or they exchange commercially sensitive information with one another about how they will do so. By contrast, joint purchasing occurs where a common organisation acting on behalf of the members of a buyer group provides the interface between suppliers in the upstream market and the purchasers in the purchasing market that the organisation represents. The essence of joint purchasing is that the buyer group, by bargaining collectively on behalf of its members, seeks to negotiate more favourable terms and conditions than would have been obtained if each purchaser had acted alone.

Chapter 4 and Annex 2 of the Report contain our research on buyer cartels and joint purchasing cases. We have reviewed relevant judgments, decisions and guidance on joint purchasing agreements from within the EU and from third countries. Our research reveals that fines have been imposed on numerous buyer cartels, both within the EU and in third countries; but that there has never been a fine imposed in a case of joint purchasing or joint negotiation. Chapter 4 of the Report also includes a discussion of the reasons given by competition authorities and courts for their findings of an infringement of Article 101 or its domestic equivalent in the law of a Member State in cases on purchasing. It describes the few decisions in which benefits in the terms of Article 101(3) have been successfully invoked by the parties to joint purchasing agreements.

Chapter 5 of the Report contains our proposal for a general framework for analysing purchasing agreements as either by object or by effect restrictions of competition. It makes suggestions on how the authors consider that chapter 5 of the Horizontal Guidelines of 2011 can be improved. In particular, it explains that buyer cartel cases – in the EU, the Member States and in third countries – have never involved joint purchasing. It suggests that the future Guidelines should define what is meant by 'buyer cartel' and 'joint purchasing' and proposes definitions to that end. It also makes a number of suggestions on the topics of 'relevant markets' 'theories of harm', 'restrictions by object', 'restrictions by effect' and 'Article 101(3)'.

Chapter 6 of the Report considers a number of specific issues raised by the Call for Tenders, including the relevance of various market considerations, secrecy and the pursuit of sustainability objectives. Annex 2 of the Report provides a number of concrete and relevant, real-life examples of joint purchasing and buyer cartels from around the world.

The report ends with some concluding thoughts in Chapter 7.

Chapter 1
Introduction

1.1 In 2019 the Commission published a Consultation strategy document[1] for an evaluation of the block exemptions for horizontal co-operation agreements[2] (the 'HBERs') and the guidance provided by the Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of 2011 (the 'Horizontal Guidelines'). The procedure was divided into two steps: first an evaluation phase followed by an impact assessment phase.[3]

The evaluation phase

1.2 An evaluation roadmap was published on 5 September 2019 and a public consultation was launched on 6 November 2019.[4] Responses to the public consultation are available on the website cited in footnote 3 above. Following the public consultation two documents were published on DG COMP's website. First, on 6 May 2021, the European Commission published its *Staff Working Document: Evaluation of the Horizontal Block Exemption Regulations*, SWD(2021)103 final (the 'SWD').[5] This document summarised the findings of the evaluation of the horizontal block exemption regulations on research & development and specialisation agreements and of the Horizontal Guidelines. The results of the evaluation showed that, while the block exemptions and Horizontal Guidelines remain useful and relevant, they also lack clarity in some respects. On the same day the Commission also published a study by external contractors, *Evaluation support study on the EU competition rules applicable to horizontal cooperation agreements in the HBERs and the Guidelines*.[6] This study provided qualitative and quantitative evidence on the effectiveness, efficiency and relevance of the HBERs and the Horizontal Guidelines.

1.3 Chapter 5 of the Horizontal Guidelines of 2011 discusses purchasing agreements. Paragraph 194 of the Guidelines notes that 'joint purchasing agreements usually aim at the creation of buyer power which can lead to lower prices or better quality products or services for consumers'. It is through **joint** purchasing that buyers are able to improve their bargaining position vis-á-vis sellers, and this can lead to benefits for their own customers. Paragraphs 200 to 204 of the Guidelines set out some possible competition concerns that might arise from joint purchasing agreements; they then consider whether such agreements could be restrictive of competition by object (paragraphs 205 to 206); whether they might be restrictive by effect (paragraphs 207 to 216); and the circumstances in which they might satisfy Article 101(3) (paragraphs 217 to 220).

1.4 The evidence gathered during the Commission's evaluation phase of the review of the regime for horizontal agreements suggested that overall Chapter 5 of the

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1 *https://ec.europa.eu/competition-policy/system/files/2021-03/consultation_strategy.pdf.*
2 *Commission Regulation (EU) No 1217/2010 for research and development agreements and Commission Regulation (EU) No 1218/2010 for specialisation agreements.*
3 *The progress of the review can be followed at https://ec.europa.eu/competition-policy/public-consultations/2019-hbers_en.*
4 *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11886-Evaluation-of-EU-competition-rules-on-horizontal-agreements/public-consultation_en.*
5 *https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf.*
6 *https://ec.europa.eu/competition-policy/evaluation-support-study-eu-competition-rules-applicable-horizontal-cooperation-agreements-hbers_en.*

Guidelines was a useful instrument in the assessment of joint purchasing agreements. However stakeholders did note a number of concerns about their application. These are conveniently set out in Annex 4 of the SWD:

> **4.1.5. Purchasing agreements (Chapter 5 of the Horizontal Guidelines)**
>
> A wide array of respondents covering individual companies, business associations (retailers in particular) and law firms consider that the **market share thresholds of 15%** are too low to exempt pro-competitive purchasing agreements. Some respondents propose a general increase of the market share threshold to between 20 and 30% in order to align them with other EU competition law regulations, such as the R&D BER, the EUMR or the VBER. Other respondents propose a differentiation of the market share threshold with different percentages applying to the purchasing and selling markets.
>
> Several law firms and associations of competition lawyers and economists consider that legal certainty is lacking due to a perceived difficulty to distinguish between **joint purchasing and buying cartels** as both involve an agreement on purchase prices. In this regard they point at recent Commission decisions covering buying cartels and the need to clarify the factors that influence the distinction between legitimate purchasing arrangements and by object buying cartels. [A few] respondents raised uncertainty about the importance of the form of the joint purchasing agreement or the degree of integration required and about the distinction between joint purchasing and joint bidding or joint negotiation.
>
> Several law firms and associations of competition lawyers and economists consider that the underlying economic approach to joint purchasing agreements and the balance between efficiencies created by the joint purchasing agreement and greater buyer power 119 is too much focused on the impact downstream through the pass-on of efficiencies to consumers, in particular, in the form of lower prices. The Horizontal Guidelines would not sufficiently address harmful effects of buyer power on suppliers or competitors.
>
> Finally, several respondents indicated that the Horizontal Guidelines do not provide sufficient guidance on retail alliances nor enough practical examples. Respondents representing retailers complained about the fragmented, national purchasing markets mainly due to the supply strategy of manufacturers. This would result in an artificial increase in the negotiation power of retail alliances compared to such large suppliers and is further aggravated by the use of territorial supply constraints by the latter. A respondent criticises the fact that joint purchasing agreements by a group of retailers are subject to two consecutive tests, namely first an assessment of the horizontal agreement and, subsequently, an assessment of the vertical agreements. According to this respondent, horizontal elements should neither be viewed in isolation nor take precedence over vertical elements but should instead be assessed together. Other respondents, mainly representing suppliers, are lacking guidance in Chapter 5 of the Horizontal Guidelines on certain practices applied by retail alliances, such as (i) collectively extracting fees unrelated to any genuine service, (ii) collective delisting, and (iii) anti-competitive exchange of information. They also request a clarification about the position of retailers, in particular, as

regards their dual role as both customers of manufacturers' products and competitors with their own private label products.

1.5 These concerns can be summed up as follows:

- are the market share thresholds in the Guidelines too low?
- do the Guidelines successfully distinguish legitimate joint purchasing from buyer cartels?
- do the Guidelines successfully distinguish between joint purchasing and joint bidding or joint negotiation?
- are the Guidelines too concerned with harm to downstream markets as opposed to harm to suppliers and competitors?
- do the Guidelines deal adequately with retail alliances?

The impact assessment phase

1.6 On 7 June 2021 the Commission published its Inception Impact Assessment (the 'IIA').[7] Feedback on the IIA included concerns about the lack of guidance on the use of joint purchasing agreements to achieve sustainability goals and about the joint negotiation by licensees of licences of standard essential patents subject to a FRAND commitment. These responses are available on the website cited in footnote 3 above. Following the IIA the Commission launched a public consultation on 13 July 2021, requiring feedback by 5 October 2021.

1.7 As part of the Commission's ongoing work on the review of horizontal agreements, it decided in the summer of 2021 that it would seek targeted expert advice specifically on the delineation between joint purchasing agreements that have to be assessed as a restriction of competition by effect under Article 101 TFEU and those types that qualify as a restriction of competition by object, that is to say as a buyer cartel.[8] The Call for Tenders required that the advice should cover all economic sectors and indicate whether the current approach laid down in Chapter 5 of the Horizontal Guidelines needs clarification and, if so, how; if necessary the advice would refer to particular sectors of the economy and to particular types of joint purchasing agreements.

1.8 The need for clarity on this topic was prompted in particular by the second of the concerns in paragraph 4.1.5 of the SWD set out above, namely the lack of clarity over **the distinction between joint purchasing arrangements and by object buyer cartels**. This concern was no doubt prompted by the fact that in recent years there have been a number of decisions by the European Commission and by national competition authorities within the EU ('NCAs') in which significant fines have been imposed in cases involving buyer cartels that were considered to be restrictive of competition by object.

1.9 We wish to highlight at this early stage of our Report that our extensive research into cases in which fines have been imposed on buyer cartels – both within the EU and in third countries – has revealed that there has **never** been a fine imposed in a case of **joint** purchasing or **joint** negotiation. Fines have been imposed only in cases where buyers agreed with one another on matters such as the maximum prices that they individually would pay for products or the terms

[7] *https://ec.europa.eu/competition-policy/system/files/2021-06/HBERs_inception_impact_assessment.pdf.*

[8] *See the Commission's Call for Tenders COMP/2021/009, available at https://ec.europa.eu/competition-policy/evaluation-support-study-eu-competition-rules-applicable-horizontal-cooperation-agreements-hbers_en.*

and conditions on which they would transact with suppliers; or where they exchanged commercially sensitive information with one another which removed competitive uncertainty that would otherwise have existed between them. However in none of these cases was there any **joint** or **collective** engagement by or on behalf of the buyers with their suppliers.

1.10 Our Table of Buyer Cartel Cases in paragraph 4.8 of this Report lists seven decisions of the European Commission and eleven decisions of NCAs in which fines have been imposed on undertakings operating a buyer cartel. Our research into **joint** purchasing has found only one decision – *Eurovision*[9] – in which there was a finding of a restriction of competition by object. In that decision the Commission found that the joint negotiation and joint purchasing of television rights to international sports events restricted competition by object and effect. That was because the joint purchasing both eliminated competition between the broadcasters participating in the Eurovision system and gave them a competitive advantage over their competitors. However the Commission granted an exemption to the Eurovision system because it created a number of cost efficiencies, such as lower transaction costs, which benefited consumers who could watch more sports programmes than would otherwise be the case.

1.11 We attach little significance to the finding of a 'by object' restriction in the *Eurovision* case for three reasons. First, the Commission did not consider whether the Eurovision system revealed a sufficient degree of harm to competition, which is the essential legal criterion for an infringement by object.[10] Secondly, it is clear from the decision that the Commission was mainly concerned with the fact that there would have been appreciably more competition in the absence of the joint acquisition of television rights, which is why it also found a restriction by effect. Thirdly, the Commission did not (and did not need to) distinguish between its findings of a restriction of competition 'by object' and 'by effect' in *Eurovision*, since it did not affect the outcome of the case: the Eurovision system was granted an exemption under Article 101(3). The exemption decision was annulled on appeal to the General Court because of errors in the Commission's application of Article 101(3); however the Court did not say anything about the application of Article 101(1) in this case.[11]

1.12 We have found several cases in which joint purchasing was found to have restricted competition by effect; or where it seems that the Commission or NCA considered that there was a restriction by effect but chose to close the case on the basis of commitments without formally deciding whether there had been or still was an infringement.

1.13 The expert advice sought by the Commission is intended to enable it to provide certainty in any future Horizontal Guidelines for firms involved in or considering whether to participate in joint purchasing agreements as to whether their conduct qualifies as a restriction of competition by object, unlikely to meet the conditions of Article 101(3) TFEU, or as a restriction of competition by effect that must be assessed in line with the Guidelines. Paragraphs 1.9 and 1.10 above indicate that the crucial question is to determine what is meant by **joint** purchasing that distinguishes it from a buyer cartel. It seems that it is the **jointness** of behaviour that determines whether an agreement should be

9 *OJ [1993] L 179/23.*

10 *See e.g. Case C-67/13 P Cartes Bancaires v Commission EU:C:2014:2204, paras 49, 52, 53 and 57.*

11 *Cases T-528/93 etc Métropole Télévision v Commission EU:T:1996:99; the exemption decision was readopted, OJ [2000] L 151/18, but this was also annulled on appeal, Cases T-185/00 etc Métropole Télévision v Commission EU:T:2002:242*

considered to be restrictive of competition by object on the one hand or by effect on the other. We provide a suggested framework of analysis for determining what is meant by **joint** purchasing in Chapter 5 of this Report. Since the purpose of this Report is to illuminate the distinction between restrictions of competition by object and by effect in the case of purchasing agreements, we will not consider in depth how the effects of such agreements should be analysed.

1.14 The Call for Tenders specifically requires that the expert advice should address a number of issues, as set out in section 2 of that document:

> – a legal analysis of any competition authority decision and EU or national court judgment on joint purchasing agreements, in addition to the expert's own, impartial legal interpretation;
>
> – a proposal for a general framework for analysing joint purchasing agreements as either by object or by effect restrictions of Article 101 TFEU;
>
> – a proposal of relevant factors for making such distinction of joint purchasing agreements as by object or by effect restrictions based on the expert's own impartial legal interpretation of decisions by competition authorities and case law of the EU and national courts. In this context, the expert shall consider whether any of the following factors, among others, are relevant for the purpose of this assessment: (i) buyers are competing downstream, (ii) degree of integration on the buyer side (e.g. whether the buyers created or not a separate (joint purchasing) entity or a looser form of cooperation in charge of the negotiations with suppliers), (iii) aggregated share of the buyers in total demand in the (upstream) purchasing market, (iv) degree of concentration of sellers in the (upstream) purchasing market, (v) aggregated market share of the buyers in the (downstream) selling markets, (vi) the fact whether the buyer cooperation is secret towards sellers. Particular attention shall also be given to the question whether the pursuit of sustainability objectives (e.g. environmental protection, animal health and/or welfare, or social protection) by the joint purchasing agreement may influence the qualification as a by object or by effect restriction. This could, for example, be at stake where buyers, in spite of their commercial interests, agree to increase their purchasing price because they want to ensure that their suppliers grant fair wages to their workers or to jointly purchase environmentally friendly products/inputs;
>
> – an illustration of the application of these distinguishing factors through concrete and relevant, real-life examples of different types of joint purchasing agreements falling in each of the two categories, namely restriction by object or by effect;
>
> – an explanation whether this assessment under the proposed general framework differs depending on the number of aspects of the joint purchasing that are negotiated jointly with the group of buyers and which ones are negotiated/decided separately. Such aspects could include (but are not limited to) the price, certain element(s) of the price, the definition/assortment of products/services, the quantity, timing, delivery, etc.;
>
> – an explanation whether the general framework and features analysed under the previous indents applies to all types of joint purchasing arrangements in all sectors of the economy and, in particular, whether this

approach is also valid for assessing licensing negotiation groups that jointly bargain with licensors of standards essential patents (SEPs).

1.15 We were engaged by the Commission to provide the expert advice sought by its Call for Tender, and this is our Report. The structure of the Report is as follows. In Chapter 2 we make some general comments about the application of Article 101 and, more specifically, on the distinction between restrictions of competition by object and restrictions of competition by effect in the light of the recent jurisprudence of the Court of Justice on this important topic. In Chapter 3 we explain the terminology that we use in this Report and discuss different structures and activities of buyer groups.

1.16 Chapter 4 and Annex 2 of our Report contains our research on joint purchasing cases. We have reviewed:

- the jurisprudence of the Court of Justice
- the decisional practice of the European Commission
- the decisional practice of the NCAs and the jurisprudence of the courts of the Member States of the EU
- relevant decisions and judgments on joint purchasing agreements in third countries
- relevant guidance on the topic, from within the EU and from third countries
- relevant academic literature.

1.17 Drawing on our research we identify the following categories of cases:

- buyer cartel cases, where there was no **joint** purchasing
- one case where there was no restriction of competition because the rules of the joint purchasing organisation were objectively necessary to support legitimate joint purchasing
- cases where any restriction of competition was *de minimis*
- findings of a restriction of competition by effect
- cases where a restriction of competition was found to satisfy the conditions of Article 101(3).

1.18 Chapter 4 of our Report includes a discussion of the reasons given by competition authorities and courts for their findings of an infringement of Article 101 or its domestic equivalent in the law of a Member State in cases on purchasing. It also notes the few decisions in which benefits in the terms of Article 101(3) have been successfully invoked by the parties to joint purchasing agreements.

1.19 Chapter 5 of the Report contains our proposal for a general framework for analysing purchasing agreements as either by object or by effect restrictions of competition, as required by the Commission's Call for Tenders. Chapter 6 of the Report responds to the specific factors set out in section 2 of the Call for Tenders, as set out in the final four indents of paragraph 1.14 above. Our conclusions are set out in Chapter 7.

1.20 As noted in paragraph 1.13 above, we have been asked to investigate the distinction between restrictions of competition by object and by effect. For this reason our Report does **not** provide an in-depth analysis of how effects analysis should be conducted in the case of joint purchasing agreements. More specifically, we address the concerns raised by respondents to the Commission's public consultation set out in paragraphs 1.4 and 1.5 above only in so far as they

concern the object-effect distinction. We should add that our Report is intended to shed light on the analysis of buyer cartels and joint purchasing across the entire economy. It is not limited to the specific phenomenon of retail alliances and the relationships that they have with sellers of branded goods. We are of course aware of the importance of this topic and we include some discussion of the nature of retail alliances in Chapter 3 of this Report. However, subject to one qualification, our Report is concerned with the phenomenon of joint purchasing generally. The qualification is that we have not considered the specific topic of no-poach agreements between employers, an important and current topic of interest but one which merits separate consideration.

Chapter 2
General comments on Article 101 TFEU

2.1 The purpose of this Report is to provide advice to the Commission on the delineation between restrictions of competition by object on the one hand and by effect on the other in the context of joint purchasing agreements. The distinction between object and effect restrictions has always been, and remains, controversial. As Advocate General Bobek said in his Opinion in *Gazdasági Versenyhivatal v Budapest Bank Nyrt etc.*[12]:

> 1. From the early days of EU competition law, much ink has been spilled on the dichotomy between restriction of competition ***by object*** and restriction ***by effect***. It may thus come as a surprise that this distinction, stemming from the very wording of the prohibition in (what is now) Article 101 TFEU, still requires interpretation by the Court.
>
> 2. The distinction is relatively easy to make in theory. Its practical operation is nonetheless somewhat more complex. It is also fair to say that the case-law of the EU Courts has not always been crystal clear on the subject. Indeed, a number of decisions given by the EU Courts have been criticised in legal scholarship for blurring the distinction between the two concepts.

2.2 We do not propose in this Report to provide a detailed analysis of the jurisprudence on the Court of Justice on this difficult topic. We have recently completed the tenth edition of our text book *Competition Law*[13] in which we set out our thoughts on the subject in the light of the most recent case-law of the Court: pages 121 to 145 of chapter 3 of *Whish and Bailey*, which are specifically on the object-effect dichotomy, will be found as Annex 1 to this Report.

2.3 We consider that it may be helpful if we make a number of comments about the application of Article 101 generally, and on the object-effect distinction in particular, in so far as they might facilitate a better understanding of our discussion of joint purchasing agreements in this Report.

Why is the object-effect distinction so important?

2.4 There are (at least) three reasons why the distinction between restrictions by object and restrictions by effect matters.

No need for effects analysis

2.5 The first, which is trite law, is that, where an agreement restricts competition by object, it infringes Article 101(1) without there being any requirement to also consider the effects of the agreement. This was established by the Court of Justice in *Société Technique Minière v Maschinenbau Ulm*[14] and has been repeated on innumerable occasions since, including in paragraphs 33 to 36 of the Court's judgment in *Budapest Bank* case referred to above.[15]

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12 *Case C-228/18 EU:C:2019:678.*
13 *Oxford University Press, 10th ed, August 2021.*
14 *Case 56/65 EU:C:1966:38.*
15 *Case C-228/18 EU:C:2020:265.*

Inapplicability of the de minimis doctrine: Expedia

2.6 The second reason why the object-effect distinction matters arises from the application of the so-called *de minimis* principle. Article 101(1) applies to an agreement only to the extent that there is an *appreciable* restriction of competition: this was established by the Court of Justice in *Völk v Vervaecke*.[16] However in *Expedia Inc v Autorité de la Concurrence*[17] the Court introduced a refinement to the doctrine in *Völk v Vervaecke*. It held at paragraph 37 of its judgment that, where an agreement restricts competition by object and has an appreciable effect on trade between Member States, it automatically violates Article 101(1) **without any need to demonstrate concrete effects on competition**. This clearly can have important implications in the case of joint purchasing agreements. For example suppose that a group of buyers were to decide not to obtain products from an unsustainable source (for example from suppliers of clothes that make use of sweatshops or from timber companies that tolerate the illegal destruction of the rain forest): if this is to be characterised in law as a group boycott by buyers that has as its object the restriction of competition, it would be ineligible for *de minimis* exclusion. However, as we explain in paragraphs 2.32 to 2.44 of this Report, we do not consider that an agreement of this type should be regarded as a restriction of competition by object.

Object restrictions and Article 101(3)

2.7 The third reason why the object-effect distinction matters is that there is a perception that restrictions by object are incapable of satisfying Article 101(3). We have observed that this perception exists over many years in our discussions with officials in competition authorities, competition lawyers and economists in private practice and in academic circles. A variant of this perception is that, even if it is theoretically possible that an object restriction could satisfy Article 101(3), in practice the burden on the parties is so high that it is in effect insurmountable. This perception is obviously significant in the case of joint purchasing agreements insofar as they might be characterised as restrictive of competition by object. As in the case of the *de minimis* doctrine, a specific difficulty would arise where buyers wish to enter into an arrangement between themselves not to purchase from certain suppliers in the interest of 'sustainability': if such an agreement is to be regarded as restrictive by object, the possibility arises that the buyers will refrain from proceeding because of the 'problem' that an object restriction in practice (even if not in law) is incapable of being defended under Article 101(3).

2.8 We explain in *Whish and Bailey*, for example on page 131 of chapter 3 (see Annex 1), that it is wrong in law to assert that an object restriction cannot be defended under Article 101(3). What the law establishes is that where an agreement restricts competition by object this reverses the burden of proof, so that the parties to the agreement have to adduce evidence to demonstrate that there will be benefits and that the other requirements of Article 101(3) are satisfied.[18] However we acknowledge that many people consider that a finding of a restriction of competition by object is somehow 'fatal' to a successful defence under Article 101(3).

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16 *Case 5/69 EU:C:1969:35.*

17 *Case C-226/11 EU:C:2012:795, para 16.*

18 *The same point is also discussed in chapter 4 of Whish and Bailey, pp 158-159.*

Object restrictions and fines

2.9 A finding that an agreement restricts competition by object may also be relevant to the question of whether the parties to a joint purchasing agreement may be fined. It would be regrettable if firms were to refrain from entering into agreements that serve a useful purpose, for example a sustainability objective, for fear that (a) the agreement might be considered to be restrictive of competition by object and that (b) object restrictions always (or nearly always) lead to the imposition of a fine.

2.10 We have noted in paragraph 1.8 above that concerns were expressed to the Commission during the consultation on the review of horizontal cooperation agreements that legitimate joint purchasing agreements might be incorrectly characterised as buyer cartels and found to be restrictive of competition by object; and that this might lead to the imposition of fines.

2.11 We acknowledge that there have been cases where fines were not imposed where an agreement (or a decision by an association of undertakings) was found to restrict competition by object[19]; however these cases are rare. We also note that it is possible, as a matter of law, for fines to be imposed in effects cases under Article 101: such cases are also rare.[20] *However we consider that it is reasonable to suppose that some undertakings will be deterred from entering into agreements, even where they consider them to be justifiable on the ground of sustainability, due to the fear that their agreement will be characterised as restrictive of competition by object and attract a fine. The seriousness with which object restrictions are regarded was noted by Advocate General Kokott in T-Mobile when she remarked that:*

> The prohibition of a practice simply by reason of its anti-competitive object is justified by the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. The per se prohibition of such practices recognised as having harmful consequences for society creates legal certainty and allows all market participants to adapt their conduct accordingly. Moreover, it sensibly conserves resources of competition authorities and the justice system.[21]

2.12 Our view is that the answer to this anxiety is to make clear that the class of purchasing agreements that restrict competition by object is extremely narrow; and to point out that the only cases in which fines have been imposed on buyer cartels did not involve **joint** purchasing at all. We also consider that it is possible to argue that an agreement by purchasers not to purchase unsustainable products does not restrict competition by object but should be subject to effects analysis: we develop this argument in paragraphs 2.32 to 2.44.

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[19] *An example is International Skating Union, Commission decision of 8 December 2017, upheld on appeal to the General Court Case T-93/18 EU:T:2020:610.*

[20] *See eg Morgan Stanley/Visa International Europe and Visa Europe, Commission decision of 3 October 2007 (imposing a fine of €10.2 million), upheld on appeal Case T-461/07 Visa Europe Ltd v Commission EU:T:2011:181; see also in the UK Compare the Market, CMA decision of 17 November 2020 (imposing a fine of €17.9 million), on appeal Case 1380/1/12/21 BGL (Holdings) Limited v CMA, not yet decided.*

[21] *Case C-8/08 EU:C:2009:110, para 43.*

When do agreements restrict competition by object?

2.13 It is obviously important that there should be a clear test of what is meant by a restriction of competition by object. This is an issue that has been considered by the Court of Justice on numerous occasions; important recent judgments on the topic are *Generics (UK) Ltd v Competition and Markets Authority*[22] and *Lundbeck v Commission*.[23] We find the judgment of the Court of Justice in *Cartes Bancaires* particularly helpful; on page 129 of *Whish and Bailey* we discuss the judgment as follows:

> *(b) Groupement des Cartes Bancaires*
>
> It was against this backdrop that the Court of Justice handed down its judgment in *Groupement des Cartes Bancaires v Commission* in September 2014[24]. The Commission[25] and the General Court[26] had held that a fee structure established by the nine main members of a payment card system, Cartes Bancaires, had the object and effect of restricting competition by preventing the entry of new banks into the sector. The Court of Justice annulled the finding of the General Court that the fee structure restricted competition by object on the basis that it had erred in law and remitted the matter to it to consider whether there was a restriction by effect. The Court of Justice rehearsed well-established law:
>
> - certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of competition[27]
> - some collusive behaviour, such as horizontal price fixing by cartels, is so likely to have negative effects that it is redundant to prove that it has actual effects on the market[28]
> - when deciding whether an agreement is restrictive of competition by object:
>
> > 'regard must be had to the content of [the agreement's] provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question'[29]
>
> - the essential criterion for ascertaining whether coordination between undertakings involves a restriction by object is the finding

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22 *Case C-307/18 EU:C 2020:52.*
23 *Case C-591/16 P EU:C:2021:243.*
24 *Case C-67/13 P EU:C:2014:2204; the Opinion of AG Wahl contains a valuable discussion of the meaning of 'object': EU:C:2014:1958; see also the Opinions of AG Wathelet in Case C-373/14 P Toshiba v Commission EU:C:2015:427, paras 40–91 and of AG Saumandsgaard Øe in Case C-179/16 F Hoffmann-La Roche v AGCM EU:C:2017:714, paras 145–150.*
25 *Commission decision of 17 October 2007.*
26 *Case T-491/07 EU:T:2012:633.*
27 *Case C-67/13 P Cartes Bancaires v Commission EU:C:2014:2204, para 50.*
28 *Ibid, para 51.*
29 *Ibid, para 53.*

that such coordination reveals in itself a sufficient degree of harm to competition.[30]

Importantly, the Court of Justice added that the General Court had erred in law when concluding that the concept of a restriction of competition by object should not be interpreted restrictively: the Court of Justice's view was that the concept should be limited to coordination which reveals a sufficient degree of harm to competition with the result that there is no need to examine its effects.[31] The idea that the concept should be given a restrictive interpretation was picked up by the EFTA Court in *Ski Taxi SA v Norwegian Government*[32], which added that the presumption of innocence in Article 6(2) of the European Convention on Human Rights means that, in a case of doubt as to whether an agreement restricts competition by object, the 'benefit of the doubt' should be given to the defendants.[33] The EFTA Court observed that only conduct whose harmful nature is 'easily identifiable', in the light of experience and economics, should be regarded as a restriction of competition by object.[34]

(c) Comment on the Cartes Bancaires judgment

The judgment in *Cartes Bancaires* is an important one, and has regularly been cited in judgments since[35]: it provides a useful template for deciding whether agreements are restrictive of competition by object. Although for the most part *Cartes Bancaires* simply repeats the consistent jurisprudence of the Court of Justice over many years, there is a sense that the judgment 'resets' the law; or, at the very least, that the Court recognises that there must be some limits to what had seemed like the relentless expansion of the object box. The clear statement that the concept of an object restriction should be interpreted restrictively is significant in this respect. The Court of Justice referred to this point in *Gazdasági Versenyhivatal v Budapest Bank Nyrt*[36] before proceeding to hand down a judgment that was highly sceptical that the agreement made by banks that participated in both the Visa and MasterCard schemes to fix uniform multilateral interchange fees were restrictive of competition by object[37]. *Cartes Bancaires* does not mean that it is not possible to add new types of agreement to the object box: in *Paroxetine* the Court of Justice explained the circumstances in which a pay for delay agreement could be restrictive by object[38]. However, it does mean that careful analysis is required before allocating cases to the object box.

2.14 On page 130 of *Whish and Bailey* we emphasise that in the *Cartes Bancaires* judgment the Court of Justice says that the concept of a restriction of competition by object is one that should be interpreted restrictively. We agree with the opinion of the EFTA Court in *Ski Taxi SA v Norwegian Government*,[39]

30 *Ibid, para 57.*
31 *Ibid, para 58.*
32 *Case E-3/16, judgment of 22 December 2016.*
33 *Ibid, para 62.*
34 *Ibid, para 61.*
35 *See eg Case C-228/18 Gazdasági Versenyhivatal v Budapest Bank Nyrt EU:C:2020: 265, paras 51–54.*
36 *Case C-228/18 EU:C:2020:265, para 54.*
37 *The Court of Justice did not reach a conclusion on the facts of this case as it was an Article 267 reference from the Hungarian Supreme Court; in 2020 that Court remitted the case to the Hungarian Competition Authority for further consideration.*
38 *Case C-307/18 Generics UK Ltd v CMA EU:C:2020:52, paras 59–111.*
39 *Case E-3/16, judgment of 22 December 2016.*

that in cases where it is uncertain whether an agreement is restrictive of competition by object, the benefit of the doubt should be given to the defendants.[40] The EFTA Court said that only conduct whose harmful nature is 'easily identifiable' should be regarded as a restriction by object.[41] We take these comments into account in our proposed framework of analysis for the delineation between by object and by effect restrictions in chapter 5 of this Report.

2.15 We also take into account the importance of not introducing effects analysis into the assessment of whether an agreement is restrictive by object. We discuss this on pages 130 and 131 of *Whish and Bailey*, where we note that both Advocate General Kokott in *T-Mobile*[42] and the EFTA Court in *Ski Taxi SA v Norwegian Government*[43] warned against the risk of 'mingling' object and effect analysis. We acknowledge that the allocation of a restriction to the object box requires consideration of the *economic and legal context* of which an agreement forms part; however this is different from requiring that the economic *effects* of the agreement should be analysed. This is why we say in our framework of analysis for object restrictions that we do not consider that object analysis should involve a consideration of market share figures, which are of relevance when predicting the likely effects of an agreement. As we have seen, the judgment of the Court of Justice in *Expedia* has expressly stated that the *de minimis* doctrine is inapplicable in the case of object restrictions, which means that there is no 'safe harbour' for such agreements between horizontal competitors with a market share of less than 10%.

2.16 The level of detail with which one must examine the economic and legal context in an object case depends on the nature of the conduct at issue. However, just as it is important not to introduce effects analysis into the question of whether an agreement restricts competition by object, so too there should be a limit to the extent of any investigation into the economic and legal context in which an agreement was entered into. In *FSL Holdings NV v Commission* Advocate General Kokott said that:

> In cases where the anticompetitive object is readily apparent, the analysis of the economic and legal context in which the practice occurs may naturally be limited to what is strictly necessary.[44]

The Court of Justice in the *FSL* case agreed with its Advocate General: it held that the analysis of the economic and legal context may be:

> limited to what is strictly necessary in order to establish the existence of a restriction of competition by object in horizontal price-fixing cases.[45]

Objective necessity and Article 101

2.17 The doctrine of 'objective necessity' is helpful when considering whether joint purchasing agreements infringe Article 101. An agreement does not violate

40 *Ibid, 62.*
41 *Ibid, para 61.*
42 *Case C-8/08 EU:C:2009:110, para 45.*
43 *Case E-3/16, judgment of 22 December 2016, paras 58 and 63.*
44 *Case C-469/15 P EU:C:2016:884, para 100.*
45 *Case C-469/15 P EU:C:2017:30, para 107; see similarly Case C-373/14 P Toshiba Corporation v Commission, C-373/14 P, EU:C:2016:26, para 29.*

Article 101 when it contains restrictive clauses that are objectively necessary to the achievement of a legitimate purpose. The Court of Justice has recognised a 'defence' of objective necessity on numerous occasions. For example in *Société Technique Minière v Maschinenbau Ulm*[46] the Court held that an exclusive licence granted to a distributor might not infringe Article 101(1) where this seemed to be 'really necessary for the penetration of a new area by an undertaking'. We provide further examples of the doctrine of objective necessity at pages 139 to 141 of *Whish and Bailey*.

2.18 In *Gøttrup-Klim Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*[47] the Court of Justice held that a provision in the statutes of a cooperative purchasing association, Dansk Landbrugs Grovvareselskab ('DLF') forbidding its members from participating in other forms of organised cooperation which were in direct competition with it, did not necessarily restrict competition, and may even have beneficial effects on competition. The Court recognised that joint purchasing might enable buyers to negotiate better prices with suppliers, and that contractual restrictions necessary to enable this to happen might not infringe Article 101:

> 32 In a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.
>
> 33 Where some members of two competing cooperative purchasing associations belong to both at the same time, the result is to make each association less capable of pursuing its objectives for the benefit of the rest of its members, especially where the members concerned, as in the case in point, are themselves cooperative associations with a large number of individual members.
>
> 34 It follows that such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article [101(1)] of the Treaty and may even have beneficial effects on competition.

2.19 We consider that the judgment in *Gøttrup-Klim* is very helpful in that it recognises that joint purchasing may have the pro-competitive effect of enabling the buyer group to countervail the power of its suppliers. However, the Court goes on to note that such an agreement could have anti-competitive effects in certain circumstances:

> 35 Nevertheless, a provision in the statutes of a cooperative purchasing association, restricting the opportunity for members to join other types of competing cooperatives and thus discouraging them from obtaining supplies elsewhere, may have adverse effects on competition. So, in order to escape the prohibition laid down in Article [101(1)] of the Treaty, the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary

[46] *Case 56/65 EU:C:1966:38, p 250.*
[47] *Case C-250/92 EU:C:1994:413.*

to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

2.20 We agree with the Court of Justice that joint purchasing could have an anti-competitive effect. However, this will depend on the circumstances of the case. In *Gøttrup-Klim* the particular question to be determined was whether the rules of DLF, which prevented its members from belonging to a competing organisation at the same time, were objectively necessary to enable it to exercise its contractual power as a counterweight to the large producers with which it was dealing. *Gøttrup-Klim* was not addressing the question of whether the creation of DLF itself was restrictive of competition under Article 101. Had this have been the question, this would have required effects analysis to be conducted: nothing in this case suggests that the formation of the joint purchasing group would have constituted a restriction of competition by object. A 'case-by-case' approach is required to the formation of a joint purchasing agreement; this question is unsuited to 'object' analysis.

Sustainability agreements and Article 101

2.21 The Call for Tenders has specifically asked us to address the question of whether the pursuit of sustainability objectives (using that term broadly to include matters such as environmental protection, animal health and/or welfare, or social protection) by a joint purchasing agreement may influence its characterisation as being restrictive by object or effect. This is an important question because, if the agreement restricts competition by object, it is ineligible for application of the *de minimis* doctrine (see paragraph 2.6 above). Furthermore, there is the (incorrect) perception, noted in paragraphs 2.7 and 2.8 above, that object restrictions are incapable of satisfying the terms of Article 101(3). A further difficulty is that, even if object agreements can benefit from Article 101(3), it is not clear whether Article 101(3)(a), which refers to agreements that improve 'the production or distribution of goods or to promoting technical or economic progress', is broad enough to apply to some sustainability objectives; nor that such agreements satisfy the requirement of Article 101(3)(b) that a fair share of any resulting benefit should be passed through to consumers.

2.22 There is no doubt that sustainability is a high priority within the EU and internationally. In December 2019 the Commission published 'The European Green Deal' containing a set of proposals for the EU's climate, energy, transport and taxation policies. These proposals are intended to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy, where there are no net emissions of greenhouse gases by 2050 and where economic growth is decoupled from resource use.[48] The publication of the Green Deal proposals was followed in June 2021 by the Council and Parliament enacting Regulation (EU) 2021/1119, which creates the legal framework for reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels.[49] In addition the United Nations' resolution, 'Transforming our world: the 2030 Agenda for Sustainable Development' is a 'plan of action for people, planet, and prosperity'.[50] The 2030 Agenda seeks to achieve a wide range of policies, such as eradicating poverty and inequality, promoting

[48] *https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#thebenefitsoftheeuropeangreendeal*
[49] *OJ [2021] L 243/1.*
[50] *https://sdgs.un.org/2030agenda.*

sustainable agriculture, supporting affordable and clean energy and promoting responsible consumption and production.

2.23 At the time of writing this report, the Commission is reflecting on how EU competition law, policy and enforcement can contribute to the goals of the European Green Deal. In September 2021 the Commission published a *Competition Policy Brief* on 'Competition Policy in Support of Europe's Green Ambition', which discusses how the competition rules might be applied to complement environmental and climate policies more effectively.[51]

2.24 We note at the outset that sustainability objectives can often best be achieved through EU or governmental action. For example the EU or a government can promote legislation or a regulatory regime that makes it unlawful to import timber that has been obtained as a result of irresponsible depletion of rainforests; indeed we note that the Commission published a draft Regulation on deforestation on 17 November 2021.[52] Another example would be to prohibit the acquisition of clothes that have been produced in sweatshops or by using child labour or of foodstuffs sourced from suppliers who pay inadequate wages. It is trite law that undertakings that act in an identical manner pursuant to sustainability requirements imposed by law or regulation will not be infringing competition law.[53]

2.25 We recognise however that there may be many desirable sustainable goals that are not the subject of legislative or regulatory rules, or where it may take a considerable time for them to be adopted. It is necessary therefore to consider on the one hand to what extent the market and competitive forces can contribute to sustainability goals; and on the other hand the extent to which competition law might act as an impediment to the achievement of those goals.

2.26 In assessing joint purchasing arrangements that pursue sustainability objectives, we agree with the statement of Executive Vice-President Vestager that:

> The starting point here is that a green competition policy still has to be – well, a competition policy. We still need to carry out our fundamental task, of keeping markets open and competitive – not least, because competition helps to make our economy greener.[54]

Competition may promote sustainability goals

2.27 In principle, it is desirable that firms should compete with one another in order to produce more sustainable products. The 'parameters' of competition include not only the obvious ones of lower prices and better standards of service, but also the quality of the products on offer, including their sustainability. The Commission's decision in *Car emissions*[55] is a significant example of a situation in which firms that could have competed with one another in the deployment of

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51 *https://ec.europa.eu/competition-policy/index/news/competition-policy-brief-12021-policy-support-europes-green-ambition-2021-09-10_en*

52 *Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, COM(2021) 706 final.*

53 *See Case C-280//08 P Deutsche Telekom AG v Commission EU:C:2010:603, para 80.*

54 *Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, 10 September 2021.*

55 *Decision of 8 July 2021; see Commission Press Release IP/21/3581, 8 July 2021.*

technology to restrict noxious emissions from diesel vehicles instead chose to restrict this parameter of competition.

