



universität
wien

MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

„Restriction of Competition by Object or Effect“

verfasst von / submitted by

Mag.^a Lisa Marie Onz

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2016 / Vienna 2016

Studienkennzahl lt. Studienblatt / A 992 548
Postgraduate programme code as it appears on
the student record sheet:

Universitätslehrgang lt. Studienblatt / Europäisches und Internationales Wirtschaftsrecht /
Postgraduate programme as it appears on European and International Business Law
the student record sheet:

Betreut von / Supervisor: RA Dr. Hanno Wollmann LL.M.

Table of Contents

1. Introduction	1
2. Basic Principles of Art 101 para 1 TFEU	2
2.1 Undertakings and Associations of Undertakings	2
2.2 Agreements, Decisions and Concerted Practices	3
2.2.1 Agreements.....	3
2.2.2 Decisions by Associations of Undertakings.....	3
2.2.3 Concerted Practices	4
2.3 Prevention, Restriction or Distortion of Competition	4
3. Relevant Market	5
4. Adverse Impact on Competition	8
4.1 General Observations	8
4.2 Counter-Factual	9
4.3 Appreciability.....	10
5. Restriction by Object or Effect.....	13
5.1 General Observations	13
5.1.1 Alternative Requirements.....	14
5.1.2 Actual and Potential Competition	15
5.1.3 Horizontal and Vertical Agreements.....	15
5.1.4 Ancillary Restraints.....	18
5.1.5 Collection of Examples of Art 101 para 1 a-e TFEU.....	19
5.2 The Evolution of Restriction of Competition by Object or Effect shown with Examples of ECJ Case Law	19
5.2.1 Société Technique Minière.....	19
5.2.2 Beef Industry	20
5.2.3 T-Mobile Netherlands and Others.....	21
5.2.4 Pierre Fabre	23
5.2.5 Allianz Hungária	25
5.2.6 Cartes bancaires.....	27

5.2.7 Dole Food vs Commission	30
5.2.8 ING Pensii	31
5.2.9 Maxima Latvija	32
5.2.10 Conclusion.....	34
5.3 Restriction by Object.....	35
5.3.1 General Observations	35
5.3.2 Advantages and Disadvantages	36
5.3.3 Finding a Restriction by Object	37
5.3.4 Examples	38
5.4 Restriction by Effect.....	40
5.4.1 General Observations	40
5.4.2 Advantages and Disadvantages	40
5.4.3 Finding a Restriction by Effect	41
5.4.4 Examples	42
5.5 Consequence of Finding a Restriction of Competition by Object or Effect – Art 101 para 2 TFEU	44
5.6 Exception of Art 101 para 3 TFEU – Rule of Reason?.....	45
6. Conclusion.....	46
7. Bibliography.....	49
7.1 Books.....	49
7.2 Commission’s Papers	49
7.3 Cases of the European Court of Justice.....	50
7.4 Cases of the European General Court	52
7.5 Opinion of Advocate General.....	52
7.6 Commission’s Decision.....	52
7.7 Other Sources	52

1. Introduction

The European Competition policy was introduced by the Treaty of Rome in 1957. Its content is found within the Articles 101-109 TFEU¹. This paper deals with a specific part of the system of competition rules: Art 101 TFEU.

Art 101 para 1 TFEU, which followed Art 81 para 1 EC², prohibits “*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 internal market*”.

Its objective is to protect competition and the structure of the market as such, as well as consumer welfare and other competitors.³ It ensures the efficient allocation of resources within the European Union. This is important for the creation and preservation of the open single market.⁴

Many elements in the Article lack a definition. Case law and literature have started to define those elements to make the Article clearer and the application less random.

The core topic of this paper is the “*restriction of competition by object or effect*”. These are quite interesting elements of Art 101 para 1 TFEU, because their relevance and extent of application changed over time with the case law of the ECJ.

In order to understand the structure and requirements of a prohibition given by Art 101 para 1 TFEU it is essential to start with a short overview on the different elements found within it. In the next chapter the ones which are less critical and controversial will be discussed at first. Those more important to the core topic “*restriction by object or effect*” and rather complicated such as the relevant market and the adverse impact on competition are reviewed afterwards.

¹ Treaty on the Functioning of the European Union; Note: the numbers of the Articles have changed, since they were introduced by the Treaty of Rome.

² Treaty establishing the European Community.

³ Whish and Bailey “Competition Law” (8th edn, 2015) p 122.

⁴ Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, para 13.

2. Basic Principles of Art 101 para 1 TFEU

2.1 Undertakings and Associations of Undertakings

Undertaking is a very **broad term**. Any entity, engaged in an economic activity, regardless of its legal status or how it is financed is an undertaking. Profit making is not necessary.⁵ Economic activity is any activity that offers goods and services on the market.⁶

Individuals can also constitute an undertaking, when they are engaged in an economic or commercial activity in their own name. This is for example the case for lawyers that are members of the bar and offer legal services to their clients.⁷

States or state owned entities can also be undertakings unless they are exercising any sovereign power.⁸

An association of undertakings can be any association and does not have to be a specific kind.⁹ It is important that Art 101 para 1 TFEU “*catches all forms of cooperation and of collusion between undertakings, including by means of a collective structure or a common body, such as an association, which are calculated to produce the results which that provision aims to suppress*” to make sure it doesn’t lose its effectiveness.¹⁰

⁵ Bellamy and Child “European Community Law of Competition” (6 edn, 2008), 2-003; *Höfner and Elsnner*, C-41/90, EU:C:1991:1979, para 21.

⁶ *Commission v Italy*, 118/85, EU:C:1987:2599, para 7.

⁷ Bellamy and Child “European Community Law of Competition” (6 edn, 2008), 2-004; *Wouters*, C-309/99, EU:C:2002:98 para 49.

⁸ Bellamy and Child “European Community Law of Competition” (6 edn, 2008), 2-007; *Benedetti v Munari*, 52/76, EU:C:1977:164, p 170.

⁹ Bellamy and Child “European Community Law of Competition” (6 edn, 2008), 2-059.

¹⁰ *MasterCard*, C-382/12 P, EU:C:2014:2201, para 62.

2.2 Agreements, Decisions and Concerted Practices¹¹

2.2.1 Agreements

Agreements are **any contracts** that can be concluded under civil law. They can be formal, informal, written or oral. An agreement does not necessarily have to be legally binding. Also a so-called Gentleman's agreement, which only has moral and factual impact falls under the Article. Further unilateral measures could be prohibited when it is clear on the grounds of the circumstances that the recipient approves upon the action. Although a real mere unilateral measure does not constitute an agreement under Art 101 TFEU. In addition, agreements which are proposed and/or supported by a state party are covered.¹²

2.2.2 Decisions by Associations of Undertakings

This prohibition element is important, because otherwise it would be possible to bypass the provision of Art 101 TFEU, simply by stating it was a decision of an association and the undertakings were not directly involved.¹³

A decision is **any resolution** by an association of undertakings in a decision-making process, which is given by its constitution. It does not have to be binding or legally effective, because that would be another way to bypass the provision.¹⁴ It is enough if it is a recommendation to undertakings when compliance with the decision would have “*an appreciable influence on competition in the market in question.*”¹⁵

¹¹ For simplification the text following will only use the word “*agreement*”, instead of repeating the word order “*agreements, decisions by associations of undertakings and concerted practices*” every time.

¹² Paschke in Bornkamm/Montag/Säcker “Europäisches und Deutsches Wettbewerbsrecht” (2nd edn, C. H. Beck 2015) Art 101 AEUV paras 11-29; Bellamy and Child “European Community Law of Competition” (6 edn, 2008), 2-023 and 2-024; *Van Landewyck*, 209/78, EU:C:1980:248, paras 85-91; Commission's Decision No. C(2001) 3915 (*Interbrew and Alken-Maes*), paras 247 and 248.

¹³ Paschke in Bornkamm/Montag/Säcker “Europäisches und Deutsches Wettbewerbsrecht” (2nd edn, C. H. Beck 2015) Art 101 AEUV para 47.

¹⁴ Paschke in Bornkamm/Montag/Säcker “Europäisches und Deutsches Wettbewerbsrecht” (2nd edn, C. H. Beck 2015) Art 101 AEUV paras 47-55.

¹⁵ *IAZ International Belgium*, 96 to 102, 104, 105, 108 and 110/82, EU:C:1983:310, para 20.

2.2.3 Concerted Practices

Concerted Practices are the **catch-all element**. Therefore, everything that is not covered by an agreement or a decision of an association of undertakings can be a concerted practice. It covers any conscious and wanted co-ordination of the market-behaviour, which has not reached the stage of an agreement yet. It effects competition, because independent decisions of undertakings on the market are prevented.¹⁶

The concerted practice can consist of positive contact between undertakings such as meetings and discussions or it can be co-operation, which contradicts the normal competitive process, such as reducing or removing the uncertainty of the future behaviour of an undertaking on the market. Further, it can be the effect of change of the commercial conduct of the undertakings in question.¹⁷ All those behaviours can constitute a concerted practice, because only like that undertakings cannot avoid the prohibition of Art 101 para 1 TFEU by just changing the form of their practice.¹⁸

Important is that the concerted practice is **subsidiary** to an agreement or a decision by an association of undertakings. Further, the market-behaviour actually has to change. Likelihood of an effect and the consensus of the undertakings are not enough in this case, because there has to be a “*practice*”, which has to be noticeable on the market.¹⁹

An example for a concerted practice is the exchange of business information. Hereby the lack of knowledge is gone and the recipients of the information can act on it.²⁰

2.3 Prevention, Restriction or Distortion of Competition

The Prevention of Competition is the most severe form of the three forbidden forms of influencing competition, because it precludes competition in its entirety. Restriction of

¹⁶ Paschke in Bornkamm/Montag/Säcker “Europäisches und Deutsches Wettbewerbsrecht” (2nd edn, C. H. Beck 2015) Art 101 AEUV paras 58-59; *ICI v Commission*, 48/69, EU:C:1972:70, para 64.

¹⁷ Bellamy and Child “European Community Law of Competition” (6 edn, 2008), 2-045.

¹⁸ *MasterCard*, C-382/12 P, EU:C:2014:2201, para 63.

¹⁹ Paschke in Bornkamm/Montag/Säcker “Europäisches und Deutsches Wettbewerbsrecht” (2nd edn, C. H. Beck 2015) Art 101 AEUV paras 59 and 73.

²⁰ Paschke in Bornkamm, Montag and Säcker “Europäisches und Deutsches Wettbewerbsrecht” (2nd edn, C. H. Beck 2015) Art 101 AEUV para 67.

competition is the broadest term, which contains both others. That means that a distortion and a prevention of competition both also restrict it.²¹

The internal market should be protected from any distortion. Both the restriction and the prevention of competition lead also to a distortion. Nevertheless, this element also has a distinct function, when there is no restriction of the freedom of action, but only the restriction of the position of third parties.²²

Those three elements protect competition as such. This means the freedom of action of the competitors and the trade rules, which enable competition. These rules are part of the legal and economic system and they bind everyone participating on the market. They state what competitors should not do in an abstract and universal way.²³

3. Relevant Market

In order to establish the boundaries of competition and the competitive constraints, a definition of the relevant market is needed. It has to be a clear definition to increase transparency.²⁴ Further, the relevant market is also very important for finding whether there is a restriction by object or effect. It is obviously crucial to first define the market, before stating whether there is any influence on it produced by an agreement.

The relevant market consists of two dimensions: the product market and the geographic market. They are equally important and both have to be defined. In the Commission's Notice²⁵ the dimensions are determined as following:

*“A relevant **product market** comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.”*

²¹ Mestmäcker and Schweitzer “Europäisches Wettbewerbsrecht” (3rd edn. 2014), § 11 para 1.

²² Mestmäcker and Schweitzer “Europäisches Wettbewerbsrecht” (3rd edn. 2014), § 11 para 2.

²³ Mestmäcker and Schweitzer “Europäisches Wettbewerbsrecht” (3rd edn. 2014), § 11 para 3.

²⁴ Commission notice on the definition of relevant market for the purposes of Community competition, OJ C372, 9. 12 . 97, para. 2 and 5.

²⁵ Commission notice on the definition of relevant market for the purposes of Community competition law, OJ C372, 9. 12 . 97, para 7 and 8 (emphasis added).

