ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – FIRST PART

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CONSTEN AND GRUNDIG AND THE INCEPTION OF AN EU COMPETITION LAW

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ABSTRACT: *Consten and Grundig* was fundamental in shaping EU competition law and giving it its distinctive character. Issued in 1966, before the creation of a vast body of EU case law on competition, it introduced many of the fundamental concepts and guiding principles of EU competition law. Especially its emphasis on market integration and the Court's treatment of vertical agreements through a purportedly "formalist" approach remain both influential and controversial to this day. The release of the *dossier de procédure* sheds light on the thought processes that led to this judgment. The Court's choice to stick with the "object" analysis when dealing with vertical restraints harmful to market integration was by no means unavoidable. The parties and the intervening governments followed an intricate litigation strategy, informed by robust argumentation and a wealth of evidence based on economic data and comparative law, which was never analysed in its entirety by the Court or the subsequent literature. The *dossier* helps contextualise the Court's choice to disregard this line of argumentation and to underline the centrality of the single market imperative for the application of competition law. At the same time, it provides a valuable insight into how the various actors involved in the dispute (not just the parties and the Court but also personally the lawyers, and the representatives of the States) perceived their role and interacted with each other during those early, formative days of EU competition law.

KEYWORDS: *Consten and Grundig* – competition law – vertical agreements – exclusive distribution – restrictions by object – market integration.

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I. Introduction

In July 1966, the Court of Justice of the European Union (CJEU) handed down its judgement in Cases 56 and 58/64 (jointly referred to as the *Consten and Grundig* case).[1] Issued before the creation of a vast body of EU caselaw on competition matters, and long before the acquisition of expertise and experience by the Commission as an antitrust enforcer, it constituted a milestone. Many of the Court's findings eventually guided the development of competition law in the EU with all its peculiar characteristics.[2] The present *Article* was written as part of the wider project on the Archives of the European Union.[3] The opening of the Archives could prove invaluable in acquiring a better understanding of the workings of the CJEU and the development of the case law. The *Article*, drawing on insights offered by the *dossier*, focuses on the Court's controversial decision in *Consten and Grundig* to emphasize market integration considerations above everything else, a highly significant step in the evolution of EU competition law doctrine. By consulting the files contained in the archives it becomes eminently clear that both the parties and the Advocate General (AG) formed their litigation strategies based on the analysis of economic data and that therefore a less formalist approach could have been a perfectly viable choice for the Court. The CJEU's eventual, *conscious* choice to reject such an approach reflects the centrality of the single market imperative for the application of competition law in Europe and affirms the importance that the Court placed on securing open borders for free trade in the EU.

II. Overview of the case

In the 1960s competition law was not as well established in Europe as it was in the US.[4] Launched in the aftermath of the Second World War, the European project incorporated provisions creating a common market in order to foster economic growth. Likewise, a main goal of EU competition law was the elimination of internal boundaries, mainly in the distribution of goods.[5]

[1] Joined cases 56/64 and 58/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41 (hereinafter *Consten and Grunding*).

[2] R Whish and D Bailey, *Competition Law* (Oxford University Press 2015) 639.

[3] For more info on the Archives project see ecjarchives.eui.eu.

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

[5] EM Fox and D Gerard, *EU Competition Law: Cases, Texts and Context* (Edward Elgar 2017) 22; G Monti, *EC Competition Law* (Cambridge University Press 2007) 39; L Warlouzet, 'The Difficult Quest to Implement Cartel Control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 261, 262.

The *Consten and Grundig* case involved an appeal against a 1964 decision by the Commission that had found the two companies in breach of the EEC Treaty's competition provisions due to an exclusive dealing agreement.[6] In brief, the Court found that an exclusive distribution agreement, according to which Consten (a French company) was appointed as the sole and exclusive distributor in France of the German-based Grundig was incompatible with the current art. 101(1) TFEU.[7] 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 violations. The applicant companies sought an annulment of the Commission decision, claiming that their distribution agreement violated EU law. The Italian and German government intervened in favour of the applicants,[8] whereas the companies Leissner and UNEF intervened in favour of the Commission. In *Consten and Grundig* the EEC Commission argued, and the Court agreed, that the aim of promoting market integration at an EU level trumped most other considerations. That is, even restrictions on competition among distributors of the same brand through absolute territorial protection of this kind violated art. 101(1) of the Treaty. The mere potential to divide the market along national lines was a danger that could not be justified by any potential efficiency enhancements that agreement might bring about.

