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The Court of Justice in the Archives Project
Analysis of the *Consten and Grundig* case (56/64 and 58/64)

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Abstract

This working paper is part of the Court of Justice in the Archives Project. It focuses on an analysis of the *dossier* of the *Consten and Grundig* case. In *Consten and Grundig* the Court introduced many of the fundamental concepts and guiding principles of EU competition law. The release of the *dossier de procédure* sheds light on the thought processes that led to this judgment. The *dossier* confirms that the Court's choice to stick with the "object" analysis when dealing with vertical restraints harmful to market integration, was by no means unavoidable; it presented a heavily contested legal issue, with strong arguments arguing for the opposite position. In fact, the parties and the intervening governments followed a litigation strategy, based on economic data and comparative law, which was never analysed in its entirety by the Court or the subsequent literature. In this way, the present study helps contextualise the Court's choice to give precedence to the single market imperative when applying competition law over all other concerns: the Court understood itself as a driver of European market integration. Parallel to that, the *dossier* provides a valuable insight into how the various actors involved in the dispute perceived their role and interacted with each other during the formative days of EU competition law.

Keywords

Consten and Grundig Case; Competition Law; Vertical Agreements; Exclusive Distribution; Restrictions by Object; Market Integration Objective; US Antitrust Law; ECJ Archives; *Dossier de Procédure*

Executive summary

This summary aims at identifying the added value of the *dossier*. It is not meant as a full summary of the report but rather as an outline of the main issues and insights that emerge from the archival material. Those insights refer to legal issues, procedures and institutions, actors and the archive documents themselves. The main takeaway is that, while the *dossier* of *Consten and Grundig* does not lead to a major new breakthrough that could completely overturn the contemporary perception of the case, it can help us understand better the subsequent development of the CJEU caselaw on market integration and the historical context surrounding it.

A. Insights into legal issues and arguments

One of the main insights into legal issues and arguments that can be extracted from the *dossier*, which was not necessarily existent in published materials, concerns the relevance of American caselaw. While Advocate General Roemer did reference US Supreme Court judgments in his Conclusion, the fact that US law was referenced by all parties and the extent to which it was deemed relevant to the dispute is a novel discovery. Contemporary observers did at the time point out the significance of US law, but it tends to be forgotten in modern literature, where market integration as a rationale is often assumed to have prevailed unchallenged. The Court seems to have seriously weighted the arguments based on American antitrust law and not to have disregarded it all together, even though references to it cannot be necessarily found in its final judgment. In addition, many factual issues of the case can be clarified by the report and the economic data it includes. Even though the judge rapporteur's summary of the argument of the parties was quite extensive, the factual situation can still be clarified by revisiting the economic data submitted by the parties, which could help explain why in this case the Court decided to side with the Commission. In addition, the object/effect distinction and its history could be clarified by explaining how the parties understood Article 101 (1) TFEU before the caselaw of the Court. Main question would be how the *dichotomization* of the test into an object and an effect analysis came to be accepted by the Court, even though Article 101 TFEU does not seem to necessarily lead to it. Lastly, Regulation 67/67 (on the group exemption of vertical agreements) was a direct result of the judgment and many of its exceptions seem to refer to arguments used by the applicants (e.g. an exemption for temporary territorial protection in cases of market penetration of new products).

B. Insights into procedures and institutions

The report can help clarify the evolution of the Commission as a competition authority given that it is an appeal against the first antitrust decision of the EEC Commission. Many things that we would consider self-evident today were not so at the time, and the procedural documents contained in the file can help clarify how the first regulations came into being and how the Commission was perceived at the time as a nascent administrative authority. Most importantly, the *dossier* can help explain how parties viewed the extent of the discretion of the Commission in dealing with antitrust matters, as well as the intensity of the judicial review in those matters. This could prove useful in understanding exactly how the interaction between Court and Commission was eventually shaped into the peculiar system of enforcement that we recognize nowadays.

C. Insights into actors

The *dossier* can shed light (combined with other archival material) on the role of Germany and Italy in shaping competition policy during that era. In addition, it can show how some of the pioneers of European competition law, such as counsel for Consten and UNEF (Lassier, Le Tallec, Collin) dealt with the foundational issues of competition law. Much of the argumentation contained in the Archives was based on national laws and it is interesting to see how those actors viewed market integration arguments at the time. Given that those actors were very significant in shaping European competition law as distinct from the US one, I believe this *dossier* can make a modest contribution to understanding the relation between their role and the development of competition law.

D. Insights into the documentation itself

The *dossier*(s) is quite extensive, and a lot of material has been redacted. This is interesting because a lot of the material that seems to be missing concerns filings of the main parties to the dispute. Therefore, it will be necessary to find those files or at least provide a plausible explanation for their absence.[1] In addition, the sheer size of the material is quite indicative as to the way that competition disputes are adjudicated to this day. Extensive amounts of factual and economic evidence have been used ever since, and the *dossiers* of competition cases are always voluminous. The contents of the *dossier* in the present case could also illustrate the paperwork involved in such a dispute and the manner that the Court and the Commission interact with each other through notes, communications etc.

E. Key Paragraph

This section provides the key paragraph of the judgment, that is a paragraph that encapsulates on what issues *Consten and Grundig* is the authority for. This proved to be quite tricky for a judgment like the present one given that it has been the authority for many diverse issues on European competition law (vertical agreements, distribution and territorial protection, object/ effect, market integration, judicial review etc). In addition, from a very practical standpoint, the fact that there are no numbered paragraphs in the judgment as well as the overall writing style of the judgment can exacerbate the problem. The style is much more narrative than later judgments and there is no use of the traditional technique of 'copy pasting' excerpts from previous judgments, which can make finding the crucial statements even more difficult.

On Market Integration (most important finding of the Court in the case):

'Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 101 (1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process'.[2]

On vertical agreements:

'Neither the wording of Article 85 nor that of Article 86 gives any ground for holding that distinct areas of application are to be assigned to each of the two Articles according to the level in the

[1] On the redacted material see below under III 1.

[2] Consten and Grundig, 340.

economy at which the contracting parties operate. Article 85 refers in a general way to all agreements which distort competition within the Common Market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels. In principle, no distinction can be made where the Treaty does not make any distinction'.[3]

On the severability of infringing provisions:

'The provision in Article 85 (2) that agreements prohibited pursuant to Article 85 shall be automatically void applies only to those parts of the agreement which are subject to the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the agreement itself. The Commission should, therefore, either have confined itself in the operative part of the contested decision to declaring that an infringement lay in those parts only of the agreement which came within the prohibition, or else it should have set out in the preamble to the decision the reasons why those parts did not appear to it to be severable from the whole agreement.'[4]

[3] *Consten and Grundig,* 339.
[4] *Consten and Grundig,* 344.

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1. Introduction

The *Consten and Grundig* case was one of the first major competition law cases decided by the European Court of Justice (then Court of Justice of the European Economic Community) and still remains one of the most important ones.[5] Issued before the creation of a vast body of EU caselaw on competition matters, and long before the acquisition of considerable expertise and experience by the Commission as an antitrust enforcer, it doubtlessly constituted a milestone. Many of the Court's findings eventually guided the development of the doctrine of competition law in the EU with all its peculiar characteristics.[6] Still, at the time that the judgment was issued it was received as a surprise by many and condemned as incompatible with existing doctrine on antitrust law.[7] Even today, a brief look at the literature on EU competition law is enough for anyone to see that the line of reasoning that the Court followed and developed is anything but uncontroversial.

The present report was written as part of the wider project on the Archives of the European Union.[8] This project seeks to offer an 'insider look' into some of the most significant EU law decisions by providing researchers with access to the original *dossiers* of those cases. The opening of the Archives and the information contained therein could prove invaluable in acquiring a better understanding of the workings of the Court and the development of the caselaw. In providing this kind of unprecedented access, the project attempts to shed light on the process through which the Court arrived at its decision. The project emphasizes the interplay between the arguments of the parties, the Advocate General and the Court during all phases of the litigation. The objectives are twofold. The first is to analyse the *dossier* itself; its composition, the information it contains, and where the arguments of the parties can be found in it. The second and arguably more important objective is to extract the 'added value' of the *dossier*, that is the extent to which it helps illuminate the legal reasoning of the Court as well as how this reasoning, flawed or not, ended up defining the future caselaw.

After this brief introduction, the second section of this report (under II.) contains a brief overview of the facts of the case and a summary of the arguments of the parties, as well as of the Advocate General's Opinion and the Court's findings. It also attempts to provide an analysis of the impact of the case on the development of future caselaw and to present the standard view of the case as it exists in EU law scholarship today.

The third section (under III.) will focus - as its title implies - on the added value of the *dossier*. It will aim to present the contents of the *dossier* and clarify which documents were not accessible to the public in the past. More substantively, it will aim to present the arguments of the parties, with emphasis on the path not taken by the Court, highlighting potential divergences, and observed irregularities. In addition, there is a section on the procedural issues that did not emerge from the public record, as well as a section concerning the Courts handling of the submissions. This part demonstrates that there is value in consulting the *dossier* because it reveals that a completely different decision was conceivable, a result that could have impacted significantly the way EU competition law approaches vertical restraints

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[5] C-56/64 and 58/64, Judgment of the Court of 13 July 1966. - *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, ECLI: EU: C: 1966:41.

[6] Richard Whish and David Bailey, *Competition Law* (Oxford University Press 2015) 639. For the importance of the single market imperative in the subsequent caselaw of the ECJ see e.g. the Football Association Premier League and Pierre Fabre cases, C-403/08, C- 429/08, EU:C:2011:631 and EU:C:2011:649 respectively.

[7] See *infra* under 2.4.

[8] For more info on the Archives project you can consult the websites https://ecjarchives.eui.eu/ and https://ecjarchives.eui.eu/research-plan/.

to this day. It is argued that the Court consciously strayed away from this path in order to promote its vision for European antitrust doctrine.

The conclusion will mainly reflect on the reasoning and attitudes of the Court. Summarizing the main findings of the dossier's analysis, an attempt will be made to ascertain whether the emphasis placed on market integration could be characterized as misguided or not.[9] The report will conclude that the Court's decision to stick with the object analysis in cases of vertical restraints, was a highly significant development for the evolution EU competition law doctrine, but by no means unavoidable. Both the parties and the AG rested their views on economic data and this could have been a perfectly viable choice for the Court too. The Court's choice reflects the centrality of the single market imperative for the application of competition law in Europe and the importance that the Court placed on securing open borders for free trade between countries in the EU, employing even arguably unorthodox means such as antitrust law.

2. Overview- Publicly Available Information

2.1 Standard view of the case

In July 1966, the Court of Justice handed down its judgement in Cases 56 and 58/64 (hereinafter jointly referred to as the *Consten and Grundig* case). The *Consten and Grundig* judgment was almost immediately recognised as important for Community competition policy on vertical agreements, especially for their subset of *exclusive dealing agreements conferring absolute territorial protection*.

A small historical digression would help explain the importance of the decision. In the 1960s competition law was not as well established in Europe as it was in the US.[10] Launched in the aftermath of the Second World War, the European project incorporated provisions creating a common market in order to foster economic growth.[11] The same was the intention for including competition law provisions. The main goal was the creation of the internal market and the elimination of internal boundaries, mainly in the distribution of goods.[12]

The *Consten and Grundig* case remains today a major precedent in the area of vertical agreements relating to the distribution of goods. This case concerned an appeal against a 1964 decision by the Commission that had found the two companies in breach of competition law due to an exclusive dealing agreement. The judgment sheds light on the notion of competition that the Commission and the Court have adopted ever since, which is intrinsically linked to the aim of market integration.[13]

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[9] See generally on market Integration and the ECJ, Pablo Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (2016) 12 Journal of Competition Law & Economics 749.

[10] See generally on the history of antitrust in Europe David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press 1998).

[11] Eleanor M Fox and Damien Gerard, *EU Competition Law: Cases, Texts and Context* (Edward Elgar Publishing 2017) 22.

[12] Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007) 39. Laurent Warlouzet, 'The Difficult Quest to Implement Cartel Control' in Fernanda Nicola and Bill Davies (eds), EU Law Stories: Contextual and Critical Histories of European Jurisprudence (Cambridge University Press 2017) 262.

[13] Fox and Gerard (n 10) 31.

The historical background of the case is complex. *Consten and Grundig* was the first major case to approach the issue of absolute territorial protection in exclusive distributorship agreements (also known as 'parallel trade restrictions'). It was also the first appeal against a decision of the Commission in its capacity as the enforcer of competition law. The implementation of the competition provisions of the TFEU was the 'product of heated legal debates' and the examination of the dossier demonstrates how the main actors in that process often disagreed.[14] The judgment can illuminate what exactly was at stake at this formative period for the European project.

In brief, the Court found that an exclusive distribution agreement, according to which Consten (a French company operating in France) was appointed as the sole and exclusive distributor of Grundig (a German company) was incompatible with Article 85 (1) of the Treaty.[15] This protection was reinforced with a supplementary trademark licence agreement that was crucial in helping the two companies seal off the market, allowing them to sue any third party importer for trademark violation. In *Consten and Grundig* the Commission argued, and the Court agreed, that the aim of promoting market integration on an EU level trumped most other considerations. In fact, even restrictions on competition among distributors of the same brand through absolute territorial protection of this kind violated then- Article 85 (1) of the Treaty. The mere potential to divide the market along national lines was a danger that could not be justified by any efficiency enhancing results of the same agreement.[16]

The reason behind the inability to justify similar restraints is rather simple and laid out almost explicitly by the Court in its judgment. Market integration is a parallel objective of Article 101 TFEU. European law on vertical restrictions cannot ignore this fact and therefore any partitioning of national markets through private restraints must be dealt with severely; in antitrust terms it has to be classified as a restriction of competition by object.[17] This means that Article 101(1) TFEU applies to such an agreement which has as its object the restriction of competition irrespective of its alleged effects. Even if the parties can demonstrate that the agreement was necessary to ensure that the supplier was able to penetrate a foreign market for its products, it would not suffice to render it legal. The impediment to the internal market goal takes precedence. No economic justifications would be able to excuse such conduct, including the need to ensure that competition between different products remains vibrant. The need to maintain inter-brand (between different manufacturers) competition or the possibility that restrictions on intra-brand competition could facilitate product differentiation for consumers and intensify competition between manufacturers are not valid justifications for restraints on trade, according to the Court. The reason is that absolute territorial protection and the removal of any competition at a wholesale level, even when just concerning products of one manufacturer in the French territory, would isolate the French market and exclude all other French distributors from effective competition.[18] This would result in the division of the internal market and should not be tolerated.

Perhaps even more importantly the Court made some very important preliminary findings. Specifically, it held that Article 101(1) applied not only to horizontal but also to vertical

[14] Warlouzet (n 8) 263.

[15] Now Art. 101 (1) TFEU. Henceforth the modern numbering of Treaty articles will be used, except when indicated otherwise.

[16] See infra under 2.3.

[17] On the meaning of 'object' in what is now article 101 (1) TFEU, see Whish and Bailey (n 5) 123 et seq.