2.28 As a general proposition, each firm should decide for itself the way or ways in which it wants to pursue sustainability objectives, and the market will reward those that make good decisions and punish those that make bad ones. The Court of Justice has repeatedly stated that the concept inherent in the Treaty provisions on competition is that:

> each economic operator must determine independently the policy which it intends to adopt on the common market.[56]

This applies just as much to the sustainability initiatives that a firm might decide to adopt as to the prices at which, or the markets in which, it chooses to sell its products. As the Netherlands Authority for Consumers and Markets has observed:

> undertakings are often themselves able to make their production processes more sustainable, either because various types of regulation offer sufficient incentives to do so, because they are able to gain a competitive advantage with such a move, or because they aim to make their production processes more sustainable anyway.[57]

2.29 However, there may be circumstances in which sustainability objectives cannot be achieved, or at least may only be achieved more slowly, if this is left purely to market forces and the process of competition. For example an individual firm may, as a matter of corporate responsibility, want to switch from using unsustainable (and cheaper) inputs to sustainable (and more expensive) ones. It is easy to imagine such circumstances. Undertaking X might wish to refrain from purchasing plastic bottles, illegally-felled timber, clothes produced in sweatshops or meat products where animal standards are unacceptably low. In the absence of legislation, regulation or *de jure* or *de facto* standards undertaking X could make this decision unilaterally, and make a virtue of its policy in the way in which it promotes its own 'sustainable' products in downstream markets: in other words this could be a parameter of competition. However X's competitors, Y and Z, might continue to purchase their inputs from unsustainable, and cheaper, sources, and then charge lower prices than X's in downstream markets. In these circumstances X might decide that the risk of losing sales to its 'irresponsible' competitors, Y and Z, because of their lower prices, is one that is not worth taking: X might therefore abandon a policy that, as a matter of public policy, seems to be a desirable one. This is consistent with the literature on 'the Prisoner's Dilemma', which recognises that, when acting unilaterally, firms may rationally pursue strategies that deliver worse overall outcomes for society than would be achieved under cooperative behaviour. In these circumstances, some form of collective action might be preferable from the perspective of sustainability. Furthermore cooperation might provide a speedier solution than waiting for legislation, regulation or the setting of appropriate standards.

2.30 We have no doubt that, in principle, certain joint purchasing arrangements can make a positive contribution to sustainability objectives. For example, a group of buyers may use their collective bargaining position in order to obtain more

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[56] *See e.g. Case C-209/07 Competition Authority v Beef Industry Development Society EU:C:2008:643, para 34.*

[57] *Draft ACM Guidelines on Sustainability agreements, 9 July 2020, para 38, available at www.acm.nl.*

favourable prices for products that are produced in a more sustainable manner which, in turn, could lead to lower prices for 'environmentally friendly' products for consumers.

2.31 However, it is possible that certain agreements between competing purchasers would be regarded as restrictions of competition by object as they amount to a group boycott. For example one of the many restrictive practices considered in the Commission's *Pre-Insulated Pipe Cartel*[58] decision was a collective boycott of customers and suppliers that dealt with Powerpipe, a competitor of the firms in the cartel. It was Powerpipe that complained to the Commission that the cartel was hindering its activities in the district heating market.[59] The Commission concluded that the various cartel arrangements, including the 'common plan to eliminate or damage Powerpipe', had the object and effect of restricting competition.[60]

Is an agreement to purchase only sustainable products restrictive of competition by object?

2.32 We have given consideration to whether a boycott of the kind condemned in the *Pre-Insulated Pipe Cartel* decision means that an agreement between purchasers to purchase only sustainable products would be found to be restrictive of competition by object: we will call such an agreement a 'sustainable products purchasing agreement' or an 'SPPA'. An example of an SPPA would arise where a group of competing purchasers agrees to buy timber only from sustainable sources and not from suppliers that are destroying the Amazonian rain forest. Other examples would be an agreement to purchase food products only from suppliers that meet appropriate animal welfare standards or to purchase products only from firms that comply with minimum protections for workers. It could be argued that the objective aim or purpose of an SPPA is to restrict or distort competition on the part of suppliers of unsustainable products, and that therefore such an agreement restricts competition by object. Even if an SPPA may be intended to pursue desirable objectives, it is well-established case-law that an agreement may be found to have an anti-competitive object even if it simultaneously pursues other legitimate objectives.[61] If an SPPA amounts to a restriction of competition by object, the problems outlined in paragraphs 2.4 to 2.12 above arise, in particular that it would be caught by Article 101(1) even though it has no appreciable effect on competition and that it would be difficult to justify under Article 101(3). These difficulties might lead to the avoidance or abandonment of initiatives that could be considered to be desirable from the perspective of sustainability.

2.33 We consider that there are several reasons why an SPPA should not be treated as restrictive of competition by object, but should instead be analysed on an effects basis.

The distinction between horizontal and vertical purchasing restraints

2.34 Our first observation is that it is not difficult to distinguish an SPPA from cases in the past in which boycotts have been found to be restrictive of competition by object. In the *Pre-Insulated Pipe Cartel* case the producers of pipes were operating a particularly 'hard-core' cartel which involved, among other things,

58 *OJ [1999] L 24/1.*
59 *Ibid, para 20.*
60 *Ibid, paras 146–147.*
61 *See e.g. Case C-551/03 P General Motors v Commission EU:C:2006:229, para 64 and case-law cited.*

allocating market share quotas, market sharing, price fixing, bid rigging, attempting to force Powerpipe to join the cartel and organising a collective boycott of Powerpipe.[62] These practices were found to constitute a single continuing infringement of Article 101(1).[63] It would be hard to think of a more obvious infringement of Article 101 than this, which clearly involved a restriction of competition by object. Specifically, **the collective boycott was intended by the members of the cartel to eliminate a competitor that was operating at the same level of the market as themselves**: the case was one of horizontal foreclosure of market access on the part of Powerpipe. The boycott in the *Pre-Insulated Pipe Cartel* can be described as a **horizontal boycott**, and is distinguishable from an SPPA that involves purchasers in a downstream market agreeing among themselves not to deal with certain suppliers in the upstream market: they are not attempting to protect themselves from competition at their own level of the market. Instead an SPPA involves a **vertical** purchasing restriction relating to firms in an upstream market, where the detriment to competition is less obvious, and where, therefore, effects analysis would appear to be more appropriate than allocating the case to the 'object box'.

2.35 Further examples of horizontal boycotts being found to restrict competition by object are *Protimonopolný úrad Slovenskej republiky v Slovenská sporitelňa a.s.*[64] and *Ordre national des pharmaciens (ONP) and Others v European Commission*[65]. We note that the Commission's Staff Working Document providing guidance on 'by object' restrictions of competition for the purpose of the *De Minimis Notice* provides these horizontal boycott cases as examples of object restrictions; it does not say that vertical purchasing restraints should be treated as a restriction by object.

2.36 There are numerous cases in which the Commission and the EU Courts have condemned collective exclusive dealing agreements, where the purpose of the parties was to keep imports out of a national market which the participants in the agreement wished to reserve to themselves. As we say at page 579 of *Whish and Bailey*, 'A more obvious target for the Commission it is hard to imagine', in particular because these cases violated the principle of single market integration. We provide numerous examples of such cases on pages 579 and 580 of our book, for example a scheme designed to keep washing machines out of the Belgian market[66] and a marketing system that could prevent imports of fruit into the Netherlands[67]. Similarly the Court of Justice upheld the Commission's decision to condemn rigid collective exclusive dealing systems in two cigarette cases, affecting the Belgian and Dutch markets respectively[68]. The Commission has dealt with many other similar situations, always striking such agreements down[69].

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62 *OJ [1999] L 24/1, para 147.*

63 *Ibid, para 148.*

64 *Case C-68/12 EU:C:13:71.*

65 *Case T-90/11 EU:T:2014:1049.*

66 *Cases 96/82 etc NV IAZ International Belgium v Commission EU:C:1983:310; note the additional fine subsequently imposed by the Commission in this case: Re IPTC Belgium SA OJ [1983] L 376/7.*

67 *Case 71/74 FRUBO v Commission EU:C:1975:61; see similarly Irish Timber Importers Association, XXth Report on Competition Policy (1990), point 98.*

68 *Cases 209/78 etc Van Landewyck v Commission EU:C:1980:248; Cases 240/82 etc SSI v Commission EU:C:1985:488 and Case 260/82 NSO v Commission EU:C:1985:489.*

69 *Re Gas Water-Heaters OJ [1973] L 217/34; Re Stoves and Heaters OJ [1975] L 159/22; Re Bomée Stichting OJ [1975] L 329/30; Groupement d'Exportation du Leon v Société d'investissements et de Cooperation Agricoles (Cauliflowers) OJ [1978] L 21/23; Donck v Centraal Bureau voor de Rijwielhandel OJ [1978] L 20/18; Re IMA Rules OJ [1980] L 318/1; Re Italian Flat Glass OJ [1981] L 326/32; Hudson's Bay—Dansk Pelsdyravlerforening OJ [1988] L 316/43, upheld on appeal Case T-61/89 Dansk Pelsdyravlerforening v Commission EU:T:1992:79.*

2.37 The cases in paragraph 2.36 are similar to the horizontal boycott in the *Pre-Insulated Pipe Cartel*, in that the infringing firms were seeking to prevent competition at their own level of the market. In the case of an SPPA the parties to the agreement operate on the downstream market and are not motivated by the intention of eliminating a competitor at their level of the market. Their intention would appear to be, in the words of a speech by Executive Vice-President Vestager in September 2021, 'to cut dirty products out of their supply chains'.[70] It seems to us that it can reasonably be argued that an SPPA does not reveal in itself a sufficient degree of harm such that it should be allocated to the object box. Instead an SPPA should be subject to effects analysis which requires, for example, an examination of the market coverage of the arrangement, the market position of the parties, the market position of competitors and other factors in order to reach an informed view as to its competitive impact.

Few precedents on agreements between purchasers to buy only sustainable products

2.38 Our second observation concerns the lack of precedents on agreements between purchasers to buy only sustainable products. In the event that purchasers were to practice a collective boycott in order to harm a purchaser or purchasers at their own level of the market, we can see that such a horizontal boycott would be a candidate case of object analysis as an extension of the reasoning in the *Pre-Insulated Pipe Cartel*. Indeed we note that in *Bitumen – NL* (better known as *Dutch Bitumen*)[71] one of the practices condemned by the Commission was an agreement between buyers and suppliers of bitumen that smaller competitors of the buyers would be offered lower discounts, placing them at a competitive disadvantage[72]. This fell short of a boycott as such, but the theory of harm was horizontal damage to firms at the same level of the market as the buyers, and the cartel was held to restrict competition by object. The case differed from an SPPA which we consider should be subject to effects analysis.

2.39 We have not found any case in which an actual collective boycott by purchasers has been found to be restrictive of competition by object. We explained in paragraphs 2.34 to 2.35 above that collective boycott cases under Article 101 typically involve suppliers of products taking action to punish a competitor at their level of the market, as in the *Pre-Insulated Pipe Cartel*, or to keep products out of their domestic market, as in paragraph 2.36. In the *Budapest Bank* case[73] the Court of Justice agreed with the opinion of Advocate General Bobek that there must be sufficiently reliable and robust experience for the view to be taken that an agreement is, by its very nature, harmful to the proper functioning of competition in order to classify it as a restriction of competition 'by object' without an analysis of its effects.[74] Advocate General Wahl observed in his opinion in *Cartes Bancaires v Commission* that:

> only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which

[70] *'Competition policy in support of the Green Deal', Speech of 10 September 2021.*
[71] *Commission decision of 13 September 2006.*
[72] *Ibid, recital 143.*
[73] *Case C-228/18 EU:C:2020:265, para 76*
[74] *Case C-228/18 Budapest Bank EU:C:2020:265, para 76, endorsing paras 54 and 63–73 of the AG Opinion: EU:C:2019:678.*

> produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition.[75]

There is no 'sufficiently reliable and robust experience' of the nature or effects of agreements by purchasers to purchase only sustainable products.

2.40 We have found only one case in which a court has given consideration to whether a collective boycott by purchasers might amount to a restriction of competition by object, *R (Cityhook) v Office of Fair Trading*[76]. This was a decision of the Administrative Court of England and Wales at a time when the UK was a member of the EU; the Court was required to apply EU competition law to conduct that had an effect on trade between Member States of the EU and to apply UK competition law consistently with the principles of EU competition law. The case involved a collective boycott of Cityhook's submarine telecommunications cable-landing technology by the major manufacturers of submarine cables; they were potential competing purchasers of the technology. The Office of Fair Trading ('the OFT'), which was the competition authority in the UK at the time,[77] prepared a Statement of Objections that alleged that the boycott had as its 'object and/or effect' the restriction of competition.[78] The OFT subsequently decided that the case was not an administrative priority and closed the file. Cityhook applied for judicial review of the OFT's decision to close the file on the basis that the OFT's failure to find an infringement by object was an error of law. The Administrative Court dismissed the application for reasons of particular interest for present purposes.

2.41 The Administrative Court was attracted by the 'simplicity' of characterising a collective boycott of a supplier who offers an innovative and cost-saving alternative approach to an established area of commercial activity as a restriction of competition by object.[79] However the Court acknowledged that the contrary view – namely, that the **effects** of this kind of boycott should be examined – was neither unreasonable nor 'wholly untenable'. The Court specifically noted that it was:

> of some, though not conclusive, significance to note that distinguished and experienced authors in the field have not said categorically that a collective boycott by purchasers constitutes an object-based infringement.[80]

2.42 In the *Cityhook* case the Administrative Court also had regard to paragraphs 19 to 21 of the European Commission's *Article 101(3) Guidelines*.[81] It considered that those paragraphs meant that the characterisation of a collective boycott by competing purchasers was 'not quite as straightforward as at first sight it might have seemed'.[82] Paragraph 21 of the *Guidelines* says that restrictions by object

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75 *Case C-67/13 P EU:C:2014:1958, para 56.*

76 *[2009] EWHC 57 (Admin).*

77 *The OFT was abolished with effect from 1 April 2014 and replaced by the Competition and Markets Authority: s 25 of the Enterprise and Regulatory Reform Act 2013.*

78 *Ibid, para 15.*

79 *Ibid, para 131; the Court referred to two cases involving a boycott **by suppliers** (not buyers): the decision of the European Commission in Video cassette recorders, OJ [1978] L 47/42 and the decision of the UK Competition Appeal Tribunal in Institute of Independent Insurance Brokers v Director General of Fair Trading [2001] CAT 4.*

80 *Ibid, para 133; the books cited by the judge were Bellamy & Child European Community Law of Competition (6th edition, 2008), paragraphs 5.98-5.100; Faull & Nikpay The EC Law of Competition (2nd edition, 2007), paragraph 8.89; and Whish Competition Law (6th edition, 2008, pp 113-121.*

81 *OJ [2004] C 101/97.*

82 *[2009] EWHC 57 (Admin), para 133.*

are those that by their very nature have the potential of restricting competition and that:

> this presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the [EU] competition rules.

The Administrative Court observed that the presumption can arise only if experience has demonstrated the presumption to be justified; this is, of course, consistent with the observations of the Court of Justice and Advocates General set out in paragraph 2.38 above.

Object restrictions should be interpreted narrowly

2.43 Our final observation on SPPAs is that, as noted in paragraph 2.14 above, the Court of Justice emphasised in *Cartes Bancaires v Commission* that the concept of a restriction of competition by object is one that should be interpreted restrictively. It is arguable that an agreement by purchasers to buy only sustainable products does not reveal 'in itself a sufficient degree of harm to competition', the words used in paragraph 49 of that judgment. Given that there is no precedent finding such an agreement by purchasers to be restrictive of competition by object, and that the concept should be interpreted restrictively, we consider that there is a good argument for 'giving the benefit of the doubt' to firms that enter into an SPPA, as suggested by the EFTA Court in the *Ski Taxi* case.

'Bargaining tactics'

2.44 It might be helpful if we distinguish an SPPA, where the parties to an agreement agree to purchase only sustainable products, from what could be called 'bargaining tactics', where a buyer group is negotiating terms and conditions with suppliers and threatens to abandon negotiations unless the sellers offer better terms. This type of behaviour appears to us to be a manifestation of collective bargaining, and not something that infringes competition law in and of itself. The competition law question here would be whether the buyer group itself restricts competition, and this is something that requires effects analysis.

Could an SPPA satisfy the requirements of Article 101(3)?

2.45 In the previous paragraphs we have argued that we consider that there are reasonable arguments to the effect that an SPPA should not be regarded as restrictive of competition by object. However we also consider that, even if such an agreement is found to restrict competition by object, it may still be possible that it could be defended under Article 101(3). We explained in paragraphs 2.7 and 2.8 above that object restrictions can, as a matter of law, satisfy Article 101(3), although we acknowledged that there is a widespread perception that this is not possible. We consider it to be regrettable if Article 101(3) can never be invoked in the case of an object restriction. If an SPPA is **not** a restriction of competition by object, then there is no doubt that, if it is found to restrict competition by effect, it may nevertheless satisfy Article 101(3).

2.46 We do not think that the scope of Article 101(3) should be broadened to include non-economic benefits; we do not see that provision as allowing broad 'public interest' criteria to be brought into the assessment. As we say on page 165 of

Whish and Bailey, there is much to be said for interpreting Article 101(3) in a narrow rather than a broad manner, according to clear legal standards. The 'narrow' view which we advocate is consistent with both the wording of Article 101(3) and the recitals to the various block exemptions which explain the reasons for permitting certain agreements under Article 101(3) purely in terms of economic efficiency. We note that respondents (in particular consumer associations and NCAs) to the Commission's consultation on how the competition rules and sustainability policies might work together, expressed a concern about embracing a broader view of Article 101(3). Having said this, we think that there is *some* scope for a greater liberalism (or an approach that is conducive to sustainability) on the part of the Commission when interpreting and applying Article 101(3). We find the Commission's *Competition Policy Brief* of September 2021 helpful on this:

- **Qualitative efficiencies**: in certain circumstances an agreement may create sustainability benefits that amount to qualitative efficiencies that can be assessed under Article 101(3). That might be the case if a joint purchasing agreement replaced a non-sustainable input with a sustainable one, which either improves the quality or longevity of the product[83]

- **Fair share for consumers:** it may be possible to 'flexibilise' the second condition of Article 101(3) and the way in which consumers are considered to receive a fair share of the benefit that results from an anti-competitive agreement. The *Competition Policy Brief* states that:

  > As long as the users of the product concerned appreciate the sustainability benefits related to the way the products are produced or distributed, and are ready to pay a higher price for this reason alone, such benefits can be taken into account in the assessment.

- **Out-of-market sustainability benefits**: Negative effects on consumers in one geographic or product market cannot normally be balanced against and compensated by positive effects for consumers in unrelated markets. However it may be possible for out-of-market benefits to be taken into account, provided that the group of consumers affected by the agreement and the group of benefiting consumers are substantially the same.[84]

2.47 We consider that these are useful proposals that would make it easier to take sustainability objectives into account.

2.48 A separate point is that we expect that undertakings and their professional advisers will be more persuaded of the possible application of Article 101(3) to joint purchasing with sustainability objectives when they have real-life examples to learn from. It is the opinion of the authors of this report that a 'finding of inapplicability' under Article 10 of Regulation 1/2003 and/or the informal guidance procedure on the part of the Commission would be valuable as a way of developing precedents, and would serve 'the public interest of the [EU]', the words used in Recital 14 of Regulation 1/2003 when introducing the Article 10

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[83] *E.g., recycled materials might replace plastic in manufacturing clothing, toys etc.*

[84] *See 'Competition Policy in Support of Europe's Green Ambition' Competition Policy Brief No 1/2021, p 6; see also Guidelines on the application of [Article 101(3)] of the Treaty, OJ [2004] C 101/97, para 43.*

procedure.[85] However we acknowledge that the Commission will be able to provide this service only if firms and their advisers are willing to submit proposals to DG COMP for scrutiny. The Commission cannot provide guidance in this area entirely on an abstract basis.

2.49 The Greek Competition Commission has discussed the possibility of the creation of a so-called 'sustainability sandbox', which would enable firms to notify business proposals for sustainable development. This might lead, in certain cases, to a competition authority certifying that there are no grounds for proceeding under Article 101 or its domestic equivalent by issuing a 'no action letter'.[86] We wonder whether this might provide a useful basis for increasing the guidance available in this difficult but important area.

2.50 A different solution to the question of how to deal with SPPAs would be the use of standards. Executive Vice-President Vestager said in a speech in Rome in September 2021 that it might be possible for companies to set 'joint standards for what counts as a green product, or pooling resources to speed up green innovation', which, in turn, 'could even mean companies agreeing to cut dirty products out of their supply chains, without being forced to do that by regulation.'[87] In our view, the Horizontal Guidelines of 2011 already provide a useful framework for determining when standard-setting will normally not restrict competition: the procedure for adopting a standard must be open and transparent, there must be no obligation to comply with the standard and access to the standard must be available on fair, reasonable and non-discriminatory terms.[88] The Netherlands Authority for Consumers and Markets uses these criteria in its draft Guidelines on sustainable agreements when giving joint standards and certification labels about the use of sustainable raw materials as an example of a permissible agreement.

2.51 Likewise, the US Department of Justice cleared a Workplace Code of Conduct created by the Apparel Industry Partnership ('AIP') of clothing and footwear manufacturers, trade unions, consumer, human rights, and religious organisations. The aim of the Workplace Code was (and is) to eradicate the inhumane working conditions in sweatshops in various parts of the world. The DoJ decided that it would not take enforcement action against the AIP's Workplace Code.[89] In the DoJ's view, it was 'far from clear that adherence to the Code will have any adverse effect on the prices'. In fact, to the contrary, participating firms that advertised their compliance with the Code would provide 'useful purchasing information to a substantial number of consumers'.

2.52 Finally, we have considered whether the *Wouters* doctrine[90] might be applicable to a case where firms privately agree to restrict competition in order to pursue

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85 *See the Commission's Notice on informal guidance relating to novel questions concerning Articles [101 and 102 TFEU] that arise in individual cases, OJ [2004] C 101/78. As at the date of this report the Commission has issued two guidance letters: one to Medicines for Europe on 8 April 2020 and the other to Ecorys and SPI on 25 March 2021; both letters concerned supply arrangements in response to the coronavirus crisis and both are available on DG COMP's website. The Director-General of DG COMP, Olivier Guersent, has also stated that the Commission is considering whether to issue informal guidance in relation to sustainability agreements: see speech of 14 September 2020, 'Sustainability Goals and Antitrust: Finding the Common Ground', available at www.concurrences.com.*

86 *https://www.epant.gr/en/enimerosi/sandbox.html.*

87 *Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, 10 September 2021.*

88 *OJ [2011] C 11/1, para 289.*

89 *www.justice.gov/atr/public/busreview/4513.pdf.*

90 *Case C-309/99 Wouters v Algemene Raad van de Nederlandshce Orde van Advocaten EU:C:2002:98.*

sustainability objectives. In *Wouters* the Dutch Government intended that there should be a regulatory system in the Netherlands for the legal profession, but it was left to the Dutch Bar Council to adopt the relevant rules. A rule that forbade multi-disciplinary partnerships (for example with the result that a lawyer could not become a partner in a firm of accountants) was clearly restrictive of competition, but the question for the Court of Justice was whether it was a restriction of competition that infringed Article 101(1). The Court's conclusion was that the rules would not infringe Article 101(1) when there was a legitimate public interest (in that case the regulation of the legal profession), where they were inherent in the pursuit of that objective, and where they were no more restrictive than was necessary to achieve that objective.

2.53 The *Wouters* doctrine has been applied in other cases involving professional ethical rules, and it has also been applied to rules regulating a particular sport.[91] However it seems to be the case that the *Wouters* doctrine is of limited application: it has not been applied outside those two situations, where regulatory functions were carried out by a body that was empowered by the State (as in *Wouters*) or by an international non-governmental organisation (as in *Meca-Medina*[92]). Advocate General Mazak's opinion in *Pierre Fabre*[93] was that 'private voluntary measures' may fall outside the scope of Article 101(1) pursuant to the *Wouters* doctrine, provided the limitations imposed are appropriate in the light of a legitimate objective sought and do not go beyond what is necessary in accordance with the principle of proportionality. However the Advocate General specifically added that the legitimate objective sought must be of a public law nature and therefore be aimed at protecting a public good. We are sceptical therefore that *Wouters* can provide a basis on which to scrutinise sustainability agreements under Article 101 in the case of a purely private initiative on the part of undertakings, which is neither required nor authorised by the State; however we do not rule out the possibility that *Wouters* might be invoked where firms enter into agreements pursuant to a clearly articulated public policy of the Commission or a Member State.

[91] *See most recently Case T-93/18 International Skating Union v Commission EU:T:2020:610, para 77.*
[92] *Case C-519/04 P Meca-Medina v Commission EU:C:2006:492.*
[93] *Case C-439/09 EU:C:2011:113, para 35 of his opinion.*

Chapter 3
Terminology and different structures and activities of buyer groups

3.1 This Report is focussed on the delineation between by object and by effect restrictions of competition in the case of purchasing agreements. In this chapter we begin by explaining the terminology that we use in our Report and then discuss different types of joint purchasing agreements.

Terminology

3.2 It is important at the outset to make a distinction between agreements entered into between undertakings that relate to their individual purchasing of goods and services – for example as to the prices (or an element in the prices) that they will pay, the applicable terms and conditions that they will agree to, the suppliers from whom they will buy or the information that they will provide to each other - and **joint** purchasing agreements that involve some **collective** activity on the part of the buyers. As will be seen in Chapter 4 and Annex 2 to this Report, cases in which the European Commission, NCAs or competition authorities in third countries have imposed fines in the case of purchasing agreements have **always** fallen into the former category: that is to say they have never involved any **joint** or **collective** behaviour on the part of the buyers, other than the fact of either agreeing purchase prices and applicable terms and conditions or exchanging information about those matters.

3.3 We have struggled to think of an appropriate expression for agreements in the former category. Since they are cases in which fines have been imposed we hesitate to call them 'pure' purchasing agreements, which would suggest moral approval. Nor would we describe them as 'simple' purchasing agreements, since the mechanics of such agreements may be far from simple. To call them 'naked' agreements would beg the question as to whether such agreements are always (or 'per se') unlawful. We will refer to such agreements as **buyer cartels**, and we emphasise that they do not involve any joint behaviour vis-à-vis suppliers in the upstream market.

3.4 In the case of a **buyer cartel** the members of the cartel agree between themselves how they will individually interact with suppliers, or they exchange commercially sensitive information with one another about how they will do so. In the case of **joint purchasing** there will be a common organisation of some kind that provides the interface between suppliers in the upstream market and the purchasers in the downstream market that the organisation represents. It is through **joint** behaviour that the buyer group can hope to negotiate more favourable terms and conditions than if each buyer had acted alone: this is the essence of joint purchasing. It is clear that the extraction of lower prices through joint purchasing may lead to beneficial welfare effects where these pass through to customers in markets downstream from the buyers. This is what caused the Court of Justice in *Gøttrup-Klim* to say that:

> the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.

3.5 We would add that despite the expressions 'buyer group' and 'joint purchasing', it is not necessarily the case that the common organisation will actually **purchase** the products that are the subject of its negotiations with suppliers and then supply them on to the members. A wide range of arrangements exist, and it may be the case that the buyer group will negotiate prices (or elements of prices such as discounts), terms and conditions with suppliers on behalf of members of the buyer group but then leave it to buyers to make their own individual purchases, albeit against the backdrop of the negotiations that have taken place. Although we will continue to use the expression 'joint purchasing' in this Report, it is important to recognise that 'buyer' groups sometimes negotiate rather than buy. It may be advisable for future Guidelines on horizontal co-operation agreements to deal with this topic under the heading 'joint purchasing and negotiation' rather than simply 'joint purchasing'.

The structure of buyer groups

3.6 Buyer groups that enter into joint purchasing agreements may take various forms and may have various functions. In this and the following section we will discuss firstly different structures of buyer groups and then the various functions that they may perform.

3.7 Buyer groups may take various forms, for example a joint venture company, an unincorporated cooperative association, a retail alliance, a contractual arrangement or a more informal form of cooperation, such as the use of a skilful negotiator to negotiate on behalf of a group of buyers. As to their form, the Commission's Horizontal Guidelines of 2011 noted that:

> Joint purchasing can be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation.

3.8 Two useful studies of joint purchasing agreements can be found in *The competitive effect of buyer groups*, a report prepared by RBB Economics for the UK Office of Fair Trading in 2007,[94] (the 'RBB Report') and in *Retail alliances in the agricultural and food supply chain*, a report published in 2020 by the Joint Research Centre, the European Commission's science and knowledge service (the 'JRC Report').[95] Each of these reports contains a useful discussion of the form that buyer groups may take.

The RBB Report

3.9 Paragraphs 1.6 to 1.11 and Chapter 2 of the RBB Report discuss the structures and activities of buyer groups.

3.10 Paragraph 2.2 of the RBB Report notes that buyer groups typically use the combined purchasing power of the members to obtain discounts on goods or services for use or resale and/or to secure better terms for their members on matters such as product quality, availability and delivery. It notes that such groups can be found across a wide range of industries.

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[94] *Economic Discussion Paper, OFT863, January 2007, available at https://www.rbbecon.com/downloads/2012/12/oft863.pdf.*

[95] *Available at https://publications.jrc.ec.europa.eu/repository/handle/JRC120271.*

3.11 Paragraph 2.3 notes that there are many formats for buyer groups, and that there is no clear taxonomy in the economics literature on the subject. Formats include:

- cooperatives of small buyers
- a buying club established by a founder member or founding group which runs the club and which other buyers can join
- a buying club which is run by a third party rather than by any of the buyers
- a joint venture established by a group of buyers
- groups of groups, for example where small local firms form a group to enable them to join a larger national group that has a minimum turnover threshold for membership
- 'super-buying groups' which bring together distributors of a wide range of diverse products
- contract-specific consortia, established for the purpose of performing a single, high-value contract that may take many years to perform
- symbol groups, where the buyers not only purchase goods or services jointly but then also operate on downstream markets subject to the use of a common symbol.

3.12 Paragraph 2.4 of the RBB Report notes that some buyer groups may be open, in that the criteria for joining are easily met; others may be more 'closed' structures where membership is determined by strict rules, for example on minimum turnover or by a vote of members of the group.

3.13 Paragraphs 1.8 to 1.10 and 2.8 and 2.9 of the RBB Report make a distinction between 'passive' and 'active' buyer groups. A passive buyer group simply aggregates the purchases of its members so as to enable higher volume discounts to be obtained against a pre-existing, non-negotiable pricing schedule. This is to be distinguished from an 'active' buyer group which bargains on behalf of its members with the intention of influencing the behaviour of suppliers (for example on prices or terms and conditions) on behalf of the members. Active groups may have pro-competitive effects in the market, where, for example, this leads to cost savings that can be passed on to consumers. However active buyer groups may also have the scope to harm competition, depending on the circumstances of the case, which is why it may be necessary to review their behaviour on an effects basis under competition law.

The JRC Report

3.14 Buyer cartels and joint purchasing occur throughout the economy: our research into the cases in this area set out in Annex 2 of this Report demonstrates this to be the case. Alliances between firms in the retail sector have existed for many years: indeed, the first two cases investigated by the Commission both concerned small buyer groups of retailers, in each of which the Commission decided that the alliances were *de minimis*.[96]

3.15 In recent times the number of retail alliances has been increasing in number, and they have become more complex and international in nature. In 2019 the European Parliament called upon the European Commission to launch an analysis of the extent and the effects of international buying alliances on the economic functioning of the agricultural and food supply chain. This led to a workshop held

[96] *See SOCEMAS, 1968 and Intergroup Trading (SPAR) 1975 in Annex 2 to this Report.*

in Brussels in later 2019 attended by a number of relevant stakeholders and the publication of the JRC Report in 2020.

3.16 Section 2.1 of the JRC Report defines a retail alliance as:

> horizontal alliances of retailers, retail chains or retailer groups that cooperate in pooling some of their resources or activities, most importantly relating to sourcing supplies.

The Report notes that these groups are often referred to as central purchasing organisations or buying groups, but uses the expression 'retail alliances' because they may have other forms and carry out other activities beyond buying.

3.17 As in the case of the RBB Report, the JRC Report notes that there are many forms of retailer cooperation, from highly informal at one end of the spectrum to a full merger at the other. The existence of a buyer group does not in itself directly affect the structure of the upstream market from which buyers source products nor the downstream market in which they sell their products. It does however change the structure of the buying market in which they deal with their suppliers, by altering their bargaining position.

3.18 Section 2.3 of the JRC Report sets out a 'typology' of retail alliances. It notes that retail alliances can be classified into three main types:

- **groups of independent retailers**: these are usually small, independent retailers. The buyer group takes responsibility for group buying. The members may sell their private label products under a common name. These groups typically operate in one Member State only, and are sometimes referred to as 'national cooperative buying groups' or 'national buying clubs'
- **national retail alliances**: these tend to consist of larger retailers than groups of independent retailers. These alliances tend not to be involved in joint buying, but perform other functions, explained in paragraphs 3.23 and 3.24 below
- **European retail alliances**: these usually consist of larger retailers, retail chains or groups of independent retailers from different countries. These alliances tend to have only one member from each Member State, who do not compete with one another as they operate on different geographical markets. As in the case of national retail alliances they are not usually involved in joint buying, but perform other functions on behalf of the members.

3.19 The JRC Report discusses the organisational structure and governance of retail alliances, which differs widely. Most alliances have a central secretariat with its own legal and commercial identity, separate from the members.

The functions of buyer groups

3.20 The most obvious function of a buyer group, as the name suggest, is to purchase centrally on behalf of the group's members; it is through the use of collective bargaining power that it is possible to obtain more favourable terms than if the members were to purchase individually. However it is important to note that buyer groups may perform other functions as well; and that some retail alliances do not purchase at all.

The RBB Report

3.21 The RBB Report explains briefly that a buyer group may simply exist to provide information to its members: for example a 'catalog hub' may contain information about suppliers' prices, leaving the members to make their own purchases. Some buyer groups simply pool the purchases of members in order to obtain discounts, where the discount schedule is unilaterally determined by the supplier and non-negotiable: this is the 'passive' buyer group referred to in paragraph 3.13 above. The more normal function of a buyer group will be to negotiate on behalf of the members, using the collective bargaining power that arises from group action; this is what is meant by an active buyer group. Chapter 3 of the RBB Report describes the various strategies that a buyer group might deploy in order to secure better terms of supply.

The JRC Report

3.22 The JRC Report contains a more detailed discussion of the various functions of retail alliances. Groups of independent retailers typically purchase on behalf of members; however the members may source some products, for example locally or from smaller suppliers, individually. Buyer groups of independent retailers may also perform other functions. For example they may develop a common label and logo and the members may sell their private label products under that logo. These buyer groups may also provide quality control services, IT infrastructure and administrative services. Additionally they may engage in marketing activities, provide support for the organisation and optimisation of the supply chain and offer warehousing facilities.

3.23 National retail alliances tend not to engage in joint buying of branded products from manufacturers, although this does sometimes happen. Rather they negotiate what are referred to as 'on-top' agreements. These agreements relate to services that the alliance members may provide to their suppliers, for example concerning the placement of products on shelves in supermarkets, promotional displays and presentation. On-top agreements can also concern data sharing, including rich detail about the sales performance of products, which is obviously of great value to brand owners. Of course these are services offered by retailers to suppliers, but they are negotiated by the retail alliance in the context of the overall price that buyers will pay to their suppliers.

3.24 As in the case of national retail alliances, European retail alliances tend not to engage in joint buying of branded products but instead negotiate 'on-top' agreements. In some cases they focus on the services that can be supplied in support of the premium brands of suppliers; in other cases they may be concerned with the procurement of retailers' own-brand products. The JRC Report notes that one European retail alliance, between REWE and E. Leclerc, does in fact engage in joint buying of products form a selected list of large brand manufacturers.

3.25 Retail alliances provide an important function in relation to the procurement of private label products, both as the direct purchaser but also in some cases as the negotiator of the framework agreement within which retailers will source their purchases.

3.26 Our research into purchasing cases will be found in Annex 2. We have indicated in relation to each case whether it was an example of a buyer cartel or whether it was a case of joint purchasing. In so far as it is possible to do so from the

information publicly available about the cases, we have attempted to explain the structure of the buyer group and the function or functions that it was established to fulfil.

Chapter 4
Legal analysis of joint purchasing cases

Introduction

4.1 In Chapter 4 we set out the main themes that we have identified in our research into joint purchasing cases. The chapter is in two parts. We begin by categorising and commenting on the cases we have reviewed indicating, for example, whether they concerned a buyer cartel as opposed to joint purchasing, and in the latter case whether or not they restricted competition by object on the one hand or by effect on the other. We then consider the reasons given by competition authorities and courts for their findings of infringement of Article 101 or a domestic equivalent thereof in cases on purchasing and we note the benefits that have been found to flow from joint purchasing in the few decisions to that effect.

4.2 In conducting our research we have reviewed:

- the jurisprudence of the Court of Justice
- the decisional practice of the European Commission
- the decisional practice of the NCAs and the jurisprudence of the courts of the Member States of the EU
- relevant decisions and judgments on buyer cartels and joint purchasing agreements in third countries
- relevant guidance on the topic, from within the EU and from third countries
- relevant academic literature.

4.3 The findings of our research will be found in Annex 2. As will be seen, in each case we have set out the facts of the case; the outcome; whether there was a restriction of competition by object or effect (or both); whether fines were imposed; the sector involved and the products affected; the type of joint purchasing; the theory of harm in the case; whether any benefits were found to flow from the joint purchasing or an explanation of why there was no harm to competition; and whether the case involved secrecy: we discuss the relevance (or otherwise) of secrecy to the analysis of joint purchasing cases in paragraphs 6.4 to 6.7 below. We have also added commentary at the end of some case-notes where appropriate.

4.4 Before proceeding to our analysis of the cases in Annex 2 we would make two general points about joint purchasing and the appropriate treatment of it under Article 101. The first is that, as noted in *Gøttrup-Klim*, the RBB Report, the JRC Report and more generally in the academic literature and in the agency guidelines that we have reviewed on the subject, in many situations the exercise of buyer power by a buyer group is capable of leading to the negotiation of better prices, terms and conditions, and, depending on the circumstances of the case, this can result in lower prices for consumers in downstream markets: in other words joint purchasing will often lead to a desirable outcome in terms of consumer welfare. It is not surprising, therefore, that there are relatively few cases on joint purchasing, since it is unlikely to represent an enforcement priority for competition authorities. It is particularly noticeable that we have not found one case, anywhere in the world, in which a competition authority has imposed a fine in a case of **joint** purchasing: all of the cases in which fines were imposed involved buyer cartels, where there was no exercise of collective bargaining power. This in itself is highly relevant to a consideration of whether

joint purchasing (as opposed to buyer cartels) should be characterised as restrictive of competition by object or effect. We conclude that the object box should be very narrow in the case of joint purchasing: indeed, if we are correct in suggesting that an SPPA should be excluded from the object box, we suggest that joint purchasing should always require effects analysis.

4.5 A second general point to make about the cases on buyer cartels and joint purchasing that we have looked at is that quite often, in the case of a finding of an infringement of Article 101(1) by a competition authority or a court, there is relatively little discussion of how competition was restricted and sometimes no theory of harm is articulated at all. In some cases there is simply a conclusory statement that Article 101(1) or some analogous provision has been infringed, but with little or no analysis. In others there may be a finding of an infringement, but it is unclear whether the restriction of competition was by object or effect. Some judgments of the Court of Justice were concerned only with fines or procedural matters, not substance, with the result that there is no analysis of the substantive law of joint purchasing. Some of the cases that we have looked at involved Article 267 references from a court of a Member State, with the result that the judgment of the Court of Justice is limited to the precise questions that were addressed to it, rather than the appropriate analytical standards for joint purchasing agreements or buyer cartels generally. Several cases on joint purchasing were closed when firms under investigation offered commitments to change their behaviour which the competition authority was prepared to accept without reaching a conclusion that competition law was infringed. The result of this is that there is not a great deal of jurisprudence from the courts on this subject, and that the decisional practice of competition authorities is often fairly uninformative. We therefore can understand why some respondents to the Commission's consultation referred to a lack of clarity in relation to joint purchasing agreements. We consider that a future iteration of guidelines on the topic by the Commission provides an excellent opportunity to achieve greater clarity going forward. Our suggested framework for analysis of purchasing agreements will be found in Chapter 5, where we concentrate on the distinction between restrictions of competition by object and restrictions by effect.

Categorisation of and commentary on the cases

4.6 We have categorised the purchasing cases that we have looked at as follows:

- buyer cartel cases, where there was no **joint** purchasing
- one case where there was no restriction of competition because the rules of the joint purchasing organisation were objectively necessary to support legitimate joint purchasing
- cases where any restriction of competition was *de minimis*
- findings of a restriction of competition by effect
- cases where a restriction of competition was found to satisfy the conditions of Article 101(3).

4.7 We will explain which cases fell into which of the categories set out above and provide commentary in the following paragraphs.

