or the obstruction of, the Commission's investigations;[257] the role of a particular undertaking as leader in, or instigator of the infringement.

On the other hand, mitigating circumstances may well occur when the firm concerned supplies evidence that the infringement has been promptly brought to an end after the competition authority's intervention, or when the undertaking has effectively collaborated with the Commission beyond the scope of its legal obligations.

However, in the former case, the new Guidelines, in line with the current jurisprudential practice,[258] specify that said mitigating factor does not apply to secret agreements,[259] since it is apparent that in such circumstances firms could always enter into confidential anti-competitive arrangements trusting that, once discovered - where by force the secrecy would subsequently be unveiled and thereby brought to an end - they would in any event benefit from a fine reduction, if they just stop their conduct once the authorities have tracked it down anyway; in other words, here the termination of the infringement at issue is actually induced by the discovery itself, and thus cannot be directly credited to the good will of the undertaking alone.

Anyway, the principles outlined are always to be applied in a flexible manner, considering the specific circumstances of each case under scrutiny. Besides, the final amount of the fine must not, in any event, exceed 10% of the undertaking's worldwide aggregate turnover in the preceding business year, as laid down in Art. 23(2) of Regulation No 1/2003 and correspondingly reflected in Point 32 of the 2006 Guidelines.[260] Moreover, under certain circumstances, those who consider to have been harmed by the anti-competitive agreement may also bring up private actions for damages before the national competent authorities.[261]

## II. The Scope of the Individual Exemption under Art. 81 (3)

The prohibition contained in Article 81(1) of the EC Treaty is not absolute. Restrictive agreements will be valid and enforceable if they satisfy the exemption criteria of Article 81(3) of the EC Treaty. An exemption under Article 81(3) of the EC

257 See, for instance, Case C-308/04 P: Judgment of the Court (Second Chamber) of 29 June 2006 — SGL Carbon AG v Commission of the European Communities, Official Journal, C 212, 2 Sept. 2006, p. 0003 – 0004.

258 As confirmed in Case C-328/05 P: Appeal brought on 30 August 2005 by SGL Carbon AG against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 15 June 2005 in Joined Cases T-71/03,T-74/03, T-87/03 and T-91/03 Tokai and Others v Commission of the European Communities, in respect of Case T-91/03, Official Journal C 281, 12 Nov. 2005, p. 0007 – 0008.

259 See Point 29, first indent, last sentence, of the 2006 Guidelines.

260 See for a confirmation of the fine's level and its underlying mechanism, i.a.: Bradgate R. et al., "Commercial Law", Oxford University Press, 2007, p. 378.

261 Carlin F. *et al.*, "The Last of Its Kind: The Review of The Technology Transfer Block Exemption Regulation", Symposium on European Competition Law, Northwestern Journal of International Law and Business, vol. 24, Spring 2004, p. 603 *et seq.*

Treaty will be granted if, broadly speaking, the pro-competitive advantages of an agreement outweigh its anti-competitive effects, hence resulting in a positive "net balance".[262]

In fact, limiting the general applicability of the mandatory prohibition set by the first paragraph of Art. 81, the third paragraph provides for a legal exemption under some particular circumstances, stating that: "The provisions of paragraph 1 may, however, be declared inapplicable in 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 benefits, and which does not: (a) impose on the undertakings concerted 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 product in question".

Sorting out the quoted provision in its essential elements, two positive and two negative requirements can be identified, respectively. Namely, a "prima facie" anti-competitive agreement may eventually be exempted under Art. 81(3), should all the following circumstances be satisfied:[263]

- It contributes to the improvement of the production or distribution of goods or (alternatively) the promotion of technical or economic progress (first positive condition);
- It allows consumers a fair share of the resulting benefits (second positive condition);
- It does not impose concerted restrictions on the undertakings that are not indispensable to the attainment of these objectives (first negative condition);
- It does not eliminate competition with respect to a substantial part of the product in question (second negative condition);

Apparently Art. 81 applies a quite frequently used legal technique, which consists in the setting of a general rule limited in its scope of application by particular exceptions. However, at a closer look some inconsistencies between the first and the third paragraph may be questioned. In fact, it cannot be consistently maintained that, on the one hand, Art. 81(1) protects competition for one or more reasons whereas, on the other hand, Art. 81(3) exceptionally allows some particular anti-competitive agreements if they are instrumental to the achievement of other aims.[264]

262 Along the same line, see i.a.: Ritter L., et al., "European Competition Law: A Practitioner's Guide", "The System of At. 81 (3)", Kluwer Law International, 2004, p. 137 *et seq.*

263 Jones A. et al., "EC Competition Law: Text, Cases and Materials", Oxford University Press, 2007, p. 1139 *et seq.*

264 Fine F., "The EC Competition Law on Technology Licensing", Sweet & Maxwell ed., 2006, p. 20.

Following the "ratio" of the provision endorsed by this contribution, one way to reconcile the apparent dichotomy of Art. 81, thereby preserving its overall internal consistency, could be to shift its emphasis:

- From a short-term perspective, which is the starting point for a first evaluation of the "prima facie" anti-competitive restraints of an arrangement falling under Art. 81(1);
- To a medium and long-term perspective, which finally represents the decisive standpoint, from which the overall positive effects labelled by Art. 81(3) shall be evaluated, eventually driving the balance towards a concluding assessment of the agreement under consideration, by extracting its "net" value.