[18] ibid 638–9.

agreements, something that the applicants had disputed strongly.[19] In addition it found that all agreements which affect trade between Member States, even if the effect on trade was not a prejudicial one, fell within the ambit of Article 101 (1) TFEU.[20] The Court, by not adopting an interventionist stance on applications for annulment of Commissions decision emphasized the extent of the margin of appreciation available to the Commissions when applying Article 101 (3) TFEU and its unwillingness to interfere with it.[21] Lastly, the Court held that agreements relating to the use of intellectual property rights fall within the scope of EU competition law.[22]

Overall, the impact of this case was significant. Unless an agreement would fall under the *de minimis* rule[23] any form of absolute territorial protection would be deemed as illegal by object. This contributed to the Commission being flooded with a massive number of exclusive distribution agreements to be notified, as before the case was decided by the Court there was widespread belief that those agreements would not fall under the prohibition of 101 TFEU.[24] The majority of those agreements were innocuous and did not need to trouble the European Commission.[25] This led to the adoption of Regulation 67/67, which was the first block exemption regulation. It resulted in the automatic exemption of any agreements that would satisfy the requirements provided by it.[26]

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[19] Note that the Court stated later in the case Allianz Hungaria that vertical agreements are 'often less damaging to competition than horizontal agreements.' Case C-32/11, EU: C: 2013:160.

[20] The current Guidelines on the Effect on Trade Concept contained in Articles 101 and 102 TFEU (The Guidelines on interstate trade') draw substantially on the caselaw developed first in Consten and Grundig, Whish and Bailey (n 15) 151.

[21] Ibid 178.

[22] Generally, on the relation between antitrust and IP in Europe see Steven Anderman and Hedvig Schmidt, *EU Competition Law and Intellectual Property Rights: The Regulation of Innovation* (Second Edition, Oxford University Press 2011).

[23] Of course, the de minimis bar did not exist then. The first case of the ECJ on it was Case 5-69, Franz Völk v S.P.R.L. Ets J. Vervaecke. ECLI:EU:C:1969:35: 'An exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in article 85(1).' On the modern de minimis rule see the Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice), OJ C 291, 30.8.2014, 1–4. In order to offer guidance on how to interpret the de minimis principle the Commission issues notices, outlining that the Commission will not start proceedings in cases which fall below the thresholds set out.

[24] Joanna Goyder, EU Distribution Law (Bloomsbury Publishing 2011) 68. Of course the flooding of the Commission is not the result of only this development but existed even before the decision of the Court. see characteristically the speech by Mr. Hans von der Groeben, EEC Commissioner responsible for competition matters at the time. Mr von der Groeben stated that 20,000 exclusive distribution agreements were notified to the Commission before the judgment, even if they did not include any territorial protection or export prohibition clauses. Only 6,000 of those included problematic clauses and could potentially harm competition, see Stephen P Ladas, 'Exclusive Distribution Agreements and the Common Market Antitrust Law' (1964) 9 Antitrust Bull 761, 767. The judgment exacerbated the situation though and was criticised exactly on those grounds by contemporary commentators, see e.g. Ernst Steindorff and Klaus Hopt, 'European Economic Community-The Grundig-Consten Case, a Landmark Decision of the European Court of Justice on Common Market Antitrust Law' (1966) 15 The American Journal of Comparative Law 811, 817.

[25] Monti (n 11) 357. It is interesting that even Commissioner von der Groeben intimated that the Commission rendered this decision in order to push harder for the adoption of a group exemption Regulation due to being already inundated by notifications. The Council of Minsters was principally opposed to that but had to acquiesce after the adoption of the judgment in Consten and Grundig Ladas (n 20) 769.

[26] Regulation No 67/67/EEC of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements, OJ: JOP_1967_057_0849_003. Regulation 67/67 was eventually superseded by new regulations see Goyder, 69.

In this context it is interesting to note that in a case that was dealt by the Court almost simultaneously to *Consten and Grundig* (namely, *Societe Technique Miniere v Maschinebau Ulm)* the Court held that agreements for exclusive distributorship do not normally infringe Article 101 (1) TFEU when the element of exclusive territorial protection is absent.[27] In some cases, that is, exclusivity can be considered necessary in order to penetrate the market.[28] In *Societe Technique Miniere* the ECJ based its conclusion on the so called 'free-rider problem', which explains the motives of a distributor requiring territorial exclusivity from a supplier.[29] However that case was different from *Consten and Grundig*. The contract did not *completely* insulate French territory and parallel imports were allowed. Therefore, the Court was able to distinguish this case from *Consten and Grundig*, since the exclusive supply contract was a necessary step allowing *Maschinebau Ulm* to penetrate the French market.[30]

Furthermore, antitrust doctrine in the United States diverged from that approach. Even before the teachings of the Chicago School became dominant, similar vertical restraints were progressively considered to be non-harmful by the caselaw of the U.S. Supreme Court by reference to the economic theory explaining their potential positive effects on competition.[31]

In sum, it has correctly been noted that 'when market integration considerations are at stake, the Court tends to follow a sui generis approach...'.[32] This *sui generis* approach does not consider the economic and legal context in which the agreement was concluded, content with finding illegality when market integration is put at risk. *Consten and Grundig* and the later caselaw of the Court on export bans of similar kind can be explained by reference to that crucial fact.[33]

But how exactly did we arrive there? Was there any kind of path dependency that resulted in the formulation of this line of caselaw and the divergence from antitrust orthodoxy (as it was perceived from the other side of the Atlantic)? The dossier of the case could shed light to the minutiae that proved decisive for the Court to arrive at this decision as well as the potential alternatives it could have chosen. First, however, it is necessary to engage intimately with the facts of the case and the main issues that the Court decided.

2.2 Facts of the case

Grundig Verkauf GmbH, a German company and manufacturer of electronic devices such as radios, agreed to name the French company **Consten** as its exclusive distributor in France. More specifically, Consten undertook to accept a minimum amount of goods by Grundig, to make a specific number of advance orders, to conduct an appropriate advertising campaign,

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[27] C-56/65 - *Société Technique Minière v Maschinebau Ulm*, ECLI:EU:C:1966:38. The preliminary ruling in *STM* came two weeks before the one in *Consten and Grundig*. All five judges that participated in *STM* were on the panel of *Consten and Grundig* and that is the reason that those cases exhibit such similarities. It is also really to understand their distinct rationale and why they led to different lines of precedent, see Kiran Klaus Patel and Heike Schweitzer, *The Historical Foundations of EU Competition Law* (OUP Oxford 2013) 147. On the different strands of caselaw based on *Consten Grundig* and *STM* see Ibáñez Colomo (n 9) 751. AG Roemer was also Advocate General in both cases and his own opinion may be said to reflect this fact, but led to him reaching a different conclusion, see infra 2.3.

[28] Ibid 250.

[29] Ibid 251.

[30] Hildebrand D., *The Role of Economic Analysis in EU Competition Law*, (Kluwer Law International 2016) 282.

[31] See infra under 3.4.

[32] Fox and Gerard (n 10) 20.

[33] See generally on the caselaw, Hildebrand (no 23) 281 et seq.

to provide repair services with sufficient replacement stock and offer guarantees and customer services.[34] Consten also agreed to purchase those goods exclusively from Grundig and to only sell them in France under the contractual obligation not to resell them in other countries. The same prohibition had already been imposed by Grundig on all its distributors in the other Member States. At the same time Grundig granted Consten exclusive retail sale rights, promising not to make deliveries to third parties in France. This contract would be reinforced by a supplementary arrangement, whereby Consten would have the exclusive right to use the trademark GINT (Grundig International) and thus would be able to prohibit any parallel imports by suing under trademark law.[35]

A small digression is due here in order to better understand the factual context of the decision. After Regulation 17/62 was adopted, the Commission had to be notified of many vertical agreements, and especially exclusive distribution agreements, like the one in question. As Warlouzet notes, 'distribution agreements were crucial for the process of European integration, but they were hard to gauge from the competition policy point of view'.[36] The integration of national markets was facilitated by such agreements by allowing products to travel easily between States. They are particularly useful for sellers of complex products which require aftersales service, such as electronics products.[37]

Despite the existence of the agreements described above, several other distributors started selling Grundig products outside their own distribution areas. In April 1961, the UNEF Company, also operating in France, succeeded in buying Grundig devices from third German traders despite the export prohibition. UNEF thus became a 'parallel importer', in other words a seller of products acquired outside the official channels created by the exclusive agreements between Grundig and its distributors.[38] *Consten* considered this practice illegal and initiated legal proceedings against UNEF under national law in France, one on grounds of unfair competition law and one based on trademark law, i.e., infringement of the GINT trademark.[39] Consten was successful in the first of these actions at first instance. UNEF appealed at the Cour d'Appel in Paris, which decided to stay the proceedings until the decision of the Commission had been issued on the application which UNEF had made to it in the meantime, on 5 March 1962, for declaration that the Consten and Grundig companies had infringed the provisions of Article 101 TFEU through the sole distributorship contract of 1 April 1957 and the ancillary agreement concerning the registration and use of the GINT trademark in France.[40] UNEF referred the case to the Commission of the European Economic Community, claiming that the agreement between Consten and Grundig should be regarded as void under Article 101 TFEU as restrictive of competition.[41] Main argument was that by limiting competition between distributors, even if they represent the same brand, the agreement would harm consumers. Parallel to that, another lawsuit based on similar grounds was brought by Consten in 1961 in Strasbourg against the Leissner Company claiming that Leissner was violating the French Law on unfair competition by selling Grundig machines in France.

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[34] See the contract, Annex 2 Doc 1 Dossier 1.

[35] Specifically, Consten was authorized to use the name and emblem of Grundig which are registered in Germany and in other Member States. In addition, on 3 October 1957, Consten registered in France, in its own name, the trademark, which is carried on all appliances manufactured by Grundig, including those sold on the German market, Annex 3 Doc 1 Dossier 1.

[36] Warlouzet (n 8) 266.

[37] Ibid.

[38] Annex to Int 3-1 Dossier 1.

[39] Ibid.

[40] Annex to Doc 1 Dossier 1.

[41] Int 1 Dossier 1 and annexes.

Grundig decided to notify the contract to the Commission before the opening of proceedings against it. On 29 January 1963, it notified to the Commission the contested agreements contracts concluded with Consten and with other distributors in the EEC. After notification of the contract the Commission decided that the contract was in breach of Article 101 TFEU.[42] At the same time the Commission denied a clearance according to Article 101 (3) TFEU and required Consten and Grundig to refrain from any activity that could prevent or hinder other companies from purchasing goods covered by the contract freely from wholesalers and retailers in the EEC for re-sale. Article 1 of the operative part of that decision stated that the contract in question and the supplementary agreement on the registration and use of the GINT trademark constituted an infringement of the provisions of Article 85 of the EEC Treaty. Article 2 contained a refusal to grant the exemption provided for in Article 85(3) EEC Treaty. Finally, pursuant to Article 3, Consten and Grundig were 'required to refrain from any measure likely to obstruct or impede the acquisition by third parties, in the exercise of their free choice, from wholesalers or retailers established in the European economic Community, of the products set out in the contract, with a view to their resale in the contract territory'.[43] Consten and Grundig brought a separate action for the annulment of the decision before the ECJ, on 8 December 1964 and 11 December 1964 respectively.[44] By an order on 6 May 1965, the Court admitted the Italian Government as an intervening party in support of the conclusions of the applicants in the two cases.[45] By orders on 10 June and 16 June 1965, the Court permitted the Leissner and UNEF companies to intervene in support of the defendant in the two cases.[46] The cases of the two applicants against the Commission were joined by the Court by order on 29 June 1965, with none of the parties objecting. Lastly, by an order on 24 September 1965, the Court admitted the German Government as an intervening party in support of applicant Grundig in Case 58/64.[47]

2.3 Analysis of the Advocate General's Opinion

The Opinion of Advocate General Karl Roemer, presented to the Court of Justice on April 27, 1966, could hardly have arrived at a more different conclusion than the one ultimately chosen by the Court.[48] As is usual in European caselaw the AG's submission runs longer than the Court's judgment. It was rather enlightening as to the rationale behind its findings.[49] The AG noted of course that the case, even at the time, had taken on unusual proportions because of

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[42] See Commission Decision of 23 September 1964, OJ: L - 20/10/1964, 2545 also found in https://ec.europa.eu/competition/antitrust/closed/en/1964.html#4. Also found in the dossier: Doc 1 Dossier 1 Annex 1a. In that case the Commission used Regulation 17/62 for the first time ever, Warlouzet (n 8) 267.

[43] Commission ibid, 15.

[44] Grundig: Doc 1 in Dossier 1. Consten's action is unfortunately missing from the dossiers.

[45] Int 1-6 Dossier 1.

[46] Int 2-5 in Dossier 1 and Int 3 – 7 in Dossier 1.

[47] For a more extensive presentation of the facts, see Annex 1 in Dossier 1 (Commission decision).

[48] Advocate General at the Court of Justice from 1953 to 1973. For a short bio of the Advocate General see https://curia.europa.eu/jcms/jcms/p1_217426/en/. He is probably most famous for his Opinion in the seminal Van Gen en Loos case and his conviction about the special nature of EU law, see Antonio Grilli, 'Aux Origines du droit de l'Union Europeenne: le ius commune national dans les conclusions des avocats generaux Karl Roemer et Maurice Lagrange (1954-1964)' (2008) 76 Tijdschrift voor Rechtsgeschiedenis 155.

[49] 14 pages for the Judgment compared to 61 for the Opinion.

the economic and legal importance of the problems dealt with and the number of parties involved.[50]

His arguments broadly track the structure of the applicants' line of argumentation, emphasising that a **restriction of competition** was mistakenly judged to be present in this case by the Commission. One interesting argument that he introduces as to the criterion of an agreements or practice **affecting trade between Member States** is that in some language versions of the Treaty the requirement in Article 101 (1) TFEU can be inferred to mean that there be an *unfavourable* influence on trade and that mere influence was not enough.[51] In the present case the agreement had a positive influence on interstate trade and thus this criterion was not fulfilled. According to him, terrible legal uncertainly would ensue if the parties did not know what clauses of the agreement constituted a breach of Community competition law, particularly at this stage of development of EU law.[52]

While he dismissed most of the technical and procedural points raised by the applicants and even though he agreed that the term 'agreements' in Article 101 (1) of the Treaty did include **vertical agreements** of the kind that was to be examined by the Court his opinion remains particularly noteworthy, as he did not agree with the Commission's object-based analysis and thought that an effects-based approach would be appropriate in this case.[53] Moreover the AG argued that the Commission made a series of grievous mistakes in the evaluation of the agreement, siding with the applicants on their more substantive points. Those mistakes included the failure to execute an adequate survey of the relevant inter-brand competition and to attempt a 'comparison of two market situations with and absent the agreements'.[54] Therefore he disagreed that a **restriction of competition** was proved by the Commission in its decision. His main objection was whether it was possible to surmise that an agreement conferring absolute territorial protection restricts competition by object without considering the economic and legal context of which it is part. Roemer compared the case to *Societe Technique Miniere*, to support his argument that eliminating intra-brand competition could be objectively necessary to enter a new market.[55] A suppression of the sole sales agency would have involved a *'…noticeable reduction in the offer of Grundig products in the French market'.*[56] Indeed the counterfactual could just as well demonstrate that the restraint would promote inter-brand competition in France and not the opposite. At the very least, the question would require an analysis of the concrete conditions of competition in the relevant market and of the position of the parties therein.[57] The Commission was thus wrong in taking exclusive account of the internal (intra-brand) competition rather external (inter-brand) competition). The result of all this was that the Commission had erred in concluding that Article 101 (1) was violated by the Grundig agreements. It is remarkable that the AG also cited the U.S. Supreme Court's judgment in *White Motor Co* to support his argumentation.[58] As the applicants did, he

[50] Opinion of AG Roemer, 353.

[51] Opinion of AG Roemer, 360.

[52] Opinion of AG Roemer, 361.

[53] Opinion of AG Roemer, 358: 'The statement of the reasons for the decision and the observations made during the proceedings show us that the Commission was content to find that the agreement in question has as its object an adverse effect upon competition, because it has the aim of freeing Consten from the competition of other wholesalers in the sale of Grundig equipment.'

