EUROsimA 2026

Court of Justice of the European Union

BAI and Commission v. Bayer

Study Guide

Court of Justice of the European Union
Study Guide

European Union Simulation in Ankara (EUROsimA) 2026

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LETTER FROM THE SECRETARY GENERAL

Dear participants,

My name is Ata Yağız Topaloğlu, and I am a third-year student in Political Science and Public Administration at the Middle East Technical University. It is a great honor for me to serve as the Secretary-General of the EUROsimA'26.

As this is the 22nd edition of our conference, it also coincides with my age; thus, carrying the torch of this significant conference has become one of the greatest journeys I have ever had. Participating in Model United Nations and Model European Union conferences has shaped my worldview and guided me in my decision to study this major. Joining the EUROsimA team two years ago was the greatest decision I have made in my university life. I cannot proceed without thanking my partner in this conference, our Director-General Buse Kemahlı, who has been a great colleague and a great friend to me. I cannot thank her enough for this incredible and unforgettable journey. Our academic and organizational teams worked diligently to provideyou with a remarkable experience that will be remembered forever.

As we say in EUROsimA, it will always be a family business to us. This was not just a business to us, as we shared a lot while building up this conference for you. I cannot wait to see you all in the coming days; please do not forget to come prepared. I believe that our hardworking delegates will always put forth their best effort in the one and only European Unionsimulation of our country.

Thank you,

Ata Yağız Topaloğlu

LETTER FROM UNDER-SECRETARY-GENERAL

Esteemed Participants, I would sincerely welcome each of you to the 22nd annual session of the EUROsimA. My name is Rana Elif Taze, and I am a junior at Ankara University Faculty of Law. It is a great pleasure of mine to serve you as the Under-Secretary-General for the Court of Justice of the European Union.

This year, the Court of Justice of the European Union will hear the case of *The Commission v. Bayer*, a vital case concerning the limits of competition law and the preservation of parallel trade within the internal market. The boundary between unilateral commercial policies and the legal requirement of a concurrence of wills, alongside the scope of *parallel trade*. Another essential part of this case is to see the importance of distinguishing between an agreement and purely independent market behavior when facing price disparities across Member States. Even though it is one of the most technically nuanced disputes, it reveals the complex struggle of pharmaceutical entities to manage their commercial interests against the rigorous demands of EU integration and state-fixed pricing systems. I hope that the Study Guide in your hands will provide you with the necessary information for the case.

Iwould like to conclude my letter by thanking our exceptional Academic Team; it was a great honor working with each one of them. I would like to express my gratitude to my exceptional academic assistant and beloved friend, Mr. Mert Halil Bölükbaşı, and our lovely trainee, Ms.Merve Arslan, with whom I have enjoyed preparing this remarkable case, and our Secretary-General, Mr. Ata Yağız Topaloğlu, who has allowed me to be a part of EUROsimA and supported us throughout the whole journey. I would also like to thank our Director-General,

Ms. Buse Kemahlı, along with her committed Organization Team, who have exceeded expectations to bring this conference to fruition.

Please do not hesitate to contact me via ranaeliftaze@gmail.com in case you have any questions regarding the committee.

Sincerely,

Rana Elif Taze

Under-Secretary-General for the Court of Justice of the European Union

LETTER FROM UNDER-SECRETARY-GENERAL

Esteemed Participants,

It is a great honor to welcome you to the 22nd session of EUROsimA. My name is Mert Halil Bölükbaşı, a junior at Ankara University Faculty of Law, serving as your Under-Secretary-General for the Court of Justice of the European Union.

This year, we will examine the landmark case of The Commission v. Bayer. This dispute explores the critical boundaries of competition law, specifically the distinction between unilateral commercial policies and the legal requirement of a concurrence of wills regarding parallel trade. While technically complex, this case highlights the struggle between pharmaceutical commercial interests and the demands of EU integration. I believe the Study Guide will provide the necessary foundation for our deliberations.

As the President of FLAUMUN, I sincerely thank DPUİT and the EUROsimA community for their dedication. I am also deeply grateful to our Academic Team, especially Ms. Rana Elif Taze and Ms. Merve Arslan, for their invaluable insights. My gratitude further extends to our Secretary-General, Mr. Ata Yağız Topaloğlu, and our Director-General, Ms. Buse Kemahlı, along with the entire organization team for bringing this conference to fruition.

Please feel free to contact me with any questions. I look forward to your contributions.

Sincerely,

Mert Halil Bölükbaşı

Under-Secretary-General for the Court of Justice of the European Union

I. COURT OF JUSTICE OF THE EUROPEAN UNION

1. Overview

The Court of Justice of the European Union (unofficially known as the "European Court of Justice") was established in with the Lisbon Treaty. In fact, dating back to the 1950's, there were the Community Courts and the Court of First Instance. However, with the Lisbon Treaty of 2007[1], the Court of Justice of the European Union has been introduced as an *umbrella* unifying the former Community Court (the Court of Justice of today), the Court of First Instance (the General Court of Today), and the Judicial Panels (the Specialized Court of today).[2] The motivation and purpose behind this court is to ensure that the European Union (EU) law is interpreted and applied in the same way in each Member State and every EU country, and to ensure that the States and institutions of the EU abide by the European Union law. To achieve this, the Court of Justice of the European Union (CJEU) interprets EU law to make sure it is applied in the same way in all Member States, and settles legal disputes between national governments and the EU institutions. Also, in certain circumstances, it may be used by individuals, companies, or organisations to take action against an EU institution, if they

believe their rights have been infringed or at stake.[3]

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306.

[2] Gráinne de Búrca, The European Court of Justice (Oxford University Press 2001) 87.

[3] Court of Justice of the European Union', (*European Union* nd), https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en , accessed 30 Jan 2026.

Today, the Court consists of 54 judges, 2 judges from each Member State, and 11 Advocate Generals from 27 Member States of the European Union. As it was counted in the TFEU, there are three main functions of the Court: interpreting the law, enforcing the law, annulling EU legal acts, ensuring the Union takes action sanctioning its institutions; and resolving the disputes within EU Institutions, the disputes between the Member States and the Institutions, and the disputes arising from the Individuals against the EU Institutions.[4] Aside from the dispute resolution, when it is needed, the court also makes law because in some situations the legislative procedure is slow to meet some concerns and legislate[5], for instance, the concerns regarding artificial intelligence for today's world. In such conditions, the rulings of the court have the same power as the other laws within the European Union.

The Court has been divided into two Courts, which are the Court of Justice and the General Court. The Court of Justice resolves appeals on questions of law from the General Court, direct enforcement actions against Member States, and the majority of preliminary rulings from national courts. However, it should be noted that, currently, it has begun to delegate certain specific technical areas to the lower courts. The Court of Justice has the role as the final arbiter and handles cases of *exceptional importance*[6], Grand Chamber rulings requested by Member States, and actions for dismissal of high-ranking officials like the Ombudsman. The General Court is resolving the majority of direct actions, such as disputes regarding competition law, and annulment actions brought by individuals or companies against EU institutions. It serves as the primary entry point for individuals and handles the bulk of the judicial workload to

[4] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art 263.

[5] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art 267.

[6] Gráinne de Búrca, The European Court of Justice (Oxford University Press 2001) 2.

relieve the burden on the Court of Justice. In three special situations, the individuals may address the General Court:

i. when the individual asks for the annulment of an act of which they are the addressee;

ii. when the individual asks for the annulment of an act addressed to a third person or an act of general application, provided that the act at issue is of 'direct and individual concern' to the applicant;

iii. When the individual asks for the annulment of a 'regulatory act', which is of 'direct concern' for the applicant and which does not entail implementing measures.[7]

Just like its various functions, the Court also rules on various outcomes as well. These are the preliminary rulings, infringement proceedings, actions for annulment, and actions for damages, which will be explained in the following chapters. Additionally, it should be noted that the official language of the Court is French, so all the rulings and actions are officially stated in French.

Although it is an independent Institution of the EU, there are some limitations to judicial shift. Before the Lisbon Treaty, the European Union had a three-pillar structure where the jurisdiction of the Court was limited in certain areas. The Lisbon Treaty merged these pillars, granting the Court full jurisdiction over the matters regarding freedom, security, and justice, such as the cooperation of the police and the judiciary.[8] Despite these changes, the jurisdiction over the Common Foreign and Security Policy (CFSP) remained restricted just like it was from previous EU Treaties.[9] However, the Lisbon Treaty modified Article 263 of the Treaty on the

[7] Tamara Ćapeta, 'Judicial Review of EU Law', p 9.

[8] Tamara Ćapeta, 'Judicial Review of EU Law', p 5.

[9] Tamara Ćapeta, 'Judicial Review of EU Law', p 6.

Functioning of the European Union (TFEU), slightly relaxing the requirements for individuals to challenge *regulatory acts* that do not entail implementing measures, responding to long-standing critiques of the *Plaumann* formula.[10]

2. Structure

As previously mentioned, the Court of Justice of the European Union (CJEU) was established in 1952 and serves as the judicial authority of the European Union. Structurally, it is independent of other EU institutions. Its mandate is to ensure the application and interpretation of EU law. The Court consists of two separate courts: the Court of Justice and the General Court. By providing a uniform interpretation of EU law, the Court ensures its consistent application throughout the entire European Union.

The two courts that have been established possess two distinct mandates and are explicitly authorized regarding the types of cases they are entitled to hear. The General Court was established later, in 1988.

Each of the two courts comprising the Court of Justice of the European Union has its own judges. The Court of Justice is composed of 27 Judges, with one judge from each Member State. The General Court, on the other hand, consists of 54 Judges, with two judges from each Member State. Additionally, there are 11 Advocates-General at the Court of Justice. Each court also has its own Registrar. Collectively, all these individuals are known as the "Members."[11]

[10] Tamara Ćapeta, 'Judicial Review of EU Law', p 8.

[11] Court of Justice of the European Union, 'About the Court of Justice of the European Union' (CURIA) https://curia.europa.eu/site/jcms/d2_5088/en/about-the-cjeu accessed 4 April 2026.

Regarding the appointments of the judges and the advocates general, the system is the same, and the process functions as a two-tiered system. First, each candidate would be nominated by national base, each member state would then submit a panel, which was established by the Statute of the Court of Justice, would give an opinion on the suitability of the candidates to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court, before the governments of the Member States make the appointments. The panel shall be set up by seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts, and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. [12]

a. Court of Justice

The Court of Justice is the supreme judicial authority of the European Union and is one of the two courts comprising the Court of Justice of the European Union (CJEU). It consists of 27 Judges (one from each Member State) and 11 Advocates-General for a renewable term of 6 years. While every Member State nominates its own candidate, there are no specific uniform rules governing how these candidates are selected at the national level; this choice is left to the discretion of the Member States, as it is explained in the above paragraphs.

However, the nominee must be independent and possess the qualifications required for appointment to the highest judicial offices in their respective country, or be a jurisconsult of recognized competence in EU law. A specialized committee evaluates whether candidates are suitable for the duties of Judge or Advocate-General. Under the current system, following the

[12] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art 255.

Treaty of Lisbon, this competence is assessed through a mechanism known as the Article 255 Panel.[13]

During the period when the case in question took place, this mechanism had not yet been established. This often resulted in the appointment of individuals with limited legal expertise. Today, however, the Judges and Advocates-General of both the Court of Justice and the General Court are appointed by common accord of the Member State governments only after the Panel provided for in Article 255 of the TFEU has been consulted.

This panel was created by the Treaty of Lisbon, which entered into force on 1 December 2009. Therefore, it did not function as an active mechanism at the time the case was heard. The mandate of the panel is to *give an opinionon candidates'suitabilitytoperform thedutiesof Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments*.[14] As a result, more qualified judges are selected today compared to the past.[15]

In the functioning of the Court, every case is assigned to a specific chamber. The number of judges presiding over a case is directly proportional to its legal importance and complexity. Cases can be heard by chambers consisting of 15 judges (the Grand Chamber), or smaller chambers of 5 or 3 judges. Invery exceptional circumstances, it is also possible for the Court to sit as a Full Court (PlenarySession), involving all 27 judges. [16] Pursuant to Article 16 of the

[13] Court of Justice of the EuropeanUnion, 'The Judges' (CURIA) https://curia.europa.eu/site/jcms/d2_5093/en/ accessed 5 April 2026.

