Collusion in Vertical Relations under Article 81 EC

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September 2007
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1. Introduction

EC Competition law does not draw any formalistic distinction between the different forms of collusion under Article 81. There are differences between the concept of agreement and that of concerted practice, but these exclusively refer to the type of evidence required to establish the collusive element of an Article 81 offence. The objective is to bring within the scope of Article 81 any formal or informal exchange of assurances or any offer (communication) and acceptance (commitment), which may prove the existence of a “common intention” between the parties.

Although the concept of agreement is an element defining the boundaries of Article 81 of the EC Treaty (hereinafter Art. 81), its contours are still nebulous. The European Court of Justice (hereinafter ECJ) affirmed in Bayer that “the concept of an agreement within the meaning of Article 85(1) of the Treaty centres on the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention”.

This definition presents similarities to the usual understanding of this concept in other areas of law: i.e. agreement implies the existence of a concurrence of wills between at least two parties, or in other words the existence of a common intention. Article 81 makes also reference to other forms of multilateral conduct, such as

2 Concerted practices are often inferred from circumstantial evidence (which may include economic evidence), while hard/direct evidence usually proves the existence of an agreement.
5 Case C-2 & 3/01 P, Bundesverband der Arzneimittel-Importeure eV & Commission v. Bayer (hereinafter Bayer) [2004] ECR I-23, para. 69. See also the European Commission in Dec 2006/895 Souris/TOPPS [2006] OJ L 353/5, para 79, “(a)n agreement within the meaning of Article 81(1) of the Treaty exists when the parties, expressly or implicitly, jointly adopt a plan determining the lines of their mutual action (or abstention) on the market. Thus, the critical element is the existence of a concurrence of wills, and neither the form of the agreement, nor the existence of contractual penalties or enforcement measures are relevant”.
6 In the law of contract, “a contract is an agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties” (emphasis added): Peel, Treitel The Law of Contracts, 12th rev. ed., (Sweet & Maxwell, 2007), p. 1. See, however, Brownsword, Contract Law, 2nd ed. (OUP, 2006) p. 17 (agreement is neither a necessary nor a sufficient condition for a contract).
concerted practice and decisions of an association of undertakings. The basic idea is that Article 81 covers collusive as opposed to unilateral practices, the latter falling within the scope of Article 82 EC only if they constitute an abuse of a dominant position.

The concept of collusion has a different meaning in economics. Massimo Motta explains that “(i)n economics, collusion is a situation where firms’ prices are higher than some competitive benchmark. A slightly different definition would label collusion as a situation where firms set prices which are close enough to monopoly prices. In any case, in economics collusion coincides with an outcome (high-enough price), and not with the specific form through which that outcome is attained [...] collusion can occur both when firms act through an organised cartel (explicit collusion), or when they act in a purely non-cooperative way (tacit collusion)". 8

Whereas economists perceive collusion as being a non-competitive market outcome, lawyers distinguish the issue of the existence of an agreement from that of a restriction to competition. This has different implications for horizontal (arrangements between competitors) and vertical agreements (arrangements between firms present at different stages of the production and commercialisation process).

In the context of a horizontal relation, cooperation between firms to substitute common action for competition increases market power in principle. The assumption is that, according to the perfect competition model, in competitive markets, “each economic operator must determine independently the policy which he intends to adopt”, which precludes “any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market” 9.

The finding of a horizontal agreement is not without relevance to the existence of a collusive outcome, according to the meaning of this term in economics. Recognizing this fact, the Commission and the European Courts made efforts to stretch the concept of agreement and concerted practice in order to cover situations of collusion as considered by economics. 10 It is clear that an expansive definition for the concept of agreement aims to improve the effectiveness of Article 81 as an instrument of tackling collusion perceived as a non-competitive market outcome. The legal concept of collusion does not cover, however, entirely the economic one, as the concepts of agreement and concerted practice under Article 81 have not been extended to tacit collusion in situations of oligopolistic interdependence. 11

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In the context of a vertical relation, the existence of a form of vertical control, for example an agreement between a supplier and a retailer, does not necessarily lead to an increase in market power and may produce significant efficiency gains. An extension of the definition of agreement could therefore lead to an important conceptual discrepancy with the economic definition of collusion, which implies a negative welfare effect. Herbert Hovenkamp is right to observe that, “(t)he conceptual differences between a horizontal agreement and a vertical agreement are significant. For example, competitors meeting together to discuss market prices may provoke considerable suspicion. But a supplier and a dealer are necessarily parties to a buyer-seller agreement, and they presumably discuss prices all the time. As a result, in vertical restraints cases the evidentiary focus tends to be the content of agreements, while horizontal cases tend to focus on the fact of agreement”.

Despite these “conceptual differences”, EC competition law does not draw any distinction between horizontal and vertical relations when it comes to the definition of the concept of agreement (Section 2). This approach could make sense if vertical and horizontal agreements were considered as equally harmful to competition. That was indeed the case, during the first decades of EC competition law, when the emphasis of enforcement action was put on restrictions of the freedom of action of distributors by their suppliers. Since the enactment of Regulation 2790/99 and the emergence of a more economic approach in interpreting Article 81, there has been, however, a considerable lessening of the focus of EC competition law on the protection of the freedom of action of distributors. The concept of agreement, which is of little practical significance in cartel cases, has been interpreted restrictively so as to limit the scope of Article 81 with regard to vertical restraints (Section 3). While the aim of reducing the scope of Article 81 to vertical agreements may be legitimate, the formalistic approach currently followed by the courts in defining the concept of agreement is theoretically and practically flawed. The last part of the study will advance an alternative approach for the definition of the concept of agreement, in particular for vertical relations (Section 4). Section 5 will conclude.

2. The vertical/horizontal distinction and collusion

During the first four decades of EC competition law enforcement, the distinction between vertical and horizontal restraints did not have the importance that it later acquired for the application of Article 81. In the seminal cases of LTM/MBU, Consten & Grundig and Italian Republic v. Council, despite the opinions of


12 For an excellent survey see, Chen & Hylton, “Procompetitive Theories of Vertical Control”, 50 Hastings L.J. (1999), 573.


15 For a critical appraisal of this evolution see, Ioannis Lianos La Transformation du droit de la concurrence par le recours à l’analyse économique, 1st ed., (Bruylant/Sakkoulas, 2007).


Advocate General Roemer, the ECJ did not draw any distinction between vertical and horizontal agreements with regard to their anticompetitive effect, in contrast to US antitrust law, where under the joint influence of the Chicago school of antitrust economics, which insists on the role of interbrand competition and market power as filters to antitrust enforcement, and the insights of new institutional economics on the economic motives of vertical contractual integration, the US Supreme Court held in *Sylvania* for territorial and customer restraints and more recently in *State Oil v. Kahn* and *Leegin* (for price restraints) that vertical restraints should be assessed according to a cost benefit analysis under the rule of reason.

The distinction between horizontal and vertical agreements has also gained momentum in EC competition law, in particular after a period of intensive reform in the late 1990s. The Commission first affirmed the specific nature of vertical restraints in 1996 when it published a *Green Paper on Vertical Restraints* stressing the need to take into account the economic effects of vertical agreements, in particular on interbrand competition, before the finding of an infringement of Article 81. Although the use of a more economic approach was also extended to horizontal agreements, the distinction between horizontal and vertical agreements still plays an important role when it comes to the drafting of block exemption regulations. There are now specific rules applying to vertical agreements, and the characterization of an agreement as being vertical usually triggers the use of a lower market share threshold for the application of the exception of Article 81(3) than for horizontal agreements.

The Commission applies a more lenient regime for vertical than for horizontal agreements because of the “self-policing” character of the former:

“(i)t is [...] generally recognized that vertical restraints are on average less harmful than horizontal competition restraints. The main reason for treating a vertical restraint more leniently than a horizontal restraint lies in the fact that the latter may concern an agreement between competitors producing substitute goods/services while the former concerns an agreement between a supplier and a retailer.”

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24 *Continental T.V. Inc. v. GTE Sylvania Incorporated*, above n Error! Bookmark not defined., at 49, “[…] the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition”.
28 See, for instance, Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, O.J. (2004), L 123/11, Art. 3 (which provides for a lower market share threshold for agreements between competitors than for agreements between non competitors in order to benefit from the safe harbour of the block exemption). See also, Commission Notice — Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, O.J. (2004), C 101/2, para 26, “(i)n general, agreements between competitors pose a greater risk to competition than agreements between non-competitors”.

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a buyer of a particular product/service. In horizontal situations the exercise of market power by one company (higher prices of its products) will benefit its competitors. This may provide an incentive to competitors to induce each other to behave anti-competitively. In vertical situations the product of the one is the input for the other. This means that the exercise of market power by either the upstream or downstream company would normally hurt the demand for the product of the other. The companies involved in the agreement may therefore have an incentive to prevent the exercise of market power by the other (the so called self-policing character of vertical restraints).  

The self-policing character of vertical restraints is however limited if the supplier or the buyer has market power, as they can raise rivals’ costs strategically to increase their profits at the expense of their direct competitors. This generally occurs “when the upstream and downstream company share the extra profits or when one of the two imposes the vertical restraint and thereby appropriates all the extra profits”.  

Thus, contrary to horizontal agreements where the interests of the parties converge, as both will profit from a price increase, the interests of the parties are, theoretically, divergent in vertical agreements. If both the upstream and the downstream markets are competitive, the gains of suppliers will be losses for the distributors and vice-versa. Nonetheless, if there is substantial market power in the upstream or downstream market, the vertical restriction may have been imposed by one of the parties on the other. This has important implications on the definition of the concept of agreement under Article 81. The existence of a “concurrence of wills” should not be analysed in abstracto but competition authorities and courts should take into account the incentives of the parties.

In the context of a horizontal relation, the “concurrence of wills” or meeting of minds, which is the constitutive characteristic of an agreement, presupposes the existence of a convergence of interests between the parties. Following this assumption, the absence of an explicit contract between the parties should not impede the finding of an agreement and there should be a wide interpretation of what counts as an intention to accept an offer, just as the offer itself can be made in many different ways. This fact alone affects the type of evidence needed in order to prove the existence of an agreement. The ECJ also accepts oral evidence of an offer and acceptance.  

In the context of a vertical relation, the assumption of the existence of a convergence of interests between the parties does not hold initially, because of the existence of the self-policing effect previously described. Certainly, it may be possible to consider that the vertical agreement is the product of side payments between the parties, whose interests converge as they have a financial incentive to “agree”, or that it has been imposed by a powerful party. In this case, it is essential to examine the totality of the economic circumstances of the vertical relation and the incentives of the parties before inferring the existence of an agreement. This is not a necessary step for the finding of a horizontal agreement as it is in the interest of rivals

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30 Id., Section III(1).
to exchange assurances that they will not compete and thus be able to increase the prices of their products and their profits.

The characterization of an agreement as horizontal or vertical has important implications as to the analysis of the existence of a restriction of competition. The Commission and the European Courts have not given sufficient attention to the self-policing character of vertical restraints when they define the concept of agreement under Article 81. The fact that coordination is not in the interest of all the parties does not impair the finding of an agreement under Article 81. Furthermore, coercion is neither a necessary nor a sufficient condition for the finding of an agreement under Article 81 but just constitutes an additional indication substantiating such a claim, along with other factors.

In conclusion, the concept of collusion under Article 81 is the same for horizontal and vertical relationships. The existence of an agreement or a concerted practice is assessed before the characterization of the relationship as being vertical or horizontal. This creates a wider gap between the legal and the economic concept of collusion for vertical agreements than the gap that exists between the legal and economic concept of collusion for horizontal agreements. One of the main reasons put forward in explaining the indifference of EC competition law to the vertical/horizontal distinction in assessing the existence of an agreement or more generally collusion is that the concept of collusion under Article 81 serves “a jurisdictional function”, not a substantive one. In reality, this conclusion does not hold, as it is generally substantive policy concerns that have framed the concept of agreement under Article 81.

3. The mirage of the “jurisdictional function” of the concept of agreement in article 81 EC

The exchange of consent (offer and acceptance) between the parties usually reveals the existence of an agreement. In contract law, the existence of a mutual consent is required for the formation of a contract. This apparent proximity between the definition of agreement under Article 81 and under the law of contract formation has led some national courts and some authors to conclude that: “the meaning of agreement in Article 81 EC can be seen to share the same meaning as ascribed to agreement in the law of contract”.

The communication of assent between the parties to the agreement may take different forms, which will often depend on the context of their relationship. For example, failing to reply to an offer may operate as a tacit acceptance where, because

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33 Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, O.J. (2004), C 101/97, para 15, “co-ordination can take the form of obligations that regulate the market conduct of at least one of the parties as well as of arrangements that influence the market conduct of at least one of the parties by causing a change in its incentives. It is not required that co-ordination is in the interest of all the undertakings concerned”. See also, Cases T-25-26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87-88 & 103-104/95 Cimenteries CBR v Commission [1992] ECR II-491, para 1849 & 1852.
34 Bayer above n Error! Bookmark not defined. at para 83.
35 Souto Soubrier, above n Error! Bookmark not defined. at 112.
36 Odudu above n Error! Bookmark not defined. at 96.
38 See, for instance in Germany, Kammergericht (KG), WuW/E OLG 1219 (“Ölfelddrohre”).
39 Odudu, above n Error! Bookmark not defined. at 59.
of previous dealings, it is reasonable to infer that the offer has been accepted, absent contrary notification by the offeree.\textsuperscript{40} The retreat of formalism in these circumstances may be justified by the need to take into account the more efficient solution for the parties to the agreement and reduce their transactions costs, which is one of the principal aims of contract law.\textsuperscript{41} What this example illustrates is that, in contract law, the concept of agreement has been framed according to the policy objectives of this area of law and that the formal element of mutual consent has been interpreted in accordance to those objectives.

Consequently, it would be erroneous to assess the definition of the concept of agreement in competition law in disconnection to the aims pursued by Article 81,\textsuperscript{42} which implies that because the aims of competition law are not similar to those of contract law, the requirement of concurrence of wills or mutual consent fulfils a different objective and should therefore be interpreted differently from contract law. The reduction of transaction costs to the mutual benefit of the parties (transactional efficiency) is not the primary objective of competition law. Its main focus is to enhance allocative efficiency to the benefit of the consumers. In other words, the incentives and aims of the parties to an “antitrust agreement” are different.

The link between the objectives of Article 81 and the concept of agreement is obvious if one examines the case law of the Commission and the European Courts on the distinction between unilateral practices and agreements, which, as some commentators correctly observe, concerns almost exclusively vertical relations.\textsuperscript{43} The possibility that vertical restraints may hinder market integration has led the European Courts to adopt an expansive definition of the concept of agreement, in an effort to bring within the scope of Article 81 as many anticompetitive practices as possible. The evolution of EC competition law towards a more permissive approach for vertical restraints has inevitably put in question that trend. In other words, the “jurisdictional function” of the concept of agreement in Article 81 is not devoid of a substantive policy purpose.