[54] Opinion of AG Roemer, 359.

[55] See supra under 2.1.

[56] Opinion of AG Roemer, 360.

[57] Opinion of AG Roemer, 359.

[58] White *Motor Co. v United States*, 372 U.S. 253 (1963). According to AG Roemer the ECJ should follow the example set in the United States and Article 85(1) should be applied only to agreements which really impact

also referenced the *Bosch* case as one that could provide the basis to counter the formalist approach of the Commission and favour a case-by-case approach.[59]

In addition, the AG criticised the refusal of the Commission to grant an exemption under Article 101 (3) of the Treaty.[60] The AG noted that even German Law - famously the harshest one when dealing competition restraints - took a lenient view of similar agreements and stipulated that the Commission should have acted likewise as inter-brand competition was more important than competition between distributors of the same product.[61] The Commission should not just remain passive when considering the application of 101 (3) due to the fact that it does not bear the burden of proof, but attempt to '…r*aise questions on its own initiative and make conscientious enquiries together with the undertakings concerned*'.[62] The Commission after all failed to argue persuasively that the prerequisites of Article 101 (3) were not satisfied in the present case. On the contrary the submissions of the parties and the interveners rightly pointed out that consumers share the benefits, that lively competition still existed between manufacturers of different products and that the agreements could well prove necessary to guarantee it.[63]

To sum up, Advocate General Roemer concluded his opinion by stating the agreement did not violate Article 101 TFEU. He reasoned that the agreement allowed the German producer to enter the French market, which could potentially promote market integration by allowing German commerce into France. He called for an approach based on the concrete economic effects of the agreement. Thus, he called for the annulment of the decision *in toto* and for it to be referred back to the Commission for consideration. While the Court did not ultimately agree with him, his opinion remains persuasive even today, especially among detractors of the *Consten and Grundig*-inspired caselaw.[64]

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competition. Intrabrand restraints of competition are normally harmless if interbrand competition is strong. This mirrors the approach adopted by the Supreme Court in White *Motor Co. v United States*. That Court denied the application of the *per se* rule in those cases. Accordingly, both the Commission and the Court should inquire into the concrete impact of those practices. Article 85(3) comes into a later stage and should not be applicable if a practice does not restrict competition in the first place. This happens in such cases where stronger interbrand competition compensates for any possible restriction of competition of distributors of the same brand. The Commission in its briefs also referred to this case, but explicitly pointed to the distinctive nature of European competition law compared to US antitrust, see Doc 7 in Dossier 2, 85. See an extensive discussion of the relevance of the American caselaw for the parties and the AG infra under 3.4.

[59] Roemer cites *Bosch* five times in order to argue different points. His most important one arguing against formalism, see Opinion of AG Roemer, 357: 'Article 85 applies also to what may be called vertical agreements, especially in so far as they contain export prohibitions. In that respect it is useful to refer to the judgment in the Bosch Case (13/61) because there the Court held that it is not possible to form a general opinion on the applicability of Article 85 (1) to export prohibitions, but that it is necessary **to examine all the facts of the particular case**.' See also page 363 'is precisely in that respect that Consten rightly relies upon the Court's judgment in the Bosch Case, from which it is possible to deduce that purely theoretical and abstract considerations on the compatibility of an export prohibition with Article 85 (1) are not defensible' Cf. Doc 15 in Dossier 1. The Bosch case was the first antitrust case judged by the ECJ. The Court dealt principally with the applicability of Art. 85 in the transitional period referred to in Art. 87. It did not however rule on the substantive points of exclusive dealership agreements, only passingly referring to them, Steindorff and Hopt (n 20) 814. It is therefore remarkable that the AG put so much weight behind what amounted to obiter dicta by the Court.

[60] Opinion of AG Roemer, 367 et seq.

[61] Opinion of AG Roemer, 368.

[62] Opinion of AG Roemer, 370.

[63] Opinion of AG Roemer, 370-1.

[64] Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (Bloomsbury Publishing 2018) 94. See also infra 2.4.

Why would the Advocate General hold such a different opinion? While the investigation into the *dossier* alone cannot shed light on his motivations, historical studies could prove helpful. His arguments cannot be explained by a mere reference to interests that could benefit by a more economic approach to exclusive distributorships. Certain sections of the business sector, for example electronics exporters like Grundig, could stand to gain but others (i.e. parallel importers) would not necessary benefit. It cannot be said that the business sector as a whole would be more receptive to the AG's argumentation. As *Warlouzet's* inquiry into the topic suggests, his stance may have something to do with different priorities set by the German and French governments during the early years of the European project.[65] The latter was much more welcoming of a stronger enforcement against competitive restraints as way to facilitate a more integrated common market. Germany was ambivalent; it preferred leaving open the option for business actors to conclude such agreements, considering them useful in penetrating new markets after the tariff barriers went down.[66] Roemer was approached by officials from the German Ministry of Economics[67] who were conservative in respect to the development of European law as a supranational law. Roemer shared that skepticism.[68] Roemer's conclusion was that the economic evidence presented by the Commission was unconvincing and that the empowerment of the Commission institutionally was too far-reaching.[69] This can be explained by his caution as to a potential overreach of the European project.

Lastly, it must be noted here that Roemer had also advised the Court *in Italy v Council and Commission*[70] and in *STM*, the latter being decided differently.[71] His opinion could be influenced by those other Opinions as well. *STM* was decided to favour certain kinds of distribution agreements, as we saw above, siding with Roemer in that case. However, in *Consten and Grundig*, the Court deemed it necessary to distinguish between the cases and create a separate strand of caselaw, emphasising the market integration aspect at least in the specific factual circumstances of an exclusive agreement granting absolute territorial protection.

2.4 Summary of Academic Commentary

Consten and Grundig has been said to be the most famous decision of the European Court of Justice in matters of competition.[72] No scholar disputes that it shaped the subsequent caselaw relating to vertical restrains on an EU level. The majority view contends that the emphasis should be placed on the fact that arguments based on economic efficiency did not play a large

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[65] Warlouzet (n 8) *passim*.

[66] Warlouzet posits that the German government however was hesitant of overturning the first significant decision by the Commission as this would deal a substantive blow to the European integration process. Nonetheless Germany decided to support the appeal against the Commission. Warlouzet (n 8) 278.

[67] Ulrich Everling (future judge at the European Court of Justice), see ibid 278-9.

[68] Ibid.

[69] Warlouzet emphasizes the fact that 'Roemer was a judge at the Sarrebrück Appeal Court (1947–52) defending German authorities in the framework of the specific occupying regime of Saarland, a German region disputed with France. He led special missions on behalf of the federal government abroad before becoming Advocate General at the Court of Justice in 1953.' Ibid 280.

[70] C- 32/64, Italian Republic v Commission of the EEC, ECLI:EU:C:1965:61.

[71] Patel and Schweitzer (n 26) 150–2. In Italian Government v Commission of the EEC, the Court dismissed a request brought by the Italian government for annulment of various Council regulations, including Regulation No. 19/65. As in the Maschinenbau-Ulm case, the Court refused to exclude vertical agreements from Article 85 and the Advocate General agreed on principle.

[72] Jörg Karenfort, *Entscheidungen Zum Europäischen Kartellrecht* (1st edn, Mohr Siebeck 2010) 75.

role and that the Court preferred a more formalistic, by object analysis.[73] It has been pointed out that the essential conclusions of this judgment were eventually reflected on all subsequent group exemption regulations concerning similar restraints, most recently the one numbered 330/2010 that was released in 2010.[74]

It is a completely different matter though whether this decision has been positively received and whether it is still considered consistent with modern competition doctrine.[75] Here it is clear that *Consten and Grundig* has had to face extensive criticism, especially in light of the turn of antitrust scholarship and practice towards a more economic approach.[76] Ignoring the legal and economic context of an agreement and preferring a by object handling of vertical restraint cases does not sit particularly well with modern antirust doctrine.[77] The Court's position has been described invariably as relatively inflexible, as completely ignoring the free rider problem[78] and even worse as ultimately ineffective as a means to safeguard market integration itself. [79]

It is remarkable that even at the time when the judgement was issued there was criticism from that point of view.[80] The judgment has been characterised as *short sighted* because the Court did not take account of the fact that Consten would only have the incentive to promote Grundig's goods in the internal market if it had a degree of protection from inter-brand competition. With free riding present, Consten would lose the incentive to promote the products, etc.[81] In short, the Court was criticised for interpreting the notion of "restriction of competition" too broadly, especially as regards restrictions of competition that are deemed to

[73] Barry E. Hawk, 'System Failure; Vertical Restraints and EC Competition Law' (1995) 32 Common Market Law Review 973.

[74] A great number of contemporary reaction piece to the decision can be found here: https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX%3A61964CJ0056.

[75] Stakeholders, especially international commercial firms, may have regarded the decision with apprehension. It is very interesting that the Commissioner responsible for competition matters at the time, Hans von der Groeben, hosted a press conference when the decision was adopted. There he explicitly assured stakeholders that not all exclusive distributorship agreements are in risk but only those that share the controversial features of absolute territorial protection as in the case *Consten and Grundig*. See generally Ladas (n 20).

[76] Roger Van den Bergh, 'Vertical Restraints: The European Part of the Policy Failure' (2016) 61 The Antitrust Bulletin 167, 174 et seq.

[77] Ibid.

[78] Mark Furse, *Competition Law of the EC and UK* (Oxford University Press 2006) 175. See Doc 20 in Dossier 1 for a reference to the same problem.

[79] Monti (n 8 39-40).

[80] Rudolf Callmann, 'Wettbewerbsbeschränkungen Im Warenverkehr nach Amerikanischem Recht' [1967] Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 406.: 'In den Fällen Grundig-Consten und Bosch fehlt es an der in amerikanischen Antitrustfällen selbstverständlichen, umfassenden Untersuchung der Wirtschaftsumstände eines jeden Einzelfalls, und der Gedanke, ob ein Vertrag den Handel zwischen Mitgliedstaaten beeinträchtigt, genießt eine ihm nicht zukommende Überbewertung'.

[81] Monti (n 11) 40.

be 'by object'.[82] According to some, the *Grundig* case reveals the 'anti-competitive turn that European competition policy took right from the start.'[83]

Other commentators emphasised the economic evidence presented by the parties as decisive for the Court's assessment of the harmfulness of such agreements to competition. For Steindorff and Hopt, the factual situation made a difference, a perspective that was not necessarily shared by other commentators who highlighted the formalist aspect of the decision.[84] American commentators were interested in the practical aspects of how business practices were shaped after the judgment and in how the market integration process was moving forward.[85] They were also struck by the prohibition of clauses that would be legal in the United States at the time. Many commentators emphasised how formalistic European Common Market law – as they called it – was shaping up to be.[86] The *Grundig and Consten* case highlighted the importance of **notification** of agreements under Regulation No. 17. The Commission did not impose any fines on *Consten* and *Grundig* despite the finding of an infringement of Article 101 of the Treaty as the two companies notified the agreement to the Commission.[87] Lastly, commentators noted that the word 'indispensable' in Article 101(3) was given a narrow interpretation by the Commission and an economic justification for such agreements will be ignored if they lead to higher prices in certain countries of the Common Market.[88]

Even from a market integration standpoint *Consten and Grundig* has been found lacking as exhibiting an irrational understanding of market integration. After all, Grundig's eventual reaction to the judgment was to buy Consten, becoming vertically integrated and thus being able to seal off the French market that way.[89] In short, the very incentive to undertake the efforts to export one's own products is removed when those distribution agreements are constrained.[90]

This does not necessarily mean that the decision has been universally condemned, far from it. It could be argued that many scholars consider it as fitting the special structure of EU competition law, and that its consistency with the internal market goals of the European Project is not something that should be criticised but seen with approval.[91] Essentially all scholars thus

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[82] There are even extreme examples of criticism which however arguably remain on the fringe: 'It is an extremely rare event for a Judgment to contain many errors on many issues. It is even rarer for such a Judgment to be correct on virtually nothing. And it approaches the unheard that the Judgment becomes the leading case in a whole sector of Law. If we add that critical voices during the procedure were raised that would have avoided the biggest mistakes, then the Court errors appear to be diabolical. The Grundig-Consten Judgment handed down by the European Court of Justice on July 13, 1966 does all that and for that reason is exceptional and almost miraculous' in Alfaro, Jesus, Delenda Est Consten-Grundig: Why Europe Needs a Bork (July 29, 2013), available at SSRN: https://ssrn-com.ezproxy.eui.eu/abstract=2302558

[83] Cécile Philippe, Valentin Petkantchin and Xavier Méra, 'The Banning Of Vertical Agreements In Europe: An Anti-Competitive Policy' [2007] Institut Economique Molinari; Bergh (n 75).

[84] Steindorff and Hopt (n 20)

[85] Arved Deringer, 'Exclusive Distributorships' (1971) 40 Antitrust LJ 1020, 1023. See Deringer's analysis of the Commission Decision in 'Exclusive Agency Agreements with Territorial Protection under the EEC Antitrust Laws with an Opinion on the Grundig-Consten Decision' (1965) 10 Antitrust Bull 599, 1023.

[86] Deringer, 'Exclusive Distributorships' (n 84) 1022.

[87] Ladas (n 20) 778.

[88] Ladas (n 20) 773.

[89] Monti (n 8) 40.

[90] In that vein see Monti (n 11) 41 et seq. Bergh (n 63), 181.

[91] See e.g. Lawrence Ebb, 'Grundig-Consten Case Revisited: Judicial Harmonization of National Law and Treaty Law in the Common Market' (1967) 115 University of Pennsylvania Law Review 855.

at least concede that the Court was drawn to 'integrationist concerns' and 'was precluded from developing a sound, coherent pattern of economic analysis by their position within the Community'.[92] There is also a consensus that the decision was extremely influential in giving EU competition law a character of its own.

It has also been suggested that one of the main motivations of the Court was its wish to uphold the decision of the Commission in its first major antitrust case.[93] By choosing the object test under Article 101 (1) TFEU and by highlighting the parties' intent to restrict competition, the Court was able to uphold the Commission's findings, even though it may not have been persuaded from the factual inquiries regarding the actual impact of the agreement on competition. However, contemporaries believed that such assumption had no evidence to support it, even if it could be deemed as plausible.[94]

2.5 Most important issues that arise from the judgment

There are six points that the rest of this investigation in the Archives of the Court will aim to concentrate on in the next section. In this author's view they represent the distillation of the most important conclusions of the Court and - crucially - those from which it could have chosen to diverge. In deciding those points a different solution would have been feasible and defensible at the time. In fact, it was over these points where the defendants clashed more forcefully with the applicants, the AG disagreed with the Court, and most of the controversy and academic commentary arose.

These six points are the following:

Application of Article 101 (1) to Vertical Restraints

This may seem evident today, but at the time the parties and especially the Italian Government fiercely argued that vertical agreements should be removed from the ambit of Art. 101 (1) of the Treaty.[95] How did these arguments develop and what was the rationale behind them? Why did both the Court and the AG find it relatively easy to dismiss them?

Content of the rule that a restriction of competition must affect trade between member states

The legal definition of the requirement that a restriction can '*affect trade between member states*' in 101 (1) of the Treaty was solidified by the Court and its most important elements analysed.[96] The potential to improve competition was not relevant in relation to this matter, contrary to what the applicants claimed. The existence of an inter-state trade effect also seems today to be largely self-explanatory, at least in cases like the one dealt by the Court, but quite a number of arguments in the applicants' submissions where devoted to refuting its existence in *Consten and Grundig*. It can also be considered one of the landmark conclusions of the Court and the cornerstone of ECJ caselaw on this matter.