*Buyer cartel cases, where there was no **joint** purchasing*

4.8 We have discovered a total of 24 buyer cartel cases in which fines were imposed on members of the cartel, seven decided by the European Commission, eleven

by national competition authorities of the EU and six by competition authorities in third countries. Details of these cases will be found in the following Table of Buyer Cartel Cases.

Table of Buyer Cartel Cases

Buyer cartel cases: European Commission

Case name	**Date of decision**	**Amount of fines**
French Beef	2 April 2003	€16.7 million, reduced on appeal to €11.97 million
Spanish Raw Tobacco	20 October 2004	€20 million, reduced on appeal to €13.22 million
Italian Raw Tobacco	20 October 2005	€56 million, reduced on appeal to €55 million
Dutch Bitumen	20 September 2006	€266.72 million, reduced on appeal to €238.52 million NB: the cartel involved suppliers and purchasers
Air Freight	9 November 2010, annulled by General Court judgment 16 December 2015; readopted decision 17 March 2017	€799 million, reduced in the readopted decision to €776 million NB: this was predominantly a selling cartel concerning fuel and security surcharges on airfreight services; however the airlines also agreed not to pay commission on those surcharges to their freight forwarders
Car Battery Recycling	8 February 2017	Fines of €68 million, reduced on appeal to €64.1 million
Ethylene	14 July 2020	€260 million; there is one undecided appeal against the level of the fine, Case T-590/20 *Clariant v Commission*

Buyer cartel cases:
national competition authorities of Member States of the European Union

Case name	Date of decision	Amount of total fines
T-Mobile **The Netherlands**	2003	€16.2 million
Billa/Julius Meinl **Czech Republic**	2009	CZK 51 million; fines reduced slightly on appeal
Timber Cartel **Finland**	2011	€51 million
Real Estate Auctions **Netherlands**	2011 and 2013	€6.1 million in 2011; €6.4 million in 2013; fines reduced slightly on appeal
Pork Charcuterie **France**	2013	€4.57 million, reduced on appeal to €2.64 million
Used Batteries **Spain**	2018	€5.37 million
Dairy **Spain**	2019	€80.6 million
Long Steel Cartel **Germany**	2020	€100 million
Saucissons **France**	2020	€93 million
Timber **Romania**	2021	RON 129.6 million
Used Cooking Oil Netherlands **Netherlands**	2021	€4 million on the two companies, and €190,000 on the three individuals, involved in the cartel

Buyer cartel cases: competition authorities in third countries

Case name	Date of decision	Amount of total fines
Dried Figs **Turkey**	2012	Fines were imposed
Public Auctions of Motor Vehicles **Singapore**	2013	$179,071
Scrap Steel **South Africa**	2016	R 1.6 billion Rand
Residential Property **New Zealand**	2019	$400,000
Estate Agent Advertising Services **New Zealand**	2020	$3 million
Car Insurance **Malaysia**	2020	RM 130.24 million

4.9 A number of observations may be made about these cases.

4.10 The first point is that in none of them was there any **joint** purchasing. None of them involved an attempt by the purchasers to pool their purchasing power so that they would be able to obtain, for example, better prices, terms or conditions. They simply concerned agreements and/or concerted practices as to the ways in which the cartelists would individually behave towards suppliers.[97]

4.11 The second point to make about the buyer cartel cases is that fines were imposed in every case that we have discovered, and that in some cases the fines were considerable; for example €68 million in the case of *Car Battery Recycling* and €260 million in the case of *Ethylene*. We have not found a buyer cartel case in which the competition authority did **not** impose a fine. We would add that we are unaware of any case in which a fine was imposed in the case of **joint** purchasing. This should provide comfort to those respondents to the Commission's consultation who were concerned that joint purchasing might be mischaracterised as a buyer cartel and attract a fine.

4.12 Our third observation is that in the buyer cartel cases that we have identified that were found to infringe Article 101 and/or an equivalent provision of the law of a Member State of the EU it is clear that the agreement was found to restrict

[97] *In two cases, Car Insurance in Malaysia and Live Poultry Dealers' Protective Association in the US, the price fixing was achieved through a trade association rather than by agreement between buyers; in neither case was there any **joint** purchasing.*

competition by object. Each of the European Commission's decisions specifically concluded that there was an object restriction, and the Court of Justice always upheld these findings when it was relevant to the appeal in question.

4.13 A fourth observation is that many of the buyer cartel cases involved agreements or concerted practices on prices (or elements of prices) to be paid, terms and conditions, quantities to be acquired or the choice of suppliers. However it is also noticeable that in several of the cases there was also (and sometimes only) an exchange of commercially sensitive information.

4.14 We also note, as discussed further in paragraph 4.26 below, that in several of the buyer cartel cases the competition authority or court hearing an appeal relied explicitly on the wording of the relevant legislation to conclude that an agreement to fix buying prices was unlawful. This explains why some decisions contain little elaboration of a relevant theory of harm: the unlawfulness of buyer cartels is usually expressly stated in the applicable law.

4.15 For the avoidance of doubt, it is helpful to note an important distinction between a buyer cartel and the joint purchasing of a product. In the former case the cartelists may agree the maximum price that they will pay for a product, but then deal individually with suppliers: this will be regarded as a restriction of competition by object. On the other hand a buyer group may purchase products on behalf of buyers, or negotiate the price at which the products will be bought; in this situation the buyers may have agreed what the maximum acceptable price will be. This agreement on prices is not regarded as a restriction by object: rather the lawfulness of the arrangement will depend on the compatibility of the joint purchasing agreement itself, which requires effects analysis. This is explicitly recognised in paragraph 206 of the Commission's Horizontal Guidelines:

> Agreements which involve the fixing of purchase prices can have the object of restricting competition within the meaning of Article 101(1) (1). However, this does not apply where the parties to a joint purchasing arrangement agree on the purchasing prices the joint purchasing arrangement may pay to its suppliers for the products subject to the supply contract. In that case an assessment is required as to whether the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). In both scenarios the agreement on purchase prices will not be assessed separately, but in the light of the overall effects of the purchasing agreement on the market.

Cases where there was no restriction of competition because the joint purchasing was objectively necessary to support legitimate collective behaviour

4.16 There is only one case that was decided on the basis of objective necessity, *Gøttrup-Klim Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*. Although it is the only such case, we find it very helpful as we explained at paragraphs 2.19 and 2.20 above. The Court notes that joint purchasing can be pro-competitive in effect, although it acknowledges that, depending on the circumstances of any particular case, there could be anti-competitive effects. This is important when it comes to deciding on the delineation between restrictions by object and by effect in the case of joint purchasing: the Court's judgment in *Gøttrup-Klim* strongly supports the proposition that effects analysis is a preferable approach.

Cases where any restriction of competition was de minimis

4.17 We found two joint purchasing cases where the decision that Article 101 was not infringed was reached on *de minimis* grounds, *SOCEMAS* and *Intergroup trading (SPAR)*. These were two early Commission decisions, from 1968 and 1975 respectively. The Commission's thinking on the *de minimis* doctrine has developed considerably since those days and is currently expressed in its Notice on Agreements of Minor Importance, which provides safe harbours for certain agreements where the parties' market shares are below specified thresholds.[98] We return to the issue of safe harbours in the analysis of joint purchasing agreements in Chapter 5 of this Report.

Findings of a restriction of competition by object or effect

4.18 We have reviewed the cases of **joint** purchasing (as opposed to the buyer cartel cases) in order to determine whether any of them were found to be restrictive of competition by object. Our conclusion is that there has only been one case, *Eurovision*, in which the European Commission found joint purchasing to be restrictive of competition by object as well as by effect. In that case the European Broadcasting Union (the 'EBU') jointly acquired the television rights to international sporting events on behalf of its members. The Commission considered that this joint acquisition restricted competition by object and effect, but granted an individual exemption under Article 101(3). The exemption decision was challenged successfully on two occasions by third party appellants dissatisfied with the Commission's conclusion on Article 101(3). In the judgments of the General Court no comment was made on the classification of the restriction of competition as one by object and effect, as this was irrelevant to the appeals.

4.19 We do not consider that the finding of a restriction by object in the *Eurovision* decisions to be persuasive. In one sense it does not matter whether any restriction was by object or effect, in that the Commission granted exemption under Article 101(3) anyway[99]. Furthermore it appears that what the Commission was really concerned about was the negative *effects* of the joint acquisition of the television rights to international sporting events. It found that, in the absence of the Eurovision system, the members of the EBU would have competed with each other for the acquisition of the television rights in question.[100] This type of counterfactual analysis is neither necessary nor desirable in an object case. As the Court of Justice held in *Lundbeck v Commission*:

> unless the clear distinction between the concept of 'restriction by object' and the concept of 'restriction by effect' arising from the wording itself of Article 101(1) TFEU is to be held not to exist, an examination of the 'counterfactual scenario', the purpose of which is to make apparent the effects of a given concerted practice, cannot be required in order to characterise a concerted practice as a 'restriction by object'.[101]

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98 *OJ [2014] C 291/1.*

99 *We would however note in passing that the Commission's grant of an individual exemption to an agreement that it considered to be restrictive of competition by object contradicts the assertion that object restrictions cannot be defended under Article 101(3).*

100 *OJ [2000] L 151/18, para 74.*

101 *Case C-591/16 P EU:C:2021:243, para 140.*

We would add that we are not convinced that the joint acquisition of the rights to sporting events by the EBU should be regarded, by its very nature, as being harmful to the proper functioning of normal competition,[102] which is the essence of an infringement by object.

4.20 In *National Sulphuric Acid Association* it is not possible to tell whether the Commission considered that the joint buying pool had as its object the restriction of competition, since its decision considered its effects only. In any event, the practical importance of that decision is that the Commission granted an individual exemption under Article 101(3) to the rules of the buying pool. Similarly in *Orphe* the Commission closed a case by sending a so-called 'comfort letter' indicating that the rules of a group of wholesalers of pharmaceuticals satisfied Article 101(3) without even deciding whether Article 101(1) was infringed: its *Annual Report on Competition Policy* simply noted that there may have been restrictions of competition, without deciding on whether this would have been by object or effect.

4.21 When reviewing the decisions of national competition authorities, we have not found any decisions in which joint purchasing was held to restrict competition by object. We have cited eleven buyer cartel cases in the Table of Cases above: to repeat, none of these cases involved **joint** purchasing. In the three interventions by national competition authorities that were not concerned with buyer cartels – *Carrefour Belgium and Provera Benelux* in Belgium, *Centrale Italiana* in Italy and *Glassmatix System* in Ireland - the cases were closed on the basis of commitments without any formal finding of an infringement of Article 101(1) or the domestic equivalent, whether by object or effect.

4.22 As we discussed in paragraphs 2.32 to 2.44 above, we have found no decision in any jurisdiction in which a boycott of suppliers by purchasers was found to be restrictive of competition by object. We have set out reasons there why we consider that it would be reasonable to subject vertical purchasing restraints by purchasers, including what we have described as an SPPA, to effects analysis rather than to allocate them to the object box.

Cases where a restriction of competition (by object or effect) was found to satisfy the conditions of Article 101(3)

4.23 The Commission has concluded that Article 101(3) was satisfied in the case of joint purchasing on three occasions, *National Sulphuric Acid Association*, *Eurovision* and *Orphe*. In the first case a formal individual exemption was granted in relation to the Association's rules on sulphur pools; in *Eurovision* the exemption was annulled on appeal; and in *Orphe* the case was disposed of by a comfort letter.

Theories of harm: reasons given for findings of an infringement of Article 101 or its domestic counterpart

4.24 As we noted in paragraph 4.5 above, decisions in purchasing cases – by which we mean both buyer cartel cases and cases on joint purchasing – often contain relatively little discussion of how or why the relevant legislation was infringed. A theory of harm is rarely articulated. There is sometimes little more than a conclusory statement that there has been an infringement of Article 101 or its domestic equivalent.

[102] *Case C-67/13 P EU:C:2014:2204, para 50.*

4.25 In the decisions and judgments that we have reviewed we detect the following approaches on the part of competition authorities and courts.

Buyer cartels are unlawful because the legislation says so

4.26 There are several cases in which a competition authority, court or Advocate General has relied specifically on the wording of the legislation to conclude that an agreement between buyers to fix prices or to agree on terms and conditions is unlawful. It will be recalled that Article 101(1)(a) gives as an example of a prohibited agreement those that 'directly or indirectly fix **purchase** or selling prices or any other trading conditions' (emphasis added). We stress that the following are **not** cases on joint purchasing: they involve buyer cartels.

- In *AOK Bundesverband v Ichthyol-Gesellschaft Cordes*[103] Advocate General Jacobs considered that it was clear that the sickness funds under scrutiny in that case were engaged in a fixing of trading conditions within the meaning of Article 101(1)(a) when they coordinated, by setting fixed amounts, the maximum level of contributions that they would make towards the cost of medicinal products. The Court of Justice did not consider this issue because it held that the sickness funds were not acting as undertakings so that Article 101 was not engaged.[104]

- In *Spanish Raw Tobacco*[105] both the Commission and the General Court began their analysis of a cartel between competing purchasers of raw tobacco by noting that Article 101(1)(a) expressly states that agreements and concerted practices that directly or indirectly fix purchase or selling prices are incompatible with the internal market

- In *Italian Raw Tobacco*[106] the Commission adopted the same approach as in *Spanish Raw Tobacco*. The same is true in one of the appeals to the General Court in this case: in *Transcatab v Commission*[107] the Court held that:

> the infringement in issue related to a secret cartel having as its object, in particular, price fixing and the allocation of suppliers and quantities to be purchased. Thus … that type of cartel is expressly prohibited by Article [101(1)(a) and (b) TFEU] and constitutes an infringement classified in the case-law as 'particularly serious', since it has a direct impact on the essential parameters of competition on the relevant market.

- In *Car Battery Recycling*[108] the Commission found that four recycling undertakings had colluded to reduce the purchase price paid to scrap dealers and collectors for used car batteries. The Commission referred to the prohibition contained in Article 101(1)(a) TFEU in relation to both liability and the seriousness of the infringement for the purpose of setting the fine.[109] On appeal the General Court held that the coordination of purchase prices revealed

[103] *Cases C-264/01 etc. EU:C:2003:304, para 68.*
[104] *Cases C-264/01 etc. EU:C:2004:150.*
[105] *Commission decision of 20 October 2004, para 299, upheld on appeal Case T-29/05 Deltafina v Commission EU:T:2010:355, para 239.*
[106] *Commission decision of 20 October 2005, para 277*
[107] *Case T-39/06 Transcatab v Commission EU:T:2011:562, para 285, upheld on appeal Case C-654/11 P Transcatab v Commission EU:T:2011:562.*
[108] *Commission decision of 8 February 2017.*
[109] *Ibid, paras 231 and 324.*

a sufficient degree of harm to competition. Having referred to Article 101(1)(a), it held that:

> the practice that was the object of the cartel is thus expressly prohibited by Article 101(1) TFEU, as it involves inherent restrictions on competition in the internal market.[110]

- In *General Insurance Association of Malaysia*[111] the Malaysia Competition Commission condemned an agreement between the General Insurance Association of Malaysia and its insurer members to fix discounts for car parts and hourly rates for car repairers. The Commission specifically relied on section 4(2)(a) of the Malaysian Competition Act 2010, which provides that a horizontal agreement between enterprises that has the object of price fixing is *deemed* to have the object significantly preventing, restricting, or distorting competition in any market for goods or services.[112]

Buyer cartels are unlawful because they distort the process of competition

4.27 There are numerous cases in which the competition authority or court expressly notes that agreements between buyers on matters such as the prices to be paid or the terms and conditions to be accepted **distort the process of competition**. We note that there is well-established jurisprudence of the Court of Justice that says that the process of competition should be protected in itself. For example in *T-Mobile* the Court held that Article 101:

> like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.[113]

The Court of Justice has applied this basic principle on numerous occasions, including in *GlaxoSmithKline Services Unlimited v Commission*,[114] when it rejected the General Court's finding that harm to consumers was the touchstone for establishing a breach of Article 101 TFEU, and in *Dole Food Co v Commission*.[115]

4.28 Examples of decisions referring to a distortion of the process of competition in buyer cartel cases or exchanges of information between buyers include the following:

- As noted in paragraph 4.27, in *T-Mobile*[116] the Court of Justice rejected the argument that there must be a direct link between a concerted practice between five mobile phone operators and consumer prices in order to find that the practice had an anti-competitive object, emphasising the importance of protecting 'competition as such'. In the case of a buyer cartel, the buyers should compete with one another in relation to their acquisition of inputs.

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110 *Case T-240/17 Campine v Commission EU:T:2019:778, para 297.*
111 *Malaysia Competition Commission decision of 29 October 2020.*
112 *Ibid, para 206.*
113 *Case C-8/08 EU:C:2009:343, para 38.*
114 *Case C-501/06 P EU:C:2009:610, paras 62–64.*
115 *Case C-286/13 P EU:C:2015:184, para 125.*
116 *Case C-8/08 EU:C:2009:343, citing para 58 of AG Kokott's opinion: EU:C:2009:110.*

- In *Spanish Raw Tobacco*[117] the Commission pointed out that the impact of the buyer cartel was significant because it allowed the members of the cartel:

  > to align as closely as possible the final prices they would pay to the producers and to reduce them for their own benefit to a level below that which would result from the free interplay of competition.[118]

- In *Italian Raw Tobacco*[119] the Commission stated that the buyer cartel sheltered the processors of raw tobacco in Italy from full exposure to market forces. Recital 285 of the decision states:

  > by eliminating the autonomy of strategic decision-making and competitive conduct, they prevent such undertakings from competing on the merits and enhancing their position on the market vis-à-vis the less efficient firms.

  The General Court made a similar point in its judgments in two appeals in this case, *Romana Tabacchi v Commission*[120] and *Transcatab v Commission*.[121]

- In *Car Battery Recycling*[122] the General Court considered the coordination of competing recycling companies' policy on the purchase price of scrap lead-acid car batteries through the fixing of target prices, maximum prices and fixed-amount price reductions and held that:

  > Such coordination of purchase prices, with the aim of reducing or preventing their increase and thus, ultimately, increasing the cartel participants' profit margins, reveals a sufficient degree of harm to competition that it may be found that there is no need to examine its effects. A price cartel can be regarded, by its very nature, as being harmful to the proper functioning of normal competition. In that regard, it must be borne in mind that the first example of a cartel given in Article 101(1)(a) TFEU, expressly declared incompatible with the internal market, is precisely one which 'directly or indirectly [fixes] purchase or selling prices or any other trading conditions'. The practice that was the object of the cartel is thus expressly prohibited by Article 101(1) TFEU, as it involves inherent restrictions on competition in the internal market.[123]

  The Court also held that the exchange of information on current and future purchase prices and future volumes of purchases 'clearly' had as its object the restriction of competition because:

  > they clearly run counter to the requirement of independence, which is a key feature of the market conduct of undertakings operating within a system of effective competition.[124]

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117 *Commission decision of 20 October 2004.*
118 *Ibid, para 300.*
119 *Commission decision of 20 October 2005.*
120 *Case T-11/06 EU:T:2011:560, para 83.*
121 *Case T-39/06 Transcatab v Commission EU:T:2011:562, para 160.*
122 *Case T-240/17 Campine v Commission EU:T:2019:778.*
123 *Ibid, para 297.*
124 *Ibid, para 305.*

- In the Finnish case of *Timber Cartel*[125] the Market Court held that an exchange of current and future purchase prices for timber had the object of restricting competition because it reduced uncertainty as to the future pricing behaviour of parties on the timber purchasing market, thereby diminishing their incentives to compete.

- In the French case of *Pork Charcuterie*[126] the Autorité de la concurrence decided that the coordinated reduction of slaughtering distorted the process of competition for the purchase of live pigs, to the detriment of live pig farmers.

- In the German case of *Long Steel Cartel*[127] the Bundeskartellamt decided that BMW, Daimler and VW had infringed German competition law by agreeing uniform surcharges for the purchase of long steel products. The theory of harm appears to have been that the agreement between the three motor vehicle manufacturers meant that scrap and alloy surcharges were no longer negotiated individually which, in turn, distorted the process of competition for the purchase of long steel products.

- In the Dutch case of *Real Estate Auctions*[128] the competition authority and the District Court of Rotterdam held that a large group of real-estate traders had infringed competition law by keeping property prices at foreclosure auctions artificially low in order to make a profit at secret after-auctions. The competition concern appears to have been that the participating traders were distorting the normal process of competition at foreclosure auctions.

- In the Dutch case of *Used Cooking Oil*[129] the agreements on the purchase price of used cooking oil, and related exchanges of competitively-sensitive information, distorted the process of competition in the purchasing market. The Dutch competition authority considered that the buyer cartel harmed the suppliers of used cooking oil, such as restaurants and snack bars.

- In the Singaporean case of *Public Auctions of Motor Vehicles*[130] the Competition and Consumer Commission of Singapore (the 'CCCS') held that the object of the motor vehicle traders' bid-suppression agreement was to restrict competition at public government auctions in Singapore. The essential feature of an auction is the expectation on the part of the tenderer that it will receive, as a response to its tender, a number of independently articulated bids formulated by contractors wholly independent of each other. An auction is designed to produce competition in a structured way. The CCCS concluded that the parties' bid-suppression agreement patently conflicted with this competitive process.

- In the South African case of *Scrap Steel*[131] the Competition Commission of South Africa objected to four purchasers of scrap metal agreeing a common approach to setting a pricing formula for scrap metal, which they then agreed with scrap merchants. It is not entirely clear from the publicly available materials, but the theory of harm appears to have been that the purchasers'

125 *Case 407/06/KR, judgment of 3 December 2009.*
126 *Decision of 13 February 2013.*
127 *Bundeskartellamt Press Release of 21 November 2019.*
128 *Decisions of 19 December 2011 and 4 February 2013, upheld on liability on appeal but the fines were slightly reduced, judgment of 18 December 2014, ECLI:NL:RBROT:2014:10174.*
129 *Decision of 5 October 2021.*
130 *Decision of 28 March 2013.*
131 *Decision of 21 August 2016.*

agreement restricted or distorted the process of competition in the market for buying scrap metal.

Additional reasons for finding an infringement of competition law in purchasing cases

4.29 In some of the decisions that we have reviewed the competition authority or court has provided more reasoning in support of a finding that competition law had been infringed. For example:

- In *Italian Raw Tobacco*[132] the Commission found that the agreements and/or concerted practices of the processors to fix purchase prices and allocate suppliers had the object to restrict competition. As noted above, the Commission considered that the buyer cartel had sheltered its members from full exposure to market forces. The Commission went on to add that the result:

  > could be reduced pressure to control costs, to improve quality and to innovate, thereby limiting productive and dynamic efficiencies.[133]

- In *French beef*[134] the General Court held that an agreement between four federations of farmers and two federations of slaughterers to set a minimum purchase price for beef had the object of restricting competition because it limited artificially the commercial negotiating margin of farmers and slaughterers and distorting the formation of prices in the markets in question.[135]

4.30 In *National Association of Sulphuric Acid*,[136] which involved a joint buying pool for the purchase of sulphur, the Commission's theory of harm appears to have been customer foreclosure. The buying pool restricted the amount that suppliers could sell to members of the Association which, in turn, might have meant that they no longer had access to a sufficient customer base.[137]

4.31 Further insights into theories of harm in joint purchasing cases can be found in the RBB Report and the JRC Report. Chapter 5 of the RBB Report looks at the impact of buyer groups on competition among members in the downstream market; Chapter 6 looks at the possibilities for buying groups to behave strategically to harm the terms of supply for other buyers; and Chapter 7 considers whether buyer groups could harm competition in other ways, for example by leaving suppliers with insufficient funds to invest and innovate. Chapter 3 of the JRC Report discusses the economic benefits associated with buyer groups, but also considers the impact they might have on consumers, competition between retailers and on upstream supply chain actors.

4.32 We do not intend to explore these theories of harm further in this Report, which is focussed on the delineation between by object and by effect cases. We consider that the category of object cases is very small for purchasing cases, and

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132 *Commission decision of 20 October 2005.*
133 *Ibid, para 285.*
134 *Case T-217/03 and T-245/03 Fédération nationale de la coopération bétail and viande v Commission EU:T:2006:391.*
135 *Case T-240/17 Campine v Commission EU:T:2019:778.*
136 *OJ [1980] L 260/24.*
137 *Ibid, paras 32–34.*

that a deeper consideration of theories of harm is unlikely to lead to either an expansion or a contraction of the size of the 'object box'. Theories of harm are obviously important when considering the effects of an agreement; however this is beyond the scope of this Report.

Benefits that might arise from joint purchasing

4.33 As noted throughout this Report, joint purchasing may lead to benefits for stakeholders in the market. This was the reason why the Court of Justice considered in the *Gøttrup-Klim* judgment that the prohibition on the simultaneous membership of two competing cooperative purchasing associations might fall outside Article 101 altogether where it was objectively necessary to enable the members of the cooperative to obtain more favourable terms and conditions.

4.34 Paragraph 217 of the Commission's Horizontal Guidelines of 2011 notes that joint purchasing may give rise to efficiencies: it says that:

> Joint purchasing arrangements can give rise to significant efficiency gains. In particular, they can lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs, thereby facilitating economies of scale. Moreover, joint purchasing arrangements may give rise to qualitative efficiency gains by leading suppliers to innovate and introduce new or improved products on the markets.

4.35 The Commission has made a formal conclusion that joint purchasing satisfied Article 101(3) on two occasions: *National Sulphuric Acid Association* and *Eurovision*. In *National Sulphuric Acid Association*[138] the Commission concluded that the buying pool would bring about improvements in both the distribution of sulphur and the production of sulphuric acid within the meaning of Article 101(3)(a). The Commission also considered that the selling markets for sulphuric acid were sufficiently competitive to ensure that a fair share of the pool's benefits would be passed on to consumers. Given that the pool members could buy up to 75% of their sulphur requirements from outside the pool, the pool was indispensable to attain its benefits and did not eliminate competition in respect of a substantial part of sulphur. The Commission granted an individual exemption for eight years; it renewed the exemption for a further year in 1989.[139]

4.36 In *Eurovision*[140] the European Broadcasting Union had notified its regulations governing the joint negotiation, acquisition and sharing of television rights to sports events (the 'Eurovision system') to the Commission for negative clearance or, alternatively, individual exemption. The Commission found that the joint acquisition of these television rights had as its 'object and effect' the restriction of competition between the members of the Eurovision system. Instead of competing with each other, members participated in joint negotiations and agreed among themselves the financial and other terms for the acquisition of rights. However, the Commission considered that the Eurovision system satisfied the conditions of Article 101(3), subject to conditions designed to permit third parties to have access to the television rights in question. The Commission specifically found that the joint acquisition of rights would lead to a number of

138 *OJ [1980] L 260/24, paras 38–50.*
139 *OJ [1989] L 190/22.*
140 *OJ [1993] L 179/23.*

improvements, such as a reduction of transaction costs, which would benefit members of the EBU from smaller countries, allowing them to show more sports programmes of better quality than would otherwise be the case.[141]

4.37 The Commission's first decision in *Eurovision* was annulled on appeal due to errors of law in the way that it had applied the indispensability requirement in Article 101(3)(a).[142] The Commission re-adopted its exemption decision,[143] but that decision was also annulled due to an error of assessment in finding that the EBU rules did not substantially eliminate competition.[144] For present purposes, what matters is the Commission's recognition in a formal decision that (in principle) this type of joint purchasing could bring about benefits within the meaning of Article 101(3).

[141] *Ibid, paras 59–62; see similarly OJ [2000] L 151/18, paras 84–87.*
[142] *Cases T-528/93 etc Métropole Télévision v Commission EU:T:1996:99.*
[143] *Eurovision OJ [2000] L 151/18.*
[144] *Cases T-185/00 etc Métropole Télévision v Commission EU:T:2002:242.*

Chapter 5
A suggested framework for analysing joint purchasing agreements as either by object or by effect restrictions of Article 101 TFEU

5.1 Our Terms of Reference require us to provide a proposal for a general framework for analysing whether joint purchasing agreements are restrictive of competition by object or by effect for the purposes of Article 101. Our starting point is that we think that the basic format of Chapter 5 of the 2011 Horizontal Guidelines remains fit for purpose when revised guidelines are adopted. The sequence adopted in the 2011 Guidelines is as follows:

- definition
- relevant markets
- assessment under Article 101(1)
  - main competition concerns
  - restrictions of competition by object
  - restrictive effects on competition
- assessment under Article 101(3)
- examples.

We consider that this template should be retained. It may be helpful in the section on assessment under Article 101(1) to include some narrative on the doctrine of objective necessity and its application to joint purchasing, as indicated by the *Gøttrup-Klim* case. We will present our thoughts according to the sequence of the 2011 Guidelines, making suggestions on how we consider that they can be improved.

Definition

5.2 This Report is specifically concerned with the distinction between purchasing agreements that restrict competition by object and those that should be subjected to effects analysis. This is an important issue, in particular because of the perceived lack of clarity on how joint purchasing differs from a buyer cartel.

5.3 Our analysis of the cases has shown that buyer cartel cases – in the EU, at the level of the NCAs, and in third countries – have never involved **joint** purchasing. Paragraph 205 of the existing Horizontal Guidelines, when discussing restrictions of competition by object, simply says that:

> Joint purchasing agreements restrict competition by object if they do not truly concern joint purchasing, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation.

We do not find paragraph 205 to be very helpful, since it says nothing about what is meant by joint purchasing and how it is distinguishable from a buyer cartel. We understand why respondents to the Commission's consultation said that there was a lack of clarity in this area. Future guidelines should contain definitions both of a buyer cartel and of joint purchasing agreements; we suggest that some examples should be given that seek to shed light on the distinction between these two types of agreement. We discuss definitions in the following paragraphs and provide some examples in paragraph 5.42.

Definition of a buyer cartel

5.4 In the case of a **buyer cartel** undertakings agree with one another on how they will **individually** interact with suppliers about matters such as price, quantities and terms and conditions. Alternatively they agree to exchange commercially sensitive information with one another about such matters. A buyer cartel does not involve any **joint** interaction between the cartelists and suppliers in the upstream market; there is no common organisation that represents the interests of the members of the buyer group in dealings with suppliers. We suggest that guidance on types of buyer cartels should be contained in the section of the guidelines that discuss restrictions of competition by object under Article 101(1), discussed in paragraphs 5.24 to 5.30 below. The definition of a buyer cartel could say explicitly that such agreements restrict competition by object, whereas joint purchasing should be subject to effects analysis. The next paragraph of the guidelines would then explain what is meant by joint purchasing.

Definition of joint purchasing

5.5 In chapter 3 of this Report we explained the terminology that we use and discussed the different structures and activities of buyer groups. In paragraphs 3.2 to 3.5 we distinguished between buyer cartels and joint purchasing agreements, and noted that all the cases in which fines have been imposed concerned buyer cartels where there was no joint behaviour. The key expression requiring definition in any future Guidelines therefore is **joint purchasing**, since in our view it is **joint** behaviour that takes an agreement out of the object box and requires the application of effects analysis to it. The 2011 Guidelines provided guidance on the different forms that joint purchasing organisations might have, that is to say their structure. However very little guidance was given on the activities of joint purchasing organisations, and in particular on what is meant by **joint** behaviour.

5.6 We suggest that the section of the future Guidelines containing definitions should discuss three issues when defining joint purchasing: (i) what is meant by joint **purchasing**; (ii) what is meant by **joint** purchasing; and (iii) the different forms that buyer groups may take.

Purchasing

5.7 The expression 'joint purchasing' is a slightly misleading one since, as we explained in paragraph 3.5 of this Report, some buyer groups do not **buy** products. Instead the buyer group negotiates on matters such as prices (or elements thereof such as discounts), terms and conditions with suppliers on behalf of members of the group, but then leaves it to buyers to make their own individual purchases, albeit against the backdrop of the negotiations that have taken place. It would be advisable for future Guidelines on horizontal co-operation agreements to note this point explicitly; indeed this topic would perhaps be better dealt with in a chapter on 'joint purchasing and negotiation' rather than simply on 'joint purchasing'. It may be helpful to add that a buyer group may go beyond negotiating on price, terms and conditions; for example where it purchases products on behalf of members it may also provide joint warehousing and arrange joint distribution.

Joint

5.8 Joint purchasing and negotiation occurs where a common organisation acting on behalf of the members of a buyer group provides the interface between suppliers in the upstream market and the purchasers in the purchasing market that the organisation represents. The essence of joint purchasing is that the common organisation can hope to negotiate more favourable terms and conditions than would have been obtained if each buyer had acted alone. Under the New Zealand Commerce Act of 1986 there is an exception from the prohibition of price fixing for joint buying, and joint buying is helpfully defined in paragraph 86 of the Commerce Commission's Competition Collaboration Guidelines as occurring when:

> Buyers arrange to purchase goods or services collectively on terms that an individual buyer would be unlikely to be able to negotiate on their own.[145]

5.9 In the case of a buyer cartel there is no **joint** behaviour by the cartelists, other than the agreement between them, for example not to pay more than a given amount for goods or services. This restricts competition by object. To avoid the object box, a buyer group must be involved in collective bargaining on behalf of members of the buying group that enhances the possibility of obtaining more favourable terms than if the buyers were acting unilaterally. Typically this might be possible because the group will be purchasing larger volumes, but it could also be the result, for example, of more efficient negotiation.

5.10 The Guidelines should advise buyers who intend to enter into a joint purchasing agreement that, in order to avoid the object box, they should be able to demonstrate that their agreement will involve collective bargaining of some kind that may make it possible for them to acquire goods or services on more favourable terms than if each individual buyer were to negotiate on its own behalf. The buyer group should be able to show why their agreement constitutes joint purchasing and should therefore be subject to effects analysis rather than being regarded as restrictive of competition by object. It is clear that undertakings bear the evidential burden in support of the assertions that they make in competition proceedings. While the legal burden of proving an infringement remains on the person alleging the infringement, the parties to a joint purchasing agreement may reasonably be expected to explain why their agreement is not a buyer cartel, but is instead a genuine joint purchasing arrangement that should be subject to effects as opposed to object analysis.[146]

5.11 While conducting our research we have reviewed the class exemption for collective bargaining for certain businesses adopted by the Australian Competition & Consumer Commission in June 2021.[147] This permits collective bargaining (by both sellers and buyers) by smaller businesses that might otherwise infringe competition law where this may enable them to negotiate

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145 *Available at https://comcom.govt.nz/__data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf.*

146 *See eg AG Kokott in Case C-195/04 P FEG v Commission EU:C:2005:751: 'Thus, the Commission naturally bears the burden of proving all the findings which it makes in its decision. However, before there is any need to allocate the burden of proof at all, each party bears the burden of adducing evidence in support of its respective assertions. A substantiated submission by the Commission can be overturned only by an at least equally substantiated submission by the parties'.*

147 *Available at https://www.accc.gov.au/media-release/collective-bargaining-by-small-business-facilitated-by-class-exemption.*

more efficiently with larger businesses than they would be able to do on their own. We note that where a group seeks to take advantage of the class exemption it must make a simple notification, known as a *Collective bargaining class exemption notice form*, to the ACCC in which it must set out the following: [148]

1. details of the collective bargaining group
2. details of the target business(es) with which the group will be dealing
3. what the group proposes to bargain about
4. details for a contact person.

The notification does not require technical or complex information and the ACCC considers that it may be contained in a single page. The notification is placed on a public register at the ACCC; once the form has been sent to the ACCC, legal protection attaches to the collective bargaining, assuming that the participants in the group satisfy the eligibility criteria.

5.12 We do **NOT** consider that a notification procedure should be introduced for joint purchasing agreements. Nor do we propose the adoption of a class exemption of the kind that operates in Australia, where the competition law system is somewhat different from that of the EU. However we do consider that it would be sensible to suggest to buyer groups that it would be advisable for them to produce a memorandum for their own purposes recording the contents of their agreement and containing information of the kind envisaged by the ACCC procedure. In paragraph 5.10 above we noted that the parties to agreements are required to produce evidence in support of their own assertions in competition law proceedings, and we believe that this would be of assistance to them.

5.13 We note that the ACCC requires that the *Collective bargaining class exemption notice form* must be provided to the target business(es) with which the group intends to bargain. We have not consulted with stakeholders as to whether this would be a desirable feature of the future Guidelines on joint purchasing and negotiation. In principle it seems to us to be reasonable that suppliers should be made aware that they are dealing with a buyer group rather than with individual purchasers. Suppliers should be made aware of the nature of the buyer group that they are dealing with; however it does not appear to us that there should be a requirement that individual members of the buyer group should be identified.

5.14 For the avoidance of doubt we consider that it would be important for future Guidelines on joint purchasing and negotiation to make clear that the fact that joint purchasing is subject to effects analysis (as opposed to being an object restriction, as in the case of a buyer cartel) does not imply that it is unlikely to be found to be restrictive of competition. Rather each joint purchasing agreement must be considered on a case-by-case basis in order to determine whether it might have the effect of restricting competition to an appreciable extent. Of course the *de minimis* doctrine would apply in the case of any effects analysis. Furthermore the Horizontal Guidelines may contain safe harbours for agreements below certain market share thresholds (as the existing Horizontal Guidelines do); this topic is beyond our terms of reference. However the Guidelines should make clear that joint purchasing my, depending on the facts of the case, be restrictive of competition by effect.

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[148] *See the ACCC's Guidelines on Collective bargaining class exemption, available at https://www.accc.gov.au/system/files/public-registers/documents/Collective%20bargaining%20class%20exemption%20-%20Guidelines%20June%202021.pdf*

5.15 In paragraph 5.42 we provide some examples of buyer cartels and joint purchasing agreements which are intended to elucidate the distinction between these two categories of case.

The form of buyer groups

5.16 The future Guidelines should explain that common purchasing organisations may take several forms, as does paragraph 194 of the Horizontal Guidelines of 2011. It may be useful to draw upon paragraphs 3.6 to 3.19 of this Report when drafting this section in order to provide a fuller account of the different structures that exist.

Relevant markets

5.17 The Horizontal Guidelines of 2011 discuss relevant markets in paragraphs 197 to 199, distinguishing between the purchasing market in which buyers procure inputs and the downstream selling market in which they may sell their own products. It will obviously be important to retain a discussion of relevant product and geographic markets in a future iteration of the Guidelines, because this is necessary in order to be able to conduct effects analysis under Article 101. However we will not discuss this issue further in this Report since we are concerned with the distinction between restrictions of competition by object and by effect. Where competition is restricted by object the Court of Justice's judgment in *Expedia Inc v Autorité de la concurrence*[149] has established that, provided that the agreement affects trade between Member States to an appreciable extent, it violates Article 101 irrespective of the appreciability of its effect on competition.[150] That being so, there is no need to define the relevant market in the case of an object restriction.

Assessment under Article 101(1)

Main competition concerns – theories of harm

5.18 We discussed theories of harm in buyer cartel and joint purchasing cases in paragraphs 4.24 to 4.32 of this Report. The Horizontal Guidelines of 2011 discuss 'main competition concerns' in paragraphs 200 to 204. It is clear from the research that we have conducted in producing this Report that those paragraphs could usefully be amplified, not least to explain in greater depth how buyer cartels and joint purchasing agreements might be harmful to suppliers in upstream markets. We note that some respondents to the Commission's consultation considered that more guidance was needed on this topic.

5.19 Our Report is specifically concerned with the distinction between restrictions of competition by object and by effect in the case of purchasing agreements, and we consider that it will be useful if the future Guidelines explain the main theories of harm that are relevant in buyer cartel cases, which clearly are restrictive of competition by object. Given that the extraction of lower prices from suppliers, which could follow from a buyer cartel as well as from joint purchasing, might result in the charging of lower prices in downstream markets, it would be helpful to explain why a buyer cartel is nevertheless regarded as restrictive of competition by object.

149 *Case C-226/11 EU:C:2012:795.*
150 *Ibid, para 37.*

5.20 It may be helpful to begin by pointing out that Article 101(1)(a) (and its counterparts in the laws of the Member States) specifically provides that agreements, decisions and concerted practices which 'directly or indirectly fix **purchase** or selling prices or any other trading conditions' are prohibited as incompatible with the internal market. We explained in paragraph 4.26 of this Report that there have been many cases on buyer cartels in which competition authorities and courts have emphasised the explicit reference to agreements to fix purchase prices in the wording of Article 101(1).