Additionally, the Court made some important preliminary findings. Specifically, it confirmed that (current) art. 101(1) TFEU applied not only to horizontal but also to vertical agreements.[9] Vertical agreements between firms operate at different levels of the supply chain, whereas horizontal operate at the same level. The Court found that both types of agreements as long as they affect trade between Member States belonged to the ambit of art. 101(1) TFEU.[10] Furthermore, the Court emphasized the extent of the margin of appreciation available to the Commissions when applying art. 101(3) TFEU.[11] Lastly, it confirmed that agreements relating to intellectual property rights fell under the scope of EU competition law.[12]

[6] Décision 64/566/CEE de la Commission du 23 September 1964 relative à une procedure au titre de l'art. 85 du traité (IV-A/00004-03344 "Grundig-Consten").

[7] Then art. 85(1) EEC Treaty. Current Treaty numbering will be used in the text unless otherwise indicated.

[8] The reasons behind their interventions are persuasively revealed in L Warlouzet, 'The Difficult Quest to Implement Cartel Control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' cit. 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.

[9] Note that the Court stated later in the recent *Allianz Hungaria* case that vertical agreements are "often less damaging to competition than horizontal agreements". See case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160.

[10] The current Guidelines on the Effect on Trade Concept contained in Arts. 101 and 102 TFEU (The Guidelines on interstate trade) draw substantially on the caselaw developed first in *Consten and Grundig* cit., and R Whish and D Bailey, *Competition Law* cit. 151.

[11] R Whish and D Bailey, *Competition Law* cit. 178.

[12] On the relation between antitrust and IP in Europe see S Anderman and H Schmidt, *EU Competition Law and Intellectual Property Rights: The Regulation of Innovation* (Oxford University Press 2011).

A small digression is warranted here to better understand the factual context of the decision. After the first competition 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".[13] The integration of national markets was facilitated by such agreements, which allowed products to travel easily between states. They were particularly useful for sellers of complex products which required aftersales service, such as electronics products.[14] Thus the CJEU in *Société Technique Minière* (*STM*)– handled almost simultaneously to *Consten and Grundig* – held that agreements for exclusive distributorship did not normally infringe art. 101(1) TFEU when the element of absolute territorial protection was absent.[15] In some cases, that is, exclusivity could be considered necessary to penetrate the market. In *Société Technique Minière* the CJEU based its conclusion on the so-called "free-rider problem", which explains the motives of a distributor requiring territorial exclusivity from its supplier.[16] However that case was different from *Consten and Grundig*. The contract did not completely insulate French territory and parallel imports were allowed. Hence the Court was able to distinguish the cases.[17]

Nonetheless, AG Roemer supported a different conclusion.[18] His arguments broadly tracked the structure of the applicants' submissions in *Consten and Grundig*. AG Roemer reasoned that even agreements involving absolute territorial protection allowed German producers to enter the French market and called for an approach based on the concrete economic effects of the agreement and for the annulment of the Commission's decision. *STM* and *Consten and Grundig* should thus not be distinguished. This divergence of opinion is paralleled by the different priorities set by the German and French governments

[13] L Warlouzet, 'The Difficult Quest to Implement Cartel Control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' cit. 266.

[14] *Ibid*.

[15] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* ECLI:EU:C:1966:38. The preliminary ruling in *STM* came two weeks before the one in *Consten and Grundig* cit. All five judges that participated in *STM* were on the panel of *Consten and Grundig* cit. See the analysis in KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) 147. On the different strands of case law based on *Consten Grundig* cit. and *STM*, see P Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (2016) Journal of Competition Law & Economics 749. AG Roemer was also Advocate General in both cases.

[16] *Ibid*. 251.