*“The relevant **geographic market** comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.”*

The product market consists of all the products, which constitute a competitive constraint to those products of the parties under investigation. The geographic market deals with the firms, which are present in the same region and can therefore produce a competitive constraint on the undertakings under investigation.²⁶

There is a standard test applied to find the range of the relevant market. It is called the **“Hypothetical Monopolist Test”**, **“SSNIP²⁷-test”** or **“5% test”**. The question that has to be asked during the test is: *“What happens if monopolist increases the price of his products permanently for about 5 %?”* If an undertaking can increase the price profitably, which means that the gain of money due to the price increase is higher than the losses produce by the consumers who are not willing to pay that higher price, the undertaking is a monopolist and those products are the main source of the competitive constraint. If he cannot increase the price profitably, there are other products, which play a role in competition and are part of the market. Those products then have to be added to the test market and the test has to be applied again until the relevant products are all found and the relevant market is established. The smallest number of products possible, which succeed the monopolist test, are the ones that are part of the relevant market, but no more.²⁸

The test is necessary to make sure that all products and undertakings, which pose a competitive constraint onto the parties, are taken into consideration.²⁹ Competitive constraints can be demand substitution, supply substitution or potential competition.³⁰ That means that the possibility to increase the price permanently and profitably depends on the availability of substitute products, which will be bought by the consumer instead of the product in question

²⁶ Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 4-006.

²⁷ Small but Significant Non-transitory Increase in Price.

²⁸ Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 4-005 and 4-008.

²⁹ Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 4-005;

³⁰ Commission notice on the definition of relevant market for the purposes of Community competition law, OJ C372, 9. 12 . 97, para 13.

(demand substitution). Further it depends on the possibility of other suppliers to change their production process and produce the same product in order to give the consumer another product which might be cheaper and similar (supply substitution). The third kind of competitive constraint, the potential competition is not used for defining the relevant market, but plays a role after that.³¹

A party therefore has **market power** when it is able “to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time.”³²

There is a problem with the test, which is called “*the cellophane fallacy*”: It could be that the monopolist is already charging the monopolist price. If the price gets now even higher people might stop buying with this increase of price. The test would now tell us that because the consumers do not purchase the product anymore that there is a high degree of substitutability, but that is not true. This mistake was made by the US Supreme Court in the case of United States v El du Pont de Nemour and Co. The case was about packaging material including cellophane.³³

In order to avoid a mistake like that one must look at the whole situation and evidence helps with that. This could be evidence of substitution in the past, quantitative tests, the views of consumers and competitors, market studies and consumer surveys, the barriers and costs associated with switching demand to potential substitution and different categories of consumer and price discrimination.³⁴ By looking at substitution in the geographic market consideration of transportation costs as well as basic demand characteristics such as national preferences for national brands have to be taken into account. In addition, trade and shipment routes and current geographic patterns of purchase are important.³⁵ Further the market can be

³¹ Commission notice on the definition of relevant market for the purposes of Community competition law, OJ C372, 9. 12 . 97, paras 15-24; Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 4-006.

³² Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, para 25.

³³ Whish and Bailey “Competition Law” (8th edn, 2015) p 32.

³⁴ Whish and Bailey “Competition Law” (8th edn, 2015), p 35 and 36.

³⁵ Whish and Bailey “Competition Law” (8th edn, 2015), p 40-42.

temporal and may vary from season to season. Therefore, it could be that an undertaking has market power only in winter or summer.³⁶

4. Adverse Impact on Competition

4.1 General Observations

Not every contractual agreement is a restriction of competition. There has to be an adverse impact that has to be determined by economic analysis.³⁷

The Commission has to show that there is restriction on competition in the specific case and not just copy and paste her arguments.³⁸

Only agreements, which are likely to have a negative influence on competition, are prohibited. Especially the following elements of the market are important when looking at the impact an agreement has: price, output, product quality, product variety and innovation.³⁹ It is impossible to state whether an agreement is violating Art 101 para 1 TFEU in the abstract. The relevant market has to be established first to make it easier to look at the economic conditions and for being actually able to know if there is really an impact on competition.⁴⁰

In order to find the impact of the agreement one must consider both the effect on inter-brand and intra-brand competition. An example for the former is the competition between suppliers of competing brands and for the latter the competition between distributors of the same brand.⁴¹

³⁶ Whish and Bailey “Competition Law” (8th edn, 2015), p 42.

³⁷ Whish and Bailey “Competition Law” (8th edn, 2015) pp 121 and 122.

³⁸ Whish and Bailey “Competition Law” (8th edn, 2015) p 122; *European Night Services*, T-374/94, T-375/94, T-384/94, T-388/94, EU:T:1998:198, para 206.

³⁹ Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, p 99.

⁴⁰ *Gottrup-Klim*, C-250/92, EU:C:1994:5671, p 5687.

⁴¹ Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, p 99.

4.2 Counter-Factual

To find out whether an agreement is likely to have an adverse effect on competition, establishing a counter-factual is necessary. The counter-factual is not only important for a restriction by effect, but also for a restriction of object.⁴²

It is a comparison between the situation with the agreement in question and the hypothesis of what the situation would be like without the agreement. Therefore, the hypothetical market without the agreement has to be evaluated realistically. The difference of the situations is the impact the agreement has.⁴³

In the case of trying to find out if there is a cartel and what effect it has on the market there are several different approaches:

There is the simple comparison approach where there is an assumption on how high the prices would be without the cartel being established. For this approach, also a comparison with the prices of the same product in another geographic market is possible. The problem with this approach is that it is too simple and weak.⁴⁴

Another approach is an economic one. The advantage is that there a lot more factors can be taken into account, but of course, for that, a lot of data from non-cartel times is needed. This approach identifies the determinants of prices which are absent in a cartel and looks at the difference between prediction and reality. This is far more complicated but it can also be wrong because for example there might have been a cartel, which was not known of before, and data from this time might wrongly be used as data from non-cartel times.⁴⁵

In addition, there is the cost-based approach. Therefore, one has to look at the costs of the undertaking and estimate how much over these costs would be charged when selling the

⁴² Mestmäcker and Schweitzer “Europäisches Wettbewerbsrecht” (3rd edn. 2014), § 11 para 21.

⁴³ Mestmäcker and Schweitzer “Europäisches Wettbewerbsrecht” (3rd edn. 2014), § 11 para 21; *Société Technique Minière*, C-56/65, EU:C:1966:38, p 304.

⁴⁴ Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 17-007 and 17-008.

⁴⁵ Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 17-010 and 17-011.

product without having a cartel. Therefore, the non-cartel price can be “*re-engineered*”. This approach is quite vague and it needs a lot of data.⁴⁶

For each approach, it is essential to do some “*sanity checking*” of the outcome. Therefore, some facts have to be looked at. First, one has to consider whether the outcome can be true and correct. Further the easier it is for others to enter the market the fewer possibilities are there for the cartel to raise prices. This also counts if there is a lot of import.⁴⁷

Therefore, there are many ways to establish a counter-factual. To get to the best and reliable outcome it is necessary to use all the approaches and all the data available. Further, it is important to look at the whole market situation in as much detail as possible. Otherwise, vital things might be missed and the analysis will turn out wrong.

4.3 Appreciability

Appreciability is an **unwritten element** of Art 101 para 1 TFEU. It is important for the restriction by effect. An agreement that constitutes a restriction by object does not need to be appreciable to be prohibited.⁴⁸

An important case where the ECJ mentioned the criterion was the *Völk/Vervaecke* Case. Here the Court decided that there has to be a sufficient degree of possibility that the market can be influenced by an agreement in order to consider it prohibited under Art 101 para 1 TFEU. The case was about an exclusive dealing agreement of washing machines, but the parties were in a very weak position on the market and so their agreement could not influence it at all and the Court stated that this could not be a distortion of competition.⁴⁹

Interestingly this case dealt with a restriction by object and the ECJ stated that because of the insignificant effect the agreement is not prohibited under Art 101 para 1 TFEU. The *Expedia* judgment on the other hand tells us that a restriction by object is already appreciable when it

⁴⁶ Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 17-013.

⁴⁷ Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 17-014.

⁴⁸ Commission’s Guidance on the restriction of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD (2014) 198 final, p 5.

⁴⁹ *Völk vVervaecke*, 5/69, EU:C:1969:295, paras 6-7.

may affect trade between member states.⁵⁰ This is quite a contradiction. The element that the agreement “*may affect trade between member states*” does not have anything to do with the unwritten element of appreciability, because it is explicably required under Art 101 para 1 TFEU. So mentioning this prerequisite of constituting a restriction of competition is not new and irrelevant, because it is already necessary by law. Therefore, it can be presumed that the ECJ overruled parts of the *Völk/Vervaecke* case, when he found that also a restriction of object can be exempted from Art 101 para 1 TFEU when it isn’t appreciable, with the *Expedia* judgment in which he states that a restriction by object is always appreciable when it fulfils all the explicitly stated requirements of the paragraph in question.

Of course, an agreement with a restriction by object makes only sense, if the object is actually to restrict competition appreciably. Therefore, it also might not be necessary to take this element additionally into account, because it is part of the restriction by object.⁵¹

An agreement that is a restriction by effect has to have a minimal impact on trade between member states and on competition. This is called **double appreciability**.⁵²

For guidance when establishing whether or not there is an impact on trade between member states the *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*⁵³ help. Trade between member states is any “*cross-border economic activity*”. This means following the Commission’s opinion that at least two states have to be involved, but it is enough if just a part of one state is affected.⁵⁴ The ECJ decided in the case *Cementelaren v Commission* that even a purely national cartel can influence trade between member states. This is the case because the agreement of the Cement Dealer’s Association in the case was extensive all over the Netherlands and therefore made it harder for producers and sellers from other member states to trade their goods in the Netherlands.⁵⁵ The trade may be affected when there is a sufficient degree of probability that an influence will be given by the agreement. To

⁵⁰ *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, para 37.

⁵¹ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellverbot, para 237; *Brasserie Nationale and Others v Commission*, T-49/02 to T-51/02, paras 140-141.

⁵² Whish and Bailey “Competition Law” (8th edn, 2015), p 148.

⁵³ Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 101.

⁵⁴ Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 101, paras 19-21

⁵⁵ *Vereeniging van Cementshandelaren v Commission*, 8/72, EU:C:1972:977, paras 26-30; similar decision: *Papiers Peints v Commission*, 73/74, EU:C:1975:1492, paras 25-26.

establish this probability, it is necessary to look at the objective facts. Subjective intent is not needed, but might of course be taken into account. Further, it is not necessary that the trade is actually really affected, it is enough that the agreement “*may*” affect it.⁵⁶ About the element of appreciability, the Commission stated in its Guidelines that it is a quantitative one and so there might be no infringement of Art 101 para 1 TFEU if the parties are very weak on the market and can influence the market only marginally with their agreement. This depends of course on the actual case, the market and the parties. The Commission takes the point that there cannot be an appreciable effect if two conditions are met. First, the market share of the parties together does not exceed 5%. Second, in horizontal agreements the annual turnover of the undertakings with the products concerned in the agreement does not exceed 40 million euro and in vertical agreements the annual turnover of the supplier with the products concerned does not exceed 40 million euro. In addition, SMEs are unlikely to influence trade between member states, because they work rather regionally or locally.⁵⁷

For the effect on competition, there exists another Commission’s Notice⁵⁸, which is also called the *De Minimis Notice* and is giving assistance. Competition cannot be appreciably restricted when the market shares of parties that are competitors do not exceed 10% or the market shares of parties that are not competitors do not exceed 15%. Further, the Notice lists some hardcore restrictions, such as price fixing, limitation of output sales and allocation, which do not fall under the exception of appreciability.⁵⁹

For both kinds of appreciability, it is important to establish the relevant market first in order to calculate market shares and turnover in the product market.⁶⁰

In the *Expedia* judgment of the ECJ, he declared that the *De Minimis Notice* is not binding for the national authorities of the member states. Its purpose is to make the Commission’s

⁵⁶ Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 101, paras 23-26.

⁵⁷ Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 101, paras 50-52.

⁵⁸ Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*) OJ 291.

⁵⁹ Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*) OJ 291, paras 8-13.