[14] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art 255/1.

[15] Panel provided for by Article 255 of the Treaty on the Functioning of the European Union, 'Home' https://comite255.europa.eu/en/ accessed 5 April 2026.

[16] Court of Justice of the European Union, 'The Judges' (CURIA) https://curia.europa.eu/site/jcms/d2_5093/en/ accessed 5 April 2026.

Statute, the Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is a party to the proceedings so requests. Article 16 of the Statute also specifies the circumstances under which the Full Court shall convene. Pursuant to Article 228 of the TFEU, the Full Court shall sit for the dismissal of the European Ombudsman. Similarly, in accordance with Articles 245 and 247 of the TFEU, the Full Court is required to convene for the compulsory retirement or dismissal of members of the European Commission and the Court of Auditors.[17]

Additionally, Article 17 of the Statute of the Court of Justice of the European Union states that decisions of the Court are valid only when an odd number of its members is sitting in the deliberations. If a Chamber consists of 3 or 5 Judges, at least 3 Judges must be present.[18] For decisions of the Grand Chamber, the presence of 11 Judges is required, and for the Full Court (Plenary Session), a quorum of 17 Judges must be met. In order to ensure that the panel consists of an uneven number of members, a Judge from another chamber may be called upon to sit in the event that a Judge is unable to attend.[19]

Furthermore, as mentioned in Article 9(a), the Judges shall elect from among their number the President and the Vice-President of the Court. They shall be elected for a term of three years and may be re-elected. However, the Presidents of the Chambers of five Judges shall also be elected for a period of three years, but they may be re-elected only once.[20]

The Advocates General, as other members of the Court, are subject to the same appointment criteria and selection principlesas the Judges. Advocates General play a unique role within the

[17] Consolidated version of the Treatyon the Functioning of the European Union [2012] OJ C 326, Articles 228, 245, 247.

[18] Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ C 326/210, art 16.

[19] Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ C 326/210, art 17.

[20] Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ C 326/210, arts 9a, 16.

Court. Unlike Judges, they do not decide the case. Before the Judges reach a verdict, the Advocate General delivers an independent and impartial Opinion to the Court. This Opinion analyzes the case and proposes a legal solution to the issues raised. Advocates General do not participate in every case; they intervene only when a case introduces new points of law or when an independent legal analysis is deemed beneficial. Ultimately, the Judges remain entirely free to decide the case as they see fit.

Furthermore, under Article 9 of the Statute of the Court of Justice of the European Union, the partial replacement of Judges and Advocates-General shall take place every three years. This replacement shall involve half of the total number of members if the total number is odd, the number of members to be replaced shall be alternately the number which is the next above half and the number which is the next below half.[21]

Another essential member of the institution is the Registrar. This official holds a dual mandate: they are responsible for the seamless administration of judicial proceedings and simultaneously serve as the Secretary-General of the institution.

In their capacity as Secretary-General, the Registrar operates under the authority of the President, overseeing various administrative departments. Furthermore, the Registrar is tasked with the preparation and negotiation of the Court's annual budget, ensuring that all funds are allocated and utilized correctly. Beyond internal management, they act as a representative of the Court, engaging and cooperating with other European Union institutions and bodies.

The primary mission of the Court of Justice of the European Union (CJEU) is to ensure that EU law is interpreted and applied consistently across all Member States. The Court's caseload is mainly divided into two categories: references for preliminary rulings and direct actions.

[21] Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ C 326/210, art 9.

Preliminary rulings, which account for over 60% of cases, occur when national courts ask the CJEU to clarify the meaning or validity of an EU law provision so they can apply it correctly. Direct actions, on the other hand, include infringement proceedings against Member States for non-compliance, actions for annulment to cancel unlawful EU acts, and actions for failure to act. While the Court of Justice typically handles cases involving institutions and Member States, the General Court is responsible for cases brought by individuals and companies.

Furthermore, the judicial system provides an appeals mechanism, allowing decisions of the General Court to be challenged before the Court of Justice. However, these appeals are strictly limited to "questions of law" and do not re-evaluate the facts of the case. The judicial procedure itself is governed by the Statute of the Court and consists of a written phase, where parties submit their arguments, and an oral phase, which includes public hearings and the delivery of the Advocate General's Opinion. On average, a case takes between 16 and 18 months from commencement to the final judgment delivered in open court, ensuring a thorough and transparent legal process.

b. General Court

The General Court holds the status of a lower court within the structure of the Court of Justice of the European Union, which consists of 54 Judges, with two appointed from each Member State. While the initial nomination process allows each Member State to follow its own internal procedures, the final selection is subject to strict merit-based criteria. Candidates must demonstrate absolute independence and possess the qualifications necessary to hold high judicial office in their respective countries. The most critical oversight mechanism in this

process is the *255 Committee*[22], named after the article that established it; this specialized body acts as a rigorous filter to ensure that each candidate is suitable for the role. Once cleared by the Committee, judges are officially appointed by the common accord of all Member States. They serve a renewable six-year term, ensuring both the expertise and the continuity of the Court's judicial functions.

Unlike the Court of Justice, the General Court does not have permanent Advocates-General; however, a Judge within the Court may be called upon to perform that role. It should be noted that, under Article 49 of the Statute, a Judge who is designated to act as an Advocate General in a specific case cannot participate in the decision-making process as a Judge. They must be excluded from the judicial deliberations to ensure absolute impartiality.[23]

The General Court operates through a structured system where cases are allocated to specific Chambers based on their complexity and legal importance. Currently, 10 Chambers typically hear cases with either three or five Judges, with the majority being handled by three-judge panels. For more significant matters, the Court may sit as a Grand Chamber of 15 Judges or an intermediate Chamber of 9 Judges. In exceptional and simpler instances, a single Judge-Rapporteur may determine a case. Furthermore, specific types of litigation, such as intellectual property and staff cases, are assigned to specialized Chambers to ensure judicial efficiency.

A unique procedural framework exists for references for preliminary rulings transferred to the General Court. These are heard by five Judges within two specialized Chambers, each consisting of six Judges. In these specific proceedings, one Judge from the parallel specialized

[22] Craig & De Búrca, *EU Law: Text, Cases, and Materials* (8th edn, Oxford University Press 2024).

[23] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202 art 49.

Chamber serves as the Advocate General to provide an independent Opinion; however, the opinion is advisory, which is non-binding. Generally, the Presidents of the Chambers are elected by their peers for a three-year term, ensuring a rotating leadership that maintains the Court's organizational stability.[24]

It should also be noted that prior to the entry into force of the Treaty of Lisbon on December 1, 2009, the General Court was known as the Court of First Instance. Therefore, the *Bayer Case*, the case in question, was heard before what was then called the Court of First Instance.[25]

c. Specialized Courts

The provisionsrelating to the jurisdiction, composition, organisation and procedure of the specialised courts established under Article 257 of the Treaty on the Functioning of the European Union are set out in an Annex to this Statute.

The European Parliament and the Council, acting in accordance with Article 257 of the Treaty on the Functioning of the European Union, may attach temporary Judges to the specialised courts in order to cover the absence of Judges who, while not suffering from disablement deemed to be total, are prevented from participating in the disposal of cases for a lengthy period of time. In that event, the European Parliament and the Council shall lay down the conditions under which the temporary Judges shall be appointed, their rights and duties, the detailed rules

[24] Court of Justice of the European Union, 'About theGeneral Court of the European Union' (CURIA) https://curia.europa.eu/site/jcms/d2_5088/en/about-the-cjeu accessed 5 April 2026.

[25] European Union, 'General Court' (EUR-Lex) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:general_court accessed 5 April 2026.

governing the performance of their duties and the circumstances in which they shall cease to perform those duties.[26]

3. Jurisdiction

Although the Court is independent while deciding, its jurisdiction is limited at some points, These limitations shall be counted in the Statute of the Court of Justice ("the Statute") and the Treaty on the Functioning of the European Union. As it is mentioned under Article 275 of the TFEU, the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, in the scope of Article 263, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.[27]

Any otherexceptiontothejurisdictionis Article 51 of the Statute. This article dictates that the jurisdictionshallbereservedtotheCourt of Justice in the actions referred to in Articles 263 and 265 oftheTreatyontheFunctioning of the European Union they are brought by a Member State againstanactoforfailuretoactby the European Parliament or the Council, or by those institutionsactingjointly,exceptforthree situations: firstly for the decisions adopted by the Council underArticle108(2)oftheTFEU regarding the compatibility of State aid with the internal market,secondactsoftheCouncil adopted pursuant to regulations concerning trade protectionmeasureswithinthemeaning of Article 207 of the TFEU, lastly the acts where the

[26] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art 257.

[27] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art 275.

Council exercises implementing powers in accordance with the second paragraph of Article 291 of the TFEU.Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Union against an act of or failure to act by the European Central Bank.[28]

4. Proceedings Before the Court

The procedure before the Court is structured into two mandatory phases: written and oral stages. A case which was officially brought before the Court by a written application to addressed to the Registrar, which must include the subject matter of the dispute, the form of order sought, and a brief statement of the pleas in law. The written phase involves communication of applications, statements of case, defenses, and observations to the parties and relevant EU institutions. For preliminary rulings under Article 267 of the TFEU, the Registrar notifies the parties, Member States, and the Commission, who have two months to submit their written observations.[29]

Regarding the representation, Member States and the Institutions are represented by an agent which appointed for each case, who may be assisted by an adviser or a lawyer. In addition to the Member States, the States that are parties to the European Economic Area (EEA) Agreement and the EFTA Surveillance Authority are represented in the same manner as well. All other parties must be represented by a lawyer authorized to practice before a court or of a

[28] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202 art 51.

[29] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202 art 20.

Member State or an EEA State. Also, university professors who are nationals of a Member State and possess the right of audience under their national law enjoy the same rights before the Court as authorized lawyers. All these representatives enjoy the rights and immunities necessary to perform their duties independently.[30]

The oral procedure follows the written stage and consists of a public hearing by Court of advisers, lawyers, and agents. Also, in this stage the opinion of the Advocate General is presented, which is an independent legal analysis and proposes a solution to the case. While the opinion is advisory and not binding, it holds a significant influence on judges. However, if the Court determines that a case raises no new point of law, it may decide, after hearing the Advocate-General, to proceed to a ruling without a formal submission from the Advocate- General.[31]

Once the hearings conclude, the judges engage in deliberations that are strictly confidential and conducted behind closed doors. This secrecy of deliberations ensures that while the reasoning of the final outcome is public, the specific discussions and individual positions of the judges remain unknown. Unlike many other high courts, the Court of Justice does not permit dissenting or concurring opinions; all decisions are issued as a single, unanimous judgment. This practice is specifically designed to protect and ensure the independence of the judges. Since the judges are appointed by Member States for six-year terms, the absence of individual opinions prevents national governments from pressuring or retaliating against judges based on

[30] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202 art 19.

[31] *Ibid.*

their specific legal views or votes. Despite their nomination by Member States, judges act as independent legal experts rather than representatives of their home countries.[32]

5. Appeals

The appellate jurisdiction of the Court of Justice is strictly limited to points of law, specifically grounds of lack of competence of the General Court, breaches of procedure adversely affecting the appellant, or infringements of EU Law.[33] Article 56 states that, an appeal against a final decision or a decision disposing of substantive or procedural issues in part must be brought within two months of notification, however, it should be noted that in case of dismissal of intervention, the limit is two weeks instead of two months.[34] This right extends to any party who thinks their rights would be infringed during the process, however, non-institutional interveners, who are the natural persons, may only appeal if the decision directly affects them.[35] On the other hand, Member States and EU institutions may appeal even if they did not intervene at first instance, except in staff disputes. While appeals generally lack suspensory effect, Article 60 dictates that decisions declaring a regulation void only take effect after the appeal period expires or the appeal is dismissed. Procedurally, the Court may dispense with an oral procedure

[32]Directorate General for Internal Policies, 'Dissenting Opinions in the Supreme Courts of Member States' (European Parliament 2012), https://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf, accessed 10 April 2026.

[33] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202 Art. 58.

[34] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202 Art 57.