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

[18] Advocate General at the Court of Justice from 1953 to 1973. For a short bio of the Advocate General see curia.europa.eu. He is probably most famous for his Opinion in the seminal *Van Gen en Loos* case see A Grilli, 'Aux origines du droit de l'Union européenne: le "Ius Commune" national dans les conclusions des Avocats Généraux: Karl Roemer et Maurice Lagrange (1954-1964)' (2008) Tijdschrift voor Rechtsgeschiedenis 155.

during the early years of the European project.[19] The latter was much more welcoming of stronger enforcement against competitive restraints as a way to facilitate a more integrated common market. Germany was ambivalent; it considered similar agreements useful in penetrating new markets after the tariff barriers went down.[20] Roemer was approached by officials from the German Ministry of Economics,[21] who were conservative with respect to the development of European law as a supranational law. He himself shared that scepticism.[22] 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.[23]

Consequently, the impact of *Consten and Grundig* was significant. Any form of absolute territorial protection would be deemed 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 these agreements would not fall under the prohibition of art. 101(1) TFEU.[24] This in turn led to the adoption of Regulation 67/67, the first block exemption regulation, which resulted in the automatic exemption of similar agreements.[25] Most importantly, the judgment confirmed that "when market integration considerations are at stake, the Court tends to follow a sui generis approach…". [26] 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

[19] L Warlouzet, 'The difficult quest to implement cartel control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' cit. *passim*.

[20] Warlouzet posits that the German government was hesitant of overturning the first significant decision by the Commission as this would deal a substantive blow to the European integration process. L Warlouzet, 'The Difficult Quest to Implement Cartel Control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' cit. 278.

[21] Among others Ulrich Everling (future judge at the CJEU), see L Warlouzet, 'The difficult quest to implement cartel control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' cit. 278-279.

[22] *Ibid*.

[23] *Ibid*. 280.

[24] J Goyder, *EU Distribution Law* (Hart 2011) 68. 20,000 exclusive distribution agreements were notified to the Commission before the judgment. Only 6,000 of those included problematic clauses and could potentially harm competition, see SP Ladas, 'Exclusive Distribution Agreements and the Common Market Antitrust Law' (1964) The Antitrust Bulletin 761, 767; E Steindorff and K Hopt, 'European Economic Community-The Grundig-Consten Case, a Landmark Decision of the European Court of Justice on Common Market Antitrust Law' (1966) AmJCompL 811, 814-817.

[25] Regulation (EEC) 67/67 of the Commission of 22 March 1967 on the application of art. 85(3) of the Treaty to certain categories of exclusive dealing agreements (art. 85(3) is now art. 101(3) TFEU). G Monti, *EC Competition Law* cit. 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, SP Ladas, 'Exclusive distribution agreements and the common market antitrust law' cit. 769.

[26] M Fox and D Gerard, *EU Competition Law: Cases, Texts and Context*, cit. 20.

export bans of similar kind can be explained by reference to this crucial fact.[27] The *dossier* helps illuminate how the Court reached this distinctive approach.

III. The *dossier(s)*

The *Consten and Grundig* file is rather extensive, something typical for a competition law case. Such cases require large amounts of documentary evidence, most of all economic data. The file spans 5 *dossiers* and 2500 pages in total. It contains a vast number of submissions, evidentiary and procedural documents, Court orders, etc.[28] One of the remarkable characteristics of the case is that it consists of two separate applications for annulment of the contested decision of the Commission, which the Court decided to join. The result is that many documents seem not to be in the right order, especially in the first 3 *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).

A large portion of the *dossier* is made up of documentary evidence, for example:

a) The contract between Consten and Grundig;

b) Documents relating to the Supplementary Agreement relating to the GINT trademark;[29]

c) 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;[30]

d) The Commissions' decision and evidence submitted in this process;

e) Caselaw of national courts.[31]

As the factual situation was complicated and the issues of law novel, the submissions and arguments of the parties were extremely extensive.[32] According to a rough count undertaken by the judge rapporteur, the arguments raised by both applicants and interveners could be boiled down to 31 distinct complaints on issues of law and fact, substance and procedure. While there was definitely overlap in the arguments used by the two applicants, it was not absolute.[33] Many arguments were only brought by one and not

[27] See generally on the caselaw, D Hildebrand, *The Role of Economic Analysis in EU Competition Law* cit. 281 ff.

[28] *Dossier de Procédure Original Consten Grundig*, HAEU CJUE-0886/87/88/89/90. The archival references correspond to the original Codes C2-14-054 to C2-14-057. For ease of reference the five *Dossiers* will be referred to as *Dossiers* 1 to 5 in the text below, Page numbers refer to individual documents.

[29] E.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJUE-0886 cit., Annexes 2 and 3, *Dossier* 1.

