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1. Introduction

Competition in a free market economy reflects a sustainable and beneficial for the consumers' economic environment in a modern economic setting. Though there is not a clear and exact definition of what competition entails as a term, it is understood that it includes a form of economic "rivalry" between companies constituting a fundamental concept for the functioning of the market and at the same time a fundamental pillar of free markets. In such a context, the term competition may be used interchangeably with the term market to describe the supply of goods and services provided by companies to customers in a free but not completely unregulated environment[1]. The European Union (hereinafter: EU) is the main institution established to facilitate the process of European Integration. The aims of the EU are set by the Treaties, including -among others- in Article 3 of the Treaty of the EU (hereinafter: TEU) economic aims and goals such as the establishment of an internal market and the achievement of sustainable development based on balanced economic growth and price stability and a highly competitive market economy with full employment and social progress. As it is evident, Article 3 TEU sets the legal basis for the concept of adopting and enforcing EU competition legislation. EU competition law stems therefore from the core of the European integration procedure with the main purpose of achieving consumer welfare as very frequently mentioned by the competition in its publications[2] while other aims of the EU which are also relevant to EU Competition law especially sustainable development and environmental protection[3]. In the internal market, the citizens of the Member-States may freely develop economic activity by producing or consuming goods or services. Competition, as stated above is crucial to the functioning of the internal market as it contributes to the reduction of prices, and improvement of their quality and provides a wide variety of choices for each product to consumers, enhancing innovation. There are however instances where the right to economic freedom is abused endangering the smooth operation of the internal market and the very existence of competition as an economic phenomenon requiring institutional intervention in the form of legal intervention on both EU- and state-level based on Article 3 TEU. The rules set by article 101 of the Treaty for the Functioning of the European Union guarantee that the market operates smoothly and freely and that it is not threatened by "*prevention, restriction or distortion of competition within the internal market*" caused by agreements, decisions or concerted practices between undertakings.

The purpose of this dissertation is to focus on the positive and negative requirements for the exemption of agreements between two companies from the rule of Article 101(1) TFEU from a binary approach based on whether the exemption is provided directly by the Treaty (the "legal" exception) or if it is provided in other texts (regulations, notices, guidelines) of the EU legal order. The first basis is analyzed on Chapter 2 regarding the Article 101(3) TFEU and the second basis on Chapter 3 regarding Block Exemptions, the De Minimis doctrine and Collective agreements.

The reason for choosing this binary division lies in the interesting fact that although the Treaty provides for one exemption as per Article 101(3) TFEU, the scope of exempted agreements has been extensively shaped by subsequent legal developments which are either based on the Article 101(3) but developed by the European Commission (hereinafter: the Commission) following a

[1] Van de Gronden J. & Rusu C., "Competition Law in the EU: Principles, Substance, Enforcement", Edward Elgar Publishing, 2021, p.3

[2] E.g. EC Guidelines on vertical restraints (2022/C 248/01) par. 15, Guidelines on article 101 (3) TFEU 2004, para 13

[3] EC Guidelines on vertical restraints (2022/C 248/01), para 8

specific procedure (e.g., the Block Exemption Regulations) or belong entirely in the sphere of soft law (e.g., the De Minimis doctrine).

Firstly, as an introduction, the concept of an undertaking will be discussed to better illustrate the nature of the subjects of article 101 par. TFEU and a short explanation of the key elements of this article namely the terms of "agreement", "concerted practice" and the resulting restriction or distortion of competition.

1.1 Undertakings

1.1.1 What is an undertaking?

Article 101 mentions undertakings as the subjects that may conclude agreements, practices and decisions that restrict or distort competition in the EU internal market, making the concept of an "undertaking" the main unit of analysis in EU competition law. Consequently, it is important to analyze this concept focusing on the approach developed by the Court of Justice of the European Union (hereinafter: CJEU or "The Court") to better understand the nature of the term used by the authors of the TFEU to designate the perpetrators of an infringement of EU competition law.