[35] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202 Art. 56.

after hearing the Advocate-General and the parties.[36] If well-founded, the Court of Justice quashes the decision and may either render final judgment or refer the case back to the General Court, which is then bound by the decision on points of law.[37] Finally, the Article 62 provides anextraordinary mechanism where the First Advocate-General may propose a review if there isaserious risk to the unity or consistency of Union law.[38]

III. KEY CONCEPTS

1. Competition Law

Competition law governs economic rivalry in the marketplace. It does not regulate every form of dishonest or unfair commercial conduct. Rather, it focuses on preserving the competitive process by preventing conduct that weakens price rivalry, reduces output, narrows consumer choice, or discourages innovation. The materials you uploaded also present competition law as a field shaped jointly by law and economics. That is why its basic goals are usually framed in terms of consumer welfare, social welfare, innovation, entrepreneurship, and the protection of firms' economic freedom. In practical terms, competition law exists because competitive markets tend to produce lower prices, better products, greater output, and more choice than markets shaped by coordination or entrenched market power.[39]

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[36] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202.
Art. 59.

[37] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202 Art. 61.

[38] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION Statute [2016] OJ C 202 Art. 62

[39] Turkish Competition Authority, *Rekabet Terimleri Sözlüğü* (6th edn, 2019).

For competition law to apply, several legal elements must first be established. The first is the existence of an undertaking, which is understood broadly as any entity engaged in economic activity, regardless of whether it is a natural person, a company, or a public body. The second is the definition of the relevant market. This is indispensable because one cannot determine market power, restriction of competition, or abuse without first identifying the product market and the geographic market in which the conduct operates. The uploaded handbook on economic analysis shows that market definition is not a merely formal step. It is the analytical basis for measuring substitutability, competitive pressure, and the ability of firms to act independently of rivals and customers. Competition law therefore begins with legal concepts, but it becomes operational only through structured market analysis.[40]

The first main pillar of competition law is the prohibition of restrictive agreements. This category includes agreements, concerted practices, and decisions of associations of undertakings. The prohibition is triggered where such conduct has the object or the effect of preventing, distorting, or restricting competition. The distinction between object and effect is important. Object restrictions are treated as especially serious because their harmful character is considered sufficiently clear from the nature of the conduct itself. Typical examples include price fixing, market sharing, limitation of output, bid rigging, exchange of information on future conduct, and resale price maintenance. By contrast, effect based restrictions require a fuller inquiry into market consequences. The law also recognizes that not every agreement with restrictive features must be condemned. Some arrangements may qualify for exemption where their efficiencies outweigh their harmful impact and where consumer welfare is improved.[41]

[40] Turkish Competition Authority, *Rekabet Kurulu Kararlarında Kullanılan İktisadi Analizlere Yönelik El Kitabı* (2019).

[41] Ebru İnce, 'Tacit Collusion: Economics and Implications for Anti-Competitive Agreements Regime' (2020) 20(2) *Rekabet Dergisi* 4.

The second major pillar is the law on dominant position. Dominance is not unlawful in itself. The legal problem arises only when a dominant undertaking abuses that position. The slides define dominant position as a position of economic strength that allows a firm to behave to an appreciable extent independently of its competitors, customers, and ultimately consumers. In economic terms, this corresponds to market power. Whether a firm is dominant is assessed mainly through market share, barriers to entry and expansion, and countervailing buyer power. Once dominance is established, the analysis turns to abuse. Here the law distinguishes between exploitative abuse and exclusionary abuse. Exploitative abuse concerns direct harm to customers or consumers, usually through excessive prices or unfair terms. Exclusionary abuse concerns conduct that forecloses rivals and weakens the competitive structure of the market. The most common examples include predatory pricing, refusal to deal, exclusivity, rebates, tying, and margin squeeze. The law is careful at this stage because some conduct that appears harmful to rivals may still be legitimate competition on the merits and may even benefit consumers.[42]

The third pillar of competition law is merger control. Unlike the rules on restrictive agreements and abuse of dominance, which typically operate after the conduct has occurred, merger control works ex ante. Its purpose is to prevent structural changes that are likely to produce the same harmful outcomes that firms would not be allowed to achieve through agreement or abusive conduct. The uploaded slides explain that merger control turns on the concept of control and requires a lasting change in control between undertakings. It is therefore not enough that assets or shares change hands in a purely formal sense. What matters is whether decisive influence over an undertaking has shifted. This branch of competition law is also forward looking. Authorities must predict whether the proposed transaction is likely to produce unilateral effects,

[42] ACTECON, *The Output® Quarterly Bulletin, 1st Quarter 2023* (2023).

coordinated effects, or foreclosure effects in the future. For that reason, merger review relies heavily on economic analysis, counterfactual assessment, and the evaluation of market structure before and after the transaction. In short, merger control is the preventive side of competition law, while the other two pillars are primarily corrective and sanction oriented.[43] Another concept that deserves separate emphasis is the notion of undertaking. Competition law does not use the ordinary language of company law or commercial law when determining who is subject to its rules. It asks instead whether an entity is engaged in economic activity. This means that the legal form of the actor is not decisive. A private company, a partnership, a public enterprise, or another organization may all fall within the scope of competition law if they participate in market activity. The same applies to associations of undertakings when their decisions or recommendations are capable of influencing market conduct. This functional approach is important because it prevents firms from escaping scrutiny merely by relying on formal legal categories that are external to competition law itself.[44]

The concept of relevant market also has deeper importance than it may first appear. It is not only a technical tool for drawing boundaries around products and territories. It also determines the frame within which market shares, competitive constraints, and dominance are assessed. A narrow market definition may make a firm appear powerful, while a broader market definition may show that the same firm faces substantial competitive pressure. For this reason, competition authorities rely on economic methods and factual indicators to identify the real field of rivalry. The uploaded materials show that relevant market analysis is especially

[43] Mehmet Helvacı and İrem Taşkın, 'Defining the Concept of Dominant Position in European Union Competition Law and a Comparative Evaluation of the Definition with Turkish Law' (2021) 22(1) *Rekabet Dergisi* 100.

[44] Ahmet Buğra Kazak, 'Antitrust Enforcement Against Anti-Competitive Practices in the EU Pharmaceutical Market' (2022) 23(2) Rekabet Dergisi 78.

important where market power is alleged, because the question whether a firm can act independently of competitors and customers can only be answered within a properly defined market context.[45]

At the same time, competition law is not designed to condemn every practice that has some restrictive aspect. This is where doctrines such as de minimis and exemption become important. The de minimis approach reflects the idea that conduct which does not appreciably restrict competition may fall outside active enforcement priorities. Exemption, by contrast, accepts that some agreements may generate efficiencies that justify their restrictive features. The uploaded slides explain that these efficiencies may arise where an agreement enhances consumer welfare and where its positive effects outweigh its anticompetitive risks. The law therefore preserves room for economically beneficial cooperation while still prohibiting serious restraints. This balance is essential because competition law is not a system of automatic hostility to coordination. It is a structured framework for distinguishing harmful restraint from justified cooperation. [46]

Finally, competition law is defined not only by its substantive rules but also by its enforcement structure. Public authorities investigate restrictive agreements, abuses of dominance, and notifiable concentrations, while courts may also play a role through private enforcement. The materials further show that modern enforcement increasingly relies on economic evidence, consumer welfare analysis, and procedural tools such as on site inspections, leniency, and settlement. In this respect, competition law is both preventive and corrective. It prevents harmful market structures through merger control, corrects unlawful behavior through

[45] David Jackson, *Defining the Relevant Market in EU Concentration Cases – Applied to the Plate Heat Exchanger Industry* (Master thesis, Lund University 2010).

[46] İnce (N 41).

administrative intervention, and deters future infringements through fines and compliance pressure. The broader significance of this system is that it seeks to maintain confidence in the market as an institution. Competition law does not merely punish firms after harm occurs. It also shapes the conditions under which competitive rivalry can continue to function over time.[47]

i. EU Competition Law

European Union competition law is centrally administered and enforced at the Union level, primarily through the European Commission. The Commission investigates and sanctions anti- competitive conduct that affects trade between Member States, thereby ensuring the proper functioning of the internal market. It has extensive powers to conduct inspections, request information, and impose significant fines on undertakings that violate competition rules. In addition to enforcement, the Commission also issues guidelines and decisions that shape how competition law is interpreted and applied across the Union, creating a consistent and predictable legal framework.[48]

A key function carried out by the European Union is the control of agreements and coordinated practices between undertakings. The Commission assesses whether such conduct restricts competition either by its nature or by its effects on the market. Where necessary, it may prohibit the conduct or grant exemptions if the arrangement produces sufficient efficiencies that benefit consumers. The Union has also developed a structured system for reviewing vertical and horizontal agreements, providing legal certainty through block exemptions and detailed

[47] Turkish Competition Authority (n 40)
[48] *İbid.*

guidance. This regulatory activity ensures that cooperation between firms does not undermine the competitive process within the internal market.

2. Agreement

In classical contract law, the formation of a legally binding agreement relies fundamentally on two core elements: an offer and an acceptance. An offer constitutes a communication in which a person agrees to be legally bound on specified terms if accepted by the offeree. For an agreement to be finalized, the offeree must provide a valid acceptance, which is defined as the complete agreement to the terms of the original offer. This dynamic is strictly governed by the mirror image rule, which dictates that an acceptance must be exactly the same as the offer to which it relates. Ultimately, courts determine the existence of this binding agreement by applying an objective test, analyzing the interaction between the parties from the point of view of a reasonable person.[49]

European competition law construes the concept of an agreement significantly more broadly than traditional private contract law. To effectively capture anticompetitive conduct, the formal validity, legal enforceability, and written execution of an arrangement are deemed entirely irrelevant.[50] Consequently, an agreement may be oral, written, or assume the form of an informal understanding lacking legal force, such as a gentlemen's agreement. The Union Courts have consistently established that the decisive criterion rests exclusively on the existence of a mutual understanding between independent undertakings to restrict, coordinate, or otherwise determine their commercial behavior on the market, irrespective of the arrangement's standing under national civil law.

[49] California State University Northridge, 'Understanding the Roles of Offer and Acceptance in Formation of Contract' (CSUN Business Law Resources).

[50] Julian Nowag, *EU Competition Law* (University of Würzburg 2019).

The foundational element of an agreement is a "concurrence of wills" between at least two independent undertakings. Often characterized as a joint intention or a meeting of the minds, this concurrence serves as the critical legal boundary distinguishing coordinated conduct from purely unilateral behavior. To establish an agreement, the parties must express a shared commitment to act on the market in a specific manner. Conversely, if an undertaking independently implements a commercial policy without any prior coordination, invitation, or subsequent acceptance from another entity, there is no concurrence of wills. Such unilateral action inherently falls outside the scope of prohibitions against coordinated restraints and must instead be scrutinized under the rules governing the abuse of a dominant position.[51]

This concurrence of wills does not need to be explicitly documented and can frequently arise tacitly, particularly within the context of continuous commercial relations. In cases involving complex distribution networks, a policy that appears purely unilateral at first glance can legally be transformed into an agreement. For instance, as demonstrated in case law such as *Sandoz*[52] and *Volkswagen*[53], when a manufacturer sends out circulars or implements measures aimed at restricting crossborder sales, the vital question is how the distributors react. If the distributors tacitly acquiesce to the manufacturer's anti competitive policy by continuing their commercial relationship and adapting their conduct to align with those requests, the courts will identify a tacit concurrence of wills. The ongoing business framework provides the context in which an initially unilateral act is integrated into a broader, mutual understanding.[54]

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[51] Authority for Consumers and Markets, *Guidelines Regarding Arrangements Between Competitors* (2019).

[52] Case C-277/87 *Sandoz prodotti farmaceutici SpA v Commission* [1990] ECR I-45

[53] ase C-74/95 *Commission v Volkswagen AG* [1996] ECR I-3913.

[54] Louis Kaplow, 'On the Meaning of Horizontal Agreements in Competition Law' (2011) 99 California Law Review 683.