3.1. The concept of agreement as an instrument of market integration

Defining the contours of agreement when there is direct (written or oral) evidence of an exchange of consent between a supplier and a distributor has never been a matter of controversy. Much of the case law struggled with the issue of apparently unilateral practices that take place in the context of a rightly controlled existing distribution network. It is commonly accepted in EC competition law that the existence of a distribution network magnifies the anticompetitive effect of vertical restraints.\textsuperscript{44} Consequently, by conceptualising distribution networks as organisms governed by specific norms, which are the product of an implicit agreement between the members of the distribution network, the European Commission and the Courts


\textsuperscript{42} For a similar conclusion concerning the enforcement of Section 1 of the Sherman Act in US antitrust law, see Burns, “Rethinking the ‘Agreement’ Element in Vertical Antitrust Restraints”, 51 Ohio State L. J. (1990), 1.

\textsuperscript{43} Wickihalder, above n Error! Bookmark not defined., p. 91.

\textsuperscript{44} See, Case C-234/89 Delimitis/Henninger Bräu [1991] ECR I-935, para 19.
managed to infer the existence of an agreement under Article 81, simply by focusing on the economic and legal contexts of the specific vertical relationship. The need to extend the scope of Article 81 to vertical practices that affect the objective of the Internal Market provided the policy justification for this expansive definition.

3.1.1. Networks, social norms and the theoretical justification for the expansion of the concept of agreement under Article 81

The constitution of distribution networks has been a salient feature of modern economy. Networks can be conceived as a hybrid institution separate from the model of the “market” but falling still short of establishing a “hierarchy”, if one uses the terminology of new-institutional economics. The formation of an institution, such as a network, presupposes the existence of “a self-sustaining system of shared beliefs” about the rules of the game. The operation of the distribution network is therefore based on formal and informal “game rules” that have been progressively shaped by its members. One could consider that the “social norms” of the network govern the interaction between the parties of the network as much as the text of the bilateral distribution contract between the supplier and the dealer.

It follows that a comprehensive analysis of the “social norms” that govern the network is essential in order to have a complete picture of the practice in question. An apparently unilateral practice may qualify as an agreement under Article 81 if the existence of informal rules or social norms within the network will make it plausible to conclude that the practice in question is the product of collusion. In other words, the abstraction of the distribution network will curtail the assumption of the divergence of interests between manufacturers and distributors that underpins the theory of the self-policing character of vertical restraints. Being parts of the same network, the supplier and the dealer will have convergent interests, which will facilitate the inference of a concurrence of wills and therefore of a vertical agreement.

The abstraction of the distribution network has important implications, not only for finding an agreement but also for the assessment of the anticompetitive effect of the relevant practice. Following well-established case law, the Commission and the courts assess the anticompetitive object or effect of the agreement within its economic and legal context. The “distribution system” forms part of this legal and economic context: even if the agreement in question does not itself restrict competition, the distribution network to which it is part may contribute to a cumulative foreclosure effect. In both situations, the abstraction of the distribution network, conceived as a set (nexus) of relationships forming a separate but uniform system of formal and informal rules, from the point of view of outsiders, will make possible the expansion of the scope of Article 81. The following section will demonstrate that the expansive

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49 Delimitis above n Error! Bookmark not defined., para 19.
50 Id., para 24.
3.1.2. The concept of “apparently unilateral conduct”: a vehicle for an instrumental definition of the concept of agreement under Article 81

Motivated by the need to tackle business practices that affect market integration, the Commission has progressively embraced an expansive definition of the concept of agreement and included “apparently unilateral conduct” adopted in the context of a distribution network within the scope of Article 81.\(^{51}\) The ECJ initially supported this strategy and although it affirmed that Article 81 does not cover unilateral conduct, it also held that conduct which appears unilateral may constitute an agreement for the purposes of Article 81 if it is integrated in the operation of a distribution network.\(^{52}\)

One could distinguish two trends in the case law of the Court.\(^{53}\) The ECJ has been quick to recognize that if the unilateral conduct was part of a continuous business relation, governed by a general agreement established in advance, the conduct will fall within the scope of Article 81. In *AEG-Telefunken*, the ECJ held that AEG’s refusal to accept dealers that were complying with the qualitative requirements of its selective distribution network, because the latter were not willing to follow its pricing policy, constituted an agreement under Article 81. The Court was able to infer the existence of tacit acceptance of AEG’s pricing policy by the retailers from the simple fact that continuing adherence to a distribution network implies the acceptance, tacit or express, of the supplier’s policy on the basis of the pre-existing contractual relation.\(^{54}\) Refusals to approve distributors, even if they satisfy the qualitative criteria, may provide evidence of the supplier’s anticompetitive policy, “if their number is sufficient to preclude the possibility that they are isolated cases not forming part of systematic conduct”.\(^{55}\) The Court adopted an expansive definition of the concept of agreement with the aim of preventing the suppliers from achieving their anticompetitive aims through a series of unilateral practices, for example by making the admission of dealers to their network conditional on meeting anticompetitive criteria. Such strategies would have the effect of curtailing the effectiveness of the Court’s decision in *Metro I* on the prohibition of quantitative admission criteria in selective distribution networks.\(^{56}\)

The Court adopted an equivalent approach in *Ford*,\(^{57}\) where it held that Ford’s decision to discontinue the supply of right-hand-drive cars to German dealers in order to prevent them from exporting the cars into the UK was not a unilateral practice but formed part of the contractual relationship between the supplier and the resellers. The admission to the supplier’s distribution network implied acceptance by the dealer of

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\(^{52}\) The assumption is that admission and participation to the distribution network implies acceptance of its social norms by the dealers and in particular of the supplier’s policy. See, for instance, Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, para 38.


\(^{54}\) *AEG-Telefunken* above n *Error! Bookmark not defined.*, para. 38-39.

\(^{55}\) Id., para. 39. In this case 13 out of 26 were found to be sufficient for finding a “systematic conduct”.

\(^{56}\) Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875 (*Metro I*).

the policy pursued by the manufacturer. Ford was applying its initial agreement with the dealers, which granted to the supplier the right to decide which car models should be delivered.\textsuperscript{58} The German dealers continued their business relationship with Ford, although the restrictions imposed were not in their interest. Souto Soubrier concludes that the significance of the objective of market integration in EC competition law led the Court to adopt the “controversial principle” that “entering lawful distribution agreements indicates the acceptance by dealers of unlawful variations of the agreement unknown to them at that time”.\textsuperscript{59}

The ECJ went even further in subsequent cases declaring that there could be an agreement, even in the absence of any link between the apparently unilateral conduct and the pre-existing agreement between the supplier and the dealer. The dealer’s acceptance could be tacit and inferred from its compliance with the terms of the supplier’s invitation to collude.

In \textit{Sandoz}, the Court held that constantly and systematically sending invoices to customers with the inscription “Export prohibited” could not be considered as unilateral conduct if it formed part of a continuous business relationship and customers continued to place orders without protest on the same conditions.\textsuperscript{60} The repeated use of general conditions of sale printed on the invoices and other order forms would thus lead to the conclusion that the resellers have accepted the offer of the supplier, which amounted to an agreement within the meaning of Article 81. Remarkably, this was the case even if the aforementioned practice did not stem from the enforcement of a pre-existing agreement and even if no sanctions were apparently taken against the dealers that did not comply with the supplier’s policy. The aim of the supplier would have never been achieved, however, without the assistance of the dealers, which may explain why the Court refused to characterize the conduct as unilateral.

The Court’s approach facilitated the proof of an agreement, in situations where there was a continuous business relation between the supplier and the dealer, as it is usually the case in distribution networks. The Court adopted a purely instrumental approach with the aim to bring within the scope of Article 81 practices, promoted by the suppliers in the context of their distribution networks that had the effect of jeopardising the objective of market integration.\textsuperscript{61}

The majority of the authors criticized the Court’s approach for being “excessively far reaching”, as it made possible for the Commission to employ Article 81 to attack any business practice that might affect the objective of market integration.\textsuperscript{62} Encouraged by the case law of the Court, the Commission advanced in some decisions that, in the context of an ongoing business relationship, it is not necessary specifically to establish the acquiescence of the resellers to the conduct suggested by the supplier or any form of tacit or explicit acceptance.\textsuperscript{63} This, as well as problems with the supply of medicines in some countries because of parallel exports, led the European judiciary to adopt a more cautious approach.

\textsuperscript{58} Id., para. 20.
\textsuperscript{59} Souto Soubrier above n Error! Bookmark not defined., p. 103. \textit{Ford}, para 21: “…admission to the Ford AG dealer network implies acceptance by the contracting parties of the policy pursued by Ford with regard to the models to be delivered to the German market”.
\textsuperscript{60} Case C-277/87 \textit{Sandoz prodotti farmaceutici SpA v Commission} [1990] ECR I-45, para 1.
\textsuperscript{61} See also, Case C-279/87 \textit{Tipp-Ex v European Commission} [1990] ECR I-261.
\textsuperscript{62} Souto Soubrier above n Error! Bookmark not defined., p. 99.
3.2. Towards a more restrictive definition of the concept of agreement under Article 81 EC: a stepchild of “mechanical jurisprudence”?

The expansive interpretation of Article 81 by the Commission finally backfired and led the CFI and the ECJ to clarify the previous case law. In a series of landmark cases, starting with *Bayer*, the Courts emphasized the jurisdictional character of the concept of agreement and underscored its formal element, the existence of an offer and an acceptance. The Courts have done so without paying adequate attention to the specific characteristics of vertical agreements and to the real function of collusion under Article 81: the identification of multilateral practices that may lead to a restriction of competition. The concept of agreement under Article 81 was, instead, interpreted independently from the aims pursued by EC competition law. Its premises were no longer examined and deduction from the familiar concept-type of agreement in other areas of law became the dominant interpretative approach, thus producing what Roscoe Pound once called “mechanical jurisprudence”.

3.2.1. The turn in *Bayer*: towards a formalistic definition of the concept of agreement

Following the reform of the EC Competition policy on vertical restraints, the CFI and the ECJ moved towards a more restrictive definition of the concept of agreement. Remarkably, the case law on the concept of agreement did not adopt an instrumental approach that would attempt to tally the transformation of the concept of restriction of competition after the advent of the economic approach to Article 81, but preferred instead to trail the familiar root of the law of contract formation and to champion a formalistic definition of this concept.

3.2.1.1. *Volkswagen I*

*Volkswagen*, the German car manufacturer and Autogerma, its subsidiary in Italy, adopted several measures with the aim of impeding the parallel trade of Volkswagen and Audi vehicles and spare parts from Italy to Austria and Germany. These measures consisted of restrictions of supply restricting the re-exportation of vehicles, the imposition of various checks and penalties in case of parallel exports, the introduction of a split-margin system and the evaluation of the bonus paid to the Italian dealers on the number of vehicles sold so as to induce them to sell at least 85% of the delivered vehicles in their contract territory. The Commission found that there was an agreement between Volkswagen and its dealers, which restricted exports and thus infringed Article 81 EC.

The fourth chamber of the CFI confirmed the position of the Commission with regard to the barriers resulting from the bonus system. The bonus system was included in an agreement attached to the dealer contract, which was later subsequently amended and it was effectively implemented and in force. With regard to the split-margin system, the Court noted the absence of direct evidence of an agreement by the company’s documents and found that the statement of a sub-dealer on the existence of an agreement was insufficient proof of an agreement, particularly as the system was

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64 See, Section 3.2.1.2.
68 Id., para 79.
severely criticised within the Volkswagen group. The interests of the supplier and the retailers were not convergent in this case, as the split margin system was effectively constraining the capacity of the latter to receive the full amount of the discount upfront. Nevertheless, the Court upheld the Commission’s conclusion with regard to the measures restricting the supply of the Italian market taken by Autogerma in order to restrict re-exports to other member States. The dealers applied these measures, not because they were not interested in selling vehicles outside their contract territory but because of the pressure exercised by Autogerma and other manufacturers. The imposition of supply quotas as well as the fact that Autogerma was also systematically monitoring the retailers in order to ensure that the measures were effectively implemented influenced, according to the Court, the dealers “in the performance of their contract with Autogerma”. Reference to the economic interests and incentives of the parties thus facilitated the finding of collusion.

3.2.1.2. Bayer

The fifth chamber of Court of First Instance moved towards a more restrictive position in Bayer. The facts are well known. Bayer had developed a policy in order to limit parallel imports of its best-selling range of medicines. Because of an important price differential between Spain, France and the UK, resulting from differences in the price regulation of the pharmaceutical industry, French and Spanish wholesalers started to export to the UK. As a result, Bayer’s sales to its UK subsidiary fell considerably. Bayer reduced its sales of Adalat, one of its best-selling ranges of medicines, to the Spanish and French dealers to the amount it thought that dealers needed for domestic sales and informed each dealer of its maximum amount. The dealers continued however to export to the UK and tried to find ways to circumvent Bayer’s policy. Following the complaints of some of the dealers, the Commission found that Bayer had imposed an export ban in their commercial relations with its wholesalers in France and Spain, which formed an agreement under Article 81.