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[92] Sandra Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Hart 2010) 187. See also Gerber (n 6) 355, Patel and Schweitzer (n 20) 4.

[93] Hopt and Steindorff (n 20) 820.

[94] Ibid 821.

[95] See infra under 3.2.2. It is remarkable that on the exact day of the *Consten and Grundig* decision, the European Court of Justice handed down a second judgment concerning the problem of exclusive dealerships. In that case and in STM decided two weeks before the Court found that vertical agreements are not regulated exclusively by Article 102 but also by Article 101. The Court stressed the aim of the EEC Treaty to prohibit trade barriers; an important place is reserved for this aim in the interpretation of Article 85, Hopt and Steindorff (n 20) 816.

[96] Michael E Treacy, 'Common Market Antitrust Law: Jurisdiction: Limitations Imposed by Article 85(I) of the Treaty of Rome' (1973) 6 Cornell Int'l LJ 163

The Object/Effect distinction

The dichotomization of the test under Art. 101 TFEU into an object and an effect analysis was a novelty of the judgment, even though it could be found in the STM case discussed above. This dichotomization means that the ECJ interprets 'object or effect of restricting competition' under Art. 101 TFEU as referring to two distinct concepts. Agreements that have the object of restricting competition are presumed to have anticompetitive effects.[97] This caselaw partly originates in *Consten and Grundig*.[98] This was not a self-evident solution and has led to immense theoretical confusion ever since. Advocate Generals have tried to grapple with the problem as late as 2019.[99] In light of the current debates on this point, it is interesting to see how exactly the Court came to perceive Article 101 TFEU as providing for two different tests.

Exclusive Distribution Agreements, the Object/Effect distinction and Article 101 (3)

The first big novelty introduced by this decision is the application of an object analysis on vertical restraints of the type concerned. Therefore, an exclusive distribution agreement conferring absolute territorial protection will be held incompatible with the Treaty as restrictive of competition, without needing to take account of its actual or potential effects. Such agreements have by their very nature the potential of restricting competition The difference mainly affects the burden of proof. In the former case (by object infringments), a violation of Article 101 is proved unless it can be demonstrated that the agreement satisfies the Article 101(3) criteria.[100] In the latter case, the burden of proving the restrictive effect is on the person alleging the breach. Once the moving party has established that an agreement has a 'restrictive effect', the burden shifts onto the parties to defend the agreement under Article 101(3). The rejection of the by object analysis by AG Roemer reveals the extent to which this approach by the Court could be deemed controversial even back then.[101]

Market Integration and the Competition Law Provisions of the Treaty

While a far more abstract point, it is probably the most important result of the Court's judgment. When the single market imperative is at stake, EU competition law will not tread lightly. It will confer a large margin of appreciation to the Commission and will tolerate exceptions to the application of Article 101 (3) TFEU under rare circumstances. This is not explicitly stated by the Court but can be inferred and seems to be the central novelty of the judgement. Thus, Article 101 TFEU has at least a parallel objective of promoting market integration.

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[97] Witt AC, 'The Enforcement of Article 101 TFEU: What Has Happened to the Effects Analysis?' (2018) 55 Common Market Law Review 417, 423.

[98] *Consten and Grundig* 343: 'Since the agreement thus aims at isolating the French market for Grundig products and maintaining artificially, for products of a very well-known brand, separate national markets within the Community, it is therefore such as to distort competition in the Common Market. It was therefore proper for the contested decision to hold that the agreement constitutes an infringement of Article 85 (1). No further considerations, whether of economic data (price differences between France and Germany, representative character of the type of appliance considered, level of overheads borne by Consten) or of the corrections of the criteria upon which the Commission relied in its comparisons between the situations of the French and German markets, and no possible favourable effects of the agreement in other respects, can in any way lead, in the face of abovementioned restrictions, to a different solution under Article 85 (1).

[99] Opinion of AG Bobek in Case C-228/18, ECLI:EU:C:2019:678.

[100] Advocate General Kokott in the *T-Mobile* case parallel object infringements are to drunk driving, meaning that they are inherently wrong, and merit sanction even where there has been no actual harm as a consequence of the actions in question. Opinion of AG Kokott in Case C-8/08 *T-Mobile Netherlands*, ECLI:EU:C:2009:110, para 47.

Severability of the Infringing Provisions of the Agreement

This is where the applicants prevailed, and the Commission did not. The Commission tried to defend its annulment of the whole agreement, but the Court dismissed its arguments relatively quickly, establishing that the nullity of certain provisions can be limited to the improper provisions only and need not infect the whole contract. Eventually, the approach taken by the Court developed into a solid line of caselaw and has never been seriously doubted since. At the time, the Commission did defend its decision, but it was deemed unsustainable by the Judges and its arguments were easily dispatched.

These are the main points constituting the primary focus of the investigation of the *dossier* in the following part.

3. The *dossier*'s analysis and added value

3.1 Composition of the dossier

The *Consten and Grundig dossier* is rather extensive, something which could be said to be typical for a competition law case. Competition law cases often require large amounts of documentary evidence, most of all economic data. The ambiguity, in both legal and economic terms, can lead to thousands of pages of text needed to be appraised by the Court and the parties. Hence the *Consten and Grundig* file spans 5 *dossiers*, including about 2500 pages in total and contains a vast number of submissions, evidentiary documents, procedural documents, orders by the Court etc. It is much larger than most of the other *dossiers* in this project, which typically do not exceed 500 pages. The number of documents is rather low compared to the number of pages, as the biggest part of the 5 *dossiers* is composed of the submissions of the parties and interveners, as well as their translations. It is remarkable that many documents are only found in French even though the official working language of the eventual joint process was German. One of the remarkable procedural characteristics of the cases is the fact that it is a joint case. More specifically, *Consten and Grundig* unites two separate applications for annulment of the contested decision of the Commission, which the Court decided to join. Thus, many documents seem not be in the right order, especially in the first three *dossiers*, and even though almost all documents from the *Grundig* case seem to be included, many of the documents from the *Consten* case are not (e.g. the submissions of the applicant Consten constitute a notable absence).

As to what the *dossiers* contain, the following can be said in order to give an idea of their most important contents.

- The **first *dossier*** mainly contains the submissions by Grundig, the reply of the Commission and the counter-reply of Grundig.[102]
- The **second *dossier*** contains the counter-replies of the Commission to both Consten and Grundig.[103] The Consten counter-reply is available only in French with no translation included. It also includes the memorandum of UNEF on the joint cases and the request for intervention by the German Government.
- The **third *dossier*** is mainly comprised of documents relating to the multiple interventions and the parties' statements concerning them.

[102] That would probably be composed of the contents of the dossier on the *Grundig* case before it was joined with the *Consten* Case.
[103] I.e. the dossier seems to be mixed, containing both *Consten* and *Grundig* documents.

- The **fourth *dossier*** contains mostly documents relating to the oral procedure, notably the Judge Rapporteur's report on the oral hearings. Apart from that it includes evidentiary documents relating to the oral hearings.
- The **fifth *dossier*** contains the Opinion of the Advocate General and the Decision of the Court.

For more details the reader can consult the analytical index of all documents (Annex I).

In the *Consten and Grundig* the *dossiers* are composed of eight categories of documents, namely:

- **Submissions** of the parties and interveners i.e. written submissions of the parties during the written procedure
- **Documents containing evidence**: i.e. documents submitted by the parties upon request of the Court, or on their own initiative
- **Process-related documents**: namely, correspondence between the Court (Registrar) and the parties, orders by the President of the Court appointing the chamber and reporting judge, ordering that the cases are examined together, setting the dates of the procedure, requests for interventions etc.
- **Miscellaneous documents submitted by the parties:** e.g. powers of attorney
- **Report of the Oral Hearing** by the Judge Rapporteur (Judge A. Trabucchi)
- **The Opinion of the Advocate General**
- **The Final Judgment of the Court**
- **Documents** of the original file that are not available to the public.

Many of those documents are in duplicate: one in the German and another in the French version.[104] Others are only in German or French. Crucially the Consten counter-reply in Dossier 2 is available only in French with no translation included. The Italian Government requested to be able to file its intervention using Italian as an official language and the Court accepted its request by its Order of 6 May 1965.[105]

The table below provides a quantitative overview of the composition of the dossier:

[104] See e.g. the request for Intervention of UNEF, Int 3 in Dossier 1.

[105] See. All the same there are German and French translations of the Italian Intervention in the dossiers:

Table 1: Composition of the *dossier*

Category of Document	**Number of Documents**	**% of number of documents (n=322, annexes included)**	**Number of pages**	**% of publicly available pages *dossier* (2093 p)**	**% of the original file (2477 p)**
Submissions by the parties[106]	27	8	1135	54	45
Evidence (oral procedure)	3	1	155	7	6
Procedure-related documents (including Misc.)	289	88	375	18	15
Report of the Oral Hearing	1	1	190 (French and German)	9	7
Opinion of the Advocate General	1	1	67	3	3
Final Judgment	1	1	206 (French and German)	10	8
Documents not available to public		384		15,5	

Total number of publicly available pages (all dossiers): 2093
Total number of pages (all dossiers): 2477
Total number of pages redacted: 384

	Pages in each *dossier*:	Pages missing by *dossier*:
1st Dossier	470	4
2nd Dossier	579	89
3rd Dossier	332	93
4th Dossier	410	198
5th Dossier	302	-

[106] Including annexes and multiple translations, see Doc 4 in Dossier 2.

3.1.1 Evidence

A large portion of the *dossier* is made up of documentary evidence submitted by the parties, namely:

- The contract between Consten and Grundig;
- Documents relating to the Supplementary Agreement relating to the GINT trademark;[107]
- Economic data on operations of the companies in France and Germany, especially their margins, prices and overall comparison of market conditions in the two countries;[108]
- The Commissions' decision and evidence submitted in this process;
- Caselaw of national courts.[109]

3.1.2 Submissions of the parties

The submissions of the parties constitute by far the largest part of the five *dossiers*. They encompass in total 27 documents:

1. Doc 1 in Dossier 1 the Submissions of the first applicant (Klageschrift der Firma Grundig-Verkauf GmbH) asking for the annulment of the decision of the Commission of 23 September 1964;
2. Doc 7 in Dossier 1 the Submission of the defendant, i.e. the Commission's reply requesting the Court to dismiss the action (Klagebeantwortung);
3. Doc 15 in Dossier 1 the counter-reply by Grundig to the submissions (reply) by the EEC Commission;
4. Int 1- 1 in Dossier 1, the request for Intervention by the Italian Government;
5. Int 2-2 in Dossier 1, the request for Intervention by Willy Leissner SA;
6. Int 2-3 in Dossier 1, Statement of the EEC Concerning the Intervention;
7. Int 2-4 in Dossier 1, Statement of Grundig Concerning the intervention;
8. Int 3-1 in Dossier 1, the Request for intervention by UNEF;
9. Int 3-5 in Dossier 1, the statement of the EEC Commission regarding the Intervention;
10. Doc 2 and 3 in Dossier 2, the Intervention of Leissner (German and French versions);
11. Doc 4 in Dossier 2, the submissions of the Italian Government;
12. Doc 7 in Dossier 2, 2nd counter Reply of the EEC Commission in case 58/64;
13. Doc 8 in Dossier 2, 2nd counter reply of the EEC Commission in case 56/64;
14. Doc 13 the Memorandum of UNEF on joint case 56/64 and 58/64;
15. Int 4-1 in Dossier 3, the request for Intervention by the German Government;
16. Int 4-5 in Dossier 3, the statement of the EEC Commission regarding the Intervention of the German Government;
17. Int 4-6 in Dossier 3, Statement of Grundig regarding the Intervention of the German Government;
18. Doc 18 in Dossier 3, Observations of the EEC Commission concerning the intervention of the Italian Republic;

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[107] E.g. Annexes 2 and 3 in Dossier 1.

[108] See e.g. Doc 15 in Dossier 1, 46 -62, Annex 1 to Doc 15 in Dossier 1.

[109] E.g. Doc 7 in Dossier 2, 35.

19. Doc 19 in Dossier 3, Observations of Consten concerning the intervention of the Italian Republic;
20. Doc 20 in Dossier 3, Observations of Consten concerning the intervention of Leissner;
21. Doc 21 in Dossier 3, Observations of Consten concerning the intervention of UNEF;
22. Doc 22 in Dossier 3, Intervention of the German Government;
23. Doc 23 in Dossier 3, Observations of Grundig concerning the intervention of the Italian Republic;
24. Doc 24 in Dossier 3 Observations of Grundig concerning the intervention of Leissner;
25. Doc 25 in Dossier 3 Observations of Grundig concerning the intervention of UNEF;
26. Doc 26 in Dossier 3 Observations of the Commission on the intervention of the German Government;
27. Doc 27 in Dossier 3 Observations of Grundig on the intervention of the German Government (German and French versions)

3.1.3 Procedure-related documents

Documents relating to the procedure make up a considerable part of the *dossier*, if only in terms of their sheer number. Content-wise they tend not to provide any major insights. The oral hearings are included in the report of the Judge Rapporteur which has been reproduced in the final judgment. The documents contained in the file (dossier 4) indicate that the Court requested additional documentation.[110] The report of the oral hearing does not clarify their content further though.[111]

3.1.4 Documents contained in the *dossier* already available before

The four documents which are also published in ECR and can be found on the web are: (1) the report of the Judge Rapporteur, (2) the Advocate General's opinion and (3) the Court's Judgment and an Order of the Court allowing Leissner's intervention. Those, along with their translations, make up about 20 to 25 % of the *dossiers*. The report by the Judge Rapporteur is the only document which summarises the Oral Hearing but is integrated almost verbatim in the judgment of the Court under the heading 'issues of fact and law' (as the Court invariably used to do). It can also be noted that the Commission decision that the applicants aimed to annul can be found on the internet (after some searching).[112]

3.1.5 Documents not available to the public

About 20 % of the material has been removed from the original file. It can thus be concluded that the *dossiers* had been heavily redacted before they were opened for consultation. However, it is impossible to identify the kind of documents that have been subject to redaction, as they have been entirely removed from the *dossier* without any information regarding the

[110] Docs 4,5,6 in Dossier 4.

[111] Doc 8 in Dossier 4.

[112] https://ec.europa.eu/competition/antitrust/closed/en/1964.html#4. See also Annex 1 in Dossier 1 where the Commission can be found in the dossier.

type or the authorship of the withheld documents.[113] The (electronic) *dossier* merely states: '*Pages (XXX to XXX) of the original file are not available for public consultation*.' However, the author notes that important documents of the procedure seem to be indeed missing. Most important of all are the submissions of **Consten**, applicant to the second of the cases (58/64) that were eventually joined together by the Court. The same can be said as to the Commission's first reply to it. Some of the submission of the intervenors seem to be missing as well. It can be presumed that at least some of the missing pages contain exactly those files.

3.2 Parties and intervenors

3.2.1 Brief presentations of the various parties

There are three parties to the dispute. The applicants, that is the companies **Consten and Grundig,** separately sought an annulment of the Commission decision which found their distribution agreement to violate EU law. As a corollary of that, there was one defendant, the **Commission**. The cases of the two applicants against the Commission were joined by the Court by order of 29 June 1965, with none of the parties objecting. There were also four interveners, two on each side. The **Italian** and **German governments** intervened in favour of the applicants (the latter only intervened in Case 58/64 i.e. against Grundig) also seeking the annulment of the Commission decision,[114] whereas the companies **Leissner** and **UNEF** intervened in favour of the Commission.