Furthermore, the threshold for establishing this joint intention focuses strictly on the objective alignment of the parties' market strategies rather than their subjective motives or their specific role on the market. Even if a party feels coerced into the arrangement or merely acts as an administrative facilitator, the concurrence of wills can still be firmly established. A prime example of this expansive interpretation is the *AC Treuhand* judgment[55], where the Court of Justice concluded that a consultancy firm that organized meetings and concealed data for cartel members, without operating on the affected product market itself, was nonetheless a party to the agreement. Ultimately, as long as the parties achieve a mutual consensus to adhere to a specific line of conduct that alters normal competitive dynamics, the exact mechanisms of their cooperation remain secondary to the fundamental reality of their shared intention.

3. Concerted practice

Under European competition law, the concept of a concerted practice captures forms of collusive behavior that have failed to reach the stage of a crystallized agreement. Article 101 of the Treaty on the Functioning of the European Union prohibits both agreements and concerted practices to ensure that undertakings cannot successfully circumvent competition rules through informal coordination. The Court of Justice established the foundational definition of this concept in the *Imperial Chemical Industries* judgment[56]. A concerted practice constitutes a form of coordination between undertakings which knowingly substitutes practical cooperation for the risks of competition, even though no formal agreement has been concluded. This standard ensures that competition authorities can address parallel behavior stemming exclusively from anticompetitive coordination, distinguishing it from intelligent adaptation to

[55] Case C-194/14 P *AC-Treuhand AG v Commission* [2015] ECR I-717.

[56] Case 48/69 Imperial Chemical Industries Ltd v Commission [1972] ECR 619.

existing market conditions.[57] The base of a concerted practice lies in the elimination of strategic uncertainty through direct or indirect contact between competitors. Undertakings are strictly required to determine their market policies independently. When competitors exchange commercially sensitive information regarding prices, output, or future strategic intentions, they artificially alter the normal operation of the market. This shared intelligence allows the participating entities to anticipate the actions of their rivals. Consequently, the undertakings mutually adapt their market conduct based on these coordinated signals. The law views this reduction of uncertainty as inherently restrictive of competition, as it precludes the independent decision making process essential to a functioning free market.

Establishing a concerted practice generally requires three distinct elements: concertation between undertakings, subsequent conduct on the market, and a causal link connecting the two. The European Courts have significantly eased the evidentiary burden for establishing this causal link. According to established jurisprudence, there is a legal presumption that undertakings taking part in concerting arrangements and remaining active on the market take the exchanged information into account when determining their conduct. This presumption shifts the burden of proof to the defending undertakings, requiring them to demonstrate that the illicit contact had absolutely no influence on their subsequent commercial behavior. The evolution of this doctrine is deeply rooted in landmark jurisprudence from the Court of Justice. The *Imperial Chemical Industries* case, commonly known as the *Dyestuffs* decision[58], provided the initial framework for evaluating informal collusion.The *Suiker Unie* judgment[59] refined the

[57] Cristina Cucu, '"Agreements", "Decisions" and "Concerted Practices": Key Concepts in the Analysis of Anticompetitive Agreements' (2013) XX(1) *LESIJ* 24.

[58] *İbid.*

[59] Joined Cases 40/73 to 48/73 etc Cooperatieve Vereniging Suiker Unie UA and others v Commission [1975] ECR 1663.

legal standard, emphasizing the strict requirement for independent market conduct and explicitly condemning any direct or indirect contact that influences the market behavior of an actual or potential competitor. Furthermore, the *T Mobile Netherlands* judgment[60] solidified the strict approach toward information exchange, confirming that a single isolated meeting between competitors can constitute a concerted practice if the participating undertakings remain active on the market and utilize the shared intelligence. These judgments collectively illustrate the robust judicial approach to capturing anticompetitive coordination.

4. Parallel Trading

Parallel trade refers to the resale of genuine goods across borders outside the manufacturer's authorised distribution network. It usually arises where the same product is sold at different prices in different national markets, allowing traders to purchase in a low price State and resell in a high price State. In legal terms, the concept sits at the intersection of free movement of goods, intellectual property, and competition law. Within the European Union, the issue is shaped by the internal market objective: national market partitioning is generally viewed with suspicion because it frustrates crossborder trade and weakens price competition between Member States.[61]

A central legal idea behind parallel trade is the exhaustion of intellectual property rights. Once a protected product has been lawfully placed on the market by, or with the consent of, the right holder, the right holder's power to control further distribution of that specific item is exhausted.

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[60] Case C 8/08 T Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I 4529

[61] Margaret K Kyle, 'Parallel Trade in Pharmaceuticals: Firm Responses and Competition Policy' in Barry E Hawk (ed), *International Antitrust Law & Policy: Fordham Competition Law 2009* (Juris Publishing 2010) 339.

The legal consequences depend on the exhaustion regime adopted. Under national exhaustion, resale from abroad may be blocked; under international exhaustion, resale from any country is generally allowed; and under the EU's regional or Community exhaustion, goods first marketed within the Union may circulate freely within it. This is why parallel trade in the EU is not treated as counterfeiting: the products are genuine, but they move outside the manufacturer's preferred distribution structure.[62]

The competition law foundation of the EU approach was established by Consten and Grundig v Commission, where the Court treated contractual measures designed to prevent crossborder resale as contrary to the internal market logic. The case made clear that agreements partitioning national markets and preventing parallel imports can amount to restrictions of competition by object, because they eliminate intrabrand competition and shield distributors from crossborder pressure. That approach was reinforced by the broader internal market reasoning seen in Dassonville, which defined national measures hindering intra Community trade very widely. Together, these authorities explain why EU law has historically been hostile to territorial restraints that obstruct parallel trade.[63]

Parallel trade also generated major litigation in the pharmaceutical sector, where price regulation creates particularly strong incentives for arbitrage. In *GlaxoSmithKline Services Unlimited v Commission*[64], the dispute concerned a dual pricing system under which products intended for export were sold at higher prices than products remaining on the domestic Spanish market. A related but distinct issue arose under abuse of dominance doctrine in *Sot Lélos kai*

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[62] Nicolas Petit, 'The Economics of Parallel Trade – Iconoclast Views on a Dogma of EU Competition Law' (Working Paper, 19 August 2010) SSRN abstract 1661884.

[63] Dmitry A Kuptsov, *Parallel Trade in the European Union: Competition Law Aspects* (Master thesis, Lund University 2013).

[64] Case C-501/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291.

Sia v GlaxoSmithKline[65]. The Court dealt with a dominant pharmaceutical undertaking that restricted supplies to wholesalers in order to curb parallel exports from Greece. The Court rejected any blanket rule that the special characteristics of pharmaceuticals automatically justify conduct aimed at eliminating parallel trade. At the same time, it accepted that a dominant undertaking is not required to satisfy orders of an extraordinary scale detached from ordinary domestic demand.

Finally, intellectual property case law shows that parallel traders may resell genuine goods within the EU even when repackaging is necessary. In cases such as *Hoffmann-La Roche v Centrafarm*[66]*, Pfizer v Eurim-Pharm*[67]*,* and *Bristol-Myers Squibb v Paranova*[68] The Court limited the ability of trademark owners to rely on their marks to obstruct repackaged pharmaceutical imports where repackaging was necessary for access to the importing market and did not damage the reputation of the mark.

5. Tacit Acquiescence

Tacit acquiescence is a competition law concept used to determine when conduct that appears unilateral in form is nevertheless capable of constituting an agreement under Article 101 TFEU. EU law requires a concurrence of wills: there must be some form of acceptance by the addressee of the proposed restriction. For that reason, unilateral conduct by a manufacturer does not automatically become an agreement merely because it is communicated to distributors or dealers. Tacit acquiescence exists only where the conduct of the addressee reveals support

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[65] Joined Cases C-468/06 to C-478/06 *SotLéloskaiSiaEEvGlaxoSmithKline AEVE Farmakeftikon Proionton* [2008] ECR I-7139.

[66] Case 102/77 *Hoffmann-La Roche v Centrafarm* [1978] ECR 1139.

[67] Case 1/81 *Pfizer Inc v Eurim-Pharm GmbH* [1981] ECR 2913.

[68] Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-MyersSquibb v Paranova A/S* [1996] ECR I-3457.

for, or compliance with, the unilateral policy in a way that demonstrates joint action rather than independent market behaviour.[69]

The concept became especially important in cases involving vertical restraints and parallel trade. Earlier enforcement practice had sometimes stretched Article 101 TFEU to cover conduct that was essentially unilateral, particularly where manufacturers attempted to restrict exports or resale. Later case law imposed a stricter test: for an agreement to exist, the manifestation of one party's wish to achieve an anticompetitive aim must amount to an invitation to the other party to pursue that aim jointly, whether expressly or impliedly. This doctrinal shift was designed to preserve the line between genuine agreements and purely unilateral conduct, which may instead fall outside Article 101 and, in some cases, be assessed under Article 102 TFEU.[70]

The same logic was in Volkswagen II case[71]. The Commission argued that dealers had effectively accepted Volkswagen's later restrictive pricing initiatives simply because they had signed dealership agreements in advance. The Court rejected that reasoning. It held that the Commission could not treat a manufacturer's unilateral conduct as an anticompetitive agreement without proving express or implied acquiescence by the dealers. Nor could the original signature of the dealership agreement be treated as blanket acceptance of future unlawful restraints. Actual market conduct had to be examined. This made clear that tacit

[69] Sinan Diniz, Simru Tayfun and Beyza Nur Arlı, 'From Tacit Collusion to Algorithmic Coordination: A Comparative View of EU and Turkish Competition Law' (2025) 21(2) *Competition Law International* 201.

[70] Nicolas Petit, *Agreements, Concerted Practices and Decisions of Associations of Undertakings* (IEB lecture, Madrid, 15 January 2010).

[71] Case T-208/01 *Volkswagen AG v Commission* [2003] ECR II-5141.

acquiescence cannot be presumed abstractly; it must be inferred from concrete behaviour showing real support for the restriction.

Tacit acquiescence must also be distinguished from concerted practice. In an agreement case, the focus is on whether one party's proposal has been accepted by another. In a concerted practice case, the focus shifts to contacts, information exchange, consensus, and subsequent conduct on the market. Yet the two concepts are closely related because both concern coordination that substitutes cooperation for the risks of competition.

IV. CASE BEFORE THE COURT: BAI AND THE COMMISSION V BAYER

1. Overview

A. BAYER AG and ADALAT

Bayer AG (hereinafter 'Bayer' or 'the Bayer Group') is a highly diversified international chemicals group, and it is the parent company of one of the main European chemical and pharmaceutical groups. It has a presence through its national subsidiaries in all the Member States of the European Community. [72] At the time the case was heard, BAYER was operating in 180 countries in six sectors: polymers, organic chemicals, industrial products, health, agriculture, and information technology. The turnover of the Group amounted to *Deutsche Mark* (DM) 41 195 million in 1992, which equals to 22 029 million European Currency Units (ECU) (EURO currency at the time). Its turnover in the health sector amounted to DM 7 198 million (some ECU 3 849 million) in 1992.

[72] Case T-41/96, *Bayer AG v. Commission of the European* Communities [2000], ECR 2000 II-03383, Para 22.

Adalat, or Adalate in France, is a product of BAYER that has been manufactured by Bayer AG since 1975. ADALAT is a category of medicinal products known as calcium antagonists. This brand of a range of medicinal preparations consists of nifedipine[73] as the active ingredient, which was designed to treat cardiovascular disease, which is subdivided into three categories: coronary heart disease, arterial hypertension, and congestive heart failure. However, ADALAT mostly had great potential in markets in order to treat Hypertension and Coronary Heart Disease (CHD).[74] The medication has several different forms available to use, such as capsules, tablets, modified-release tablets, and one-per-day tablets in different dosages. As well as these forms, it also has the form as an injectable solution for hospital use purposes only.[75]

Concerning the impact of the product worldwide, ADALAT ranked ninth in the world's top 40 pharmaceutical products in 1992. In 1991 to 1992, the Bayer group was eighth in the pharmaceuticals sector at the world level with sales of US$ 4 309,1 million (3 264 European Currency Units). According to the Annual Report of Bayer of 1990, ADALAT medications are *the very effective calcium antagonists are among the most important therapeutic principles for the treatment of coronary heart disease and hypertension.*The product ADALATE (nifedipine) was available in more than one hundred countries in the year 1990. Under the same report, ADALAT was identified as the major product of

[73] Nifedipine: *A chemical compound works as calcium channel blocker that treats high blood pressure and chest pain (angina).*

[74] Commission Decision 96/478/EC relating to a proceeding under Article 85 of the EC Treaty [1996], OJ L 201, recital 8.