The Commission based this conclusion on the following two findings: First, Bayer developed a system for detecting exporting wholesalers and subjected them to a permanent threat to reduce the quantities supplied if they did not comply with the export ban. Second, the export ban was incorporated into the continuous relations between Bayer and its respective wholesalers. The wholesalers acquiesced in Bayer’s policy as they were aware of Bayer’s real motives and they reduced the amounts they ordered from Bayer to align themselves with the figures that Bayer considered normal for supplying the national markets. Some wholesalers even

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69 Volkswagen I, para 70. Interestingly, the split-margin system was introduced after the signature of the dealer contract between Autogerma and the retailers and constituted therefore a modification of the later. See, VW above n Error! Bookmark not defined., at para 67. The split-margin system was applied with regard to the Volkswagen vehicles and was about to be included in the Italian dealership contracts in the form of a supplementary agreement.  
70 Volkswagen I, para 91.  
71 Id. para 236.  
73 ADALAT above n Error! Bookmark not defined..  
75 Id. para 173.  
76 Id. para 180. Although the wholesalers were aware of the reasons underlying Bayer’s refusal to supply them, Bayer had never communicated to its wholesalers its intention to limit parallel trade, as
attempted to obtain greater supplies by indirect means, precisely because of the export bans imposed by Bayer. In sum, the fact that Bayer coerced its wholesalers to adopt a policy, which was not in their interest, did not impede the Commission to find the existence of an agreement between them and Bayer.\(^77\)

Bayer appealed the decision to the Court of First Instance on the ground that its conduct was unilateral and involved no collusion with the dealers. The Court distinguished the concept of agreement, which centres on the existence of “a concurrence of wills between at least two parties” from genuinely unilateral practices, which do not require the express or implied participation of another undertaking and therefore do not fall within the scope of Article 81.\(^78\) If the Court contemplated the possibility that practices, apparently adopted unilaterally by the manufacturer in the context of its contractual relations with the dealers, could be characterized as agreements, it also held that it is on the plaintiff to establish the existence of an express or implied acquiescence by the wholesalers in the attitude adopted by the manufacturer.\(^79\)

Faced with the absence of direct evidence of an agreement between Bayer and its wholesalers in Spain and in France, the Court examined in detail the conduct of the parties. The Court remarked that the Commission did not demonstrate the establishment by Bayer of a supply policy conditional upon actual compliance with an alleged export ban and deemed non-conclusive evidence the subjective perception of Bayer’s intentions by the wholesalers.\(^80\) The Court also found that the wholesalers did not have an interest in complying with the export ban, as there was no evidence that Bayer made that request and that, in the absence of any monitoring of the final destination of the products, the possibility of sanctions was remote. Furthermore, the wholesalers did not have the intention to pursue Bayer’s objectives and adopted instead a line of conduct designed to circumvent Bayer’s new policy of reducing supplies, which made the CFI conclude that the wholesalers did not adhere, explicitly or implicitly, to Bayer’s policy.\(^81\) The simple continuation of pre-existing commercial relations between the manufacturer and the distributor when the former adopts a new policy is not enough to infer the existence of an agreement.\(^82\)

The Court emphasized the formal element of an agreement: the existence of a formal concurrence of wills to the detriment of a more instrumental approach that would link the concept of agreement to the objectives of Article 81 and in particular the concept of the restriction of competition. The CFI could have arrived at the same conclusion, had it chosen instead to emphasize the absence of coercion of the dealers who were still able to continue to seek additional supplies for export.\(^83\) There was no evidence of coercion, as Bayer did not adopt a monitoring system and sanctions or other forms of inducement, such as bonuses exercising financial pressure as in Volkswagen I,\(^84\) were not imposed. This showed that the success of Bayer’s policy of

\(^77\) Bayer v. Commission (Judgment), para. 52.
\(^78\) Id. para. 71. Emphasis added.
\(^79\) Id., para. 72.
\(^80\) Id. para. 103
\(^81\) Id. para. 156.
\(^82\) Id. para. 182.
\(^83\) Id. para 126.
\(^84\) VW above n Error! Bookmark not defined., para 80.
restricting supplies did not depend on the wholesalers’ assistance and compliance but was purely unilateral conduct.

The ECJ confirmed the position of the CFI. Advocate general Tizzano made clear in his opinion that, contrary to the facts of Sandoz, Bayer had never required its retailers to adopt specific conduct and, consequently, an agreement could not be formed by the tacit acceptance of an offer that had never been made.\footnote{85}{Id para. 61} The Court also distinguished this case from AEG and Ford, where the implementation of the measures was in effect provided for in the agreements establishing and regulating the selective distribution systems, with the consequence that, by entering into those agreements, the dealers were effectively agreeing to be bound by the measures adopted by the supplier. There were no distribution agreements to which the measures adopted by Bayer could have been ascribed.\footnote{86}{Id. para. 76.}

The Court focused on the subjective element of the concept of agreement: the existence of a concurrence of wills between at least two parties “so long as it constitutes the *faithful* expression of the parties’ (common) intention”.\footnote{87}{Id para. 97.} The lack of an implicit or explicit invitation from the supplier to the retailers to achieve the reduction of exports defeated any finding of agreement. The continuation of business relations by the retailers was not also deemed sufficient evidence of acquiescence.\footnote{88}{Id para. 141.}

As far as there was no declared intention on the part of the retailers to join efforts with Bayer to prevent parallel trade, the Court did not confirm the existence of a concurrence of wills.\footnote{89}{Id para. 122.} The dealers had attempted to circumvent Bayer’s policy by simulating increases in national demand, thus indicating that nominal compliance to Bayer’s policy was not a “faithful expression” of their intentions.\footnote{90}{Id para. 123.}

This subjectivist perception of the concept of agreement by the Court explains the significant role played by the analysis of the “faithful” (true) intention of the parties in order to find an agreement for the purposes of Article 81. In his Opinion, Advocate General Tizzano suggested that in the absence of “stated intention”, the analysis should concentrate on the actual conduct of the dealers on the market, thus advancing an objective intention test.\footnote{91}{A.G. Tizzano, above n 53, para. 110} Some authors advance the view that this “objective test” should act as a filter in cases where there is divergent conduct and will aim to isolate “those acts that merit the status of a declaration of will”.\footnote{92}{Souto Soubrier above n Error! Bookmark not defined., p. 97.} In selecting the relevant facts, “the pivotal question would be whether or not the conduct under scrutiny from which consent will be inferred is contradicted by contextual acts or circumstances potentially observable ex ante by third parties”.\footnote{93}{Id, p. 98.} For example, “instances of agreement followed by deviation would not qualify because the time gap would preclude third parties from observing the mismatch ex ante”.\footnote{94}{Id} Any discussion of the will or conduct of the parties, independently from the analysis of their (economic) incentives, may seem, however, a futile exercise and could lead to substantial uncertainty in the presence of a complex pattern of facts or conflicting expressions of intent. The display of the true intention of the parties should not depend entirely on the ability of the fact-finder to uncover facts that will indicate one or the other
direction. It is also unclear from the Court’s decision how a test focusing on the intention of the parties, as defined by a declaration of will or a pattern of conduct, could relate to the primary function of Article 81: the prohibition of a restriction of competition.

3.2.1.3. Opel

In Opel, the second chamber of the CFI had to examine an action for annulment against a Commission’s decision finding that Opel Nederland, a subsidiary of General Motors, had infringed Article 81 EC by adopting a series of measures distorting or impeding exports from the Netherlands, after some of its retailers had proceeded to large-scale exports. The existence of an anticompetitive agreement was substantiated by the fact that Opel Nederland had adopted a general strategy to restrict export sales, which it implemented through individual measures, acting with the consent of its dealers. The CFI turned to the analysis of the different individual measures, which were implemented by the retailers, in order to find out whether they were an integral part of their distribution agreements with Opel. The lack of direct evidence that there was communication by Opel of its decision to restrict supplies to the retailers and the lack of measures relating to the implementation of such a practice, made the Court conclude that the Commission did not produce “sufficiently precise and coherent proof to justify the firm conviction that the alleged infringement has taken place”.

The Court arrived, however, at a different conclusion with regard to the claim that Opel’s bonus system constituted an agreement under Article 81, as the new bonus system had already applied to retailers, it became “an integral part” of the dealership contracts between Opel Nederland and its dealers and was therefore “incorporated into a series of continuous commercial relations governed by a pre-established general agreement”. The CFI also found that there were implementing measures, such as warning letters concerning the direct bans on exports by the retailers, and that after Opel’s intervention some of the retailers had taken express commitments to stop exports. This provided evidence that the specific measures adopted by Opel “formed part of the existing contractual relations between the parties” and therefore constituted an agreement for the purposes of Article 81. The retailers could not have acted on their own initiative, as it was not in their commercial interest to cease or reduce their export activities. Their conduct was the result of pressure (or inducement) from Opel.

The CFI observed though that evidence of coercion alone cannot be a sufficient factor to prove the existence of an agreement under Article 81 and, as a consequence, found an agreement between Opel and only nine of the dealers that had been threatened, as there was no evidence of an “express undertaking” of the other twenty dealers to comply with Opel’s policy. The emphasis put on the direct

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96 Id. para. 81 & 88.
97 Id. para. 98.
98 Id. para 146.
99 Id. para 147.
100 Id. para 139 & 142
101 Id. para 150.
evidence of acquiescence by the dealers to the supplier’s policy underscores the formalism of the CFI’s approach.

3.2.1.4. Volkswagen II

The CFI’s approach became even more formalistic in Volkswagen II. Volkswagen had sent three circulars to its German dealers urging them not to sell vehicles at prices below a suggested resale price and not to grant discounts to consumers. Volkswagen had also sent individual letters to those of the dealers that did not follow the recommended prices, threatening them to terminate the agreement in case of non-compliance. A combined interpretation of the general duty of loyalty of the dealers to the policy adopted by the distribution network and the fact that the distribution agreement granted Volkswagen the right to issue non-binding price recommendations, brought the Commission to the conclusion that the circulars and the individual warnings sent to the dealers formed a “system of agreements” between Volkswagen and the German dealers. The Commission left open the question of the implementation of these circulars and did not examine if these had actually affected the prices charged by the retailers. The admission to a distribution network implied, according to the Commission, that the contracting parties explicitly or implicitly accepted the distribution policy of the manufacturer” and that these calls were therefore part of a set of continuous business relations governed by a general agreement drawn up in advance.

The fourth chamber of the CFI reversed the decision of the Commission and highlighted the need to establish the existence of an explicit or tacit acquiescence by the dealers of the supplier’s policy, in order to prove an agreement. The fact that the dealers have entered the manufacturer’s distribution network and have signed a dealership agreement compatible with competition law could not prove their express or implied acquiescence, in particular if this modification was an unlawful variation of the previous agreement. In these circumstances, “acquiescence in the unlawful contractual variation can occur only after the dealer has become aware of the variation desired by the manufacturer”.

It follows that it is important to examine the existence of acquiescence with respect to the specific manufacturer’s actions, something the Commission had done in this case. Furthermore, in contrast to the facts in Volkswagen I, the dealers had not been shown to have implemented in practice the manufacturer’s policy. The Court emphasized the subjective element of the concept of agreement, the existence of a concurrence of wills, and rejected the position of the Commission that a supplier’s request intending to influence the dealer in the performance of the contract constituted an agreement for the purpose of Article 81. The action of the supplier should be “an integral part” of a pre-existing contract, where it is intended to influence the dealer,

104 Id. para. 68.
105 Id. para. 57.
106 Volkswagen II above n Error! Bookmark not defined., para 36.
107 Id. para 45.
108 Id. para 47.
109 Id. para 38 & 53.
110 Id. para 56-57.
and “above all” it should be “in some way or other, actually accepted by the dealer”.\textsuperscript{111}

The requirement of “actual acquiescence” by the dealers seems to tighten the standard of proof, in comparison to the case law before Bayer, and weakens the presumption that admission or participation to a distribution network implies acceptance of the supplier’s policy, in particular if the dealer was aware of the measures adopted.\textsuperscript{112} If the contract is drafted in “neutral terms”, in the sense that it is clear “from the very terms” of the contract that “it does not envisage in any way an anti-competitive variation”, the only way to prove an agreement for the purpose of Article 81 is to bring independent evidence of actual acquiescence by the retailers.\textsuperscript{113} It follows that an unlawful variation of an otherwise neutral agreement cannot establish the existence of a concurrence of wills between the supplier and the retailers under Article 81, unless the plaintiff brings evidence of tacit acquiescence by the dealer following the modification of the agreement.

In his opinion in Commission v Volkswagen AG, AG Tizzano conceptualized the previous case law on the concept of agreement as enshrining two distinct approaches: first, a formalistic approach requiring the plaintiffs to prove that the supplier is able to impose these restrictive measures on the retailers, on the basis of specific provisions of the agreement in question; second, an approach focusing on the effective implementation of the supplier’s measures by the dealers, which would show that the latter have implicitly accepted the supplier’s new policy.\textsuperscript{114} The issue in this case was the application of the first approach, as there was a pre-existing agreement to which the measures of the manufacturer could be ascribed.\textsuperscript{115} Finding that the distribution agreement between the supplier and the retailers was neutral and that the Commission has not established that the measures adopted by the manufacturer were anticipated by any of the provisions of the distribution agreement, the advocate general suggested to the ECJ to confirm the position of the CFI and to dismiss the Commission’s appeal.\textsuperscript{116}

The Court followed, in part, the recommendations of the Advocate General but reversed the decision of the CFI with regard to the presumption that neutral (to competition law) clauses of a dealership agreement may not be regarded as authorising measures, which are anticompetitive:

“the Court of First Instance could not, without making an error of law, refrain from examining the clauses of the dealership agreement individually, taking into account, where applicable, all other relevant factors, such as the aims pursued by that agreement in the light of the economic and legal context in which it was signed”.\textsuperscript{117}

\textsuperscript{111} Id. para 58-59.

\textsuperscript{112} Although the Court made efforts to distinguish this case from the facts in AEG, Ford and BMW (Id. para 47-52), actual acquiescence was in these cases presumed by the continuing participation of the dealer to the distribution network and the communication of the measures by the supplier. See, Ford above n \textsuperscript{Error! Bookmark not defined.}, para. 21.

\textsuperscript{113} Id. para 63-66. Contrast with Sandoz above n \textsuperscript{Error! Bookmark not defined.}, where the fact that the dealership agreement was drafted in neutral terms did not impede the Court from concluding that the invoices sent by Sandoz were tacitly accepted by the dealers, as “they formed part of the general framework of commercial relationships which (Sandoz) undertook with its customers” (Sandoz para 10) and that the distributors failed to object to these new conditions and continued to place more orders with Sandoz subject to the same conditions.


\textsuperscript{115} Id., at para. 54.

\textsuperscript{116} Id., at para. 59.

\textsuperscript{117} Case C-74/04P Commission v Volkswagen AG [2006] ECR I-6585, para. 45.
The position of the CFI could have led to a possible under-enforcement of Article 81, as it focused entirely on the text of the agreement and ignored other relevant criteria that could also establish the common intention of the parties. The decision of the ECJ was not, however, clear on the other factors that should be taken into account, but only acknowledged that these may not relate to the specific clauses of the agreement and that the courts may refer to the legal and economic context of the relation between the parties. This is a broad formulation that grants an important discretionary power to the fact-finder and opens the door to the emergence of a more instrumental approach in defining the concept of agreement under Article 81.

3.2.1.5. Conclusion

Although both the CFI and the ECJ made efforts to affirm that Bayer did not constitute a dramatic change from the previous case law and could be considered as a refinement of the latter, it is clear that the formalistic definition of the concept of agreement as the meeting of an offer with an acceptance is difficult to accommodate with the previous instrumental approach. The policy reason underpinning this recent retraction of the concept of agreement is, however, purely instrumental: the evolution towards a more pragmatic approach with regard to the role of competition law in achieving the objective of market integration in Europe, in particular in sectors such as the pharmaceutical industry where there exist different national regulations.\footnote{This evolution is noticeable since the Opinion of Advocate General Jacobs, Case C-53/03 Syfait & others [2005] I-4609, para 100.}

An important implication of Bayer is that each element of an Article 81 inquiry is assessed independently from the others. This may be a sound judicial practice as it provides firms with a degree of legal certainty and a more predictable ground to build their defence. Nevertheless, overemphasizing a formalistic reading of Article 81 may also hamper the effectiveness of this provision and may lead to an inconsistent interpretation of the different elements of Article 81(1).