⁶⁰ Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*) OJ 291, para 12; Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 101, para 55.

decisions more transparent and giving guidance to the authorities of the member states, which can consult the notice if they want to but are not bound by it.⁶¹

In an early ECJ case from 1967 called *Brasserie de Haecht* the Court already stated that it is necessary to search for the effects on trade and for effects on competition. For both not only the subject of the contract, but also the economic, factual and legal context matter. It is not enough to look at an agreement in isolation, because then the whole extent of the influence cannot be seen.⁶²

Further, the ECJ case law also shows that quantity is important when talking about appreciability. In the *Völk/Vervaecke* case, which was already mentioned above, the Court, decided that the parties were in a very weak position on the market and so they were not able to influence it with their agreement. In that case the parties had a market share in producing washing machines in Germany of less than one percent.⁶³ In another case *Miller International*, the undertaking concerned had a market share of more than five percent and the ECJ stated that therefore it has influence of part of the market, which is not insignificant. Therefore, in this case it was an infringement of Art 101 para 1 TFEU. This shows that also the ECJ tries to quantify the market share in order to strengthen and explain his decisions.⁶⁴ It is not a bad way to handle the issue of appreciability. If there are not any concrete numbers involved, the decisions might get vague, intransparent and incomprehensible.

5. Restriction by Object or Effect

5.1 General Observations

The application of the restriction by object or effect under Art 101 para 1 TFEU used to be very controversial. The Commission applied it broadly, so that many more agreements were caught than today. There was a high uncertainty, as well as long procedures and high costs. New agreements had to be notified to the Commission to get a “*negative clearance*” under Art

⁶¹ *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11 EU:C:2012:795, paras 23-31.

⁶² *Brasserie de Haecht v Wilkin*, 23/67, EU:C:1967:408, p 415.

⁶³ *Völk vVervaecke*, 5/69, EU:C:1969:295, p 299.

⁶⁴ *Miller International v Commission*, 19/77, EU:C:1978:132, paras 9-10.

101 para 1 TFEU or an “*individual exemption*” under Art 101 para 3 TFEU. Today the Commission interprets the Art 101 TFEU much more realistic and narrower than before.⁶⁵

5.1.1 Alternative Requirements

The restriction by object or effect are **alternative requirements**. This is already given by the text of the treaty, which uses the word “or”. This means that there has to be either a restriction by object or a restriction by effect in order to have an agreement, which is prohibited by Art 101 para 1 TFEU.⁶⁶ If an agreement has the restriction of competition as its object, an actual effect on competition and the market are not taken into account.⁶⁷ That is the case because the restriction by object is presumed very harmful and likely to have such negative effects.⁶⁸ Therefore, first the actual object of the agreement and the economic circumstances have to be looked at. Only if here is no sufficient restriction of competition found, the actual effects of the agreement are investigated. Those effects are given when competition is actually restricted, distorted or prevented.⁶⁹

If other language versions demand object and effect as cumulative requirements the ECJ finds that also these versions have to be interpreted in a way that the requirements are alternative ones.⁷⁰

The differentiation between restriction by object and restriction by effect is important, because some collusion between undertakings are just so harmful to competition and the Common Market that they can be banned without the Commission having to prove a concrete effect on competition and trade.⁷¹

This broad wording is necessary because otherwise there would be no prohibition of the agreement if it does not have as its object the restriction of competition. It is important though

⁶⁵ Whish and Bailey “Competition Law” (8th edn, 2015) pp 120-121.

⁶⁶ See for example: *Société Technique Minière*, C-56/65, EU:C:1966:38, p 303.

⁶⁷ *BNIC/CLAIR*, 123/83; EU:C:1985:33, para 22.

⁶⁸ Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, para 21.

⁶⁹ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellrecht, para 218.

⁷⁰ *Ferriere Nord*, C-219/95, EU:C:1997:4430, paras 12-16.

⁷¹ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellrecht, para 219; *Beef Industry*, C-209/07, EU:C:2008:643, para 17, *Allianz Hungária*, C-32/11, EU:C:2013:160, para 35; *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, para 29, *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, para 36.

to define both kinds of restrictions carefully, because there is a different standard of evidence given. In case that there is a restriction by object, no effect has to be proven.⁷² Therefore, the restriction by object has to be used restrictively because there would not be any legal certainty if the European Institutions could declare anything a restriction by object.

5.1.2 Actual and Potential Competition

Both actual and potential competition is protected by Art 101 para 1 TFEU. This means that also market entry and therefore some kind of freedom of action are secured. **Actual** competition is competition that is going on right now between undertakings, which are active within the same relevant market. **Potential** competition on the other hand is the possibility that an undertaking would bring up the necessary costs and enter the market within short time. This has to be a realistic possibility and not purely theoretical.⁷³

5.1.3 Horizontal and Vertical Agreements

A restriction of competition by object or effect can be by either a horizontal agreement or a **vertical agreement**.⁷⁴ Horizontal is an agreement that is concluded by competitors. It is vertical when it is between non-competitors. The ECJ stated already very early in 1966 in his *Consten and Grundig* judgment that the text of Art 101 para 1 TFEU⁷⁵ “refers in a general way to all agreements which distort competition within the Common Market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels. In principle, no distinction can be made where the Treaty does not make any distinction.”⁷⁶ Ever since then, there cannot be any doubt that

⁷² Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellrecht, para 220; *Consten and Grundig v Commission*, 56 and 58/64, EU:C:1966:301, p 342; *Beef Industry*, C-209/07, EU:C:2008:643, para 18.

⁷³ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellverbot, paras 163 and 164; Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, 14.1.2011, para 10.

⁷⁴ *Société Technique Minière*, C-56/65, EU:C:1966:38, pp 302-303.

⁷⁵ In that time it was still Art 85 para 1.

⁷⁶ *Consten and Grundig v Commission*, 56 and 58/64, EU:C:1966:301, p 339.

vertical agreements can also restrict competition by object or effect and do not only fall under Art 102 TFEU where the abuse of power element is needed.⁷⁷

Horizontal agreements might lead to economic benefits, because undertakings can combine complementary activities, skills and assets. Further, they can “*share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster*”.⁷⁸

Still they are those contracts that are usually more likely to be harmful for competition. The typical concern is that the parties are able to raise the prices and/or are losing their rivalry. Agreements like this are concluded easier when there is a flow of information between the undertakings. In addition, it gets harder for authorities to detect a prohibited agreement when the undertakings have a lot of contact and chances to collude with each other.⁷⁹

It is true that vertical agreements are often less harmful than horizontal ones. Often it brings advantages and efficiencies even for the consumer. Vertical agreements usually only arise if there is not enough competition in one of the trade levels and either the supplier or the buyer has some market power⁸⁰.⁸¹ This is the case when the supplier or the buyer do not have any better option, depend on the contract and are therefore in the weaker position. Therefore, the problem is that when one party is stronger than the other it can force the other one to an agreement that it does not really want. This is the case for example with resale price maintenance, quantity forcing or exclusive dealership.⁸²

A good example for a vertical agreement, which is good for the supplier, reseller and the consumer and still can be forbidden by Art 101 para 1 TFEU is the *Delimitis vs Henninger Bräu AG* judgment. The case is about beer supplier contracts between the supplier and the reseller. The two parties are not on the same level of the economic process and therefore the agreement constitutes a vertical contract. The advantage for the supplier is that he has a

⁷⁷ *Consten and Grundig v Commission*, 56 and 58/64, EU:C:1966:301, p 339.

⁷⁸ Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, 14.1.2011, para 2.

⁷⁹ Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010), 5-056 and 5-057.

⁸⁰ For the definition of market power see above.

⁸¹ Commission Guidelines on Vertical Restraints, SEC (2010) 411 final, para 6.

⁸² Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010), 5-034 and 5-035.

guaranty that he can sell his beer to the reseller who is not allowed to buy any other beer. Therefore, he can by working together with the reseller plan the sale of his goods over a certain period of time. The reseller has the advantage to get a good entry in the market under favorable conditions. In addition, he has the guaranty to be supplied with the goods he needs for his business. Further, by working in the same interest with the supplier, the quality of the goods is high and the consumers will be happy about good conditions for them. The ECJ stated that the agreement does not restrict competition by object because it has quite other purposes and objectives. Therefore, there might be a restriction by effect. Therefore, it is necessary to look at the economic and legal context and take into consideration that there are other beer supply agreements, which cumulative restrict competition by effect. In order to do that the court had to establish the relevant market first. In this case, the product market was the one of the distribution of beers for the sale and consumption of drinks. The relevant geographic market was national, because most of the beer supply contracts were concluded only nationally. Now the ECJ suggested that in such a situation one has to look at the nature and extent of the agreements and further at the possibilities for competitors to enter the market. That all depends on how many contracts exist and how much ground they cover and on the degree of saturation of the market and the consumer happiness and fidelity to the existing brands.⁸³ The decision and its explanation are very clear and the court explains its steps very well. It shows how important the relevant market is and that the agreement never can be looked at just in the abstract. Further it helps understanding that even though for supplier, reseller and consumer the agreement might be good, but that Art 101 para 1 TFEU doesn't only protect the consumer, but competition as such.

Altogether, bot horizontal and vertical agreements are covered by Art 101 para 1 TFEU, because it does not make a distinction between them. Further, even if vertical agreements are usually less harmful than horizontal ones, they can also restrict competition, even when giving benefits to the parties and the consumers.

⁸³ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 10-27.

5.1.4 Ancillary Restraints

Not every contractual restriction is necessarily also a restriction of competition. An agreement that tries to achieve a legitimate purpose and the restriction is for that purpose vital a contractual restriction might not fall under the prohibition of Art 101 para 1 TFEU. For this matter, the objectively necessary restriction also has to be proportionate and directly related to the purpose.⁸⁴

This is only the case when it is impossible to leave out the ancillary and restrictive part of the contract without endangering the agreement and its purpose. Therefore, it has to be impossible to carry out the agreement without the ancillary clause. It is not enough that the agreement would be more difficult to implement and less profitable without the restriction, because in this case the restriction is not objectively necessary.⁸⁵

*Whish and Bailey*⁸⁶ divide ancillary restraints into two groups. They call the above-discussed commercial ancillarity and introduce a second kind: the regulatory ancillarity. This is an ancillarity used to ensure a regulatory outcome. An example for this is the *Wouters*⁸⁷ judgment.

The *Wouters* case was about a regulatory decision that prohibited lawyers to conduct a partnership with non-lawyers in this case with accountants.⁸⁸ After declaring that lawyers can be undertakings and that the bar of the Netherlands, which rendered the problematic decision, therefore is an association of undertakings, the ECJ looked at the specific situation in the Netherlands.⁸⁹ There would be an advantage when lawyers and accountants could work together as partners, probably even shown by lower costs. Not allowing them into a partnership deprives of production and innovation.⁹⁰ After seeing that, the ECJ weighed the non-competition objectives of the decision against the restriction of competition. The objective was to make sure that lawyers can stay in competition because of the high

⁸⁴ Whish and Bailey “Competition Law” (8th edn, 2015), pp 136-137.

⁸⁵ Whish and Bailey “Competition Law” (8th edn, 2015), p 137; *MasterCard*, C-382/12 P, EU:C:2014:2201, paras 89-91.

⁸⁶ Whish and Bailey “Competition Law” (8th edn, 2015), pp 138-141.

⁸⁷ *Wouters*, C-309/99, EU:C:2002:98.

⁸⁸ *Wouters*, C-309/99, EU:C:2002:98, para 2.

⁸⁹ *Wouters*, C-309/99, EU:C:2002:98, paras 44-71.

⁹⁰ *Wouters*, C-309/99, EU:C:2002:98, paras 87-90.

concentration of accountants in the Netherlands and in order to keep up to their professional duties as lawyers.⁹¹ The court stated that not every agreement, which restricts the freedom of action necessarily, is forbidden under Art 101 para 1 TFEU. The ancillary effect of restricting competition is lawful because it was necessary to fulfill the legitimate purpose of ensuring a flawless legal service. In order to reach that objective the means were proportionate.⁹² Therefore, “reasonable” regulatory rules are not within the scope of Art 101 para 1 TFEU.⁹³

5.1.5 Collection of Examples of Art 101 para 1 a-e TFEU⁹⁴

The letters a-e provide examples of kinds of agreements, which might fall under the prohibition of Art 101 para 1 TFEU. This list should not be understood as a list of forbidden agreements, but as a list of dangerous ones, which are likely to be prohibited under competition law. It also has to be noted that it is not necessary that all of those agreements are restrictions by object. They might also be a restriction by effect or under the circumstances that they do not fulfill all the requirements of Art 101 para 1 TFEU they might not even be prohibited.⁹⁵

5.2 The Evolution of Restriction of Competition by Object or Effect shown with Examples of ECJ Case Law

5.2.1 *Société Technique Minière*⁹⁶

This case from 1966 was about an exclusive dealing agreement of washing machines from Germany in France.⁹⁷ According to the ECJ, such an agreement is not automatically

⁹¹ *Wouters*, C-309/99, EU:C:2002:98, paras 91-105.