In the TFEU the term "undertaking" is used repeatedly instead of other similar terms such as "firm", "company", and "legal or natural person" while a clear and precise definition of the term is not offered, raising the question of what is meant by the TEU and TFEU (hence: the Treaties) regarding the concept of undertakings in the framework of competition law[4]. The Court in its settled case law has chosen a functional approach for a definition of this term meaning that the legal form of an organization is not important when examining the applicability of competition rules in a case[5]. In Höfner the Court ruled that every entity engaged in an economic activity regardless of its legal status and the way it is financed constitutes an undertaking[6]. The Court favors also an *in concreto* analysis of the term in light of the specific activity under scrutiny, citing that the notion of undertaking must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question provided that a legal case will arise[7]. Despite the Court offering this functional definition of an undertaking, another question arises regarding the main criterion presented by the Court: what is considered an "economic activity" to define an undertaking? The Court has repeatedly stated that an economic activity is the offering of goods or services on a given market[8]. The company has to be active, holding assets and having employees and economic turnover to fill this criterion[9] and not be characterized as "*dormant*". Additionally, the exercise of economic activity does not require a profit-motive of a company[10]. Thus, according to the Court, companies may be considered undertakings even when supplying their services free of charge[11], or when the company does not officially have an economic purpose[12]. For example, in *Piau* the General Court decided that the practice of football clubs playing football is an economic activity and that national football associations are associations of undertakings even if

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[4] Interestingly, the term has been used also in the Article 80 of the Treaty establishing the European Coal and Steel Community and article 80 of the Euratom Treaty each describing an undertaking for their respective purposes.
[5] Van de Gronden (n 1), p. 20.
[6] Case C-41/90 Höfner, para 21.
[7] See the of AG Jacobs in Cases C-67/96 etc. Albany para 207, citing the Judgment in Case C-170/83 Hydrotherm para 11.
[8] Case C-35/96 Commission v Italy, para 7 and Case C-180/98 Pavlov, para 75.
[9] Case T-386/06 Pegler, paras 43-49
[10] See Case C-475/99 Ambulanz Glockner where the ECJ held that non-profit making medical organizations, here the German Red Cross, were acting as undertakings in a competition law setting, when providing ambulance services for remuneration.
[11] Case C-41/90 Höfner
[12] Case C-222/04 Cassa di Risparmio di Firenze, para 123.

amateur teams are grouped with professional ones[13]. As mentioned, the legal status and the way an undertaking is financed are irrelevant to the Court. Aside from companies and partnerships which are eligible for being characterized as undertakings, the Court has also included in this concept other forms of entities such as agricultural cooperatives[14] and Protection and Indemnity Clubs[15] Sometimes, agreements between trade associations may also be caught by the prohibition of Article 101 par. 1[16]. The Commission has included even foreign trade associations in the concept of undertakings[17] with the Court ruling that this inclusion is in effect when the union is acting on its own right but not when the union is acting only as an agent of its members and an executive organ of an agreement between them[18]. A physical person may also be considered an undertaking in EU Law, provided that they engage in economic activity as described above, however not when the individual concerned acts as an employee or when the person purchases goods or services as a final consumer[19]. It is also important to note that the definition of "undertaking" in terms of relationships between various entities is strongly tied to the notion of "competition" amongst them. If the numerous entities share the same interests or are under the same management, they would constitute a single economic unit as there may be no economic competition between them. The Court has ruled that Article 101 par. 1 TFEU does not apply to agreements or concerted practices between undertakings belonging to the same group of companies in the form of parent company and subsidiary[20], as well as when companies have identical interests and are controlled by the same natural person, constituting a "single party" and rendering competition impossible[21]. As a result, the idea of an enterprise is connected to a relationship of actual or potential competition among the numerous entities whose behavior is evaluated. These entities may, therefore, only be subject to the regulations of competition law if the interaction may be examined through the prism of the potential establishment of a competitive order[22].

