

Case Digest: COMP/AT.39847 – E-BOOKS

Case Title: Case COMP/AT.39847 – E-BOOKS **Date of Decision:** December 12, 2012 **Legal Basis:** Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement; Council Regulation (EC) 1/2003.

1. Parties Involved

The Decision was addressed to the following entities:

- **The "Four Publishers":** Hachette Livre SA, HarperCollins Publishers (Limited and L.L.C.), Georg von Holtzbrinck/Macmillan, and Simon & Schuster.
- **Apple, Inc..**
- *Note:* Proceedings against **Pearson plc (Penguin)** were handled separately and remained ongoing at the time of this decision.

2. Facts and Background

Historically, e-books were sold under a **wholesale model**, where retailers were free to set retail prices. In 2007, Amazon launched its Kindle platform and set a standard **USD 9.99 pricing policy** for bestsellers, which was often at or below the wholesale price publishers charged them.

Inter alia -

The Four Publishers became concerned that this low pricing would negatively impact print book sales and their overall business model. Consequently, they sought a collective response to force Amazon to raise its prices.

3. Challenged Conduct

The European Commission's preliminary assessment found evidence of a **concerted practice** involving a common global strategy to raise retail prices in the European Economic Area (EEA). Key elements included:

- **Joint Conversion to Agency Model:** Apple and the Four Publishers coordinated to switch from a wholesale model to an **agency model**, where publishers set the final retail price and the retailer acts as an agent.
- **Parallel Negotiations:** Apple negotiated identical key pricing terms simultaneously with the Four Publishers, ensuring each knew the others were also moving to the agency model.

- **Retail Price MFN (Most Favoured Nation) Clauses:** The agreements with Apple included MFN clauses. If another retailer (like Amazon) sold an e-book for less, the publisher had to match that lower price on Apple's iBookstore.
- **Price Grids:** The agreements included identical maximum retail price grids for new releases, pegged to hardcover list prices.
- **Global Implementation:** This strategy was first implemented in the United States in early 2010 and then rolled out in the EEA (specifically the UK, France, and Germany) using the U.S. agreements as templates.

4. Preliminary Legal Assessment

The Commission provisionally concluded that these practices restricted competition:

- **Restriction by Object:** The concerted practice had the objective of raising retail prices or preventing the emergence of lower prices in the EEA.
- **Concerted Practice:** The Commission found that the publishers' decision to enter into identical agreements with Apple was not independent behavior; it only made economic sense if they knew their competitors were also following suit.
- **Effect on Trade:** The practice was found to have an appreciable effect on trade between EU Member States.

5. Final Commitments (The "Competitive Reset")

To resolve the antitrust concerns without a formal finding of infringement, the parties offered the following **Final Commitments**, which were made legally binding for five years:

1. **Termination of Agreements:** The parties agreed to terminate all existing agency agreements for e-book sales in the EEA.
2. **The "Cooling-Off Period":** For a period of **two years**, publishers must not restrict a retailer's ability to offer discounts or promotions on e-books. Retailers are permitted to discount up to the total value of the commission the publisher pays them over a year.
3. **MFN Ban:** For a period of **five years**, the parties are prohibited from entering into agreements containing retail price MFN clauses, wholesale price MFNs, or commission-based MFNs.

6. Conclusion

The Commission determined that these commitments were sufficient to achieve a **"competitive reset"** in the EEA e-book market by re-introducing uncertainty regarding pricing and business models. Making these commitments binding ended the proceedings against Apple and the Four Publishers regarding the investigated conduct.

Case Digest: Groupement des Cartes Bancaires v. European Commission (C-67/13 P)

1. Case Information

- **Case Name:** Groupement des Cartes Bancaires (CB) v. European Commission
- **Case Number:** C-67/13 P
- **Court:** Court of Justice of the European Union, Third Chamber
- **Date of Judgment:** September 11, 2014
- **ECLI Reference:** ECLI:EU:C:2014:2204
- **Language of the Case:** French

2. Factual Background: The CB System and Pricing Measures

The appellant, Groupement des Cartes Bancaires ("the Grouping"), is an economic interest grouping established to manage the "CB system" in France. The system's primary utility lies in its "interoperability" function, which permits bank cards issued by any member institution to be utilized seamlessly across the entire network. This allows a cardholder to make payments to any merchant affiliated with the system or withdraw cash from any Automated Teller Machine (ATM) operated by any member, regardless of which specific bank issued the card or manages the merchant's account.