⁹² *Wouters*, C-309/99, EU:C:2002:98, paras 97 and 109.

⁹³ Whish and Bailey “Competition Law” (8th edn, 2015), p 139.

⁹⁴ (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.“

⁹⁵ *Schröter and Voet van Vormizee* in *Schröter, Jakob, Klotz and Mederer “Europäisches Wettbewerbsrecht”* (2nd edn, 2014), chapter 2, para 132; *Pedro IV Servicios*, C-260/07, EU:C:2009:215, para 82.

⁹⁶ *Société Technique Minière*, C-56/65, EU:C:1966:38.

prohibited under Art 101 para 1 TFEU but has to fulfill the conditions set out in it.⁹⁸ Those elements were listed and examined by the court. One of them is the restriction of competition by object or effect. The court states that these are alternative requirements and therefore only if the analysis “*does not reveal the effect on competition to be sufficiently deleterious*”, which would be the restriction by object, it has to be shown that there is an appreciable effect on competition. Therefore, the agreement had to be looked at in the actual context and not only in an isolated nature.⁹⁹

With this judgment, the ECJ started to define those two elements. A restriction by object was just something very bad, meaning “*deleterious*”. For the restriction by effect an actual influence and harm to competition has to be proven. The statements were still quite vague and short.

5.2.2 Beef Industry¹⁰⁰

Ireland had a high overcapacity in the processing sector of the beef industry. The need of reducing the number of processors was seen. Therefore, the Beef Industry Development Society Ltd (BIDS) was founded. Some of the competitors would have to leave the market. The processors staying active in the market should compensate those leaving it.¹⁰¹

In this case, the ECJ stated that if the object of an agreement is harmful enough, again he used the words “*sufficiently deleterious*”, there is no need to prove an actual effect. To examine the agreement, all circumstances have to be taken into account. Important is the wording of the agreement and the objectives it has. Subjective intention on the other hand is not needed and the fact that a crisis shall be overcome by it is irrelevant.¹⁰²

⁹⁷ *Société Technique Minière*, C-56/65, EU:C:1966:38, p 237.

⁹⁸ *Société Technique Minière*, C-56/65, EU:C:1966:38, p 248.

⁹⁹ *Société Technique Minière*, C-56/65, EU:C:1966:38, pp 249f.

¹⁰⁰ *Beef Industry*, C-209/07, EU:C:2008:643.

¹⁰¹ *Beef Industry*, C-209/07, EU:C:2008:643, paras 3-7.

¹⁰² *Beef Industry*, C-209/07, EU:C:2008:643, paras 15, 16 and 21.

The court continues following his AG that the list in letters from a-e of Art 101 para 1 TFEU is not exhaustive, which means that also other agreements than the named ones can be a restriction by object.¹⁰³

The court acknowledges that there are other objects pursued with the agreement, than the ones that restrict competition, but it takes away the freedom of the operators to determine their policies on their own, which is against the natural way of development of the market shares and it tries to make it harder for new competitors to enter the market. Therefore, it is a restriction by object and is prohibited under Art 101 para 1 TFEU.¹⁰⁴

In this judgment, the ECJ explains his decision a lot longer and in more detail than in the *Société Technique Minère* judgment discussed above. He discusses all the submissions of the parties and explains why he comes to the decision. Again, he emphasizes that the restriction by object is something especially harmful to competition.

5.2.3 T-Mobile Netherlands and Others¹⁰⁵

This preliminary ruling procedure of the ECJ was about information exchange in the Netherland's mobile telephone network. There were only five mobile telecommunication operators active at that time in the relevant market. There was a meeting between them, where they discussed, among other things, the reduction of standard dealer remuneration. During that meeting, also confidential information was exchanged.¹⁰⁶ This is problematic for competition because normally when the dealer remuneration is reduced, it might be that the dealer starts dealing for the competitors. This is a risk of normal competition, which the undertakings in this case wanted to avoid.¹⁰⁷

¹⁰³ *Beef Industry*, C-209/07, EU:C:2008:643, para 23.

¹⁰⁴ *Beef Industry*, C-209/07, EU:C:2008:643, paras 31-38.

¹⁰⁵ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343.

¹⁰⁶ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paras 9-12.

¹⁰⁷ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:110, opinion of the AG Kokott, para 70.

This information exchange constitutes a concerted practice, because it is a kind of cooperation between undertakings, which does not constitute an agreement, but is a practical collaboration.¹⁰⁸

In order to find out if the agreement restricts competition there first has to be established whether it has as its object the restriction of competition and only if it does not, whether it has as its effect the restriction of competition.¹⁰⁹

To be a restriction by object it has to be harmful by its very nature to the proper functioning of competition. Therefore, it is enough that the agreement has the potential to have a negative effect on competition in the concrete legal and economic context. The actual effect is in this case only important for the evaluation on how high the damages and fines are going to be.¹¹⁰

The AG Kokott made a great comparison for this matter. She compares the restriction of competition by object to the risk offences (Gefährungsdelikte) in criminal law: Driving under alcohol or drug influence is forbidden also if no accident is caused. The same principle is used when undertakings are endangering competition: They can be fined even if no one was actually harmed and no effect has occurred.¹¹¹

The exchange of information is a concerted practice because of the coordination and collaboration by the undertakings. The new won information sets aside the uncertainty of the operation in the market. For competition, it is essential that each competitor can choose the policy, he wants to conduct on the market. This is restricted through the exchange of confidential information because it influences the actions on the market of the collaborating undertakings. Especially on a highly concentrated oligopolistic market, like the Netherland's mobile telephone market at that time, the exchange of information is very likely to influence the competitors and therefore appreciably effect competition.¹¹²

The ECJ follows the opinion of AG Kokott when finding that it is of no importance that the consumer welfare is not being impaired, because Art 101 para 1 TFEU does not state that it

¹⁰⁸ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, para 26.

¹⁰⁹ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, para 28.

¹¹⁰ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paras 29 and 31.

¹¹¹ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:110, opinion of AG Kokott, para 47.

¹¹² *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paras 32-35.

protects only the consumer or individual competitors. The competition law is protecting competition as such and the structure of the market. This means that a restriction of competition can even occur when the consumer actually profits from a forbidden agreement. Of course there is an indirect protection of consumers and competitors because most of the time when competition is harmed, third parties do not profit from that.¹¹³

The ECJ was very strict with his conclusion to this judgment: “*An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.*”¹¹⁴

AG Kokott did point out in her opinion that not every exchange of information is a restriction by object.¹¹⁵ This was decided in the case *Asnef-Equifax*, which was about a system that gathered information for credit institution about potential borrowers. The clear objective of the system was to find out how the chances of repayment are. This was found a legitimate object and a restriction by object was denied by the ECJ.¹¹⁶

If looking only at the sentence cited the paragraph above, one must get, in my view, to a different solution, which might be wrong. Of course, there is a difference between the two cases, but also the exchange of creditability information about potential borrowers is capable of removing uncertainties. Therefore, this conclusion of the ECJ is too broad, making more agreements a restriction by object than it should.

5.2.4 Pierre Fabre¹¹⁷

The French cosmetic firm Pierre Fabre Dermo-Cosmétique was producing and selling cosmetics and personal care products. In their distribution contracts they laid down the rule that the products can only be sold by pharmacists and therefore not on the Internet, which was found a restriction by object of Art 101 para 1 TFEU by the French Competition Authority.

¹¹³ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paras 36-39; *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:110, opinion of the AG Kokott, para 58.

¹¹⁴ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, para 43.

¹¹⁵ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:110, opinion of the AG Kokott, para 37.

¹¹⁶ *Asnef-Equifax*, C-238/05, EU:C:2006:734, paras 46-48.

¹¹⁷ *Pierre Fabre*, C-439/09, EU:C:2011:649.

The court of appeal in Paris then referred a question to the ECJ in a preliminary ruling procedure.¹¹⁸

A selective distribution system that forbids any sales on the Internet restricts competition, because consumers might be outside the range of the stores and they might want to buy the products on the Internet.¹¹⁹

Selective distribution systems always affect competition. If a legitimate reason is given for such a restriction such as “*maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price.*”¹²⁰ This means for justification of a selective distribution system a legitimate objective and goal is necessary.¹²¹

Further, it is vital for an exception that the resellers are chosen because of objective criteria and because of qualities, which are used on all of them in the same way. Pierre Fabre fulfills this requirement.¹²²

The last element is proportionality. This means that the restriction of competition compared to the legitimate objective must not be unproportioned. In favor of the freedom of movement there has to be said that the necessity of the personal advice of the consumer and the protection from wrong use of the products cannot be classified higher.¹²³

This judgment states that every selective distribution system with only a very narrow exception is a restriction by object. This is a declaration that goes too far in my opinion, because the effect of the contractual clause of this judgment is that the products cannot be sold on the Internet does not necessarily constitute a restriction by object, which is harmful by its very nature. It might be that the restriction in the case is just an ancillary constraint, which

¹¹⁸ *Pierre Fabre*, C-439/09, EU:C:2011:649, paras 9-31.

¹¹⁹ *Pierre Fabre*, C-439/09, EU:C:2011:649, para 54.

¹²⁰ *AEG-Telefunken v Commission*, 107/82, EU:C:1983:1351, para 33.

¹²¹ *Pierre Fabre*, C-439/09, EU:C:2011:649, para 40.

¹²² *Pierre Fabre*, C-439/09, EU:C:2011:649, paras 41 and 43.

¹²³ *Pierre Fabre*, C-439/09, EU:C:2011:649, para 44.

has to be part of the agreement, because otherwise the quality and the consumer protection cannot be obtained.

5.2.5 Allianz Hungária¹²⁴

Insurance companies contracted with car repairers in order to fix the cost of the hourly work for the vehicles insured by the companies. This was done to make sure that the car repairers could start working on the cars right away and would not have to wait and negotiate with the insurance first. This hourly rate depended on the number of the insurance contracts the car repairers sold to customers for the insurance in question as an insurance broker.¹²⁵

In the preliminary ruling procedure, the ECJ first reminds again that there has to be a prevention, restriction or distortion of competition in order to fulfill Art 101 para 1 TFEU. Further he points out that object and effect are alternative requirements, because of the conjunction “or”. Then the court goes on stating his basics about restrictions by object or effect, citing his case law.¹²⁶

The problem with the agreements is that the hourly rate the car repairer gets for repairing a car for the insurance company directly relates to the number of insurance contracts he sold in the name of the insurance company. An agreement like this can be a restriction of competition in two relevant markets: the market of car insurances and the market of car repairs.¹²⁷

Although it is a vertical agreement, it can be a restriction of competition. Vertical agreements are usually less harmful in their nature than horizontal agreements, but they can also have a very restrictive potential. Therefore, also a vertical agreement between two not competing undertakings can be a restriction of competition.¹²⁸

¹²⁴ *Allianz Hungária*, C-32/11, EU:C:2013:160.

¹²⁵ *Allianz Hungária*, C-32/11, EU:C:2013:160, paras 6-16.

¹²⁶ *Allianz Hungária*, C-32/11, EU:C:2013:160, paras 31-38.

¹²⁷ *Allianz Hungária*, C-32/11, EU:C:2013:160, paras 39-42.

¹²⁸ *Allianz Hungária*, C-32/11, EU:C:2013:160, para 43.

The objective of the agreements for the insurances is the stabilization and expansion of their market shares and for the car repairers it is to increase their profit.¹²⁹

The question the ECJ asked was whether the agreements are sufficient harmful to be declared a restriction by object. This might be that case, because under Hungarian law the insurance brokers have to be independent from the insurance companies. Only then, they can sell their clients the best insurance for them and not only the ones where the brokers profit from the most.¹³⁰

Further, there is a restriction by object in the case when in the economic context the competition in one of the markets is probably restricted or eliminated. To examine this question the national court has to look at the market structure, the existence of alternative ways of distribution and the market power of the undertakings.¹³¹

Also the fact that an association of the car repairers was giving recommended prices for such agreements might be a restriction of competition by object when the undertakings confirmed those decision by concluding contracts with the organization.¹³²

Reading through the decision gives the feeling that the ECJ wanted this case to be a restriction by object. All the phrases at the beginning¹³³ were just the standard wording that he uses in all the Art 101 para 1 TFEU cases. The objective of the agreements to stabilize or expand the market share of the insurance companies is in my view a legitimate one that does not have to constitute a restriction by object. Every undertaking wants to achieve this and competition is still given by the insurance companies in order to give out the best prices to the car repairers to get them to sell their insurance contracts to their clients.