[75] Commission Decision 96/478/EC relating to a proceeding under Article 85 of the EC Treaty [1996], OJ L 201recital 2.

BAYER. It was referred as the BAYER product as a calcium inhibitor, which was guaranteed effective and could be used in cases of associated pathologies.[76]

In different markets, Adalat products are marketed under various names. Despite a wide range of types and brands of medications, this case in question concerns only two products: the *10 mg capsule* which was marketed in the United Kingdom and Spain under the name ADALAT and in France under the name ADALATE, and the *20 mg modified-release* tablet which was marketed in the United Kingdom and Spain under the name ADALAT-Retard and in France under the name ADALATE 20 mg LP. [77] Regarding the license and selling of the medication, in France, ADALATE 10 mg was licensed in May 1979, and ADALATE 20 mg LP in 1985. The two products were manufactured, packaged, and marketed by Bayer Pharma SA (hereinafter Bayer France). On the other hand, in Spain, ADALAT and ADALAT-Retard were licensed in January 1986, and the two products were manufactured, packaged, and marketed by Química Farmacéutica Bayer SA (Bayer Spain). Finally, in the United Kingdom, BAYER AG applied for a patent in the early 1980s for the ADALAT-Retard 20mg Tablets, and this patent was definitively awarded at the beginning of 1995.[78]

[76] Commission Decision 96/478/EC relating to a proceeding under Article 85 of the EC Treaty [1996], OJ L 201, recital 14.

[77] Commission Decision 96/478/EC relating to a proceeding under Article 85 of the EC Treaty [1996], OJ L 201 recital 4.

[78] Commission Decision 96/478/EC relating to a proceeding under Article 85 of the EC Treaty [1996], OJ L 201recitals 5-7.

B. Distribution of Medication

Pharmaceutical distribution in Europe uses three distinct channels: hospitals, pharmacies and drugstores, and wholesalers. Hospitals generally obtain their supplies directly from the laboratories or through purchasing consortia. Obtaining supplies from wholesalers was only in exceptional cases. regarding the demands for the product, hospitals accounted for 11 % of demand in France, 12 % in Spain, and 5 % in the United Kingdom during that time. Following this, pharmacies and drugstores obtained only a few of their supplies directly from laboratories. Direct sales of pharmaceutical specialities to pharmacies represented 7 % of distribution in France, 3 % in Spain, and 19 % in the United Kingdom. Pharmaceutical wholesalers were thus the main intermediaries between laboratories and retailers in the European Community. European wholesalers thus distributed 90 % of medicinal products. At the time of this case concerning, there were about 500 wholesalers in Europe.

In France, the specific legislation on the distribution of medications laid down the following rules by several different legislations[79], such as but not limited to:

i. There must be a pharmacist authorized to make decisions (Article L.596),
ii. A pharmaceutical establishment that was capable of wholesale distribution of medicinal products may not be opened until administrative authorization has been obtained (Article L.598),
iii. Distributing wholesalers must keep a sufficient stock of medicinal products to be able to supply the relevantpharmacies (third paragraph of Article R.5115—6),
iv. French legislation doesnot prohibit exports

[79] legislative articles L.596, L.596—1 , L.598, L.599, and L.600 of the Code de la santé publique (9), — the regulatory articles relating to establishments preparing and dealing wholesale in pharmaceutical products, Articles R.5105 to R.5516 of the 'Code de la santé publique', — the Order of 3 October 1962 (10) laying down the requirements incumbent on distributing wholesalers as regards the supply of medicinal products to pharmacies.

v. No implicit impediment to exports may be inferred from the legislation. It is therefore clear that, under the terms of the legislation, exports are authorized.

vi. French law grants distributing wholesalers a monopoly for the distribution of medicinal products to pharmacies. In return for this monopoly, it imposes a number of public-service requirements.

vii. The territory of the Community is treated by the law on a par with the French national territory, and distributing wholesalers are free to export to other countries of the Community once their public-service obligations have been fulfilled.

viii. Producers are not subject to any statutory requirement as regards supplies to wholesalers or the supplying of the national market.[80]

Moreover, in Spain, Spanish legislation applicable to pharmaceutical wholesalers is based on the Ministerial Decision of 7 April 1964 as supplemented by the Ministerial Decision of 5 May 1965. In 1990, a Law on medicinal products was also adopted, spelling out the earlier provisions without amending them. This legislation also dictated rules that were similar to those provided for under French legislation:

i. There must be a pharmacist authorized to make decisions. A pharmaceutical establishment may not be opened until administrative authorization has been obtained

ii. Wholesalers must, at all times, keep sufficient stocks for the region (which refers to the autonomous communities of today)

iii. Spanish law does not provide for any obligation to supply pharmacies (which indicates that the wholesalers do not have to provide pharmacies in Spain directly)

iv. The wholesalers have the right to export.

[80]Commission Decision 96/478/EC relating to a proceeding under Article 85 of the EC Treaty [1996], OJ L 201 recital 44-46.

v. Producers are not subject to any statutory requirement regarding supplies to wholesalers or the supplying of the national market.

2. Facts of the Case

1. In most Member States, the price of Adalat is directly or indirectly fixed by the national health authorities. Between 1989 and 1993, the prices fixed by the Spanish and French health services were, on average, 40% lower than prices in the United Kingdom. Because of those price differences, wholesalers in Spain exported Adalat to the United Kingdom from 1989 onwards. French wholesalers did the same thing starting from 1991.

2. Starting from 1988, parallel exports[81] became the main problem for BAYER, especially in the UK. Reports from the official authorities showed that between 1988 and 1990, the main cause of the overall decline in sales for the period was the significant increase in the level of parallel imports of the ADALAT product range, in particular the 20 mg presentation of ADALAT RETARD. Parallel imports of ADALAT RETARD 20 mg accounted for some 25 % of that product's sales in the UK. At the end of 1989, Bayer UK stated that although the official sources put the true size of Parallel Imports between £ 70 to £ 300m it was probably more than that. Additionally, in 1991, it was stated that although in the market the sales of ADALAT were increasing in general, BAYER UK was losing sales of ADALAT against parallel imports.

[81] Parallel export/import: The practice of buying genuine branded goods in a EU Member State with lower prices and exporting the goods to another Member State, where prices are higher, without the authorization of the original manufacturer or brand owner.

3. As a result, in 1988, BAYER UK organized a “brainstorm meeting” in order to combat the potential increase in the demand for ADALAT, which was parallel imported. Several potential measures were decided.

4. According to BAYER, sales of ADALAT by its British subsidiary, Bayer UK, fell by almost half between 1989 and 1993 on account of the parallel imports, entailing a loss in turnover of DEM[82] 230 million for the British subsidiary, representing a loss of revenue to Bayer of DEM 100 million.

5. Following these events, on 4 April 1989, BAYER Spain formally decided to restrict its sales to several wholesaler groups as they considered them to be the exporters. Some of the main wholesaler groups were SAFA, HEFAME, Cofares, OCP, and CERP groups. To enforce the restriction, Bayer Spain implemented a computerized *distribution control system* to track orders and automatically stop shipments that exceeded an assigned local limit.

6. As a response, at the end of 1989, the exports of the medication were significantly decreasing. The Hufasa Group met with Bayer Spain management and argued that they needed more pills for the domestic market. Bayer Spain rejected this, explicitly stating Hufasa's requests represented 50% of the entire domestic market and suspecting the product was actually intended for export, because, according to the reports, starting from early 1989, wholesalers had been ordering 50% to 100% more than normal. By its *ethical obligation*, Bayer Spain stated that they would stick to its exact quotas to ensure local pharmacies had stock as their official excuse.

[82] Deutsche Mark.

7. In February 1990, Hefame Group complained to the headquarters in Germany and demanded a written explanation stating that the constantly low stocks and undersupply in Spain.

8. Contrary to what was happening in Spain, in France, the demand and stocks were still freely supplying export orders. In October 1990, Bayer France sent a memo to headquarters in Leverkusen acknowledging this rapid rise in exports. According to the memorial, imports originating from France rose rapidly starting in the fourth quarter of 1989.

9. Despite the situation, French wholesalers continued to order massive quantities explicitly for export, and Bayer France continued to deliver them without any issue. For example, between June and September 1991, Bayer France supplied the wholesaler CERP Lorraine with an average of 67,000 to 75,000 packs per month without claiming any shortages in stocks.

10. Since Bayer France was still allowing massive exports, the parallel trade issue could not be solved. Because, despite the efforts of Spain, the deliveries could still be provided by wholesalers in France. This failure to combat parallel trade resulted in a Bayer Group meeting in Travemünde, Germany, called *Hauptländertreffen* (Top Country Meeting) in September 1991. At that meeting, the Bayer Group commanded Bayer France to immediately adopt the same strict quota and tracking systems that Bayer Spain had been using since 1989, leading to the sudden blockage of 137,000 packs to French wholesalers the very next month.

11. The tracking system was functioning continuously, tracking the parallel export data, shared statistics, and reported suspicious wholesale activity back to the central headquarters in Leverkusen, Germany. Starting in late 1991, Bayer France began systematically tracking the orders of its major wholesalers, such as CERP Rouen, CERP

Lorraine, and OCP. If an order of a wholesaler drastically exceeded the typical domestic needs, Bayer France blocked the shipment.

12. In January 1992, to face the situation and restrictions, wholesalers in France secretly spread their large export orders across dozens of small, local regional agencies, hoping Bayer would think the drugs were just for local pharmacies. However, this move was noticed by BAYER France, and faced with that situation, the Bayer Group changed its delivery policy and began to cease fulfilling all of the increasingly large orders placed by wholesalers in Spain and France with its Spanish and French subsidiaries.

13. However, on 17 February 1992, CERP Rouen complained in writing that an order placed on February 10 had not arrived, this was because BAYER France had noticed the move they had made. In April 1992, during a management Committee Meeting, the Director of BAYER France stated that they were managing to reduce the impact of re-exports on our business, despite strong pressure from them.

14. In the aftermath of all these events, the French and Spanish wholesalers, who were losing millions in export revenue and facing various challenges, heavily complained to Bayer about what they recognized as an illegal export ban. These supply blocks and complaints also caught the attention of the European Commission.

15. On September 26, 1994. The European Commission acted as the enforcer of the EC Treaty, which guarantees the free movement of goods, and officially initiated proceedings against BAYER.

16. On January 10, 1996, the European Commission adopted Decision 96/478/EC, relating to a proceeding under Article 85 of the EC Treaty. The Commission ruled that Bayer AG had violated Article 85(1) (now Article 81(1) EC Treaty) of the EC Treaty by imposing an illegal export ban through its continuous commercial relations with its

wholesalers. As a penalty,theCommissionfinedBAYERAG3,000,000ECUsand ordered it to immediatelyceasetheexportbans.

17. On 22 March 1996, byapplicationlodgedattheRegistryoftheCourtofFirstInstance, Bayer brought an actionfortheannulmentoftheDecision.

18. On 1 August 1996, aGermanassociationofimportersofmedicinalproducts,the Bundesverband der Arzneimittel-ImporteureeV('theBAI'),appliedforleaveto intervene in support oftheformofordersoughtbytheCommission.

19. On 26 August1996,theEuropeanFederationofPharmaceuticalIndustries' Associations('theEFPIA'),aprofessionalassociationrepresentingtheinterestsof16 national professionalassociationsinrelationtothemedicinalproductsindustry,applied for leave to interveneinsupportoftheformofordersoughtbytheapplicant.Byorder of 8 November1996,theCourtofFirstInstancegrantedtheseinterventions.

20. Until 28 October1999,thepartiespresentedoralargumentandrepliedtothewritten and oral questionsoftheCourtofFirstInstanceatthehearingonthisdate.