Ultimately, the view is taken that the apparent conflict of Art. 81 could also be solved by considering "competition", preserved by the general prohibition of the first paragraph, not as the highest goal, but instead as one among the "means" available to foster "the production or distribution of goods or to promoting technical or economic progress, while allowing the consumers a fair share of the resulting benefits", the latter representing the real, ultimate "aim" justifying the exception contained in the third paragraph.[265] Therefore, innovation, coupled with consumers' welfare, represents the real final target to be achieved. This approach is also shared by the modern doctrine, where it has been highlighted that: "Competition is not […] regarded as an end in itself. It is one of the most important means by which a genuinely integrated market is achieved".[266]

This vision also appears to be partly supported by the Commission's Guidelines on the Application of Art. 81(3) of the Treaty,[267] which states under its general remarks: "The objective of Article 81(1) is to protect competition on the market as a means of enhancing consumer's welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of the common market promotes an efficient allocation of resources throughout the Community for the benefit of consumers".[268]

Following a certain common sense it should be questioned why "competitiveness" as such should after all arise as privileged value and, consequently, be entitled to a higher rank than other business practices, which are in principle also defensible. In fact, our political system, although basically inspired by liberal principles, might only be legitimised by the attainment of the general public good, which - while it cannot be already concretised by competition itself, being that a mere step in the way of promoting innovation - may eventually become tangible for the community

265 In the same sense and with respect to the so-called "efficiency goal" of Art. 81 and 82 EC, the complementarity of IP and competition law's protection has been recently supported also by: Kolstad O., "Competition Law and IP Rights – Outline of an Economic-Based Approach", In: Drexl J. ed.: Research Handbook on Intellectual Property and Competition Law, Cheltenham, UK, Northampton, MA, USA, Edward Elgar, 2008, p. 3 *et seq.*

266 Fairhurst J., "Law of the European Union", Pearson Education, 2007, p. 637.

267 Guidelines on the Application of Art.81(3) of the Treaty (2004/C 101/08).

268 *Id.*, para. 12.

through improved "production or distribution of goods", as well as through "technical or economic progress", both ultimately benefiting society by generating collective welfare. It is within this interpretative framework and against the attainment of these goals that patent pools should be assessed when confronted with antitrust concerns.

## *B. The Way to the TTBER*

### I. TTBER 1996 and Commission Evaluation Report

In March 1965 the issuance of the Council Regulation No 19/65/EEC,[269] and in particular its Art. 1, empowered the Commission to apply Article 81(3) of the EC Treaty by regulation to certain categories of technology transfer agreements and corresponding concerted practices that would otherwise fall within the prohibition of Article 81(1) and to which only two undertakings were party, thereby excluding the exemption of multiparty licensing. Pursuant to such legislative mandate, the Commission had, in particular, adopted Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 81(3) of the Treaty to certain categories of technology transfer agreements (hereinafter TTBER 1996).[270] In fact, block exemption regulations in the field of technology licensing were adopted for the first time in the mid 1980s for both patent and know-how licenses,[271] the combination of which resulted in the TTBER of 1996.[272]

Basically, the ultimate scope of the Commission in adopting a "block exemption" regulation to the benefits of certain categories of technology transfer agreements was to facilitate the dissemination of knowledge, thereby maximizing the benefits of innovation, as fostered by licensing and technology exchange. The idea behind the block exemption is to automatically exclude certain types of agreements, i.e. as a "block", from the general prohibition of Art. 81(1) of the EC Treaty, thus eliminating the need for an "individual exemption", requiring the latter a laborious case-by-case assessment of the anti- and pro-competitive effects of the licensing agreement at issue, balancing, on the one hand, the restrictive effects caught by Art. 81(1) with,

269 Council Regulation (EEC) No 19/65, OJ 36, 6.3.1965, p. 533-65. As last amended by Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, p. 1 *et seq*.

270 Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) [now Art.81 (3)] of the Treaty to certain categories of technology transfer agreements, OJ L 31, 9.2.1996, p. 2-13, as amended by the 2003 Act of Accession, and available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31996R0240&model=guichett

271 Commissions Regulations (EEC) 2349/84 of 23 July 1984 and 556/89 of 30 November 1989.

272 For a more extensive legal analysis on the TTBER of 1996, see i.a.: Ullrich H. In: "EG Wettbewerbsrecht", Immenga U. & Mestmaecker E. eds, 1997, n. 33, p. 1241 *et seq*.