The Disputed Pricing Measures

Measure Name	Mechanism Description	Applicability Criteria
MERFA (Mécanisme de régulation de la fonction acquéreur)	A formula-based levy comparing a member's share of total acquisition activities (merchants and ATMs) against its share of total issuing activities. Notably, the sums collected are redistributed among members who contributed to the acquisition business.	Triggered when the ratio of a member's acquisition activities to its issuing activities is less than 0.5.
Membership Fee Reform	A pricing structure consisting of a fixed €50,000 membership fee, plus a fee per active CB card issued during the initial three years of membership.	A supplementary membership fee is levied if a member triples its CB card stock between its third and sixth year of membership.

Dormant Member "Wake-up" Mechanism	A specific fee per CB card issued, designed to address members with historically low activity.	Applies to members whose CB card issuing share in 2003, 2004, or 2005 was more than three times higher than their share in the total CB card activity during the 2000–2002 period.
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3. Procedural History

1. **Notification (2002):** On December 10, 2002, the Grouping notified the Commission of the new pricing measures under Regulation No 17.
2. **Evolution of Objections (2004–2006):** In 2004, the Commission issued a first statement of objections alleging a "secret anti-competitive agreement." However, the Commission subsequently shifted its legal characterization, withdrawing the first statement and issuing a second in 2006. This second statement focused on a "decision by an association of undertakings" having an anti-competitive object or effect.
3. **Commission Decision (2007):** On October 17, 2007, the Commission adopted Decision C (2007) 5060 final. It concluded that the measures infringed Article 81 EC (now Article 101 TFEU), asserting they possessed both an anti-competitive "object" and "effect" by hindering new entrants and limiting price competition in the card-issuing market.
4. **General Court Ruling (2012):** The Grouping sought annulment of this decision. In Case T-491/07, the General Court dismissed the action, upholding the Commission’s finding that the measures inherently constituted a restriction of competition by object.

4. Key Legal Issue

The central legal question before the Court of Justice (CJEU) was whether the General Court erred in law by failing to apply a restrictive interpretation of the concept of "restriction of competition by object" under Article 81(1) EC. Specifically, the Court examined whether the General Court vitiated its judgment by erroneously characterizing the pricing measures as restrictive by their very nature without a sufficient legal and economic analysis of the degree of harm they posed to competition.

5. The CJEU’s Reasoning and Findings

The "Sufficient Degree of Harm" Requirement

The CJEU held that the General Court committed a fundamental error in law by stating that the concept of "restriction by object" should not be interpreted restrictively. The Court clarified that this classification is reserved exclusively for coordination that reveals a "sufficient degree of harm" to competition. For an agreement to be restricted "by object," it must be established that the coordination is, **by its very nature**, harmful to the proper functioning of normal competition. Absent such a finding, the Commission is mandated to conduct a full examination of the coordination's actual or potential effects on the market.

Relevance of the Two-Sided Market Context

The CJEU found that the General Court erroneously ignored the complex interactions inherent in a two-sided market. The Court emphasized that the CB system relies on **indirect network effects**, where the value of the system for cardholders depends on the number of merchants accepting the cards, and vice versa. Because the issuing and acquisition facets are interdependent and essential to the system's viability, the General Court could not legally conclude that a "balancing" mechanism—designed to ensure a ratio between these two activities—was harmful by its very nature. The objective of combatting "free-riding" in such a two-sided system was deemed a legitimate factor that should have precluded a per se finding of anti-competitive object.

Distinction from the BIDS Case

The CJEU rejected the General Court's reliance on the *BIDS* judgment (C-209/07). In *BIDS*, the measures were explicitly intended to change the structure of the market through the withdrawal of competitors to reduce overcapacity. Conversely, the pricing measures in the CB case were intended to achieve a specific ratio between activities to further develop the CB system. Because the CB measures did not seek to consolidate the market via competitor withdrawal, the degree of harm present in *BIDS* was not applicable, and the General Court's analogy was held to be legally flawed.

6. Critique of the General Court's Review Standard

The CJEU determined that the General Court failed to observe the required standard of judicial review by abdicating its responsibility to conduct an in-depth analysis of the legal characterization of the facts. Rather than verifying whether the evidence established a "sufficient degree of harm" based on the wording, objectives, and context of the measures, the General Court largely reproduced the Commission's decision. This failure to review the "legal characterization" of economic information meant the General Court did not fulfill its obligation to ensure the Commission had met the high jurisprudential threshold required for an "object" infringement.

7. Final Ruling and Disposition

The Court of Justice issued the following orders:

- **Judgment Set Aside:** The judgment of the General Court in Case T-491/07 is set aside.
- **Referral:** The case is referred back to the General Court for the specific purpose of examining the "effects" of the pricing measures on competition, a requisite analysis that the General Court had previously erroneously bypassed.
- **Costs:** The decision on costs is reserved.

This case digest summarizes the judgment of the Court of Justice of the European Communities in **Imperial Chemical Industries Ltd. (ICI) v Commission of the European Communities (Case 48/69)**, delivered on July 14, 1972.