It is against national Hungarian law that the insurance broker is dependent on the insurance companies. So in case that the broker receives a bonus when selling the contract and maybe doing so in his own best interest and not in the client's is against the law. However, why should this constitute a restriction of competition by object under EU competition law?

¹²⁹ *Allianz Hungária*, C-32/11, EU:C:2013:160, para 44.

¹³⁰ *Allianz Hungária*, C-32/11, EU:C:2013:160, paras 46 and 47.

¹³¹ *Allianz Hungária*, C-32/11, EU:C:2013:160, para 48.

¹³² *Allianz Hungária*, C-32/11, EU:C:2013:160, paras 49 and 50.

¹³³ *Allianz Hungária*, C-32/11, EU:C:2013:160, paras 31-38.

Moreover, when having to check the actual problem with this issue and the influence on the market – is this not a restriction by effect?

The whole judgment feels like the ECJ is examining a restriction by effect, but really wants it to be a restriction by object in the end. One of the best examples for that is para 48 of the judgment:

“Furthermore, those agreements would also amount to a restriction of competition by object in the event that the referring court found that it is likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements. In order to determine the likelihood of such a result, that court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned.”

This is more than just looking whether the agreement that has as its objective the restriction of competition has the potential of restricting competition. It is proving an actual effect, which is necessary, because the drastic harmful nature is not given in this case.

Also *Whish and Bailey*¹³⁴ state that in their opinion the restriction by object is far from obvious and that in this case the restriction is interpreted broadly and not narrowly.

5.2.6 Cartes bancaires¹³⁵

This case is an appeal against a judgment of the General Court. It is about an interest grouping of banks that introduced a payment card system, which ensured interoperability of the bank cards issued by the members. With one of the cards, the clients can pay with the cards at each trader’s station that any of the member banks has recruited and can make withdrawals at the automatic teller machines of any of the banks in the grouping.¹³⁶

¹³⁴ Whish and Bailey “Competition Law” (8th edn, 2015), p 131.

¹³⁵ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204.

¹³⁶ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, paras 1 and 3.

There were banks that issued a lot more cards and acquired a lot less than others. They had a good income because clients pay for the cards they receive from those banks. The interest grouping introduced a fee for those banks that issued a lot and had only few acquiring activities in order to make sure that those would not profit unfairly from the others. The money was distributed between those banks that had high acquiring activities.¹³⁷

Further a higher membership fee was introduced which contained a fixed sum and a fee per active credit card issued in the first three years.¹³⁸

In addition, a dormant member wake-up fee per card issued was started for members that were not very active before these new measures.¹³⁹

The Commission found that this was a restriction of competition by object and effect and an infringement of Art 101 para 1 TFEU. It stated that the relevant market was the market for the issue of payment cards in France and the measures were a decision by an association of undertakings. In addition, she stated that Art 101 para 3 TFEU was not applicable.¹⁴⁰

After the General Court had dismissed the case in its entirety, the case came in front of the ECJ.¹⁴¹ The ECJ was very discontent with the work done by the General Court. This is shown by the criticism throughout the whole judgment.

First, the court reminds that some agreements “*reveal a sufficient degree of harm to competition*” so that proving an actual effect is not necessary. Those types of coordination are “*by their very nature*” harmful to the functioning of competition. They are “*so likely to have negative effects, in particular on the price, quantity or quality of the goods and services*” that it can be called a restriction by object. Here it is the first time he points out that it is clear through experience that those agreements lead “*to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular of consumers.*”¹⁴²

¹³⁷ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, para 4.

¹³⁸ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, para 4.

¹³⁹ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, para 4.

¹⁴⁰ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, para 8.

¹⁴¹ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, para 12.

¹⁴² *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, paras 49-51.

Only if the analysis of the agreement does not show that there is such a danger to competition, the effect on competition meaning that it has been prevented, restricted or distorted has to be proven.¹⁴³

Further, the ECJ points out that the restriction by object has to be interpreted with caution and narrowly, because here the Commission does not have to prove the effects and it has to be prevented that the obligation to prove the effect is getting ineffective.¹⁴⁴

The court criticizes the General Court because it did not show where the sufficient degree of harm actually lies. It just pointed out that even though there was a legitimate purpose in the agreement, which is the combating of free-riding, it does not preclude the possibility of there also being a restriction by object. However, the GC failed to show this restrictive object.¹⁴⁵

In addition, a problematic point was the establishing of the relevant market. The GC followed the Commission in the thinking that the relevant market was the market of issuing bank cards in France. The GC missed hereby that the interest grouping is active on the whole payment systems market in France and both elements the issuing and the acquiring are equally important for the system to work. Therefore, the relevant market has to be the market of issuing bank cards and acquiring traders in France.¹⁴⁶

In addition, the GC made the mistake of finding that the agreement is similar to the one in the *Beef Industry Case*¹⁴⁷. In this case there was the real and clear objective to reduce overcapacity and for that purpose make undertakings withdraw from the market. The *Cartes Bancaires* agreement is different, because the purpose here is not the reduction of an overcapacity, but to establish a balance between the issuing and acquiring activities of the banks in order to prevent free-riding within the system.¹⁴⁸

In addition, the GC stated that the measures of the interest grouping might hinder new competitors to enter the market, because of the entrance fee and the additional sums having to

¹⁴³ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, para 52.

¹⁴⁴ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, para 58.

¹⁴⁵ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, paras 69 and 70.

¹⁴⁶ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, paras 72-77.

¹⁴⁷ See above.

¹⁴⁸ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, paras 83-88.

be paid for each issued bank card. For other competitors who cannot afford paying those fees this might lead to the exclusion of them from the market. The ECJ following the opinion of the AG stated that this is true, but this has to be examined when looking into the question if the agreement constitutes a restriction by effect and not a restriction by object.¹⁴⁹

After stating that the work was “*a general failure of analysis by the General Court*” and that “*the General Court failed to fulfil its obligation to observe the standard of review required under the case-law*” the ECJ referred the case back to the GC for it to analyze whether the agreement constitutes a restriction by effect.¹⁵⁰

The ECJ was very hard to the GC in this judgment. This was probably to point out how important it is not to mix up restriction by object and effect and to remind that it might get dangerous when the Commission can find agreements just without any explanation as a restriction by object because then she never has to prove an actual effect on competition and trade.

Also interesting is the explanation given in this judgment in paragraph 51, that when finding a restriction by object no effect has to be proven, because experience shows us already that such agreements are harmful to competition and the market.

Altogether, it is a very new and favorable judgment, which reminds again not to handle the restriction by object too easily.

5.2.7 Dole Food vs Commission¹⁵¹

Several companies that traded with bananas were fined by the Commission, because of forbidden exchange of information that constituted a concerted practice under Art 101 para 1 TFEU. The companies met with each other before determining their prices and therefore the price was dependant on the information given to each other, because such information is necessarily taken into account.¹⁵²

¹⁴⁹ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, paras 80 and 81.

¹⁵⁰ *Groupement des cartes bancaires*, C-67/13 P, EU:C:2014:2204, paras 89, 91 and 98.

¹⁵¹ *Dole Food vs Commission*, C-286/13P, EU:C:2015:184.

¹⁵² *Dole Food vs Commission*, C-286/13P, EU:C:2015:184, paras 1-20.

The General Court and the ECJ followed the decision of the Commission. In the beginning, the ECJ stated and explained his “basics” about the differentiation between restriction by object and effect, citing previous case law.¹⁵³

The ECJ ruled similar as in the *T-Mobile*¹⁵⁴ case when he stated that an economic operator has to determine his policy on the market himself and independently. It is allowed that he adapts his actions when he sees the behaviour of his competitors, but any direct or indirect contact between them that may influence the conditions on the market is forbidden. The exchange of information reduces uncertainty of the future behaviour of the competitors on the relevant market “*as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market*” and therefore restricts competition by object.¹⁵⁵

An influence on consumer prices by the practice is not needed, because the competition rules do not only protect the consumer, but the structure of the market and competition as such. It can be presumed, that undertakings that came together and exchanged information and afterwards stayed active will use this information when acting in the relevant market. Therefore, a restriction of competition by object was given.¹⁵⁶

In this case, the ECJ did not find anything new in regards to the restriction of competition by object or effect but confirmed his previous case law, especially the cases *Cartes Bancaires* and *T-Mobile*, discussed above. So with this case it becomes clear that the ECJ found his way to look at such restriction cases and will carry on doing this in a strict but clear way.

5.2.8 ING Pensii¹⁵⁷

This preliminary ruling case coming from Rumania was about the sharing of clients on the obligatory pension fund market. Several companies managing pension funds agreed in bilateral agreements that clients who signed up for two pension funds at the same time would

¹⁵³ *Dole Food vs Commission*, C-286/13P, EU:C:2015:184, paras 111-118.

¹⁵⁴ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paras 32, 33, 35 and 41.

¹⁵⁵ *Dole Food vs Commission*, C-286/13P, EU:C:2015:184, paras 119-122.

¹⁵⁶ *Dole Food vs Commission*, C-286/13P, EU:C:2015:184, paras 123, 125 and 127.

¹⁵⁷ *ING Pensii*, C-172/14, EU:C:2015:484.

be shared equally between those two pension funds in question. This is against national Rumanian law.¹⁵⁸

The ECJ examined and affirmed a restriction by object: First, he stated again the same standard sentences he always does in a restriction by object or effect case, before getting into details.¹⁵⁹ Agreements that by their very nature have as their object the sharing of clients are dangerous to the functioning of competition. These together with price fixing agreements are the most severe restrictions of competition.¹⁶⁰ The agreement between the pension funds are such agreements. They were concluded with the purpose to strengthen the position of the parties of the agreement on the market. After checking the economic and legal background and the international character of the agreements, the ECJ found that these agreements are a restriction by object and the number of clients actually affected is irrelevant.¹⁶¹

Interestingly the court found the restriction by object, because of the sharing of clients, which had already decided that they wanted the two companies in question. The client sharing happened after the decision making of the clients. In addition, it might appear as a fair mechanism, when persons chose two companies that the companies share them equally. Therefore, this is again a very strict decision by the ECJ.

5.2.9 Maxima Latvija¹⁶²

This case was about Maxima Latvija a Latvian entity doing food retail trade. Therefore, it rent several commercial rooms in shopping centers. In many of those rental contracts a “non-compete” clause was found that gave Maxima Latvija the right to consent to companies wanting to rent other commercial rooms in the shopping centers. The question arose whether this might constitute a restriction by object or effect and the ECJ answered this question in a preliminary ruling procedure.¹⁶³

¹⁵⁸ *ING Pensii*, C-172/14, EU:C:2015:484, paras 16-25.

¹⁵⁹ *ING Pensii*, C-172/14, EU:C:2015:484, paras 28-34.

¹⁶⁰ *ING Pensii*, C-172/14, EU:C:2015:484, para 32.

¹⁶¹ *ING Pensii*, C-172/14, EU:C:2015:484, paras 35-54.

¹⁶² *Maxima Latvija*, C-345/14, EU:C:2015:784.

¹⁶³ *Maxima Latvija*, C-345/14, EU:C:2015:784, paras 4-10.

First, the ECJ explained that even though the case was a purely national one, the law in question was built after Art 101 para 1 TFEU and in order to have common interpretation of those rules there is an interest of the EU given and the ECJ was free to answer the questions referred to him.¹⁶⁴

At the beginning of answering the question whether the clauses constitute a restriction by object, he explained once again the differences and basics of this matter.¹⁶⁵ Then he stated that the restriction by object has to be interpreted narrowly, as he also had before in the *Cartes Bancaires* judgment discussed above.¹⁶⁶

The agreements in question are vertical agreements, because there is no competition between Maxima Latvija and the shopping centers. Nevertheless, as already stated in the *Allianz Hungária* case discussed above, also such agreements can restrict competition by object.¹⁶⁷

In this case, however the ECJ found that there was not enough evidence that those agreements clearly restrict competition, because there is no sufficient degree of harm shown. Therefore, those agreements do not constitute a restriction by object.¹⁶⁸

Then the court examined whether it could be an agreement with restrictive effects. For this, the economic and legal context has to be taken into account and also the cumulative effects of those agreements. The real concrete possibility of a competitor to become active on the relevant market has to be looked at. In addition, economic and regulatory barriers play a role.¹⁶⁹

Further important is the number and the strength of the competitors active in the relevant market, as well as “*the degree of concentration of that market and customer fidelity to existing brands and consumer habits.*”¹⁷⁰

¹⁶⁴ *Maxima Latvija*, C-345/14, EU:C:2015:784, paras 11-14.

