

**Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the  
European Economic Community**

(Judgment of the Court of 13 July 1966 Case 56/64, ECLI:EU:C:1966:41)

Prepared by UNCTAD's Intellectual Property Unit

## Summary

In *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, the Court of Justice of the European Communities (CJEC), known today as the Court of Justice of the European Union, examined the application of most aspects of Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits agreements restricting competition. It held *inter alia* that the prohibition of Article 101 TFEU applies not only to horizontal agreements but also to vertical agreements.

### Article 101(1) and (2) TFEU<sup>1</sup>

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

## The facts

In 1957, the German manufacturer of electronic equipment Grundig entered into an exclusive distribution agreement with the French company Consten. Under the agreement, Consten was designated as the sole representative to distribute Grundig's products in France and undertook to sell only Grundig and no other competing products while Grundig agreed not to deliver anyone else in France. As with its distributors in other European countries, Grundig imposed an export prohibition upon Consten. In 1961, the company UNEF bought appliances from German

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<sup>1</sup> Formerly Article 85 of the Treaty Establishing the European Economic Community.

distributors who delivered them in spite of the export prohibition and UNEF resold them in France. Consten brought actions against UNEF, but the Commission of the European Economic Community decided in 1964 that Consten and Grundig had infringed European competition rules, namely what is now Article 101 TFEU. Both Consten and Grundig appealed to the CJEC for annulment of the Commission's decision.

### **The legal issues**

The key legal issues are (1) the application of the European competition rules on a vertical agreement between non-dominant undertakings; (2) whether an agreement restricting parallel trade, such as the one concluded between Grundig and Consten, 'affects' trade between Member States; (3) whether such type of agreement restricts competition in the internal market; and lastly (4) to which extent an agreement falling under the prohibition of Article 101(1) TFEU is void according to Article 101(2) TFEU.

The CJEC decided that:

1. The notion of "agreements between undertakings" in Article 101 TFEU includes all agreements which distort competition within the internal market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process (horizontal agreements) or between non-competing persons operating at different levels (vertical agreements). Competition can be distorted within the meaning of Article 101(1) TFEU by agreements which prevent or restrict competition between the parties to the agreement or between one of them and third parties. Such agreements can lead to unjustified advantages to the contracting parties at the expense of the consumers, contrary to the general aims of Article 101 TFEU. Besides, it is possible that, without involving an abuse of a dominant position, an agreement between economic operators at different levels may affect trade between Member States while having the object or effect of prevention, restriction or distortion of competition, thus falling under the prohibition in Article 101(1) TFEU.
2. Article 101(1) TFEU only applies to agreements capable to affect trade 'between Member States'; if there is no effect on trade 'between Member States', then only national competition law may be applicable. An agreement 'which affects' trade between Member States is an agreement capable of constituting a threat, direct or indirect, actual or potential to the freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States. In the case at hand, the contract between Grundig and Consten restricted the freedom of trade by preventing other undertakings than Consten from importing Grundig products into France and by prohibiting Consten from re-exporting these products to other countries of the internal market. The contract therefore indisputably affected trade between Member States.
3. Under Article 101(1) TFEU, the concrete effects on competition of an agreement are irrelevant if it has been established that the object of the agreement at stake is to restrict competition. In the case at hand, the agreement between Grundig and Consten prohibited in fact all third parties to import Grundig products from other Member States for resale in

France, isolating thereby the French market for Grundig products and giving them market power, i.e. to charge prices higher than competitive level. As a result, the distributor Consten enjoyed absolute territorial protection for these products. The agreement between Grundig and Consten therefore distorted competition in the internal market and constituted an infringement of Article 101(1) TFEU.

4. Under Article 101(2) TFEU, an agreement that infringes Article 101 TFEU shall be automatically void. Nullity under Article 101(2) TFEU only applies to the parts of the agreement which are subject to the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the agreement itself. In the present case, only specific clauses of the agreement between Grundig and Consten, mainly those concerning absolute territorial protection, were incompatible with Article 101(1) TFEU. Thus, the agreement could not be rendered void in its entirety.

**Points of significance:**

- European competition rules prohibit all agreements that may distort competition in the internal market, including vertical agreements between non-dominant undertakings.
- An exclusive distribution agreement that prohibits re-export affects trade between Member States under Article 101(1) TFEU.
- An agreement with absolute territorial protection infringes the European Competition rules.
- If the object of an agreement is the prevention, restriction or distortion of competition, then there is no need to take into account the concrete effects of the agreement for the purpose of applying Art. 101(1) TFEU.
- Only the specific clauses of an agreement that infringe Article 101(1) TFEU are rendered void under Article 101(2) TFEU.

**Key words**

Competition, vertical agreements, territorial protection, parallel import, distribution agreements, Article 101 TFEU, nullity

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