Case Overview

- **Applicant:** Imperial Chemical Industries Ltd. (ICI), Manchester, United Kingdom.
 - **Defendant:** Commission of the European Communities.
 - **Subject Matter:** Application for the annulment of a Commission Decision (July 24, 1969) relating to price-fixing in the dyestuffs industry under Article 85 of the EEC Treaty.
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Facts of the Case

Following an inquiry into price increases in the dyestuffs market between 1964 and 1967, the Commission found that several major producers had engaged in **three uniform price increases**:

1. **January 1964:** A 15% increase in most aniline dyes across several Community countries.
2. **January 1965:** A 10% increase on products not covered by the 1964 hike.
3. **October 1967:** An 8% to 12% increase on all dyes in most Member States.

The Commission concluded these were the result of **concerted practices** and fined several undertakings, including ICI, 50,000 u.a. each. ICI, a company registered in the UK (then a third country), challenged the decision on grounds of lack of jurisdiction, procedural irregularities, and an incorrect application of the concept of concerted practices.

Key Legal Issues

1. **Concerted Practices:** Does parallel behavior in an oligopolistic market automatically constitute a concerted practice prohibited by Article 85(1)?
2. **Jurisdiction (The Economic Unit Doctrine):** Can the Commission exercise jurisdiction over a parent company located outside the Community for conduct carried out by its subsidiaries within the Community?.

3. **Limitation Period:** Was the Commission's power to impose fines barred by the lapse of time?.
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Arguments of the Parties

1. On Concerted Practices

- **ICI (Applicant):** Argued that the price increases were "conscious parallelism" typical of an oligopolistic market. They claimed producers acted independently based on "price leadership" and the need to rectify low profit margins.
- **Commission (Defendant):** Contended that the uniformity, timing, and advance announcements of the increases (which eliminated uncertainty regarding competitors' future conduct) proved a coordinated course of action.

2. On Jurisdiction

- **ICI (Applicant):** Asserted that as a company outside the EEC, it was not subject to the Commission's jurisdiction based on the "effects" of its actions alone, which they claimed violated international law.
 - **Commission (Defendant):** Argued that ICI influenced its subsidiaries within the EEC to implement the price increases. Therefore, the conduct took place *inside* the Common Market.
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The Court's Ruling

On the Concept of Concerted Practice

The Court defined a **concerted practice** as a form of coordination between undertakings which, without reaching the stage of an actual agreement, "knowingly substitutes practical cooperation between them for the risks of competition".

- While parallel behavior alone does not equal a concerted practice, it is **strong evidence** if it leads to conditions not corresponding to normal market conditions.
- In this case, the **advance announcements** of price increases rendered the market transparent and eliminated the risks usually inherent in independent price changes.
- The Court found it "hardly conceivable" that such uniform action across different national markets and product ranges could occur spontaneously.

On Jurisdiction and the "Economic Unit" Doctrine

The Court rejected ICI's jurisdictional challenge by establishing the **Economic Unit Doctrine**:

- The fact that a subsidiary has a separate legal personality is not sufficient to exclude the possibility of **imputing its conduct to the parent company**.
- If a subsidiary "does not decide independently upon its own conduct... but carries out, in all material respects, the instructions given to it by the parent company," they form a **single economic unit**.
- Because ICI ordered its subsidiaries via telex to implement the price increases, the conduct was carried out **directly within the Common Market**, thereby giving the Commission jurisdiction.

On Limitation and Procedures

- **Limitation:** The Court noted that EEC law did not then specify a limitation period for fines. While the principle of legal certainty prevents the Commission from delaying indefinitely, the time elapsed here did not constitute a bar to the fine.
- **Notification:** Notification to a subsidiary within the EEC was deemed sufficient since the parent company received the text and was able to exercise its right to appeal.

Conclusion

The Court **dismissed the application** in its entirety and ordered ICI to bear the costs of the proceedings. The judgment solidified the Commission's power to regulate foreign parent companies that operate through controlled subsidiaries within the EU.

This case digest provides a comprehensive overview of the judgment delivered by the **General Court of the European Union** on December 16, 2020, in the matter of **International Skating Union v European Commission (Case T-93/18)**.

Case Overview

- **Case Citation:** ECLI:EU:T:2020:610
- **Court:** General Court (Fourth Chamber, Extended Composition)
- **Parties:**
 - **Applicant:** International Skating Union (ISU)
 - **Defendant:** European Commission
 - **Interveners:** Mark Jan Hendrik Tuitert, Niels Kerstholt, and the European Elite Athletes Association

Facts of the Case

The ISU is the sole international sports federation recognized by the International Olympic Committee as responsible for regulating figure skating and speed skating. The ISU also organizes and owns the rights to major international speed skating events.