5.21 In paragraphs 4.27 and 4.28 of this Report we discussed the many occasions on which competition authorities and courts have stated that the EU competition rules are intended to protect the structure of the market and competition as such. This was the case in the *T-Mobile* case, which involved mobile telephony operators exchanging commercially sensitive information as to the terms on which they would procure the services of sales agents.[151] It is because competition law seeks to protect the process of competition that it was not necessary to prove that the concerted practice in *T-Mobile* would lead to higher prices for the end consumer; the distortion of the competitive process caused the Court to characterise the practice in question as restrictive of competition by object.[152]

5.22 The process of competition requires that each economic operator must determine independently the policy which it intends to adopt on the market, including the choice of the persons from whom it decides to buy and the terms or conditions that it will accept.[153] The requirement that undertakings should act independently was established by the Court of Justice in the *Sugar Cartel* case.[154] In *Car Battery Recycling* the General Court had no doubt that the exchanges of pricing information between the members of the buyer cartel had an anticompetitive object because:

> they clearly run counter to the requirement of independence, which is a key feature of the market conduct of undertakings operating within a system of effective competition.[155]

5.23 The process of competition requires that competitors must not deliberately substitute practical cooperation between them for the risks inherent in competition. This well-established principle has been clearly restated by the Court of Justice in recent judgments such as *Paroxetine*[156] and *Lundbeck*.[157] This principle applies just as much to agreements between buyers in purchasing markets as it does to suppliers' behaviour in selling markets.

Restrictions of competition by object

5.24 We suggested in paragraphs 5.4 to 5.15 above that future Guidelines on horizontal co-operation agreements should contain definitions both of a buyer cartel and of a joint purchasing agreement. In the section of the Guidelines that discusses restrictions of competition by object we consider that further guidance

151 *Case C-8/08 EU:C:2009:343, para 38.*
152 *See e.g. Cases C-501/06 P etc. GlaxoSmithKline v Commission EU:C:2009:610, paras 62–64.*
153 *Ibid, para 173.*
154 *Cases 40/73 etc. Suiker Unie v Commission EU:C:1975:174.*
155 *Case T-240/17 Campine v Commission EU:T:2019:778, para 297.*
156 *Case C-307/18 Generics (UK) v CMA EU:C:2020:52, paras 83 and 87.*
157 *Case C-591/16 P Lundbeck A/S v Commission EU:C:2021:243, para 114.*

should be given on three topics: (i) buyer cartels; (ii) boycotts; and (iii) whether a joint purchasing agreement might ever restrict competition by object.

5.25 Buyer cartels fall into two categories. First, there are cases where the buyers agree between themselves on how they will individually interact with suppliers when purchasing inputs. The second category consists of agreements between buyers to exchange commercially sensitive information about their purchasing intentions. Object restrictions would include agreements on, or the exchange of information about:

- maximum prices to be paid, including agreements on elements of prices, discounts and other aspects of prices
- price negotiation strategy, such as regular updates among buyers about the status of their separate negotiations with the supplier(s)
- the parties' joint evaluation of market trends, price developments and factors relevant for the purchase price formation
- terms and conditions
- sources of supply, both as to suppliers and territories
- volumes and quantities
- quality
- other parameters of competition, for example innovation and sustainability.

It might be useful to add that a specific type of buyer cartel is one in which the cartelists manipulate the outcomes of auctions: in Annex 2 to this Report we provide examples of such cases that have arisen in the Netherlands, Malaysia, Singapore and New Zealand.

5.26 As we discussed in paragraph 4.15, it will be useful for the future Guidelines to explain the distinction between the situation in which a buyer cartel fixes the maximum price that each firm individually will pay for products, which restricts competition by object, and an agreement between the members of a buyer group on the maximum price that a joint purchasing organisation will pay or negotiate for them, in which case effects analysis is required of whether the organisation itself is distortive of competition. This point is covered by paragraph 206 of the existing Guidelines of 2011.

5.27 We consider that it would be useful if the future Guidelines could explain the circumstances in which a collective boycott by purchasers might be considered to be restrictive of competition by object. In paragraphs 2.32 to 2.44 we made a distinction between horizontal boycotts, SPPAs and bargaining tactics and concluded that only horizontal boycotts, aimed at eliminating competitors from the level of the market at which the perpetrators of the boycott operate, should be allocated to the object box. We consider that a horizontal boycott by purchasers intended to eliminate another purchaser either from the upstream purchasing market or the downstream selling market restricts competition by object. However vertical purchasing restraints, directed towards suppliers, including what we describe in this Report as an SPPA, should be subject to effects analysis on a case-by-case basis.

5.28 It would be helpful for the future Guidelines to contain a discussion of whether joint purchasing could ever amount to a restriction of competition by object. Our view is that joint purchasing should always require effects analysis. We explained in paragraphs 4.18 and 4.19 that the only finding of a restriction of competition by object in a joint purchasing case that we have found was in *Eurovision*, and that was in a decision in which the Commission found there to be a restriction

both by object and effect, and in which it granted an individual exemption under Article 101(3) anyway. Given that object restrictions should be interpreted narrowly; that there is no judicial precedent for finding that joint purchasing restricts competition by object; and that joint purchasing can lead to lower prices that may be passed on to consumers, we consider that there are convincing reasons for subjecting all joint purchasing to effects analysis, unless the joint purchasing is actually a disguised cartel.

5.29 The Commission's Call for Tenders – Tender Specifications, which led to the commissioning of this Report, asked us to consider whether any of the following factors are relevant to the characterisation of a buyer cartel as a restriction by object:

- whether the buyers are competing downstream
- the aggregated share of the buyers in total demand in the (upstream) purchasing market
- the degree of concentration of sellers in the (upstream) purchasing market; and
- the aggregated market share of the buyers in the (downstream) selling market.

5.30 None of these factors is relevant to characterising the **object** of an agreement. However they are important factors to be taken into account when deciding whether an agreement has the actual or likely **effect** of restricting competition in the internal market.

Restrictive effects on competition

5.31 Whilst this issue is beyond our Terms of Reference, we briefly summarise six points that are relevant to the assessment of effects upon competition.

5.32 First, where the analysis of an agreement does not reveal a sufficient degree of harm to competition, the relevant question under Article 101(1) is whether the agreement has the effect of restricting competition compared to the competition conditions that would have occurred in the absence of the agreement. The need to establish a 'counterfactual' is to be found in the case-law of the Court of Justice.[158]

5.33 Secondly, it is necessary to take into account the actual context in which the joint purchasing agreement takes place, and in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.[159]

5.34 Thirdly, the assessment of the effects of a joint purchasing agreement is not limited to actual effects alone, but must also take account of its likely effects.[160]

5.35 Fourthly, we agree with paragraph 207 of the Horizontal Guidelines of 2011 that any analysis of the effects on competition generated by a joint purchasing

158 *See eg Case C-382/12 P Mastercard v Commission EU:C:2014:2201, para 161.*
159 *Ibid, para 165.*
160 *Case C-7/95 P John Deere v Commission EU:C:1998:256, para 77.*

arrangement must cover the negative effects on both the purchasing and the selling markets. Each of these markets will need to be defined.

5.36 Fifthly, we consider that all of the factors in the Terms of Reference, set out in paragraph 5.29 above, are relevant to an effects analysis.

5.37 Sixthly, it is necessary to examine whether, as a result of the agreement, competition has been restricted or distorted **to an appreciable extent**.[161]

5.38 Whilst market shares are only one of a number of quantitative and qualitative criteria that may be used for assessing whether a joint purchasing agreement appreciably restricts competition, we consider that market share thresholds are a valuable way of identifying cases that are unlikely to give rise to an appreciable restriction of competition. They also can contribute to the legal certainty that businesses and their advisers require by providing safe harbours. We agree with paragraph 1.84 of the RBB report that it is for the competition authority to decide on the appropriate market share thresholds.

Objective necessity

5.39 As we said in paragraph 5.1 above, it may be helpful if the future Guidelines on Horizontal co-operation agreements were to include some narrative on the doctrine of objective necessity and its application to joint purchasing, as indicated by the *Gøttrup-Klim* case. Specifically the Commission might provide examples of the typical restrictions in agreements on joint purchasing and negotiation that can be regarded as ancillary to the function of legitimate buyer groups.

Assessment under Article 101(3)

5.40 An assessment of the criteria contained in Article 101(3) is beyond the Terms of Reference for this Report. However we feel that it would be useful if the future Guidelines were to acknowledge that it is not legally impossible that an agreement that restricts competition by object might nevertheless be capable of satisfying Article 101(3). The fact that it is unlikely that an efficiency argument in the case of most object restrictions does not mean that it is legally impossible for such an argument to prevail in a particular case.

5.41 We have discussed sustainability, Article 101(3) and the *Wouters* doctrine in paragraphs 2.45 to 2.53 of this Report. Since this issue is of relevance to all aspects of the future regime for horizontal cooperation agreements we have nothing further to say concerning the future Guidelines and joint purchasing agreements specifically.

[161] *Case 5/69 Völk v Vervaecke EU:C:1969:35, para 7; Case C-226/11 Expedia v Autorité de la concurrence EU:C:2012:795, para 16.*

Examples

Example 1

Situation: Company A, Company B and Company C are brewers of beer. They sell canned and bottled beer in retail outlets such as pubs, night clubs, cafés and restaurants (the on-trade) and in retail outlets such as supermarkets and off licences (the off-trade). Company A, Company B and Company C have a 90% share of the on-trade market for beer and a 70% share of the off-trade beer selling market. One of the most important inputs for beer is cans. In the relevant purchasing market for cans there are only two major suppliers, each of which has considerable market power. Company A, Company B and Company C are dissatisfied with their respective supply arrangements for cans, and in particular the prices that they are being charged. They have secretly agreed with one another the maximum prices that they will pay for cans and to share with one another information about the prices that they are currently being charged.

Analysis: This is a buyer cartel. The agreement made by Company A, Company B and Company C does not involve any collective bargaining by a common organisation acting on their behalf vis-à-vis the two suppliers of cans in the upstream purchasing market. Company A, Company B and Company C have simply agreed between themselves to fix the maximum price that each of them is willing to pay for cans and to share commercially sensitive information. There is no joint purchasing of cans, nor is there any joint negotiation. Company A, Company B and Company C have substituted practical cooperation between them for the risks inherent in competition. This agreement restricts competition by object. The fact that the cartel is secret does not affect the legal characterisation of the agreement, but it may be relevant to the level of the fine.

Example 2

Situation: Company A, Company B and Company C produce batteries, specialising in supplying to manufacturers of electric cars. Their technology is advanced, and most car manufacturers in the EU purchase batteries from one or all of them. Recently Company D has entered the EU market for car batteries and it has succeeded in persuading many of the car manufacturers to source batteries from it. Company A, Company B and Company C are concerned about the situation and have agreed that they will approach the suppliers of 'rare earths' such as tantalum and niobium and request that they (the suppliers) refuse to supply those products to Company D for as long as they have any supply arrangements in place with any of Company A, Company B and Company C. Company D now complains that it is unable to obtain supplies of rare earths necessary for its production of car batteries.

Analysis: This is a horizontal boycott by Company A, Company B and Company C, the object of which is to restrict the emerging competition presented by Company D at their level of the market. This is not a joint purchasing agreement whereby a common organisation collectively negotiates on behalf of a number of buyers in order to obtain more favourable terms and conditions. The intention of Company A, Company B and Company C is to foreclose Company D's access to the market, harming Company D both in the purchasing market for rare earths and in the selling market for car batteries.

Example 3

Situation: Ruritania, a fictional Member State of the EU, has introduced new standards on air conditioning systems in motor vehicles with the aim of reducing harmful emissions and combating global warming. Four motor vehicle manufacturers, Company A, Company B, Company C and Company D, agree to establish an alliance that will buy a new type of refrigerant used in air conditioning systems for cars that complies with the new Ruritanian environmental standards. The alliance will be an unincorporated cooperative association. The bylaws of the association provide that Company A, Company B, Company C and Company D must purchase all of their requirements of refrigerants through the joint purchasing arrangements and are prohibited from negotiating independently with suppliers. On the relevant purchasing market for refrigerants used in air conditioning systems for cars the parties have combined market shares of between 10% and 20%. On the relevant selling market for motor vehicles they have a combined market share of 25%; Company E, a competing motor vehicle manufacturer, has a 40% market share.

Analysis: The proposed alliance is an example of a joint purchasing agreement. The unincorporated cooperative association has the requisite element of 'jointness': it will bargain collectively on behalf of Company A, Company B, Company C and Company D in a way that will enhance their buyer power compared to the power that each would have if it were to negotiate on its own. The proposed alliance does not have as its object the restriction of competition. Rather the joint purchasing agreement would have to be tested for its effect on competition. On these facts it seems unlikely that the alliance will have appreciable restrictive effects: Company A, Company B, Company C and Company D have a relatively modest market position on the purchasing and the selling markets; moreover, Company E is not participating in the alliance and will be an independent competitor with a larger share of the selling market. It would have been advisable for Company A, Company B, Company C and Company D to have produced a memorandum recording the basic details of their joint purchasing agreement and to have informed their suppliers of the buyer group's existence.

Example 4

Situation: Five steel manufacturers account for 60% of the domestic purchases of iron ore in Valhalla, a fictional Member State of the EU. The steel manufacturers set up, own and operate a joint venture, 'Metalworks', that will negotiate the purchase of iron ore on their behalf. Metalworks demands and obtains from a major iron ore supplier a 20% reduction in the purchase price of iron ore in Valhalla. Instead of competing with each other, the five steel manufacturers buy iron ore at the purchase price negotiated by Metalworks. There is no evidence that the owners of Metalworks lowered their steel prices as a result of the lower prices that they paid for iron ore.

Analysis: This is an example of a buyer group (Metalworks) that does not purchase the input (iron ore) in Valhalla. The five steel manufacturers make their purchases of iron ore on an individual basis, albeit on the basis of the price negotiated by Metalworks. It is therefore an example of joint negotiation. Metalworks is the common organisation which has negotiated with suppliers on behalf of the five steel manufacturers, which, in turn, have been able individually to obtain a lower purchase price for iron ore. The formation and implementation of Metalworks does not have as its object the restriction of competition. Whether it has a restrictive effect on competition will depend on, for example, whether Metalworks gives rise to a

significant commonality of costs whether their agreement produces a real risk of coordinated behaviour on the selling market for steel.

Example 5

Situation: 30 independent wholesalers in the grocery sector that mainly supply to smaller retailers of grocery products, alcoholic and non-alcoholic drinks and other household items establish a buyer group, 'Buyrite', to make purchases from suppliers of these products. The suppliers in question publish list prices, which provide for volume discounts. The level of discounts offered by the suppliers is non-negotiable: they are based purely on the quantities purchased. Buyrite aggregates the combined requirements of all its member wholesalers and purchasers at the price determined by the suppliers' list prices. As a result Buyrite purchases at lower purchase prices than its members would have obtained if they had purchased individually.

Analysis: This is an example of a 'passive buyer group', which we discussed in paragraph 3.13 of this Report. There is no negotiation of the price at which Buyrite will purchase, because the suppliers do not deviate from their list prices. However, Buyrite does purchase jointly on behalf its members and achieves lower prices as a result. There is no restriction of competition by object. The agreement would infringe Article 101 only if it has an appreciable adverse effect on competition; in the event that the agreement is found to be restrictive of competition consideration would have to be given as to whether it satisfies the conditions of Article 101(3).

Example 6

Situation: Company A, Company B, Company C and Company D are all active in the processing and distribution of cocoa beans around the world. Each of them also makes a series of semi-finished cocoa products, such as cocoa butter and cocoa powder. Each of them has unilaterally committed to respect the human rights of cocoa farm labourers in countries such as Côte d'Ivoire and Ghana. To that end, in 2020, they formed a 'Cocoa Fair Trade Initiative', which promises to pay cocoa farm labourers a 'fair wage'. In 2021 Company A, Company B, Company C and Company D decided to go a step further and agreed not to buy cocoa beans from any supplier of cocoa beans who does not pay a living wage to the labourers on its cocoa farms.

Analysis: This is an example of a vertical purchasing restraint rather than a horizontal boycott as in Example 2 above; more specifically the agreement entered into between Company A, Company B, Company C and Company D is what we have described in this Report as a sustainable products purchasing agreement. As we have explained at paragraphs 2.32 to 2.44 of this Report, we believe that vertical purchasing restraints, and in particular SPPAs, should not be treated as restrictive of competition by object. This means that the applicability of Article 101(1) cannot be determined simply by taking into account the formal terms of the agreement. Rather the agreement would have to be assessed by taking into consideration the entire factual, legal and economic context in which it operated. The effect of an agreement upon competition could be determined only if a market analysis were undertaken, so that it would be relevant to consider, for example, the degree of concentration in the relevant purchasing market for cocoa beans; the market position of Company A, Company B, Company C and Company D and their competitors in the relevant selling markets for semi-finished cocoa products; and the stance adopted by competitors to dealing (or not) with producers who do not pay a living wage to labourers working on cocoa farms. In the event that the agreement is found to be restrictive of competition consideration would have to be given as to whether it satisfies the conditions of Article 101(3).

Chapter 6
Responses to specific issues raised by the Call for Tenders

6.1 The Call for Tenders required us, when giving our advice, to give consideration to a number of specific issues. This chapter contains our responses. We have divided our responses into five parts, dealing in turn with (i) market considerations; (ii) the sustainability issue; (iii) concrete and relevant, real-life examples; (iv) joint and separate behaviour; and (v) the joint negotiation of licences of standard essential patents.

Market considerations

6.2 The Call for Tenders set out six specific factors that we were asked to address:

> [A] proposal of relevant factors for making such distinction of joint purchasing agreements as by object or by effect restrictions based on the expert's own impartial legal interpretation of decisions by competition authorities and case law of the EU and national courts. In this context, the expert shall consider whether any of the following factors, among others, are relevant for the purpose of this assessment: (i) buyers are competing downstream, (ii) degree of integration on the buyer side (e.g. whether the buyers created or not a separate (joint purchasing) entity or a looser form of cooperation in charge of the negotiations with suppliers), (iii) aggregated share of the buyers in total demand in the (upstream) purchasing market, (iv) degree of concentration of sellers in the (upstream) purchasing market, (v) aggregated market share of the buyers in the (downstream) selling markets, (vi) the fact whether the buyer cooperation is secret towards sellers.

6.3 We do not consider that any of these factors is relevant to the question of whether a purchasing agreement restricts competition by object. As we explained in paragraphs 5.29 and 5.30, most of these are factors of relevance to the assessment of the **effects** of an agreement. However they are not relevant in the case of **object** restrictions.

Secrecy

6.4 The Call for Tenders asks us specifically to consider whether it is relevant to the assessment of purchasing agreements as restrictive of competition by object or effect that the buyer cooperation is secret towards the sellers. We have two points to make on this.

Secrecy is not a requirement for an object restriction

6.5 The first point is that secrecy is not a requirement for a finding of a restriction of competition by object. This point emerges clearly from cases such as *Beef Industry Development Society*,[162] where the Court of Justice had no doubt that the agreement to reduce the total capacity of the Irish beef processing industry had the object of restricting competition, even though the agreement was in the

[162] *Case C-209/07 EU:C:2008:643.*

public domain and had the support of the Irish government. Similarly, in *Ski Taxi*[163] the EFTA Court held that transparent joint bidding by two competing taxi firms was capable of revealing a sufficient degree of harm to competition, a point that was subsequently confirmed by the Norwegian Supreme Court. There are other cases to the same effect.[164]

Secrecy may be relevant to the imposition and/or level of the fine

6.6 Our second point is that our review of buyer cartel cases reveals that secrecy may be relevant to the level of the fine in a buyer cartel case. In *Spanish raw tobacco* the Commission took into account that the secret nature of the tobacco processors' cartel enabled it to be fully implemented[165]; this was one of the factors that led it to find that the infringement was 'very serious'.[166] On appeal the General Court agreed with the Commission. In *Deltafina v Commission*[167] the Court ruled that 'there was a secret aspect to the processors' cartel, which is a factor that can accentuate the gravity of the infringement.'[168]

6.7 The converse can sometimes be true: the fact that an arrangement has been and is public may influence the Commission not to impose a fine. In *International Skating Union's Eligibility rules*[169] one of the reasons why the Commission decided not to impose a fine was that the ISU's rules had been publicly known since their adoption.[170]

The sustainability issue

6.8 The Call for Tenders asks us to consider whether the pursuit of sustainability objectives, such as environmental protection, animal health and/or welfare, or social protection, by the joint purchasing agreement may influence the qualification as a by object or by effect.

6.9 We have addressed this issue in paragraphs 2.21 to 2.53 of this Report. We consider that, in principle, it is desirable that firms should compete with one another in order to produce more sustainable products. As a general proposition each firm should decide for itself the way or ways in which it wants to pursue sustainability objectives, and the market will reward those that make good decisions and punish those that make bad ones.

6.10 Having said this, we consider that certain joint purchasing arrangements may be able to make a positive contribution to sustainability objectives. We agree with the observation of Executive Vice-President Vestager that:

> the rules shouldn't discourage companies from working together, to make their products more sustainable – especially when that cooperation doesn't have much effect on the way companies compete with each other. In practice, that could involve companies setting joint standards for what counts as a green product, or pooling resources to speed up

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163 *Case E-3/16 Ski Taxi Ski SA v Staten v/Konkurransetilsynet, judgment of 22 December 2016, paras 88–102 and Case 2015/203, judgment of the Norwegian Supreme Court of 22 June 2017.*

164 *See eg Alloy surcharge, OJ [1998] L 100/55 and the Commission's re-adopted decision of 20 December 2006;.*

165 *Commission decision of 20 October 2004, para 413.*

166 *Ibid, para 414.*

167 *Case T-12/06 EU:T:2011:441, upheld on appeal Case C-578/11 P Deltafina v Commission EU:C:2014:1742.*

168 *Case T-12/06 EU:T:2011:441, para 239.*

169 *Commission decision of 8 December 2017, upheld on appeal Case T-93/18 EU:T:2020:610, on appeal Case C-124/21 P, not yet decided.*

170 *Commission decision of 8 December 2017, para 348(ii).*

> green innovation. It could even mean companies agreeing to cut dirty products out of their supply chains, without being forced to do that by regulation.[171]

6.11 In paragraphs 2.32 to 2.44 we have identified several arguments that might be advanced in support of the proposition that a vertical 'sustainability boycott' does not restrict competition by object; instead such cases should be subject to effects analysis.

Concrete and relevant, real-life examples

6.12 Annex 2 contains our research into number real-life examples both of buyer cartels that have been classified as restrictions by object and of joint purchasing agreements that have either been found to fall outside Article 101(1) altogether or to have satisfied Article 101(3). Paragraph 5.42 provides hypothetical examples of the application of Article 101 to a range of buyer cartel and joint purchasing and negotiation agreements.

Joint and separate behaviour

> [A]n explanation whether this assessment under the proposed general framework differs depending on the number of aspects of the joint purchasing that are negotiated jointly with the group of buyers and which ones are negotiated/decided separately. Such aspects could include (but are not limited to) the price, certain element(s) of the price, the definition/assortment of products/services, the quantity, timing, delivery, etc.

6.13 We are required to identify purchasing cases that restrict competition by object. Our conclusion is clear: that it is buyer cartels that restrict competition by object, and that these cases do not involve **joint** purchasing. We do not consider that joint purchasing restricts competition by object, and it follows that none of these factors is a relevant consideration.

Whether the general framework applies to all types of joint purchasing in all sectors of the economy and in particular the joint negotiation of licences of standard essential patents

6.14 The Call for Tenders asks us to consider whether the general framework and features analysed under the previous indents applies to all types of joint purchasing arrangements in all sectors of the economy and, in particular, whether this approach is also valid for assessing licensing negotiation groups that jointly bargain with licensors of standards essential patents.

6.15 We consider that the general framework set out above applies to all sectors of the economy. We see no reason why the future Guidelines on horizontal co-operation agreements should treat different sectors of the economy differently. On the object-effect distinction, we believe that buyer cartels should (continue

[171] *Competition policy in support of the Green Deal, Speech of 10 September 2021.*

to) be regarded as restrictive of competition by object, and that all cases of joint purchasing and negotiation should be subject to effects analysis.

6.16 It follows that we believe that the joint negotiation of the terms of licences of standard essential patents by a group of potential licenses should be assessed on the basis of the likely effects on competition of such a practice; such joint negotiations are not suitable for allocation to the object box.

Chapter 7
Conclusions

7.1 This Report concerns the distinction between purchasing agreements that restrict competition by object and those that should be subjected to effects analysis. One of the concerns that led to the commissioning of this report was a perceived lack of clarity over the distinction between joint purchasing arrangements and by object buyer cartels. Our research into cases in which fines have been imposed on buyer cartels – both within the EU and in third countries – has revealed that there has never been a fine imposed in a case of joint purchasing or joint negotiation. Fines have been imposed only in cases where buyers agreed with one another on matters such as the maximum prices that they individually would pay for products or where they exchanged commercially sensitive information with one another.

7.2 Having said this, the Horizontal Guidelines of 2011 say nothing about what is meant by joint purchasing and how it is distinguishable from a buyer cartel. To assist the Commission in writing any future Horizontal Guidelines, we have proposed definitions both of a buyer cartel and of joint purchasing agreements: these can be found at paragraphs 5.4 to 5.9 of this Report. We suggest that some examples should be given that seek to shed light on the distinction between these two types of agreement; we have offered a few examples at paragraph 5.42 above. Annex 2 of the Report provides a number of real-life examples of joint purchasing and buyer cartels from around the world.

7.3 A difficult issue of particular importance is whether the pursuit of sustainability objectives by a joint purchasing agreement may influence its characterisation as being restrictive of competition by object or effect. We consider that, in principle, certain joint purchasing arrangements can make a positive contribution to sustainability objectives. Certain agreements between competing purchasers might be regarded as restrictions of competition by object as they amount to a group boycott. We have suggested that a distinction should be made between 'horizontal boycotts' that harm competitors at the same level of the market as the perpetrators of the boycott, on the one hand, and 'vertical purchasing restraints' where purchasers agree not to deal with a supplier or suppliers at a different level of the market, on the other. An example of a vertical purchasing restraint would be what we describe as a sustainable products purchasing agreement, for example where a group of competing purchasers agree to purchase timber only from sustainable sources. We consider such an agreement should not be considered to be restrictive of competition by object, but should instead be analysed on an effects basis.

7.4 The expert advice sought by the Commission is intended to enable it to provide certainty in any future Horizontal Guidelines for firms involved in or considering whether to participate in joint purchasing agreements as to whether their conduct qualifies as a restriction of competition by object, unlikely to meet the conditions of Article 101(3) TFEU, or as a restriction of competition by effect that must be assessed in line with the Guidelines. To that end, we have made a number of suggestions on the topics of 'relevant markets' 'theories of harm', 'restrictions by object', 'restrictions by effect' and 'Article 101(3)', which, we hope, will be useful for the Commission, NCAs, undertakings and their professional advisers.

Annexes

Annex 1 ***Whish and Bailey*, pp 121-145**

Annex 2 **Joint purchasing cases**

4. The Object or Effect of Preventing, Restricting or Distorting Competition

Article 101(1) prohibits agreements that have as their object or effect the prevention, restriction or distortion of competition[385]. It contains an illustrative list of agreements that may be caught, such as price fixing and market sharing, but this is insufficient in itself to explain the numerous intricacies involved in understanding how this provision works. Judgments of the General Court and, at the top of the hierarchy, the Court of Justice contain the most authoritative statements of the law, although some of the best analyses will be found in Opinions of the Advocates General; the Commission's decisions, Notices and Guidelines provide important insights into its views on the application of Article 101(1), as do its annual *Report on Competition Policy* and *Competition Policy Brief*[386].

The application of Article 101(1) to agreements, in particular by the Commission, was for many years controversial. In essence, the complaint of many commentators was that Article 101(1) was applied too broadly, catching many agreements that were not detrimental to competition at all[387]. Agreements that are caught by Article 101(1) are void and unenforceable[388], and may attract a fine and damages claims, unless they satisfy the criteria set out in Article 101(3). Critics argued that Article 101(1) should be applied to fewer agreements in order to avoid the problems of delay, cost and uncertainty associated with the old system of notification of agreements to the Commission for 'negative clearance' under Article 101(1) and/or 'individual exemption' under Article 101(3). These procedural problems no longer exist following the abolition of notification and individual exemption by Regulation 1/2003[389]. Since Regulation 1/2003, the precise sphere of application of Article 101(1) on the one hand and Article 101(3) on the other does not have the significance that it once did[390]; today the real question for undertakings and their professional advisers is whether their agreements infringe Article 101 as a whole.

The EU Courts have repeatedly made clear that, except in those cases where the object of an agreement is anti-competitive, the applicability of Article 101(1) cannot be determined simply by taking into account its formal terms. Rather:

> it is necessary to assess competition within the actual context in which it would occur if that agreement had not existed in order to assess the impact of that agreement on the parameters of competition, such as the price, quantity and quality of the goods or services[391].

[385] In the text that follows the term 'restriction' of competition is taken to include the prevention and distortion of competition.

[386] All of these materials are available on DG COMP's website at www.ec.europa.eu/competition.

[387] See eg Bright 'EU Competition Policy: Rules, Objectives and Deregulation' (1996) 16 OJLS 535; there is a considerable amount of academic literature criticising the 'over'-application of Article 101(1): see eg Joliet *The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective* (Springer, 1967), pp 77–106, 117 to the end; Korah 'The Rise and Fall of Provisional Validity' (1981) 3 Northwestern Journal of International Law and Business 320; Forrester and Norall 'The Laicization of Community Law: Self-Help and the Rule of Reason' (1984) 21 CML Rev 11; Korah 'EEC Competition Policy—Legal Form or Economic Efficiency' (1986) 39 Current Legal Problems 85; Venit '*Pronuptia*: Ancillary Restraints or Unholy Alliances?' (1986) 11 EL Rev 213; Holley 'EEC Competition Practice: A Thirty-Year Retrospective' [1992] Fordham Corporate Law Institute (ed Hawk), 669, 689; Nazzini 'Article 81 EC Between Time Present and Time Past: A Normative Critique of "Restriction of Competition" in EU Law' (2006) 43 CML Rev 497; Colomo and Lamadrid 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know' in Gerard, Merola and Meyring (eds) *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant, 2017).

[388] See further ch 8, 'Competition law as a defence', pp 342–347.

[389] OJ [2003] L 1/1; see further ch 4, 'Regulation 1/2003', pp 172–175.

[390] Note however that the burden of proof rests with different persons under Article 101(1) and Article 101(3): see ch 4, 'Burden and standard of proof', pp 156–157.

[391] Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt* EU:C:2020:265, para 55 and the case-law cited.

(A) Horizontal and vertical agreements

Article 101 is capable of application both to horizontal agreements (between undertakings at the same level of the market) and to vertical agreements (between undertakings at different levels of the production chain). In *Consten and Grundig v Commission*[392], Grundig and its distributor Consten argued that Article 101 had no application to vertical agreements, which could be caught, if at all, only by Article 102. The Court of Justice firmly rejected this:

> Neither the wording of Article [101] nor that of Article [102] gives any ground for holding that distinct areas of application are to be assigned to each of the two Articles according to the level of the economy at which the contracting parties operate.

As a general proposition vertical agreements are less damaging to competition than horizontal ones, as the Court of Justice expressly acknowledged in *Allianz Hungária*[393]. However, that is not a reason for excluding vertical agreements entirely from scrutiny under Article 101; in *Consten and Grundig* the Court said that, as a matter of principle, no distinction should be made where the Treaty itself does not make one[394]. The application of Article 101 to vertical agreements established in *Consten and Grundig* was attributable to the 'single market imperative', which remains as important today as it ever has been[395]. In recent years the Commission has taken action in several cases where vertical restrictions on cross-border e-commerce violated the single market imperative[396]. Vertical agreements will be considered in detail in chapter 16.

(B) Horizontal agreements: actual and potential competition

It is important to be able to characterise an agreement as horizontal on the one hand or vertical on the other[397]. The application of Article 101 may vary depending on whether an agreement is horizontal or vertical: for example, Regulation 330/2010 applies only to vertical agreements (as defined in that Regulation), and there are separate guidelines for horizontal cooperation agreements[398] and for vertical agreements[399]. Deciding whether an agreement is horizontal or vertical therefore requires careful consideration.

Assuming that two or more undertakings are already operating on the same relevant product or geographic market, it is clear that they are actual competitors and that therefore there is a horizontal relationship between them. However, the position is less clear where an undertaking not currently active on the market might at some point in the future enter it. What factors are relevant, and how plausible does entry by that undertaking have to be, before it can be regarded as a potential, and therefore a horizontal, competitor?

[392] Cases 56 and 58/64 EU:C:1966:41.

[393] Case C-32/11 *Allianz Hungária Biztosító* EU:C:2013:160, para 43.

[394] Cases 56 and 58/64 EU:C:1966:4; see similarly Case C-194/14 P *AC-Treuhand v Commission* EU:C:2015:717, para 35.

[395] See ch 2, 'The single market imperative', pp 51–52.

[396] See eg *Guess*, Commission decision of 17 December 2018; *Ancillary Sports Merchandise*, Commission decision of 25 March 2019; *Character Merchandise*, Commission decision of 9 July 2019; *Film Merchandise*, Commission decision of 30 January 2020; *Holiday Pricing*, Commission decision of 21 February 2020.

[397] For the sake of clarity it should be added that an agreement may be neither horizontal nor vertical where the parties have no functional relationship in any market.

[398] See ch 15, 'The Guidelines on Horizontal Cooperation Agreements', pp 616–620.

[399] See ch 16, 'The methodology for the analysis of vertical agreements in the Commission's *Vertical guidelines*', pp 665–666.

(i) *Paroxetine*: the meaning of potential competition

In *Generics (UK) Ltd v Competition and Markets Authority*[400], often referred to as *Paroxetine* after the drug involved in that case, the Court of Justice handed down an important judgment on the meaning of potential competition. This was an Article 267 reference from the UK Competition Appeal Tribunal (the 'CAT'), which was hearing an appeal against a decision of the Competition and Markets Authority in which various undertakings had been fined for entering into so-called pay for delay agreements in the pharmaceuticals sector[401]. The Court of Justice held that, in order to determine whether an undertaking was a potential competitor of one or more other undertakings already present on the market:

> it must be determined whether there are **real and concrete possibilities** of the former joining that market and competing with one or more of the latter[402] (emphasis added).

The Court added that it would be insufficient to establish a potential competitive relationship from the 'purely hypothetical possibility' of entry, but equally that it was not necessary to demonstrate with certainty that a manufacturer would actually enter the market and that, having entered, it would be capable of retaining its place on the market[403]. Rather, the assessment of potential competition must be carried out:

> having regard to the structure of the market and the economic and legal context within which it operates[404].

It is also relevant to consider the perception of the undertaking already on the market: if it perceives an undertaking outside the market to be a potential entrant, that may give rise to competitive pressure on the undertaking already established there[405].

In a pay-for-delay case the owner of a patent, faced with a challenge to the validity of its patent by a producer of generic drugs intending to enter the market, settles the dispute or litigation on the basis that the generic company withdraws the challenge, agrees not to enter the market independently of the patent owner and receives in return a significant transfer of value (in cash or in kind[406]) from the patent owner. One question in such cases[407] is whether the existence of the patent means, in itself, that the generic company cannot be considered a potential competitor of the patent owner, since it is unlawful to infringe a valid patent. The Court of Justice held that it is necessary to determine, first, whether the generic company has taken sufficient preparatory steps to enable it to enter the market, and, secondly, whether any barriers to entry are insurmountable. In the context of the pharmaceutical sector, where challenges by generic companies to the validity of patents are commonplace and where generic entry does occur, the patent did not in itself mean that there was an insurmountable barrier to entry by generic companies[408]. Furthermore, the facts that there was a genuine dispute between the parties, the outcome of which was uncertain[409], and that they had entered into settlement agreements were themselves evidence of a potential competitive relationship between them[410]. In May 2021 the CAT upheld the findings of infringement in this case, but reduced the level of fines.

[400] Case C-307/18 EU:C:2020:52.

[401] *Paroxetine*, CMA decision of 12 February 2016; pay for delay agreements will be discussed in ch 19, '"Pay for delay' agreements', pp 834–835.

[402] Case C-307/18 EU:C:2020:52, para 36, citing Case C-234/89 *Delimitis* EU:C:1991:91, para 21.

[403] Case C-307/18 EU:C:2020:52, para 38. [404] Ibid, para 39. [405] Ibid, para 42.

[406] An example of value 'in kind' would be the transfer of a restricted volume of the patent owner's product and associated profit margins; this had happened in the *Paroxetine* case.

[407] As will be seen in chapter 19, there have been several European Commission decisions in which pay for delay agreements have been scrutinised.

[408] See Case C-307/18 EU:C:2020:52, paras 43–51.

[409] Ibid, para 52. [410] Ibid, para 55.

(ii) Cases on potential competition

The issue of potential competition has arisen in several contexts other than pay for delay agreements[411]. In *Visa Europe Ltd v Commission*[412] the question was whether Visa had illegally excluded Morgan Stanley from its card system; this depended on whether Morgan Stanley was a potential competitor to Visa in the acquiring market for Visa cards. The Commission had concluded that Morgan Stanley was a potential competitor because it had real and concrete possibilities to enter and that its exclusion was unlawful[413]; the decision was upheld on appeal to the General Court[414].

In *Telefónica/Portugal Telecom*[415] Telefónica agreed to acquire sole control of a Brazilian mobile telephony operator previously jointly controlled by both of them. The share purchase agreement contained a non-compete clause whereby neither would compete with the other for a stated period of time in any telecommunications business in Spain or Portugal. The Commission considered this to be a horizontal market-sharing agreement that restricted competition by object, and imposed fines totalling in excess of €79 million. The Commission's decision was upheld on substance on appeal to the General Court[416], which was satisfied that the clause was a restriction by object, and that the non-compete clause was, in itself, strong evidence of the existence of potential competition between the parties[417].

In *Toshiba v Commission* Toshiba argued that it was not party to a geographical market-sharing cartel whereby European and Japanese undertakings agreed not to enter each other's markets for power transformers, essentially arguing that it was not an economically viable strategy for a Japanese company to enter the European market. The Commission rejected this argument because there were no insurmountable barriers to entry, and its decision was upheld on appeal to the General Court[418] and to the Court of Justice[419]. The Court of Justice pointed out that Toshiba was party to a 'Gentlemen's Agreement' whereby producers of power transformers had regularly met over a four-year period: as in *Paroxetine* and *Telefónica*, this agreement in itself was 'strong evidence' of a competitive relationship between them[420].

In *European Night Services v Commission*[421] the General Court rejected a finding of the Commission that the establishment of a joint venture, European Night Services, restricted potential competition between its parents; the Court considered this to be

> a hypothesis unsupported by any evidence or any analysis of the structure of the relevant market from which it might be concluded that it represented a real, concrete possibility[422].

The issue of potential competition is of importance in various other situations. One is when considering whether joint bidding in response to an invitation to tender may infringe Article 101; this is discussed in chapter 13 on cartels[423]. It is also an important concept when advising on the application of the Commission's guidelines on horizontal

[411] Apart from the cases in the text, potential competition was an important issue in Case T-360/09 *E.ON Ruhrgas and E.ON v Commission* EU:T:2012:332 where the Commission's finding that undertakings supplying gas were potential competitors on the German market was partially annulled: ibid paras 97–116.

[412] Case T-461/07 EU:T:2011:181.

[413] *Morgan Stanley/Visa International and Visa Europe*, Commission decision of 3 October 2007.

[414] Case T-461/07 EU:T:2011:181, paras 162–197.

[415] Commission decision of 23 January 2013.

[416] Case T-216/13 *Telefónica v Commission* EU:T:2016:369, upheld on appeal to the Court of Justice Case C-487/16 P EU:C:2017:961.

[417] Case T-216/13 EU:T:2016:369, paras 208–227; see in particular para 218.

[418] Case T-519/09 *Toshiba v Commission* EU:T:2014:263.

[419] Case C-373/14 P *Toshiba v Commission* EU:C:2016:26.

[420] Ibid, para 33.

[421] Cases T-374/94 etc EU:T:1998:198.

[422] Ibid, paras 139–147.

[423] See ch 13, 'Collusive tendering', pp 564–567.

cooperation agreements between undertakings: a threshold question is whether the agreement is horizontal or not, and this often requires an assessment of whether the parties are potential, if not actual, competitors[424]. It may also arise when advising on technology transfer agreements[425].

(C) The 'object or effect' of preventing, restricting or distorting competition

Article 101(1) prohibits agreements 'which have as their *object or effect* the prevention, restriction or distortion of competition' (emphasis added). It is important to understand the significance of the words 'object or effect' in Article 101(1).

(i) 'Object or effect' to be read disjunctively

It is clear that these are alternative, and not cumulative, requirements for a finding of an infringement of Article 101(1). In *Société Technique Minière v Maschinenbau Ulm*[426] the Court of Justice stated that the words object or effect were to be read disjunctively; this means that where an agreement has as its object the restriction of competition it is unnecessary to prove that it will produce anti-competitive effects: only if it is not clear that the object of an agreement is to restrict competition is it necessary to consider whether it might have the effect of doing so. This position has been restated by the Court of Justice on innumerable occasions, including in *Gazdasági Versenyhivatal v Budapest Bank Nyrt*[427] at paragraphs 33 to 36. However, in that case the Court went on to hold that, even though it was possible for a competition authority to omit effects analysis where an agreement restricts competition by object, this does not mean that that authority cannot also find that an agreement has anti-competitive effects should it consider it appropriate to do so[428]. The Supreme Court of Hungary had asked the Court of Justice whether it was possible for the Hungarian Competition Authority to have concluded that multilateral interchange fees agreed upon by banks that participated in the Mastercard and Visa payment card systems restricted competition both by object and effect. The answer was that in principle this was permissible[429].