21. On 26 October2000,theJudgment [83] oftheCourtofFirstinstancewasdelivered.Inits judgment, theCourtofFirstInstancedecidedthatBayer'ssupplyrestrictionswere purely unilateralactsanddidnotconstituteanillegal *agreement* underArticle85(1)of the EC Treaty,astheCommissionfailedtoproveany *concurrence of wills* or*tacit acquiescence* by the wholesalers.

22. On 5 January2001,twoapplicantswerelodgedattheCourtofJustice,bythe BundesverbandderArzneimittel-ImporteureeV(hereinafterBAI)andtheCommission of the EuropeanCommunities(hereinafterCommission)lodginganappealunder Article 49 oftheECStatuteoftheCourtofJusticeagainstthejudgment. [84] European

[83] Case T-41/96, *BayerAGv.Commission ofthe European* Communities [2000], ECR 2000 II-03383.

[84] Joined cases C-2/01 P and C-3/01 P, *BAI and the CommissionvBayerAG* [2004], *ECR* 2004 I-00023, para 1.

Association of Euro Pharmaceutical Companies (EAEPC) intervened as the supporter of the applicants, BAI and the Commission.

3. Claims of Parties

A. Claims of BAI and the Commission

i. The Commission contends that the infringement of Article 85(1) of the Treaty is constituted by the agreement between the applicant and Spanish and French wholesalers concerning the ban on exporting the product Adalat to other Member States. Bayer France and Bayer Spain planned and imposed an export ban, and to establish it, the Bayer Group set up a system for monitoring parallel imports consisting of identifying exporting wholesalers, drastically reducing deliveries, monitoring the final destination of the quantities delivered, and penalising wholesalers who exported deliveries by reducing deliveries in the future. The wholesalers knew about the system Bayer put into operation. They consented to this export ban because they knew if they didn't, Bayer would only give them enough supply for their national market.

ii. Bayer France and Bayer Spain have committed an infringement of Article 85(1) of the Treaty and that the conditions for applying that article were met because those subsidiaries imposed an export ban as part of their continuous commercial relations with their customers. This presents an established fact that the wholesalers adopted an implicit acquiescence in the export ban.

iii. Where, therefore, the Commission refers in the Decision to the 'export ban', it views it as a unilateral demand which has formed the subject-matter of an agreement between the applicant and the wholesalers. If the Commission concluded that an

agreement existed contrary to Article 85(1) of the Treaty, it did so because it considered it established that the applicant sought and obtained an agreement with its wholesalers in Spain and France, the purpose of which was to prevent or limit parallel imports.

iv. As regards the export ban, for the BAI the situation is indisputable. Since BAYER constantly monitored the distribution of its products and always adapted itself to market developments. In support of that contention, it maintains that the table of orders for 'Adalate 20 LP' contained in the Decision[85] clearly proves that any wholesaler who carried out exports had to expect a subsequent reduction in the volumes delivered, and that Bayer reacted each time to the volume of the wholesalers' orders and penalised exporting wholesalers by making very large reductions in deliveries.

v. The Commission states that, according to that table, whereas CERP Lorraine placed average monthly orders of between 50 000 and 70 000 packets of Adalat between June 1991 and February 1992, and had received 69 000 packets from Bayer France in July 1991, it received only 35 000 in September 1991, then 15 000 per month during the following three months, and only 7 500 in February 1992. The Commission maintains that those reductions in supplies proves that Bayer did not always apply the same criterion, namely the reference quantities fixed by reference to orders in the previous year.

[85] Commission Decision 96/478/EC relating to a proceeding under Article 85 of the EC Treaty [1996], OJ L 201 recital 87.

vi. The wholesalers, therefore, considered that the restrictions imposed were linked to exports and that, in view of the possible retaliatory measures, they had every interest in formally complying with the export ban, which they did. The wholesalers agreed with the applicant not to export Adalat so as to obtain sufficient supplies in return.

vii. Bayer argued that their reductions in deliveries were not applied uniformly to all wholesalers using a single reference level, such as the previous year's quantity increased by 10%. To prove this, they pointed out that the cuts varied: for certain wholesalers, orders were reduced to the exact level of the previous year without any 10% increase, while in other cases, the reductions were so severe that they even harmed the wholesalers' capacity to supply their traditional domestic markets. However, despite these arguments, it was clear that Bayer was acting in a generalized manner to restrict supplies. They were deliberately providing only the amounts needed for the domestic market, effectively choking off any extra stock that could be used for parallel exports.

viii. BAI argues, that there was hard, physical evidence of this tracking system, such as Bayer tracing the specific serial batch numbers of medicine found in the UK back to the wholesalers in Spain.

ix. Moreover, the BAI states, on the one hand, that, in the medicinal-products market, pharmacies are unable both economically and logistically to keep a full assortment of current medicines in stock in sufficient quantities, and, on the other hand, that, by reason of their position and function on that market, wholesalers are obliged to have such an assortment in stock, so as to be able to deliver rapidly to a pharmacy all the

medicinal products ordered by it, lest it turn to a wholesaler having the necessary stocks. In those circumstances, and considering the structure of the pharmaceutical market and of the system for monitoring distribution established by BAYER, the BAI contends that wholesalers had no option but to yield to that control, significantly reduce orders and hence significantly reduce exports, without the manufacturer needing to threaten them expressly.

x. The wholesalers, therefore, considered that the restrictions imposed were linked to exports and that, in view of the possible retaliatory measures, they had every interest in formally complying with the export ban, which they did. The wholesalers agreed with the applicant not to export Adalat so as to obtain sufficient supplies in return.

xi. In order to put that export ban into place, the BAYER counted on the acquiescence of the wholesalers. The concurrence of wills is not contradicted by the fact that the two parties did not have the same interest in agreeing. An agreement within the meaning of Article 85(1) of the Treaty requires only that the two parties have an interest in its being concluded, without there being any need for that interest to be identical. Since the wholesalers had an interest in avoiding restrictions on deliveries and the applicant had an interest in preventing, or at least limiting, parallel exports, a concurrence of wills to prevent, or at least limit, parallel exports existed.

xii. The fact that the wholesalers did not completely renounce exports cannot call into doubt the existence in this case of an agreement or an acquiescence on their part in relation to the export ban. Whilst it recognises that the Spanish and French wholesalers would have preferred to continue their export operations to the United Kingdom, it

claims that they had reduced the quantities ordered to a level such that Bayer must have had the impression that they were responding to its declared wish to see them limit themselves to the needs of their traditional markets only.

xiii. In sum, the Commission contends that Bayer's actions were not a unilateral business decision, but rather formed an anti-competitive agreement under Article 85(1) Because Bayer and the wholesalers had continuous, long-standing commercial relations, Bayer's supply quotas constituted an 'export ban' that the wholesalers implicitly accepted and coordinated with in order to survive.

xiv. The Commission then affirms that it sets out from the principle that, in the long term, parallel imports will bring about the harmonisation of the price of medicinal products and it does not consider it acceptable for parallel imports to be hindered so as to enable pharmaceutical companies to impose excessive tariffs in countries not applying any price control in order to compensate for lower profits in Member States which intervene more on prices.

xv. Although the Member States have different systems for regulating prices, this does not mean that the objective of establishing an internal market does not apply to the pharmaceutical area. Since, in any event, the price regulation systems leave undertakings sufficient margin for manœuvre, parallel imports must not be hindered either by State measures or by conduct in restraint of competition by the undertakings. Moreover, if State measures hindering parallel exports are prohibited, measures taken by undertakings pursuing the same goal, as in this case, should also be prohibited. Consequently, the Commission argues, the very fact of hindering parallel imports of

medicinal products infringes Article 85 of the Treaty, as is shown in particular by the *Sandoz* judgment

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xvi. As the Court of Justice has already stated in its previous judgments, the rules on the implementation of the free movement of goods apply to an industry whether or not the national provisions concerned have been subject to harmonisation. That is why the Commission, concludes that steps may also be taken to combat export bans even in the pharmaceutical sector, as is clear from the caselaw of the Court of Justice. The argument mentions that the pharmaceutical sector constitutes a special market to which the competition rules should apply only in a limited way is not true. It should be acknowledged that many Member States continue to intervene in the pharmaceutical products market and that, given the existing differences in approach, average prices and consumption habits differ. The Commission would like to point out, however, that it has been held that it cannot challenge price control systems as such by recourse to the rules on the free movement of goods, but can only combat possible discriminatory repercussions in the light of Article 30 of the Treaty[86]. It was for that reason that the Commission attacked only State measures which clearly discriminated in favour of the national pharmaceutical industry or research.

xvii. In this manner, the Decision made by the commission is entirely consistent with the decision-making practice and the case-law of the Court of Justice, the concept of an agreement having formed the subject of a similar interpretation, in particular, in Case C-277/87 *Sandoz v Commission* and Case C-279/87 *Tipp-Ex v Commission*.[87]

[86] Consolidated Version of the Treaty Establishing the European Community [2002] OJ C325/33, art 30.

[87] For further information *see also:* **Chapter VI. Case Law.**

xviii. The BAI advances three pleas in law in support of its appeal, arguing, first, that the Court of First Instance failed fully to take into account the facts on which the contested decision was based, second, that it made an erroneous assessment of the evidence in breach of the rules on the burden of proof, and, third, that it erred in law as to the legal criteria used to determine the existence of an agreement within the meaning of Article 85(1) of the Treaty. The Commission makes a general criticism of the restrictive approach of the Court of First Instance in applying Article 85(1) of the Treaty to export restrictions, before advancing five more precise pleas in law, essentially arguing that the Court of First Instance used too restrictive an interpretation of the concept of an 'agreement' within the meaning of that provision, that it erred in law as to the application of Article 85(1), and that it misinterpreted the evidence.

xix. The Commission and the BAI also underlines that the Court of First Instance unlawfully shifted the burden of proof onto the Commission, ignored the hard evidence, and falsely assumed that an illegal agreement requires an express *export prohibite*d stamp on an invoice to be proven.

xx. For this reasons above, the Court of Justice should:

-Annul the judgment under appeal and dismiss the claims of BAYER - Order Bayer, in its capacity as respondent and as applicant, to pay the costs of the cases before the Court of Justice and the Court of First Instance, including those incurred by BAI in connection with its intervention at first instance.

B. Claims of BAYER AG

i. Bayer contends that its conduct does not constitute an infringement of Article 85(1) of the Treaty because it never concluded an agreement with its Spanish and French wholesalers concerning an export ban. Bayer's decision to restrict the supply of Adalat was a purely unilateral commercial decision, which falls completely outside the scope of Article 85(1). Bayer never planned or imposed an export ban, nor did it establish a system of subsequent monitoring of the final destination of the packets of Adalat.

ii. The argument of the Commission that an "implicit acquiescence" existed between Bayer and the wholesalers is fundamentally wrong. An agreement within the meaning of Article 85(1) requires a "concurrence of wills" or a meeting of minds. However, the Commission's own findings prove that the wholesalers adopted a line of conduct deliberately designed to circumvent Bayer's new supply policy. The wholesalers actively deceived Bayer by distributing their export orders among various small local agencies to make it appear as though the drugs were for local pharmacies. This deliberate deception and continued exporting proves that the wholesalers had a firm intention to resist Bayer's policy, which is the exact opposite of consenting or acquiescing to a ban.

iii. Where the Commission attempts to frame Bayer's supply quotas as an "export ban" formed within continuous commercial relations, Bayer argues this is a misinterpretation of the law. The mere existence of long-standing commercial relations between a manufacturer and its wholesalers does not mean that every unilateral act by the manufacturer automatically becomes an "agreement." Since Bayer did not require any formal commitment from the wholesalers to stop exporting, and the wholesalers did not offer any such commitment, no agreement was ever sought or obtained.

iv. Bayer maintains that its reductions in deliveries were justified by legitimate business and ethical reasons. Starting in 1989, demand from wholesalers spiked abnormally, with orders coming in that were 50% to 100% higher than normal. Because of these massive orders intended for parallel export, Bayer faced stock shortages. Bayer had a strict ethical and legal obligation to satisfy the needs of the domestic markets and guarantee that local pharmacies had enough life-saving medicines for patients in France and Spain. Limiting deliveries to the traditional, historical needs of the domestic market is a standard, legal commercial practice to manage depleted stocks, not an illegal penalty.