¹⁶⁵ *Maxima Latvija*, C-345/14, EU:C:2015:784, paras 16-20.

¹⁶⁶ *Maxima Latvija*, C-345/14, EU:C:2015:784, para 18.

¹⁶⁷ *Maxima Latvija*, C-345/14, EU:C:2015:784, para 21.

¹⁶⁸ *Maxima Latvija*, C-345/14, EU:C:2015:784, paras 22-24.

¹⁶⁹ *Maxima Latvija*, C-345/14, EU:C:2015:784, paras 25-27.

¹⁷⁰ *Maxima Latvija*, C-345/14, EU:C:2015:784, para 28.

A restriction by effect is given if the access to the market is getting harder by all the similar agreements in question. If the agreement in question contributes to this closing-off of the market, it restricts competition.¹⁷¹

This judgment again emphasizes that the restriction by object has to be interpreted restrictively, as the court already explained in the *Cartes Bancaires* case. Further, the case affirmed his case law to the examination on the restriction by effect, which he created in the *Delimitis* case and the *Allianz Hungária* case.

5.2.10 Conclusion

The cases discussed above show the evolution of the case law of Art 101 para 1 TFEU.

In the *Société Technique Minère* case the ECJ first pointed out what “restriction by object or effect” means. Those are alternative requirements and if there is a restriction by object, there is no need to prove an anti-competitive effect.

In the *Beef Industry* case, the ECJ explained in more detail the differences between object and effect, stating that a restriction by object is by its very nature harmful for competition. Whereas for other agreements it is necessary to look at them closer in order to find an anti-competitive effect. In this case, the normal development and freedom of actions on the market were impaired, because some competitors had to leave and it was getting harder to enter the market. Everything was explained and showed in detail by the ECJ.

The *T-Mobile* and the *Pierre Fabre* judgments have a very broad interpretation of the restriction by object. In *T-Mobile*, the ECJ found that every exchange of information that sets aside uncertainty is a restriction by object. In *Pierre Fabre*, the court stated that almost every selective distribution agreement is a restriction by object with only a very narrow exception that has many requirements. Therefore, in those judgments the requirements to find a restriction by object were not really hard to fulfill.

The *Allianz Hungária* judgment is a bad example for an evolution of the restriction by object or effect. It shows better the confusion of the requirements of a restriction by object or effect.

¹⁷¹ *Maxima Latvija*, C-345/14, EU:C:2015:784, paras 28-31.

Again, the court interpreted the requirements for a restriction by object way to broad and just forced the case to be what he probably was not: a restriction by object.

The lesson to draw from the *Cartes Bancaires* judgment is that the kind of agreements that we put in the box that contains all restriction by object cannot be expanded forever. The restriction by object has to be interpreted narrower than before, because there is no need to prove an effect. If within this narrow interpretation no anti-competitive object can be found, an effect has to be given. With this judgment, the ECJ used a more conservative approach.¹⁷²

So here again the ECJ reminds himself on the reason of the distinction between restriction by object or effect. That it is dangerous if everything can be a restriction by object despite a very harmful nature, which also is against the legal certainty and further for a restriction by effect there would be no application area left.

The decisions *Dole Food vs Commission*, *ING Pensii* and *Maxima Latvija* show that the ECJ has created a clear case law. Those judgments affirm older decisions and emphasize the narrow interpretation of the restriction by object and the way the court examines restriction by effect cases. With these cases the legal certainty of the strict case law is improved.

Those judgments show how the ECJ starts at the beginning, defining the differences, then from judgment to judgment going into more detail and evolving the case law. Then during the time, he gets to a quite broad interpretation of the restriction by object until finally mixing both up entirely. In the end, he found his way back to a useful and comprehensible strict case law.

5.3 Restriction by Object

5.3.1 General Observations

A restriction by object has to be, as stated in the case law above, sufficiently harmful to competition. That kind of restriction is always serious, but not always obvious. Therefore, the content and the objective of the agreement have to be looked at as well as the conduct. If by

¹⁷² Whish and Bailey “Competition Law” (8th edn, 2015) p 126.

doing so, sufficient harm to competition is found, there is no need to prove any anti-competitive effect.¹⁷³

Experience shows that those restrictions by object are so harmful that they lead to “*misallocation of resources, because goods and services demanded by customers are not produced.*” Further, it is often coming to a reduction of consumer welfare, because consumers have to pay higher prices than they would on a working market situation.¹⁷⁴ Especially “*the price, quantity or quality of goods or services*” are protected by finding some agreements a restriction by object.¹⁷⁵

5.3.2 Advantages and Disadvantages

An advantage of the restriction by object is that it gives legal certainty. There are some agreements that are known as such harmful restrictions and the undertakings know that they are not allowed to contract in such a way. In that way, it works as a deterrent for them.¹⁷⁶

The legal certainty that when an agreement falls into a certain category it constitutes a restriction by object does not mean that the restriction by object contains a presumption of an anti-competitive effect. Therefore, it is not possible to argue for an undertaking that in the special case, there is no effect on competition.¹⁷⁷ About this topic, also see above the comparison of the restriction by object with drunk driving made by AG Kokott in the *T-Mobile Netherlands and Others* case.

Contrary to the restriction by effect, when looking at the restriction by object it is enough that the agreement has the potential to have negative effects on competition. This means that the specific contract is capable of restricting competition.¹⁷⁸

¹⁷³ Alexander Italianer, “The Object of Effects” (speech 10. December 2014), p 2.

¹⁷⁴ Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, para 21.

¹⁷⁵ Commission’s Guidance on the restriction of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD (2014) 198 final, p 3.

¹⁷⁶ Whish and Bailey “Competition Law” (8th edn, 2015) p. 128.

¹⁷⁷ Alexander Italianer, “The Object of Effects” (speech 10. December 2014), p 6; *General Motors and Opel Netherland vs Commission*, T-368/00, EU:T:2004:275, para 104.

¹⁷⁸ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellrecht, para 221.

This is a huge relief of burden of proof for the Commission, which is why she cannot just use the restriction by object all the time, but has to interpret it narrowly.¹⁷⁹ The positive side is that the restriction by object saves time and costs, the negative side is that the Commission might be tempted to use it too often, because then she does not need to prove an effect.

5.3.3 Finding a Restriction by Object

An agreement constituting a restriction by object limits the freedom of action of the parties and the situation on the market changes.¹⁸⁰ This is the reason, why also the relevant market has to be established.

The agreement has to be examined not isolated, but in the economic and legal context. Therefore, also the nature of the goods and services, as well as the actual conditions and the structure of the relevant market are being looked at.¹⁸¹

Especially important is the wording of the agreement, the content and the objectives pursued by it. In addition, taken into account has to be the behaviour of the parties on the market and the actual conduct.¹⁸² This behaviour is most important when the wording of the agreement is not clear or the text does not contain what the parties actually wanted to agree on. If the parties are only trying to restrict competition, but are incapable of doing so, this does not fall under the prohibition of Art 101 para 1 TFEU.¹⁸³

The subjective ideas of the parties of the agreement are not relevant, only the content, the objectives and purpose of the contract are. A subjective intention is also not needed to establish a restriction by object. In the case, such an intention is given and known about

¹⁷⁹ Whish and Bailey “Competition Law” (8th edn, 2015) p. 128.

¹⁸⁰ Schröter and Voet van Vormizeele in Schröter, Jakob, Klotz and Mederer “Europäisches Wettbewerbsrecht” (2nd edn. 2014), chapter 2, para 121.

¹⁸¹ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellrecht, para 221.

¹⁸² Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, para 22.

¹⁸³ Schröter and Voet van Vormizeele in Schröter, Jakob, Klotz and Mederer “Europäisches Wettbewerbsrecht” (2nd edn. 2014), chapter 2, para 120.

anyways, it can be taken into account by the court and of course, it is an indication for a restriction of competition.¹⁸⁴

Further, other legitimate purposes and aims of the agreement are not relevant when finding a restriction by object.¹⁸⁵ It might be though that the restriction is justified with certain objective means such as health or safety.¹⁸⁶ This was given in the *Meca-Medina* case where the general objective of the agreement was to combat doping, which of course limited the freedom of the athletes and was capable of producing an adverse effect on competition, when athletes were excluded because of doping. Nevertheless, the ECJ decided that this was justified by the legitimate objective of ensuring a competitive sport and a healthy rivalry between competitors.¹⁸⁷

The best way to find out if an agreement contains a restriction by object is to look at other cases of the ECJ and the General Court where an object restriction was given. When the given case is very similar, a restriction by object may be given. Otherwise it might not be, because the restriction by object has to be interpreted narrowly. In addition, one must be careful when there is a legitimate aim or purpose behind the agreement, such as free riding in the *Cartes Bancaires* judgment discussed above.¹⁸⁸

5.3.4 Examples

As we learned from the *Beef Industry* judgment there is no exhaustive list of restrictions by object. Especially is the prohibition not limited to the list of Art 101 para 1 lit a-e.¹⁸⁹

There were several cases where a restriction by object was found:¹⁹⁰

¹⁸⁴ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellrecht, para 222; Mestmäcker and Schweitzer “Europäisches Wettbewerbsrecht” (3rd edn. 2014), § 11 para 36; *General Motors vs Commission*, C-551/03 P, EU:C:2006:229, paras 77-78.

¹⁸⁵ *Beef Industry*, C-209/07, EU:C:2008:643, para 21; *General Motors vs Commission*, C-551/03 P, EU:C:2006:229, para 64.

¹⁸⁶ Commission’s Guidance on the restriction of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD (2014) 198 final, pp 4-5; Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellrecht, para 222; Whish and Bailey “Competition Law” (8th edn, 2015) p 124.

¹⁸⁷ *Meca-Medina v Commission*, C-519/0 P, EU:C:2006:492, paras 43-47.

¹⁸⁸ Alexander Italianer, “The Object of Effects” (speech 10. December 2014), p 13.

¹⁸⁹ Whish and Bailey “Competition Law” (8th edn, 2015), p 129; *Beef Industry*, C-209/07, EU:C:2008:643, para 23.

- Price fixing and exchange of information relating to future prices,¹⁹¹
- Market sharing, quotas, collective exclusive dealing,¹⁹²
- Controlling outlets and export bans.¹⁹³

The Commission tells us, that all the restrictions that are black-listed in her block exemption regulations or hardcore restrictions in her guideline and notices, will be found by her as a restriction by object.¹⁹⁴

Whish and Bailey did invent the “*object box*”, where all restrictions by objects can be found. It is divided into horizontal and vertical agreements:¹⁹⁵

- Horizontal agreements: price fixing, exchange of information that reduces uncertainty about future prices, market sharing, limit output, including the removal of excess capacity, limit sales, collective exclusive dealing and paying competitors to delay the launch of competing products.¹⁹⁶
- Vertical agreements: impose fixed or minimum resale price, impose export bans, selective distribution agreement and certain agreements after scrutiny.¹⁹⁷

However, even when there is an agreement that falls within the scope of the object box, the actual context has to be taken into account, because under special circumstances even then there is no restriction by object given.¹⁹⁸

¹⁹⁰ Whish and Bailey “Competition Law” (8th edn, 2015), pp 129-130; similar in Commission’s Guidance on the restriction of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD (2014) 198 final, p 5.

¹⁹¹ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, para 41; *Dole Food vs Commission*, C-286/13 P, EU:C:2015:184, para 122; *BNIC/CLAIR*, 123/83; EU:C:1985:33, para 22.

¹⁹² *Beef Industry*, C-209/07, EU:C:2008:643; Commission’s Decision No. C(2013) 3803 (Lundbeck).