[30] *Ibid*., Annex 1 to Doc 15, *Dossier* 1, 46 -62.

[31] E.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJUE-0887 cit., Doc 7, *Dossier* 2, 35.

[32] *Ibid*., Doc 7, *Dossier* 2, 102, 104.

[33] E.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 1: Grundig's submission, *Dossier* 1; *Ibid*. Doc 21: Consten's reply, *Dossier* 3, 97.

the other applicant, though they do not appear to directly conflict with each other.[34] 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.[35]

Furthermore, a look into the *dossier* illuminates the contributions of the actors involved in litigating this dispute. Jacques Lassier, Robert Collin, and Georges Le Tallec[36] all established their reputation during this case. They eventually became renowned experts in EU competition law and pioneers in the field. There is still an important prize awarded to competition scholars named the Jacques Lassier prize.[37] Their interest in competition matters and their knowledge of both national and international economic law (mainly French and German) shaped the dispute and could have influenced the final decision. It must be noted moreover that Le Tallec went on to draft a commentary on the case, seemingly adopting a position consistent with the one he developed as counsel for the Commission.[38] Without a doubt, their involvement in the case and their subsequent fame shows the enduring importance of *Consten and Grundig*. It is noteworthy that French experts were involved, and that they based their arguments on French law, which was stricter on vertical restraints and allowed the use of trademarks for suppressing export prohibitions.

In terms of their litigation strategy, all parties made extensive reference to economic data (gross margins in France and Germany, price comparisons, overhead costs, etc.).[39] There are vast annexes to the submissions that contain multiple documents relating to the conclusion of the contested contracts,[40] the registration of the trademark,[41] ongoing legal disputes relating to parallel imports, etc.[42] The process is at times reminiscent of a civil or administrative process under national law, with its broad usage of documentation

[34] 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, as Consten's initial submissions are absent from the file.

[35] *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 1: Order of the Court joining the cases, *Dossier* 2.

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

[37] C McFadycan, 'Maitre Jacques Lassier 1920-1979' (1979) International Bar Journal 8; R Franceschelli, R Plaisant and J Lassier, *Droit Europeen de la Concurrence, Articles 86 à du traité C.E.E.* (Delmas 1966).

[38] G Le Tallec, 'Die Wettbewerbsregeln in der Europäischen Wirtschaftsgemeinschaft nach der Rechtsprechung des Gerichtshofs. Die Konsequenzen für Ausschliesslichkeitsvertäge' (1966) Aussenwirtschaftsdienst des Betriebsberaters 437.

[39] See e.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 15, *Dossier* 1, 222; and the tables that can be found there about the revenue of Grundig between 1961 and 1965 and import tariffs paid in France, *ibid*. 271. Just in this reply the economic and factual arguments of Grundig span twenty pages. There is even talk of technical details, such as radio frequencies, *ibid*. 284. Also see *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit., Doc 21, *Dossier* 3, 101 indicating the volume of sales of radios in France.

[40] E.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Annexes in Doc 1, *Dossier* 1, 73 ff.

[41] *Ibid*., Annexes in Doc 7, *Dossier* 1, 199.

[42] *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit., Doc 21, *Dossier* 3, 112-128.

to prove arguments both in fact and in law. This makes sense, given that the case concerns competition law, which 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 trademarks.[43] More specifically the parties make reference to decisions of Dutch and Italian courts on the legality of prohibition of parallel imports, but also to French unfair competition and trademark law.[44] Even more notable is the fact that references to US law abound.[45] For instance, the Sherman Act is used by Grundig and the Commission in order to support their definition of what constitutes an "agreement" as an issue of law.[46] This can be explained by that fact that US law served as the model for the introduction of antitrust in the EU.[47] 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, which were mentioned above, were discussed at length.[48] Lastly, it also 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 to support their claims, even though the body of case law at this point in time could be characterised as meagre at best.[49]

IV. The path not taken

In spite of all this wealth of argumentation and evidence adduced before it, the CJEU 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 a finding of a violation of art. 101(1) TFEU by the contested agreement.[50] The *dossiers* support the opinion that that the Court did not ignore any significant arguments by the parties, but seemed to consciously reject them in favour of this formalist approach. Crucially, it explicitly denied that

[43] *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 7, *Dossier* 1, where the Commission refers to the case law of the German Federal Supreme Court, in answer to a claim from the applicants. Another example is the discussion of the French law doctrine of opposability aux tiers, see *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 15, *Dossier* 1, 20; *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0887 cit. Doc 7, *Dossier* 2, 19.