Reference was already made to Advocate General Roemer and his career. However, Consten and Grundig is remarkable from the standpoint of some other actors that were involved in litigating this dispute. Jacques Lassier, Robert Collin and Georges Le Tallec[115] all established their reputation on this case. There is e.g. an important prize awarded to competition scholars which is named the Jacques Lassier prize.[116] They eventually became renowned experts in EU competition law and pioneers in the field. Their interest in competition matters and their knowledge of both national and international law (mainly French and

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[113] Whether some of the documents contained business secrets, as in many competition cases is usual, and this is the reason why they are redacted was the initial assumption of the drafter of this report. No documents are redacted in a visible way, or statistics deleted on available documents. According to William Valasidis, incumbent Director of Communication of the Court of Justice of the European Union, speaking at conference on the present project on the 21st of February of 2020 the answer to those questions is rather simple. The redacted parts are translations of court documents, the deliberations of the Court which are always removed from the dossier and research notes which are drafted for the judges' convenience. The abscence of the Consten submissions remains though still unexplained.

[114] The reasons behind their interventions are persuasively revealed by Warlouzet in Warlouzet (n 8) 269. Namely, both governments thought that exclusive agreements of the kind were useful for penetrating foreign markets and where hostile to potential institutional consequences of the overreach of the Commission. See the discussion above under II 3 and 4.

[115] As lawyers for UNEF, Leissner and the Commission.

[116] Colin McFadycan, 'Maitre Jacques Lassier 1920-1979' (1979) 10 Int'l BJ 8: 'He was one of the first to understand the importance for lawyers of the competition rules of the Treaty of Rome, a field in which he rapidly became an acknowledged expert. He was a familiar figure at the Court of Justice in Luxembourg where he appeared, among many others, in the famous Grundig case. He was appointed Professor of Competition Law at the Centre d'Etudes International de Propri6td Industrielle of the University of Strasbourg when it was founded in 1958 and, in 1960, as Professor at the Ecole Supdrieure des Sciences Economiques et Commercials de Paris. He also found the time to write books on various legal subjects, the best-known beingBaux Commerciaux and Droit Europden de la Concurrence(the latter written in collaboration with Professors Plaisant and Franceschelli) both of which were published by Delmas in 1978.' Franceschelli, Plaisant, Lassier, Droit Europeen de la Concurrence (1966).

German) shaped the dispute and could have influenced the final decision. It must be noted moreover that Le Tallec went on to draft a commenting piece on the case, seemingly adopting a position consistent with the one he developed as counsel for the Commission.[117] Without a doubt, their involvement in the case and their subsequent fame shows the enduring importance of *Consten and Grundig*. The fact that French experts were involved, basing their arguments on French law which was stricter on vertical restraints and could allow the use of trademarks for suppressing export prohibitions, is also interesting.

3.2.2 Submissions of the parties in the *dossier* files

Given the importance, but also the sheer size of both the decision and the *dossier*, the present investigation into the Archives will aim to concentrate on the most important arguments and conclusions of the decision and not every single issue raised in it. Thus, the conclusions presented in the section preceding this one will form the crux of the analysis.[118] An attempt will be made to ascertain exactly who made the arguments, what points were emphasised, if the AG and the Court found the arguments persuasive or not, and finally whether it would be possible at all to draw some conclusions about the kind of legal reasoning that that parties, the interveners, and ultimately the AG and the Court used (e.g. literal, formalistic, teleological). At the time, the Court used a procedure whereby before the judgment it would almost exhaustively list all arguments of the parties as well as the interveners.

The five *dossiers* provide vital information for appraising the parties' methods of interpretation, their legal reasoning as well as their handling of evidence. As the factual situation was complicated and the issues at law novel, the submissions and arguments of the parties were extremely extensive.[119] In sum, by the rough count undertaken by the judge rapporteur the arguments could be boiled down to *31 distinct complaints* on issues of law and fact, raised by both applicants and interveners, to which the Commission had to reply. While there was definitely wide overlap for the arguments used by the two applicants, that does not mean that it was absolute.[120] Quite a lot of arguments were only brought by one applicant, though the applicants' arguments tended to complement, rather than conflict with, each other.[121] This can be easily explained by the fact that the parties did not have a common litigation strategy and that the cases were joined at a later stage.[122]

More specifically, the judge rapporteur and the Court summarised the complaints thusly:

A — The complaints concerning the form of the decision and the procedure followed for its adoption

1. The complaint concerning the classification of the disputed measure
2. The complaint based on the finding of an infringement in the operative part of the decision
3. The complaint concerning the failure to communicate the entire content of the file
4. The other complaints concerning the principle of respect for the rights of the defence

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[117] Georges Le Tallec, Die Wettbewerbsregeln in der Europaischen Wirtschaftsgemeinschaft nach der Rechtsprechung des Gerichtshofs, 1966 Aussenwirtschaftsdienst des Betriebsberaters 43.

[118] *Infra* under II 5.

[119] See e.g. where the Commission apologises for the extent of its briefs, particularly its counterreply, see Doc 7 in Dossier 2, III.

[120] Cf. Doc 1 in Dossier 1 and Doc 21 in Dossier 3.

[121] E.g. the complaint concerning the classification as a directive was raised by Consten. It is hard however to tell apart each applicant's arguments from each other, because Consten's initial submissions are absent from the file.

[122] Doc 1 in Dossier 2.

B— The operative part of the decision

C — The findings of fact

D — The criteria for the application of the prohibition laid down in Article 85 (1)

E — The conditions for the application of Article 85 (3)

[123] Article 101 (1) TFEU.

These arguments can be further 'distilled' as follows. The bolded characters indicate the main issues referred to under section II 5 of this report:

Consten and Grundig

First, there were several complaints concerning the form and procedure of the contested decision.[124] Both applicants complained that the Commission failed to respect a number of procedural rights of the applicants.[125] Those include a complaint relating to the use of the word '*directive'* instead of '*decision'* in the original version of the decisions in French, not communicating the entire content of the file etc.[126]

More substantive were their objections as to the operative part of the decision. Consten and Grundig purported that the prohibition of Article 101 applied only to horizontal agreements;[127] similarly exclusive distribution agreements were not agreements between enterprises, therefore only Article 101 could be applicable.[128] Grundig in its reply also disputed the very applicability of Article 101 (1) of the Treaty before the adoption of Regulation No 19/65 exempting certain agreements.[129]

In addition, both parties placed emphasis on the criterion of the concept of 'restriction of competition' and of that of 'agreements that may affect trade between member states,' claiming in short that their distribution agreement does not belong in those categories.[130] As to the latter point, there had been no **effect on interstate commerce** as the applicants showed that there was an increase and not a decrease in turnover in the trade between Consten and Grundig over the past few years.[131] Moreover, they complained very extensively against the findings of fact by the Commission which showed a **restriction of competition** and the way it chose to prove such restriction. Economic data was crucial to their arguments, as to why the mere price difference between Germany and France was not enough to show that consumers were harmed.[132] In that context, they contended that the Commission had failed to show that trade would have been livelier without the agreement.[133] Also, the Commission had not examined which effects the contract had on the competition between different brands; competition with similar electronic devices of other brands had in fact increased.[134] The Commission, by condemning the agreement as a by object restriction of competition, was essentially enforcing a *per se* rule similar to the one applied in the US.[135]

[124] A summary of Grundig's pleadings can be found in Doc 1 in Dossier 1, 65-67.

[125] Doc 1in Dossier 1 (Grundig's submissions)

[126] These arguments though were easily dispatched by the Court. Such procedural arguments may seem almost naïve today however one should not forget that the process took places during early stages of the Commission as an enforcer. Some contemporary commentators had even to clarify that the Commission was an administrative agency and not a court, see Steindorff and Hopt (n 20) 819 fn 4.

[127] Doc 1 in Dossier 1, 35.

[128] Doc 1 in Dossier 1, 34. Doc 15 in Dossier 1, 69-70.

[129] Doc 15 in Dossier 1, 4 et seq. See the Commission's reply to that in Doc 7 in Dossier 2, 1 et seq.

[130] Doc 1in Dossier 1 (Grundig's submissions) 46 et seq.

[131] See Doc 15 in Dossier 1, 79, noting a 4000 % increase in revenue between 1957 and 1963.

[132] Doc 1 in Dossier 1, 25- 35, 50.

[133] Doc 1 in Dossier 1, 38.

[134] Doc 1 in Dossier 1, 40.

[135] Doc 15 in Dossier 1, 15-16.

To reinforce that claim they posited that allowing exclusive distributorships conferring absolute territorial protection protected a distributor's legitimate interests by preventing competitors from free riding on the sunken costs of advertising and marketing incurred initially by the distributor by undercutting prices. Grundig argued that German buyers were more familiar with its product whereas the French were not, and in order to penetrate the market a better level of service and promotion was necessary. Consten was responsible for guarantees, repairs, customer service, advance orders, maintaining vast amount of stock and commercial costs.[136] Thus cheap imports from Germany by the parallel importers (like Leissner and UNEF) would undercut Consten's business model and the brands reputation by extension.[137] This justified the export ban as inter-brand competition was more important than intra-brand.[138]

Part of their criticism also concentrated on the **prohibition of the agreement on the GINT trademark**, which they objected to on two separate grounds.[139] Both parties argued that the Commission lacked competence in the area of trademark law and by prohibiting the use of the trademark it violated treaty provisions guaranteeing the protection of intellectual property law by the EEC.[140]

In that context they objected to the **extent of the prohibition in Article 3** of the contested decision claiming that the whole agreement should not be held contrary to competition law in any case, but only the infringing parts of it.[141] In that they made reference to Article 101 (2) of the Treaty.

Finally, they claimed that **Article 101 (3)** should apply, as there were positive effects for competition caused by this agreement and its prerequisites were fulfilled.[142] In respect to Article 101 (3), their arguments concentrated on the criteria of a fair share of benefit to the consumers by this agreement and chiefly of its necessity to ensure a better distribution of goods.[143] In that sense, they laid out the main advantages of the distribution system for intensifying rather than limiting competition, such as the extra services and guarantees offered by Consten, which were necessary to ensure a more efficient market presence in France for Grundig product and which the parallel imports undermined.[144]

EEC Commission

The EEC Commission has by far the highest page count among the various parties to the dispute.[145] Its replies are extensive, and very thorough in countering the arguments of the applicants. This can also be explained by that fact that it had two separate legal counsels for the two cases before they were joined, thus submitting in multiple occasions the same

[136] Doc 15 in Dossier 1, 72-73.

[137] Doc 15 in Dossier 1, 74-75.

[138] Doc 1 in Dossier 1, 39-40.

[139] Doc 15 in Dossier 1, 36 et seq.

[140] Doc 1in Dossier 1, 12-19, Doc 15 in Dossier 1, 34.

[141] Doc 1 in Dossier 1, 5 et seq, Doc 15 in Dossier 1, 8-14.

[142] Doc 1 in Dossier 1, 9 et seq, 53 et seq. Doc 15 in Dossier 1,24.

[143] Doc 1 in Dossier 1, 56, 57.

[144] Doc 1 in Dossier 1, 58

[145] They even apologise for the extent of their submissions in Doc 15 in Dossier 3, Preface.

arguments twice. [146] At the same time, it cannot be denied that the Commission answered all those points meticulously.[147]

First of all, it dismissed all the procedural complaints, answering them extensively. It paid special attention to arguments of proper procedure before it as grounds for annulment. The AG and the Court were persuaded by its argumentation. In any case those arguments need not bother us further as they were peripheral to the main conclusions of the Court. As to the more substantive arguments which form the core of this report the Commission's approach was shaped according to the following scheme.

The Commission posited that nothing in Article 101 established a distinction between enterprises competing at the same stage or between mutually non-competitive enterprises operating at different stages, and that no distinction should be made where the Treaty did not make them.[148] It was therefore possible that a **vertical agreement** not involving the abuse of a dominant position could be liable for impairing trade between Member States and at the same time, might have the object or result of preventing restricting or distorting competition, and thus violate Article 101(1).[149]

The exclusive distribution agreement which conferred absolute territorial protection violated Article 101 (1) of the Treaty, as it constituted a **restriction of competition**. It restricted the market freedom of the participants and third parties by object. It was also capable of **affecting trade between Member States**, as this criterion only referred to any influence on such trade and not merely negative effects, and the counterfactual could easily prove that such an influence on trade existed.[150] The Commission was not obliged to undertake a cost-benefit analysis, weighing advantages and disadvantages of different agreements distorting competition. EU competition law was after all different from US antitrust, where the rule of reason doctrine had developed and where Section 1 of the Sherman Act allows for several exceptions from antitrust enforcement based on undertaking such an analysis. By contrast, Article 101 (1) was joined by Article 101 (3) of the Treaty, and it was only the last provision which allowed for all other economic factors to be taken into account, not Article 101 (1) itself.[151] These observations, alongside its argumentation concerning the fact that Article 101 (3) of the Treaty does not apply either, could be said to constitute the central point of the Commission's defence. In any case, the Commission did undertake a far-reaching investigation into the facts of the case and the economic context in order to refute applicants' claims, not settling for formal arguments.[152]

As for the alleged **violation of trademark law**, the Commission argued that the decision did not breach national trademark law and the EU Treaty provisions guaranteeing it. The GINT trademark was not used as a distinctive mark; its only use was ancillary to the export ban by

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[146] Much to the annoyance of the Commission counsel, who complained about the applicants repeating the same arguments in their initial submissions and counterreplies! Doc 15 in Dossier 3. In sum there is a reply to Grundig (Doc 7 in Dossier 1), a reply to Consten, a counter reply to Grundig, and a counter reply to Consten. See the Summary of the Conclusion in its second counter reply, Doc 7 in Dossier 2, 109.

[147] It even cites to show its meticulousness recites the commending remarks to its original decision of Deringer, see Doc 7 in Dossier 2.

[148] Doc 7 in Dossier 2, (Commission's counter reply) 14.

[149] Doc 7 in Dossier 1, 11 and 35, Doc 7 in Dossier 2, 14 et seq. Doc 18 in Dossier 2 (Commission's Reply to the Italian Intervention), 3.

[150] *Consten and Grundig*, 327. Doc 7 in Dossier 1, 43 -44. Doc 7 in Dossier 2, 88.

[151] Doc 7 in Dossier 2, 50.

[152] Doc 7 in Dossier 2, 50-77.

helping ensure it. Thus, it constituted an abuse of trademark law and the Commission decision did not unduly interfere with the property on the mark itself, but rather limited its abusive use.[153]

Moreover, **Article 101 (3)** could not be applied in the present case, as not all of its requirements were present. Crucially, the applicants had been unable to prove that this agreement was *necessary* to ensure a better distribution of Grundig products in France. Consten could provide the extra services that it claimed to offer even without the export ban.[154] Lastly, the French consumers did not share the benefits, in the sense of the relevant condition of Article 101 (3), as the Commission observed that prices for Grundig products were higher in France than those in Germany.[155] Even more importantly, the Commission enjoyed a wide margin of appreciation in applying this article. This discretionary power meant that it could refuse the exemption, if it was not persuaded of the merits of the agreements, without needing to justify its decision in the absence of legitimate argumentation by the parties.[156]

Overall, the Commission paid great attention to the question of **market integration**.[157] The possibility that export bans such as the one central to this case could restore national borders meant that only exceptionally would such agreements not contravene EU competition law.

Private law limitations on interstate commerce were just as harmful for market integration as state-ordained measures. This could show that it was the Commission itself that pushed for a hard-line stance with respect to export bans and for utilizing competition law in order to achieve this. Thus, this was not merely an innovation of the ECJ, a fact which adds an important insight.