The role of the concept of agreement is currently important in the litigation of cases involving restrictions on parallel trade and resale price maintenance clauses. The relinquishment of the per se interdiction rule against certain practices limiting parallel imports of pharmaceuticals by the CFI in GlaxoSmithKline authorizes an evolution towards a less formalistic approach in defining the concept of agreement.\footnote{Case T-168/01, GlaxoSmithKline Unlimited v Commission [2006] ECR II-2969, para 121. Cases C-501, 513, 515 & 519/06 P (judgment pending).}
The Court affirmed that

\begin{quote}
“…while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as the agreement may be presumed to deprive final consumers of those advantages”\footnote{Id. at 121.}
\end{quote}

If this position is to be confirmed by the ECJ, a restrictive definition of the concept of agreement as a means to limit the scope of Article 81(1) to a restriction of parallel imports of pharmaceuticals would not be necessary, as the specific economic and legal context of the restriction will be considered before any finding of an Article 81(1) infringement.

One could also note the restrictive position of the CFI on the finding of resale price maintenance. In JCB, the CFI refused to consider that recommended prices and discussions, which were held between JCB and other dealers, were equivalent to a
fixing of purchaser or selling prices, despite the significant influence exercised by JCB on the retailers.\textsuperscript{121} This influence was “essentially that of a manufacturer who draws up suggested lists of retail sale prices and fixes invoicing prices internal to its network according to the retail sale prices desired”.\textsuperscript{122} The prices were not binding and “there was nothing to indicate that JCB’s efforts to influence dealers and discourage them from agreeing to sale prices considered to be too low involved coercion”.\textsuperscript{123} Although there was no doubt in this case that there was “agreement or concerted practice” between JCB and its retailers, as the Commission had adopted the attacked decision after notification of the agreement, it is remarkable that the Court took into account the existence of coercion as a constitutive element of an infringement of Article 81 in the case of resale price maintenance.

3.2.2. The application of the \textit{Bayer} rule by the national competition authorities and national courts

The ambivalence of \textit{Bayer} has led to various interpretations by national competition authorities and courts, some emphasizing the subjective element of the meeting of minds, while others focus on the implementation of the specific policy on the market. One could contrast the formalistic approach followed by the UK competition authorities and courts with the more purposive position adopted by the French competition authority and courts.

3.2.2.1 The application of \textit{Bayer} in the UK

Direct evidence of an exchange of consent between the supplier and the retailer often avoids the difficult issue of identifying the real motives and interests of the parties. In a number of vertical cases brought by the UK Office of Fair Trading (OFT), the restrictive practices were either considered as linked to an existing distribution agreement\textsuperscript{124}, or there was evidence of correspondence between the supplier and the retailers proving the existence of collusion.\textsuperscript{125} In \textit{Hasbro (distributors)}, the fact that the retailers had accepted without any dispute the interpretation of the distribution agreement advanced by the supplier as well as evidence that they continued to place orders with Hasbro after the receipt of the supplier’s letters provided evidence of the existence of an agreement under Chapter 1 of the Competition Act (provision equivalent to Article 81).\textsuperscript{126}

In \textit{Unipart Group Ltd & O2}, the Court of Appeal rejected the adoption of a more instrumental approach in defining the concept of agreement.\textsuperscript{127} Unipart, an independent service provider, contended that Cellnet, a network operator, had

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{122} Id, at 130.
  \item\textsuperscript{123} Id.
  \item\textsuperscript{124} CA98/04/2003 \textit{Agreements between Lladró Comercial SA and UK retailers fixing the price of porcelain and stoneware figurines}, [2003] UKCLR 652, para. 63, 64, 66, 83, 107, (“…the Agreement was reserving to Lladró Comercial a contractual right to interfere with a retailer’s pricing policy”).
  \item\textsuperscript{125} CA98/12/2002 \textit{Price Fixing Agreements involving John Bruce}, [2002] UKCLR 435, para. 64, 67 (direct evidence of a resale price maintenance scheme from correspondence).
  \item\textsuperscript{126} CA98/18/2002 \textit{Agreements between Hasbro UK Ltd and distributors fixing the price of Hasbro toys and games}, [2003] UKCLR 150, para. 34-35 (the OFT considered that these letters became part of the existing distribution agreement between the supplier and the distributor).
  \item\textsuperscript{127} \textit{Unipart Group Ltd & O2 (UK) Ltd (formerly BT Cellnet Ltd)} [2004] EWCA Civ 1034.
\end{itemize}
\end{footnotesize}
infringed article 81 EC by adopting a policy of margin squeezing. Cellnet refused these allegations arguing that Article 81 could not apply in the absence of an agreement between undertakings and that the policy of prize squeezing was a unilateral act falling outside the scope of Article 81. The question was therefore if the policy of price squeezing, which largely consisted in the setting of a price level, was an agreement or a unilateral practice. Unipart relied on the decision of the European Commission in Distillers, where the Commission found that a supplier of whisky, which had sent a circular letter to distributors in the UK indicating that they were not entitled to discounts in respect of goods which were exported outside the UK, had infringed article 81, as the price terms formed an essential part of pre-existing distribution agreements. 128 According to Unipart, the setting of the level of prices by Cellnet formed part of pre-existing express agreements with Unipart for the supply of airtime for mobile communications. Unipart contended that a restrictive interpretation of the concept of agreement would put into question established case law of the ECJ on the application of Article 81 to supplier’s standard terms “which are proffered to dealers on a ‘take it or leave it’ basis”. 129

The Court of Appeal confirmed, however, the decision of the High Court and refused to adopt a “purposive” definition of the concept of agreement. 130 In line with Bayer, the Court of Appeal emphasized the need to prove a concurrence of wills between the supplier and the distributor in order to find an agreement under Article 81. 131 The existence of a continuing commercial or even contractual relationship between the parties does not prevent such conduct from being unilateral. Consequently, the Court found that the fact that Cellnet’s standard conditions of sale set the prices for its airtime did not constitute an agreement: “it is, after all, a commonplace for a dealer to agree, without negotiation, to pay a supplier’s published prices for its products”; such standard terms are “neutral” in the sense that they are “the usual clauses included in a contract for the sale of goods”. 132 The Court found also that Cellnet’s price squeezing policy was not an integral part of the contractual relationship constituted by the incorporation of Cellnet’s standard terms, thus distinguishing the case from the facts in Distillers. 133 The Court relied on its previous case law in considering that giving notice of termination under a contract constitutes unilateral conduct and not an agreement. 134 Unipart could not have consented to the adoption of a policy that went against its commercial interests. Furthermore, it was possible to implement a margin squeezing without the assistance and cooperation of Unipart. 135

Other national competition authorities and national courts have moved, however, towards a more purposive approach and appear, in some recent decisions, to stretch the concept of agreement beyond a strict interpretation of the limits set in Bayer.

129 Unipart, above n 127, para. 83.
130 Id para. 93
131 Id para. 91.
132 Id para. 100.
133 Id. para. 70 & 101. In Distillers, the price terms restricted the opportunity to resale to other Member States and therefore had the same effect on competition than the provision on prohibition of exports previously included in the distribution agreements.
135 Id para. 105.
3.2.2.2. The marginalisation of Bayer in France

The French Competition Council (FCC) indicated, in recent decisions, two ways to prove the existence of a vertical collusion: (i) existence of a distribution agreement that grants to the supplier direct or indirect control over the prices charged by his distributors, provided that the latter acquiesced to the supplier’s policy and, in the absence of a distribution contract or other “formal” evidence of collusion, (ii) an array of serious, specific and corresponding indications that there was a vertical collusion. The second approach focuses more on the implementation of the anticompetitive practice by the distributors than on the formal elements of the existence of a concurrence of wills between the supplier and the distributors.

In consumer electronics, the FCC imposed sanctions on three major manufacturers of electronic equipment for each entering into a vertical agreement with its distributors imposing a minimum retail price scheme. The FCC had received the complaint from a low price distributor who encountered difficulties in its dealings with suppliers and wholesalers on the grounds that the prices were lower than those recommended by the suppliers of electronic equipment. The FCC rejected the claim that the manufacturers and the other distributors had put in place a vertical boycott strategy, as there was no evidence of the acquiescence of the latter to such a policy. It acknowledged that in the absence of any other contractual element or of an explicit consent of the distributors to the manufacturer’s policy, the communication of non-binding recommended prices by a supplier to its distributors may not constitute an agreement under Article 81.

The FCC found, however, that, because of the diffusion of a list of recommended retail prices, there was a high degree of price transparency in the retail market. It then observed the alignment of retail prices of a number of products sold by all the distributors of the brands of the suppliers concerned. The FCC based its findings on the number of the points of distribution that provided prices close to the recommended price listings of the manufacturers. This important price alignment could not be explained by market conditions, as it concerned different types of distribution, which had different costs and therefore might have been expected to charge different retail prices. The suppliers monitored, through retail price control mechanisms, the pricing policy of their distributors. The FCC relied largely on the existence of direct evidence of monitoring such as faxes, transcriptions of telephone conversations and commercial cooperation agreements that some of the suppliers had concluded with their distributors. Based on these findings, it rejected any alternative explanation of the price alignment and concluded that it was the outcome of collusion.

The Court of Appeal of Paris confirmed the methodology of the FCC and grasped the opportunity offered by the appeal to lower the standard of proof for vertical agreements by accepting that the proof of collusion between a manufacturer and its distributors does not require evidence of the individual participation of each

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137 Id. para 518.
138 Dec. 05-D-66, relative à la saisine de la SARL Avantage à l’encontre de pratiques mises en oeuvre dans le secteur des produits d’électronique grand public, BOCRF No 5, 29 April 2006.
139 Id. para. 241-242
140 Id. para. 283.
distributor to the pricing scheme but that it is enough to prove a general application of recommended prices by most of the distributors of the specific network.\footnote{Judgment of 19 juin 2007, Cour d’appel de Paris, RG n° 2006/00628, p. 11.}

The FCC systematized its approach in luxury perfumes.\footnote{Dec. 06-D-04, relative à des pratiques relevées dans le secteur de la parfumerie de luxe, available at http://www.conseil-concurrence.fr/activites/avis/recherche.php.} Thirteen luxury perfume and cosmetic brands had each entered into vertical agreements with national chains of distributors in order to limit price competition at the distribution level. Each supplier of perfumes had set a recommended retail price for each product and had also indicated the maximum discount the retailers were permitted to practice in order to "level up" the retail prices of the products concerned. The FCC found that the alignment of retail prices that followed between the different distribution chains could have three possible explanations: it might be the result of horizontal collusion between the distributors, it might be provoked by a series of vertical agreements between each supplier and the distributors members of its network or, because of the specific conditions applying on the market, it might be the result of an identical reaction of the distributors to the recommended pricing lists that were circulated by the suppliers.\footnote{Id. at para. 454.} The first and the third hypothesis refer to the existence of an explicit or tacit horizontal collusion between the distributors.

In order to decide the most plausible explanation for this conduct, the FCC required three cumulative conditions for the finding of collusion:

- The distributors should be aware of the retail prices recommended by the supplier,
- There must be sufficient monitoring by the supplier of the implementation of the recommended prices in order to avoid deviant behaviour that could put into question the stability of the collusive outcome,
- There must be a significant implementation of the supplier’s recommended prices.\footnote{Id., at para. 455.}

The FCC made use of quantitative factors, such as statistical evidence on the prices implemented through different distribution points, in order to prove the implementation of the recommended prices by a significant number of distributors. The FCC presumed that there is significant implementation if more than 80% of the distribution points of a particular manufacturer comply with the recommended prices for a specific product.\footnote{Id., at para. 515.} If, however, the percentage of compliance to the recommended prices is lower than the threshold of 80%, the analysis should continue by observing directly, through a graphic representation, the effective concentration of prices close to the recommended prices. If it appears, following the analysis of the retail prices of a specific product by different distribution points, that there is not a significant dispersion from the level of recommended prices the price alignment will prove the acceptance of the agreement by the distributors.\footnote{Id. Compare para. 523 (price levels which are from 9.8% lower than the recommended prices to 22.2% higher do not constitute evidence of the acceptance by the distributors of the invitation to collude) with para. 575 (price alignment in different distribution networks close to the manufacturer’s recommended prices constitutes evidence of acceptance).}

The Court of Appeal of Paris confirmed the decision of the FCC.\footnote{Judgment of 26 June 2007, Cour d’appel de Paris, RG n° 2006/07821.} It rejected the claim of the respondents that by inferring the existence of an agreement between
the perfume suppliers and all their distributors, without any evidence of the acquiescence of each distributor to the resale price maintenance system, the Council had excessively lowered the standard of proof for vertical agreements. The Court noted that the standard of proof for vertical agreements under EC and national competition law does not require evidence of an individual agreement between a manufacturer and the distributors, when the acquiescence of the distributors may be clearly inferred by the overall context of the agreement, in particular the existence of a continuing commercial relationship.

The Court took a broad view of the existence of the invitation and acceptance to collude. An invitation to collude exists every time the supplier informs the retailers of a recommended price. The form of the invitation or the absence of negotiations between the supplier and the distributors is irrelevant. It is also important that there is an element of constraint giving binding force to the supplier’s recommended prices, such as a monitoring mechanism to control the implementation of the scheme.

The Court of Appeal also adopted a very broad definition of the second element of the three steps test, monitoring by the manufacturer of the implementation of the recommended prices, as it found that it is sufficient to bring some evidence of pressure by the manufacturer to some of the members of the distribution network to prove the existence of a monitoring system.

Finally, the distributors are presumed to have accepted this invitation to collude if there is a significant implementation of the recommended prices. This can be demonstrated by quantitative evidence illustrating the implementation of recommended practices by a considerable number of distribution points for each perfume supplier. On the other hand, the Court of Appeal did not rely entirely on statistical evidence because of the important error margin, which for some of the manufacturers was around 11%. It relied instead on “qualitative” indications of collusion, such as the existence of documents, faxes and emails providing direct evidence of the acceptance of the invitation by the distributors. Recent case law confirmed that the analysis of the FCC relies essentially on qualitative factors. It cannot be excluded that quantitative evidence may indirectly lead to the finding of collusion, if the other two conditions of the test are fulfilled, thus marginalising the formalistic approach followed in Bayer but also creating a considerable risk of over-enforcement of competition law, in particular as evidence of monitoring without sanctions may lead to the finding of an agreement under Article 81(1).