1.1.2 Limits to the definition of undertakings

An undertaking is therefore presented expansively by the Court following this functional approach method, however, there are also a few limits set in this concept by the case law. The main limits which will be discussed here are the exercise of public authority and solidarity. In Wouters, the CJEU said that competition rules set by the Treaty do not apply to an activity which by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity or which is connected with the exercise of public authority[23] meaning that the exercise of official authority does not amount to economic activity when this activity is typical for the public domain and forms part of the essential functions of the state in the field of the activity concerned[24].

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[13] Case T-193/02 Piau: The Court ruled also that FIFA, whose members are national football associations, is an association of undertakings. See also Case C-519/04 Meca-Medina v Commission, where the Commission proceeded on the basis that the International Olympic Committee constitutes an association of undertakings and Case T-93/18 International Skating Union, where the Court designated the ISU as an association of undertakings (Appeal Case before the Court of Justice pending C-124/21 P)

[14] See Case C-61/80 Coöperatieve Stremsel

[15] See Commission decision (1999/329/EC)

[16] Whish R. & Bailey D., Competition law, 10th edn, Oxford University, Oxford, 2021, p. 87-88.

[17] European Commission, Fourteenth Report on Competition Policy, Publications Office, 1990, para 57.

[18] Case C-22/98 Becu, para 28 and Case T-217/03 FNCBV where the Court examined price fixing agreements between associations of farmers.

[19] Whish R. & Bailey D. (n. 19), p. 88

[20] Case C-73/95 Viho, para 16.

[21] See Case C-170/83 Hydrotherm, para 11

[22] Lianos I. & Korah V. & Siciliani P., Competition Law, Oxford University Press, 2019, p. 279

[23] Case C-309/99 Wouters, para 57

[24] E.g. cases C-364/92 Eurocontrol, C-343/95 Diego Cali, C-687/17 Aanbestedingskalender

In *Wouters*, the Court applied a proportionality test and ruled that the restriction of competition in question was necessary to achieve its public interest objective without any other less restrictive means. Additionally, the restriction did not have a disproportionate effect on other interests going beyond what is necessary for the attainment of the objective[25].

An interesting point was made in *FENIN* by AG Maduro who said that the Court enters a dangerous territory, and addressed the need for finding a balance between the protection of competition and respecting the powers of the state when determining whether a state is engaged in economic activity[26]. The Court has ruled that state-owned corporations, entities entrusted by the state with particular tasks as well as quasi-governmental bodies may act as undertakings[27]. The Court also elaborated on this limit concerning the social, cultural and educational objectives of an entity financed by the State in the *CEPPB case*, finding that an entity fulfilling these obligations is not engaged in economic activity[28]. In the field of solidarity, which AG Fenelly defined as the inherently uncommercial act of involuntary subsidization of one social group by another[29], the Court had to decide on whether entities providing social protection (social security, pensions, health insurance, healthcare) participate in economic activity. In this field, the Court had to make a distinction between social protection provided solely based on solidarity or in the context of a market. Here, the Court emphasized the degree of solidarity, which may preclude the exercise of economic activity, depending on the freedom of the entity to determine the level of contributions and benefits payable as entities may have a wide variety of forms, including state social security schemes and private individual schemes operated by commercial insurers[30]. Supplementally, an activity which is ancillary to a non-economic activity is accordingly not economic when said activity should not be dissociated from the purpose of the main non-economic activity[31]. Additionally, an undertaking may be engaged both in economic and non-economic activities, meaning that the activities of said undertaking must be "severed" in two parts, one being part and following the rules of competition law and one outside the scope of competition[32].

1.2 Elements required for the application of Article 101 (1)

Under Article 101(1) TFEU agreements between undertakings, i.e., the concerted practices between undertakings and decisions of associations of undertakings that restrict competition and may affect the trade between Member States are not allowed. The elements that constitute the cumulative requirements for the application of Article 101 (1) TFEU derive from the wording of the Article and are the following: a form of cooperation between the undertakings in the form of agreements, concerted practices and decisions of undertakings, restriction of competition and an effect on the trade of the Member States.