[44] *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0887 cit., Doc 15, *Dossier* 2, 33 under footnote 40, 35.

[45] *Ibid*. 31 under footnote 37.

[46] *Ibid.* 10.

[47] See D J Gerber*, Law and Competition in Twentieth Century Europe: Protecting Prometheus* cit. *passim*.

[48] See e.g., the Annexes in UNEF's submissions where the cases before the French court are invoked, *Dossier de Procédure Original Consten Grundig*, HAUE CJEU-0887 cit., Annexes to Doc 13, *Dossier* 2, 21.

[49] *Ibid*. Doc 15, *Dossier* 1, 40, referring to the *Bosch* decision of the CJEU. Also, *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit., Doc 18, *Dossier* 3, 7.

[50] KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* cit. 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.

a cost benefit analysis would be appropriate in this case, even though the parties' litigation strategy centred around this.[51] The Court had all the information in front of it to engage in such an analysis of the competitive merits of the agreement but simply was not convinced by the hundreds of pages of economic data submitted by the parties. The CJEU disregarded pages upon pages of submissions by the applicants and interveners concerning the peril of free riding and the positive economic effects of territorial protection in promoting interbrand competition.[52] In fact, in favouring a clearly pro-market integration approach with its judgment, it seemed to strive towards guaranteeing legal certainty, as agreements similar to this one would be almost always be held illegal. Thus, the files -while not upending received wisdom concerning this case- could indicate 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. This explains the fact that the Court's decision is relatively short, especially compared with the extensive submissions of the parties and the opinion of AG Roemer. When it accepted the Commission's findings almost in their entirety in a relatively brief judgment, instead of examining further the actual effects on the agreement on the market, the CJEU 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.[53] However, this tactic also helped the Court to establish itself as the motor of integration and made integrationist teleology "the cornerstone of its interpretive strategy".[54]

To try to imagine an alternative approach, one could follow the parallel development of the case law concerning distribution agreements in the US. In short, this can be described as marked by the "eventual disappearance of the per se rule".[55] The US Supreme

[51] 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.

[52] Some examples are: the applicants' and defendants' detailed discussion -both in the context of art. 101(1) and (3) TFEU- on whether after service and guarantees could only be provided in the presence of absolute territorial protection agreements: *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 1, *Dossier* 1, 58; *Ibid*. Doc 15, *Dossier* 1, 72-73; *Ibid*. Doc 7, *Dossier* 1, 54-55; *Ibid*. Doc 7, *Dossier* 2,105 ff. (i.e. the main filings and replies of the parties). Another example is *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit. Doc 13, *Dossier* 2, 19 where UNEF argued comprehensively that the system of advance orders was not necessary for the better distribution of goods as evidenced by Grundig wholesalers inside of Germany. Cf. however Consten's answer to that argument in *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit., Doc 20, *Dossier* 3, 9-10.

[53] KW Dam, 'Exclusive Distributorships in the United States and the European Economic Community' (1971) The Antitrust Bulletin 111, 117; A Andrie, 'Evidence before the European Court of Justice, with Special Reference to the Grundig/Consten Decision' (1968) CMLRev 35, 48.

[54] DJ Gerber, 'The Transformation of European Community Competition Law' (1994) HarvIntlLJ 96, 108.

[55] S Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Hart 2010) 76.

Court was in general more positively predisposed to vertical distribution agreements. The first case where this uncertainly as to the per se illegality of vertical restrains was mentioned was *White Motor Co v US*, which, interestingly, is also mentioned by the Advocate General and the applicant parties in their submissions.[56] Nevertheless, under the subsequent *United States v Arnold, Schwinn and Co.* a distributor agreement for imposition of absolute territorial restrictions was declared *per se* illegal.[57] This case essentially overturned *White Motor Co* for a brief time and is reminiscent of *Consten and Grundig*. Yet the Supreme Court's hard line against exclusive agreements with territorial protection did not survive the changes in antitrust law under the influence of the Chicago School and was repudiated shortly after. 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.[58] Thus, a less formalistic and more economic approach can be imagined under EU law too in view of the US developments. The Court however did not comment directly on the material on US law in its judgment. It only included a reference to this line on argumentation *in passim* on the section that outlines the submissions of the parties.[59] This section, which used to precede the operative part and the grounds of the decision itself in earlier judgements of the CJEU, is merely copied *verbatim* from the judge rapporteur's report.[60] The fact that the Court abstained from commenting reinforces the point made above concerning the conscious shaping of EU competition law by the Court: the framework of US antitrust was simply not appropriate in view of the integrationist goal of the Court.