4. Redefining the boundaries of vertical collusion in Article 81 EC

The last part of this study suggests an alternative, more pragmatic, approach for the definition of the concept of agreement under Article 81. A pragmatic approach recognizes the need for instrumentalism in interpreting the different terms of Article

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148 Id, at 32.
149 Id.
150 Id., 33.
151 Id. at 46. This position is similar to that adopted by the Court of Appeal of Paris in Judgment of 4 April 2006, Cour d’appel de Paris, Royal Canin, RG n° 2005/14057, p. 16; See also, Dec. n° 05-D-32, relative à des pratiques mises en oeuvre par la société Royal Canin et son réseau de distribution, BOCCRF No 4, 14 March 2006, para. 207.
152 Id.
153 Id., at 35-36.
154 Dec. 07-D-50, above n 136, para 611.
81, while avoiding, at the same time, an arbitrary and boundless enforcement of Article 81 to all types of business practices.

4.1. An instrumental interpretation of the concept of concerted practice

The restrictive approach of the Bayer rule concerning the definition of agreement under Article 81 applies to both horizontal and vertical agreements. The Court does not establish any distinction between them before the step of analysing the existence of a restriction of competition. This is in line with the dominant approach followed by the courts: each element of Article 81 is considered a distinct concept and interpreted without any reference to the function of this provision as a whole. A certain form of teleological interpretation takes place however implicitly at each step of the analysis. Nevertheless, because of the lack of a complete picture, the result is often a conceptual mismatch between the different elements of Article 81. One could compare the restrictive definition of the concept of agreement in Bayer with the expansive definition of the concept of concerted practice, the other form of collusive practice targeted by Article 81.

If one considers, as apparently the Court does\textsuperscript{155}, that the form of the collusion, concerted practice or agreement, does not matter and that what counts is evidence of collusion\textsuperscript{156}, it does not make much sense to develop a restrictive and legalistic definition of the concept of agreement while expanding, at the same time, the concept of concerted practice. This paradox may be explained by the purposive interpretation of these concepts by the Court. The concept of agreement is more often decisive in the context of the application of Article 81 to vertical relations, while the concept of concerted practice predominately applies to horizontal relations. Interpreting narrowly the concept of agreement limits the scope of Article 81 with regard to vertical relations.

The purely instrumental role of the concept of concerted practice has been a constant feature of the case law on Article 81(1). As the ECJ explained in ICI, the aim of the concept of concerted practice is “to bring within the prohibition of that article a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition”.\textsuperscript{157} The basic assumption behind this concept is that “each economic operator must determine independently the commercial policy which it intends to adopt in the common market”, although this requirement of independence “does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors”.\textsuperscript{158} Nevertheless, undertakings should not develop any direct or indirect contact with their competitors or disclose the course of conduct they have themselves decided to adopt or contemplate adopting in the market.\textsuperscript{159}

It is obvious from the above that the concept of concerted practice will be more operational in the context of a horizontal relation, as the existence of frequent contacts between suppliers and distributors is a common feature of the operation of distribution networks. Furthermore, the limitation of the independence of action of the

\textsuperscript{157} Case 48/69, Imperial Chemical Industries Ltd. V. Commission (ICI) [1972] ECR 619, para 64.
\textsuperscript{159} Id.
distributors does not constitute a restriction of competition. The concept of concerted practice refers however to conduct with which one of the parties has eliminated, or at the very least substantially reduced, uncertainty as to the expected conduct of the other on the market, and it seems that this broad formulation of the concept could be more relevant in the context of a vertical relation. This brings us to the issue of the objective being served by the concept of concerted practice in a vertical relation context.

An expansive interpretation of the concept of concerted practice may be justified by the need to extend the scope of Article 81 to situations of non-oligopolistic interdependence between competitors. A broad interpretation of the same concept in the context of a vertical relation may conflict however with the Bayer rule, which seems to set the outer boundaries of the scope of Article 81 for vertical arrangements. There are three circumstances where the concept of concerted practice has been used in a vertical context: (a) the concerted practice sanctions an apparently unilateral practice that implements a pre-existing vertical agreement, not necessarily anticompetitive, (b) there is no clear evidence of the existence of an agreement between the supplier and the distributor but there is at least evidence of some degree of collusion between them and, (c) the concerted practice brings within the scope of Article 81 a vertical/horizontal hybrid type of conspiracy between the supplier and members of its distribution network ("hub and spoke conspiracy”).

4.1.1. The concerted practice sanctions an apparently unilateral practice implementing a pre-existing vertical agreement

In Pittsburgh Corning, the European Commission applied the concept of concerted practice to a system of discriminating prices used by a producer of cellular glass in order to prevent parallel imports. The supplier had initiated a new price system in which the normal price, greatly increased from the previous one, was calculated so as to make all parallel exports impossible in view of the transport costs and the prices charged by the supplier. The Commission found that there was a concerted practice between the supplier and two of its distributors, as the latter had supplied assistance to the implementation of the scheme, under the coercion of the supplier.

It is clear that the Commission mentioned that there was evidence of discussions and correspondence between Pittsburgh Corning and the distributors, before the entry into force of the new price system. However, the Commission did not explain if these discussions related to the exchange of assurances on the implementation of the specific price discrimination policy or if they were part of the discussions and meetings usually held between members of a distribution network. This was quite unlikely as there was not the slightest sign of collusion between the distributors and the distributors had no interest in adopting the new pricing system, which in reality was exclusively in the interest of the supplier. The Commission implied the existence of collusion (concerted conduct) simply from the fact that the distributors had implemented the anticompetitive scheme initiated by the supplier.

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160 GlaxoSmithKline above n Error! Bookmark not defined., para 171.
163 Id, at p. 36.
164 Id., at p. 39.
In Dunlop Slazenger the Court of First Instance distinguished between the general export ban that Dunlop Slazenger had imposed on its distributors in unwritten terms of the distribution agreement, and a series of measures that Dunlop Slazenger implemented, in concert with certain of its exclusive distributors, in order to ensure the enforcement of that general export ban and the elimination of parallel exports.  

The measures consisted of refusals to supply parallel exporters, pricing measures to make exports uncompetitive, buying back products which have been exported through parallel channels, product marking in order to identify the source of parallel imports: each of which apparently had a unilateral character. The Commission, upheld by the CFI, found that these measures, implemented for the purpose of securing compliance to the general prohibition on exported products covered by the distribution agreement, constituted a concerted practice. The distributors had complied with the scheme. Furthermore, in view of “the nature and importance of the commercial relationship” that Dunlop Slazenger maintained with the distributors, it appeared that the former had not made an autonomous decision on its commercial policy, thus implying that their behaviour was the product of coercion by the supplier. In other words, the Court extended the concept of concerted practice so as to catch apparently unilateral measures, which facilitated the accomplishment of the anticompetitive aims of the main agreement. The Court did not seem to go so far as to suggest the application of Article 81 to anticompetitive practices that were not directly or indirectly linked to the implementation of the agreement between the supplier and the distributors.

Evidence of implementation by the dealers and indications of coercion by the supplier were sufficient elements to support the finding of collusion, without any additional indication of acquiescence, as it is required in the context of an agreement following the Volkswagen II decision. A possible explanation of this conceptual discrepancy between the different forms of collusion under Article 81 is that in Dunlop Slazenger the apparently unilateral measures implemented an agreement that was itself anticompetitive, whereas in Volkswagen II the terms of the agreement were neutral and therefore one could not assume that the distributors knew about the anticompetitive practices of the supplier. If one follows the position of the Court in Dunlop Slazenger, evidence that the distributors were aware of the anticompetitive scheme and that they implemented it should still be enough to infer collusion, even if there is no evidence of “actual acquiescence” of the distributors; a requirement that the CFI imposed in Volkswagen II for the finding of an agreement. This variation between the scope of concerted practice and that of the agreement becomes more obvious if one examines the extension of the concept of concerted practice to situations of simple vertical coordination that are not directly or indirectly linked to a pre-existing distribution agreement.

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167 Id para. 107.
168 Id para. 112.
169 See, para. 88, “Article 85(1) of the Treaty cannot in any event be held not to apply to an exclusive distribution agreement which in itself involves no prohibition on re-exporting the products concerned where the parties to the agreement participate in a concerted practice seeking to restrict parallel imports to an unauthorized reseller”. See also, Dec. 85/79 John Deere, O.J. (1985), L 35/58 (measures implementing an agreement constitute a concerted practice infringing Article 81)
170 Volkswagen II, above n Error! Bookmark not defined., para 66.
4.1.2. There is at least some evidence of vertical coordination: concerted practice as a residual category of collusion under Article 81

The European Commission has also used the concept of concerted practice when there is no clear evidence of the exchange of assurances between a supplier and a distributor on their future conduct and it is not therefore possible to infer the existence of an agreement under Article 81. The concept of concerted practice operates in these cases as a residual category of collusive conduct for the application of Article 81. This situation can predominately, but not exclusively, be found when the fact pattern is complex and it would be extremely difficult to identify and distinguish the facts that support the finding of collusion from those that support the finding of a concerted practice. The Commission has often employed the double qualification of “agreement or concerted practice” in these situations, a practice that has been upheld by the CFI. An expansive definition of the concept of concerted practice may create though tensions with the restrictive definition of the concept of agreement in Bayer.

In Konica, the supplier had sent a circular to its distributors requesting their cooperation in order to stop parallel exports. The supplier had also put in place a monitoring system that traced any deviation from this policy and had threatened to stop supplying recalcitrant dealers. The Commission found a concerted practice, as “it would be unusual in business for a dealer to expressly react to such a letter from a manufacturer”, thus implying that the dealers had by their conduct tacitly accepted these conditions. The decision of the Commission heavily relies on the assumption that members of a distribution network will generally conform to the instructions of their supplier and that therefore there is no need to bring additional evidence of the existence of an agreement.

In Tretorn the Commission used the double qualification of “agreement or concerted practice” for a series of practices between a manufacturer of tennis balls and the members of his distribution network, which aimed to restrict parallel exports. There was no clear evidence of an exchange of consent between the parties but indicia of collusion, such as the reporting of parallel imports by the distributors, the stamping of products with traceable date codes, the change of product packaging for different countries and the suspension of supplies after complaints by the distributors.

The Commission has also used the double qualification of “agreement or concerted practice” in Topps. Topps was supplying, under licence from Nintendo, different types of collectibles, such as stickers, trading cards or removable tattoos to European intermediaries. Faced with an increasing amount of parallel exports, the supplier had put in place a system of collecting information and had been monitoring the final destination of the products delivered. Topps had requested assurances from the intermediaries that they would not export any products and had also threatened to

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172See also, Faull & Nikpay, above n Error! Bookmark not defined., p. 215.
175 The decision was confirmed by Case T-49/95 Van Megen Sports Group v Commission [1996] ECR II-1799.
cut the supplies of the distributors that did not comply in order to induce their cooperation.

The Commission made efforts to interpret the concept of concerted practice in conformity with the definition of the concept of agreement in *Bayer*. Indeed, the requirement of coordination/cooperation seems to be the same for the two forms of collusive action under Article 81.177

The only difference between the two forms of collusion seems to be that concerted practice requires “subsequent conduct on the market”, but “subject to proof to the contrary, which the parties concerned must adduce, there is a presumption that the concerted action influenced the subsequent conduct”178 The Commission noted that “…the acceptance of complaints in relation to parallel imports may also give rise to a concerted practice”.179 Evidence of complaints, emanating from the supplier or the distributors, and complying conduct from the other party thus demonstrates the existence of a concerted practice. Internal reservation, that is a situation where a distributor continues to export while giving assurances to the supplier that he will respect the export ban, does not put into question this finding, in particular if the supplier is not aware of such parallel exports. The fact that some of the distributors do not comply with the supplier’s requests does not imply that the conduct is unilateral: “assurances can be breached as cheating can be advantageous”.180

A situation of internal reservation does not impede any finding of concerted practice if the distributor has already given to the supplier some type of assurance that he will comply with the latter’s policy of restricting parallel exports.181 It is important that the supplier gets the impression from his distributors that the policy of restricting parallel exports is implemented, even if in reality this is not the case. Some supplementary indicators of coordination are still necessary in order to support the finding of an agreement in this case.182 There should also be some evidence of the distributors’ intent to restrict parallel exports. This condition is interpreted broadly by the Commission as the existence of complaints and the fact that the distributors were just telling Topps about parallel imports, even if they were not requesting specific action to be taken against them, was sufficient evidence of the distributors’ intent to restrict parallel trade and therefore of an agreement. It would seem artificial to assume that the distributors wanted Topps to contact the parallel importers without taking further action against parallel exports.183 The concept of concerted practice has therefore fulfilled a residual function, as it seems unlikely that the Commission would have been able to infer the existence of an agreement simply from evidence of complaints by the distributors and complying conduct by the supplier.

4.1.3. “Hub and Spoke” conspiracies

177 *Id.* para 88, “(t)he reciprocity inherent in the concept of concerted practice is given where one party discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it”.
178 *Id.* para 89.
179 *Id.*
180 *Id.* para 106.
181 *Id.* para 109.
182 This conclusion follows from a comparison of the relevant facts taken into account in the parts of the decision finding an agreement to restrict competition with those considered when the Commission qualified the conduct as being a concerted practice or employed the double qualification of agreement or concerted practice.
183 *Id.* para 113.
The third type of cases where a concerted practice was found within a vertical context are “hub and spoke” conspiracies, where many parties, conspire directly with one “hub” or main party. The hub may be either a supplier or a distributor. Its function is to serve as “an intermediary that speaks individually to each of the competitors and then relays each competitor’s agreement...to the other competitors in a series of one-to-one conversations”.184 The main concern of the participants to these conspiracies is the implementation of a horizontal restraint even if that takes place in a vertical context.

In Musique Diffusion Française the Commission, upheld by the ECJ, found that three exclusive distributors of Pioneer electronic equipment had participated in a concerted practice with Pioneer Electronic with the aim to prevent imports of Pioneer equipment from Germany and the UK to France and therefore to maintain a higher level of prices in France.185 The refusals of some of the exclusive distributors of Pioneer to deal with wholesalers that delivered the equipment to French retailers, correspondence between the exclusive distributors and retailers requesting the later to cease exporting Pioneer products and the participation of all the distributors to a meeting with Pioneer in which the French distributor complained of the existence of parallel imports in France, constituted evidence of a concerted scheme to restrict competition. The Commission found that Pioneer had participated in concerted practices with each of its exclusive distributors, as it had informed them of the complaints of the French distributor.