v. Regarding the Commission's reliance on order tables, such as those concerning CERP Lorraine, Bayer argues that the fluctuations in supply deliveries actually prove the exact opposite of the Commission's claims. The fact that delivery reductions varied and were not applied uniformly using a single reference level, which demonstrates varied,that Bayer was making unilateral, case-by-case assessments to manage severe stock shortages and supply domestic markets, rather than applying a systematic, generalized algorithm to penalize exporters.

vi. Bayer firmly denies the assertion of BAI that it operated an illicit tracking system to police the final destination of its products. Any monitoring conducted by Bayer was strictly limited to evaluating normal domestic sales volumes to prevent stock depletion. As the Court of First Instance correctly found, the Commission failed to prove that Bayer ever established a system of subsequent monitoring to trace individual batches

found in the United Kingdom back to specific wholesalers for the purpose of penalizing them.

vii. Bayer completely rejects the BAI's argument that the structure of the pharmaceutical market and the wholesalers' obligations to pharmacies forced their 'tacit consent.' Bayer does not hold a dominant position in the market, and its standard commercial relationships do not constitute a restrictive 'selective distribution system.' The wholesalers remained entirely independent economic operators. The fact that they may have felt commercial pressure to secure supplies does not legally transform their forced adaptation into a 'concurrence of wills' with Bayer.

viii. Furthermore, Bayer affirms that the root cause of the market distortion was not its own conduct, but the actions of the Member States. The national health authorities in Spain and France intervened to artificially fix the prices of Adalat at levels 40% lower than in the United Kingdom. Bayer argues that it is entirely unacceptable for the Commission to use Article 85(1) to penalize a private pharmaceutical company for trying to protect its commercial interests against massive parallel imports that were caused solely by the lack of price harmonization between Member States.

ix. Furthermore, regarding the specific situation in Spain, Bayer argues that parallel imports of Adalat to the United Kingdom were legally impermissible under patent law. Under the transitional provisions of the Act of Accession of Spain to the European Communities, Bayer was fully entitled to invoke its patent rights to prevent the import of these medicines. Therefore, any actions taken to restrict Spanish wholesalers from exporting were entirely justified to protect Bayer's legitimate intellectual property rights

x. The argument that this case is identical to the case-law of the Court of Justice, such as the *Sandoz* and *Tipp-Ex* judgments, is factually incorrect. In the Sandoz case, the manufacturer placed an express *export prohibited* stamp directly on its invoices, which the customers read and paid without complaint, creating a tacit contract. Bayer never placed any such stamps on its invoices, never altered its written contracts to forbid exports, and never threatened the wholesalers. Therefore, the concept of tacit acquiescence established in Sandoz cannot apply here, because Bayer never invited the wholesalers to enter into an anti-competitive agreement in the first place.

xi. Regarding the appeals advanced by the Commission and the BAI, Bayer argues that the Court of First Instance did not err in law, did not misinterpret the evidence, and correctly applied the rules on the burden of proof. The burden of proof rests exclusively on the Commission to establish that a concurrence of wills existed. The Court of First Instance rightfully concluded that the Commission failed to provide this proof, and unlawfully tried to presume an agreement simply because Bayer restricted its supplies.

xii. Finally, Bayer asserts its fundamental right to freedom of contract and the right to freely dispose of its property. Because Bayer does not hold a dominant position in the relevant pharmaceutical market, it cannot be legally forced to supply infinite quantities of its products to wholesalers simply so those wholesalers can maximize their own profits through parallel exports. A manufacturer's unilateral refusal to fulfill excessive orders is a legitimate exercise of basic commercial freedom, not an anti-competitive agreement.

xiii. Furthermore, Bayer argues that the Commission is unlawfully attempting to stretch the boundaries of Article 85(1) to penalize conduct that it has no legal right to punish. It is an undisputed fact in the Commission's own decision that Bayer does not hold a dominant position in the relevant pharmaceutical markets, holding less than a 20% market share in the UK, Spain, and France. Therefore, the Commission could not legally prosecute Bayer for a unilateral 'abuse of dominance' under Article 86 of the EC Treaty. Because the Commission lacked the legal grounds to attack Bayer's unilateral conduct under Article 86, it artificially fabricated the existence of a *tacit agreement* under Article 85(1) simply to trap the company. Bayer asserts that a purely unilateral refusal to supply by a non-dominant company is a legal exercise of commercial freedom, and the Commission cannot simply invent an agreement to cover up its lack of jurisdiction.

4. Established Agenda of the Court

The Court shall decide on the following questions and address these matters properly in the judgment:

1- Whether or not Bayer’s policy of restricting supply quotas to French and Spanish wholesalers constituted an "agreement" to ban exports within the meaning of Article 85(1) of the EC Treaty, **2-** Whether or not the continuous commercial relationship between Bayer and the wholesalers automatically transformed Bayer's unilateral supply policies into a bilateral agreement, **3-** Whether or not the wholesalers' behavior of splitting orders and using local agencies to bypass Bayer's quotas amounted to "tacit acquiescence" to an export ban,

4- Whether or not a "concurrence of wills" (a true meeting of minds) existed between Bayer and the wholesalers regarding the restriction of parallel imports to the United Kingdom, **5-** Whether or not the Court of First Instance erred in law by requiring proof of an express *export prohibited* demand or a formal post-export penalty system to establish the existence of an agreement, **6-** Whether or not the Court of First Instance misapplied the rules regarding the burden of proof when assessing the wholesalers' compliance with Bayer's supply policies, **7-** Whether or not the commercial dependence of the wholesalers on Bayer for domestic pharmaceutical supplies forced them to yield to the quotas, thereby creating a legally binding agreement despite their opposition, **8-** Whether or not unilateral measures taken by a non-dominant company to protect its commercial interests and manage stock shortages fall completely outside the scope of Article 85(1), **9-** Whether or not the lack of price harmonization for medicinal products between Member Statesjustifies actions by pharmaceutical companies to restrict parallel trade.

V. APPLICABLE LAW

1. Treaty Establishing the European Community (EC Treaty) [88]

Article 28

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 29

[88] Consolidated Version of the Treaty Establishing the European Community [2002] OJ C325/33.

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 30

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 81

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 84

Until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82.

Article 85

1. Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

Article 86

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

2. PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION[89]

Article 22

[89] Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ C 326/210.

A case governed by Article 18 of the EAEC Treaty shall be brought before the Court of Justice by an appeal addressed to the Registrar. The appeal shall contain the name and permanent address of the applicant and the description of the signatory, a reference to the decision against which the appeal is brought, the names of the respondents, the subject matter of the dispute, the submissions and a brief statement of the grounds on which the appeal is based.

The appeal shall be accompanied by a certified copy of the decision of the Arbitration Committee which is contested.

If the Court rejects the appeal, the decision of the Arbitration Committee shall become final.

If the Court annuls the decision of the Arbitration Committee, the matter may be reopened, where appropriate, on the initiative of one of the parties in the case, before the Arbitration Committee. The latter shall conform to any decisions on points of law given by the Court.

Article 56

An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the General Court directly affects them.

With the exception of cases relating to disputes between the Union and its servants, an appeal may also be brought by Member States and institutions of the Union which did not intervene in the proceedings before the General Court. Such Member States and institutions shall be in the same position as Member States or institutions which intervened at first instance.

3. Rules of procedure of the Court of First Instance of the European Communities of 2 May 1991[90]

Article 87

§ 1

A decision as to costs shall be given in the final judgment or in the order which closes the proceedings.

§ 2

The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.

Where there are several unsuccessful parties the Court of First Instance shall decide how the costs are to be shared.

§ 3

Where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

[90] Rules of Procedure of the Court of First Instance of the European Communities [1991] OJ L136/1.

The Court of First Instance may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.

§ 4

The Member States and institutions which intervened in the proceedings shall bear their own costs.

The Court of First Instance may order an intervener other than those mentioned in the preceding subparagraph to bear his own costs.

§ 5

A party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the other party's pleadings. However, upon application by the party who discontinues or withdraws from proceedings, the costs shall be borne by the other party if this appears justified by the conduct of that party.

Where the parties have come to an agreement on costs, the decision as to costs shall be in accordance with that agreement.

If costs are not claimed in the written pleadings, the parties shall bear their own costs.

§ 6

Where a case does not proceed to judgment, the costs shall be in the discretion of the Court of First Instance.

Article 88

Without prejudice to the second subparagraph of Article 87 (3), in proceedings between the Communities and their servants the institutions shall bear their own costs.

Article 89

Costs necessarily incurred by a party in enforcing a judgment or order of the Court of First Instance shall be refunded by the opposite party on the scale in force in the State where the enforcement takes place.

Article 90

Proceedings before the Court of First Instance shall be free of charge, except that:

(a) where a party has caused the Court of First Instance to incur avoidable costs, the Court of First Instance may order that party to refund them;

(b)

where copying or translation work is carried out at the request of a party, the cost shall, in so far as the Registrar considers it excessive, be paid for by that party on the scale of charges referred to in Article 24 (5).

Article 91

Without prejudice to the preceding Article, the following shall be regarded as recoverable costs:

(a) sums payable to witnesses and experts under Article 74;

(b)

expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers.

Article 92

§ 1

If there is a dispute concerning the costs to be recovered, the Court of First Instance hearing the case shall, on application by the party concerned and after hearing the opposite party, make an order, from which no appeal shall lie.

§ 2

The parties may, for the purposes of enforcement, apply for an authenticated copy of the order.

Article 93

§ 1

Sums due from the cashier of the Court of First Instance shall be paid in the currency of the country where the Court of First Instance has its seat.

At the request of the person entitled to any sum, it shall be paid in the currency of the country where the expenses to be refunded were incurred or where the steps in respect of which payment is due were taken.

§ 2

Other debtors shall make payment in the currency of their country of origin.

§ 3

Conversions of currency shall be made at the official rates of exchange ruling on the day of payment in the country where the Court of First Instance has its seat.

4. Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties[91]

Article 42

Quantitative restrictions on imports and exports and any measures having equivalent effect shall be abolished on 1 January 1986 between the Community as at present constituted and the Kingdom of Spain.

Article 47

1. Notwithstanding Article 42, the holder, or his beneficiary, of a patent for a chemical or pharmaceutical product or a product relating to plant health, filed in a Member State at a time when a product patent could not be obtained in Spain for that product may rely upon the rights granted by that patent in order to prevent the import and marketing of that product in the present Member State or States where that product enjoys patent protection even if that product was put on the market in Spain for the first time by him or with his consent.

2. This right may be invoked for the products referred to in paragraph 1 until the end of the third year after Spain has made these products patentable.

VI. CASE LAW

1. Sandoz prodotti farmaceutici SpA v Commission (Case C-277/87) [1990] ECR I-45

[91] Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties [1985] OJ L302/23.

This landmark judgment of the European Court of Justice significantly broadened the concept of an "agreement" under Article 85(1) of the EC Treaty specifically addressing the doctrine of tacit acquiescence. Sandoz, a prominent pharmaceutical company, was found to have systematically printed the words "export prohibited" (*esportazione vietata*) on the commercial invoices sent to its Italian distributors. The dispute arose when the Commission fined Sandoz for restricting parallel trade, a foundational breach of EU single market principles. Sandoz challenged the decision, arguing that the restrictive wording on the invoices was a purely unilateral act on its part, and that it had never entered into a formal agreement with its distributors to ban exports.

The core question before the Court was whether a manufacturer's seemingly unilateral demand, communicated through routine commercial documentation, could constitute a bilateral "agreement" under European competition law if the distributors continued to trade without objection.

The Court firmly rejected Sandoz's formalistic defence. It held that the systematic dispatch of invoices bearing the export ban, coupled with the distributors' continuous payment of those invoices and placement of subsequent orders without protest, demonstrated tacit acquiescence. The Court emphasised that Article 85(1) does not require a formal written contract; a concurrence of wills is sufficient. Therefore, the export ban was not a unilateral act but rather formed an integral part of the continuous commercial relationship between Sandoz and its distributors.

In academic commentary, *Sandoz* is widely regarded as a turning point in EU competition law. It established the principle that manufacturers cannot shield themselves from antitrust liability by imposing restrictive policies disguised as unilateral conduct. The decision affirms that the courts will look to the economic reality and the continuous course of dealing to establish an

anti-competitive agreement, ensuring that parallel trade, a vital mechanism for market integration, remains protected from subtle corporate suppression.