(ii) The 'object' and 'effect' boxes

The distinction between object and effect restrictions can be depicted pictorially by thinking in terms of two boxes, as in Figure 3.1.

THE OBJECT BOX	THE EFFECTS BOX
Agreements that have as their *object* the restriction of competition	Agreements that have as their *effect* the restriction of competition

Fig. 3.1

[424] See the Commission's *Guidelines on Horizontal Cooperation Agreements* OJ [2011] C 11/1, para 10 and fns 3 and 4; see further ch 15, 'Purpose and scope of the Guidelines on Horizontal Cooperation Agreements', pp 617–618.

[425] See the Commission's *Technology Transfer guidelines* OJ [2014] C 89/3; see further ch 19, 'Horizontal agreements', pp 822–823.

[426] Case 56/65 EU:C:1966:38. [427] Case C-228/18 EU:C:2020:265. [428] Ibid, para 40.

[429] There is a useful discussion of this topic in paras 18–36 of Advocate General Bobek's opinion in this case, EU:C:2019:678.

The text that follows will explore the still controversial topic of what constitutes a restriction of competition by object, a concept that, after more than 50 years of EU competition law, continues to be hotly debated. Advocate General Bobek acknowledged the complexity of this topic in his opinion in *Gazdasági Versenyhivatal v Budapest Bank Nyrt*[430]:

> 1. From the early days of EU competition law, much ink has been spilled on the dichotomy between restriction of competition *by object* and restriction *by effect*. It may thus come as a surprise that this distinction, stemming from the very wording of the prohibition in (what is now) Article 101 TFEU, still requires interpretation by the Court.
>
> 2. The distinction is relatively easy to make in theory. Its practical operation is nonetheless somewhat more complex. It is also fair to say that the case-law of the EU Courts has not always been crystal clear on the subject. Indeed, a number of decisions given by the EU Courts have been criticised in legal scholarship for blurring the distinction between the two concepts.

The Advocate General's conclusion was stark:

> 49. . . . It is impossible to (or at least I am unable to) draw, in abstract terms, a bright line between (the second step of) an object analysis and an effects analysis[431].

In this section, after discussing what is meant by a restriction of competition by object, an attempt will be made to describe the content of the object box as the law currently stands[432].

(iii) Why does Article 101(1) prohibit object restrictions without proof of anti-competitive effects?

Advocate General Kokott's Opinion in *T-Mobile*[433] includes an interesting discussion of why Article 101(1) makes a distinction between object and effect restrictions. First, the classification of certain types of agreement as restrictive by object 'sensibly conserves resources of competition authorities and the justice system'[434]. The fact that a competition authority does not need to demonstrate, for example, that a horizontal price-fixing agreement produces adverse economic effects relieves it of some of the burden that would otherwise rest upon it. Secondly, the Advocate General pointed out that the existence of object restrictions 'creates legal certainty and allows all market participants to adapt their conduct accordingly'[435], adding that, although the concept of restriction by object should not be given an unduly broad interpretation, nor should it be interpreted so narrowly as to deprive it of its practical effectiveness[436]. Thirdly, she pointed out that, just as a law that forbids people from driving cars when under the influence of alcohol does not require, for a conviction, that the driver has caused an accident—that is to say, proof of an effect—in the same way, Article 101(1) prohibits certain agreements that have the object of restricting competition, irrespective of whether they produce adverse effects on the market in an individual case[437]. Such agreements will be permitted, therefore, only where the parties can demonstrate that they will lead to economic efficiencies of the kind set out in Article 101(3), and that a fair share of those efficiencies will be passed on to consumers.

[430] Ibid.

[431] See to similar effect the opinions of Advocate General Wahl in Case C-67/13 P *Groupement des Cartes Bancaires v Commission* EU:C:2014:1958, paras 44–62; of Advocate General Wathelet in Case C-373/14 P *Toshiba Corp v Commission* EU:C:2015:427, paras 55–91; and of Advocate General Kokott in Case C-469/15 P *FSL Holdings NV v Commission* EU:C:2016:884, para 103.

[432] See 'The contents of the object box', pp 132–136, later in this chapter.

[433] Case C-8/08 EU:C:2009:110. [434] Ibid, para 43. [435] Ibid. [436] Ibid, para 44.

[437] Ibid, para 47; see similarly para 136 of AG Geelhoed in Case C-407/04 P *Dalmine v Commission* EU:C:2006:547 (*Seamless steel tubes*).

(D) Agreements that have as their object the prevention, restriction or distortion of competition

Numerous issues must be considered when trying to understand what is meant by a restriction of competition by object and why the object–effect distinction exists[438].

(i) Meaning of 'object'

The essential legal criterion for ascertaining whether coordination between undertakings restricts competition by object is the finding 'that such coordination reveals in itself a sufficient degree of harm to competition'[439]. The term 'object' in Article 101 means the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied[440]. It is not necessary to prove that the parties have the subjective intention of restricting competition when entering into the agreement[441]. However, subjective intention may be a relevant factor in assessing whether the object of an agreement is anti-competitive[442]. Where an agreement has an anti-competitive object, it does not cease to be characterised as such because it also has an alternative, lawful, purpose[443]. However, the Court of Justice has said that an object restriction may fall outside Article 101(1) where there is an objective justification for it[444], for example the protection of health or safety.

Given that it is not necessary to demonstrate that an agreement that restricts competition by object produces adverse effects, it is obviously important to know what categories of agreement fall within the object box. One answer is that particular agreements restrict by object because the Court of Justice has said that they do: we therefore know, for example, that horizontal price fixing or resale price maintenance do so. This, however, is an unsatisfying answer to the question, first because it does not explain how those agreements were found to restrict by object in the first place and secondly because this answer provides no guidance as to how new types of agreement might be added to the box.

[438] The following articles capture much of the writing on this subject: Jones 'Left Behind by Modernisation? Restrictions by Object under Article 101(1)' (2010) European Competition Journal 649; King 'The Object Box: Law, Policy or Myth?' (2011) 7 European Competition Journal 269; Bailey 'Restrictions of Competition by Object under Article 101(1) TFEU' (2012) 49 CML Rev 599; Mahtani 'Thinking Outside the Object Box: An EU and UK Perspective' (2012) 8 European Competition Journal 1; King *Agreements that Restrict Competition by Object under Article 101(1) TFEU: Past, Present and Future* (LSE, 2015), available at www.lse.ac.uk; Colomo 'The Divide Between Restrictions by Object and Effect' (2016) 2 Competition Law Review 173; Peeperkorn 'Defining "By Object" Restrictions' Concurrences No 3–2016, 54; Vandenborre and Rupp 'Restrictions by Object or Why No Restriction has Proven More Difficult to Define than Those that are Obvious' (2016) 9 Global Competition L Rev 25; MacCulloch 'The "Public" Wrong of Cartels and the Article 101 TFEU "Object Box"' (2020) 65 Antitrust Bulletin 361.

[439] Case C-67/13 P *Groupement des Cartes Bancaires v Commission* EU:C:2014:2204, para 57.

[440] Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission* EU:C:1984:130, paras 25–26.

[441] Ibid; see similarly Case C-277/87 *Sandoz Prodotti Farmaceutici v Commission* EU:C:1989:363; Case T-148/89 *Tréfilunion v Commission* EU:T:1995:68, para 79 (*Polypropylene*); Case C-551/03 P *General Motors BV v Commission* EU:C:2006:229, paras 77–78.

[442] Case C-32/11 *Allianz Hungária Biztosító Zrt* EU:C:2013:160, para 37; Case C-67/13 P *Groupement des Cartes Bancaires* EU:C:2014:2204, para 54; see similarly Case C-8/08 *T-Mobile* EU:C:2009:343, para 27; on the relevance of subjective intention see Odudu 'Interpreting Article 81(1): Object as Subjective Intention' (2001) 26 EL Rev 60 and Odudu 'Interpreting Article 81(1): The Object Requirement Revisited' (2001) 26 EL Rev 379.

[443] Case C-551/03 P *General Motors BV v Commission* EU:C:2006:229, para 64; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* EU:C:2008:643, para 21; the same point was made by the General Court in Case T-90/11 *ONP v Commission* EU:T:2014:1049, para 327.

[444] Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649, para 39; see also *Guidelines on vertical restraints* OJ [2010] C 130/1, para 60.

(ii) The legal test for identifying restrictions by object

(a) Introduction

As noted earlier, the essential criterion for identifying an object restriction is whether the coordination of conduct by undertakings reveals in itself a sufficient degree of harm to competition. Cases regularly occur in which the question of whether an agreement restricts by object falls to be determined; challenges in the Court of Justice to such a classification failed, for example, in *Beef Industry Development Society*[445], *GlaxoSmithKline v Commission*[446], *T-Mobile*[447], *Pierre Fabre*[448], *Football Association Premier League*[449], *Allianz Hungária Biztosító Zrt*[450], *Lundbeck v Commission*[451], *Philips v Commission*[452] and *Hoffmann-La Roche*[453]. The judgment in *T-Mobile* appeared to lay down a very wide test for allocating agreements to the object box: the Court said that, in order to ascribe an anti-competitive object to a concerted practice, 'it is sufficient that it has the potential to have a negative impact on competition', adding that the effects of such a practice are relevant only to the level of any fine or the award of damages to victims of the harm[454]. The Court in *T-Mobile* also said that, in order to find a restriction by object, it is not necessary to demonstrate a direct effect on prices to end users: Article 101 is designed to protect the structure of the market and competition as such[455]. In a subsequent case, *Allianz Hungária Biztosító Zrt*[456], the Court of Justice repeated the formulation in *T-Mobile*[457] and went on to hold that certain bilateral vertical agreements, entered into in a complex factual matrix, restricted competition by object[458].

These judgments and others, including that of the General Court in *Groupement des Cartes Bancaires*[459], gave the impression that the object box was steadily expanding, to a point where it no longer contained 'obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets': a formulation that had been used by the General Court in *European Night Services v Commission*[460]. The Commission's practice of identifying 'new' object restrictions, for example in the 'pay for delay' cases, *Lundbeck* and *Servier*, in conjunction with its *Notice on Agreements of Minor Importance* of 2014[461], in which it states that it regards all 'hard-core' restrictions in block exemptions as restrictions by object[462], added to the impression that the object box was inexorably getting larger.

[445] Case C-209/07 EU:C:2008:643; for comment see Odudu 'Restrictions of Competition by Object—What's the Beef?' [2009] Comp Law 11.

[446] Cases C-501/06 P etc EU:C:2009:610.

[447] Case C-8/08 EU:C:2009:343.

[448] Case C-439/09 EU:C:2011:649.

[449] Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure* EU:C:2011:631.

[450] Case C-32/11 EU:C:2013:160.

[451] Case T-472/13 EU:T:2016:449, upheld on appeal Case C-591/16 P EU:C:2021:243.

[452] Case C-98/17 P EU:C:2018:774; see similarly Case C-99/17 P *Infineon Technologies AG v Commission* EU:C:2018:773.

[453] Case C-179/16 F *Hoffmann-La Roche Ltd v Autorità Garante della Concorrenza e del Mercato* EU:C:2018:25.

[454] Case C-8/08 EU:C:2009:343, para 31; on the scope of this finding see the EFTA Court in Case E-3/16 *Ski Taxi SA v Norwegian Government*, judgment of 22 December 2016, paras 52–55.

[455] Case C-8/08 EU:C:2009:343, paras 36–39.

[456] Case C-32/11 EU:C:2013:160.

[457] Ibid, para 38.

[458] The case is discussed at '*Allianz Hungária Biztosító*', p 135, later in this chapter.

[459] Case T-491/07 EU:T:2012:633.

[460] Cases T-374/94 etc EU:T:1998:198.

[461] OJ [2014] C 368/13; a Staff Working Document, SWD(2014) 198 final, accompanying the *De Minimis Notice* gives examples of object restrictions.

[462] OJ [2014] C 368/13, para 13.

(b) Groupement des Cartes Bancaires

It was against this backdrop that the Court of Justice handed down its judgment in *Groupement des Cartes Bancaires v Commission* in September 2014[463]. The Commission[464] and the General Court[465] had held that a fee structure established by the nine main members of a payment card system, Cartes Bancaires, had the object and effect of restricting competition by preventing the entry of new banks into the sector. The Court of Justice annulled the finding of the General Court that the fee structure restricted competition by object on the basis that it had erred in law and remitted the matter to it to consider whether there was a restriction by effect. The Court of Justice rehearsed well-established law:

- certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of competition[466]
- some collusive behaviour, such as horizontal price fixing by cartels, is so likely to have negative effects that it is redundant to prove that it has actual effects on the market[467]
- when deciding whether an agreement is restrictive of competition by object:

  > regard must be had to the content of [the agreement's] provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question[468]

- the essential criterion for ascertaining whether coordination between undertakings involves a restriction by object is the finding that such coordination reveals in itself a sufficient degree of harm to competition[469].

Importantly, the Court of Justice added that the General Court had erred in law when concluding that the concept of a restriction of competition by object should not be interpreted restrictively: the Court of Justice's view was that the concept should be limited to coordination which reveals a sufficient degree of harm to competition with the result that there is no need to examine its effects[470]. The idea that the concept should be given a restrictive interpretation was picked up by the EFTA Court in *Ski Taxi SA v Norwegian Government*[471], which added that the presumption of innocence in Article 6(2) of the European Convention on Human Rights means that, in a case of doubt as to whether an agreement restricts competition by object, the 'benefit of the doubt' should be given to the defendants[472]. The EFTA Court observed that only conduct whose harmful nature is 'easily identifiable', in the light of experience and economics, should be regarded as a restriction of competition by object[473].

[463] Case C-67/13 P EU:C:2014:2204; the Opinion of AG Wahl contains a valuable discussion of the meaning of 'object': EU:C:2014:1958; see also the Opinions of AG Wathelet in Case C-373/14 P *Toshiba v Commission* EU:C:2015:427, paras 40–91 and of AG Saumandsgaard Øe in Case C-179/16 *F Hoffmann-La Roche v AGCM* EU:C:2017:714, paras 145–150.

[464] Commission decision of 17 October 2007.

[465] Case T-491/07 EU:T:2012:633.

[466] Case C-67/13 P *Cartes Bancaires v Commission* EU:C:2014:2204, para 50. [467] Ibid, para 51.

[468] Ibid, para 53. [469] Ibid, para 57. [470] Ibid, para 58.

[471] Case E-3/16, judgment of 22 December 2016. [472] Ibid, para 62. [473] Ibid, para 61.

(c) Comment on the Cartes Bancaires *judgment*

The judgment in *Cartes Bancaires* is an important one, and has regularly been cited in judgments since[474]: it provides a useful template for deciding whether agreements are restrictive of competition by object. Although for the most part *Cartes Bancaires* simply repeats the consistent jurisprudence of the Court of Justice over many years, there is a sense that the judgment 'resets' the law; or, at the very least, that the Court recognises that there must be some limits to what had seemed like the relentless expansion of the object box. The clear statement that the concept of an object restriction should be interpreted restrictively is significant in this respect. The Court of Justice referred to this point in *Gazdasági Versenyhivatal v Budapest Bank Nyrt*[475] before proceeding to hand down a judgment that was highly sceptical that the agreement made by banks that participated in both the Visa and MasterCard schemes to fix uniform multilateral interchange fees were restrictive of competition by object[476]. *Cartes Bancaires* does not mean that it is not possible to add new types of agreement to the object box: in *Paroxetine* the Court of Justice explained the circumstances in which a pay for delay agreement could be restrictive by object[477]. However, it does mean that careful analysis is required before allocating cases to the object box.

(iii) How much analysis is required to allocate cases to the object box?

Irrespective of how large or small the object box might be, there remains a riddle: how much analysis should be undertaken when determining whether a particular agreement belongs to one box or the other? As we have seen, the Court in *Cartes Bancaires* said that in order to decide this regard must be had to the terms of the agreement, its objectives, the economic and legal context of which it forms a part, the nature of the goods or services affected and the structure of the market or markets in question[478]. There is a danger that if this exercise requires extensive analysis it could undermine the very purpose of the object–effect distinction in the first place, which is to eliminate effects analysis in the case of object restrictions: a criticism of the *Allianz Hungária* judgment is that this is what the Court of Justice seemed to require, not least when it stated that it was necessary to take into account the structure of the market, the existence of alternative distribution channels and the respective importance and market power of the companies concerned[479]. In her Opinions in *T-Mobile*[480] and *FSL Holdings v Commission*[481] Advocate General Kokott warned against the risk of 'mingling' object and effects analysis, a point which was also made by the EFTA Court in *Ski Taxi SA v Norwegian Government*[482].

The authors of this book agree that there is a risk that an extended review of the economic and legal context in an object case might turn into effects analysis, which would undermine the object–effect distinction. It is, perhaps, with this risk in mind that the Court of Justice indicated in *Toshiba v Commission*[483] and in *FSL v Commission*[484] that the analysis of context may be 'limited to what is strictly necessary in order to establish the existence of a restriction of competition by object'. In some cases there will be

[474] See eg Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt* EU:C:2020:265, paras 51–54.

[475] Case C-228/18 EU:C:2020:265, para 54.

[476] The Court of Justice did not reach a conclusion on the facts of this case as it was an Article 267 reference from the Hungarian Supreme Court; in 2020 that Court remitted the case to the Hungarian Competition Authority for further consideration.

[477] Case C-307/18 *Generics (UK) Ltd v CMA* EU:C:2020:52, paras 59–111.

[478] Case C-67/13 P EU:C:2014:2204, para 53.

[479] Case C-32/11 EU:C:2013:160, para 48.

[480] Case C-8/08 EU:C:2009:110, para 45.

[481] Case C-469/15 P EU:C:2016:884, para 103.

[482] Case E-3/16, judgment of 22 December 2016, paras 58 and 63.

[483] Case C-373/14 P EU:C:2016:26, para 29.

[484] Case C-469/15 P EU:C:2017:308, para 107.

a clear decisional practice that a particular type of agreement is restrictive by object—for example, horizontal price fixing or market sharing—in which case little analysis would be required; however, some other cases may be quite novel—for example, the pay for delay agreements in *Paroxetine* and the multilateral interchange fees in *Gazdasági Versenyhivatal v Budapest Bank Nyrt*—in which case deeper analysis will be required.

(iv) Object restrictions and the *de minimis* doctrine

The treatment of object restrictions under the *de minimis* doctrine is dealt with separately later in this chapter[485].

(v) Is it possible to justify object restrictions under Article 101(3)?

As will be explained in chapter 4[486], it is possible to justify an agreement that restricts competition by object under Article 101(3). This was stated by the General Court in *Matra Hachette v Commission*[487] and was recognised by the Court of Justice in *Beef Industry Development Society*[488], *GlaxoSmithKline v Commission*[489] and *Pierre Fabre*[490], although no final decision on the application of Article 101(3) was reached by the Court of Justice in any of those cases. Similarly, when *Ski Taxi SA v Norwegian Government*[491] was referred back to the Supreme Court of Norway[492] that Court noted that it was possible for the taxi companies to defend their object restriction on the basis of efficiencies under the Norwegian equivalent of Article 101(3).

Once it is recognised that object cases can be defended under Article 101(3), the classification of a particular type of agreement as falling within the 'object box' can be seen for what it is: a legal presumption, but a rebuttable one[493]. The presumption shifts the burden of proof from the Commission to the parties, and provides a structure within which to analyse agreements. Decisions and/or informal guidance finding that object agreements satisfy the conditions of Article 101(3) might lead to fewer cases in which undertakings challenge the object–effect distinction: this sometimes happens because of the misperception that only restrictions by effect can benefit from Article 101(3)[494].

[485] See 'The *De Minimis* Doctrine', pp 145–148, later in this chapter.

[486] See ch 4, 'Any type of agreement can be defended under Article 101(3)', pp 158–160.

[487] Case T-17/93 EU:T:1994:89, para 85; see similarly Case C-439/09 *Pierre Fabre Dermo-Cosmétique SA* EU:C:2011:649, paras 49 and 57.

[488] Case C-209/07 EU:C:2008:643: the case was remitted to the High Court in Ireland to consider whether the criteria of Article 101(3) were satisfied; however, BIDS withdrew its defence before the Court had made a decision on the matter: see Irish Competition Authority Press Release, 25 January 2011, available at www.tca.ie; for comment see Odudu 'Restrictions of Competition by Object—What's the Beef?' [2009] Comp Law 11.

[489] Cases C-501/06 P etc EU:C:2009:610.

[490] Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649; note the Paris Court of Appeal subsequently held that Pierre Fabre's ban on internet sales did not benefit from Article 101(3): judgment of 31 January 2013.

[491] Case E-3/16, judgment of 22 December 2016.

[492] Judgment of 22 June 2017, para 52.

[493] On the use of presumptions see Bailey 'Presumptions in EU Competition Law' (2010) 31 ECLR 20 and Ritter 'Presumptions in EU Competition Law' (2018) 6 Journal of Antitrust Enforcement 189; see also the OECD Roundtable *Safe Harbours and Legal Presumptions in Competition Law* (December 2017), available at www.oecd.org/competition and *The Pros and Cons of Presumptions* (Swedish Competition Authority, 2020).

[494] Note that the Competition Commission of Singapore, applying a provision that is substantially the same as Article 101, has on several occasions concluded that agreements that restricted competition by object produced 'net economic benefits' and were therefore lawful: see eg *United Airlines, Continental Airlines and All Nippon Airways*, 4 July 2011, available at www.ccs.gov.sg; see also the Australian Competition and Consumer Commission's authorisation of minimum retail prices for power tools under the Competition and Consumer Act 2010, 5 December 2014, available at www.accc.gov.au.

(vi) Object restrictions and per se rules under the Sherman Act

Section 1 of the US Sherman Act 1890 characterises some agreements as per se illegal, whereas others are subject to so-called rule of reason analysis: application of the rule of reason requires a balancing of the pro-and anti-competitive effects of an agreement[495]. Where there is a per se infringement it is not open to the parties to the agreement to argue that it does not restrict competition: it belongs to a category of agreement that has, by law, been found to be restrictive of competition. There is an obvious analogy between an agreement that is per se illegal under the Sherman Act and one that is restrictive of competition by object under Article 101(1). However, there is an important difference between section 1 of the Sherman Act and Article 101 TFEU in that, even if an agreement has as its object the restriction of competition, that is to say that it infringes Article 101(1) per se, the parties can still attempt to justify it under Article 101(3). This possibility does not exist in US law, since there is no equivalent of Article 101(3) in that system. In this sense a judgment such as that of the US Supreme Court in *Leegin*[496], in which it determined that minimum resale price maintenance should be analysed under the rule of reason rather than being per se illegal, brings US law into alignment with that of the EU: it has always been possible to argue that resale price maintenance satisfies Article 101(3), even though it is classified as having as its object the restriction of competition for the purpose of Article 101(1)[497].

(vii) The contents of the object box

The Court of Justice in *Competition Authority v Beef Industry Development Society Ltd*[498] stated that the notion of restriction of competition by object cannot be reduced to an exhaustive list, and that it should not be limited just to the examples of anti-competitive agreements given in Article 101(1) itself[499]. Ultimately it is for the Court of Justice to determine which agreements should be allocated to the object box. The Commission may decide that a particular type of agreement restricts by object, but only the Court can decide that this is the case as a matter of law. The text that follows attempts to state the position as it currently stands, and concludes with a summary of what can currently be found in the object box.

(a) Price fixing and exchanges of information about prices

Price fixing is specifically cited as an example of an anti-competitive agreement in Article 101(1)(a) of the Treaty, and it is unsurprising that it is characterised as having as its object the restriction of competition, whether horizontal[500] or vertical[501]. The EFTA Court held in *Ski Taxi SA v Norwegian Government*[502] that joint bidding for a contract by actual or potential competitors is capable of restricting competition by object as it restricts price

[495] For discussion of the rule of reason under US law see Areeda and Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Kluwer, 4th ed, 2020), Vol VII, ch 15; Hovenkamp *Principles of Antitrust* (West Academic Publishing, 2nd ed, 2020), ch 5; Sullivan and Harrison *Understanding Antitrust and its Economic Implications* (Carolina Academic Press, 7th ed, 2021), ch 4.

[496] *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007), reversing the earlier judgment of the Supreme Court in *State Oil Co v Khan* 522 US 3 (1997); see similarly *Continental TV v GTE Sylvania* 433 US 36 (1977), where the Supreme Court overruled an earlier judgment, *US v Arnold Schwinn & Co* 388 US 365 (1967), that had subjected non-price vertical restraints to a per se rule and instead subjected them to the rule of reason.

[497] See 'Is it possible to justify object restrictions under Article 101(3)?', p 31, earlier in this chapter.

[498] Case C-209/07 EU:C:2008:643. [499] Ibid, para 23.

[500] See ch 13, 'Horizontal Price Fixing', pp 547–558.

[501] See ch 16, 'Article 4(a): resale price maintenance', pp 697–698.

[502] Case E-3/16, judgment of 22 December 2016.

competition. In *T-Mobile*[503] the Court of Justice said that the exchange of information between competitors 'is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings'[504]; in that case mobile telephone operators exchanged information about the remuneration that they intended to pay to their dealers for the services that they provided and this was found to restrict competition by object. In its *Guidelines on Horizontal Cooperation Agreements*[505] the Commission says that it considers the exchange of information between competitors of individualised data regarding intended future prices or quantities to be restrictive of competition by object[506]. In *Bananas*[507] the General Court held that 'pre-pricing communications' in which competitors discussed price-setting factors relevant to the setting of future quotation prices amounted to object restrictions. In *Forex*[508] two Commission decisions imposing fines totalling €1.07 billion on five banks concluded that exchanging sensitive information and trading plans and sometimes coordinating strategies for foreign exchange spot trading was restrictive of competition by object. Other information exchanges require effects analysis[509].

(b) Market sharing, quotas, collective exclusive dealing

Market-sharing agreements are specifically mentioned in Article 101(1)(c), and again their treatment as restrictive by object is to be expected, in particular because they are likely to be harmful to the internal market[510]. There are numerous judgments of the EU Courts in which market-sharing agreements were held to restrict competition by object[511]. Agreements to limit output also belong to the object box: they are specifically referred to in Article 101(1)(b). In *Competition Authority v Beef Industry Development Society Ltd*[512] the Court of Justice held that arrangements to enable several undertakings to implement a common policy of encouraging some of them to withdraw from the market in order to reduce overcapacity had the object of restricting competition[513]. The Commission, upheld by the EU Courts, has also characterised collective exclusive dealing as restricting competition by object[514]. It is irrelevant that the victim of a boycott is allegedly operating illegally on the market[515].

[503] Case C-8/08 EU:C:2009:343. [504] Ibid, para 43. [505] OJ [2011] C 11/1.

[506] Ibid, para 74.

[507] Case T-587/08 *Fresh Del Monte Produce v Commission* [2013] EU:T:2013:129, paras 293–585, dismissing an appeal against Commission decision of 15 October 2008, paras 263–277; the General Court's judgment was upheld on appeal to the Court of Justice Cases C-293/13 P etc EU:C:2015:416; similarly see Case T-240/17 *Campine NV v Commission* EU:T:2019:778, para 305 (*Car battery recycling*); Case T-758/14 RENV *Infineon v Commission* EU:T:2020:307, paras 87, 96 and 133 (*Smart card chips*).

[508] *Forex—Three Way Banana Split* and *Forex—Essex Express*, Commission decisions of 16 May 2019; both were settlement decisions.

[509] See eg Case C-238/05 *Asnef-Equifax v Asociación de Usuarios de Servcicios Bancarios (Ausbanc)* EU:C:2006:734 and the Commission's *Guidelines on Horizontal Cooperation Agreements* OJ [2011] C 11/1, paras 75–94; information agreements are discussed in ch 13, 'Exchanges of information', pp 568–576.

[510] See ch 13, 'Horizontal market sharing', pp 558–562.

[511] See eg Case C-172/14 *ING Pensii v Consiliul Concuretnei* EU:C:2015:484; Case C-373/14 P *Toshiba Corp v Commission* EU:C:2016:26; Case T-216/13 *Telefónica v Commission* EU:T:2016:369, upheld on appeal to the Court of Justice Case C-487/16 P EU:C:2017:961; for an unusual example of an object restriction to 'reduce competitive pressure' of one competing product on another see Case C-179/16 *F Hoffmann-La Roche v AGCM* EU:C:2018:25.

[512] Case C-209/07 EU:C:2008:643. [513] Ibid, paras 33–34.

[514] See eg *Nederlandse Federative Vereniging voor de Grootlandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU)* OJ [2000] L 39/1, para 105, and the further examples given in fn 120 of that decision; the decision was upheld on appeal, Cases T-5/00 and 6/00 EU:T:2003:342 and on further appeal to the Court of Justice EU:C:2006:593.

[515] Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* EU:C:2013:71, paras 19–21.

(c) Pay for delay agreements

In *Paroxetine*[516] the Court of Justice held that a settlement of patent litigation in the pharmaceutical sector could be restrictive of competition by object:

> when it is plain from the analysis of the settlement agreement concerned that the transfers of value provided for by it cannot have any explanation other than the commercial interest of both the holder of the patent and the party allegedly infringing the patent not to engage in competition on the merits[517].

In particular, the agreement must be characterised as a restriction by object if the value transferred from the patent owner to the potential competitor is sufficiently beneficial to encourage the latter to refrain from entering the market[518]. The Court added that, where the parties to a pay for delay agreement rely on its pro-competitive effects, those effects must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a 'restriction by object'[519]. The General Court held that the pay for delay agreements in *Lundbeck v Commission*[520] and *Servier v Commission*[521] had as their object the restriction of competition.

(d) Controlling outlets; export bans

The General Court in *European Night Services v Commission* referred to agreements to control outlets as containing obvious restrictions of competition; the control of outlets is not specifically referred to in Article 101(1), but the Court presumably had in mind the imposition on distributors of direct and/or indirect export bans from one Member State to another, which have consistently been found to have as their object the restriction of competition[522]: nothing could be more obviously inimical to the goal of market integration than restrictions of this kind. In *Consten and Grundig v Commission*[523] the Court of Justice held that an agreement conferring absolute territorial protection on a distributor had as its object the restriction of competition and did not satisfy the criteria of Article 101(3). The judgment of the General Court in *GlaxoSmithKline v Commission*[524] somewhat muddied this apparently simple point by suggesting that, in the specific and unusual conditions in which pharmaceutical products are bought and sold, an indirect export ban did not have as its object the restriction of competition[525], although it did restrict competition by effect[526]. However, the Court of Justice reversed the judgment of

[516] Case C-307/18 *Generics (UK) Ltd v Competition and Markets Authority* EU:C:2020:52.

[517] Ibid, para 87.

[518] Ibid, para 89; for comment see Ibáñez Colomo 'The Legal Status of Pay-for-Delay Agreements in EU Competition Law: Generics (Paroxetine)' (2020) 57 CML Rev 1933 and Zelger 'By Object or Effect Restrictions—Reverse Payment Settlement Agreements in light of Lundbeck, Servier, and Generics' (2020) 11 JECLAP 273.

[519] Case C-307/18 *Generics (UK) Ltd v Competition and Markets Authority* EU:C:2020:52, para 103; on the relevance of pro-competitive effects to 'object' see ibid, paras 104–107.

[520] Commission decision of 19 June 2013, upheld on appeal to the General Court Cases T-472/13 etc *Lundbeck A/S v Commission* EU:T:2016:449, upheld on further appeal to the Court of Justice Case C-591/16 P *Lundbeck A/S v Commission* EU:C:2021:243.

[521] Commission decision of 9 July 2014, substantially upheld on appeal to the General Court Cases T-691/14 etc *Servier v Commission* EU:T:2018:922, on appeal to the Court of Justice Cases C-176/19 P and C-201/19 P, not yet decided.

[522] See eg Case 19/77 *Miller International Schallplaten v Commission* EU:C:1978:19, paras 7 and 18; Case C-551/03 P *General Motors BV v Commission* EU:C:2006:229, paras 64–80; Cases T-175/95 etc *BASF v Commission* EU:T:1999:99, para 133; Case T-176/95 *Accinauto SA v Commission* EU:T:1999:10, para 104.

[523] Cases 56 and 58/64 EU:C:1966:41.

[524] Case T-168/01 *GlaxoSmithKline Services v Commission* EU:T:2006:265.

[525] Ibid, paras 114–147.

[526] Ibid, paras 148–192.

the General Court, repeating that an agreement aimed at prohibiting or limiting parallel trade has as its object the restriction of competition, and that that principle applies to the pharmaceutical sector as it does to any other[527]; the Court of Justice added that, in order to be found to restrict by object, it was not necessary to show that the agreement entailed disadvantages for final consumers[528]. In *Mastercard II*[529] the Commission imposed a fine of €570 million on the eponymous card scheme for imposing rules that limited the possibility for merchants to make use of cross-border acquiring services, which it considered to be a restriction by object.

The Court of Justice has also held that the imposition of fixed or minimum resale prices on distributors is restrictive of competition by object[530]. The Court of Justice in *AEG-Telefunken AG v Commission*[531] regarded a selective distribution system as restrictive of competition by object unless it was operated in accordance with the *Metro* doctrine[532]. The Court did not actually use the expression 'by object' in this judgment, but this seems to have been what it meant and was the interpretation that it adopted in its judgment in *Pierre Fabre*[533].

(e) Allianz Hungária Biztosító

In *Allianz Hungária Biztosító*[534] the Court of Justice held that bilateral vertical agreements between car insurance companies and car repair shops concerning the hourly charge for car repairs, which incentivised the repairers to sell more insurance policies on behalf of the insurer contrary to Hungarian consumer law, would restrict by object where:

> Following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned.

With respect to the Court, it is far from obvious that such agreements are suitable for allocation to the object box, and the analysis suggested by it seems to risk improperly intermingling object and effect analysis. In addition, prior to this judgment the only vertical agreements to be allocated to the object box were export bans, resale price maintenance and selective distribution agreements; the addition of the agreements in *Allianz* increases the range of vertical agreements found to restrict by object and might be regarded as contravening the later pronouncement of the Court of Justice in *Cartes Bancaires* that the concept of an object restriction should be interpreted restrictively.

(f) Benchmark manipulation

There is no doubt that the manipulation of a benchmark such as LIBOR is an egregious offence, particularly given that it is supposed to represent an objective fact, the daily borrowing rate of money on wholesale markets. It is however a separate question whether such a manipulation infringes Article 101, and more specifically whether it restricts by

[527] Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* EU:C:2009:610, paras 59 and 60.

[528] Ibid, paras 62–64.

[529] Commission decision of 22 January 2019, paras 62–80.

[530] Case 161/84 *Pronuptia de Paris GmbH v Schillgalis* EU:C:1986:41, paras 23 and 25.

[531] Case 107/82 EU:C:1983:293, para 34.

[532] On the *Metro* doctrine see ch 16, 'Selective distribution systems', pp 674–678.

[533] Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* EU:C:2011:649, para 39.

[534] Case C-32/11 EU:C:2013:160; for criticism of this judgment see Harrison 'The Court of Justice's Judgment in *Allianz Hungária* is Wrong and Needs Correcting' [2013] CPI Antitrust Chronicle, May 14 (1); Nagy 'The Distinction Between Anti-Competitive Object and Effect after *Allianz*: The End of Coherence in Competition Analysis?' (2013) 36 World Competition 541.

object. In *Yen Interest Rate Derivatives*[535], *Euro Interest Rate Derivatives*[536] and *Swiss Franc Interest Rate Derivatives*[537] the Commission characterised the manipulation of benchmarks as having as its object the restriction of competition because it aimed to distort the normal course of pricing components for interest rate derivatives. In *Icap v Commission*[538] and *HSBC v Commission*[539] the General Court endorsed the Commission's view that the manipulation of a financial benchmark had an anti-competitive object; such conduct necessarily restricted competition to the colluding banks' advantage and to the detriment of other operators on the market[540].

Following the order of the text earlier, it seems that the contents of the 'object' box can be depicted as shown in Figure 3.2.[541]

Horizontal agreements:

- to fix prices
- to exchange information that reduces uncertainty about future behaviour
- to share markets or customers
- to limit output, including the removal of excess capacity
- to limit sales
- for collective exclusive dealing
- to pay competitors to delay the launch of competing products
- to manipulate a financial benchmark

Vertical agreements:

- to impose fixed or minimum resale prices
- to impose export bans
- selective distribution agreements that do not accord with the *Metro* doctrine
- agreements of the kind under scrutiny in *Allianz Hungária*

Fig. 3.2 The object box

[535] Commission decision of 4 February 2015.

[536] Commission decisions of 4 December 2013 and 7 December 2016; the latter decision is the subject of three separate appeals: the decision was mostly upheld on substance but the fine was annulled on appeal Case T-105/17 *HSBC Holdings plc v Commission* EU:T:2019:675, on appeal to the Court of Justice Case C-883/19 P, not yet decided; the other appeals are Case T-106/17 *JPMorgan Chase v Commission*, not yet decided and Case T-113/17 *Crédit agricole v Commission*, not yet decided.

[537] Commission decision of 21 October 2014.

[538] Case T-180/15 EU:T:2017:795, para 72.

[539] Case T-105/17 *HSBC Holdings plc v Commission* EU:T:2019:675, paras 85–113, on appeal to the Court of Justice Case C-883/19 P, not yet decided.

[540] Case T-105/17 *HSBC Holdings plc v Commission* EU:T:2019:675, para 97.

[541] It will be seen that the contents of the object box correspond to a large extent with the provisions that are blacklisted in Articles 4(a) and 4(b) of Regulation 330/2010 on vertical agreements (ch 16, 'Article 4(a): resale price maintenance', pp 697–698, and ch 16, 'Article 4(b): territorial and customer restrictions', pp 698–702), Article 5 of Regulation 1217/2010 on research and development agreements (ch 15, 'Article 4: duration of exemption and the market share threshold', pp 625–626) and Article 4 of Regulation 1218/2010 on specialisation agreements (ch 15, 'Article 4: hard-core restrictions', pp 630–631).

(E) Agreements that have as their effect the prevention, restriction or distortion of competition

(i) Meaning of 'effect'

Where it is not possible to say that the object of an agreement is to restrict competition, it is necessary to assess its effect on actual and potential competition before it can be found to infringe Article 101(1). For an agreement to have the effect of restricting competition, the Court of Justice in *MasterCard v Commission*[542] observed that it must be:

> liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of the goods or services.

The Commission has explained that an agreement can have such an adverse impact 'by appreciably reducing competition between the parties to the agreement or between any one of them and third parties'[543].

A restriction by effect can be established by demonstrating that an agreement has had actual effects on competition; however it is also relevant to take into consideration any potential effects it might have[544]. The Court of Justice upheld a decision of the Commission in which it concluded that an agreement violated Article 101(1) because of potential effects in *Deere v Commission*[545]. In *Krka v Commission*[546] an agreement had been entered into between Servier and Krka that, in the Commission's opinion, had the object and effect of restricting competition by preventing generic entry into the market by Krka as an independent producer of perindopril; the Krka agreement was not a 'simple' pay for delay agreement of the kind that Servier had entered into with four other generic manufacturers. Krka was fined €10 million; Servier was fined €330.9 million for this and the four other agreements. In the *Krka* judgment the General Court annulled the finding of restriction by object[547]; it also disagreed that the agreement restricted competition by effect[548]. In *Krka* the agreement in question had been implemented, and yet the Commission's analysis turned on its assessment of its potential effects. The General Court held that this was wrong in principle, since to ignore the actual effects of the agreement was effectively to treat it as restrictive by object[549].

(ii) The need to establish a 'counterfactual'

In determining whether an agreement has a restrictive effect on competition it is necessary to establish a counterfactual. In *MasterCard v Commission*[550] the Court of Justice said that it:

> has repeatedly held that in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute.

[542] Case C-382/12 P EU:C:2014:2201, para 93.

[543] *Guidelines on Horizontal Cooperation Agreements* OJ [2011] C 11/1, para 27; on restrictive effects generally see paras 26–47; for discussion see Witt 'The Enforcement of Article 101 TFEU: What Has Happened to Effects Analysis?' (2018) 55 CML Rev 417; Ibáñez Colomo 'Anticompetitive Effects in EU Competition Law' (2021) 17 Journal of Competition Law & Economics, available at www.ssrn.com.

[544] See eg Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* EU:C:2013:127, para 71 and Case C-345/14 *Maxima Latvija* EU:C:2015:784, para 30.

[545] Case C-7/95 P EU:C:1998:256.

[546] Case T-684/14 EU:T:2018:918, on appeal to the Court of Justice Case C-151/19 P *Commission v Krka*, not yet decided.