1.2.1 Agreements, concerted practices and decisions of undertakings

As it is evident, to apply the prohibition of Article 101 (1) TFEU a form of cooperation between undertakings is needed, not unilateral behaviour. This Article prohibits cartel agreements, practices and decisions not only between competitors (ex. Price fixing agreements, market sharing agreements) but also between firms engaged in economic activity at different levels of the market (vertical agreements). It is important to note that Article 101 (1) does not preclude only formal

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[25] See Case C-309/99 Wouters
[26] Case C-205/03 FENIN, para 26.
[27] See Cases 155/73 Sacchi, 258/78 Nungesser KG
[28] Case C-74/16 CEPPB
[29] Case C-70/95 Sodemare, para 29
[30] Opinion of AG Jacobs in AOK Bundesverband C-264/01, para 36
[31] Case T-319/99 FENIN, paras 35-36
[32] Van de Gronden (n 1), p. 22-23

contracts requiring a broad interpretation of the terms "agreement", "concerted practice" and "decision" to include also informal agreements, such as gentlemen's agreements and other forms of informal cooperation in the form of parallel behaviour by firms which may constitute a violation of Article 101[33].

1.2.1.1 Agreements

Agreements have been described by the Court as being present where there is a concurrence of wills between at least two parties, the form of which is not important as long as it constitutes the faithful expression of the parties[34]. Decisive for the existence of an agreement is the will of the parties and even non-binding, oral, informal agreements and simple understandings, may fall in the area of Article 101 (1) TFEU prohibition when the parties have the will to abide by what was agreed between them[35]. In other words, an agreement may be explicit or evident implicitly from the behavior of the parties. Companies or persons facilitating the smooth operation[36] of an anticompetitive practice by a cartel by other undertakings, even when not operating in the same market as the cartel, could be part of the cartel[37]. The existence of an agreement is not affected by the fact that other undertakings forced an undertaking to conclude an agreement[38] but it may be a factor in influencing the Commission to mitigate or to not impose a fine or to not at all institute proceedings[39]. Additionally, the actual implementation of the agreement[40] or the fact that the individual who concluded the agreement did not have the authority inside the undertaking to do so[41] is irrelevant to the existence of the agreement. Also, the Court has ruled that there is a concurrence of wills on the principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation[42]. Agreements are also categorized as horizontal or vertical. Horizontal agreements may be defined as cooperation between two or more actual or potential competitors and vertical agreements as cooperation between companies operating at different levels of production or distribution chain[43].

1.2.1.2 Concerted practices

Anticompetitive conduct, in the form of concerted practices, which is not attributable to an agreement or a decision may lead to an infringement of Article 101 (1). In that instance, the companies concerned align their real commercial operations and activities acting in a parallel manner. Naturally, such operations could have a significant negative effect on competition and, as a result, coordinated actions are covered by Article 101 (1) TFEU. The Court in the *Dyestuffs Case* described concerted practices as a form of coordination between undertakings, that have not yet reached the stage of an agreement and that knowingly substitute practical cooperation between them for the risks of competition[44]. The Court, to prove the existence of concerted practices, allows the Commission to bring evidence of contacts between the undertakings or any evidence that

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[33] Whish R. & Bailey D. (n. 19), p. 104
[34] Joined Cases C-2 and C-3/01 Bayer, para 97.
[35] Case 41/69 ACF Chemiefarma, para 110-112
[36] See Case C-194/14 Treuhand, where a consultancy firm did not operate on the same market as the cartel participating firms but offered management services to these companies.
[37] Jones A., Sufrin B. and Dunne N., Jones & Sufrin's EU Competition Law: Text, Cases, and Materials. 7th edn. Oxford: Oxford University Press, 2019, p. 195
[38] Case T-83/08 Denki, paras 47 and 61-62
[39] Commission Decision of 2 December 1981 Hasselblad (IV/25.757), para 131
[40] See Commission Decision of 29 September 2004, Brasseries Kronenbourg - Brasseries Heineken (COMP/C.37.750/B2), para 61.
[41] Case C-68/12 Protimonopolný úrad Slovenskej republiky, para 25.
[42] Case T-240/07 Heineken Nederland, para 45.
[43] Triantafyllakis G., Δίκαιο Ελεύθερου Ανταγωνισμού [Competition Law], Nomiki Bibliothiki, 2014, p. 146
[44] Case 48/69 ICI, para 64