Pioneer contested this finding claiming that forwarding this type of information formed part of the “normal exchange of information between supplier and distributor concerning the market situation”.186 The Court, however, rejected this argument, considering the active role that Pioneer played in the concerted practice, as it did not only call and preside meetings on parallel imports with the exclusive distributors but it also incited some of them to discover the source of parallel imports and to put a stop to them.187

National competition authorities and courts followed the same pragmatic approach by paying little attention to the form of the collusive practice when applying Article 81 or equivalent provisions of national competition law to hybrid, vertical and horizontal practices.

In Replica Football kits, the OFT found that Umbro, a manufacturer of sport products, and a number of distributors were party to a series of agreements or concerted practices regarding the price fixing of replica football shirts of the England and other national league teams supplied by Umbro.188 The objective of these agreements was to maintain the level of retail prices for some Umbro products and to avoid a price war between the different retailers. The resale price maintenance agreements did not only involve the manufacturer and each of the distributors but also had a horizontal component at the distribution level. Some agreements were indeed initiated by a distributor, JJB, which put pressure on Umbro to convince Sports Soccer, a retailer competitor, to raise its prices and to stop discounting. JJB had a considerable bargaining power in relation to Umbro which supplied JJB with much of its branded products. Following JJB’s and other retailers’ complaints, Umbro requested that Sports Soccer stop discounting and gave Sports Soccer assurances as to

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186 Id. para. 73.
187 Id., para. 75, 76 & 79. See also,
the intentions of other retailers and in particular JJB on raising prices. The CAT confirmed the decision of the OFT as to the existence of a trilateral agreement or concerted practice between Umbro, Sport Soccer and the other major retailers, even if the reciprocal contact between one competitor and the other took place indirectly through Umbro, following JJB’s complaints. The case was appealed to the Court of Appeal, which had to determine if the CAT “failed to accord enough weight to the requirement of subjective consensus between all parties if an agreement or concerted practice between them is to be found”. Because, in this case, the complaints were addressed indirectly by JJB to Umbro, the Court found it necessary to examine “JJB’s state of mind in making the complaints”, thus implicitly requiring evidence of the subjective consensus of the parties to an agreement or concerted practice. The conclusion of the Court of Appeal was that “the level and the extent of the pressure” exercised on Umbro was such “that JJB plainly did expect Umbro to do something in response, vis-à-vis Sports Soccer”. Nevertheless, the Court considered that the CAT “may have gone too far... insofar as it suggests that if one retailer (A) privately discloses to a supplier (B) its future pricing intentions ‘in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions’ and B then passes that pricing information on to a competing retailer (C) then A, B and C are all to be regarded as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The Tribunal may have gone too far if it intended that suggestion to extend to cases in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact, appreciate that the information was being passed to him with A’s concurrence”. The Court’s objective was to ensure that the scope of article 81 would not be unduly extended so as to cast doubt on the freedom of discussion of actual or likely prices in a vertical context, between the manufacturers and their principal distributors, “so long as they are conducted on a bilateral basis”. The Court insisted, however, that its decision did not outlaw “complaints by a wholesale customer to its supplier in general, especially if they are directed at getting better terms for the business between those two parties”. The horizontal component of the discussions between Umbro and its retailers made this practice a “far more serious” breach of the Chapter I prohibition “than two unrelated vertical concerted practices, the customer party in each case being unaware of the fact or circumstances of the other”. Similarly, in Argos, the OFT found the existence of two bilateral vertical agreements or concerted practices between Hasbro, a toys manufacturer and two distributors, Argos and Littlewoods, and of a trilateral agreement, “with a horizontal component”, between Hasbro, Argos and Littlewoods with the aim to fix retail prices.

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190 Id., at 667.
192 Id. para 82.
193 Id. para 89.
194 Id. para 91.
195 Id. para 106.
196 Id.
197 Id. para. 105.
margins for certain Hasbro products.\textsuperscript{198} Hasbro had published recommended retail prices and had also developed a “pricing initiative” by inviting the distributors to maintain retail margins. None of the distributors would have committed to follow the pricing scheme without the assurance that its competitor would also adopt the same policy.\textsuperscript{199} Finding that each of the companies “was aware of the other’s involvement and the nature of its intentions regarding its conduct in the relevant markets”, the OFT concluded that “this conduct constituted an overall agreement and/or concerted practice between these three undertakings”\textsuperscript{200}

The Competition Appeal Tribunal (CAT) confirmed the OFT’s decision and found that there was an “understanding” between Hasbro and the two distributors that prices would be at or near the recommended retail prices (RRP).\textsuperscript{201} It also recognized that the agreement and/or concerted practice provided no guarantee that the distributors would follow the recommended prices. Referring to its case law in \textit{Replica Football Kits}, the CAT assumed that by participating in discussions with Hasbro on their pricing intentions, each distributor “must be taken to have known, or could at least have reasonably foreseen, that the information about pricing intentions which it was passing to Hasbro would be used by the latter in a way that would facilitate the maintenance of prices at RPRs in the market”.\textsuperscript{202} This led the Court to conclude that the distributors had participated “in indirect contacts with other economic operators the object or effect of which was to influence conduct in the market or to disclose future pricing intentions” and had thus infringed Chapter I of the Competition Act.\textsuperscript{203}

Argos and Littlewoods challenged the CAT’s conclusion by arguing that it did not adequately take into consideration the \textit{Bayer} rule as there was no direct contact between the two distributors, or at least an invitation to collude. The Court of Appeal dismissed the appeal but emphasised the need, following the \textit{Bayer} rule, to prove that there was an invitation to collude, in other words, that the distributors effectively knew that the information they were giving to Hasbro on their retail pricing strategy would be passed on to their competitor.\textsuperscript{204} This seems to be a more restrictive definition of the concept of agreement than the CAT, which only required that it was “reasonably foreseeable” that the competitor might make use of this information.\textsuperscript{205}

\begin{footnotes}
\item \textsuperscript{198} CA/98/8/2003 \textit{Agreements between Hasbro UK Ltd, Argos Ltd & Littlewoods Ltd fixing the price of Hasbro toys and games}, [2004] 4 UKCLR 717.
\item \textsuperscript{199} Id. para 96. This was essential because of the retailing format of these two companies, as “any ‘agreement’ or ‘understanding’ that the other catalogue retailer would price at an agreed price would not be seen to be implemented until much later when it would be too late to change one’s own catalogue”.
\item \textsuperscript{200} Id. para. 108. \textit{Argos Ltd, Littlewoods Ltd v. OFT} [2004] CAT 24.
\item \textsuperscript{201} Id. para. 787.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id. para. 141, “(t)he proposition which, in our view, falls squarely within the Bayer judgment in the ECJ…can be stated in more restricted terms: if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition. The case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions and, as a result, B intends to pass information to A on the basis of which A will change its own pricing in a way that facilitates the maintenance of prices at RPRs in the market”.\textsuperscript{204} This seems to be a more restrictive definition of the concept of agreement than the CAT, which only required that it was “reasonably foreseeable” that the competitor might make use of this information.
\end{footnotes}
According to the Court of Appeal, “it must have been apparent to Argos that, if Hasbro was feeding back to Argos Hasbro’s views as to other retailers’ pricing intentions, by the same token Hasbro would be feeding such views to other retailers, based on Hasbro’s conversations with Argos”.\textsuperscript{206} Evidence of the intent of the distributor remains still largely speculative.

4.1.4. Conclusion

The case law of European and national courts on hybrid, vertical/horizontal type restrictions illustrates the purposive character of the concepts of agreement and concerted practice. Although the courts follow, at least ostensibly, the limits set in \textit{Bayer} to the extension of the scope of Article 81, there is a clear tension between a subjective approach that focuses on the intent of the parties and an objective approach, which emphasizes the implementation of the anticompetitive practice on the market. While the courts developed terminology that accommodates the subjective approach, as is illustrated by the \textit{Argos} case, their propensity to find a concerted practice or an agreement in the absence of a clear invitation to collude may be explained by the need to ensure an effective enforcement of competition law.

This is particularly clear when the restrictive practice has a horizontal component. When powerful distributors complain to their suppliers with the aim to influence the conduct of other retailers on the market, the courts have found a horizontal agreement or a concerted practice, even in the absence of a direct contact between the two distributors. The same is also true if an apparently vertical agreement or concerted practice is directly linked to a horizontal conspiracy scheme. It is only if the manufacturer participates actively in the anticompetitive scheme and puts in place a monitoring system seeking to ensure the implementation of the practice that the courts find the existence of a vertical collusion.\textsuperscript{207} Assuming that the interests of the supplier and that of consumers often coincides, it makes more sense to apply to supplier driven strategies the more lenient antitrust standards for vertical restraints. In any circumstance, it appears that the choice of the adequate, horizontal or vertical, angle of attack is a function of the enforcement priorities. These are currently horizontal restrictions of competition, which explains why the horizontal component of the "conspiracy" will most often dominate the vertical one.

The ECJ has already accepted that the existence of an anticompetitive agreement can be inferred from “an overall evaluation of all the relevant evidence and indicia”.\textsuperscript{208} This includes direct evidence of collusion as well as circumstantial evidence, such as the fact that the supplier adopts a policy under economic coercion.\textsuperscript{209} The Court should therefore adopt a purposive interpretation of the element of collusion in Article 81, as it is not the form of the practice, but its aim which seems to be the decisive criterion.

\begin{footnotesize}

\begin{itemize}
  \item \textsuperscript{206} Id, para 144.
  \item \textsuperscript{207} See, Judgment of 26 June 2007, \textit{Cour d’appel de Paris}, above n 147, p. 33, “…l’existence d’une police verticale des prix, impliquant aussi bien les fournisseurs que les distributeurs, exclut une entente entre les seuls distributeurs”.
  \item \textsuperscript{208} Case C-105/04P, Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission [2006] ECR I-8725, para. 96.
  \item \textsuperscript{209}Case T-5/00, Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch GE v. Commission [2003] ECR II-5761, para 149-150.
\end{itemize}
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4.2. A responsive definition of collusion under Article 81 EC

The main feature distinguishing dogmatic from responsive rules is that the latter take into account the direct and indirect consequences that ensue from the implementation of the rule, even if this comes at the price of some degree of ambiguity, while dogmatic rules in principle stay indifferent to outcomes. The reasoning for dogmatic rules derives from an original exemplar in an everlasting effort to achieve consistency between the different parts of the legal system, however unrelated these are in terms of their objectives. It should be obvious by now that interpreting the concept of agreement under Article 81 by referring to the usual meaning of this concept in other areas of law, such as contract law, is a dogmatic approach that does not cope with the particular objectives of competition law. The quest for a responsive definition of the concept of agreement should therefore begin by addressing the function of the specific requirement of collusion in the application of Article 81 to vertical restraints.

4.2.1. The role of the requirement of collusion in the application of Article 81 to vertical restraints

The evolution of EC competition law towards a more effects-based economic approach for vertical restraints has major implications on the function of the element of collusion. The significant role that market power plays in the application of Article 81 to vertical restraints, which are not by their nature anticompetitive, reduces the importance of the distinction between the respective scope of application of Articles 81 and 82 and consequently that of the boundaries between unilateral and collusive anticompetitive practices.

For example, finding the existence of an agreement or concerted practice is not an essential element of a claim of anticompetitive tying/bundling. Certainly, the Vertical Restraints Guidelines distinguish between different situations in which vertical tying practices may infringe EC competition law, but the conditions seem to be the same for Article 81 and Article 82. It follows that what distinguishes a tying claim under Article 81 from an Article 82 claim is the degree of market power of the supplier. If the supplier has a significant market power providing a dominant position on the relevant market, the case will most likely be brought under Article 82. Otherwise, it will be an Article 81 claim.

It is also possible to use both provisions, if the firm has a dominant position, in order to sanction different components of a single antitrust offence. For example, in Van den Bergh Foods, Unilever’s distribution practices were found to infringe both

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210 Vertical Restraints Guidelines above n Error! Bookmark not defined., para. 215.
211 Id. para 215 (Article 81). For example, the condition that there should be two distinct products, see para 216 (the existence of demand of the buyers for the tied product is the determinant criterion to distinguish if there are two separate products). Compare with Art. 82: Dec. 2007/54 Microsoft, O.J. (2007), L 32/23, para 794; upheld by the CFI in Case T-201/04 Microsoft Corp. v. Commission, judgment of 17 September 2007, nyr, para 859, 862.
212 See also, Rousseva, “Modernizing by Eradicating: How the Commission’s new Approach to Article 81 EC Dispenses with the Need to Apply Article 82 to Vertical Restraints”, 42 CML Rev. (2005), 587, 623.
213 See, Case 85/76 Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461, para 116 (the fact that exclusive agreements may fall within the scope of Article 81 “does not preclude the application of Article 82 since this latter Article is expressly aimed in fact at situations which clearly originate in contractual relations”).
Articles 81 and 82. Article 81 applied to the exclusivity clause that was included in the distribution agreements concerning the use of the freezer cabinets provided by Unilever (then HB Ice Cream) to members of its distribution network. Article 82 applied to the practice of inducing the retailers who did not have a freezer cabinet to enter into freezer-cabinet agreements with HB, subject to a condition of exclusivity. The latter practice could not fall within the scope of Article 81 as it was a purely unilateral conduct: an invitation to participate to an agreement naturally pre-dates the conclusion of the agreement itself. This interpretation is supported by the explicit reference of the CFI to the retailers that did not have their own freezer cabinets or cabinets available by other suppliers, which is retailers that had not yet concluded a distribution agreement with HB. The ECJ rejected Unilever’s argument that the Commission and the CFI had recycled the same arguments for the purposes of applying Articles 81 and 82 and affirmed that these claims involved a “separate analysis”.

The distinction between unilateral and collusive conduct was not, however, an important issue in this case, as the Court had to examine thoroughly, in both situations, the effect of HB’s conduct on consumer welfare. It made no difference, from the point of view of the judicial test applied, if this was an Article 81 or an Article 82 case. In both situations, the plaintiff had first the burden to prove the existence of an anticompetitive effect. The alleged anticompetitive conduct could then be justified by objective justifications and/or efficiency gains. It is highly unlikely that the litigants will concentrate the most important part of their efforts in contesting the identification of the practice as an agreement/concerted practice.

Nevertheless, the finding of collusion has important practical implications when the specific practice is by its nature anticompetitive under Article 81(1). The characterization of the practice as unilateral or collusive will in this case be decisive as, if there is collusion, the conduct will automatically be found to infringe Article 81, without the need to further examine its actual or potential effect on consumer welfare and possible efficiency justifications. The definition of what constitutes collusion (agreement or concerted practice) will therefore have important implications on the analysis of the element of the restriction of competition. If the courts adopt a broad interpretation of the concept of agreement, a greater number of practices will be found to infringe Article 81. A narrower interpretation of this concept will have the opposite effect. The right judicial strategy would be to adopt an interpretation of the concept of agreement that will minimise the risk of over-enforcement of Article 81.