[547] Case T-684/14EU:T:2018:918, paras 50–298. [548] Ibid, paras 299–470. [549] Ibid, paras 361–368.

[550] Case C-382/12 P EU:C:2014:2201, para 161.

This jurisprudence can be traced back to the *STM* judgment in 1966[551]. The need to examine the counterfactual was stressed by the General Court in *O2 (Germany) GmbH & Co, OHG v Commission*[552], where it annulled a Commission decision[553] finding that a roaming agreement in the mobile telephony sector had the effect of restricting competition: the Commission had failed to show what the position would have been in the absence of the agreement, or that the agreement could have restrictive effects on competition[554]. In *Generics (UK) Ltd v Competition and Markets Authority*[555] the Court of Justice said that the purpose of determining the counterfactual was to establish the realistic possibilities of the generic manufacturers of pharmaceutical products in the absence of the pay for delay agreements in that case.

(iii) Effects analysis

In *Brasserie de Haecht v Wilkin*[556] the Court of Justice said that:

> it would be pointless to consider an agreement, decision or practice by reason of its effect if those effects were to be taken distinct from the market in which they are seen to operate, and could only be examined apart from the body of effects, whether convergent or not, surrounding their implementation. Thus in order to examine whether it is caught by Article [101(1)] an agreement cannot be examined in isolation from the earlier context, that is, from the factual or legal circumstances causing it to prevent, restrict or distort competition. The existence of similar contracts may be taken into consideration for this objective to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade[557].

In *Maxima Latvija*[558] the Court of Justice emphasised that an assessment of effects must be based on a thorough analysis of the economic and legal context in which the agreements at issue in the main proceedings occur and the specificities of the relevant market.

When deciding whether an agreement falls within the effects box, it is usually necessary to consider five factors[559]:

- the agreement and/or clause in the agreement that is said to constitute a restriction on competition
- the relevant market or markets in which the effects should be assessed[560]
- a theory of harm, that is to say, a theory as to how and why an agreement and/or clause is likely to have negative effects on competition
- the counterfactual, as discussed above
- the available evidence on the existence of the alleged effects.

In some cases, effects analysis may be relatively straightforward; in others it may be more complex. A case which demonstrates the depth of analysis that may be required in

[551] See Case 56/65 *Société Technique Minière v Maschinendau Ulm* EU:C:1966:38; see also the Commission's *Guidelines on Horizontal Cooperation Agreements* OJ [2011] C 11/1, para 29.

[552] Case T-328/03 EU:T:2006:116.

[553] *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag* OJ [2004] L 75/32.

[554] Case T-328/03 EU:T:2006:116, paras 65–117.

[555] Case C-307/18 EU:C:2020:52, paras 118–121.

[556] Case 23/67 EU:C:1967:54.

[557] Ibid; see similarly Cases C-7/95 P etc *John Deere v Commission* EU:C:1998:256, paras 76 and 91 and Cases C-215/96 and C-216/96 *Carlo Bagnsaco v BPN* EU:C:1999:12, para 33; Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrencia* EU:C:2013:127, para 70.

[558] Case C-345/14 EU:C:2015:784, para 29.

[559] Note that in some cases it may be possible to show anti-competitive effects by analysing the conduct of the parties to the agreement: *Article 101(3) Guidelines* (ch 3 n 509 earlier), para 27.

[560] Case C-234/89 *Delimitis* EU:C:1991:91, para 13.

determining whether an agreement has the effect of restricting competition is *Delimitis v Henninger Bräu AG*[561]. There the Court of Justice considered a provision in an agreement between a brewery and a licensee of a public house owned by the brewery, whereby the licensee was required to purchase a minimum amount of beer each year. The licensee claimed that the agreement was void and unenforceable under Article 101. The Court of Justice said that beer supply agreements of the type under consideration do not have an anti-competitive object[562]. Instead it stressed that the agreement had to be considered in the context in which it occurred[563]. To begin with, it was necessary to define the relevant product and geographic markets[564]: these were defined as the sale of beer in licensed premises (as opposed to beer sold in retail outlets) in Germany. Having defined the markets, the Court said that it was necessary to determine whether access to the market was impeded: could a new competitor enter the market, for example by buying an existing brewery together with its network of sales outlets or by opening new public houses[565]? If the answer was that access to the market was impeded, it was necessary to ask whether the agreements entered into by Henninger Bräu contributed to that foreclosure effect, for example because of their number and duration[566]. Only if the answer to both of these questions was yes could it be held that Article 101(1) was infringed. The analysis suggested in this case was specific to the issues raised by beer supply agreements, and is not necessarily the same as would have to be applied, for example, to restrictive covenants taken on the sale of a business or to the rules of a group purchasing association. However, the important point about the judgment is its requirement that a full analysis of the agreement in its market context must be carried out before it is possible to determine whether its effect is to restrict competition.

(F) Objective necessity

(i) Jurisprudence on objective necessity

An undertaking or undertakings accused of participating in agreements that violate Article 101 sometimes argue as a defence that the agreement, and/or the restrictive clauses in it, were objectively necessary to the achievement of a legitimate purpose[567]. The Court of Justice has recognised a defence of objective necessity on numerous occasions. In *Société Technique Minière v Maschinenbau Ulm*[568] the Court of Justice held that an exclusive licence granted to a distributor might not infringe Article 101(1) where this seemed to be 'really necessary for the penetration of a new area by an undertaking'[569]. In *LC Nungesser KG v Commission*[570] the Court held that an open exclusive licence of plant breeders' rights would not infringe Article 101(1) where, on the facts of the case, the licensee would not have risked investing in the production of maize seeds at all without some immunity from intra-brand competition[571]. In *Coditel v Ciné Vog Films SA (No 2)*[572] the Court held that an exclusive copyright licence to exhibit a film in a Member State would not necessarily infringe Article 101(1), even where this might prevent transmission of that

[561] Case C-234/89 EU:C:1991:91, para 13; see similarly Case C-214/99 *Neste Markkinointi Oy v Yötuuli* EU:C:2000:679; Case T-65/98 *Van den Bergh Foods Ltd v Commission* EU:T:2003:281, paras 75–119.

[562] Case C-234/89 EU:C:1991:91, para 13. [563] Ibid, para 14.

[564] Ibid, paras 16–18; on market definition see ch 1, 'Market definition', pp 22–39.

[565] Case C-234/89 EU:C:1991:91, paras 19–23. [566] Ibid, paras 24–27.

[567] On objective necessity in UK cases see ch 9, 'Objective necessity', p 367.

[568] Case 56/65 EU:C:1966:38, p 250.

[569] Cf Cases 56 and 58/64 *Consten and Grundig v Commission* EU:C:1966:41, on which see 'Controlling outlets, export bans', pp 134–135, earlier in this chapter; on the single market imperative see ch 2, 'The single market imperative', pp 51–52.

[570] Case 258/78 EU:C:1982:211. [571] See ch 19, 'Patent licences: territorial exclusivity', pp 814–815.

[572] Case 262/81 EU:C:1982:334.

film by cable broadcasting from a neighbouring Member State, where this was necessary to protect the investment of the licensee. In *Pronuptia de Paris v Schillgalis*[573] the Court of Justice held that many restrictive provisions in franchising agreements designed to protect the intellectual property rights of the franchisor and to maintain the common identity of the franchise system fall outside Article 101(1). In *Erauw-Jacquery Sprl v La Hesbignonne Société Coopérative*[574] the Court of Justice held that a provision preventing a licensee from exporting basic seeds protected by plant breeders' rights could fall outside Article 101(1) where it was necessary to protect the right of the licensor to select his licensees. In *Gøttrup-Klim Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*[575] the Court held that a provision in the statutes of a cooperative purchasing association, forbidding its members from participating in other forms of organised cooperation which were in direct competition with it, did not necessarily restrict competition, and may even have beneficial effects on competition[576].

A defence of objective necessity was unsuccessful in *MasterCard v Commission*[577], where the Court of Justice rejected MasterCard's argument that the multilateral interchange fee charged by an issuing bank to an acquiring bank when making payment to it was objectively necessary to the creation of the payment card system. MasterCard argued that there had to be a default mechanism in place to determine what fee was payable in the absence of agreement between the issuing and acquiring banks; therefore the agreement did not restrict competition at all. The Court's view was that where the agreement in question 'is simply more difficult to implement or even less profitable without the restriction concerned' the test of objective necessity would not be satisfied; in such cases the restriction should be tested under the 'indispensability' criterion in Article 101(3)[578].

(ii) The objective necessity defence and the rule of reason

In US law, agreements that are not per se illegal are subject to rule of reason analysis, requiring a balancing of the pro- and anti-competitive effects of the agreement to determine its compatibility with section 1 of the Sherman Act[579]. Critics of what was perceived to be the over-inclusiveness of Article 101 often argued that a rule of reason should be applied under Article 101(1)[580]. The EU Courts have consistently rejected the idea that there is a rule of reason within Article 101(1). In *Métropole télévision v Commission*[581] the General Court said:

> in various judgments the Court of Justice and the [General] Court have been at pains to indicate that the existence of a rule of reason in [EU] competition law is doubtful[582].

[573] Case 161/84 EU:C:1986:41.

[574] Case 27/87 EU:C:1988:183; see similarly the Commission's decision in *Sicasov* OJ [1999] L 4/27, para 53–61.

[575] Case C-250/92 EU:C:1994:413.

[576] Ibid, paras 35–45; the Court of Justice subsequently applied *Gøttrup-Klim* in Case C-399/93 *Luttikhuis v Verenigde Coöperatieve Melkindustrie Coberco BA* EU:C:1995:434, paras 14 and 18; so did the Commission in *P&I Clubs* OJ [1999] L 125/12, paras 66ff.

[577] Case C-382/12 P EU:C:2014:2201; see also *Mastercard II*, Commission decision of 22 January 2019, para 76, rejecting a defence of objective necessity in that case.

[578] Case C-382/12 P EU:C:2014:2201, para 91; note that under Article 101(3) the question is whether the restriction is indispensable to achieve the economic efficiency claimed, that is to say, an improvement in the production or distribution of goods or in technical or economic progress.

[579] See 'Object restrictions and *per se* rules under the Sherman Act', pp 132 earlier in this chapter.

[580] Many of the authors cited in n 387 above argued to this effect.

[581] Case T-112/99 EU:T:2001:215: for comment on this case see Manzini 'The European Rule of Reason—Crossing the Sea of Doubt' (2002) 23 ECLR 392.

[582] Case T-112/99 EU:T:2001:215, para 72.

The Court went on to say that the pro- and anti-competitive aspects of an agreement should be considered under Article 101(3)[583]. In the General Court's view:

> Article [101(3)] would lose much of its effectiveness if such an examination had to be carried out already under Article [101(1)] of the Treaty[584].

The same point was made by the Court of Justice in *Generics (UK) Ltd v CMA*[585]. To put the point another way, the objective necessity defence is not an application of a US-style rule of reason; 'balancing' is something that is effected through the application of Article 101(1) and 101(3). Of course the Commission and the EU Courts should be 'reasonable' when applying Article 101(1), but this is not the same as saying that they should apply a US-style rule of reason.

(G) The *Wouters* doctrine

In *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*[586] Mr Wouters challenged a rule adopted by the Dutch Bar Council that prohibited lawyers in the Netherlands from entering into partnership with non-lawyers: Wouters wished to practise as a lawyer in a firm of accountants. A number of questions were referred to the Court of Justice as to the compatibility of such a rule with EU competition law. In its judgment the Court stated that a prohibition of multi-disciplinary partnerships 'is liable to limit production and technical development within the meaning of Article [101(1)(b)] of the Treaty'[587]; it also considered that the rule had an effect on trade between Member States[588]. However, at paragraph 97 of its judgment the Court stated:

> However, not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience . . . It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives[589].

The early part of the *Wouters* judgment reads as though the Court would conclude that Article 101(1) was infringed, whereas from paragraph 97 onwards it explains why Article 101(1) would not be infringed if the rule in question could 'reasonably be considered to

[583] Ibid, para 74. [584] Ibid. [585] Case C-307/18 EU:C:2020:52, para 104.

[586] Case C-309/99 EU:C:2002:98; for comment see Vossestein (2002) 39 CML Rev 841; Monti 'Article 81 EC and Public Policy' (2002) 39 CML Rev 1057; O'Loughlin 'EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the Court of Justice *Wouters* Decision' (2003) 24 ECLR 62; Loozen 'Professional Ethics and Restraints of Competition' (2006) 31 EL Rev 28; Forrester 'Where Law Meets Competition: Is *Wouters* Like *Cassis de Dijon*' in Ehlermann and Atansiu (eds) *European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions* (Hart, 2006), 271; see also the judgment of the High Court in Ireland that the Medical Council of Ireland was not subject to competition law when making and applying professional rules in *Hemat v The Medical Council* [2006] IEHC 187; the case is noted by Ahern at (2007) 28 ECLR 366.

[587] Case C-309/99 EU:C:2002:98, para 90; see also paras 86 and 94. [588] Ibid, para 95.

[589] To similar effect see Case T-144/99 *Institut des Mandataires Agréés v Commission* EU:T:2001:105, para 78.

be necessary in order to ensure the proper practice of the legal profession, as it is organised in [the Netherlands]'[590]. The judgment means that, in certain cases, it is possible to balance *non-competition* objectives against a restriction of competition, and to conclude that the former outweigh the latter, with the consequence that there is no infringement of Article 101(1).

Wouters was concerned with 'deontological' (that is to say, professional ethical) rules for the regulation of the legal profession; it has since been considered in other cases involving professional services, such as *OTOC*[591] and *Italian Geologists*[592]. The Court of Justice applied *Wouters* in *Meca-Medina v Commission*[593], where it held that sporting rules in principle were subject to competition law scrutiny, but that they would fall outside Article 101 where they satisfied the principles in *Wouters*. In *Meca-Medina* the Court concluded that the anti-doping rules of the International Swimming Federation had a legitimate objective: to combat drugs in order for competitive sport to be conducted fairly, including the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport[594]; the Court went on to decide that the restrictions of competition inherent in the rules were proportionate[595]. In *International Skating Union v Commission*[596] the General Court agreed with the Commission's decision[597] in which it concluded that the ISU's eligibility rules were manifestly disproportionate to the objective of the protection of the integrity of speed skating.

(H) Article 106(2)

Article 106(2) precludes the application of the competition rules to undertakings in so far as compliance with them would obstruct them in the performance of a task entrusted to them by a Member State. This subject is dealt with in chapter 6[598].

(I) State compulsion and highly regulated markets

The competition rules do not apply to undertakings in so far as they are compelled by law to behave in a particular way: this is sometimes referred to as the 'state compulsion' defence; nor do they apply where a legal framework leaves no possibility for competitive activity on the part of undertakings, that is to say, where they operate on highly regulated markets. These two defences have often been invoked, but they are narrowly applied

[590] Case C-309/99 EU:C:2002:98, para 107.

[591] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* EU:C:2013:127.

[592] Case C-136/12 *Consiglio nazionale dei geologi* EU:C:2013:489; see further *ONP*, Commission decision of 8 December 2010, paras 684–691, upheld on appeal on this point Case T-90/11 *ONP v Commission* EU:T:2014:1049; Cases C-184/13 etc *API* EU:C:2014:2147, paras 46–57; Cases C-427/16 etc *CHEZ Elektro Bulgaria AD* EU:C:2017:890, paras 54–55.

[593] Case C-519/04 P EU:C:2006:492; see Weatherill 'Anti-Doping Revisited—The Demise of the Rule of "Purely Sporting Interest"?' (2006) 27 ECLR 645; see similarly *UEFA*, Commission Press Release IP/02/942, 27 June 2002.

[594] Case C-519/04 P EU:C:2006:492, paras 42–45.

[595] Ibid, paras 47–56.

[596] Case T-93/18 EU:C:2020:610, paras 90–95, 103 and 110–111, on appeal to the Court of Justice Case C-124/21 P, not yet decided.

[597] *International Skating Union's Eligibility Rules*, Commission decision of 8 December 2017.

[598] See ch 6, 'Article 106(2)', pp 246–251.

and almost invariably fail[599]. Where undertakings genuinely have no room for autonomous behaviour they would not be liable for infringing Article 101[600]; however, the position would alter if a decision to disapply the national legislation has been taken and has become definitive[601]. An argument that the Italian sugar market was so highly regulated that there was no scope for competition succeeded in *Suiker Unie v Commission*[602].

The law was summarised by the Court of Justice in *Deutsche Telekom v Commission*[603], where Deutsche Telekom ('DT') argued (in an Article 102 case) that it was not guilty of an illegal margin squeeze because its behaviour was approved by the German regulator of the electronic communications sector. The Court rejected the defence because DT retained the right to adjust its prices for the retail sale of broadband internet access services and thereby bring the margin squeeze to an end: approval by the regulator did not deprive DT of its ability to behave autonomously. The Court of Justice summarised the law at paragraph 80 of its judgment[604]:

> According to the case-law of the Court of Justice, it is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles [101 TFEU and 102 TFEU] do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles [101 TFEU and 102 TFEU] may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings.

The Court's judgment cited several earlier judgments, in particular pointing out that there is no defence where national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct[605].

(J) Commission Notices

A number of Commission Notices provide guidance on the application of Article 101(1) to various types of agreement; it might be helpful to provide a checklist of these Notices.

[599] The 'state compulsion' defence was rejected in *Wood Pulp I* OJ [1985] L 85/1; *ENI/Montedison* OJ [1987] L 5/13, para 25; *Aluminium Products* OJ [1985] L 92/1; *SSI* OJ [1982] L 232/1, upheld on appeal to the Court of Justice Cases 240/82 etc *SSI v Commission* EU:C:1985:488; *French-West African Shipowners' Committee* OJ [1992] L 134/1, paras 32–38; and in Case T-513/93 *CNSD v Commission* EU:T:2000:91, paras 58–59; see also Cases C-359/95 and 379/95 P *Commission v Ladbroke Racing* EU:C:1997:531, para 33; Case T-228/97 *Irish Sugar v Commission* EU:T:1999:246, para 130; *Airfreight*, Commission decision of 9 November 2010; the 'highly regulated markets' defence was rejected in Cases 209/78 etc *Van Landewyck v Commission* EU:C:1980:248, paras 126–134; Cases 240/82 etc *SSI v Commission* EU:C:1985:488, paras 13–37 and Case 260/82 *NSO v Commission* EU:C:1985:489, paras 18–27; *Greek Ferry Services Cartel* OJ [1999] L 109/24, paras 98–108, upheld on appeal Cases T-56/99 etc *Marlines SA v Commission* EU:T:2003:333; *French-West Africa Shipowners' Committees* OJ [1992] L 134/1; Cases T-202/98 etc *Tate & Lyle plc v Commission* EU:T:2001:185, paras 44–45; *Spanish Raw Tobacco*, Commission decision of 20 October 2004, paras 349–356; *Raw Tobacco Italy*, Commission decision of 20 October 2005, paras 315–324; *Bananas*, Commission decision of 15 October 2008, paras 272, 279, 292, 306, 308, upheld on appeal Cases T-587/08 etc *Fresh Del Monte Produce v Commission* EU:T:2013:129, paras 377–418, and on further appeal Cases C-293/13 and C-294/13 P EU:C:2015:416; *E.ON/GDF Suez*, Commission decision of 8 July 2009, paras 293–297.

[600] See eg Case T-387/94 *Asia Motor France v Commission* EU:T:1996:120, paras 78–100.

[601] See Case C-198/01 *CIF* EU:C:2003:430, paras 54ff.

[602] Cases 40/73 etc EU:C:1975:174; see also Case T-325/01 *Daimler Chrysler v Commission* EU:T:2005:322, para 156.

[603] Case C-280/08 P EU:C:2010:603.

[604] See also para 22 of the Commission's *Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements* OJ [2011] C 11/1.

[605] The Court cites Cases 40/73 etc *Suiker Unie v Commission* EU:C:1975:174, paras 36–73 and Case C-198/01 *CIF* EU:C:2003:430 para 56 for this proposition.

(i) Notice on sub-contracting agreements

Article 101(1) does not apply to some sub-contracting agreements[606].

(ii) Notice on the application of the competition rules to cross-border credit transfers

This *Notice* has specific application in the banking sector[607].

(iii) Notice on the application of the competition rules to the postal sector

This *Notice* has specific application in the postal sector[608].

(iv) Notice on the application of the competition rules to access agreements in the telecommunications sector

This *Notice* has specific application in the telecommunications sector[609].

(v) Notice regarding restrictions directly related and necessary to the concentration

Article 101(1) does not apply to ancillary restrictions[610]; this *Notice* is specifically of relevance to the analysis of concentrations under the EUMR, but it provides useful insights into the Commission's thinking more generally[611].

(vi) Notice on agreements of minor importance

This *Notice* is concerned with the *de minimis* doctrine and is examined later[612].

(vii) Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU]

These are important in determining the jurisdictional scope of Article 101 and are examined later[613].

(viii) Guidelines on the application of Article [101(3) TFEU]

These *Guidelines* are predominantly concerned with the application of Article 101(3); however, paragraphs 13 to 37 discuss the principles under Article 101(1)[614].

(ix) Guidelines on the application of Article 101 TFEU to technology transfer agreements

These *Guidelines* deal at length with the application of Article 101(1) and Article 101(3) to technology transfer agreements and technology pools[615].

(x) Commission Consolidated Jurisdictional Notice

Article 101 does not apply to full-function joint ventures, which are dealt with under the provisions on merger control: this is explained in Chapter 21[616]. Paragraphs 91 to 109 examine the concept of full functionality[617].

[606] OJ [1979] C 1/2. [607] OJ [1995] C 251/3. [608] OJ [1998] C 39/2.
[609] OJ [1998] C 265/2. [610] OJ [2005] C 56/244.
[611] The *Notice* is discussed in ch 21, 'Jurisdiction', pp 876–900. [612] OJ [2014] C 368/13.
[613] OJ [2004] C 101/81. [614] OJ [2004] C 101/97.
[615] OJ [2014] C 89/3: see ch 19, 'Technology transfer agreements: Regulation 316/2014', pp 820–829.
[616] See Ch 21, 'Joint ventures—the concept of full-functionality', pp 880–882. [617] OJ [2008] C 95/1.

(xi) Guidelines on vertical restraints

These *Guidelines* deal with the application of Article 101(1) and Article 101(3) to vertical agreements. Paragraphs 12 to 21 of these *Guidelines* provide specific guidance on the application of Article 101(1) to agreements between principal and agent[618].

(xii) Guidelines on horizontal cooperation agreements

These *Guidelines* deal with the application of Article 101(1) and Article 101(3) to horizontal cooperation agreements[619].

5. The *De Minimis* Doctrine

(A) Introduction

The *de minimis* doctrine was first formulated by the Court of Justice in *Völk v Vervaecke*[620]: agreements that affect competition within the terms of Article 101(1) will nevertheless not be caught where they do not have an appreciable impact either on inter-state trade or on competition[621]. This rule of double appreciability—an appreciable impact both on trade between Member States and on competition—has been repeated by the Court many times since, most recently in *Expedia Inc v Autorité de la Concurrence*[622]. However, the *Expedia* judgment introduced an important refinement: the Court held at paragraph 37 that an agreement that restricts competition by object and that has an effect on trade between Member States automatically violates Article 101(1) without any need to demonstrate concrete effects on competition: in other words, the Court abandoned the test of double appreciability for object restrictions[623].

The Commission has provided guidance on the issue of appreciability in two documents: its *Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU]* are discussed in the next section[624]; and the Commission published a new *Notice on Agreements of Minor Importance*, revised to give expression to the *Expedia* judgment, in June 2014[625]. The Commission has also published a Staff Working Document[626] on object restrictions for the purposes of the *De Minimis Notice*.

(B) The Commission's *Notice on Agreements of Minor Importance*

(i) Part I of the *Notice*: introductory paragraphs

Part I of the *Notice* contains important statements on the application of the *de minimis* doctrine. Paragraph 1 refers to the case-law of the Court of Justice on appreciability. Paragraph 2 states that the *de minimis* doctrine does not apply to object restrictions, citing the *Expedia* judgment. Paragraph 3 explains that the *Notice* uses market share thresholds for determining when a restriction of competition is not appreciable. It points out

[618] OJ [2010] C 130/1; see ch 16, 'Commercial agents', pp 654–657.

[619] OJ [2011] C 11/1; see ch 15, 'The *Guidelines on Horizontal Cooperation Agreements*', pp 616–620.

[620] Case 5/69 EU:C:1969:35.

[621] Note that an agreement that does not infringe Article 101 may nevertheless infringe the law of one (or more) of the Member States.

[622] Case C-226/11 EU:C:2012:795, para 16.

[623] For comment see González 'Restrictions by Object and the Appreciability Test: The *Expedia* Case, a Surprising Judgment or a Simple Clarification?' (2013) 34 ECLR 457; King 'How Appreciable is Object? The *De Minimis* Doctrine and Case C-226/11 *Expedia Inc v Autorité de la concurrence*' (2015) 11 European Competition Journal 1.

[624] See 'The effect on trade between Member States', pp 148–153, later in this chapter.

[625] OJ [2014] C 291/1.

[626] SWD(2014) 198 final, available at www.ec.europa.eu.

ANNEX 2

A. JUDGMENTS OF THE GENERAL COURT AND THE COURT OF JUSTICE

Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab (1994)

1. **Facts**: Dansk Landbrugs Grovvareselskab AmbA ('DLG') was a Danish cooperative purchasing association. DLG made collective purchases on behalf of its members of basic products for agriculture, in particular fertilizers and pesticides. DLG then supplied those basic products to its members, together with a wide range of ancillary services, such as financial and insurance services. DLG's market share of the selling market for fertilizers was 36%; its share of the selling market for pesticides was 32%. A provision in the statutes of DLG forbade its members from participating in other forms of organised cooperation that were in direct competition with it. Gøttrup-Klim was one of 37 members who were expelled for breaching the ban on dual membership. The expelled members challenged the legality of DLG's statutes in a Danish court. The case was referred to the Court of Justice in a reference under Article 267 TFEU.[1]

2. **Outcome**: The Court of Justice held that the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.[2] If some members belonged to two competing cooperatives, the result would be to make each association less capable of pursuing its objectives.[3] It followed that DLG's ban on dual membership did not necessarily restrict competition, and may even have had beneficial effects on competition.[4] It was necessary to consider the effect of the provision on the market; it would not be caught by Article 101(1) if it was restricted to what was necessary to ensure that the cooperative could function properly and maintain its contractual power in relation to the suppliers with which it had to deal.[5]

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1 Case C-250/94 EU:C:1994:413.

2 Ibid, para 32.

3 Ibid, para 33.

4 Ibid, para 34.

5 Ibid, para 35.

3. **Object and/or effect of restricting competition**: Neither: while the application of the law to the facts was a matter for the national court to decide when the case was referred back to it, the Court of Justice's judgment is clear that it considered that the ban on dual membership was objectively necessary for the proper functioning of the cooperative and, as such, fell outside Article 101 provided that it was no more restrictive than necessary for that purpose.

4. **Fines**: None. This case arose from private litigation in the Danish courts.

5. **Sector**: The buying market was the purchase of basic agricultural products, including, notably, fertilizers and pesticides. The selling market was the supply of those basic agricultural products to members of DLG which, in turn, resold them to individual farmers.

6. **Type of joint purchasing**: DLG was a cooperative purchasing association. DLG provided a range of services to its own members, which included collectively buying and supplying various basic products, such as animal feeds, cereals, fertilizers, pesticides, seeds, to its members and a number of ancillary services, such as processing and marketing of cereals, financial and insurance services; and research concerning animal feeds and the quality and hardiness of vegetable species.

7. **Theory of harm/benefit/reason why no harm to competition**: The ban on dual membership did not result in a restriction of competition because it was objectively necessary to ensure that DLG functioned properly and maintained its bargaining strength in relation to suppliers.[6]

8. **Was secrecy a relevant consideration**? No.

9. **Comment**: This is the most important judgment of the Court of Justice on joint purchasing. It recognises the legitimate and pro-competitive purpose that joint purchasing can have where this is a way of countervailing the market power of large suppliers. The judgment confirms that a ban on dual membership could be defended on the basis that it was objectively necessary to the achievement of that legitimate purpose, provided that any restrictions are limited to what was necessary.

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6 Ibid, para 45.

AOK Bundesverband v Ichthyol-Gesellschaft Cordes (2004)

10. **Facts**: Most employees in Germany are required to belong to a statutory health insurance system. Statutory health insurance is provided by sickness funds. The funds buy medical services and products directly and supply them in kind to the insured persons who need them. German law provides for the funds jointly to determine the maximum price ('fixed amounts') they pay for certain medicinal products. In theory pharmaceutical companies could set a price above the fixed amounts, with the result that the insured person pays the excess. In practice only 7% of medicinal products to which a fixed amount applies are sold at a price exceeding the fixed amount. Several pharmaceutical companies challenged the compatibility of the fixed amounts with Article 101 TFEU. The Bundesgerichtshof referred several questions to the Court under Article 267 TFEU.

11. **Outcome**: Having concluded that the sickness funds were organised on the basis of a principle of solidarity, and were therefore not economic in nature, the Court of Justice held that they were not acting as undertakings or associations of undertakings when setting the fixed amounts.[7] This was despite the existence of some degree of competition between the funds, deliberately introduced by the national legislature. It is interesting to note, however, that Advocate General Jacobs reached a different conclusion.[8] In his opinion, the funds were associations of undertakings decisions and that their decisions to fix maximum purchase prices for medicinal products was a restriction by object.[9] He also considered that these decisions had anti-competitive effects by coordinating a large part of demand and having a very clear impact on the prices charged by pharmaceutical companies in Germany.[10]

12. **Object and/or effect of restricting competition**: Neither: the Court of Justice held that the sickness funds were not acting as undertakings or associations of undertakings and therefore their activities fell outside the scope of Articles 101 and 102 TFEU.

13. **Fines**: None: this case arose from private litigation in the German courts.

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7 Cases C-264/01 etc EU:C:2004:150.

8 Cases C-264/01 etc EU:C:2003:304.

9 Ibid, para 70.

10 Ibid, para 71.

14. **Sector**: The buying market was the purchase of medicinal products in Germany. The selling market was the supply of those products to the insured persons who need them.

15. **Type of joint purchasing**: The German social security code laid down a two-step procedure for determining the fixed amounts. First, the Federal Committee of Doctors and Sickness Funds (the Bundesausschuss) chose the medicinal products to which fixed amounts were to apply. Secondly, the associations of sickness funds jointly determined uniform fixed amounts for each category of medicinal products.

16. **Theory of harm/benefit/reason why no harm to competition**: Advocate General Jacobs considered that the fixed amounts should be prohibited '*in the light of their potential to suppress the price of purchased products to below the competitive level, with negative consequences for the supply side of the relevant market*'.[11]

17. **Was secrecy a relevant consideration**? No.

18. **Comment**: The Court of Justice decided that Article 101 TFEU had no application in this case because the sickness funds were not undertakings. However the case is of interest in that Advocate General Jacobs, who considered that the sickness funds were undertakings, was of the opinion that their decisions to fix maximum purchase prices for medicinal products were restrictive of competition by object. In reaching this conclusion he relied on the explicit wording of Article 101(1)(a) which refers to the fixing of buying prices; he also referred to economic theory that says that the fixing of purchase prices would take them below the competitive level. He also considered that the setting of fixed amounts introduced a '*type of anti-competitive effect not previously seen on the German market for medicinal products, by coordinating a large part of demand on that market*'.[12]

***T-Mobile v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (2009)**

19. **Facts**: Five mobile phone operators in the Netherlands – T-Mobile, Orange, KPN, Vodafone and O2 – held a meeting on 13 June 2001 at which they discussed a proposed reduction of standard dealer remunerations for post-paid subscriptions for mobile phones. The matter came to the attention of the Dutch competition authority,

11 Ibid, para 70.

12 Ibid, para 71.

which decided that the discussions amounted to an agreement or concerted practice that had as its object the restriction of competition and imposed fines.[13] There were appeals that culminated in an reference by a Dutch court to the Court of Justice under Article 267 TFEU.

20. **Outcome**: The Court of Justice held that the exchange of price information between competitors at a single meeting could give rise to a concerted practice that had as its object the restriction of competition.[14] It was for the national court to decide whether the information exchanged at the meeting removed uncertainties about 'the timing, extent and details of the modifications' to be adopted by the mobile phone companies and therefore had an anti-competitive object.[15]

21. **Object and/or effect of restricting competition**: This was an **object** case.

22. **Fines**: Yes, after the preliminary reference, the total fines were €16.2 million.

23. **Sector**: The buying market was the purchase of mobile phone dealers' services. The selling market was for retail supply of post-paid subscriptions to end-consumers of mobile telephony services.

24. **Type of joint purchasing**: There was not a case of joint purchasing. *T-Mobile* was concerned with the unlawful exchange of information, in this case about the possibility of reducing the standard commissions paid by mobile phone companies to dealers.

25. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm appears to have been that the exchange of purchase price information was capable of removing uncertainties between the mobile phone operators as regards a reduction in the standard commission paid to dealers. As Advocate General Kokott said in her opinion '*such exchange of confidential commercial information between competitors concerning their intended market behaviour is capable, in principle, of generating an anti-competitive impact because it reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted*'.[16]

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13 Case C-8/08 EU:C:2009:343, para 13.

14 Ibid, paras 43 and 61.

15 Ibid, para 42.

16 Case C-8/08 EU:C:2009:110, para 51.

26. **Was secrecy a relevant consideration**? No.

27. **Comment**: This was a reference for a preliminary ruling pursuant to Article 267 TFEU, in which the Court of Justice's role is to rule on the interpretation of the law, while leaving its application to the facts to the national court. That said, the Court of Justice was clear that an exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.[17] It is interesting to note in passing that the likely *effect* of the information exchanged would appear to have been to reduce prices paid by end-consumers (since the mobile phone operators were discussing a reduction in the remuneration that they paid to dealers). However, the Court clearly stated that there does not need to be a direct link between a concerted practice and consumer prices in order for that practice to pursue an anti-competitive *object*.[18] In the Court's view, Article 101 is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.[19]

***FNCBV v Commission* ('French Beef') (2003)**

28. **Facts**: In October 2000 cases of 'mad cow disease' were discovered in the United Kingdom and subsequently in other Member States. This created a crisis in the beef sector: consumption declined, prices fell and there was a sharp drop in French imports and exports. In October 2001, after several weeks of violent protests by farmers and pressure from the French Minister for Agriculture, six French federations entered into an agreement in the beef sector. Four of the federations represented farmers and the two others represented slaughterers. The six federations agreed jointly to set a minimum purchase price for beef and to suspend or at least limit imports of all types of beef. The agreement continued beyond the end of November 2001, the date on which it was supposed to end, despite the fact that the Commission had warned the federations on 25 November 2001 that the agreement was unlawful.

29. **Outcome**: In April 2003 the Commission decided that there was an agreement between associations of undertakings that had as its object the restriction of

17 Case C-8/08 EU:C:2009:343, para 43.

18 Ibid, para 39.

19 Ibid, para 38.

competition.[20] The agreement between farmers' and slaughterers' representatives was aimed at setting minimum prices for the purchase of culled cows in France and, as such, contravened Article 101(1)(a).[21] The agreement by which the parties promised not to import beef products originating in the other Member States partitioned the single market, which was incompatible with Article 101(1). On appeal the General Court upheld the Commission's finding of an infringement by object, but reduced the fines imposed on the federations. According to the General Court, the agreement of 24 October 2001, by its very nature, restricted competition 'by limiting artificially the commercial negotiating margin of farmers and slaughterers and distorting the formation of prices in the markets in question.'[22] The General Court's judgment was upheld by the Court of Justice.[23]

30. **Object and/or effect of restricting competition**: This was an **object** case.

31. **Fines**: The Commission imposed fines totalling €16.7 million on the six federations of farmers and slaughterers in the French beef industry. The fines were reduced on appeal to €11.97 million.[24]

32. **Sector**: The buying market was the purchase of certain categories of cattle in France. The selling market was the sale of beef products to final consumers in France.

33. **Type of joint purchasing**: This was not a case of joint purchasing. *French Beef* was a cartel.

34. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm appears to have been that the agreement eliminated the process of competition that ought to have determined prices for, and imports of, beef in France.

35. **Was secrecy a relevant consideration**? The agreement was continued in secret *after* the Commission had warned the federations that it was unlawful. This was not

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20 Commission Decision of 2 April 2003, paras 102–130.

21 Ibid, paras 124–125.

22 Case T-217/03 and T-245/03 *Fédération nationale de la coopération bétail and viande v Commission* EU:T:2006:391, para 85.

23 Cases C-101/07 P and C-110/07 P *Coop de France bétail et viande v Commission* EU:C:2008:741.

24 Case T-217/03 and T-245/03 *FNCBV v Commission* EU:T:2006:391, para 364.

relevant to the finding that the agreement restricted competition by object; however it was treated as an aggravating factor leading to an increase in the level of the fine.

36. **Comment**: The Commission and the EU Courts had no doubt that the minimum purchase prices and suspension of imports of beef into France had the object of restricting competition. What made the case unusual were the circumstances that precipitated these agreements, namely the collapse in the demand for beef as a result of the 'mad-cow' crisis in the UK and elsewhere, the plight of French farmers who were faced with falling slaughterhouse prices and the ensuing violent protests carried out by farmers.[25] A further mitigating circumstance was the intervention of the French Minister for Agriculture who had cajoled some of the slaughterers into signing the unlawful agreement and who subsequently described that agreement as 'an act of good citizenship'.[26]

***Deltafina v Commission* ('Spanish Raw Tobacco') (2004)**

37. **Facts**: All of the major processors of tobacco in Spain – Cetarsa, Agroexpansión, WWTE, Taes – and Deltafina, an Italian processor, which was also the main purchaser of Spanish raw tobacco, agreed (a) to fix the maximum prices to be paid to growers for each variety and grade of raw tobacco; (b) to share the quantities of raw tobacco that each of them would buy; and (c) to exchange information on purchase prices and quantities.[27] These secret cartel arrangements were in place from 1996 to 2001. During the same period unions representing domestic tobacco growers engaged in their own collective price setting when negotiating with the processors in Spain.[28]

38. **Outcome**: In October 2004 the Commission decided that the processors had entered into a buyer cartel to fix prices, share quantities and exchange sensitive information that had as its object the restriction of competition.[29] The Commission's decision was substantially upheld on appeal, although, as noted below, the General Court reduced some of the fines.[30] The judgments of the General Court were all upheld on

25 Ibid, para 356–361.

26 Ibid, para 33.

27 Commission decision of 20 October 2004, paras 1 and 278–295.

28 Ibid, paras 2 and 318–325.

29 Ibid, paras 299–314.

30 Case T-24/05 *Alliance One v Commission* EU:T:2010:453; Case T-29/05 *Deltafina v Commission* EU:T:2010:355; Case T-33/05 *Cetarsa v Commission* EU:T:2011:24; Case T-38/05 *Agroexpansión v Commission* EU:T:2011:585; Case T-37/05 *World Wide Tobacco España v Commission* EU:T:2011:76.

appeal to the Court of Justice. [31] The judgments deal with issues such as duration of participation in the cartel, parental liability, and the size of the fines; they do not address the substantive law on purchasing agreements and Article 101. The General Court agreed with the Commission that this case involved a 'very serious' infringement.[32]

39. **Object and/or effect of restricting competition**: This was an **object** case.

40. **Fines**: The Commission imposed fines of €20 million on the five raw tobacco processors; the relatively small size of the fines reflected the small size of the Spanish raw tobacco market. On appeal the General Court these were reduced to €13.22 million.

41. **Sector**: The buying market was the purchase of raw tobacco in Spain. The selling market was the sale of processed tobacco in Spain and elsewhere.

42. **Type of joint purchasing**: This was not a case of joint purchasing. *Spanish Raw Tobacco* was a buyer cartel. The agreements and concerted practices related to the maximum prices that the processors would pay for raw tobacco and the quantities that they would buy. There were also extensive and recurrent exchanges of information.

43. **Theory of harm/benefit/reason why no harm to competition**: Aside from noting that the cartel had fixed purchase prices and shared quantities within the meaning of Article 101(1)(a) and (b), the Commission found that the raw tobacco processors '*managed to align as closely as possible the final prices they would pay to the producers and to reduce them for their own benefit to a level below that which would result from the free interplay of competition*'.[33] This suggests that the theory of harm was the distortion of the competitive process.

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31 Case C-537/10 P *Deltafina v Commission* EU:C:2011:475; Case C-181/11 P *Cetarsa v Commission* EU:C:2012:455; Case C-668/11 P *Alliance One v Commission* EU:C:2013:614; Case C-240/11 P *World Wide Tobacco España v Commission* EU:C:2012:269; Cases C-628/10 P and C-14/11 P *Alliance One (formerly Standard Commercial Corp) and Standard Commercial Tobacco v Commission* EU:C:2012:479.