indicates collusive behaviour. If the Commission may prove both elements, it is presumed that a causal link exists between the contacts and the collusive behaviour. The Court here has offered a helping hand in its case-law ruling that if undertakings take part in concerted action and remain active on the market, the burden of proof that coordination was a result of autonomous developments in a normal functioning market rests with them[45]. Then, it would be up to the concerned undertakings to dispute this presumption by arguing that their market behavior is caused by another convincing justification, like logical parallel behavior when companies operate on a highly oligopolistic market or a rise in the costs of particular raw materials[46]. Factors that may make a rebuttal of the Commission's claims more difficult may be meetings between the undertakings over a long period[47]. If it is impossible to provide proof of contacts between the undertakings the existence of a concerted practice will only be recognized if a National Competition Authority or the Commission may uphold that the parallel conduct may only be explained through the lens of concertation[48]. Therefore, although it is not enough to simply demonstrate comparable behavior to prove that concerted practices are present in a market[49], mere assertions that parallel bahaviour could be attributed to other factors or be explained otherwise are not considered sufficient.

This approach indicates the significance of the two elements which are crucial in identifying concerted practices, which are parallel behaviour and coordination[50]. As mentioned above, on the market, similar behaviour or economic evolvement in a similar direction regarding the setting of prices as well as other commercial matters of various undertakings is possible. As coordination usually takes place behind closed doors it is often very difficult to prove the existence of contacts that resulted in the alignment of commercial policies. Cases concerning the determination of a concerted practice are, therefore, highly specific requiring an in-depth examination of the available evidence[51]. The extensive digitalization of the market in the 21st century has also led to interesting developments in this area. In the *E-Turas* preliminary ruling, the aforementioned presumption of the causal link was applied to digital markets, adapting the concept of concerted practices to *Information and Communication Technologies* when used for an economic activity in a market. In this case, the Court found that the use of software- in this case the dispatch of an e-mail- and knowledge of what it could do, may lead to concerted practices. As data in such markets are automatically transferred electronically in a process facilitated by the use of algorithms, concerns about possible concerted practices are further complicated when taking into account the awareness factor. As in *E-Turas*, the Court left this particular issue to the domestic court, the establishment of awareness of the data transferred is a matter for future case law[52].

1.2.1.3 Decisions of associations of undertakings

Another form of coordination, which may by prohibited by competition law, is that of creating associations of undertakings with the aim of better cooperation in terms of common interests. Cooperation between undertakings is not always harmful to the market they operate in, as they

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[45] Case C-455/11 Solvay SA, paras 39–41 and Case C-8/08 T-Mobile paras 44-53
[46] Case C-199/92 Hüls, para 167
[47] Whish R. & Bailey D. (n. 19), p. 119
[48] Joined Cases C-89, 104, 114, 116, 117, 125–129/85 Woodpulp II, paras 126-127
[49] Van Cleynenbreugel P., Article 101 TFEU and the EU courts: Adapting legal form to the realities of modernization?, Common Market Law Review 51: 1381–1436, 2014, p. 1405
[50] Van de Gronden (n 1), p. 61
[51] Whish R. & Bailey D. (n. 19), p. 120
[52] Lawrance S., Linsner M., Eturas – Any conclusions on platform collusion..?, Kluwer Competition Law Blog, available at http://competitionlawblog.kluwercompetitionlaw.com/2017/01/19/eturas-conclusions-platform-collusion/

may, for example, facilitate administrative tasks and provide services of facilities management[53]. However, on many occasions, this coordination of undertakings may result in limitation of competition in the market where they operate when, for instance, the policies of the association lead to the alignment of prices. To apply the EU competition law rules in a case of a decision by associations of undertakings, two elements must be present[54]. Though it is not needed for the association to have a legal personality or be a profit-making organization, the association should have an organizational element with some lasting corporate structure. Additionally, a functional element is needed, indicating that either the activities of the association are economic or the members' activities are economic. In other words, this element relates to the aforementioned concept of the undertaking, meaning that the association must indeed consist of undertakings in the sense of competition law[55]. Applying the prohibition of Article 101 (1) to trade associations means that not only the trade association itself may be fined but also the members, which the Commission has made clear in the statement of objections[56]. The term "decision" itself is interpreted broadly to include, among others, the constitution of a trade association[57] and a recommendation made by an association, which, upon compliance, will have a significant influence on competition, if members tend to comply with the recommendations of said association[58]. The non-binding nature of the recommendation or the fact that not all members accepted this recommendation is not relevant[59].