The dispute centered on the ISU's "**eligibility rules**" (**Rules 102 and 103**), which established a **pre-authorization system**. Under these rules, professional skaters could only participate in events authorized by the ISU. Under the 2014 version of the rules, skaters participating in unauthorized events faced a **lifetime ban**. This was revised in 2016 to a system of tiered penalties (warnings to 10-year or lifetime bans) depending on the seriousness of the infringement.

The administrative procedure began in 2014 after two professional speed skaters (the complainants) alleged that these rules prevented them from participating in the "Dubai Grand Prix," an event planned by a third-party organizer, Icederby International. In 2017, the European Commission adopted a decision finding that the ISU's eligibility rules infringed **Article 101 TFEU**.

Key Legal Issues

1. **Restriction of Competition:** Did the ISU's eligibility rules constitute a restriction of competition "by object" or "by effect" under Article 101 TFEU?

2. **Legitimate Sporting Objectives:** Could the rules be justified as inherent and proportionate to legitimate objectives, such as protecting the integrity of the sport from betting risks?
3. **Territorial Scope:** Did the Commission have jurisdiction to rule on the eligibility rules when they affected an event (the Dubai Grand Prix) taking place outside the European Economic Area (EEA)?
4. **Arbitration Rules:** Did the ISU's rules requiring disputes to be resolved exclusively by the **Court of Arbitration for Sport (CAS)** reinforce the competition law infringement?

The Court's Ruling

1. Restriction of Competition by Object

The Court upheld the Commission's finding that the eligibility rules constituted a **restriction of competition by object**. The Court noted that because the ISU is both a regulator and a commercial organizer, it has a clear conflict of interest. Consequently, it must ensure that third parties are not unduly deprived of market access. The Court found the rules lacked clearly defined, transparent, and non-discriminatory authorization criteria, giving the ISU broad discretion to refuse third-party events.

2. Disproportionate Penalties

While the Court acknowledged that protecting the integrity of sport from betting is a **legitimate objective**, it found the ISU's penalties were **disproportionate**. Even the revised 2016 penalties (5 to 10-year bans) were considered excessive given the short average length of a skater's career (eight years).

3. Territorial Scope of Article 101 TFEU

The Court rejected the ISU's argument that the Commission lacked jurisdiction. It ruled that because the eligibility rules prevented skaters from offering services to third-party organizers globally, they were capable of producing **immediate, substantial, and foreseeable effects** within the European Union.

4. Annulment Regarding Arbitration Rules

The Court ruled in favor of the ISU on the issue of arbitration. It found that the Commission was **wrong** to conclude that the CAS arbitration rules reinforced the restriction of competition. The Court held that:

- Arbitration is a generally accepted method of dispute resolution.

- The exclusive jurisdiction of the CAS is justified by the specific nature of the sport and the need for procedural uniformity.
- These rules did not compromise the effectiveness of EU competition law, as athletes and organizers could still seek damages in national courts.

Conclusion and Disposition

The General Court **dismissed the action** regarding the main finding of a competition law infringement (Article 1 of the Commission's decision). However, it **annulled Articles 2 and 4** of the contested decision insofar as they required the ISU to amend its **arbitration rules** as a condition for maintaining its pre-authorization system. Each party was ordered to bear its own costs.

This comprehensive case digest of **Leegin Creative Leather Products, Inc. v. PSKS, Inc.** (2007) is based on the provided source material.

Case Title

Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. ____ (2007).

Facts of the Case

Leegin Creative Leather Products (petitioner) manufactured leather goods and maintained a policy of refusing to sell to retailers that discounted its products below suggested prices. When PSKS, Inc. (respondent), operating as Kay's Closet, refused to comply with this pricing policy, Leegin stopped selling to the store. PSKS filed suit, alleging that Leegin violated Section 1 of the Sherman Act by entering into vertical agreements with its retailers to set minimum resale prices.

Procedural History

- **District Court:** During the trial, the court excluded expert testimony regarding the **procompetitive effects** of Leegin's pricing policy, relying on the precedent set in **Dr. Miles Medical Co. v. John D. Park & Sons Co.** (1911), which established that vertical price-fixing is *per se* illegal. The jury found in favor of PSKS.
- **Fifth Circuit Court of Appeals:** The appellate court affirmed the lower court's decision, declining to apply the **rule of reason** because the *per se* rule from *Dr. Miles* rendered procompetitive justifications irrelevant.
- **Supreme Court:** The Court granted certiorari to determine if vertical price restraints should continue to be treated as *per se* violations.

Issue

Should vertical agreements between a manufacturer and its distributors to set minimum resale prices be considered *per se* illegal under the Sherman Act, or should they be judged under the **rule of reason**?