2. Tipp-Ex GmbH & Co. KG v Commission (Case C-279/87) [1990] ECR I-261

This case further refined the jurisprudence surrounding the boundary between unilateral conduct and anti-competitive agreements, building upon the foundations laid in cases like *Sandoz*. Tipp-Ex, a manufacturer of correction products, operated a network of exclusive distribution agreements across several Member States. In an effort to artificially partition the common market and maintain differing national price levels, Tipp-Ex exerted pressure on its exclusive distributors to prevent them from selling to parallel importers who were exporting the goods to other territories. When distributors complied with these demands, often under the threat of having their supplies cut off, the Commission intervened and penalised the company.

The central issue before the Court was whether the factual compliance of distributors with a manufacturer's coercive, anti-competitive policy transforms that unilateral coercion into an "agreement" within the meaning of Article 85(1) of the EC Treaty.

The Court upheld the Commission’s findings, ruling that an agreement undoubtedly existed. The judgment highlighted that an agreement is formed as soon as the distributors align their conduct with the manufacturer's restrictive demands, regardless of whether that alignment was achieved through willing cooperation or economic coercion. The fact that the distributors acted upon Tipp-Ex's instructions to trace and cut off parallel traders constituted a clear concurrence of wills designed to isolate national markets.

The significance of the *Tipp-Ex* decision lies in its confirmation that economic pressure and reluctance on the part of distributors do not negate the existence of an illegal agreement. The judgment underscores the strict approach of the CJEU toward territorial protectionism. It

remains a leading precedent demonstrating that the implementation of a supplier's restrictive policy by its distribution network, even when driven by the supplier's aggressive enforcement, decisively triggers the application of European competition rules.

3. Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG v Commission (Case 107/82) [1983] ECR 3151

This highly influential judgment shaped the application of EU competition law to selective distribution systems. AEG, a manufacturer of consumer electronics, operated a selective distribution network based on ostensibly objective, qualitative criteria, which is generally permissible under EU law. However, the Commission found that AEG was actively manipulating this system by refusing to admit certain dealers, specifically supermarkets and discount retailers, not because they failed the qualitative technical standards, but because they engaged in aggressive price competition. AEG argued that its refusal to supply these specific dealers was a purely unilateral corporate decision and therefore fell outside the scope of Article 85(1), which requires an agreement between undertakings.

The core question before the Court was whether a manufacturer’s unilateral refusal to admit a qualified dealer into a selective distribution network could be construed as an "agreement" with the *existing* approved distributors.

The Court rejected AEG’s argument, ruling that a selective distribution system necessarily relies on a fundamental agreement between the manufacturer and the approved dealers. Therefore, any subsequent actions taken by the manufacturer to enforce or manage that system, including the arbitrary exclusion of price-cutting applicants, are not isolated, unilateral acts. Instead, they form part of the practical implementation of the overarching distribution agreement. The Court held that the existing approved distributors implicitly consent to the manufacturer's exclusionary practices, as those practices shield them from price competition.

In academic and practitioner literature, *AEG v Commission* is universally cited as the cornerstone case establishing that the discriminatory application of a selective distribution system constitutes an anti-competitive agreement. The decision restored a principled approach to distribution networks, affirming that while manufacturers may control the quality of their retailers, they cannot use qualitative systems as a smokescreen to unlawfully dictate retail prices or eliminate intra-brand competition.

4. Ford-Werke AG and Ford of Europe Inc v Commission (Joined Cases 25/84 and 26/84) [1985] ECR 2725

This landmark case addressed the legal characterisation of corporate circulars and product supply decisions within an established distribution network. Ford-Werke AG, manufacturing vehicles in Germany, noticed a surge in UK consumers travelling to Germany to purchase right- hand drive (RHD) vehicles, as they were significantly cheaper than those sold by Ford's UK dealers. To protect the higher-priced UK market and stem these parallel imports, Ford unilaterally issued a circular to its German dealers announcing that it would no longer accept orders for RHD vehicles. Ford argued before the Court that this was a unilateral withdrawal of a product from the market, independent of the dealership agreements, and thus outside the scope of Article 85(1).

The central issue was whether a manufacturer's unilateral decision to cease the supply of a specific product type, communicated via a corporate circular, constitutes an "agreement" when executed within the framework of an existing distribution network.

The Court of Justice dismissed Ford's arguments, taking a holistic view of the commercial relationship. The Court held that the main dealership agreement, while perhaps silent on the specific supply of RHD cars, provided the overarching framework for the continuous relationship between Ford and its dealers. Consequently, Ford's decision to cease supply was

not an independent, unilateral act; rather, it was intrinsically linked to the underlying distribution agreement. By remaining within the dealership network and accepting the new supply conditions, the German dealers had tacitly acquiesced to the restrictive policy.

The *Ford* judgment is a cornerstone of EU competition law literature regarding parallel trade and vertical agreements. Its significance lies in its powerful assertion that a manufacturer cannot artificially separate its commercial policies from its distribution contracts to evade antitrust scrutiny. The decision guarantees that corporate strategies aimed at partitioning the common market, even when implemented through seemingly unilateral supply restrictions, will be captured by the prohibition on anti-competitive agreements.

VII. CONCLUSION

In conclusion, the element that makes the *Bayer* case a landmark is the Court's meticolous clarification of the boundary between a unilateral commercial policy and the existence of a bilateral agreement under Article 81(1) of the EC Treaty. Although the Commission sought to penalize the restriction of parallel trade, which is a foundational pillar of the EU single market, the Court had to determine whether Bayer's implementation of supply quotas for Spanish and French wholesalers could legally be transformed into a *concurrence of wills* despite the wholesalers' active attempts to circumvent those very policies. This case creates an atmosphere to consider several significant matters, including the limits of *tacit acquiescence* within continuous commercial relations, the protection of legitimate business freedom for non- dominant undertakings, and the tension between national pharmaceutical price-fixing and the overarching objective of market integration. As a result, *Bayer* serves as a critical precedent ensuring that the Commission cannot artificially fabricate an agreement from purely unilateral conduct simply to address market distortions caused by a lack of price harmonization between Member States.

VIII. BIBLIOGRAPHY

1. Primary Sources

A. EU Cases

AC-Treuhand AG v Commission Case C-194/14 P [2015] ECR I-717.

Bayer AG v Commission Case T-41/96 (Court of First Instance, 26 October 2000).

Bristol-Myers Squibb v Paranova A/S Joined Cases C-427/93, C-429/93 and C-436/93 [1996] ECR I-3457.

Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG Joined Cases C-2/01 P and C-3/01 P (Court of Justice, appeal).

Commission v Volkswagen AG Case C-74/95 [1996] ECR I-3913.

GlaxoSmithKline Services Unlimited v Commission Case C-501/06 P [2009] ECR I-9291.

Hoffmann-La Roche v Centrafarm Case 102/77 [1978] ECR 1139.

Imperial Chemical Industries Ltd v Commission Case 48/69 [1972] ECR 619.

Pfizer Inc v Eurim-Pharm GmbH Case 1/81 [1981] ECR 2913.

Sandoz prodotti farmaceutici SpA v Commission Case C-277/87 [1990] ECR I-45.

Sot Lélos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proionton Joined Cases C-468/06 to C-478/06 [2008] ECR I-7139.

Suiker Unie UA and others v Commission Joined Cases 40/73 to 48/73 [1975] ECR 1663.

T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit Case C-8/08 [2009] ECR I-4529.

Volkswagen AG v Commission Case T-208/01 [2003] ECR II-5141.

B. EU Legislation and Official Materials

Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties.

Commission Decision 96/478/EC relating to a proceeding under Article 85 of the EC Treaty.

Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ C 326/210.

Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991 [1991] OJ L 136/1.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306.

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326.

C. Statutes and Statutory Materials

Code de la santé publique arts L.596, L.596-1, L.598, L.599 and L.600; arts R.5105–R.5516.

Order of 3 October 1962 laying down the requirements incumbent on distributing wholesalers as regards the supply of medicinal products to pharmacies.

2. Secondary Sources

A. Books

ACTECON, *The Output® Quarterly Bulletin, 1st Quarter 2023* (2023).

Authority for Consumers and Markets, *Guidelines Regarding Arrangements Between Competitors* (2019).

Paul Craig and Gráinne de Búrca, EU Law: Text, Cases, and Materials (7th edn, OUP 2020).

Gráinne de Búrca, The European Court of Justice (Oxford University Press 2001).

Ćapeta T, *Judicial Review of EU Law.*

Cristina Cucu, '"Agreements", "Decisions" and "Concerted Practices": Key Concepts in the Analysis of Anticompetitive Agreements' (2013) XX(1) LESIJ 24.

Jackson D, *Defining the Relevant Market in EU Concentration Cases – Applied to the Plate Heat Exchanger Industry* (Master thesis, Lund University 2010).

Kuptsov DA, *ParallelTradeinthe European Union: Competition Law Aspects* (Master thesis, Lund University 2013).

Nowag J, *EU Competition Law* (University of Würzburg 2019).

Petit N, *Agreements,ConcertedPractices and Decisions of Associations of Undertakings* (IEB lecture, Madrid, 15 January 2010).

Petit N, 'The Economics of Parallel Trade – Iconoclast Views on a Dogma of EU Competition Law' (Working Paper, 19 August 2010) SSRN abstract 1661884.

Turkish Competition Authority, *Rekabet Kurulu Kararlarında Kullanılan İktisadi Analizlere Yönelik El Kitabı* (2019).

Turkish Competition Authority, *Rekabet Terimleri Sözlüğü* (6th edn 2019).

Craig & De Búrca, *EU Law: Text, Cases, and Materials* (8th edn, Oxford University Press 2024).

B. Contributions to Edited Books

Kyle MK, 'Parallel Trade in Pharmaceuticals: Firm Responses and Competition Policy' in Hawk BE (ed), *International Antitrust Law & Policy: Fordham Competition Law 2009* (Juris Publishing 2010) 339.

C. Journal Articles

Diniz S, Tayfun S and Arlı BN, 'From Tacit Collusion to Algorithmic Coordination: A Comparative View of EU and Turkish Competition Law' (2025) 21(2) *Competition Law International* 201.

Helvacı M and Taşkın İ, 'Defining the Concept of Dominant Position in European Union Competition Law and a Comparative Evaluation of the Definition with Turkish Law' (2021) 22(1) *Rekabet Dergisi* 100.

İnce E, 'Tacit Collusion: Economics and Implications for Anti-Competitive Agreements Regime' (2020) 20(2) *Rekabet Dergisi* 4.

Kaplow L, 'On the Meaning of Horizontal Agreements in Competition Law' (2011) 99 *California Law Review* 683.

Kazak AB, 'Antitrust Enforcement Against Anti-Competitive Practices in the EU Pharmaceutical Market' (2022) 23(2) *Rekabet Dergisi* 78.

D. Websites and Blogs

California State University Northridge, 'Understanding the Roles of Offer and Acceptance in Formation of Contract' (CSUN Business Law Resources).

Court of Justice of the European Union, 'About the Court of Justice of the European Union' (CURIA) https://curia.europa.eu/site/jcms/d2_5088/en/about-the-cjeu accessed 4 April 2026.

Court of Justice of the European Union, 'About the General Court of the European Union' (CURIA) https://curia.europa.eu/site/jcms/d2_5088/en/about-the-cjeu accessed 5 April 2026.

Court of Justice of the European Union, 'The Judges' (CURIA) https://curia.europa.eu/site/jcms/d2_5093/en/ accessed 5 April 2026.

European Parliament, online document on the Court of Justice of the European Union https://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf.

European Union, 'Court of Justice of the European Union (CJEU)' https://european-union.europa.eu /ins ti tutions -l aw -budget/ ins titu tions - and-bodies /s ear ch -all- eu-ins ti tutions - and-bodies/court-justice-european-union-cjeu_en.

European Union, 'General Court' (EUR-Lex) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:general_court accessed 5 April 2026.

Panel provided for by Article 255 of the Treaty on the Functioning of the European Union, 'Home' https://comite255.europa.eu/en/ accessed 5 April 2026.