The limits of what constitutes over-enforcement in this case are not set by a concrete evaluation on a case-by-case basis of the effects of the specific conduct on consumer welfare: in the sense that consumers will suffer a price increase or a loss of product quality and innovation. There is a presumption of consumer harm because of the nature of the specific practice. The Commission explains that hardcore restrictions are “restrictions which in light of the objectives pursued by the Community

215 Id. para. 159, the infringement of Article 82 “takes the form, in this case, of an offer to supply freezer cabinets to the retailers and to maintain the cabinets free of any direct charge to the retailers”. This important element of the Court’s decision is not taken into account by Rousseva, above n Error! Bookmark not defined., at 636, who concludes that inducement was not a “meaningful point of distinction” between Article 81 and Article 82 and that the reasoning of the Court “was a mere recycling of the arguments made under Article 81”.
competition rules have such a high potential of negative effects on competition that is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effect on the market”.\(^{217}\) The Commission explains that “evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition” for Article 81 to apply.\(^{218}\) Anticompetitive intent may nonetheless be objectively deduced from the implementation of such practices. It follows that, for our purposes, an essential step of the inquiry will be to focus on the objective analysis of the intent of the firms to implement the hardcore restraint.\(^{219}\) The search for a collusive practice or agreement is therefore typically a basic intent test.\(^{220}\)

By requiring the existence of an invitation to collude and an acceptance of this invitation, the *Bayer* test takes a formalistic and superficial view of the intent test. What definitively counts is the external manifestation of the intent of the parties to the agreement to implement the anticompetitive practice, either explicitly by oral/written statements or implicitly by their conduct on the market.

This methodology is flawed. The fact that a distributor and a supplier adopt convergent strategies on the market may be explained either by an independent decision to follow their individual interests or by the existence of collusion. The requirement of an invitation to collude or offer may reduce the risk of over-enforcement, as it is assumed that the distributor acted in concert with the supplier if the latter had informed the former of his desire to adopt a specific pattern of conduct and the distributor acted in consequence. This requirement has been strictly interpreted in *Bayer*: the CFI, confirmed by the European Court of Justice, reached the conclusion that adopting a specific conduct does not in itself amount to an offer to collude but that it is also necessary to prove that the specific conduct requires participation or assistance from other parties in order for its objectives to be accomplished.\(^{221}\) Resale price maintenance schemes always require the cooperation of dealers, as they have to charge the resale price, so this additional condition may seem redundant (unless its aim was to limit the scope of the *per se* application of Article 81(1) only for vertical restraints affecting market access). A different criterion should be adopted. For example, systematic price monitoring and sanctions by the supplier will most often indicate that the success of the anticompetitive scheme requires the assistance of the retailers. It will also bring within the scope of Article 81 those anticompetitive practices that are most likely to be implemented.

Evidence of acquiescence can either be direct or circumstantial.\(^{222}\) Circumstantial evidence of acquiescence may result from an objective analysis of the intent of the distributors. In *Bayer*, the ECJ approved the examination by the CFI of the “genuine wishes” of the wholesalers to prevent parallel imports, in the absence of an agreement.\(^{223}\) The CFI took into consideration the fact that the wholesalers

\(^{217}\) Guidelines on the application of Article 81(3), above n Error! Bookmark not defined., para 21.

\(^{218}\) Id., para 22.

\(^{219}\) See, *Bayer v Commission* above n Error! Bookmark not defined., para 67, “in order for there to be an agreement within the meaning of Article 81(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way”. Emphasis added.

\(^{220}\) There is no need to bring evidence of specific intent. See, *GlaxoSmithKline Services v. Commission* above n Error! Bookmark not defined., para 77, “…not required to establish the existence of a joint intention to pursue an anti-competitive aim”. Emphasis added.

\(^{221}\) *Bayer* above n Error! Bookmark not defined., para 101.

\(^{222}\) *GlaxoSmithKline Services v. Commission* above n Error! Bookmark not defined., para 83.

\(^{223}\) *Bayer* above n Error! Bookmark not defined., para 121.
“adopted a line of conduct demonstrating a firm and persistent intention to react against a policy that was fundamentally contrary to their interests.”

The decision of the CFI contains no further analysis of this counterfactual consideration. It seems that if any reference was made to the “genuine interest” of the wholesalers, in the absence of an agreement, it is because the latter had indirectly reacted to the policy adopted by the supplier, while at the same time they deliberately attempted to give the impression that they were acting in accordance with Bayer’s policy. It is the analysis of the actual conduct of the distributors and not the consideration of a simple declaration of intention that will be decisive for the finding of tacit acquiescence. This is in conformity with the assumption that there is in principle a divergence of interest between the suppliers and the distributors in a vertical relation and that therefore actual compliance to an identified supplier’s policy will most likely be an indication of concerted action.

This condition is difficult to apply in cases where only some members of the distribution network implement the specific practice, as this could be interpreted as either that there is collusion between the supplier and these dealers or that the dealers have simply acted in accordance with an individual profit-maximising strategy. One may be tempted to adopt the quantitative analysis undertaken by the French Competition Council: first, take into account the percentage of compliance to the supplier’s policy of all distribution points and then deduce from a significant percentage of compliance the distributor’s acquiescence to the supplier’s policy and therefore the existence of an agreement under Article 81. This technique is, nonetheless, highly impressionistic. It may lead to the finding of an agreement even for those members of the distribution network that did not follow the supplier’s policy, unless there is evidence that they actively reacted to it. Ironically, the existence of parallel conduct by a significant number of retailers could lead in this case to a finding of a vertical agreement with the supplier, while it could not be sufficient evidence to infer a horizontal agreement or concerted practice between the distributors.

The exact role of the concept of agreement in a vertical restraint inquiry remains therefore unclear. The requirement of an offer and acceptance does not serve a “socially relevant purpose” as it does not seem to have “any logical or empirical connection” to the effects of the specific practice on the objectives of EC competition law. Judge Richard Posner highlights the irrelevance of the distinction between unilateral conduct and collusion in a vertical context with regard to the concept of the restriction of competition when he remarks that vertical restraints are “unilateral abuses of market power.” A possible option would be to relativize the importance of the boundaries between concerted and unilateral conduct, by moving towards a rule of reason for all types of vertical restraints. EC competition law is not, however, there yet and it will require a further debate if we should head towards that direction. This criticism highlights the need to place the requirement of agreement on firmer

224 Bayer v. Commission above n Error! Bookmark not defined., para 129.
225 It is a well established precedent that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. See, Ahlström above n Error! Bookmark not defined., para 61-72.
theoretical grounds and to link its definition to the issue of the anticompetitive harm of the relevant conduct.

4.2.2. Linking the requirement of collusion to that of harm to competition

The objective of this study is not to suggest setting aside the requirement of collusion for vertical restraints but to develop instead an interpretation of the concept of agreement that will respond to the text and the objectives of Article 81. It seems therefore important to connect the concept of "agreement" to that of "harm to competition", particularly in situations where collusive practices are anticompetitive by their nature and the finding of an agreement leads automatically to the application of Article 81(1).

There are three types of vertical restraints that are by their nature anticompetitive in EC competition law: fixed and minimum resale price maintenance\(^\text{228}\), restrictions providing absolute territorial protection, including restrictions on passive sales in selective distribution systems\(^\text{229}\) and customer restrictions in specific circumstances.\(^\text{230}\) These restraints may reduce the welfare of final consumers, which is the main objective followed by Article 81(1).\(^\text{231}\) Territorial restrictions leading to absolute territorial protection may also affect the objective of market integration.

4.2.2.1. Absolute territorial protection and territorial restrictions

Territorial restrictions often have efficiency justifications and lead to the provision of better distribution services for final consumers. The assumption is that retailers have better information on evolving local market conditions than the manufacturer and will therefore be able to choose the most adequate level of distribution services for the local consumers.\(^\text{232}\) Exclusive territories will generally compensate retailers for their distribution efforts by offering them the possibility to obtain a higher distribution margin. The exclusive distributors may still have the incentive to behave opportunistically by inflating the price of their distribution services or by providing distribution services in excess of what local infra-marginal consumers effectively need.\(^\text{233}\)

The risk of opportunistic behaviour is limited in situations of relative territorial protection: competition from external distributors that are able to make passive sales to the local consumers will constrain the ability of the exclusive distributor to extract monopolistic profits. The same conclusion cannot, however, be reached in situations of absolute territorial protection. Certainly, even if there are no active or passive sales from other distributors, this does not necessarily lead to higher

\(^{228}\) Article 4(a) of Reg 2790/99 above n Error! Bookmark not defined.; Vertical restraints Guidelines above n Error! Bookmark not defined., para. 47-48.

\(^{229}\) Article 4(b) and 4(c) of Reg 2790/99.; Vertical restraints Guidelines, para. 49-55.

\(^{230}\) Article 4(b) & 4(d) of Reg 2790/99. In addition, according to Art. 4(e) of Reg 2790/99, restrictions on suppliers of components which limit “the supplier to selling the components as spare-parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods” are also prohibited.

\(^{231}\) GlaxoSmithKline above n Error! Bookmark not defined., para 118.


prices for consumers. There may be other substitute products in the local market that could constrain the ability of the exclusive distributor to increase prices. It is also unlikely that a supplier with market power will grant an absolute territorial protection to an exclusive distributor, when he can achieve his objectives with a relative territorial protection and thus keep the most important part of the monopolistic profits for himself. It is only if the retailer(s) hold(s) an important economic position or the supplier intends to commercialise a new product (which implies that he does not have a strong bargaining position with respect to the dealers) that absolute territorial protection will be used. In this case, absolute territorial protection does not necessarily lead to higher prices for the consumers, which brings us to consider the issue of the reason it should be prohibited under Article 81(1).

According to the dominant approach in EC Competition law, Article 81 prohibits restraints that have the effect to foreclose national markets and to put into question the benefits of trade liberalisation. If national suppliers foreclose a substantial part of a national market, market access of foreign suppliers will suffer. Article 81 will therefore apply prophylactically against concerted conduct instituting an absolute territorial protection (because of the potential foreclosing effect of these clauses for foreign producers(importers). Unilateral practices of dominant firms that foreclose national markets may also constitute an infringement of Article 82. This leaves out of the scope of these two provisions unilateral practices of non-dominant firms that foreclose market access. For example, a non-dominant supplier is free to geographically discriminate between different national markets or to impede exports, as long as this is not the result of concerted action.

This exception does not seem to make much sense, as it is unclear how different, from the point of view of the effects on market integration, this situation is from that of a supplier that adopts restrictive measures in concert with his distributors. A possible explanation may be that there is a greater likelihood of successful implementation of these practices if both the supplier and the distributors were in agreement over the adoption of these measures. As previously explained, it is most likely that the supplier will concede to the retailer the benefit of an absolute territorial protection if the retailer has an important economic (bargaining) position relative to that of the supplier (e.g. because the product is new). The expression “economic position” does not necessarily correspond to that of retailer market power, but may also amount to a situation of economic dependence or to a situation of bargaining strength (or power), for example because of the quality certification role of the specific retailer. There is also a greater likelihood of implementation of the practice if the supplier’s product occupies a dominant position on the market. It seems unlikely that the distributors will not implement the supplier’s policy, if the supplier’s product is relatively indispensable for their activity. It follows that the economic position of the retailer or the supplier will generally indicate the degree of probability of implementation of the specific practice. It will also suggest whether the supplier or the retailer were coerced in adopting the specific conduct and, consequently, that they did not act according to what would have been their best interest, in the absence of coercion.

4.2.2.2. Resale price maintenance

Resale price maintenance clauses may reduce consumer welfare in two circumstances:

1. the distributors can no longer compete on price for (the specific brand), leading to a total elimination of intra-brand price competition, and
2. there is increased transparency on price and responsibility for price changes, making horizontal collusion between manufacturers or distributors easier, at least in concentrated markets. The reduction in intra-brand competition may, as it leads to less downward pressure on the price for the particular good, have as an indirect effect a reduced level of inter-brand competition.\(^{235}\)

While the importance of intrabrand competition for antitrust law enforcement has steadily declined in US antitrust law\(^{236}\) since the late 1970s, intrabrand price competition is still an important concern for EC competition law.\(^{237}\) Resale price maintenance leading to total elimination of intrabrand price competition is presumed to affect consumer welfare and therefore constitutes a hardcore restraint under Article 81. The underlying assumption is that suppliers can use means which are less restrictive for price competition than RPM in order to compensate their dealers for additional services to consumers. It follows that one of the potential effects of resale price maintenance is higher prices for the consumers than what would have been the case in the absence of the agreement. This is still the subject of considerable debate as empirical evidence is fairly limited.\(^{238}\) Furthermore, the supplier has no interest in totally restricting intrabrand competition, as this will have the effect of increasing the distribution margin and therefore decreasing his profits.

The impetus for the RPM may also come from a powerful distributor.\(^{239}\) The latter can either coerce the supplier to increase the distribution margin or can agree with the supplier to share the additional profit following the price increase. Neither of these situations can occur, however, if the supplier has market power, as in this case he can achieve the monopolistic return without any help from dealer(s) and without having to share the additional profits. Moreover, it seems unlikely that a dealer would be able to coerce a supplier with market power.

The second justification refers to circumstances in which RPM operates as a facilitating device for a dealer or a supplier cartel.\(^{240}\) In a dealer cartel, the distributors may have obtained the assistance of one or more suppliers in order to enforce a cartel price. The suppliers do not have a priori an interest to cooperate, as their aim is to increase the sales of their product and therefore to limit the distribution margin, unless the dealers are able, through their collective market power or because of a situation of economic dependence, to coerce them to cooperate. However, there can be no

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\(^{235}\) Communication from the Commission on the application of the Community competition rules to vertical restraints – Follow up to the Green Paper on vertical restraints, O.J. (1998), C 365/3, Section 2.1. See also, Vertical Restraints Guidelines above n Error! Bookmark not defined., para 112.

\(^{236}\) Sylvania above n Error! Bookmark not defined., footnote 19; see also State Oil Co. v. Khan, 522 U.S. 3, 5 (1997), “…antitrust laws’ primary purpose is to protect interbrand competition”.

\(^{237}\) See Korah & O’ Sullivan, Distribution Agreements under the EC Competition Rules, 1st ed., (Hart Pub., 2002), p. 190 remarking that all hardcore restraints of Article 4 of Reg 2790/99 affect only intra-brand competition.


\(^{240}\) Ippolito, above n Error! Bookmark not defined., p. 281 suggests that the use of RPM as a collusive device is fairly uncommon as only 13,1% of all cases involved a price fixing allegation.
coercion if the supplier(s) has market power or if it is possible to use alternative distribution channels.