Ruling

The Supreme Court overruled *Dr. Miles*. The Court held that **vertical price restraints are to be judged by the rule of reason**, which requires a case-by-case analysis of the restraint's history, nature, and effect to determine if it is truly anticompetitive. The decision of the Fifth Circuit was reversed and remanded.

Rationale

The Court's decision to abandon the nearly century-old *per se* rule was based on several factors:

- **Procompetitive Justifications:** Economics literature suggests that minimum resale price maintenance can stimulate **interbrand competition** (competition between different brands). By reducing **intra-brand competition** (competition between retailers of the same brand), manufacturers encourage retailers to invest in services and promotional efforts that help their brand compete against rivals.
- **Prevention of Free Riding:** Without price restraints, discounting retailers might "free ride" on the services provided by high-service retailers, leading to an under-provision of those services.
- **The Standard for Per Se Rules:** *Per se* rules are reserved for restraints that "always or almost always" restrict competition. The Court found that vertical price agreements do not meet this criteria, as they can have both procompetitive and anticompetitive effects depending on circumstances.
- **Evolution of the Law:** The Sherman Act is treated as a **common-law statute** that evolves with economic understanding. Subsequent cases had already undermined the doctrinal underpinnings of *Dr. Miles*, making the *per se* rule inconsistent with the Court's modern approach to other vertical restraints.
- **Relevant Factors for Rule of Reason:** To eliminate anticompetitive uses of price maintenance, courts must consider factors such as the number of manufacturers using the practice, the source of the restraint (e.g., whether it was pushed by a retailer cartel), and the manufacturer's market power.

Dissent

Justice Breyer filed a dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg. The dissenters disagreed with the decision to overrule long-standing precedent.

This case digest provides a comprehensive overview of the judgment in **Case C-260/09 P**, *Activision Blizzard Germany v Commission*, involving the appeal of a decision regarding anti-competitive practices within Nintendo's distribution network.

Case Overview

- **Case Name:** Activision Blizzard Germany GmbH v European Commission.
- **Case Number:** C-260/09 P.
- **Court:** Court of Justice of the European Union (First Chamber).
- **Date of Judgment:** 10 February 2011.

Facts of the Case

Nintendo Co., Ltd. operated a distribution system for video game consoles and cartridges in the European Economic Area (EEA) using both wholly-owned subsidiaries and independent exclusive distributors. **CD-Contact Data GmbH** (the predecessor to Activision Blizzard Germany) served as Nintendo's exclusive distributor for Belgium and Luxembourg starting in April 1997.

Following an investigation into the video games industry, the European Commission found that Nintendo and its distributors participated in a complex of agreements and concerted practices designed to **restrict parallel exports**. Specifically, the Commission found that CD-Contact Data participated in this infringement from 28 October 1997 to the end of December 1997. The Commission concluded that CD-Contact Data and Nintendo had reached a "**concurrence of wills**" to ensure no exports occurred from CD-Contact Data's territory.

Procedural History

1. **Commission Decision (2003/675/EC):** The Commission imposed a **EUR 1 million fine** on CD-Contact Data for infringing Article 81(1) EC.
2. **General Court (Case T-18/03):** CD-Contact Data sought annulment of the decision. The General Court reduced the fine to **EUR 500,000**, citing the company's "exclusively passive role" in the infringement, but otherwise dismissed the action.
3. **Appeal to ECJ:** Activision Blizzard appealed to the Court of Justice to set aside the General Court's judgment.

Key Legal Issues & Arguments

Activision Blizzard raised three primary grounds of appeal:

- **Distinction Between Active and Passive Sales:** The appellant argued that its distribution agreement only prohibited **active parallel trade** (which is legal under EU law) and that the General Court failed to prove an agreement existed to illegally restrict **passive parallel trade**.
- **Distortion of Evidence:** The appellant claimed the General Court misinterpreted several faxes. They argued these documents were not evidence of an illegal agreement but were instead complaints about active sales by others or "bargaining tools" used to negotiate better prices from Nintendo.
- **Standard of Proof in Vertical Agreements:** The appellant contended that for vertical relationships (between supplier and distributor), the law requires a specific standard of proof for "concurrence of wills"—specifically an invitation to join an anti-competitive goal followed by tacit acquiescence. They argued that their own continued participation in parallel trade proved they had not acquiesced to Nintendo's restrictive policy.

Court's Findings and Reasoning

The Court of Justice rejected all three grounds of appeal:

- **On Sales Distinction:** The Court found the General Court *had* properly examined the distinction. While the written agreement was legal on its face, the General Court correctly determined that the **subsequent correspondence** between the parties evidenced a concurrence of wills to limit parallel trade generally, not just active sales.
- **On Evidence:** The Court ruled that it has no jurisdiction to re-examine facts unless the evidence was "distorted". It found that while the faxes *could* be interpreted differently, the General Court's interpretation was not "manifestly at odds with their wording".
- **On the Standard of Proof:** The Court clarified that the standard of proof for an anti-competitive agreement is **not higher for vertical relationships** than for horizontal ones. Furthermore, it held that a distributor's secret participation in parallel trade for its own benefit does not automatically preclude the existence of an agreement to restrict such trade.