32 Case T-29/05 *Deltafina v Commission* EU:T:2010:355, para 239.

33 Commission decision of 20 October 2004, para 301.

44. **Was secrecy a relevant consideration**? This was not relevant to the finding that the agreement restricted competition by object; however secrecy contributed to the finding that the infringement was 'very serious', which affected the level of the fine.[34]

***Airfreight* (2010) and (2017)**

45. **Facts**: 11 airlines providing airfreight services coordinated their fuel surcharges and security surcharges on airfreight services from, to and, in the case of some carriers, within the EEA. The airlines initially contacted each other in order to impose a flat rate 'fuel surcharge' per kilo for all shipments worldwide. Thereafter their illicit cooperation extended to introducing a 'security surcharge' and agreeing not to pay commission on those surcharges to their freight forwarders, who were their customers.[35]

46. **Outcome**: In November 2010 the Commission found a single cartel, constituting a single and continuous infringement of Article 101 TFEU, of Article 53 EEA and of Article 8 of the Swiss Agreement. In particular, the Commission decided that the air cargo carriers had coordinated their pricing behaviour and that this amounted to price fixing prohibited by Article 101(1)(a) TFEU.[36] In the Commission's view, the '*cartel arrangements permeated the whole industry for airfreight. Senior management in the head offices of a*

47. *number of airlines conceived, directed and encouraged them. They operated to the benefit of the participating airfreight service providers and to the detriment of their customers and ultimately the general public*.'[37] The Commission's 2010 decision was annulled by the General Court on procedural grounds;[38] however, the Commission readopted its decision in relation to 11 air cargo carriers in 2017.[39] The 2017 decision has also been appealed to the General Court and judgments are awaited.[40]

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34 Ibid, paras 406–414.

35 Commission decision of 9 November 2010, paras 97–98, 715, 725, 748, 753, 766, 777, 875 and 940.

36 Ibid, para 899.

37 Ibid, para 1175.

38 Cases T-9/11 etc *Air Canada v Commission* EU:T:2015:994.

39 Decision of 17 March 2017; a non-confidential version of this decision has not been published.

40 Case T-326/17 etc *Air Canada v Commission*, not yet decided.

48. **Object and/or effect of restricting competition**: This was an **object** case.[41]

49. **Fines**: The Commission imposed fines totalling €799 million on 11 air cargo carriers. In December 2015 the General Court annulled the 2010 decision in 11 appeals; the Commission readopted its decision in 2017 and imposed total fines of €776 million.[42]

50. **Sector**: The buying market appears to have been the purchase of freight forwarding services. The selling market was the market for air cargo, which was European-wide for intra-European cargo and on a continent-to-continent basis for the intercontinental transport of cargo.

51. **Type of joint purchasing**: This was not a case of joint purchasing. *Airfreight* was a cartel, which included an element of purchaser price-fixing.

52. **Theory of harm/benefit/reason why no harm to competition**: The Commission noted (i) horizontal price-fixing of any kind is prohibited by Article 101(1)(a) TFEU; (ii) price is the main instrument of competition, and so arrangements between competitors that coordinate their behaviour in order to remove uncertainty in respect of pricing matters are, by their very nature, restrictive of competition;[43] and (iii) '*by refusing to pay commission the carriers ensured that surcharges did not become subject to competition through the negotiation of discounts with customers*.'[44]

53. **Was secrecy a relevant consideration**? The cartel was secret, but this did not affect either the finding of restriction by object or the level of the fines.

***Transcatab v Commission* ('Italian Raw Tobacco') (2005)**

54. **Facts**: Four major Italian tobacco processors – Deltafina, Mindo, Transcatab and Romana Tabacchi – agreed their overall strategy for purchasing raw tobacco between 1995 and 2002. In particular, they agreed maximum purchase prices to be paid to tobacco growers; they allocated suppliers on a preferential or exclusive basis; and they engaged in bid-rigging of auctions held by public authorities.[45] Separately, the

41 Decision of 9 November 2010, para 894.

42 The fine was lower because the turnover of one airline (Martinair) was lower in 2016 than it was in 2009.

43 Decision of 9 November 2010, para 900.

44 See Summary of Commission Decision of 9 November 2010, OJ [2014] C 371/11, para 11.

45 Commission decision of 20 October 2005, paras 1 and 240–242.

Italian trade associations of respectively processors and tobacco growers – APTI and UNITAB – negotiated minimum prices to be inserted into 'cultivation contracts' at the beginning of each season between 1999 and 2001.[46]

55. **Outcome**: In October 2005 the Commission found that Deltafina, Mindo, Transcatab and Romana Tabacchi had entered into agreements and/or concerted practices that aimed at fixing the trading conditions for the purchase of raw tobacco in Italy in respect of both direct purchases from producers and purchases from third packers. The setting of common purchase prices, the allocation of suppliers and quantities, and the exchange of information to co-ordinate their competitive purchasing behaviour all had as their object the restriction of competition.[47] The General Court dismissed the appeals against the Commission's finding of infringement,[48] although it reduced one of the fines slightly. The judgments of the General Court were upheld on appeal to the Court of Justice,[49] except for one that was annulled for procedural reasons.[50] In *Transcatab v Commission*[51] the General Court held that purchase price-fixing and the allocation of suppliers and quantities of raw tobacco '*constitute horizontal restrictions of the 'price cartel' type within the meaning of the Guidelines and are therefore by nature 'very serious' infringements. Agreements of that type are classified by the case-law as clear-cut infringements of the competition rules*'.[52]

56. **Object and/or effect of restricting competition**: This was an **object** case.

57. **Fines**: The Commission imposed fines totalling €56 million on the four tobacco processors for participating in a buyer cartel.[53] On appeal the General Court reduced

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46 Ibid, para 2 and 253–255.

47 Ibid, paras 277–292.

48 Case T-12/06 *Deltafina v Commission* EU:T:2011:441; Case T-25/06 *Alliance One v Commission* EU:T:2011:442; Case T-11/06 *Romana Tabacchi v Commission* EU:T:2011:560; Case T-39/06 *Transcatab v Commission* EU:T:2011:562; note that the appeal in Case T-19/06 *Mindo v Commission* EU:T:2011:561 was held to be inadmissible.

49 Case C-578/11 P *Deltafina v Commission* EU:C:2014:1742; Case C-593/11 P *Alliance One v Commission* EU:C:2012:804 and Case C-654/11 P *Transcatab v Commission* EU:T:2011:562; Case C-654/11 P *Romana Tabacchi v Commission* EU:C:2012:806.

50 Case C-652/11 P *Mindo v Commission* EU:C:2013:229; Mindo discontinued its appeal when it was remitted to the General Court: Case T-19/06 RENV EU:T:2013:485.

51 Case T-39/06 *Transcatab v Commission* EU:T:2011:562, upheld on appeal Case C-654/11 P *Transcatab v Commission* EU:T:2011:562.

52 Case T-39/06 *Transcatab v Commission* EU:T:2011:562, para 160.

53 It also imposed symbolic fines of €1,000 on the two associations that had engaged in collective price negotiations.

one fine, imposed on Romana Tabacchi, from €2.05 million to €1 million because the Commission had exaggerated the duration of its participation in the cartel.[54]

58. **Sector**: The buying market was the purchase of raw tobacco in Italy. The selling market was the sale of processed tobacco in Italy and elsewhere.

59. **Type of joint purchasing**: This was not a case of joint purchasing. *Italian Raw Tobacco* was a buyer cartel. The agreements and concerted practices related to the common purchase prices which processors would pay to suppliers and the allocation of suppliers and quantities. There was also the exchange of information to co-ordinate their competitive purchasing behaviour and bid-rigging.

60. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was the distortion of the process of competition on the buying market. The Commission found that the cartel had sheltered '*processors and producers of raw tobacco in Italy from full exposure to market forces*', thereby preventing them from competing on the merits. As a result, there was reduced competitive pressure on the members of the cartel to control costs, to improve quality and to innovate, thereby limiting productive and dynamic efficiencies.[55]

61. **Was secrecy a relevant consideration**? Yes, the Commission noted that the processors of raw tobacco had 'secretly agreed on several aspects relating to price and quantities to be transacted' when setting the fines.[56]

Koninklijke Wegenbouw Stevin v Commission (**'Dutch Bitumen') (2006)**

62. **Facts**: Bitumen is used to make asphalt and is used in road construction. An unusual feature of this case is that the cartel involved not only eight out of nine suppliers of road pavement bitumen in the Netherlands but also the six largest road construction companies there (they were the purchasers of bitumen). Between 1994 and 2002 these suppliers and purchasers regularly met to fix jointly the gross price for road pavement bitumen. They also agreed a uniform rebate on the gross price for participating road builders and a smaller rebate on the gross price for other road

54 Case T-11/06 *Romana Tabacchi v Commission* EU:T:2011:560.

55 Commission decision of 20 October 2005, para 285; see also para 280 on the significance of fixing purchase prices given raw tobacco was a substantial input of the downstream sale of processed tobacco.

56 Ibid, para 363.

builders. Prior to these meetings, the suppliers and road builders held separate preparatory meetings between themselves.

63. **Outcome**: In September 2006 the Commission found that the various agreements between the bitumen suppliers and the road builders on gross prices and rebates constituted a single and continuous infringement of Article 101(1) TFEU.[57] The infringement consisted of fixing, directly and indirectly, both sale and purchase prices and of applying unequal conditions to equivalent transactions, placing other road construction companies at a competitive disadvantage.[58] The General Court dismissed 14 out of 16 appeals against the Commission's decision in their entirety.[59] As noted below, it reduced the fines in the other two cases. In *Koninkliijke Wegenbouw Stevin v Commission*[60] the General Court disagreed with KWS that the Commission had mischaracterised the object of the agreements. The Court held that the agreements were intended, on the one hand, to fix the purchase and selling prices of bitumen and, on the other, to grant a preferential rebate to the participating road builders. The nature of the agreements was therefore sufficient for them to have as their object the restriction of competition.[61] The Court of Justice upheld the General Court's judgment in this case.[62]

64. **Object and/or effect of restricting competition**: This was an **object** case.

65. **Fines**: The Commission imposed fines totalling €266.717 million on 14 companies; of this amount Shell was fined €108 million. However, the General Court reduced the fine imposed on Shell to €81 million because the Commission failed to prove that Shell had played the role of instigator and leader in the infringement.[63] The Court of

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57 Commission decision of 13 September 2006.

58 Ibid, para 156.

59 See e.g.; Case T-344/06 *Total SA v Commission* EU:T:2012:479; Case T-347/06 *Nynäs Petroleum v Commission* EU:T:2012:480; Case T-348/06 *Total Nederland v Commission* EU:T:2012:481; Case T-351/06 *Dura Vermeer Groep v Commission* EU:T:2012:482; Case T-352/06 *Dura Vermeer Infra v Commission* :EU:T:2012:483; Case T-353/06 Vermeer *Infrastructuur v Commission* EU:T:2012:484; Case T-354/06 *BAM NBM Wegenbouw v Commission* EU:T:2012:485; Case T-355/06 *Koninkliijke BAM Groep v Commission* EU:T:2012:486; Case T-356/06 *Koninkliijke Volker Wessels Stevin v Commission* EU:T:2012:487; Case T-357/06 *Koninkliijke Wegenbouw Stevin (KWS) v Commission* EU:T:2012:488; Case T-359/06 *Heijmans Infrastructuur v Commission* EU:T:2012:489; Case T-360/06 *Heijmans NV v Commission* EU:T:2012:490; Case T-362/06 *Ballast Nedam Infra v Commission* EU:T:2012:492 and Case T-370/06 *Kuwait Petroleum Corp v Commission* EU:T:2012:493, upheld on appeal Case C-581/12 P EU:C:2013:772.

60 Case T-357/06 EU:T:2012:488.

61 Ibid, para 113.

62 Case C-586/12 P EU:C:2013:863.

63 Case T-343/06 *Shell Petroleum NV v Commission* EU:T:2012:478.

Justice reduced Ballast Nedam's fine from €4.65 million to €3.45 million due to a procedural error.[64]

66. **Sector**: The purchasing market was the purchase of road pavement bitumen in the Netherlands. The selling market was the construction of roads in the Netherlands.

67. **Type of joint purchasing**: This was not a joint purchasing case. *Dutch Bitumen* was a seller and buyer cartel. The Commission and the General Court specifically rejected the argument that the road builders' participation in the cartel arrangements amounted to joint purchasing.[65] The arrangements were intended only to fix prices and rebates, which is why the Commission and the General Court regarded them as a price-fixing cartel.

68. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm appears to have been that the major buyers and sellers of road bitumen had 'stitched up' the market and so eliminated virtually all competition on both sides of the market. The buyers and sellers jointly fixed the price of road pavement bitumen in the Netherlands. Moreover, they agreed on lower rebates to road construction companies that did not participate in the cartel, thereby placing them at a competitive disadvantage. The General Court did not articulate a theory of harm and instead relied on Article 101(1)(a) TFEU.

69. **Was secrecy a relevant consideration**? The cartel did operate in secret, but secrecy does not appear to have played a role in the decision-making.

70. **Comment**: The Commission and the General Court drew attention to the fact that the cartel agreements did not constitute joint purchasing because the only agreement between the participating purchasers of road bitumen was to fix prices and discounts.

***Campine v Commission* ('Car Battery Recycling') (2017)**

71. **Facts**: Used car batteries are the most recycled consumer product in the EU: more than 50 million are recycled every year.[66] Four recycling undertakings – Campine of

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64 Case T-361/06 *Ballast Nedam v Commission* EU:T:2012:491, set aside on appeal Case C-612/12 P EU:C:2014:193.

65 Commission decision of 20 September 2016, paras 162–168, upheld on appeal Case T-357/06 EU:T:2012:488, para 123.

66 Commission Press Release IP/17/245 of 8 February 2017.

Belgium, Eco-Bat Technologies of the UK, Johnson Controls of the US and Recylex of France – agreed to reduce the purchase price paid to suppliers of used car batteries (i.e., scrap dealers and scrap battery collectors) between 2009 and 2012.[67] This was buttressed by various exchanges of information on current prices offered to specific suppliers, on expected volumes of purchases and on purchasing intentions in Germany, Belgium, France and the Netherlands (where the main third-party suppliers of scrap batteries were located). The majority of the anti-competitive contacts took place on a bilateral (and sometimes trilateral) basis, mainly through telephone calls, emails, or text messages.[68] Some of the individuals involved used coded language in some of their communications.[69]

72. **Outcome**: In February 2017 the Commission found that the four recycling companies had participated in a cartel to fix the purchase prices of scrap lead-acid automotive batteries in Belgium, France, Germany, and the Netherlands. The Commission's decision was substantially upheld on appeal to the General Court. Campine was partially successful in challenging its participation in the single and continuous infringement.[70] However, the General Court confirmed that the Commission had correctly characterised the arrangements as restrictive of competition by object. Referring to Article 101(1)(a) TFEU, the General Court held that '*A price cartel can be regarded, by its very nature, as being harmful to the proper functioning of normal competition*'.[71]

73. **Object and/or effect of restricting competition**: This was an **object** case.

74. **Fines**: The Commission imposed fines totalling €68 million on Campine, Eco-Bat and Recylex; Johnson was granted immunity from a fine under the Commission's Leniency Notice. On appeal the General Court reduced the fine on Campine from €8.2 million to €4.3 million because it had committed a single, but repeated, infringement rather than a single and continuous infringement (as the Commission had found).[72]

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67 Commission decision of 8 February 2017, paras 40–44 and Article 1.

68 Ibid, para 50.

69 Ibid, paras 56 and 74.

70 Case T-240/17 *Campine v Commission* EU:T:2019:778.

71 Ibid, para 297.

72 Ibid, para 425.

75. **Sector**: The buying market was the purchase of scrap lead-acid batteries from scrap collectors or scrap dealers located in Germany, Belgium, France and the Netherlands. The selling market was the sale of recycled lead to battery manufacturers (which, in turn, sell batteries to motor vehicle manufacturers). Some of the recycling companies were active on both sides of the buying and selling markets, that is to say, they were also scrap battery collectors (i.e., suppliers on the purchasing market) and/or battery manufacturers (i.e., customers on the selling market).[73]

76. **Type of joint purchasing**: This was not a case of joint purchasing. *Car Battery Recycling* was a **buyer cartel**. The parties agreed on target prices or maximum prices to pay to their suppliers. They also agreed to exchange information on prices to be paid for scrap batteries, on the quantities they intended to purchase and future business intentions more generally.

77. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was the distortion of the process of competition on the buying market. The Commission contrasted the actual world in which the buyer cartel had operated – where the infringing recycling companies had coordinated their pricing behaviour and agreed volumes of purchases – with the counterfactual world in which they would have sought to offer sufficiently high (competitive) prices to attract the required supply of scrap batteries.[74]

78. **Was secrecy a relevant consideration**? Yes, the fact that the parties took precautions to conceal their cartel arrangements and to avoid their detection was relevant to the intentional nature of their infringement, which is a requirement for imposing a fine.[75]

B. DECISIONS OF THE EUROPEAN COMMISSION

SOCEMAS (1968)

79. **Facts**: The Société commerciale et d'Études des Maisons d'Alimentation et d'Approvisionnement a Succursales (SOCEMAS) was a French trading and research company set up to facilitate cooperation between about 60 food-retailing chain stores. One of its aims was to purchase grocery products on behalf of the chain

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73 Commission decision of 18 February 2017, para 18.

74 Ibid, para 233.

75 Ibid, para 293.

stores from other members of the former European Economic Community ('EEC') and import them into France. Members were not obliged to buy exclusively through the SOCEMAS. The foodstuffs purchased by SOCEMAS accounted for just 0.1% of member stores' total turnover.[76]

80. **Outcome**: The Commission decided that the formation and operation of SOCEMAS fell outside Article 101(1) because it had a *de minimis* effect on inter-state trade and competition. The activity of SOCEMAS in EEC countries other than France was not on a sufficiently large scale to bring about an appreciable restriction of competition or an effect on trade between Member States of the EEC.

81. **Object and/or effect of restricting competition**: There was no appreciable restriction of competition in this case.

82. **Fines**: None.

83. **Sector**: the buying market appears to have been the purchase of grocery products within the EEC other than France. The selling market seems to have been the retail of grocery products in France.

84. **Type of joint purchasing**: SOCEMAS was a company that engaged in joint purchasing abroad on behalf of grocery retailers in France.

85. **Theory of harm/benefit/reason why no harm to competition**: This decision is an application of the *de minimis* doctrine.

86. **Was secrecy a relevant consideration**? No.

***Intergroup trading* (SPAR) (1975)**

87. **Facts**: Intergroup was a buyer group that imported goods for SPAR chains in the EEC. Intergroup sought to buy and import goods on more favourable terms than if each SPAR chain had imported them separately.[77] The goods imported by Intergroup accounted for 0.06–0.89% of the participating chains' turnover. The participating chains accounted for less than 4% of total turnover for grocery retailing in the EEC.

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76 OJ [1968] L 4/7; see the Commission's *First Report on Competition Policy* (1972), point 41.

77 OJ [1975] L 212/23.

The participating chains were free not to use Intergroup's services when making purchases.

88. **Outcome**: The Commission found that Intergroup and its company statutes fell outside what is now Article 101(1) because they did not have an appreciable impact on competition. Given the weak position of the participating SPAR chains and the very small proportion of their products imported by Intergroup, Intergroup had '*no substantial implications for the market position of suppliers of the relevant goods*' within the EEC.

89. **Object and/or effect of restricting competition**: There was no appreciable restriction of competition in this case.

90. **Fines**: None.

91. **Sector**: the buying market appears to have been the cross-border purchase of grocery products in the EEC. The selling market seems to have been the retail of grocery products in various national or local markets in the EEC.

92. **Type of joint purchasing**: Intergroup was a limited liability company incorporated under Dutch law, which was founded by Internationale SPAR Centrale BV Amsterdam and a number of SPAR chains. Intergroup negotiated prices and conditions of sale with suppliers and coordinated orders and consignments; it drew up supply contracts, obtained customs clearance and dealt with complaints and disputes with suppliers.

93. **Theory of harm/benefit/reason why no harm to competition**: This decision is an application of the *de minimis* doctrine.

94. **Was secrecy a relevant consideration**? No.

National Sulphuric Acid Association **(1980) and (1989)**

95. **Facts**: The members of the National Sulphuric Acid Association were manufacturers of sulphuric acid in the United Kingdom and Ireland. Most of them created a joint buying pool for the purchase of elemental sulphur to countervail the strength of US producers. The management committee of the buying pool was given the power to negotiate and buy the amount of sulphur specified by each member, provided that the amount was no less than 25 per cent of the member's annual total requirements. There were 19 members of the buying pool, which together accounted for around 80

per cent of production of sulphuric acid in the United Kingdom. The rules of the buying pool were notified to the Commission under the old system of notification for individual exemption.

96. **Outcome**: The buying pool was given an individual exemption under Article 101(3).[78] The Commission found that the buying pool had anti-competitive effects because it prevented each member of the pool from negotiating and buying 25% to 100% of their sulphur needs from suppliers other than those obtained by the pool.[79] The Commission also found that the buying pool had a knock-on effect on downstream competition for sulphuric acid, since sulphur accounts for 80 per cent of the cost of sulphuric acid.[80] However, the Commission found that the buying pool improved the distribution of sulphur and the production of sulphuric acid by bringing about cheaper sulphur, flexibility in distribution and greater security of supply.[81] The downstream selling markets for sulphuric acid and products incorporating acid (e.g. fertilizers, paint, detergents) were sufficiently competitive to ensure that a fair share of these benefits would be passed on to consumers.[82] The pool members' minimum purchasing requirement was limited to 25% and indispensable to attain its benefits.[83] Finally, the buying pool did not eliminate competition in respect of a substantial part of the sulphur market, since at least one producer with 11% of the market remained outside the pool.[84]

97. **Object and/or effect of restricting competition**: The Commission's decision is silent on the object of the buying pool; it simply finds that the Rules of the buying pool have the effect of restricting competition between the members of the Pool.

98. **Fines**: None.

99. **Sector**: the buying market was the purchase of sulphur in the UK. The main selling market was the sale of sulphuric acid in the UK.

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78 OJ [1980] L 260/24, renewed OJ [1989] L 190/22.

79 OJ [1980] L 260/24, paras 31–34.

80 Ibid, para 35.

81 Ibid, paras 39–46.

82 Ibid, para 47.

83 Ibid, paras 48–49.

84 Ibid, para 50.

100. **Type of joint purchasing**: The joint purchasing of elemental sulphur was carried out by a joint buying pool, which was created by the rules of the National Sulphuric Acid Association. The pool was run by a management committee, which fixed the price paid by members for sulphur purchased through the pool. The sulphur was resold to the members on a no-profit, no-loss basis.

101. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm appears to have been input foreclosure. The Commission was concerned that the joint buying pool would make it harder for members to obtain supplies of sulphur from suppliers other than those obtained by the pool.

102. **Was secrecy a relevant consideration**? No.

***Orphe* (1990)**

103. **Facts**: Seven wholesalers of pharmaceutical products, each from a different Member State, formed an European Economic Interest Grouping ('EEIG'). Orphe's members were SMEs, most of them cooperatives. The by-laws of Orphe required that its members should give each other priority for commercial transactions. It also provided for joint purchasing on behalf of members and the creation of a common trade mark that would appear beside the trade mark of each member on the labelling of products distributed by the members. However members continued to set their own prices and terms of sale, including for those which they obtained through the Orphe.

104. **Outcome**: The Commission sent a comfort letter indicating that the by-laws of Orphe satisfied the requirements of Article 101(3) TFEU.[85] In the Commission's view Orphe would enable its members to compete more effectively with larger wholesale companies across Europe.

105. **Object and/or effect of restricting competition**: The Commission's *XX Annual Report on Competition Policy* says that the EEIG agreement contained some restrictions of competition, but does not say whether they were restrictions of competition by object and/or by effect.

106. **Fines**: None.

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85 Commission's *XXth Report on Competition Policy* (1990), point 102.

107. **Sector**: the buying market was the purchase of various pharmaceutical products. The selling market was the wholesale supply of pharmaceutical products.

108. **Type of joint purchasing**: Orphe undertook joint purchasing on behalf of its members, but also provided for other types of cooperation, such as a common trade mark.

109. **Theory of harm/benefit/reason why no harm to competition**: The benefit of Orphe was that it improved the ability of its members to compete with larger wholesalers. The Commission considered that the EEIG arrangements would 'allow diversification of distribution in this sector and will give consumers wider choice while maintaining prices at a reasonable level.'[86]

110. **Was secrecy a relevant consideration**? No.

***Eurovision* (1993) and (2000)**

111. **Facts**: The European Broadcasting Union ('EBU') was and is an association of public service media organisations. In 1989 the EBU notified to the Commission its internal rules and regulations governing the joint acquisition of television rights to sports events, the sharing of those rights and the access scheme for non-EBU members to Eurovision sports rights (the so-called 'Eurovision system'). The Eurovision system applied to joint acquisition of television rights for international sporting events and not domestic events. The Eurovision system provided for collective negotiation of exclusive television rights. All interested members then shared those rights, regardless of the territorial scope of their activity and regardless of the technical means of broadcasting. In addition, the EBU and its members promised the Commission that they would grant non-member broadcasters extensive access to Eurovision sports rights.

112. **Outcome**: The Commission found that the joint acquisition of television rights to sporting events had as their 'object and effect' the restriction of competition between the members of the Eurovision system.[87] Instead of competing with each other, members participated in joint negotiations and agreed among themselves the financial and other terms for the acquisition of rights.[88] However, the Commission

86 Ibid.

87 OJ [1993] L 179/23, para 73.

88 Ibid, para 74; the obligation on the members to acquire jointly could have a particularly harmful effect in the market given the rights were sold on an exclusive basis: ibid, para 75.

granted an individual exemption to the Eurovision system under Article 101(3) because it improved the access of smaller EBU members to certain major international sports events and reduced transactions costs associated with a multitude of licensing negotiations.[89] The Commission's decision was annulled on appeal due to errors of law in the way that it had applied the indispensability requirement in Article 101(3)(a) TFEU.[90] The Commission re-adopted its exemption decision,[91] but that decision was also annulled due to an error of assessment in finding that the EBU rules did not substantially eliminate competition within the meaning of Article 101(3)(b) TFEU.[92]

113. **Object and/or effect of restricting competition**: Both.

114. **Fines**: None.

115. **Sector**: The buying market was the acquisition of the television rights to important sporting events in all disciplines of sport. The selling markets were the markets for free-to-air and pay TV broadcasting, in which sporting events were broadcast as part of the broadcasters' offer to viewers and/or subscribers.

116. **Type of joint purchasing**: The joint purchasing arrangements were enshrined in the EBU's internal rules and regulations governing the Eurovision system. The EBU not only engaged in the joint acquisition of television rights to international sporting events but also shared those rights between its members and granted sub-licences of those rights to non-members.

117. **Theory of harm/benefit/reason why no harm to competition**: The Commission seems to have applied two theories of harm in this case. The first was that the Eurovision system restricted or distorted the competitive process for the acquisition of television rights to international sports events.[93] In the absence of the Eurovision system, the EBU members would have bid against each other to acquire those rights. The second theory of harm was that the joint acquisition of television rights might foreclose non-EBU members (i.e. commercial broadcasters) insofar as they could not match the EBU's access to major international sports events or the

89 Ibid, paras 85 and 86.

90 Cases T-528/93 etc *Métropole Télévision v Commission* EU:T:1996:99.

91 OJ [2000] L 151/18.

92 Cases T-185/00 etc *Métropole Télévision v Commission* EU:T:2002:242.

93 Ibid, paras 73–74.

terms on which they acquired the rights to broadcast such events.[94] Against this, however, the Eurovision system created a net benefit to consumers, since EBU members could show more, and higher quality, international sports programmes to European television viewers.[95]

118. **Was secrecy a relevant consideration**? No.

***Ethylene* (2020)**

119. **Facts**: Four ethylene purchasers – Westlake of the US, Orbia of Mexico, Clariant of Switzerland and Celanese of the US – coordinated their price negotiation strategies in Belgium, France, Germany and the Netherlands between 2011 and 2017. The price of ethylene is volatile. Ethylene supply agreements use a standard pricing formula in order to reduce the risk of price volatility, which is known as the 'Monthly Contract Price' ('MCP'). The ethylene purchasers coordinated their price negotiation strategies before and during the bilateral negotiations with ethylene suppliers in order to push the MCP down to their advantage. They also exchanged price-related information.[96]

120. **Outcome**: The Commission found that the buyers' conduct had the object of restricting competition because they 'refrained from determining independently the commercial policy that they intended to adopt for MCP but instead coordinated their behaviour related to MCP and MCP settlement negotiations.'[97] All four companies acknowledged their involvement in the cartel and agreed to settle the case in accordance with the Commission's settlement procedure.[98] Clariant has, however, brought an appeal contesting the level of the fine imposed upon it.[99]

121. **Object and/or effect of restricting competition**: This was an **object** case.

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94 Ibid, para 75; this theory can also be seen when the Commission considers whether there is a substantial elimination of competition under Article 101(3)(b): ibid, paras 102–103.

95 Ibid, paras 87 and 91.

96 Commission decision of 14 July 2020, para 1.

97 Ibid, paras 69–70.

98 See the Commission's Notice on the conduct of settlement procedures, OJ [2008] C 256/2.

99 Case T–590/20 *Clariant v Commission*, not yet decided.

122. **Fines:** The Commission imposed fines totalling €260 million on Orbia, Clariant and Celanese; Westlake blew the whistle and was therefore granted immunity from paying a fine.

123. **Sector**: The buying market was the merchant market for the purchase of ethylene in Belgium, Germany, France and the Netherlands. The selling markets were the production and sale of various chemical products.

124. **Type of joint purchasing**: This case did not involve joint purchasing. *Ethylene* was a buyer cartel.

125. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that the colluding purchasers of ethylene sought to disrupt the competitive process by coordinating their price negotiation strategy vis-à-vis suppliers in order to influence MCP negotiations in their favour.

126. **Was secrecy a relevant consideration**? The settlement decision does not mention secrecy other than in support of making a direction to bring the infringement to an end.[100]

127. *Ethylene* and *Car Battery Recycling* (paragraphs 71 to 78 above) are two recent Commission decisions on buyer cartels that have contributed to the concern expressed by respondents to the Commission's consultation on horizontal co-operation agreements that there is uncertainty as to the dividing line between buyer cartels and joint purchasing agreements.

C. MEMBER STATES OF THE EU

Belgium – *Carrefour Belgium and Provera Belux* (2021)

128. **Facts**: In November 2018 Carrefour Belgium (a supermarket chain) and Provera Belux (the Louis Delhaize group's purchasing unit for brands such as Cora and Match) entered into a joint purchasing alliance in Belgium and Luxembourg.[101] The alliance provided for Carrefour to negotiate and buy 'fast-moving consumer goods' from 140 suppliers on behalf of both Provera and itself.

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100 Ibid, para 106.

101 www.carrefour.com/en/newsroom/carrefour-belgium-and-provera-belux-enter-purchasing-alliance.

129. **Outcome**: In April 2021 the Belgian Competition Authority ('BCA') accepted legally-binding commitments from the parties to transfer the Carrefour purchasing department to a separate legal entity. The BCA's preliminary assessment was that the alliance created the risk that buyers at Carrefour and Provera could exchange information about their commercial strategies. These exchanges might affect the parties' incentive to compete in both the purchasing and selling markets. To address these concerns Carrefour offered commitments to sell its purchasing department to Interdis, a separate company; to limit exchanges of information to details that were essential for the proper functioning of the alliance; and to limit joint negotiations to negotiations on discounts from suppliers. The BCA closed its file without making a finding as to whether there had been or continued to be an infringement of EU or Belgian competition law.[102]

130. **Object and/or effect of restricting competition**: This was an **effects** case.

131. **Fines**: None.

132. **Sector**: The buying markets were the purchase of various fast-moving consumer goods in Belgium and Luxembourg. The selling markets were the retailing of those goods to end-consumers in Belgium and Luxembourg.

133. **Type of joint purchasing**: This case involved one of the parties (Carrefour) purchasing jointly on behalf of the other party (Provera) and itself.

134. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that the alliance could have spillover effects in the downstream sales market through the sharing of commercially sensitive information between Carrefour and Provera.

135. **Was secrecy a relevant consideration**? No.

Czech Republic – *Billa/Julius Meinl* (2003)

136. **Facts**: Two grocery retail chains, Billa and Julius Meinl, agreed to coordinate and unify their purchase prices for goods and the terms they applied in relation to their suppliers from 2001 to 2002. To that end they exchanged information on their purchase prices, bonus and discount systems. They also agreed to require suppliers both to compensate them for any differences in prices paid by them to the same

102 Case CONC-I/O-19/0013, BCA decision of 28 April 2021.

supplier and to pay a so-called 'alliance bonus', which was paid if suppliers supplied the same range of products to both Billa and Meinl. If the suppliers declined to accept these terms, Billa and Meinl were entitled (under certain supply agreements) to terminate their agreements with them.

137. **Outcome**: The Czech competition authority found that the practices of Billa and Meinl constituted 'cartel conduct' that infringed domestic competition law.[103] The purpose of the parties' cooperation was to enforce uniform purchase prices and maximise their profit, to the detriment of their suppliers. The finding of infringement was upheld by the Regional Court in Brno.[104]

138. **Object and/or effect of restricting competition**: This was an **object** case.

139. **Fines**: The parties were originally fined a total of CZK 51 million, but the fines were annulled on appeal. The Czech competition authority re-adopted its penalty decision, albeit imposing slightly lower fines; this decision was upheld on appeal.[105]

140. **Sector**: It is not entirely clear from publicly available materials, but the buying markets appear to have been the purchase of various grocery products. The selling market was the retailing of grocery products in the Czech Republic.

141. **Type of joint purchasing**: This case did not involve joint purchasing. *Billa/Julius Meinl* was an agreement between two grocery retailers to exchange purchase pricing information and to coordinate their behaviour vis-à-vis common suppliers.

142. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm in this case is not readily apparent from the materials in the public domain. It is not unreasonable to suppose, however, that the Czech competition authority was concerned that the grocery retailers' coordinated conduct amounted to a distortion of the process of competition in the purchasing market.

143. **Was secrecy a relevant consideration**? No.

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103 Decision of 13 October 2003.

104 Judgment of 31 May 2006.

105 Judgment of Supreme Administrative Court of 29 March 2012.

Finland – *Timber Cartel* (2009)

144. **Facts**: Metsäliitto Co-operative, Stora Enso and UPM-Kymmene collectively held nearly 80 per cent of the timber purchase market in Finland. Between 1997 and 2004 they exchanged information on current and future purchase prices for timber, quantities and costs. While the companies did not fix purchase prices, their exchanges were intended to reduce (or stabilise) the price level of timber. Moreover, if their discussions revealed that one company had paid an above-average price when buying timber, the other two would put pressure on that company to lower its purchase prices.

145. **Outcome**: The Finnish Market Court held that the information exchange constituted an infringement by object of Article 101 TFEU and domestic competition law.[106] In setting the fines the Market Court took into account the facts that the cartel lasted for seven years, covered the whole of Finland and involved large companies that were well aware of competition law. Moreover, the companies were recidivists, having been fined for colluding on the purchase of timber in the 1990s. There was no appeal to the Supreme Administrative Court.

146. **Object and/or effect of restricting competition**: This was an **object** case.

147. **Fines**: The Market Court imposed fines totalling €51 million.

148. **Sector**: The buying market was the purchase of timber in Finland. The selling market appears to have been the supply of wood and paper products.

149. **Type of joint purchasing**: This case did not involve joint purchasing. *Timber Cartel* was an exchange of information agreement between buyers.

150. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm appears to have been that the information exchanges reduced uncertainty as to the future pricing behaviour of parties on the timber purchasing market, thereby diminishing incentives to compete.

151. **Was secrecy a relevant consideration**? No.

106 Judgment of Market Court of 3 December 2009.

France – *Pork Charcuterie* (2013)

152. **Facts**: Following a complaint from four pig farmers, the Autorité de la concurrence discovered that five Breton pork slaughterers agreed for several months in 2009 on their volumes of pork purchases, with the aim to lower the prices paid to pig farmers. They did so by coordinating a reduction in the level of their respective slaughtering, which was designed to push down the price of pigs in the so-called *Marché du porc breton* ('MPB'), which was a national price index for the sale of pigs.[107] Separately, some of the slaughterers fixed the price of their purchases from farmers on a couple of days when the normal auctions were inoperative. In addition to these buyer-related restrictions, a couple of slaughterhouses engaged in RPM with the Auchan retail chain.

153. **Outcome**: In 2013 the Autorité de la concurrence decided that each of the slaughterers' practices had as its object the restriction of competition, a conclusion that was not disputed by those involved.

154. **Object and/or effect of restricting competition**: This was an **object** case.

155. **Fines**: The Autorité imposed fines totalling €4.57 million for the various collusive practices just described;[108] they were reduced on appeal to €2.64 million.[109]

156. **Sector**: The buying market was the purchase of live pigs for slaughtering in certain parts of France. The selling market was the retailing of pig meat products in France.

157. **Type of joint purchasing**: This case did not involve joint purchasing. *Pork Charcuterie* was a buyer cartel that sought to reduce demand and purchase prices for live pigs.

158. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that the artificial reduction of slaughtering distorted the process of competition for the purchase of live pigs, to the detriment of live pig farmers.

159. **Was secrecy a relevant consideration**? The Autorité noted that the arrangements in question had been secret.

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107 Decision of 13 February 2013, paras 230–231.

108 Decision of 13 February 2013.

109 Judgment of 25 September 2014, Case RG n° 2013/10559.

France – *Auchan, Casino, Metro, and Schiever* (2020)

160. **Facts**: In November 2018 a 'partnership agreement' between four well-known French retailers – Casino, Auchan, Metro and Schiever – was notified to the Autorité de la concurrence under the domestic Law for Growth, Activity and Equal Economic Opportunities (which is described below). The four retailers proposed to create a jointly-owned company that would organise tenders for the procurement of a wide range of own-brand label grocery products, such as milk, eggs, cooked cold meats, canned fish, canned meats, breaded fish, aperitifs, digestifs.

161. **Outcome**: The Autorité de la concurrence identified two potential competition concerns. The first was that the joint purchasing partnership agreement could harm suppliers, many of whom are SMEs. The second was that the agreement could distort competition in the selling market by limiting the level of differentiation between the parties' own-brand labels products ranges. Auchan, Casino, Metro, and Schiever responded to these concerns by offering commitments to modify their partnership agreement. In October 2020 the Autorité accepted these commitments under Article L464-1 of the Commercial Code.[110] The commitments reduced the scope of the parties' cooperation in order to remove products from sectors that had experienced economic difficulties. The parties also limited their cooperation to 15% of the market volume for a number of grocery products.

162. **Object and/or effect of restricting competition**: It is not clear, but it appears to have been a suspected effects case.

163. **Fines**: None.

164. **Sector**: The buying market was the purchase of a wide range of own-brand label grocery products in France. The selling market was the retailing of those own-label grocery products in France.

165. **Type of joint purchasing**: This was a case of joint purchasing, whereby a jointly-owned company provided the interface between suppliers and the purchasers that the company represented. It was through this joint behaviour that the partnership aimed to negotiate more favourable terms and conditions than if each retailer had acted alone.

110 Decision of 22 October 2020.

166. **Theory of harm/benefit/reason why no harm to competition**: There were two theories of harm. The first was that the joint purchasing partnership agreement could harm suppliers, many of whom are SMEs. The Autorité de la concurrence found that the purchasing market was characterised by short-term, low-margin supply contracts that were unfavourable to suppliers. In these circumstances, suppliers were vulnerable to the price reductions sought by the alliance, which might hinder their ability to invest in the production and development of own-label products. The second theory of harm was that the joint purchasing agreement might distort competition in the selling market by limiting the level of differentiation between the parties' own-brand labels products. Auchan, Casino, Metro and Schiever would jointly select and negotiate with their own-brand label suppliers and then sell own-brand label products with identical characteristics. In the Autorité's view, this could reduce the variety of own-label products available in the parties' stores and therefore restrict an important parameter of competition.

167. **Was secrecy a relevant consideration**? No.

168. **Comment**: In 2014 the French government asked the Autorité de la concurrence for an opinion on the impact of these arrangements on competition. In 2015 the Autorité found that, following a series of mergers, there were four buyer groups – *ITM/Casino group*, *Carrefour/Cora*, *Auchan/Système U*/*E. Leclerc* – which collectively accounted for more than 90% of the grocery retail market in France. The Autorité acknowledged that these buyer groups or retail alliances could be beneficial insofar as they secured lower prices for consumers. The Autorité noted, however, a number of risks for competition in the purchasing and selling markets, including spillover effects, waterbed effects and customer foreclosure concerns. The Autorité recommended the introduction of a system of notification which would enable it to review purchasing agreements in the retail sector that meet a turnover threshold. The French Law for Growth, Activity and Equal Economic Opportunities of 6 August 2015 ('Egalim Law') required the retailers to notify their respective alliances to the Autorité.