A distinct possibility would be for the dealers to induce the suppliers to enforce the dealer cartel by agreeing to share the expected monopolistic return with them. It is difficult, however, to imagine circumstances in which the dealers will act in concert, if there is a fairly important number of them on the market, as this will increase the difficulty to police the eventual dealer cartel arrangement. In a supplier cartel the RPM scheme will increase market transparency and will facilitate tacit collusion if there are barriers to entry and the cartel members account for a substantial part of the market.

It follows from the above that the existence of a concurrence of wills between the supplier and a distributor is relevant to the finding of harm to competition only in situations in which they both agree to share the monopolistic return following the implementation of the RPM scheme. In this case, the dealer(s) dispense an individual or collective market power that cannot be counterbalanced by market power in the supply side of the market, as the suppliers do not have any interest to share profits with dealers if they are able to achieve on their own the monopolistic return. In all other circumstances, when dealers and suppliers have a common interest in adopting a vertical restraint, it is because they agree that the additional distribution services will appeal to consumers.\textsuperscript{241} The vertical agreement will in this case bring an economically efficient outcome and increase consumer welfare.

The requirement of a concurrence of wills and of a common intention of the supplier and the dealer to adopt a specific conduct will therefore bring within the scope of Article 81 practices that produce positive consumer welfare effects. At the same time, unilaterally imposed RPM will escape the application of Article 81, even if they produce negative consumer welfare effects.

4.2.2.3. An instrumental approach to the definition of collusion

An instrumental approach to the definition of the concept of collusion should aim to develop administrable criteria that will link the finding of collusion to the existence of harm to competition. These criteria should also recognize that it is not the objective of Article 81 to sanction any type of conduct that may produce negative consumer welfare effects but that this provision exclusively aims at collusive behaviour. It follows that if the conduct of the parties is perfectly consistent with individual profit-maximizing behaviour and that it is not the result of inducement or constraint from another market actor, Article 81 should not apply.

Nevertheless, a counterfactual test that would attempt to identify the most profitable strategy for the firm, in the absence of an agreement, and compare it with its actual conduct in order to find the existence of collusion would impose on the competition authority or judge the impossible task of second-guessing the strategy of the firm, without having adequate information on its incentives, its costs and estimated short or long-term profits. Such a test should be avoided. In the absence of any direct evidence of an agreement, the inquiry should focus on observable patterns of behaviour, which along with a thorough analysis of the incentives of the parties would indicate the exercise of inducement or constraint to adopt the specific conduct.

\textsuperscript{241} Wegman Burns, above n 42, p. 16.
This approach will acknowledge the differences that exist between vertical and horizontal restraints in defining the criteria of the relevant test for the definition of an agreement under Article 81.

The inquiry will first identify if the relevant facts point to the direction of a horizontal collusion between dealers or suppliers (first step). As it is the case for all horizontal restraints, parallel behaviour, such as complaints from various retailers to the supplier against a price-cutting retailer, does not necessarily indicate the presence of a retailer (dealer) cartel. The existence of multiple complaints may be explained by the individual profit-maximizing behaviour of the dealers that may suffer from free-riding. Multiple complaints may nonetheless indicate the existence of a horizontal agreement or concerted practice if by providing information on the need to maintain or increase retail prices the dealers knew that their competitor(s) might make use of this information, for example, if there is evidence that the supplier met with other dealers and discussed with them his pricing policy before adopting a list of recommended prices. The fact that the dealers charged an identical or very similar resale price would not be attributable to oligopolistic interdependence but it would be the result of a tacit agreement between the dealers, enforced with the assistance of the supplier. The situation will be more complex if, following the dealers’ complaints the supplier terminated the price cutting retailer. The supplier may have acted according to his best interests: the retailer was probably providing inadequate distribution services. The plaintiff should in this case establish causation between the complaints and the termination, by proving that the terminated retailer provided equivalent distribution services to the other retailers on the market.

In the absence of any circumstantial evidence of tacit collusion between the dealers or suppliers, the fact-finder should examine the possible existence of a vertical collusion. Anticompetitive vertical restraints are forced upon one level of the distribution chain by a firm or firms with a strong economic position at another level. Evidence of coercion will exclude the possibility that the supplier or the dealer acted in their best interest by adopting an individual profit-maximizing behaviour and will therefore indicate the existence of a vertical collusion (second step). It will also indicate instances in which the vertical restraint will most likely produce anticompetitive effects. There are two elements that may establish coercion.

The inquiry could examine the individual or collective market position of the dealers and/or the suppliers in the specific vertical context. As previously mentioned, market position is not similar to the neoclassical concept of market power and may refer to a economic dependence/obligatory partner situation (i.e. a situation where an important part of the dealer’s or supplier’s turnover is realized with the particular supplier or dealer). Depending on the market position at the supply/retailer level, this assessment will identify if the specific vertical restraint was initiated by the dealer(s) or the supplier, which will also be useful information with regard to the existence of a restriction of competition. If the vertical restraint was adopted under dealer pressure, it will certainly reduce consumer welfare as it will increase the

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242 Id, at 36, “The complaining dealers, if affiliated with the same manufacturer, might believe the restraints would enhance the interbrand marketability of the product and they would therefore have a legitimate and procompetitive reason for both making their views known and coordinating their efforts”.

243 This supports the inference of the Court of Appeal in Argos Ltd, Littlewoods & OFT, JJB Sports & OFT, above n Error! Bookmark not defined., para 141.

244 This information will not be unknown to the plaintiff as in most cases it will be the terminated dealer that will bring the case.
distribution mark up and will lead to higher prices for consumers, without this increase being justified by the provision of better distribution services. Herbert Hovenkamp explains:

“…a powerful dealer’s interests lies in protecting itself from price competition from other dealers. As a result, a restraint initiated by a dealer and that results from powerful dealer pressure placed on a supplier can be regarded as contrary to the supplier’s independent best-interest. In that case the agreement requirement is clearly met and, if dealer power is proven, anticompetitive effects can be presumed as well”.

If the dealer does not have a strong market position, the impetus for the restraint comes from the supplier. In this case, there is less risk that the specific restraint will reduce consumer welfare. The assumption is that the supplier and the consumers’ interest are convergent, except in situations of market imperfection because of the existence of a collective or individual market power at the supply side of the market.

One should also take into account the possibility that the vertical arrangement may foreclose national markets and therefore affect the objective of market integration. As previously explained, the likelihood of implementation of such a practice is the decisive criterion of the inquiry. The strong market position of the supplier or/and the existence of an agreement to share profits between the supplier and the retailers indicates the likelihood of implementation of the practice. The latter event will only occur if the supplier is not able to achieve the additional monopolistic profit by himself and the success of the scheme requires the assistance of the retailers.

The existence of a systematic monitoring system (with adequate sanctions) of the conduct adopted by the retailers will indicate that the retailers’ assistance was indispensable for the success of the scheme. Systematic monitoring with sanctions will also indicate that the retailers were coerced by the supplier to adopt the specific practice and that their conduct was not the outcome of an individual profit-maximizing conduct. It is also possible to argue that systematic monitoring is also consistent with the explanation that there is an agreement between the supplier and the retailers to share additional profits, as the supplier needs to ensure that there is no cheating from some of the retailers participating to the collusion, that would jeopardise the success of the scheme.

The presumption is that the supplier is motivated by his self-interest which generally coincides with that of the consumers, in the absence of market power at the supply level. The retailers can only increase their profits by adopting a strategy that will enhance the position of the supplier’s product with consumers in the interbrand market. Consequently, absent any indication of coercion, the convergence of the supplier’s and retailer’s policy will not be explained by collusion but will portray an individual profit maximizing behaviour. If the supplier has decided to adopt measures of coercion or inducement of the retailers it is because he intended to use his market power in order to extract monopolistic profits from the consumers. The retailers have no interest to follow such a strategy, as this will have the effect to reduce sales and consequently their profits, if their distribution mark-up stays the same. The retailers will care more about the local consumers than the supplier, if the latter has market power, thus reversing the usual assumption that the interests of the supplier and the consumers coincide. **It follows that evidence of coercion, such as systematic monitoring with sanctions, will indicate the existence of an agreement between**

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245 Hovenkamp above n Error! Bookmark not defined., p. 471.
the supplier and the retailers, as the latter were induced to act contrary to their own interests.

Nevertheless, coercion should only be taken into account if it has been successful and actually has induced the dealers to adopt the specific practice. It is therefore important to examine the implementation of the supplier’s policy by looking to the percentage of retailers that have complied with it (fourth step). If a substantial percentage of the points of sale of the distribution network have implemented the scheme that would indicate the existence of an agreement under Article 81. The dealers will not necessarily be fined though for adopting an anticompetitive agreement, as this will depend on their active and non-coerced participation to the anticompetitive scheme.

The adoption of such a test will link the requirement of collusion to that of restriction of competition and will avoid the possible risk of over-enforcement or under-enforcement of Article 81 EC.

5. Conclusion

Michel Foucault once noted that classifying and distinguishing between the Same and the Other is often a product of the “familiar landmarks of (our) thought”. From there it is a small step to recognize that an existing doctrinal category or concept has emerged in order to serve a specific (analytical or other) purpose, intrinsically linked to the meta-principle that inspires the particular disciplinary field. Adopting a static approach, which would take the meaning of a concept as a given, constitutes an intellectually sterile and practically inadequate approach.

The distinction between agreement and unilateral conduct, in particular within a vertical context, challenges the “familiar landmarks of our thought” as students of the legal system, because we have learned to conceive the concept of agreement within the narrow strictures of contract law. Interestingly, much of the focus of doctrinal comment and case law in the law of contract has been on the definition and formation of an agreement, the concept of unilateral conduct/practice being totally neglected by scholars and the courts. This is because “the distinction between agreement – and non-agreement-based relations defines the field of contract” as opposed to the neighbouring field of tort, Feinman perpectively remarks. Defining the boundaries of consensual governance between the parties of an “agreement” and, consequently, the scope of the discretion of the parties to devise the extent of their own obligations, one of the principal features of contract law, is not a principal matter.

For example, in Bayer the fact that the dealers have not complied with Bayer’s policy was a decisive factor that led the Court to conclude that there was no agreement under Article 81. As is explained by Faull & Nikpay, above n Error! Bookmark not defined., p. 205, “(i)n Bayer the emphasis the CFI placed on evidence such as the fact that some wholesalers had continued to seek additional supplies for export suggests that, had they merely reduced or eliminated exports with no more, the CFI may have found tacit acquiescence”.

The Commission may take into account the fact that the dealers were coerced to participate to the agreement when deciding to impose a fine. See, Dec. 80/256 Pioneer, O.J. (1980), L 60/21, para 95; Joined Cases C-100-103/80 above n Error! Bookmark not defined., para 134; see, however, Case T-17/99, Ke Kelkit v Commission [2002] ECR II-1647, para 48 (“(a)lthough it is true that the bonds of economic dependence existing between participants in an agreement is liable to affect their freedom of initiative and decision, the existence of those bonds does not make it impossible to refuse to consent to the agreement which is proposed to them.”)


of concern for tort law. The focal role of the concept of agreement in contract law is explained by the need to defer, of course within certain limits, to the choices the parties of the agreement consensually made, in accordance to their own interests.

The concept of agreement, as it is generally perceived by contract lawyers, is not however relevant with regard to the aims pursued by competition law. Deferring to consensual governance is not an option if the resulting market outcome decreases consumer welfare. This is in conformity with the objective of competition law to provide a certain degree of public accountability for firm behaviour that may significantly affect the principle of consumer sovereignty. If competition law perceives collusion with more suspicion than unilateral conduct, it is because competition law is based on the assumption that the free market system, where firms will be price takers and will independently decide their commercial strategy according to their own costs and to their own estimates of consumer preferences, constitutes the default organizational structure in modern economy. This is in conformity with the assumptions of the perfect competition model, which still constitutes the intellectual backbone of competition law. Market outcomes matter and collusion is perceived with suspicion because it can potentially lead to a non-efficient market outcome, from the point of view of the consumers.  

It follows that if contract law centres on the existence (or non-existence) of an agreement, which indicates the scope of consensual governance that contract law aims to safeguard, competition law should focus on the existence (or not) of a market outcome that does not satisfy consumer preferences. In other words, the principle of consumer sovereignty should be preserved from the emergence of a market context where consumer choice is restricted by the conduct of other market players. Collusion between competitors constitutes thus a proxy, depicting a situation of decreased uncertainty in the marketplace with regard to the strategy of the different market players. It is a departure from the assumptions under which the aims of the principle of consumer sovereignty are fully realized.

This conclusion is not valid in the context of vertical relations, as in this situation the cooperation between producers and distributors serves consumer sovereignty. Consumer preferences are not only about lower prices but also relate to the services that go along with the purchase and the consumption of the specific product. Dealers possess invaluable information on consumer preferences in different local markets, which explains why it is important for the manufacturers to reward the dealers’ efforts and to provide the necessary incentives for them to accomplish their role. The self-policing character of vertical relationships will preserve the interests of the consumers, as each party will check that the other one is not remunerated more than the value (for the consumers) of their dispensed efforts. Finding an antitrust agreement in this circumstance will compromise the objective of antitrust

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251 The fact that Article 81 does not apply to situations of oligopolistic interdependence may be explained by the difficulty to define situations where parallel conduct by competitors was the result of behavioural interdependence (firms take action in anticipation and in response to those of their rivals) rather than independent identification by each firm of the most efficient strategy to respond to consumers’ preferences. The “oligopoly problem” is usually addressed with alternative means, such as ex ante merger control or the instrument of facilitating practices. The problem of devising administrable rules largely explains the caution of the current approach in EC Competition law. Nevertheless, a better understanding of oligopolistic interdependence and advances in game theory may increase the confidence of the competition law enforcer and could eventually lead to a possible extension of the scope of Article 81 in situations of oligopolistic interdependence.

enforcement, which is to guarantee the principle of consumer sovereignty. A different conclusion, however, suggests itself in situations where one of the parties holds the power to disregard the other party’s views on consumer preferences and impose a pattern of conduct through coercion or inducement. In this situation, it seems reasonable to find the existence of an antitrust agreement in order to subject the relevant practice to the sharp scrutiny of the antitrust authorities and courts. Coercion from one of the parties will not lead to the application of the prohibition principle of Article 81, as there is the distinct step of the proof of a restriction of competition and consumer harm. Article 81 will apply only if there is not enough competition in the downstream and in the upstream markets to safeguard consumer choice.

It follows that in order to define antitrust collusion (which could take the form of an agreement or a concerted practice), one should not focus on the exchange of consent or a meeting of minds between the parties but should instead identify situations of induced or coerced conduct, as opposed to purely unilateral one. In other words, defining the contours of what constitutes true unilateral conduct is essential in order to define the concept of antitrust agreement and not the opposite. This is true for vertical and horizontal antitrust collusion.