Final Decision

The Court of Justice **dismissed the appeal in its entirety** and ordered Activision Blizzard Germany to pay the costs of the proceedings.

Case Digest: Competition Authority v Beef Industry Development Society Ltd (BIDS)

Case Reference: Case C-209/07, Court of Justice of the European Union (Third Chamber), 20 November 2008.

1. Background and Facts

In the late 1990s, the Irish beef processing industry suffered from significant **overcapacity**, calculated at approximately 32%,. This surplus was deemed likely to lead to serious profitability losses in the medium term,. To address this, the ten principal processors formed the **Beef Industry Development Society Ltd (BIDS)** and drafted a rationalization plan to reduce processing capacity by 25%.

The **BIDS arrangements** involved two types of participants,:

- **"Stayers"**: Undertakings that remained in the industry.
- **"Goers"**: Undertakings that agreed to withdraw from the industry.

Under a standard form of contract, stayers compensated goers through BIDS. The goers, in turn, agreed to,:

- Decommission their processing plants or sell them only to persons outside Ireland.
- Not use the land associated with those plants for beef processing for five years.
- Abide by a **non-compete clause** for two years within Ireland.

To fund this, stayers paid a levy of EUR 2 per head of cattle up to their traditional volume, and **EUR 11 per head** for any volume exceeding that traditional limit.

2. Legal Issue

The primary question referred by the Supreme Court of Ireland was whether an agreement with these features has as its **"object"** (as opposed to its "effect") the prevention, restriction, or distortion of competition within the meaning of **Article 81(1) EC** (now Article 101 TFEU),.

3. Ruling

The Court ruled that an agreement with features such as those in the BIDS arrangements **has as its object the prevention, restriction, or distortion of competition** within the meaning of Article 81(1) EC,.

4. Key Reasoning

- **"Object" vs. "Effect":** To be prohibited under Article 81(1) EC, an agreement must have either the object *or* the effect of restricting competition. If the anti-competitive **object** is established, there is no need to demonstrate actual anti-competitive effects.
- **Substitution of Cooperation for Risk:** The Court noted that the BIDS arrangements were intended to change the market structure by encouraging competitors to withdraw. This substitutes "practical cooperation" for the "risks of competition" that each operator must normally face independently.
- **Anti-Competitive Features:**
 - **Levy on Excess Production:** The EUR 11 levy was found to be a deterrent that discouraged stayers from exceeding their traditional production volumes, effectively **freezing market shares**.
 - **Barriers to Entry:** Restrictions on disposing of or using decommissioned plants were designed to prevent new competitors from entering the market, as buying an existing plant is cheaper than building a new one.
- **Irrelevance of Subjective Intent:** BIDS argued the plan was a legitimate attempt to remedy a sector-wide crisis. The Court held that the **subjective intention** of the parties is irrelevant. An agreement can have a restrictive object even if it pursues other legitimate objectives; such factors are only relevant when seeking an exemption under Article 81(3) EC.
- **Scope of Prohibited Collusion:** The Court clarified that the list of prohibited practices in Article 81(1) EC is **not exhaustive**. Therefore, the fact that a "rationalization agreement" is not explicitly listed does not prevent it from being classified as an "infringement by object",.

Case Digest: Case AT.40795 – Food Delivery Services

Decision Date: June 2, 2025. **Parties:** Delivery Hero SE ("Delivery Hero") and Glovoapp23 SA ("Glovo"). **Sector:** Food delivery services, including the online ordering and delivery of food, groceries, and other retail products.

1. Case Overview

The European Commission found that Delivery Hero and Glovo engaged in a **single and continuous infringement** of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement. The conduct involved three main anti-competitive activities: **no-poach agreements, exchanges of commercially sensitive information, and market allocation.**

2. Duration and Geographic Scope

- **Duration:** The infringement lasted from **July 17, 2018** (when the first Shareholders' Agreement was signed) until **July 22, 2022** (when Delivery Hero's acquisition of Glovo became effective).
- **Geographic Scope:** The entire **European Economic Area (EEA)**.

3. Nature of the Infringement

The coordination was facilitated by Delivery Hero's initial minority non-controlling investment in Glovo, which provided a forum for strategic influence.