As to the question of the **extent of the prohibition**, according to the Commission an enumeration of the provisions that violated competition law would unduly burden the work of the Commission and would be detrimental to enforcement. Article 101 (2) of the Treaty did not belong to the competence of the Commission, and thus it was simply not its job to choose how and when to apply it, as the parties could refer in the face of legal uncertainty a preliminary question to the Court according to then-Article 177 of the Treaty. Article 101 (2) referred to partial nullity as well as total nullity, hence the declaration of nullity under Article 101 (1) did not mean that the Commission was inconsistent in interpreting the two provisions.[158]

Italian Government

The Italian Government's main plea[159] was that Article 101 was mostly concerned with the economic links between enterprises at the same stage in the economic process, whereas relationships between enterprises operating vertically at successive stages fall under Article 102 TFEU. The reason was that those agreements did not amount to agreements between undertakings, as the parties were not equal and should have the freedom to choose the way they market their products. The contract only affected *legal* relations after all, and did not concern the economic situation, as it resembled orders given e.g. to employees by the employer.[160] In conclusion, competition between concessionaires of the same product was

[153] Doc 7 in Dossier 1 (Commission's submissions), 12-22.

[154] Doc 7 in Dossier 1, 54, 55. Doc 7 in Dossier 2 105 et seq.

[155] Doc 7 in Dossier 1, 52. Annex 1 to Doc 7 in Dossier 2.

[156] Doc 7 in Dossier 1, 10.

[157] Doc 7 in Dossier 2, 6.

[158] Doc 7 in Dossier 1, 2-4.

[159] Doc 4 in Dossier 2, 3 et seq.

[160] Doc 4 in Dossier 2, 14.

impossible, as the parallel importers were not authorised by the producer to sell its products.[161] A second argument introduced by the Italian government was that then-Article 222 of the Treaty prohibited the Commission from deciding whether a company had the right to use a trademark. That is, the Commission was not merely claiming abuse of trademark law; it intervened unduly in it by declaring the nullity of the trademark.[162]

German Government

The German Government submitted comprehensive observations touching upon most relevant issues.[163] Its main novel pleas concerned the need to place more emphasis on the general situation in the market and the competition between similar products from other manufacturers (i.e. inter-brand competition). Competition between various distributors of Grundig's product was less important and market analysis should concentrate on competition between different products.[164] After all, competition could not be held to exist in a solely intra-brand situation when there was a possibility of interchangeability with products of other manufacturers.[165] In that spirit, it underlined that the Commission should not be content with just using a formal analysis to ascertain the existence of a **restriction of competition**, but should also consider the concrete economic effects of the disputed contract, as there was a presumption that vertical contracts were not harmful.[166]

One other novel argument that the German Government introduced was that the inclusion of the findings of an infringement in the operative part of the Commission's decision ran contrary to the system of Regulation of 17/62.[167] This argument could be said to reflect the ambivalence of the German Government about the shape that the Commission as an enforcer would adopt. According to Warlouzet, Germany was hesitant about giving the Commission too much discretion. Thus, it could be assumed it used procedural arguments such as this one in order to show the limited discretionary scope that the Commission enjoyed as an enforcer.[168]

The German Government also maintained that the mere existence of competition between producers selling similar products with Grundig in France was enough to consider the

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[161] Doc 4 in Dossier 2, 15. Italy's complaints could be characterised as overly legalistic and as not striking to the core of the dispute. It has to be pointed out that Italy had no entrenched tradition in competition law whatsoever. An antitrust statute was only passed in 1990. It would doubtlessly be interesting to research further the Italian government's stance as to competition law in those early formative days.

[162] Doc 4 in Dossier 2, 17-18.

[163] Doc 22 in Dossier 3. Its intervention spans almost 25 pages. Warlouzet points out that the West German government was not always in favour of a stricter competition policy. German law targeted chiefly horizontal restraints. Furthermore, it is interesting that during the process before the Commission the West German representative voted against the decision of the Commission to prohibit the agreement between Consten and Grundig. German policy at the time was to support exclusive dealing agreements as they serve to help exporters penetrate foreign markets. At the same time the German Government was cautious of not overturning the very first decision adopted by the Commission in an antitrust matter, as this would deal a blow to the European economic project, thus its overall stance was ambiguous see Warlouzet (n 8) 267.

[164] The AG agreed strongly with the German Government on that point, see *supra* under 2.3.

[165] This is analogous to the White Motor Co US caselaw discussed *infra* under 3.3.

[166] Doc 22 in Dossier 3.

[167] Doc 22 in Dossier 3.

[168] Will eventually need to consult the archives for this in order to compare both arguments. With the reality on the ground: 'The West German government was a strong supporter of the Regulation. Germany was troubled that competition policy was not implemented by an independent authority, as the Bundeskartellamt was…. During the negotiations, some German experts even suggested creating an independent European authority to implement article 85 EEC. This shows how important the German model of competition policy was, but also how flexible the interpretation of the Treaty of Rome was.'

consumers got a fair share of the benefit from the agreement, in the sense of the requirement of **Article 101 (3).** The German Government also interestingly claimed that the principle of proportionality limited the discretionary power of the Commission in applying the same Article and that therefore it should result in an exemption for the parties.[169] Lastly as to question of necessity of the agreements in the sense of Article 101 (3) the Federal Government argued that the critical question of whether the system of Consten of selling products accompanied with a guarantee and placing advance orders etc. would remain intact in the face of competition from parallel importers.

UNEF and Leissner

Both interventions were relatively short, but also influenced the Court in shaping its final decision. They mainly attempted to establish that there was both a distortion of competition and that it should not be justified under **Article 101 (3),** thus undercutting Consten's and Grundig's arguments. They achieved that mainly by referring to the fact that the applicants were overly aggressive in pursuing proceedings against both UNEF and Leissner based on French unfair and trademark law, which went to show exactly that competition for Grundig products in France among wholesalers was severely restricted.[170] Moreover, UNEF targeted individually many of the economic arguments put forth by the applicants. It argued e.g. that the system of advance orders was not necessary for the better distribution of goods as evidenced by Grundig wholesalers inside of Germany.[171] UNEF had also instituted its own guarantee scheme and provided similar services with Consten and that the prices offered by it matched Consten's own or were even lower.[172] In short, UNEF argued that it provided the same level of services as Consten and thus the restriction of competition caused by the export ban in the distribution agreement could not be justified, it not being necessary for a better distribution of goods according to **Article 101 (3).**

Leissner submitted a relatively short intervention.[173] It mostly overlapped in its argumentation with the Commission. One interesting observation of this intervener, which had, as mentioned before, been sued by Consten before the French courts due to violating the latter's export ban, concerned the argument of the applicants that the use of the GINT trademark on Consten's part was not based on their distribution agreement. According to Consten the agreement between Consten and Grundig concerning exclusive distribution did not oblige Grundig to enforce an export ban.[174] Leissner disputed this assertion. If that were true, then Consten would not have any reason to sue Leissner and would not have used this agreement as the basis of its action under French law. This argument, even if persuasive, does not appear in the judgment, nor can it be found in the Judge Rapporteurs report, probably since they considered that the existence of an export ban was evident from Consten's overall behaviour.

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[169] Doc 22 in Dossier 3, 24. The Commission argued that the principle of proportionality only exists in German administrative law, relates to restrictions of rights, and does not apply to a case of refusal of a benefit as this one. For the principle of proportionally in modern EU law see e.g. Jacques Steenbergen, 'Proportionality in Competition Law and Policy' (2008) 35 Legal Issues of Economic Integration 259.

[170] The Commission concurred; see Doc 7 in Dossier 1 23 et seq.

[171] Doc 13 in Dossier. Cf. however Consten's answer to that argument in Doc 20 in Dossier 3, 9-10.

[172] Doc 13 in Dossier 3.

[173] Doc 2 in Dossier 2.

[174] Doc 2 in Dossier 2, 8.

3.2.3 Sources and evidence in the argumentation

All parties made extensive reference to economic data (gross margins in France and Germany, price comparisons, overhead costs, etc.).[175] There are extensive annexes to the submissions that contain multiple documents relating to the conclusion of the contested contracts,[176] the registration of the trademark,[177] ongoing legal disputes relating to parallel imports etc.[178] The process is at sometimes reminiscent of a civil or administrative process under national law, with its broad usage of documentation to prove arguments both in fact and in law. This makes sense, given that the case concerns competition law, which, as mentioned above, was relatively underdeveloped at that stage in Europe. The parties thus did not hesitate to employ arguments based on national law, mainly contract, antitrust, unfair competition and trademark law.[179] More specifically the parties make reference to decisions of Dutch and Italian courts on the legality of, and prohibition on, parallel imports, but also to French unfair competition and trademark law.[180] Even more notable is the fact that references to American law abound.[181] For example the Sherman Act was used by Grundig and the Commission in order to support their definition of what constitutes an '*agreement'* as an issue of law.[182] This can be explained by that fact that US law served as the model for the introduction of antitrust in the EU.[183] As noted above, the case is an early EU competition law case and there was not an extensive body of caselaw at the European level, as there is today. The parties also referred to the previous proceedings, before both the national courts and the Commission, to support their arguments. For example, the cases of UNEF and Leissner were discussed.[184] Lastly, it is notable that the parties made extensive reference to previous decisions of the Court of Justice and of the Court of the European Steel and Coal Community in order to base their claims, even though the body of caselaw at this point in time could be characterised as meagre at best.[185]

3.3 The Court's handling of submissions

The Court reviewed the submissions in a different order than the one chosen by the Judge Rapporteur in his report and the Advocate General in his Opinion. More specifically it did not use the Rapporteur's fivefold division, preferring a different structure, which divided the complaints into ten different headings. Headings IV, VI, VII, VIII and X are the most crucial ones, taking into account the summary of most significant issues which appeared in the previous section. They refer to the main substantive rather than procedural issues raised by the applicants, those that over the course of the years became mainstays of its caselaw.

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[175] See e.g. Doc 15 in Dossier 1 and the tables that can be found there about the revenue of Grundig between 1961 and 1965 and import tariffs paid in France. Just in this reply the economic and factual arguments of Grundig span 20 pages. There is even talk of technical details, such as radio frequencies, ibid 61. Also see Doc 20 in Dossier 3, indicating the volume of sales of radios in France.

[176] E.g. Annexes in Doc 1 in Dossier 1.

[177] See e.g. the Annexes in Doc 7 in Dossier 1.

[178] Doc 20 in Dossier 3

[179] Doc 7 in Dossier 1, where the Commission refers to the case law of the BGH, in answer to a claim from the applicants. Another example is the discussion of the French law doctrine of opposability aux tiers, see Doc 15 in Dossier 1, 20 and Doc 7 in Dossier 2, 19.

[180] Doc 15 in Dossier 2, 33 under footnote 40, 35.

[181] Doc 15 in Dossier 2, 31 under footnote 37.

[182] Doc 15 in Dossier 2, 10.

[183] See Gerber (no 6), *passim*.

[184] See e.g. the Annexes in UNEF's submissions where the cases before the French court are invoked an the decisions annexed, Annexes to Doc in Dossier 2.

[185] Doc 15 in Dossier 1, 40, referring to the *Bosch* decision of the ECJ. Also Doc 18 in Dossier 3, 7.

The Court chiefly relied on the report of the Judge Rapporteur concerning the *content* of the arguments it reviewed. The Judge Rapporteur's report therefore was important for the way it summarised the argument and framed the various disputes.[186] At the same time, it can be said that the Grounds of judgment do not correspond exactly to the arguments of the parties contained in the report. The Court also relied on documentary evidence to prove singular points. Among this evidence is the declaration of Grundig on the trademark agreement, which the Court referred to,[187] UNEF's documentation showing that its level of service was equivalent to Grundig's level, economic data,[188] the contract between Consten and Grundig (especially the clause which prohibited exports) and the registration of the trademark.[189] As was mentioned above, the Court sided with the Commission in this case. It was established that exclusive distribution agreements conferring absolute territorial protection had the potential to disrupt commerce between Member States of the Community and normally infringe Article 101 (1).

The Court confirmed that the distribution agreements consisted of an 'agreement between undertakings' as Article 101 (1) did not restrict its application, as it did not distinguish between horizontal and **vertical agreements**. It also made passing reference to modern (at the time) economic theory on vertical contracts and its scepticism regarding their harmful effects, albeit distinguishing the ones at hand.[190] The fact that many, if not most, of these agreements did not distort the competitive process from an economic standpoint did not imply that absolute territorial bans were excluded from the ambit of competition law.

Moreover, the Court noted that according to Article 85 (1), in order to determine that an agreement restricted competition it was necessary to establish two prerequisites – whether it affected trade between Member States and whether the restriction constituted a by object or a by effect violation.[191] First the Court concentrated on the definition of agreements "**which**

[186] Doc 8 in Dossier 4.
[187] Annex 4 in Dossier 1.
[188] Doc 3 in Dossier 13.
[189] Annex 2 in Dossier 1.
[190] *Consten and Grundig,* 346.
[191] See supra under 2.5.

may affect trade between Member States".[192] The Court repeated, as it did in its free movement of goods case law, that only agreements which may affect trade between Member States fall under the purview of EU competition law. Therefore, 'what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to the freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market'.[193] Therefore the Court held that agreements imposing territorial restrictions or other limitations on freedom of trade restricting parallel trade in the internal market undeniably affected trade between Member States and therefore satisfied the requirement laid down in Article 85 (1).

But most important of all, agreeing with the Commission, the Court rejected the applicants' arguments that aimed to prove the absence of such a restriction, including the one concerning the danger of free riding and the potentially positive effects for competition. The rationale was the protection of the internal market, in other words, market integration. In that vein, arguably the most important finding of the Court is the following:

> 8. [...] An agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objectives of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers.

Overall, in Consten and Grundig the Court of Justice did not hold than an agreement intending to limit parallel trade is *per se* illegal.[194] It merely held that an agreement that restored national divisions and threatened to frustrate the fundamental objectives of the Community did not escape the ambit of 101 (1) TFEU. Only then did the Court carry out an economic analysis, albeit a bit abridged, and held that this agreement sought to eliminate any possibility of competition at the wholesale level and thus sheltered Consten from all competition.[195] Thus there was indeed a restriction of competition present as **market integration** was threatened and intra-brand competition was eliminated.[196] The Court rejected the most substantive arguments of the applicants and stated that there was no need for a deeper economic analysis. Separating national markets within the Community was enough. The economic and legal

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[192] *Consten and Grundig,* 341.

[193] *Consten and Grundig,* 339.

[194] As wrongly perceived by some contemporary commentators, see *supra* under 2.4.

[195] *Consten and Grundig,* 343: 'It was therefore proper for the contested decision to hold that the agreement constitutes an infringement of Article 85 (1). No further considerations, whether of economic data (price differences between France and Germany, representative character of the type of appliance considered, level of overheads borne by Consten)or of the corrections of the criteria upon which the Commission relied in its comparisons between the situations of the French and German markets, and no possible favourable effects of the agreement in other respects, can in any way lead in the face of abovementioned restrictions, to a different solution under Article 85 (1).'