¹⁹³ *European Night Services*, T-374/94, T-375/94, T-384/94, T-388/94, EU:T:1998:198, *GlaxoSmithKline*, C-501/06, EU:C:2009:610, paras 59-60; *Pierre Fabre*, C-439/09, EU:C:2011:649; *Van Landewyck*, 209-215/78, EU:C:1980:248.

¹⁹⁴ Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, para 23.

¹⁹⁵ Whish and Bailey “Competition Law” (8th edn, 2015), p 132.

¹⁹⁶ Whish and Bailey “Competition Law” (8th edn, 2015), p 132.

¹⁹⁷ Whish and Bailey “Competition Law” (8th edn, 2015), p 132.

¹⁹⁸ Whish and Bailey “Competition Law” (8th edn, 2015), p 133.

5.4 Restriction by Effect

5.4.1 General Observations

If there is no restriction by object given in an agreement the next step is looking for any anti-competitive effects. This is the case mostly when the primary objective is the improving of performance and efficiency of the undertakings.¹⁹⁹ The analysis of the impact of the agreement in question on the actual economic and legal market and competition has to be investigated comprehensively.²⁰⁰

The effect does not have to have already occurred in the market. It is enough that there is a high probability that it will in the close future. This rule helps the authorities to intervene early, not having to wait for harm to happen.²⁰¹

5.4.2 Advantages and Disadvantages

An advantage of the restriction by effect is that each concrete situation is looked at in detail and the decision is a case-to-case judgment, where the actual harm of an agreement has to be shown and proven.²⁰² This is very fair, but also time consuming and expensive.

The “*theory of the bunch*” (Bündeltheorie) helps to give a detailed insight in the real market. It states that all agreements of the same kind in the same legal and economic context have to be looked at together. So even when one agreement by itself is harmless, all of them together may be a restriction of competition and with this theory, they are prohibited.²⁰³

¹⁹⁹ Paschke in Bornkamm/Montag/Säcker “Europäisches und Deutsches Wettbewerbsrecht” (2nd edn, C. H. Beck 2015) Art 101 AEUV, para 173.

²⁰⁰ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellverbot, para 233.

²⁰¹ Schröter and Voet van Vormizeele in Schröter, Jakob, Klotz and Mederer “Europäisches Wettbewerbsrecht” (2nd edn. 2014), chapter 2, para 125.

²⁰² Alexander Italianer, “The Object of Effects” (speech 10. December 2014), p 6.

²⁰³ Mestmäcker and Schweitzer “Europäisches Wettbewerbsrecht” (3rd edn. 2014), § 11 para 58.

5.4.3 Finding a Restriction by Effect

An agreement constitutes a restriction by effect when it actually prevents, restricts or distorts competition.²⁰⁴ Therefore, an extensive analysis of the relevant market is needed.²⁰⁵ Important factors that have to be found out about the relevant market are the number of producers present on the market, the consumer happiness with the existing products and the existence of any intellectual property rights.²⁰⁶ It is unlikely that there is a restriction by effect, when the agreement in question is needed for a market entry, which would not be possible for the undertakings otherwise.²⁰⁷

It already constitutes such a restriction when the position of a third party is affected. This is the case when they are forced to leave the market and when it is getting harder for them to enter the market.²⁰⁸ The prevention of parallel imports, a restricted access to supply or technology, etc. also fall under this category.²⁰⁹ In the *Deere vs Commission* case the exchange of information constituted a restriction by effect, because it reduced the degree of uncertainty of the market behaviors of the undertakings and it restricted other competitors, which are not part of the registry in question.²¹⁰

Another restriction of competition is a negative impact on the consumer. This is for example the case when the quality or quantity gets worse or the price gets too high.²¹¹ Of course, the rules of competition do not only protect the consumer or the other competitors, but also competition as such. This means that a negative impact on the situation of the consumer is not necessary to find a restriction of competition.²¹²

²⁰⁴ See wording of Art 101 para 1 TFEU.

²⁰⁵ Whish and Bailey “Competition Law” (8th edn, 2015), p 133.

²⁰⁶ Bellamy and Child “European Union Law of Competition“ (7th edn, 2013), para 2.100.

²⁰⁷ *O2 Germany*, T-328/03, EU:T:2006:116, para 68.

²⁰⁸ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellverbot, para 234.

²⁰⁹ Bellamy and Child “European Union Law of Competition“ (7th edn, 2013), para 2.103.

²¹⁰ *Deere vs Commission*, C-7/95 P, EU:C:1998:256, paras 80-92.

²¹¹ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellverbot, para 234;

GlaxoSmithKline, C-501/06, EU:C:2009:610, para 63.

²¹² *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paras 36-39; *GlaxoSmithKline*, C-501/06, EU:C:2009:610, paras 63-64; *Slovenská sporiteľňa*, C-68/12, EU:C:2013:71, para 18.

On a market where the given scope for competition is limited any additional restriction will be regarded as a significant impact.²¹³

Important is that the effect on the market has to be at least partially caused by the agreement in question. Nothing else can be blamed on the parties.²¹⁴

Culpability of the undertakings is not needed to establish that an agreement contains a restriction by effect. It is just taken into account when it comes to the question of damages.²¹⁵

5.4.4 Examples

Finding a restriction by effect is a case-to-case determination. Therefore, something like an “*effect box*” cannot exist.

A famous example for a restriction by effect case is the preliminary ruling decision in the *Delimitis vs Henninger Bräu AG*²¹⁶ judgment of the ECJ. It was about a contract between a brewery and a publican. The publican is the licensee of a public house, which was owned by the brewery. The contract contained a clause that obliged the licensee to buy all the beer he sells from the brewery unless it is from a different Member State. Further, he has to purchase a minimum quantity of beer each year. If he does not he has to pay a penalty. The publican claims that the agreement is void and not enforceable under Art 101 TFEU.²¹⁷

The beer supply agreement is a vertical agreement. It has advantages for the supplier and for the reseller. The supplier has guaranteed outlets and working together with the reseller it is easier to plan the sale of goods over a long period of time. The reseller has access to the market often under favourable conditions and a guarantee of getting the supplies he needs. Further, because both of them are interested in promoting the sales of the goods both of them

²¹³ Bellamy and Child “European Union Law of Competition“ (7th edn, 2013), para 2.105.

²¹⁴ Schröter and Voet van Vormizeele in Schröter, Jakob, Klotz and Mederer “Europäisches Wettbewerbsrecht” (2nd edn, 2014), chapter 2, para 126.

²¹⁵ Schröter and Voet van Vormizeele in Schröter, Jakob, Klotz and Mederer “Europäisches Wettbewerbsrecht” (2nd edn, 2014), chapter 2, para 126.

²¹⁶ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977.

²¹⁷ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 2-6.

will support the quality and the consumer service. The ECJ finds that agreements like this are no restriction by object.²¹⁸

To find a restriction by effect, first the relevant market has to be established. The relevant product market, which is defined by the relevant economic activity, is the sale of beer in public houses. The relevant geographic market is Germany, because beer supply agreements are usually entered into on a national level.²¹⁹

Further, the agreement in question cannot be looked at in isolation but also other beer supply contracts have to be taken into account when asking whether they are influencing the entry of new competitors into the market. A potential competitor has to have the actual and concrete possibility to enter the market. Therefore, he has to be given the possibility to buy a brewery, sell to public houses or open new ones. In addition, the conditions of competition have to be analysed. Important factors for this are the number and size of producers on the market, the saturation and the fidelity of the consumers to the existing products.²²⁰

In case of finding that it is hard to get access to the market the question is in how far the agreement in question contributes to the cumulative effect. Important factors for this are the position of the parties on the market and the duration of the agreement. When the contribution of the agreement to the sealing-off effect is significant, a restriction by effect is given.²²¹

This judgment shows the different steps of analysis when examining a potential restriction by effect case:

1. A general analysis of the type of agreements, the advantages and purpose is needed first. Here the question of whether this can be a restriction by object has to be answered.²²²
2. The relevant product and geographic market has to be established.²²³

²¹⁸ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 10-13.

²¹⁹ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 16-18.

²²⁰ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 19-22; see also *Neste*, C-214/99, EU:C:2000:679, paras 25-26.

²²¹ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 24-26; see also *Neste*, C-214/99, EU:C:2000:679, para 27.

²²² *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 10-13.

3. Is there a possibility for new competitors to enter the market and what does this possibility look like?²²⁴
4. In the case that the access to the market is restricted, is there a contribution of the agreement in question to the cumulative effect? If there is, a restriction by effect under Art 101 para 1 TFEU is given.²²⁵

The ECJ himself summarizes that two conditions have to be fulfilled in order to find a restriction by effect: The market access has to be difficult for new competitors and the contract in question has to contribute to this in a significant way.²²⁶ This is called the “*Delimitis two stage test*”.²²⁷

5.5 Consequence of Finding a Restriction of Competition by Object or Effect – Art 101 para 2 TFEU

In case that there is an agreement that restricts competition by object or effect Art 101 para 2 TFEU stated that it “*shall be automatically void.*”

This means that an agreement that fulfills the conditions of Art 101 para 1 TFEU is directly inexistent and inapplicable. If the agreement can be separated into a prohibited and a not-prohibited part, only the part, which is subject to the prohibition, is void and the rest of the agreement is still in existence. Just if the whole contract cannot be separated in such parts all of it is invalid.²²⁸

²²³ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 16-18.

²²⁴ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 19-22.

²²⁵ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, paras 24-26.

²²⁶ *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:977, para 27.

²²⁷ Bellamy and Child “European Union Law of Competition“ (7th edn, 2013), para 2.083; Schröter and Voet van Vormizeele in Schröter, Jakob, Klotz and Mederer “Europäisches Wettbewerbsrecht“ (2nd edn. 2014), chapter 2, para 127.

²²⁸ Hengst in Langen and Bunte “Kartellrecht“ (12th edn. 2014), chapter Kartellverbot, paras 450-462; *Société Technique Minière*, C-56/65, EU:C:1966:38, p 304; *Consten and Grundig v Commission*, 56 and 58/64, EU:C:1966:301, p 344.

This voidness is an absolute one, which is aimed at everyone and against everyone. Any private law consequences are to be determined by the law of the Member States.²²⁹

5.6 Exception of Art 101 para 3 TFEU²³⁰ – Rule of Reason?

In order to be accepted under Art 101 TFEU an agreement that constitutes a restriction by object or effect has to fulfil all the condition set out in para 3. In case of a restriction by object, this is also possible but rather unlikely.²³¹ Those contracts are then allowed, because there is an efficiency benefit such as cost savings or a better quality of the products. In addition, the consumers have to profit from the agreement. This means that their situation must not be worse than without the agreement. This could be shown by lower prices or a better quality of the goods and services.²³² Further, it is necessary that the objective advantages are appreciable and outweigh the disadvantages for competition.²³³

Further, the efficiencies and benefits cannot be achieved in another way. This means that the agreement and the ant- competitive measure must be indispensable for the goal. In addition, there can never be the elimination of competition in a substantial part of the market.²³⁴

Another obstacle is that the one who wants to be exempted by Art 101 para 3 TFEU has to prove that the agreement fulfils the conditions. Therefore, a **shift of the burden of proof** is given from the authorities to the undertakings in question.²³⁵

²²⁹ Hengst in Langen and Bunte “Kartellrecht” (12th edn. 2014), chapter Kartellverbot, paras 450-457.

²³⁰ “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.”

²³¹ Commission’s Guidance on the restriction of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD (2014) 198 final, p. 4.

²³² Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 5-005 and 5-006.

²³³ *Consten and Grundig v Commission*, 56 and 58/64, EU:C:1966:301, pp 396-397; *GlaxoSmithKline*, C-501/06, EU:C:2009:610, para 92.

²³⁴ Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010) 5-005 and 5-006.