- **No-Poach Arrangements:** The parties agreed not to actively approach or hire each other's employees. This was implemented through formal "no-hire" clauses in Shareholders' Agreements (SHAs) for senior staff and a "General No-Poach" agreement among top management that covered a broader range of employees. The goal was to restrict competition for talent, which Glovo viewed as a decisive resource for expansion.
- **Information Exchange:** Between September 2018 and July 2022, the parties exchanged sensitive commercial data via direct communications and board of directors' documents. This included information on **current and future pricing, pricing methodologies, delivery fees, commercial strategies, cost structures (e.g., customer acquisition costs), and sales forecasts.**
- **Market Sharing:** Starting in January 2020, the parties aligned on a strategy to stop competing in the EEA. This included refraining from entering countries where the

other was already present, coordinating entries into new markets, and eventually removing geographic overlaps by Delivery Hero selling its operations in Bulgaria, Croatia, and Romania to Glovo in May 2021.

4. Legal Assessment

The Commission characterized these practices as **restrictions of competition "by object,"** meaning they are inherently harmful to the proper functioning of competition.

- **No-poach agreements** were classified as a form of sharing sources of supply, akin to a **buyer cartel**.
- The **information exchanges** were found to have substituted practical cooperation for the risks of competition, removing market uncertainty.
- **Market sharing** was identified as a direct violation of competition law that partitioned the internal market.

5. Fines and Settlement

The case was resolved via a **settlement procedure**, where both parties acknowledged their liability in exchange for a 10% reduction in their fines. The Commission calculated the fines based on the gravity of the conduct (set at 17% of relevant sales), the duration of the infringement, and periods of "lesser intensity" where coordination was reduced.

Final Fines Imposed:

- **Delivery Hero SE:** EUR 223,285,000.
- **Glovoapp23 SA:** EUR 105,732,000.

6. Conclusion and Remedies

The Commission ordered the companies to refrain from repeating such conduct. This decision highlights that **minority shareholdings** between competitors cannot be used as a justification for exchanging sensitive data or coordinating market behavior, and that **no-poach agreements** are viewed with the same severity as traditional cartels.

This case digest provides a comprehensive overview of the **Judgment of the Court of 28 January 1986** in **Case 161/84, Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis**.

Case Summary

- **Court:** Court of Justice of the European Communities (ECJ).
 - **Parties:** Pronuptia de Paris GmbH (Franchisor) and Mrs. Irmgard Schillgalis (Franchisee).
 - **Key Provisions:** Article 85 of the EEC Treaty; Commission Regulation No 67/67/EEC.
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1. Facts of the Case

The franchisor, a subsidiary of a French company, distributes wedding attire under the "Pronuptia de Paris" trademark. Mrs. Schillgalis entered into three franchise contracts in 1980 for territories in Hamburg, Oldenburg, and Hanover. The dispute arose when the franchisor sued the franchisee for **arrears of royalties** on her turnover for 1978 to 1980.

The franchisee argued that the contracts were void under Article 85(2) of the EEC Treaty because they restricted competition and were not covered by the block exemption for exclusive dealing agreements (Regulation No 67/67). The German Federal Court of Justice (*Bundesgerichtshof*) referred the matter to the ECJ for a preliminary ruling.

2. Legal Issues

1. Is **Article 85(1)** of the EEC Treaty applicable to franchise agreements for the distribution of goods?.
2. If so, is **Commission Regulation No 67/67/EEC** (block exemption) applicable to such franchise contracts?.

3. The Court's Analysis

The Court distinguished between service, production, and **distribution franchises**, noting that this case specifically concerned the latter. It identified two essential conditions for a distribution franchise system to function without necessarily interfering with competition:

A. Protection of Know-How

The franchisor must be able to communicate expertise and assistance to franchisees without the risk of that know-how benefiting competitors. Therefore, the following are **not** considered restrictions on competition under Article 85(1):

- **Non-compete clauses** prohibiting the franchisee from opening a similar business in a competing area during or for a reasonable period after the contract.
- Prohibitions on **assigning the contract** or transferring the shop without the franchisor's approval, to prevent competitors from indirectly gaining know-how.

B. Maintenance of Network Identity and Reputation

The franchisor must be able to maintain the uniform image and reputation of the network. Thus, the following are **not** restrictions on competition:

- Obligations to apply **uniform business methods** and use provided know-how.
- Requirements to use **specific business premises** decorated according to instructions.
- **Quality control** of goods, which may include requiring the franchisee to purchase products only from the franchisor or approved suppliers if objective quality specifications are impractical.
- A requirement for franchisor approval for **advertising**, provided it only concerns the nature of the advertising.

C. Provisions that DO Restrict Competition

The Court identified specific clauses that **do** violate Article 85(1):

- **Market Sharing:** Provisions that prohibit the franchisee from opening a second shop or that grant exclusive territories while preventing other franchisees from entering that territory.
- **Price Fixing:** Any concerted practice between the franchisor and franchisees for the actual application of specific prices. However, **price recommendations** are permissible as long as they are not binding.