[196] *Consten and Grundig,* 343: 'In addition, the more producers succeed in their efforts to render their own makes of product individually distinct in the eyes of the consumer, the more the effectiveness of competition between producers tends to diminish. Because of the considerable impact of distribution costs on the aggregate cost price, it seems important that competition between dealers should also be stimulated. The efforts of the dealer are stimulated by competition between distributors of products of the same make. Since the agreement thus aims at isolating the French market for Grundig products and maintaining artificially, for products of a very well-known brand, separate national markets within the Community, it is therefore such as to distort competition in the Common Market.'

context of the agreement was irrelevant.[197] Thus, the Court underlined that restrictions to parallel trade would be regarded as **restrictions of competition** '**by object**'. They 'automatically' triggered Article 101 TFEU, even without any assessment of actual or potential negative economic impact.[198] The ECJ made explicit that for the purpose of Article 101 TFEU there was no need to take account of concrete effects of an agreement once it appeared that its 'object' was to restrict competition.[199]

This meant that agreements aimed at dividing national markets were prohibited even when the contractual goods incorporated an **intellectual property right**.[200] A restriction of competition was present even when the distribution agreement related to trademarked goods, as the permission to use a trademark constituted the means through which Consten and Grundig were able to reinforce their absolute territorial protection in their area of operations.[201] This did not entail questioning the existence of intellectual property rights, but merely prohibited their abusive use when restricting competition.[202]

The Court also denied the availability of **Article 101(3) TFEU** in similar cases, concluding that almost always absolute territorial protection goes far beyond what would be necessary to achieve the efficiency gains claimed by the parties. More specifically, the Court dismissed a number of arguments that the applicants put forward. The most important ones concerned the potential benefits of the agreement on inter-brand competition. It was held that the argument whereby those agreements would lead to positive effects both for manufacturers and consumers by allowing new products manufactures to penetrate new markets and thus actually enhance inter-state commerce was not persuasive. It was also found that even if an agreement increased inter-state trade, this was not sufficient to exclude the possibility that it 'may' distort trade in other ways.[203] The other arguments by the applicants regarding improvements concerning distribution, promotion of sales, marketing, stability of the supply situation were also dismissed.[204] The Court emphasised that when considering the benefits stemming from

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[197] *Consten and Grundig,* 343. According to Colomo, this led to the creation of two distinct branches of caselaw regarding vertical restraints. *Consten and Grundig* is the leading case in those instances where the internal market considerations take precedence over the specific context, seeIbáñez Colomo (n 9) 751.

[198] As would have happened had it been considered a violation by effect, 342.

[199] *Consten and Grundig,* 343:

[200] *Consten and Grundig,* 343.

[201] *Consten and Grundig,* 345. The Court may have been influenced by the Commission's arguments that Consten still acquired the products from Grundig and did not manufacture itself, so that the mark did not really indicate origin with Consten, and that, therefore, the assignment was made with the intent of dividing territories and preventing the integration of the markets of the Member States.

[202] 'Consten's right under the contract to the exclusive user in France of the GINT trade mark, which may be used in a similar manner in other countries, is intended to make it possible to keep under surveillance and to place an obstacle in the way of parallel imports. Thus, the agreement by which Grundig, as the holder of the trademark by virtue of an international registration, authorized Consten to register it in France in its own name tends to restrict competition. Although Consten is, by virtue of the registration of the GINT trade-mark, regarded under French law as the original holder of the rights relating to that trade-mark, the fact nevertheless remains that it was by virtue of an agreement with Grundig that it was able to effect the registration.'

[203] *Consten and Grundig*, 347.

[204] *Consten and Grundig*, 349: 'In fact, UNEF, the main competitor of Consten, although it began selling Grundig products in France later than Consten and while having had to bear not inconsiderable risks, nevertheless supplies a free guarantee and after-sales services against remuneration upon conditions which, taken as a whole, do not seem to have harmed the reputation of the Grundig name. Moreover, nothing prevents the applicants from informing consumers, through adequate publicity, of the nature of the services and any other advantages which may be offered by the official distribution network for Grundig products. It is thus not correct that the publicity carried out by Consten must benefit parallel importers to the same extent. Was persuaded buy UENF interventions.'

an agreement only objective benefits were of importance and the subjective benefit which the parties obtain from such agreements.[205] Lastly, the Commission enjoyed a 'margin of appreciation' when applying Article 101 (3) TFEU. Thus while the AG and the parties made far reaching reference to economic data to support the application or non-application of Article 101 (3), the Court chose to refer to the Commission's discretionary power.[206] This was important as it established a certain division of power between Court and Commission concerning the substantive assessment of business practices.

In sum, exercising its wide discretionary power, the Commission could find that the price between France and Germany, even after deducting tariffs custom charges and taxes, was too significant to ignore. This was true even if the agreement would lead to a broader choice for consumers if it did not guarantee the fair distribution of the benefits.

This is reflective of the Court's stance when market integration is at stake.

However, the Court sided with the applicants on one particular point: the **severability** of the void provisions from the rest of the agreement.[207] The automatic nullity of Article 101 (2) only applied to those parts of the agreement affected by the prohibition and only extended to the whole agreement if it appeared that those parts were not severable from the agreement itself. The Commission should, therefore, have chosen to declare which parts of the agreement came within the prohibition in the operative part, or otherwise it should have made clear in the preamble to the decision its reasoning for why those parts were not severable from the whole agreement.

The Court thus annulled the decision of the Commission of the European Economic Community of 23 September 1964 only in so far as it declared that the whole of the contract of 1 April 1957 constituted an infringement of the provisions of Article 101 of the Treaty, including parts of that contract that did not constitute the said infringement. It duly dismissed the rest of applications 56/64 and 58/64 as unfounded, holding the restraints introduced by the agreements as restrictive of competition.

3.4 The path not taken. Arguments omitted

Overall, the Court approached the issue using what could be characterised as a formalist approach.[208] That means that the ECJ focused on principle rather than the facts of the specific case. It clarified that market integration was paramount, and that this by itself was enough for

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[205] *Consten and Grundig*, 348.

[206] *Consten and Grundig*, Summary, 301: 'Furthermore, the exercise of the Commission's powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.'

[207] *Consten and Grundig*, 344: 'It follows, however, from Article 1 of the decision that the infringement was found to lie in the agreement as a whole, although the Commission did not adequately state the reasons why it was necessary to render the whole of the agreement void when it is not established that all the clauses infringed the provisions of Article 85 (1). The state of affairs found to be incompatible with Article 85 (1) stems from certain specific clauses of the contract of 1 April 1957 concerning absolute territorial protection and from the additional agreement on the GINT trade mark rather than from the combined operation of all the clauses of the agreement, that is to say, from the aggregate of its effects'

[208] See *supra* under 2.4.

a finding of a violation of Article 101 (1) by the contested agreement.[209] The Court did not ignore any significant arguments of the parties. It seemed to consciously reject them in favour of this formalist approach. Crucially, it explicitly denied that a cost benefit analysis would be appropriate in this case.[210] The Court simply did not place much emphasis on the hundreds of pages of economic data submitted by the parties. However, the ECJ could be blamed for not placing due emphasis on those arguments of the applicants and interveners centring around the peril of free riding and for ignoring the positive economic effects of territorial protection in promoting inter-brand competition. On the other hand, in favouring a clearly pro-market integration approach with its judgment, it could not be blamed for potentially fostering legal uncertainty, as agreements similar to this one would be almost always be held illegal. One could say that the judgment in *Consten and Grundig* was even *meant* to shape EU competition law in a novel way, at this early stage of its development. After all, the Court's decision is relatively short, especially compared with the extensive submissions of the parties and the Opinion of AG Roemer, who delved more deeply into the facts of the case before him. But, again, this was probably by design and not by chance. More specifically the Court in this case sided with the Commission because of the affront that absolute territorial protection presented to the common market. Apart from that, the author of this report has been unable to find any significant arguments of the litigants that were not in the report or were completely ignored by the Court.

To try and imagine an alternative approach, it would be interesting to follow the parallel development of the caselaw concerning distribution agreements in the US. In short, it could be described an *eventual disappearance of the per se rule.*[211] The first case where this uncertainly as to the per se illegality of vertical restrains was mentioned was the *White Motor Co v US* case, which, interestingly, is also mentioned by the Advocate General and the applicant parties in their submissions.[212] Generally, per se illegality has vanished from the regime applicable to vertical restraints.[213] The US had a very similar rule to the rule in *Consten and Grundig*.

Under *United States v Arnold, Schwinn and Co.* a distributor agreement for the imposition of absolute territorial restrictions was declared per se illegal.[214] This case essentially overturned *White Motor Co* for a brief time and is reminiscent of the *Consten and Grundig* findings. However, one should be careful not to draw premature conclusions from the US Supreme Court's hard line against exclusive agreements with territorial protection. This strand of caselaw did not survive the changes in antitrust law under the influence of the Chicago School and was repudiated shortly after, contrary to *Consten and Grundig* that remains a leading case in the EU to this day. Furthermore, the reason that the Supreme Court adopted this stance had nothing to do with market integration. Indeed, the case that overruled this rule was *Sylvania*, with the Court ruling that non-price restraints on distributors can improve economic efficiency and that inter-brand competition is more important than intra-brand

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[209] Patel and Schweitzer (n 26) 40. It has been rightly pointed out that it was the Commission that was the first to identify integration as a central goal of 101 (1) TFEU.

[210] Six year after the Commission released a statement, emphasizing that primary focus during the first ten years of Community competition policy was on restraints which jeopardized the unity of the Common Market, see the Commission Report on Competition Policy, 2 CCH CoMm. MKT. REP. 9507 (1972). This is why most of the cases during this period involved vertical agreements and clauses involving some kind of territorial protection.

[211] Colino (n 91) 76.

[212] Though most scholarship accurately point out that the per se rule works quite fiercely that 101 TFEU as a whole, see Whish and Bailey (n 15) 127, 128 The same was remarked upon by the Commission in the present case see Doc 7 in Dossier 2, 85.

[213] For an overview see Colino (n 91) 77 et seq.

[214] *United States v Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Schwinn was cited by the Commission in support of its arguments, Doc 7 in Dossier 2, 85.

competition.[215] Setting aside the fact that the discussion of other legal systems may obfuscate even further the situation, a simple conclusion would be obvious: a less formalistic and more economic approach can be imagined under Article 101 in view of the US rules.

In Europe the crucial element that led to the divergence is the market integration objective pursued by the Treaty.[216] But potentially the Court could have chosen to reconcile economic efficiency and market integration relating to vertical agreements in a different manner. The path it could have chosen would reflect the specific circumstances of the case before it. Instead of conceding a wide margin of appreciation to the Commission, the Court could have chosen to handle this agreement as a 'potentially by effects' restriction of competition and look into its economic context in order to ascertain whether it really constituted a restraint of competition. This would have significantly changed the eventual development of EU competition law doctrine, without a need to necessary relegate the market integration goal.[217]

Considering export bans of this kind as an effects-based violation would have been one solution, albeit one vastly different from the Court's own. An alternative solution, closer to the ECJ's integrationist approach, would have been to allow for more leeway for possible justification of similar agreements in terms of Article 101 (3) TFEU, especially in cases where competition between products of different manufacturers is promoted and there are arguments to be had that a practice can encourage market integration in regards to inter-brand competition.[218] After all, even modern Commission practice towards vertical restraints seems to have been evolving in that direction.[219] On 1 May 2004, Regulation 1/2003 abolished the Commission's exclusive right to rule on the compatibility of an agreement with Article 101(3), rendering it directly applicable as a legal exception to Article 101(1) also by national courts.[220] Agreements which are covered by Article 101(1) and which do not satisfy the conditions of Article 101(3) are prohibited. No prior decision to that effect is required. The Commission has gradually detached itself from its earlier interventionist policy, moving towards an acceptance that consumer welfare should be the benchmark against which agreements are tested.[221] Article 101(3) provides the appropriate forum for weighing the restrictive effects of the agreement, identified at the Article 101(1) stage, against the economic benefits and efficiencies created by the agreement (see e.g. the White Paper on Modernization 1999).[222] After all, vertical agreements are part of the competitive process. The latter mainly involves competition between different brands, and therefore one should not view vertical restraints as considerably

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[215] *Continental Television v GTE Sylvania*, 433 U.S. 36 (1977). This process culminated in case Leegin Creative Product where the Court went as far as to pronounce that interbrand competition was the goal of the Sherman Act, See *Leegin Creative Leather Products, Inc. v PSKS*, Inc., 551 U.S. 877 (2007).

[216] Colino (n 91) 4.

[217] See the classic critique of the European approach in Barry E. Hawk, 'System Failure; Vertical Restraints and EC Competition Law' (1995) 32 Common Market Law Review 973.

[218] See Regulation 67/67 that provides exceptions that could apply to such cases. See also the discussion about the possibility of excluding temporary territorial protection from the scope of the *Consten and Grundig* decision in Steindorff and Hopt (n 20).

[219] See e.g. Reg.1/2003. Monti (n 11) 358 et seq.

[220] NCAs can however, see the Tele2 Polska ruling, Case C-375/09, ECLI:EU:C:2011:270.

[221] Cf. Ibáñez Colomo (n 5) 756: 'While the enforcement of Article 101(1) TFEU to vertical restraints has undergone a substantial transformation, the Commission has not changed its views on the treatment of agreements aimed at partitioning national markets.' .

[222] White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, OJ C 132 of 12.5.1999.

more suspect than all other vertical integration practices, which do not carry the same negative connotations.[223]

3.5 Procedural issues that did not emerge from the published report

There were no major procedural issues that did not emerge from the published report. This can be easily explained by the extensive reference that is made in the report to any procedural issues of major significance.[224]

Worthy of mention though is that Grundig asked that UNEF's intervention not be heard, because it submitted its statement in French and not in German. This objection was withdrawn later and did not influence the development of the proceedings.[225] This was not mentioned in the section of the Judge Rapporteurs report referring to procedural questions.[226] In any case its impact on the proceedings seems to have been marginal.

4. Final Conclusions

In *Consten and Grundig,* the Court reached a remarkable conclusion, the impact of which continues to be felt today.[227] It can be traced through the modern caselaw of the Court, in the Guidelines of the Commission, and can be even said to have shaped private economic relations in Europe by facilitating parallel imports, thereby promoting market integration. The Court's reasoning was, if anything rather precise, reflecting exactly the single market aspect of EU competition law. It could be described as somewhat formalistic, in the sense that it relied on a point of principle and not the specificities of the contested agreements to drive its point further. In that sense, the Court used a two-pronged approach. The Court did not dismiss all economic arguments out of hand. It made clear though they could not exclude vertical restraints that separated the common market from the ambit of competition law.

When it endorsed the Commission's findings almost in their entirety, it simultaneously endorsed an approach to competition law and vertical restraints that would be open to criticism as being unsophisticated and ignorant of dominant economic thought even at the time.[228] Nevertheless, by promoting the single market objective over and beyond economic efficiency concerns the Court affirmed its peculiar role as the Court of Justice of a supranational organisation with specific goals and objectives. It did not act as a national tribunal, ruling solely

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[223] One reason for viewing vertical integration preferably could have conceivably been the wish of early European policy makers of creating large 'European champions'. Those companies would due to their sheer size be able to counter the American dominance that threatened European business interests. see e.g. Hubert Buch-Hansen and Angela Wigger, 'Revisiting 50 Years of Market-Making: The Neoliberal Transformation of European Competition Policy' (2010) 17 Review of International Political Economy 20. Vertical agreements between small and medium sized companies could not succeed in that. It must be underlined however that this is only a hypothesis and more research is needed in order to support it.

[224] Doc 25 in Dossier 3, 3.

[225] Doc 8 in Dossier 4, 11.

[226] *Consten and Grundig*, 337.

[227] See generally Ibáñez Colomo (n 9), passim.