France – *Carrefour and Tesco* (2020)

169. **Facts**: In August 2018 Carrefour and Tesco, a leading retailer in the UK with no stores in France, entered into a cooperation agreement relating to the supply of own-brand label products. The agreement provided for Carrefour or Tesco to hold tenders on behalf of both distributors with the goal of joint production of own-brand label goods. The agreement covered more than 130 food and non-food grocery products.

The agreement was notified to the Autorité de la concurrence pursuant to the Egalim Law.

170. **Outcome**: In May 2019 the Autorité de la concurrence opened an investigation into whether the cooperation agreement had the object and/or effect of restricting competition. In particular, the Autorité was concerned that the agreement could reduce the ability of suppliers of own-brand label goods (many of whom are SMEs) to invest and innovate, and even reduce their incentive to remain on the market. As in the case of *Auchan/Casino/Metro/Schiever*, summarised above, the Autorité found that suppliers were vulnerable to adverse changes in the terms of supply such as lower prices or volumes. In December 2020 the Autorité accepted commitments from Carrefour and Tesco to reduce the scope of their cooperation: they excluded from the agreement certain agricultural products; limited their cooperation for eight product categories to a volume corresponding to 15% of Carrefour's purchases for each category; and they promised not to exclude any supplier from responding to calls for tenders.[111]

171. **Object and/or effect of restricting competition**: This appears to have been a suspected effects case.

172. **Fines**: None.

173. **Sector**: The buying market was the purchase of wide range of own-label grocery products in France. The selling market was the retailing of those products in France.

174. **Type of joint purchasing**: This was joint purchasing in the form of a contractual arrangement. It is worth noting that the agreement also covers the supply of non-market products, that is to say, products or services necessary for the parties' business and not intended for resale, and the provision of international services.

175. **Theory of harm/benefit/reason why no harm to competition**: The theories of harm were the same as those in *Auchan/Casino/Metro/Schiever*.[112]

176. **Was secrecy a relevant consideration**? No.

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111 Decision of 17 December 2020.

112 See para 165 above.

France – *Saucissons* (2020)

177. **Facts**: Between 2011 and 2013 12 manufacturers of cold meats coordinated the weekly price variation of *jambon de mouille* (ham, flank removed) in an attempt to resist price increases or obtain price reductions from pig slaughterhouses. They held bilateral phone calls in order to reach and implement a common negotiating position with the slaughterhouses. The outcome of those negotiations affected a weekly price index for *jambon de mouille*, which was a benchmark for other cold meat manufacturers, and for the negotiation of contracts for branded products. Separately, the cold meat manufacturers held phone calls and secret meetings at hotels in Paris and Lyon, during which they agreed price increases for cold meat products that they intended to sell to 'mass-market' retailers for their own-brand or economy cold meat products.

178. **Outcome**: In July 2020 the Autorité de la concurrence considered the parties' behaviour had as its object the restriction of competition.[113] By exchanging information on variations in the weekly purchase price of the *jambon de mouille* and by agreeing to defend a common position in the negotiations with the slaughterers, the companies knowingly substituted cooperation between them for the risks of competition, to use the language of the Court of Justice's *Dyestuffs* judgment. In the Autorité's view, this behaviour conflicted with the principle that each firm should determine independently the policy that it intends to adopt on the market. Put simply, practices that tend to distort the formation of purchase prices are, by their nature, anti-competitive.

179. **Object and/or effect of restricting competition**: This was an **object** case.

180. **Fines**: The Autorité imposed fines totalling €93 million on the offending cold meat manufacturers.

181. **Sector**: The buying market was the purchase of ham, flank removed in France. The selling markets were the retail of cold meat products, such as raw ham, cooked ham, sausage, rosette and chorizo in France.

182. **Type of joint purchasing**: This case did not involve any joint purchasing arrangements. *Saucissons* was an exchange of information about purchase prices.

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113 Decision of 16 July 2020, paras 505–509.

183. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that, through their phone calls, the cold meat manufacturers reduced strategic uncertainty between themselves and distorted their negotiations with slaughterhouses. As a result, the cold meat manufacturers were able to impose 'a mode of organisation that replaced effective competition' on the purchasing market.

184. **Was secrecy a relevant consideration**? No.

Germany – Long Steel Cartel (2019)

185. **Facts**: Three

motor vehicle manufacturers – BMW, Daimler and Volkswagen – were members of the *Wirtschaftsverband Stahl-und Metallverarbeitung* (the German association for steel and metal processing). Between 2004 and 2013 representatives of the car companies met twice a year with steel manufacturers and other companies in the supply chain through the medium of this trade association. They exchanged information on uniform surcharges for the purchase of long steel products. The scrap and alloy surcharges were a significant proportion (about one-third) of the purchase price for long steel.

186. **Outcome**: In November 2019 the Bundeskartellamt found that BMW, Daimler and VW had breached German competition law by agreeing uniform surcharges for the purchase of long steel products.[114] The car manufacturers admitted to their involvement in the cartel and settled the case.

187. **Object and/or effect of restricting competition**: This was an **object** case.

188. **Fines**: The Bundeskartellamt imposed fines totalling around €100 million.

189. **Sector**: The buying market appears to have been the market for the purchase of long steel products, such as scrap and alloy, in Germany. The motor vehicle manufacturers then used long steel products to make car parts, such as crankshafts, connecting rods, camshafts, gear wheels and steering rods.

190. **Type of joint purchasing**: This case did not involve joint purchasing. *Long steel cartel* was a buyer cartel.

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114 Bundeskartellamt Press Release of 21 November 2019.

191. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that the three motor vehicle manufacturers distorted the process of competition by ceasing to negotiate surcharges individually with their respective suppliers.

192. **Was secrecy a relevant consideration**? It is not apparent from publicly available materials whether secrecy played a role in the Bundeskartellamt's reasoning.

Italy – *Centrale Italiana* (2014)

193. **Facts**: Centrale Italiana was a buying alliance between four major retail chains in Italy: Coop Italia, Despar Servizi, Il Gigante, Disco Verde and Sigma.[115] The aim of the alliance was to negotiate 'framework agreements' on behalf of the chains and seek lower purchase prices for daily consumer goods.

194. **Outcome**: In 2013 the L'Autorità Garante della Concorrenza e del Mercato ('AGCM') suspected that the parties were using Centrale Italiana as a way of coordinating their behaviour beyond joint negotiations. The AGCM was concerned that Centrale Italiana facilitated collusion on prices in the purchasing and selling markets. In 2014 the AGCM closed the file because the parties gave commitments to terminate Centrale Italiana. The Coop, Disco Verde and Sigma would continue to negotiate jointly some of their purchases but only from suppliers that have a turnover of more than €2 million and do not supply private label products.

195. **Object and/or effect of restricting competition**: It is not clear from publicly available materials whether the AGCM considered this was an object and/or effect case.

196. **Fines**: None.

197. **Sector**: The buying market was the procurement of various daily consumer goods in Italy. The selling markets were the retail markets for consumer goods in regions of Italy.

198. **Type of joint purchasing**: This case involved a buying alliance that was designed to improve its members' bargaining power vis-à-vis suppliers.

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115 AGCM Press Release of 26 September 2014, Centrale d'acquisto per la Grande Distribuzione Organizzata.

199. **Theory of harm/benefit/reason why no harm to competition**: The AGCM examined two theories of harm. The first was that the bargaining strength of the alliance might harm upstream suppliers and thereby threaten their viability and ability to remain in the market. The second was that the alliance would facilitate collusion in the downstream selling markets, because the members made most of their purchases through the alliance and held market shares of between 40–50% in over 30 regional selling markets.

200. **Was secrecy a relevant consideration**? No.

Ireland – *Glassmatix system* (2003)

201. **Facts**: Four major insurers – Allianz Ireland, AXA Insurance, Hibernian General Insurance, and Royal & Sun Alliance – created a consortium to launch the 'Glassmatix system' in Ireland.[116] Glassmatix was and is a vehicle repair estimation system used for motor vehicle repairs, which provides information on labour times for repairs and up-to-date manufacturer parts prices. A complaint was made to the Irish competition authority that the four insurers had used the Glassmatix system as a means to fix the purchase prices of motor vehicle repair services. The insurers collectively held 65–70 % share of the Irish private motor vehicle insurance market at the time.

202. **Outcome:** The Irish competition authority was concerned that the four insurers could use the Glassmatix system to fix the price of motor vehicle repair services by, for example, jointly setting the hourly rate paid to repairers. The authority considered that this might distort competition in the purchasing market for motor vehicle repairs. In the authority's view, the arrangements 'could create a climate in which the members of the consortium agree to fix at least some of the costs of providing motor vehicle insurance thereby facilitating cooperation in the market for motor vehicle insurance'.[117] Each of the insurers denied breaching the domestic equivalent of Article 101. However, they gave binding undertakings that modified their use of the Glassmatix system. In particular the insurers undertook not to coordinate labour rates or other costs with other participants or any other motor vehicle insurance undertaking.[118]

116 Decision No. E/03/001 of 26 August 2003.

117 Ibid, para 2.42.

118 Ibid, para 3.5.

203. **Object and/or effect of restricting competition**: The authority's preliminary assessment was that the Glassmatix arrangements could give rise to a restriction of competition by object.

204. **Fines**: None.

205. **Sector**: The buying market was the purchase of motor vehicle repair services in Ireland. The selling market was the sale of private motor vehicle insurance in Ireland.

206. **Type of joint purchasing**: The insurers created a consortium to introduce, implement and operate the Glassmatix motor vehicle repair estimation system in Ireland. The arrangements did not provide for joint purchasing as such; rather they created the opportunity for the insurers to coordinate their behaviour on the purchasing market, for example by agreeing a fixed rate of increase of the labour rate for repairers in implementing the Glassmatix system.

207. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that the Glassmatix system enabled the insurers to fix the price of motor vehicle repair costs and thereby eliminate competition between them, on the one hand, and vehicle repairers on the other, in the purchasing market for the purchase of vehicle repair services.

208. **Was secrecy a relevant consideration**? No.

Netherlands – *Real Estate Auctions* (2011) and (2013)

209. **Facts**: When individuals fail to repay the mortgage on his or her house, they may fall into default and end up in foreclosure. When this happens the lender may require the homeowner to leave and put the house up for auction. Individuals and real-estate traders can bid to buy houses at 'foreclosure auctions'. This case concerned 65 real-estate traders that manipulated the foreclosure auctions between 2000 and 2009 to their advantage and to the detriment of the ultimate vendors of houses. The participating real-estate traders manipulated official auctions in order to drive down home prices and then re-auctioned homes at separate secret after-auctions (known as *naveilingen* in Dutch), often at a higher price. The difference between the price at the official auction and at the after-auction (the profit) was then shared among the participating traders.

210. **Outcome**: In 2011, and again in 2013, the Netherlands Competition Authority decided that real-estate traders had infringed competition law by keeping property prices at foreclosure auctions artificially low in order to make a profit at secret after-auctions.[119] Homeowners sold homes for less than would have been the case in auctions that were unaffected by the traders' manipulative behaviour. The Competition Authority subsequently published 'Guidelines for foreclosure auctions of real estate' in order to provide guidance on what is, and is not, lawful conduct at foreclosure auctions.[120]

211. **Object and/or effect of restricting competition**: This was an **object** case.

212. **Fines**: The total fines imposed in 2011 amounted to €6.3 million on the 14 most active real-estate traders. The total fines imposed in 2013 amounted to €6.4 million on 65 real-estate traders. Both decisions were appealed. The District Court of Rotterdam upheld the Authority's findings of an infringement, but reduced the fines marginally.[121]

213. **Sector**: The buying market was the purchase of foreclosed houses from banks and other lenders at auction in the Netherlands. The selling market was the resale of houses to individuals in the Netherlands.

214. **Type of joint purchasing**: This case did not involve joint purchasing. *Real Estate Auctions* was a buyer cartel.

215. **Theory of harm/benefit/reason why no harm to competition**: There appear to have been two theories of harm that were relevant in this case. The first was that the real-estate traders distorted the process of competition at foreclosure auctions. The second was that the traders' manipulative behaviour was harmful to suppliers as a wrong in itself: the necessary consequence of the traders' bid-rigging was that artificially lower prices were paid to the owners of foreclosed homes.

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119 Decisions of 19 December 2011 and 4 February 2013.

120 www.acm.nl/en/publications/publication/11093/NMa-fines-more-real-estate-traders-for-manipulation-of-foreclosure-auctions.

121 Judgment of 18 December 2014, ECLI:NL:RBROT:2014:10174 (10% reduction on the ground of financial hardship).

216. **Was secrecy a relevant consideration**? It is not clear from publicly available materials in English whether secrecy played a role in the reasoning of the Authority or the Court.

Netherlands – *Used Cooking Oil* (2021)

217. **Facts**: Used cooking oil is an important and sustainable raw material for biodiesel fuel. 'Collectors' buy used cooking oil primarily from businesses in the hospitality and food industry. A major collector of cooking oil, Rotie, discussed purchase prices and suppliers with two of its competitors, Nieuwcom and another company (that filed for bankruptcy). The discussions took place in private, often by email and WhatsApp. They concerned confidential and sensitive information such as purchase prices and who visited which supplier. The parties also monitored each other's behaviour and challenged the other if they offered too high a price to a supplier.

218. **Outcome**: The Dutch Authority for Consumers and Markets found that Rotie and Nieuwcom had made 'cartel agreements regarding the purchase of used cooking oil'.[122] The Authority considered that the two companies colluded in order to keep purchase prices as low as possible, which, in turn, improved their margins. They also shared suppliers among each other, and exchanged competitively-sensitive information between 2012 and 2018. In the ACM's view small hospitality businesses, such as restaurants and snack bars, were harmed by the buyer cartel agreements.

219. **Object and/or effect of restricting competition**: This was an **object** case.

220. **Fines**: The total fines imposed on the two companies amounted to €4 million; the total fines imposed on the three individuals involved in the cartel was €190,000.

221. **Sector**: The buying market was the purchase of used cooking oil in the Netherlands. The selling market appears to have been the sale of biodiesel fuel in the Netherlands.

222. **Type of joint purchasing**: *Used Cooking Oil* was a buyer cartel.

223. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm appears to have been that the agreements and information exchanges between the collectors distorted the process of competition for used cooking oil. The ACM's

122 Decision of 5 October 2021.

press release specifically states that small hospitality businesses, such as restaurants and snack bars, were harmed by the buyer cartel agreements.

224. **Was secrecy a relevant consideration**? It is not clear from publicly available materials in English whether secrecy played a role in the reasoning of the Authority.

Romania – *Timber* (2020)

225. **Facts**: The Competition Council carried out an *ex officio* investigation into tenders held by the state forest management company. 31 companies agreed not to compete against each other in tenders for wood exploitation to keep prices as low as possible. They buttressed their arrangements by exchanging commercially sensitive information regarding the raw materials, the timber procurement policy and the commercial strategy of participation within certain tenders for timber lots.

226. **Outcome**: The Competition Council found that 31 companies had infringed EU and Romanian competition law from 2011 to 2016; 13 of them admitted the infringement.[123] Following this investigation the RCC submitted recommendations for improving the competitive environment in the sector.

227. **Object and/or effect of restricting competition**: *Romanian Timber* was an **object** case.

228. **Fines**: The total fines imposed in this case were RON 129.6 million (approximately, €26.6 million).

229. **Sector**: The buying market was the purchase of timber in Romania. The selling market was (presumably) the sale of wood products in Romania.

230. **Type of joint purchasing**: This case did not involve joint purchasing. *Romanian Timber* was a buyer cartel.

231. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm appears to have been that the collusive tendering and exchanges of information distorted the process of competition for the procurement of timber.

123 Decision no. 71/2020

232. **Was secrecy a relevant consideration**? It is not clear from publicly available materials in English whether secrecy played a role in the reasoning of the CNMC.

Spain – *Dairy* (2015) and (2019)

233. **Facts**: Between 2000 and 2013 ten of the largest Spanish and international dairy companies, including Danone and Nestlé, exchanged information on current and future purchase prices, the volumes of raw milk purchased from particular farmers and the level of surplus unprocessed cow's milk. This information was of a kind that would normally be regarded as commercially sensitive and confidential. The objective of the exchanges was to enable the parties to control the market for raw cow's milk to their advantage.

234. **Outcome**: The Comisión Nacional de Mercados y Competencia ('CNMC') condemned the dairy companies' behaviour in a decision in 2015, but that decision was set aside on appeal. In 2019 the CNMC adopted a second infringement decision.[124] The CNMC considered that the information exchange was an infringement by object. In particular, the exchange of information on raw milk purchase prices allowed the dairy companies to stop competing with each other in the purchasing market, allowing them to avoid price rises at times of scarcity. The exchange of information on surpluses of raw milk and a proposal to withdraw milk from the market in a concerted manner was intended to raise the final price of the milk. Cartel damage claims has announced that it is intending to bring an action for damages on behalf of dairy farmers in Spain.[125]

235. **Object and/or effect of restricting competition**: This was an **object** case.

236. **Fines**: The CNMC's second decision imposed fines totalling €80.6 million.

237. **Sector**: The buying market was the purchase of supply of unprocessed cow's milk in Spain. The selling market was the sale of processed cow's milk and other dairy products in Spain.

238. **Type of joint purchasing**: This case did not involve joint purchasing. *Spanish Dairy* was an exchange of confidential and commercially sensitive information among competitors.

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124 Decision of 18 July 2019.

125 https://carteldamageclaims.com/our-cases/milk-cartel/.

239. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that the information exchanges reduced uncertainty as to the risks of competition in the market for the supply of unprocessed cow's milk. The CNMC expressly found that the parries had managed to reduce raw milk prices by approximately 10–12%.

240. **Was secrecy a relevant consideration**? It is not clear from publicly available materials in English whether secrecy played a role in the reasoning of the CNMC.

Spain – *Used Batteries* (2018)

241. **Facts**: Azor Ambiental, Exide Technologies, SLU and Recuperación Ecológica de Baterías SL were and are purchasers of used batteries for second-hand vehicles in Spain. Between 2008 and 2012 the three companies exchanged commercially sensitive information regarding the purchasing prices for used batteries. The parties regularly contacted each other by email, phone, face-to-face meetings and indirect communications through common suppliers and collectors of used batteries. These contacts enabled each party to identify the current and future purchase prices of its two main rivals on a regular basis, thereby removing an important element of uncertainty on the part of each as to the activities of the others.

242. **Outcome**: The CNMC concluded that information exchange breached Article 101 and Article 1 of the Spanish Competition Act.[126] In the CNMC's view the exchange enabled the parties to coordinate the setting of purchase prices. The exchange of such confidential information undermined the principle that every trader must determine its market strategy independently.

243. **Object and/or effect of restricting competition**: This was an **object** case.

244. **Fines**: Recobat was fined €3.37 million and Exide Technologies was fined €2 million.

245. **Sector**: The buying market was the purchase of used batteries for motor vehicles. The selling market was (presumably) the resale of used car batteries for motor vehicles.

126 Decision of 12 July 2018.

246. **Type of joint purchasing**: This case did not involve joint purchasing. *Spanish Used Batteries* was a case involving an exchange of confidential and commercially sensitive information among competitors.

247. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that the information exchanges reduced uncertainty about the future competitive conduct of rivals and, in particular, the purchase prices that they were likely to pay to suppliers.

248. **Was secrecy a relevant consideration**? It is not clear from publicly available materials in English whether secrecy played a role in the reasoning of the CNMC.

D. THIRD COUNTRIES

Malaysia – *Car Insurance* (2020)

249. **Facts**: The General Insurance Association of Malaysia ('PIAM') is the national trade association of general insurance companies in Malaysia. If a driver has an accident, their insurer is responsible for paying the costs of the motor vehicle repairs.[127] The repairs are carried out by car repair workshops (known as 'PARS workshops'). A complaint was made to the Malaysia Competition Commission ('MyCC') that PIAM and its 22 member insurers had collectively fixed both the discount for car parts used to repair certain vehicles and the labour hourly rate for PIAM-approved repairer workshops.

250. **Outcome**: The MyCC condemned PIAM and its members for fixing both the discount rate for certain car parts and the hourly labour rates. The MyCC rejected the parties' argument that this conduct did not pursue an anti-competitive object. The MyCC's view was clear: 'the conduct in question, by its nature, is injurious to the proper functioning of competition as it is artificially limiting the commercial negotiations between the individual insurers and repairers from independently determining the parts trade discounts and labour rates for motor repair services.'[128] The MyCC stated that, in future, the discount rate for parts and the repairer's labour rate per hour should be determined independently by the insurers.

251. **Object and/or effect of restricting competition**: This was an **object** case.

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127 Decision of 29 October 2020, para 78.

128 Ibid, para 194.

252. **Fines**: The MyCC fined 22 general insurance companies, including well-known insurers such as AIG and Allianz, a total of RM 130.24 million (approximately, €35.7 million).

253. **Sector**: The buying market was the purchase of car repair services, including car parts, from insurer approved repairers in Malaysia. The selling market was for the supply of private motor insurance to individual drivers in Malaysia.

254. **Type of joint purchasing**: This case did not involve joint purchasing; the PIAM fixed the car part discounts and repairer hourly rates.

255. **Theory of harm/benefit/reason why no harm to competition**: The MyCC's theory of harm was that PIAM's conduct allowed its members to 'eliminate in advance any uncertainty about the future conduct of the Parties and to take into account the information disclosed in determining the policy which they intended to follow on the market.'[129]

256. **Was secrecy a relevant consideration**? No.

New Zealand – *Residential Property* (2019)

257. **Facts**: Ronovation was a family-owned company that offered advisory services to clients who wanted to buy residential property in the Auckland area for investment purposes. Ronovation's services included the provision of information about what to look for in a property; how to negotiate with the vendor or bid at auction; how to renovate the property after acquisition; and how to find and manage tenants. Ronovations developed a set of rules to make sure that its clients did not compete to buy the same properties. The rules required the clients to notify one another of their intention to purchase a property, following which they were given priority to purchase that property. The rules were posted on Ronovation's Facebook page in 2011 and remained there until 2018.

258. **Outcome**: The rules came to the attention of the Commerce Commission of New Zealand which brought proceedings against Ronovation in the High Court. Ronovation promptly admitted liability, but contested the level of the proposed penalty. As explained below, the High Court imposed a fine and rejected Ronovations' argument that a buyer cartel is intrinsically less harmful than a seller cartel.[130] The

129 Ibid, paras 180 and 194.

130 Ibid, para 38.

High Court also agreed with the Commission that buyer-side conduct can result in material harm even where there is no clear reduction in supply or capacity.[131]

259. **Object and/or effect of restricting competition**: This was an **object** case.

260. **Fines**: The High Court imposed a penalty of $400,000 on Ronovation for price fixing in Auckland's residential property market.[132]

261. **Sector**: The buying market was the purchase of advisory services for buying residential property in the Auckland area for investment purposes. The downstream market appears to have been the purchase of residential property in the Auckland area.

262. **Type of joint purchasing**: This case did not involve joint purchasing. *Residential Property* was an exchange of confidential and commercially sensitive information among competitors.

263. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that Ronovation's rules suppressed competition between its clients in order to avoid driving up prices for the properties they were seeking to acquire. In the High Court's view the 'conduct was therefore designed to suppress the normal rivalry between members that would arise in a competitive sale process, in a manner that was to the detriment of any vendors who were directly impacted by the operation of the Agreement.'[133] As a consequence, clients may have paid less for their individual property purchases than they otherwise would have.[134]

264. **Was secrecy a relevant consideration**? No.

New Zealand – *Trade Me Property* (2020)

265. **Facts**: Trademe.co.nz is New Zealand's largest online residential listings platform. Until 2013, Trade Me charged a fixed monthly subscription fee to estate agents that wished to advertise properties for sale. In 2013, however, Trade Me changed its fee structure so that it would charge for each residential listing placed on its website. 13 real estate agencies in the Hamilton area subsequently met to discuss Trade Me's

131 Ibid, para 39.

132 [2019] NWHC 2303.

133 Ibid, para 40.

134 Ibid, para 55.

new pricing policy. The Commerce Commission of New Zealand alleged that the estate agencies had entered into an arrangement or reached an understanding that had the purpose or effect of fixing, controlling or maintaining the price of services provided by the estate agencies in competition with each other, i.e. the promotion and marketing of property for sale.[135] In other words, the agencies agreed to pass on the new listing fee to the relevant vendor.

266. **Outcome**: A number of agencies admitted their involvement in an unlawful price-fixing arrangement. Two agencies, however, disputed the Commission's allegations. Accordingly, the Commission brought proceedings against them and their owner before the New Zealand High Court. The High Court held that the Commission had failed to prove that the arrangement had either the purpose or the effect of fixing the prices of the agencies' own services since the agencies remained free to absorb the Trade Me listing fee if they wanted to do so.[136] The Court of Appeal reversed this judgment because the purpose of the arrangement was to fix the price of the agencies' services. It was sufficient that the agencies had agreed a default position that the Trade Me listing fee would not be absorbed and instead would be paid by their customers (i.e. the vendors of properties).[137] The Supreme Court of New Zealand upheld the Court of Appeal's judgment.[138] The Supreme Court had no doubt that a substantial purpose of the arrangement was to pass on the Trade Me listing fee and, as such, control the price the estate agents charged for their services.

267. **Object and/or effect of restricting competition**: This was an **object** case.

268. **Fines**: Those agencies that admitted their involvement in the cartel arrangement paid fines totalling $3 million. The question of pecuniary penalties was remitted to the High Court in the contested proceedings.

269. **Sector**: The buying market was the purchase by estate agents of advertising services through the medium of an online property portal. The selling market was the provision of estate agency services, in which estate agents compete with each other to offer services to potential vendors and lessors of property.

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135 This reflected the wording of the relevant provision of the Competition Act in New Zealand.

136 *Commerce Commission v Lodge Real Estate Limited* [2017] NZHC 1497.

137 [2018] NZCA 523.

138 [2020] NZSC 25.

270. **Type of joint purchasing**: This case did not involve joint purchasing. *Trade Me Property* was an arrangement between estate agents to pass on a significant input cost to vendors of residential property.

271. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was that, by agreeing to pass on Trade Me's new listing fees, the estate agents eliminated the risk that one of them would 'steal a march' on the others by offering to absorb the listing fee, which would otherwise have pressurised the others to respond or risk losing listings.[139]

272. **Was secrecy a relevant consideration**? No.

Singapore – *Public Auctions of Motor Vehicles* (2013)

273. **Facts**: Motor vehicle traders participate in auctions held by public authorities to sell decommissioned public transport, police, defence and similar motor vehicles. From at least 2008 12 motor vehicle traders (the 'parties') agreed to refrain from bidding against each other at these public auctions. Instead, Pang's Motor Trading Ltd ('Pang') was chosen to bid for the vehicles at the public auctions most of the time. Pang would hold a second, private auction in which the parties would bid among themselves for the vehicles bought by Pang. The difference in the price paid by Pang at the public auction and the price paid at the private auction would then be shared between the parties. The parties' agreement to suppress bids at public auctions of motor vehicles lasted until 2011.

274. **Outcome**: After receiving information from other government agencies, the Competition Commission of Singapore ('CCCS') decided that the object of the parties' bid-suppression agreement was to restrict competition at public government auctions in Singapore. The CCCS found that competitive bidding is an essential element of auction sales.[140] The parties' bid-suppression agreement conflicted with that process of rivalry. Pang appealed against the CCCS's decision, but the decision was upheld in its entirety by the Singaporean Competition Appeal Board.[141]

275. **Object and/or effect of restricting competition**: This was an **object** case.

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139 Ibid, para 178.

140 Decision of 28 March 2013, para 41.

141 Judgment of 14 January 2015.

276. **Fines**: The CCCS imposes fines totalling $179,071.

277. **Sector**: The buying market was the purchase of motor vehicles acquired by way of public auctions held by government agencies in Singapore. The selling markets appear to have been the sale of the used motor vehicles won at the public auctions and the sale of scrap metal.

278. **Type of joint purchasing**: This case did not involve joint purchasing. *Public auctions of Motor Vehicles*; it was a buyers' bid suppression arrangement.

279. **Theory of harm/benefit/reason why no harm to competition**: Auctions consist of a sale of an asset to the highest bidder. The theory of harm in this case was that the parties' bid-suppression arrangement distorted the process of competition to buy motor vehicles at public government auctions. It did so by removing the uncertainty (and thus the risks) as to the bidding conduct of one another at the public auctions.[142] It might be added that the arrangement was clearly designed to keep auction prices artificially low and thereby deprives public authorities of their expectancy of the highest price in a competitive market.[143]

280. **Was secrecy a relevant consideration**? In setting the fines the Commission specifically noted that the parties' private arrangement 'created the false impression that the winning bids were actually the result of a fair and competitive bidding process',[144] which supported its view that it was a serious infringement of section 34 of the Competition Act (the domestic equivalent of Article 101 TFEU).

South Africa – *Scrap Steel* (2016)

281. **Facts**: Between 1998 and 2008 four manufacturers of steel products – ArcelorMittal, Columbus Steel, Cape Gate and Scaw Metals – fixed the purchase price of scrap metal in South Africa. They did so by agreeing a common approach to a standard pricing formula for scrap metal and then meeting with scrap merchants (the suppliers of scrap steel) to agree the formula. The four steel manufacturers subsequently coordinated their approach to discounts and to annual negotiations of changes to the pricing formula.

142 Ibid, para 243.

143 Ibid, para 256.

144 Ibid.

282. **Outcome**: ArcelorMittal, Columbus and Cape Gate admitted their involvement in the scrap metal buyer cartel, and agreed to pay fines. Scaw had voluntarily blown the whistle and provided the Commission with decisive evidence of the cartel; it was given 100% immunity from a fine.

283. **Object and/or effect of restricting competition**: This was an **object** case.

284. **Fines**: ArcelorMittal agreed to pay a fine of 1.5 billion Rand.[145] Columbus Stainless agreed to pay a penalty of 32.6 million Rand.

285. **Sector**: The buying market was the purchase of scrap metal in South Africa. The selling market was the sale of various steel products in South Africa and elsewhere.

286. **Type of joint purchasing**: This was not a case of joint purchasing. *Scrap Steel* involved a buyer cartel.

287. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm appears to have been that the agreement between the steel manufacturers restricted or distorted the process of competition in the market for buying scrap metal.

288. **Was secrecy a relevant consideration**?

Turkey – *Dried Figs* (2012)

289. **Facts**: According to the OECD's summary of competition developments in Turkey,[146] 10 undertakings active in the purchasing of dried figs in the Aydın province agreed to fix the purchase price that they paid to suppliers.

290. **Outcome**: In March 2012 the Turkish Competition Authority decided that agreements aimed at fixing maximum purchase prices violate Turkish competition law. The Authority imposed fines and recommended that the Government should promote awareness of the competition rules in the agricultural sector.

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145 ArcelorMittal was also fined for its participation in a separate cartel in relation to long steel.

146 See OECD Annual Report on Competition Policy Developments in Turkey – 2012.

291. **Sector**: The buying market was for the purchase of dried figs in Turkey. The selling market seems to have been the resale of dried figs in Turkey and potentially elsewhere.

292. **Object and/or effect of restricting competition**: This was an **object** case.

293. **Type of joint purchasing**: This was not a joint purchasing case. *Dried Figs* was a buyer cartel.

294. **Theory of harm/benefit/reason why no harm to competition**: The theory of harm was, presumably, that the agreement fixed purchases prices and therefore eliminated competition on price between purchasers for dry figs in the Aydın province.

295. **Was secrecy a relevant consideration?** It is not clear from publicly available materials in English whether secrecy played a role in the reasoning of the Authority.

UK – *Makro-Self Service/Palmer & Harvey* (2010)

296. **Facts**: Makro-Self Service and Palmer & Harvey, two grocery wholesalers, proposed to create a jointly-owned company, PalMak, which would jointly negotiate the terms and conditions of purchases from certain suppliers for food and other products. The parties' combined share of the market for purchase of daily consumer goods was less than 15%. The parties' combined share of the market for the supply by independent wholesalers to independent retailers was 15–20%. Each party remained free to negotiate outside the joint purchasing agreement, with the outcomes of those negotiations kept secret.

297. **Outcome**: In a short-form opinion the former UK Office of Fair Trading ('OFT') said that a joint purchasing agreement would be 'unlikely' to have as its object the restriction of competition.[147] It also expressed the view that, in the absence of parallel networks of similar agreements, the joint purchasing agreement was unlikely to cause harm to competition where, as here, the parties did not have market power in the selling market.[148] Nor (for the same reason) did the commonality of the parties' input costs – the agreement covered 45–55% of the parties' variable costs – give rise to anti-competitive effects.[149] The OFT also made certain comments that

147 Short-form opinion of 27 April 2010, para 6.1.

148 Ibid, para 6.3.

149 Ibid, paras 1.6 and 6.13–6.16.

led to the amendment of the joint purchasing agreement relating to the exclusion of certain suppliers (on the basis of a specified market share threshold) and prevented exchanges of information that were unrelated to (and unnecessary for) the joint purchasing.

298. **Object and/or effect of restricting competition**: Neither.

299. **Fines**: None.

300. **Sector**: The buying market was the purchase of daily consumer goods in the UK. The selling market was the supply of those goods by independent wholesalers to independent and convenience retailers in the UK.

301. **Type of joint purchasing**: A jointly-owned company (PalMak) was set up to negotiate with selected suppliers on behalf of its parent companies. The parent companies then bought products from those suppliers on the terms negotiated by PalMak.

302. **Theory of harm/benefit/reason why no harm to competition**: The OFT's theory of harm appears to have been that a joint purchasing agreement will cause anti-competitive effects where the parties have sufficient market power in the downstream selling markets. The parties did not have such power on the facts of this case.

303. **Was secrecy a relevant consideration**? No.

304. **Comment**: The OFT's short-form opinion in this case did not conclude whether or not there had been or still was an infringement of EU or UK competition law. It is interesting to note that the OFT emphasised the importance of the parties' market position on the selling market. The OFT went as far as to say that, in the absence of parallel networks of similar agreements, joint purchasing agreements are unlikely to cause harm where the parties have no market power in the relevant selling market (without seemingly considering the possible effects in the relevant purchasing market).

US – *Live Poultry Dealers' Protective Association* (1924)

305. **Facts**: In 1914 300 wholesale buyers of live poultry in the city of New York formed the Live Poultry Dealers' Protective Association ('Protective Association'). Before the defendants adopted the conduct complained about, the prices for live poultry had

been determined without any rule and according to the negotiations of the buyers and sellers. The members of the Protective Association considered the market was in a 'demoralised condition' and that prices were being affected by 'fake sales', which resulted in higher prices to end-consumers. It was the purpose of the Protective Association to eliminate opportunities for bad trade practices and to give both the buyers and sellers a reliable guide upon which to deal. To that end, in 1923 a committee of seven members began to fix the daily price for all purchases made by any members of the association. It was also agreed that members would cease to deal with any suppliers that failed to adhere to the prices fixed by the committee.

306. **Outcome**: In 1924 the Second Circuit Court of Appeals upheld the injunction granted by the District Court which forbade members of the Protective Association from fixing poultry purchase prices and from boycotting suppliers that did not observe those prices.[150] The Court rejected the defendants' arguments about a lack of an effect on inter-state commerce and that an agreement to fix purchase prices was desirable. Judge Learned Hand's conclusion was unequivocal: 'if one thing were definitely settled, it was that the Sherman Act forbade all agreements preventing competition in price among a group of buyers, otherwise competitive, if they are numerous enough to affect the market.'

307. **Object and/or effect of restricting competition**: The buyer cartel was a *per se* violation of section 1 of the US Sherman Act 1890.

308. **Fines**: None.

309. **Sector**: The buying market was for the purchase of live poultry at the Washington Market in New York. The selling market was (presumably) the sale of poultry to end-consumers.

310. **Type of joint purchasing**: This case did not involve joint purchasing. *Live Poultry Dealers' Protective Association* was a buyer cartel in that the Protective Association fixed the price that members would pay to live poultry.

311. **Theory of harm/benefit/reason why no harm to competition**: The Court did not articulate a theory of harm, but it appears that it was concerned about the suppression of the competitive process in the purchasing market. Judge Learned Hand held that 'Congress deliberately prefers unorganized individualism in

150 4 F.2d 840 (2d Cir. 1924).

bargaining to the danger, real or fancied, which may attend any efforts to control it by concerted efforts.'

312. **Was secrecy a relevant consideration**? No.

US – *Topco v US* (1972)

313. **Facts**: Topco was a cooperative association that was founded in the 1940s by a group of small, local grocery chains. Topco purchased and distributed to its 25 members more than 1,000 different grocery items, most of which had brand names owned by Topco. Topco's bylaws provided that no member could sell Topco brand products outside the territory in which it was 'licensed' by Topco. This meant that expansion into another member's territory was, in practice, possible only with the other members' consent. Topco defended these territorial divisions on the basis that they were necessary for to compete with larger national and regional grocery chains. The United States government brought an injunction action alleging a violation of section 1 of the Sherman Act.

314. **Outcome**: The Supreme Court held that Topco's arrangements to allocate territories between its members were a *per se* violation of section 1 of the Sherman Act.[151] The Supreme Court rejected the argument that the arrangements were necessary to enable Topco's members to compete with larger supermarkets. Instead, the Court held that 'Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco brand products.'[152]

315. **Object and/or effect of restricting competition**: The buyer cartel was a *per se* violation of section 1 of the US Sherman Act 1890.

316. **Fines**: None.

317. **Sector**: The buying markets were the purchase of more than 1,000 different items, most of which have brand names owned by Topco. The selling markets appear to have been local markets for the supply of groceries by grocery retailers.

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151 405 US 596, at 608–609 (1972).

152 405 US 596, at 611 (1972).

318. **Type of joint purchasing**: Topco's basic function was to serve as a purchasing agent for its members, all of whom were SMEs. Topco procured and distributed to the members more than 1,000 different food and related non-food items. Topco did not own any manufacturing, processing, or warehousing facilities, and the items that it purchased for members were usually shipped directly from the supplier to the members. Payment was made either to Topco or directly to the supplier at a cost that was virtually the same for the members as for Topco itself.

319. **Theory of harm/benefit/reason why no harm to competition**: This case did not call into question Topco's joint purchasing arrangements. The Supreme Court condemned horizontal market-sharing in the downstream selling markets, which, by its nature, eliminated competition between Topco's members. This had the same adverse effect upon consumer welfare that other horizontal restrictions may produce: a reduction in output and an increase in price.

320. **Was secrecy a relevant consideration**? No.

US – *Northwest Wholesale Stationers* (1985)

321. **Facts**: Northwest was a wholesale purchasing cooperative that acted on behalf of office supply retailers in the Pacific Northwest States. Pacific became a member of Northwest in 1958, but was expelled in 1978. Pacific was expelled because it had failed to notify Northwest of a change in its ownership (contrary to the cooperative's bylaws). Pacific sued Northwest alleging a violation of section 1 of the Sherman Act. Pacific's case was that Northwest's expulsion of Pacific from the cooperative without a fair hearing was a group boycott that limited Pacific's ability to compete.

322. **Outcome**: The US Supreme Court held that Pacific's expulsion from Northwest did not imply 'anti-competitive animus' and was not so likely to result in anti-competitive effects that it should be condemned as illegal *per se*.[153] Rather, the Court recognised that wholesale purchasing cooperatives have to establish and enforce rules in order to function effectively. Disclosure rules, such as the one on which Northwest relied to expel Pacific, provide a cooperative with a legitimate means for monitoring the creditworthiness of its members. The Court did not consider that such rules harmed

153 The Court held that the category of restraints classed as group boycotts was not to be expanded indiscriminately, and the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor: ibid, at 294.

competition unless the purchasing cooperative had market power, which was not something that Pacific had alleged.[154]

323. **Object and/or effect of restricting competition**: The US Supreme Court did not reach a final conclusion on the substance, but it held that it would be necessary to consider the effects of the impugned rule as part of the rule of reason standard.

324. **Fines**: None.

325. **Sector**: The buying market was the purchase of office supplies in the Pacific Northwest States. The selling market was the wholesale supply of office supplies to retailers in the Pacific Northwest States.

326. **Type of joint purchasing**: This case did not involve a challenge to the lawfulness of joint purchasing. It concerned the lawfulness of the way in which a purchasing cooperative had enforced its by-laws.

327. **Theory of harm/benefit/reason why no harm to competition**: The US Supreme Court emphasised the benefits of wholesale purchasing cooperatives such as Northwest. Such cooperatives were 'not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be designed to increase economic efficiency and render markets more, rather than less, competitive. The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.'[155]

328. **Was secrecy a relevant consideration**? No.

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154 472 US 284, at 298 (1985).

155 472 US 284, at 295 (1985).

efficiency and render markets more, rather than less, competitive. The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.'[155]

328. **Was secrecy a relevant consideration**? No.

[155] 472 US 284, at 295 (1985).

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