4. Ruling on Regulation No 67/67/EEC

The Court concluded that **Regulation No 67/67 is not applicable** to franchise agreements. The reasoning included:

- The regulation was designed for exclusive dealing agreements, which differ in nature from franchises.
- Franchise agreements involve unique elements not covered by the regulation, such as the **payment of royalties**, the communication of **know-how**, and the right to use a business name or symbol.

5. Final Decision of the Court

The Court ruled that:

1. The compatibility of a distribution franchise with Article 85(1) depends on its **provisions and economic context**.
2. Provisions **strictly necessary** to protect know-how or maintain network identity are not restrictive of competition.
3. Provisions that **share markets** between members of the network constitute restrictions on competition.
4. Non-binding **price recommendations** are generally permissible.
5. Franchise agreements containing market-sharing provisions are capable of affecting trade between Member States.
6. **Regulation No 67/67/EEC does not apply** to these types of franchise agreements.

Case Digest: Super Bock Bebidas, SA, AN, BQ v Autoridade da Concorrência

Case Citation: Case C-211/22

Court: Court of Justice of the European Union (Third Chamber)

Date of Judgment: 29 June 2023

1. Parties

- **Appellants:** Super Bock Bebidas, SA (a Portuguese beverage company), along with AN (board member) and BQ (head of commercial department).
- **Respondent:** Autoridade da Concorrência (Portuguese Competition Authority).

2. Facts of the Case

Super Bock manufactures and markets beverages (beers, bottled water, soft drinks, etc.) in Portugal. For distribution in the "HoReCa" (hotels, restaurants, and cafés) sector, Super Bock entered into exclusive distribution agreements with independent distributors covering nearly the entire Portuguese territory.

Between May 2006 and January 2017, Super Bock implemented a system to fix minimum resale prices. The process involved:

- **Price Lists:** Super Bock regularly approved and transmitted lists of minimum resale prices and distribution margins to distributors.
- **Monitoring:** A tracking system was established where distributors reported resale data, including quantities and prices, back to Super Bock.
- **Retaliation:** Distributors who failed to comply with the fixed prices faced "retaliatory" measures, such as the removal of financial incentives (discounts) or refusal to supply.
- **Distributor Conduct:** Distributors generally applied these prices, and some even requested price indications or complained to Super Bock when competitors did not adhere to them.

The Portuguese Competition Authority fined Super Bock and its managers for infringing Article 101(1) TFEU and national competition law. The case was eventually referred to the Court of Justice for a preliminary ruling on the interpretation of EU competition rules.

3. Issues for Resolution

1. Does the vertical fixing of minimum prices automatically constitute a "**restriction of competition by object**" without a prior analysis of its harm?
 2. Can the existence of an "**agreement**" be established only through direct evidence, or are indicia sufficient?
 3. What constitutes an "agreement" (concurrence of wills) when a supplier imposes prices on distributors?
 4. Does an agreement covering almost the entire territory of one Member State affect **trade between Member States**?
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4. Ruling of the Court

A. Restriction of Competition "By Object"

The Court ruled that the finding of a restriction "by object" cannot be made solely because a practice falls under the category of "hardcore restrictions" in block exemption regulations.

- **Ratio:** To classify a vertical price-fixing agreement as a restriction by object, the court must determine that it presents a **sufficient degree of harm to competition**. This assessment requires looking at the nature of the terms, the objectives of the agreement, and the economic and legal context, including the nature of the goods and market structure.

B. Concept and Proof of an "Agreement"

The Court clarified that an "agreement" requires a **concurrence of wills** between at least two parties.

- **Concurrence of Wills:** This is not a purely unilateral policy. It exists if the supplier's invitation to comply with prices is met with **explicit or tacit acquiescence** by distributors. Factors such as distributors following the prices in practice, reporting data, or requesting price instructions can demonstrate this acquiescence.
- **Standard of Proof:** The principle of effectiveness dictates that an agreement can be proven using **objective and consistent indicia**, not just direct evidence.

C. Effect on Trade Between Member States

The Court held that an agreement covering nearly the entire territory of a single Member State is capable of affecting trade between Member States .

- **Ratio:** Such practices can reinforce the **partitioning of markets** on a national basis, hindering the economic interpenetration intended by the TFEU. The effect is significant if it can foreseeably influence the pattern of trade between Member States, even if it does not cover every inch of the national territory.
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5. Summary Conclusion

The CJEU emphasized that **vertical price fixing is not a per se infringement "by object."** National courts must conduct a case-by-case analysis of the economic and legal context to determine if the practice is sufficiently harmful. Furthermore, an "agreement" is established when the conduct of the parties reflects a mutual intention to follow the fixed prices, which can be proven through indirect evidence and circumstantial indicia.