[228] See contemporary comments in. The decision in the Grundig-Consten case took two and a half years after the passing of the Regulation 17/62. After this landmark case, the Commission took only a handful of formal decisions. Specifically, only four decisions were formally taken between Grundig-Consten and the completion of the Common Market by the elimination of custom duties in July 1968.18

on issues of antitrust law.[229] It is exactly due to this double role of the court why this decision, even if received with apprehension, has not been universally condemned. In later cases the market integration objective has been both affirmed and refined.[230] In *GlaxoSmithKlein* the Court stressed the importance of a full economic appraisal under 101 (1) TFEU, even when a practice aims to impede parallel imports.[231] Merely placing certain obstacles to market integration is not enough to justify the illegality of a certain practice.[232]

The *dossier* can help to explain how a certain line of caselaw that is still on-going was formed. The Court follows a sui generis approach when analysing similar agreements. Whether a practice is restrictive by object is ascertained by different criteria to this day when it concerns agreements that partitions national markets. The sui generis approach does not take into account the economic and legal context of which the agreement is part. This peculiarity explains the outcome of *Consten and Grundig* and still can be found in modern cases.[233]

On the other hand, the Advocate General's arguments (and by extension those of the applicants) also remain influential. The AG placed more emphasis on economic considerations and underlined the importance of undertaking a comprehensive assessment of the economic impact of agreements, even when market integration is at stake. This stance reflects modern thought on vertical restraints and their impact on consumer welfare, especially in US law but also in many other countries of the world. It also seems to be more compatible with the more economic approach adopted by the Commission itself since the nineties.[234] At the same time it cannot be ignored that the AG might have been influenced by policy concerns.[235]

As such even the single market imperative may not be enough to justify the Court's decision to continue to uphold this restrictive appraisal of distribution agreements conferring absolute territorial protection, as the one adopted in *Consten and Grundig*. Another path is viable and could be thought of as compatible with the market integration objective, providing for a more sophisticated approach to this objective, and utilising economic insights to concretely ascertain where this objective would be put at peril and where an agreement is harmless.[236]

Ultimately, the object/effects classification remains one of the most disputed issues of EU competition law, with endless ink spilled on what constitutes the 'object box', or even if such box exists in the first place.[237] Whether vertical restraints should be included in the object box is especially controversial. It is not the aim of this report to weigh in on this debate. What can be said though is that one look in the *dossier* reveals exactly how even at the time of the founding of the European project the choice of the Court was controversial, and how forcefully the applicants defended their right for the case to at least be reviewed under the effects approach. The Court explicitly denied moving forward using this approach, thus enhancing the

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[229] See the subsequent cases, C-100 to 103/80, SA Musique Diffusion française and others v Commission of the European Communities, ECLI: EU: C: 1983:158; C-501/06 P, GlaxoSmithKline Services Unlimited v Commission of the European Communities etc, ECLI: EU: C: 2009:610.

[230] See also the Digital Single Market Directive where the same goal is obvious: suppress restrictive activities of firms attempting to divide the internal market in that sector, Hildebrand (no 56), 60.

[231] See the analysis in Hildebrand (no 56) 284 et seq.

[232] C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities* etc, ECLI: EU: C: 2009:610, 171.

[233] Ibáñez Colomo (n 9) 754.

[234] Monti (n 8) 364: 'The reasoning in Consten and Grundig is unlikely to be repeated by the Commission'.

[235] See *supra* under 2.3.

[236] Monti (n 8) 40.

[237] Whish Bailey (n 2). See *supra* under 2.5.

Commission's margin of appreciation and its capability to enforce the antitrust provisions of the EU Treaty.

Moreover, from an institutional standpoint, the *dossier* sheds light on the development of the procedure before the Commission and the Court. *Consten and Grundig* was the first decision by the Commission on Article 101 TFEU infringements. Competition policy was not yet 'rationalized' in the 1960s. Commission officials did not have a lot of experience and the Commission had a relatively weak role in the setup of the European Community. Even if Regulation 17 of 1962 gave it broad powers on paper, it remained to be seen exactly to what extent they would develop.

EU Competition law was since its inception not concentrated just on achieving total or consumer welfare alone. It has a distinct political objective, as the single market imperative focuses European competition policy on openness of markets 'as a combined pro competition and pro integration goal.'[238] It remains to be seen in the future whether the Court will manage to strike a balance between the different objectives pursued by antitrust, in the face of the seismic changes that have taken place in competition doctrine over the last decades.

[238] Fox (n) 31.

Annex I: List of Documents

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Annex 4	Gesellschaftsvertag der Grundig Radio Verkaufs GmbH	Notar Dr. A. Schmitt	12	101
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Doc 8g	Communication regarding transmission of certain documents (German Gov)	Registrar of the Court	1	393
Doc 9a	Communication regarding transmission of certain documents, including corrections on the Report of oral proceedings (Consten)	Registrar of the Court	1	394
Doc 9b	Communication regarding transmission of certain documents, including corrections on the Report of oral proceedings (EEC Commission, Le Tallec)	Registrar of the Court	1	395
Doc 9c	Communication regarding transmission of certain documents, including corrections on the Report of oral proceedings (It. Gov.)	Registrar of the Court	1	396
Doc 9d	Communication regarding transmission of certain documents, including corrections on the Report of oral proceedings (Leissner)	Registrar of the Court	1	397

Doc 9e	Communication regarding transmission of certain documents, including corrections on the Report of oral proceedings (UNEF)	Registrar of the Court	1	399
Doc 10	Corrigendum on the Report on oral proceedings	Judge Rapporteur	1	400
Doc 10a	Communication regarding transmission of certain documents, (Consten)	Registrar of the Court	1	401
Doc 10b	Communication regarding transmission of certain documents, (Grundig)	Registrar of the Court	1	402
Doc 10c	Communication regarding transmission of certain documents, (EEC Commission, Thiesing)	Registrar of the Court	1	403
Doc 10d	Communication regarding transmission of certain documents (EEC Commission, Le Tallec)	Registrar of the Court	1	404
Doc 10e	Communication regarding transmission of certain documents, including French Translation of the Reports (Italian Gov)	Registrar of the Court	1	405
Doc 10f	Communication regarding transmission of certain documents, including French Translation of the Reports (Leissner)	Registrar of the Court	1	406
Doc 10g	Communication regarding transmission of certain documents, including French Translation of the Reports (UNEF)	Registrar of the Court	1	407
Doc 10h	Communication regarding transmission of the Report (German Government)	Registrar of the Court	1	408
Doc 11	Corrections on the Report on oral proceedings	Judge Rapporteur	1	409

Pages of the original file are not available for public consultation	pp. 409 to 502			410
Oral Procedure, Decision, Dossier No 5				
Pages of the original file are not available for public consultation	pp. 3 to 201			4
Doc 11a	Communication regarding the date of the public issuing of the AG's Opinion (Consten)	Registrar of the Court	1	5
Doc 11b	Communication regarding the date of the public issuing of the AG's Opinion (EEC Commission, Le Tallec)	Registrar of the Court	1	6
Doc 11c	Communication regarding the date of the public issuing of the AG's Opinion (Grundig)	Registrar of the Court	1	7
Doc 11d	Communication regarding the date of the public issuing of the AG's Opinion (EEC Commission, Thiesing)	Registrar of the Court	1	8
Doc 11e	Communication regarding the date of the public issuing of the AG's Opinion (It Gov)	Registrar of the Court	1	9
Doc 11f	Communication regarding the date of the public issuing of the AG's Opinion (Leissner)	Registrar of the Court	1	10
Doc 11g	Communication regarding the date of the public issuing of the AG's Opinion (UNEF)	Registrar of the Court	1	11
Doc 11h	Communication regarding the date of the public issuing of the	Registrar of the Court	1	12

	AG's Opinion (German Government)			
Opinion of AG	Opinion of AG Roemer on the joint cases 56 and 58/64	Advocate General of the Court	67	13
No number indicated	Communication regarding the date of the public announcement of the decision of the Court (Consten)	Registrar of the Court	1	80
No number indicated	Communication regarding the date of the public announcement of the decision of the Court (Grundig)	Registrar of the Court	1	81
No number indicated	Communication regarding the date of the public announcement of the decision of the Court (EEC Commission, Le Tallec)	Registrar of the Court	1	82
No number indicated	Communication regarding the date of the public announcement of the decision of the Court (EEC Commission, Thiesing)	Registrar of the Court	1	83
No number indicated	Communication regarding the date of the public announcement of the decision of the Court (It Gov)	Registrar of the Court	1	84
No number indicated	Communication regarding the date of the public announcement of the decision of the Court (Leissner)	Registrar of the Court	1	85
No number indicated	Communication regarding the date of the public announcement of the decision of the Court (UNEF)	Registrar of the Court	1	86
No number indicated	Communication regarding the date of the public announcement of the	Registrar of the Court	1	87

	decision of the Court (German Gov)			
Decision of the Court	Decision of the Court on the joint cases 56 and 58/64 (French)	Court of Justice	95	88
Decision of the Court	Decision of the Court on the joint cases 56 and 58/64 (German)	Court of Justice	111	183
No number indicated	Communication concerning the transmission of a certified copy of the decision (Consten)	Registrar of the Court	1	294
No number indicated	Communication concerning the transmission of a certified copy of the decision (Grundig)	Registrar of the Court	1	295
No number indicated	Communication concerning the transmission of a certified copy of the decision (EEC Commission, Le Tallec)	Registrar of the Court	1	296
No number indicated	Communication concerning the transmission of a certified copy of the decision (EEC Commission, Thiesing)	Registrar of the Court	1	297
No number indicated	Communication concerning the transmission of a certified copy of the decision (It. Gov)	Registrar of the Court	1	298
No number indicated	Communication concerning the transmission of a certified copy of the decision (Leissner)	Registrar of the Court	1	299
No number indicated	Communication concerning the transmission of a certified copy of the decision (UNEF)	Registrar of the Court	1	300
No number indicated	Communication concerning the transmission of a certified copy of the decision (German Gov)	Registrar of the Court	1	301
No number indicated	Communication concerning the correction of a date on	Registrar of the Court	1	302

	the German version of the Decision of the Court (German Gov)			

Annex 2: Statistical Figures on the Dossier

Table 2: Summary Table of Positions of Actors

Position of Actors	Application of Art. 101 (1) TFEU to Vertical Restraints	Effect on Trade	The Object/ Effect Distinction	101 (3) TFEU	Severability of Provisions of Treaty	Arguments on Market integration as the objective of Article 101
Grundig	Not Applicable	No	Yes	Applicable	Yes	Rejected
Consten	?	?	NM	Applicable	Yes	Not Mentioned (NM)
Commission	Applicable	Yes	Yes	Not Applicable	No	Yes
Leissner	Applicable	Yes	Yes	Not Applicable	NM	Yes
UNEF	AppIlcable	Yes	Yes	Not Applicable	NM	Yes
Italy	Not Applicable	NM	NM	Applicable	Yes	NM
Germany	Not Applicable	NM	Yes	Applicable	Yes	Yes but ultimately rejected
Advocate General	Applicable	Yes	Yes	Applicable	Yes	Rejected
The Court	Applicable	Yes	Yes	Not Applicable	Yes	Yes

Figure 2: Timeline of the Case

Figure 3: Dossier size

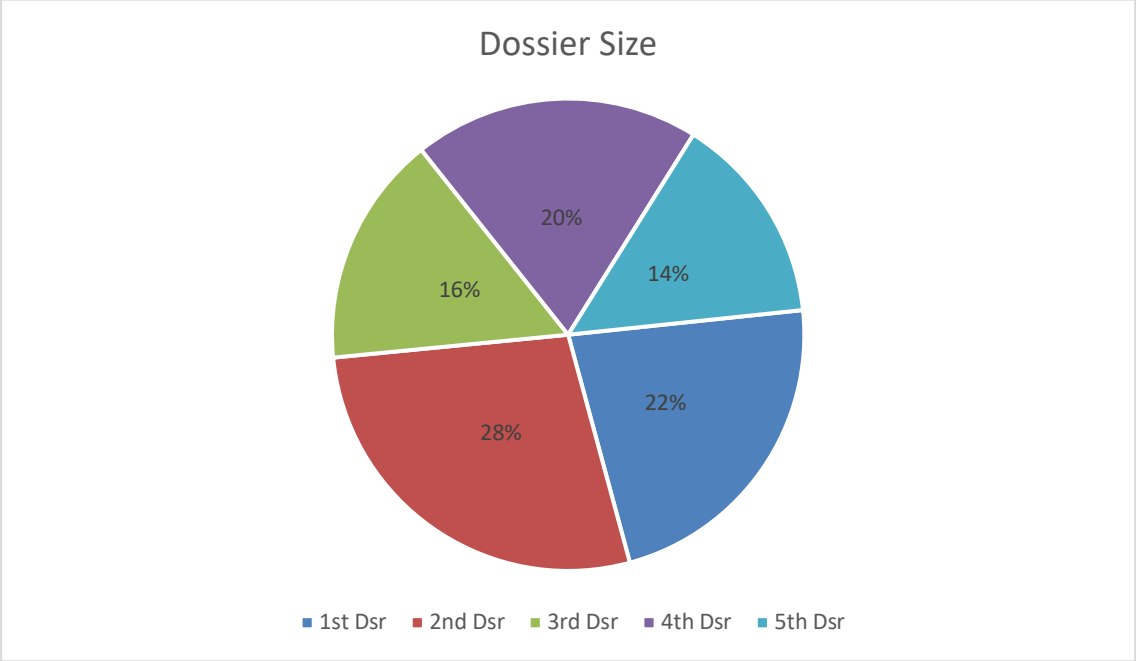
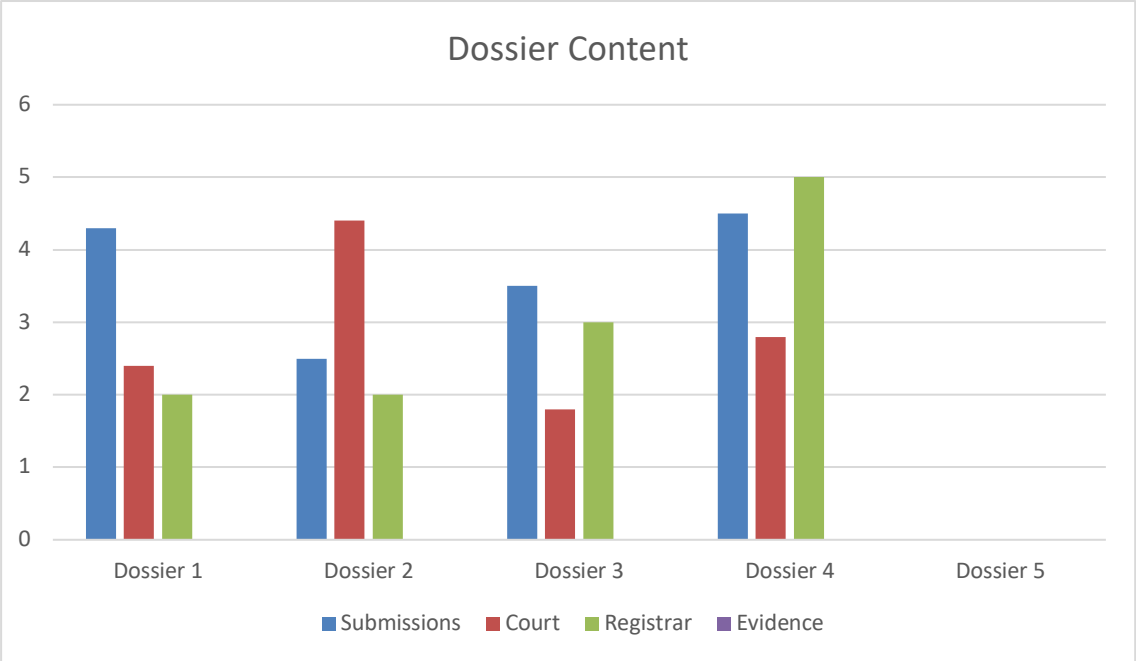


Figure 4: Dossier content



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- C-234/89, Stergios Delimitis v Henninger Bräu AG, ECLI:EU:C:1991:91
- C-56/65 - Société Technique Minière v Maschinenbau Ulm, ECLI :EU:C:1966:38
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