In Europe the crucial element that led to the divergence is the market integration objective pursued by the Treaty.[61] However, potentially the Court could have chosen to

[56] Though most scholarship accurately point out that the per se rule works quite differently compared to art. 101 TFEU as a whole, see R Whish and D Bailey, *Competition Law*, cit. 127. This point was also made by the Commission in the present case see *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0887 cit., Doc 7, *Dossier* 2, 85.

[57] US Supreme Court judgment of 12 June 1967 *United States v Arnold, Schwinn & Co*. 1967 [U.S.]. Schwinn was cited by the Commission in support of its arguments, *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0887 cit., Doc 7, *Dossier* 2, 85.

[58] US Supreme Court judgment of 23 June 1977 *Continental T.V., Inc. v GTE Sylvania, Inc*. 1977 [U.S.]. This process culminated in case *Leegin Creative Products* where the Court went as far as to pronounce that interbrand competition was the goal of the Sherman Act. See US Supreme Court judgment of 28 June 2007 *Leegin Creative Leather Products, Inc. v PSKS, Inc*. 2007 [U.S.].

[59] *Consten and Grundig* cit. para. 327.

[60] Can be found in *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0889 cit., Doc 8, *Dossier* 4, 197.

[61] S Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* cit. 4. One reason for viewing vertical integration preferably could have conceivably been the wish of early European policy makers of creating large "European champions". See e.g., H Buch-Hansena and A Wigger, 'Revisiting 50 Years of Market-Making: The Neoliberal Transformation of European Competition

reconcile economic efficiency and market integration relating to vertical agreements in a different manner. The path it could have chosen would have reflected 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 at least look into its economic context in order to ascertain whether it really constitutes a restraint of competition.[62] 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 CJEU's integrationist approach, would have been to allow for more leeway for possible justification of similar agreements in terms of art. 101(3) TFEU, especially in cases where competition between products of different manufacturers is promoted and a practice can encourage market integration in regards to interbrand competition, as the applicants suggested themselves.[63] After all, even 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.[64]

V. Conclusion

In *Consten and Grundig*, the Court reached a remarkable conclusion, the impact of which continues to be felt today.[65] 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.[66] In later cases the market integration objective has been both affirmed and refined.[67] The *dossier* can help explain how this line of case law was formed. The Court followed a *sui generis* approach which does not focus exclusively on the specific economic and legal context of which an individual agreement is part. On the other hand, the Advocate General's arguments (and those of the applicants) also remain influential. The Court could have placed more emphasis on economic considerations and underlined the importance of undertaking a

Policy' (2010) Review of International Political Economy 20, 28. It must be underlined however that this is only a hypothesis and more research is needed in order to support it.

[62] See the classic critique of the European approach in BE Hawk, 'System Failure; Vertical Restraints and EC Competition Law' (1995) CMLRev 973.

[63] See Regulation 67/67 cit. 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 E Steindorff and K Hopt, 'European Economic Community' cit.

[64] However, see P Ibáñez Colomo, 'Article 101 TFEU and Market Integration' cit. 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".

[65] *Ibid*. *passim*.

[66] See the subsequent cases: joined cases 100/80 to 103/80 *Musique Diffusion française v Commission* ECLI:EU:C:1983:158.

[67] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610.

comprehensive assessment of the economic impact of agreements. This stance reflects modern thought on vertical restraints and their impact on consumer welfare, especially in US law. It also seems to be more compatible with the more economic approach adopted by the Commission itself since the nineties.[68] Ultimately, it is not the aim of this *Article* 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 contentious, and how forcefully the applicants defended their right for the case to at least be reviewed under a more economic approach.

[68] G Monti, *EC Competition Law* cit. 364: "The reasoning in *Consten and Grundig* is unlikely to be repeated by the Commission".