The US Antitrust law knows as their “restriction by object” so-called “per se” prohibitions in the Sec. 1 Sherman Act. Those agreements listed there are always found a restriction of competition without looking at the specific situation. There is only the exception of the “*rule of reason*” which takes into account both the pro- and the anti-competitive effect in order to justify some of the agreements. This is not needed under European law, because the restriction by object is not a “per se” prohibition due to the exception of Art 101 para 3 TFEU. This exception under para 3 contains the conditions to be exempted from Art 101 para 1 TFEU.²³⁶

This is explained in more detail in the judgment of the General Court *Métropole télévision*.²³⁷ First, the Court points out that the courts of the EU never stated that there was a rule of reason. If there was a rule of reason where positive and negative effects of an agreement would be examined under Art 101 para 1 TFEU, Art 101 para 3 TFEU would lose its effectiveness, because it stated the requirements under which the agreement can, due to its positive effects, be exempted from the prohibition of Art 101 para 1 TFEU. Implying a rule of reason would be against the system within Art 101 TFEU.²³⁸

Just because the prohibition of Art 101 para 1 TFEU is not used in an abstract and undifferentiated way on every restriction of the freedom of action, also considering the actual circumstances, does not mean that there is a weighing of pro- and anti-competitive effects, neither does it mean that a rule of reason exists in EU competition law.²³⁹

6. Conclusion

In order to be prohibited under Art 101 para 1 TFEU, undertakings or an association of undertakings have to conclude an agreement, a decision of an association of undertakings or a concerted practice. Which of them is concluded is not important because they are all covered.

²³⁵ *GlaxoSmithKline*, C-501/06, EU:C:2009:610, para 82; *Slovenská sporiteľňa*, C-68/12, EU:C:2013:71, para 32.

²³⁶ Mestmäcker and Schweitzer “Europäisches Wettbewerbsrecht” (3rd edn. 2014), § 11 para 34; Whish and Bailey “Competition Law” (8th edn, 2015), p 142.

²³⁷ *Métropole télévision*, T-112/99, EU:T:2001:2464.

²³⁸ *Métropole télévision*, T-112/99, EU:T:2001:2464, paras 72-74.

²³⁹ *Métropole télévision*, T-112/99, EU:T:2001:2464, para 77.

Further, the relevant market has to be established to find the frame where the agreement might restrict competition. The relevant market is very important for both: the restriction by object and effect, because when not knowing the market, how can one be sure that the market can be influenced and competition on that very market be restricted?

When having established the relevant market, the adverse impact on competition will be examined. To find the impact on an agreement, the counter-factual can help. Therefore, the situation is looked at how it is now and how it would be without the agreement. The difference of the both situations is the influence of the agreement. In addition, a check of appreciability is necessary, in order to find out if the parties are having enough market power to influence the market with their agreement.

The next step is finding out whether the agreement in question contains a restriction by object. In my view, it is important to first denying a restriction by object before examining any effect and not just saying it is a restriction by effect, because the effect is obvious and easier to prove. Therefore, in my opinion there is a priority of the restriction by object. In addition, in some cases the ECJ mentioned that he first examines the restriction by object and only if there is none he looks at any effects of the agreement.²⁴⁰ This makes also sense, because in Art 101 para 1 TFEU the restriction by object is mentioned before the restriction by effect, as is for example the agreement mentioned before the concerted practice, which is also subsidiary to it.

Further, the examination of the restriction by object and the restriction by effect should be different, because different things have to be looked at and proven. It is important that there is a clear cut between the two elements and that there is no mix up, like there was in my opinion in the *Allianz Hungária* case mentioned above.

Also in my view, the differentiation is a useful one, because bot elements pursue different objectives that are beneficial. The restriction by object gives legal certainty, because undertakings know that certain kinds of agreements are profited and therefore they are not surprised and are hopefully also deterred from concluding such contracts. On the other hand, the restriction by effect is needed for less harmful agreements, where an actual effect on

²⁴⁰ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, para 28; *GlaxoSmithKline*, C-501/06, EU:C:2009:610, para 55.

competition has to be shown. This is a case-to-case decision, where a lot of analysis of the case and situation in question is needed. This makes it fairer, but also more time consuming and expensive. Both elements have their objective and their scope of application, which makes sense.

Altogether, the ECJ is still developing the exact scopes of the two elements and of course, they will always change through time. With the *Cartes Bancaires* judgment, the court made an important step to differentiate again between the elements and correctly emphasised that the restriction by object has to be interpreted narrowly. Overall, we can for sure expect more exciting changes in the future, which will hopefully strengthen the *Cartes Bancaires* judgment's statements.

7. Bibliography

7.1 Books

Bellamy and Child “European Union Law of Competition“ (7th edn, 2013)

Bishop and Walker “The Economics of EC Competition Law” (3rd edn, 2010)

Bornkamm, Montag and Säcker “Europäisches und Deutsches Wettbewerbsrecht” (2nd edn, C. H. Beck 2015)

Langen and Bunte “Kartellrecht” Band 1 (12th edn. 2014)

Mestmäcker and Schweitzer “Europäisches Wettbewerbsrecht” (3rd edn. 2014)

Schröter, Jakob, Klotz and Mederer “Europäisches Wettbewerbsrecht” (2nd edn. 2014)

Whish and Bailey “Competition Law” (8th edn, 2015)

7.2 Commission’s Papers

Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C372, 9.12.97

Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004

Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 101, 27.4.2004

Commission Guidelines on Vertical Restraints, SEC (2010) 411 final

Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, 14.1.2011

Commission’s Guidance on the restriction of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD (2014) 198 final

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) OJ 291, 30.8.2014

7.3 Cases of the European Court of Justice

AEG-Telefunken v Commission, 107/82, EU:C:1983:1351

Allianz Hungária, C-32/11, EU:C:2013:160

Asnef-Equifax, C-238/05, EU:C:2006:734

Beef Industry, C-209/07, EU:C:2008:643

Benedetti v Munari, 52/76, EU:C:1977:164

BNIC/CLAIR, 123/83; EU:C:1985:33

Brasserie de Haecht v Wilkin, 23/67, EU:C:1967:408

Commission v Italy, 118/85, EU:C:1987:2599

Consten and Grundig v Commission, 56 and 58/64, EU:C:1966:301

Deere vs Commission, C-7/95 P, EU:C:1998:256

Delimitis v Henninger Bräu AG, C-234/89, EU:C:1991:977

Dole Food vs Commission, C-286/13 P, EU:C:2015:184

Expedia Inc. v Autorité de la concurrence and Others, C-226/11, EU:C:2012:795

Ferriere Nord, C-219/95, EU:C:1997:4430

Football Association Premier League, C-403/08, EU:C:2011:631

General Motors vs Commission, C-551/03 P, EU:C:2006:229

GlaxoSmithKline, C-501/06, EU:C:2009:610

Gottrup-Klim, C-250/92, EU:C:1994:5671

Groupement des cartes bancaires, C-67/13 P, EU:C:2014:2204

Höfner and Elsnner, C-41/90, EU:C:1991:1979

IAZ International Belgium, 96/82 to 102/82, 104/82, 105/82, 110/82, EU:C:1983:310

ING Pensii, C-172/14, EU:C:2015:484

MasterCard, C-382/12 P, EU:C:2014:2201

Maxima Latvija, C-345/14, EU:C:2015:784

Meca-Medina v Commission, C-519/0 P, EU:C:2006:492

Miller International v Commission, 19/77, EU:C:1978:132

Neste, C-214/99, EU:C:2000:679

Papiers Peints v Commission, 73/74, EU:C:1975:1492

Pedro IV Servicios, C-260/07, EU:C:2009:215

Pierre Fabre, C-439/09, EU:C:2011:649

Société Technique Minière, C-56/65, EU:C:1966:38

Slovenská sporiteľňa, C-68/12, EU:C:2013:71

T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343

Vereeniging van Cementhandelaren v Commission, 8/72, EU:C:1972:977

Völk v Vervaecke, 5/69, EU:C:1969:295

Wouters, C-309/99, EU:C:2002:1653

7.4 Cases of the European General Court

Brasserie Nationale and Others v Commission, T-49/02 to T-51/02

European Night Services, T-374/94, T-375/94, T-384/94, T-388/94, EU:T:1998:198

General Motors and Opel Netherland vs Commission, T-368/00, EU:T:2004:275

Métropole télévision, T-112/99, EU:T:2001:2464

O2 Germany, T-328/03, EU:T:2006:116

7.5 Opinion of Advocate General

Opinion of AG Kokott, *T-Mobile*, C-8/08, EU:C:2009:110

7.6 Commission's Decision

Commission's Decision No. C(2001) 3915 (*Interbrew and Alken-Maes*)

Commission's Decision No. C(2013) 3803 (*Lundbeck*)

7.7 Other Sources

Alexander Italianer, "The Object of Effects" (speech 10. December 2014)

Abstract

Das europäische Wettbewerbsrecht findet sich in den Art 101-109 AEUV. Diese Arbeit befasst sich mit Art 101 Abs 1 AEUV, welcher Vereinbarungen zwischen Wettbewerbsteilnehmern verbietet, die geeignet sind den Handel zwischen den Mitgliedstaaten zu beeinträchtigen und eine Wettbewerbsbeschränkung **bezwecken oder bewirken**. Die Arbeit hat ihren Schwerpunkt in der Auslegung dieser letztgenannten beiden Elemente und geht dabei vor allem auf die Entwicklung der Rechtsprechung des EuGH ein.

Nicht jede Vereinbarung beschränkt den Wettbewerb. Es muss vielmehr ein negativer und spürbarer Effekt auf den Markt gegeben sein. Geschützt wird durch die Regelung nicht bloß der Verbraucher, sondern die Struktur des Marktes und der Wettbewerb als solche, was bedeutet, dass eine Vereinbarung nicht erst dann verpönt ist, wenn ein negativer Effekt für den Konsumenten bewiesen werden kann. Aktueller und potentieller Wettbewerb sind gleichermaßen geschützt. Es darf demnach auch der Markteintritt nicht verhindert oder übermäßig erschwert werden. Weiters können sowohl horizontale (zwischen Unternehmen, die miteinander im Wettbewerb stehen), als auch vertikale (zwischen Unternehmen, die miteinander nicht im Wettbewerb stehen) Vereinbarungen von dem Verbot des Art 101 AEUV erfasst sein.

Die Elemente „bezwecken“ und „bewirken“ sind alternativ zu verstehen. Dies ergibt sich bereits aus der Verwendung des Wortes „oder“ im Gesetzestext. Aufgrund ihrer unterschiedlichen Auswirkungen ist es wichtig, sie auseinanderzuhalten und zu definieren:

Eine **bezweckte** Wettbewerbsbeschränkung liegt vor, wenn das Ziel der Vereinbarung die Wettbewerbsbeeinflussung ist. Ein solcher Vertrag ist alleine schon als ausreichend schädlich anzusehen, was dazu führt, dass ein wirklicher Einfluss auf den Wettbewerb nicht mehr zu beweisen ist. Es genügt, dass ein solcher möglich ist. Eine Intention der Parteien ist nicht Voraussetzung, aber jedenfalls ein Indiz für einen Wettbewerbsverstoß. Der EuGH hat richtigerweise ausgesprochen, dass das Element der bezweckten Wettbewerbsbeschränkung eng interpretiert werden muss, da die damit verbundene Beweislastverschiebung und der Entfall des Nachweises eines direkten Effekts auf den Wettbewerb und den Markt andernfalls zu einer Inflationierung von Wettbewerbsverstößen führen würden.

Liegt keine bezweckte Beeinflussung vor, so ist zu prüfen, ob die fragliche Vereinbarung eine Wettbewerbsbeschränkung **bewirkt**. Dazu muss sehr wohl ein negativer Effekt auf den Wettbewerb bewiesen werden. Dies erfordert zum einen eine umfassende Analyse des Vertrages. Zum anderen müssen alle Bedingungen auf dem Markt, auf dem die Unternehmen aktiv sind, berücksichtigt werden.

Die Vereinbarungen, die eine Wettbewerbsbeschränkung bezwecken, können in rechtssicherer Weise vermieden werden, da durch die Judikatur des EuGH klargestellt ist, welche Art von Verträgen darunter fällt. Demgegenüber liegt bei der Prüfung des Effekts immer eine Einzelfallentscheidung vor, deren Ergebnis nicht immer bzw nicht vollständig vorhersehbar ist. Es müssen alle Umstände berücksichtigt werden, was einen erheblichen Argumentationsspielraum eröffnet und der Einzelfallgerechtigkeit dient. Jedenfalls ist die Prüfung des Elements des bewirkten Verstoßes mit deutlich mehr Aufwand verbunden als die Variante des bezweckten Verstoßes. Die Judikatur hat der Europäischen Kommission durch die Forderung einer engen Auslegung der bezweckten Wettbewerbsbeschränkung, die Berufung auf diese erschwert und diese somit auf den deutlich mühevolleren Weg des Nachweises eines bewirkten Verstoßes verwiesen.