Annex

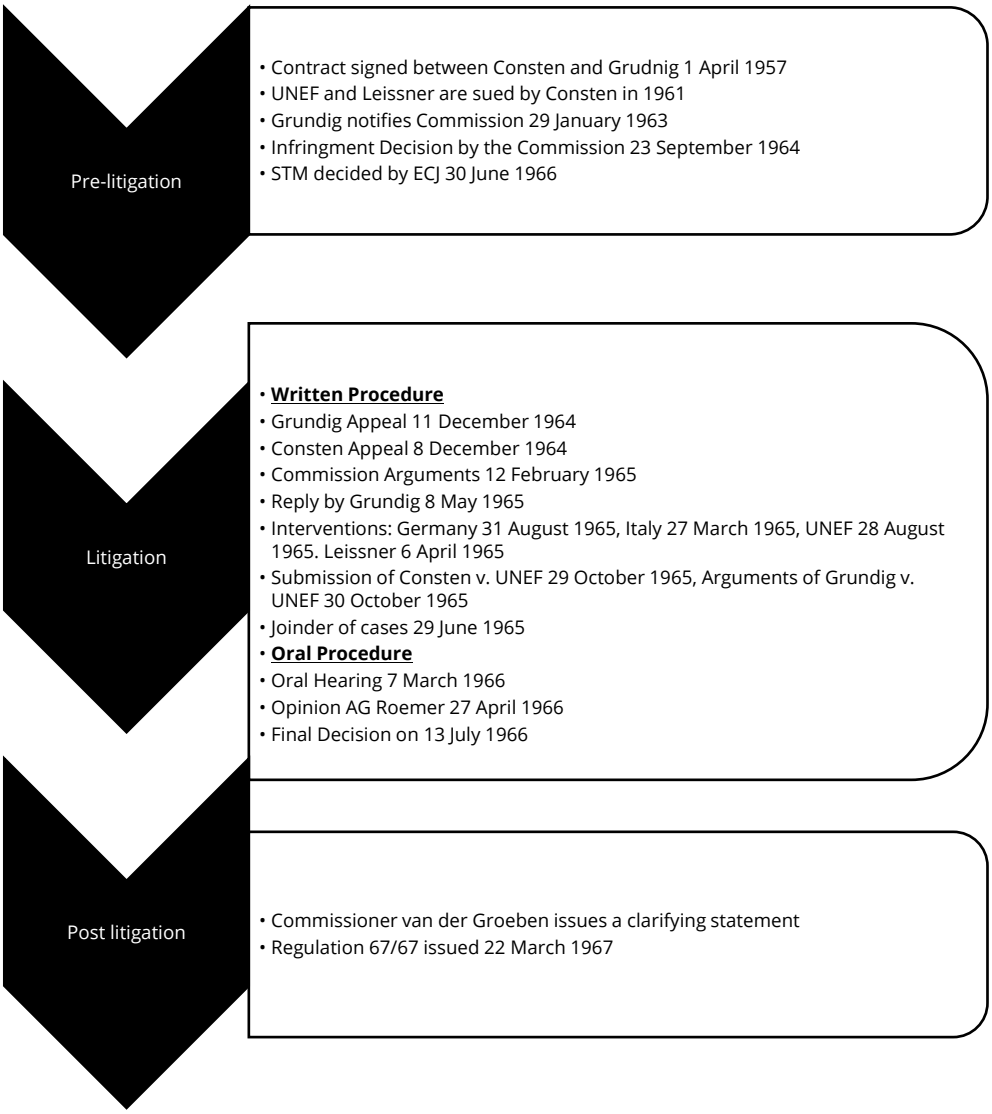

Figure 1. Timeline of the case.

Position of Actors	Application of art. 101(1) TFEU to Vertical Restraints	Effect on Trade	The Object / Effect Distinction	Art. 101(3) TFEU	Severability of Provisions of Treaty	Arguments on Market integration as the objective of art. 101 TFEU
Grundig	Not Applicable	No	Yes	Applicable	Yes	Rejected
Consten	?	?	NM	Applicable	Yes	NM
Commission	Applicable	Yes	Yes	Not Applicable	No	Yes
Leissner	Applicable	Yes	Yes	Not Applicable	NM	Yes
UNEF	Applicable	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

* NM stands for Not Mentioned

FIGURE 2. Actors and main arguments.