1.2.2 Restriction, Prevention or Distortion of Competition by Object or Effect

Article 101(1) prohibits agreements that by their object or by their effect restrict, prevent or distort competition in a market. This means that agreements, concerted practices or decisions are forbidden as far as they restrict competition and that any intervention based on this prohibition to declare the agreements void and impose fines has to be carefully weighed and is only appropriate if the proper functioning of the market is at risk[60] . As the Article expressly states that agreements are prohibited when they have as their *object or effect* the restriction of competition it is important to understand the definition and significance of these words in the following paragraphs also examining the distinction between these two categories of restrictions made by the Court. However, as *AG Bobek* wrote in his opinion on the recent Budapest Bank case: "*The distinction is relatively easy to make in theory. Its practical operation is nonetheless somewhat more complex. It is also fair to say that the case-law of the EU Courts has not always been crystal clear on the subject. Indeed, a number of decisions given by the EU Courts have been criticised in legal scholarship for blurring the distinction between the two concepts*."[61]

1.2.2.1 Restriction by Object

The term 'object' as mentioned above is a legal concept under Article 101(1) TFEU. The Court through its case law has attributed various definitions to this term characterizing as the "purpose"[62]

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[53] Van de Gronden (n 1), p. 64
[54] Lianos (n 25), p. 384
[55] OECD, Trade Associations, DAF/COMP(2007)45, par 19
[56] Cases T-25/95 etc. Cimenteries, para 485
[57] See Commission Decision of 9 July 1980 National Sulphuric Acid Association (IV/27.958)
[58] See Cases 96/82 etc IAZ
[59] Commission Decision of 8 September 2010 Visa (Case COMP/39.398), paras 597-598 upheld on appeal Case T-90/11 ONP
[60] In this chapter, the word "restriction" encompasses also the prevention or distortion of competition and the word "agreement(s)" includes also concerted practices and decisions by assosiations of undertakings.
[61] Opinion of Advocate General Bobek on Case C-228/18 Gazdasági Versenyhivatal v Budapest Bank Nyrt., paras 18-36
[62] Joined cases 96-102, 104, 105, 108 and 110/82 IAZ, para 4

"aim"[63] or "intention"[64] of an agreement or refers to a situation where the clauses of an agreement "reveal[s] the effect on competition to be sufficiently deleterious"[65]. The restriction by object as a result of collusive behaviour caused by an agreement means that this agreement is categorized as a hard-core restriction of competition if its central aim is to distort competition in the market. If the Court finds that an agreement has the object to restrict competition, there is no further need to continue establishing its anticompetitive effects on the market. Therefore, certain agreements with an object to restrict competition are caught by the prohibition of Article 101(1) regardless of whether this agreement has produced actual adverse effects on the market on an individual case[66]. As the Court has ruled, "there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition"[67]. Horizontal agreements that have the object to restrict competition frequently concern price fixing, market or customer sharing, collective exclusive dealing and manipulating a financial benchmark while vertical agreements may refer to imposing fixed or minimum resale prices, imposing export bans or selective distribution agreements[68]. These agreements may only be permitted if the economic efficiencies they lead to, and a fair share of which will be passed on to consumers, are in accordance with the legal exception of Article 101 (3) which will be discussed in the following chapter.

1.2.2.2 Restriction by Effect

In many agreements between undertakings, it is not possible to say that restriction of competition was their "object", creating a need to assess their "effect" on the actual and possible competition. As the Court observed in *MasterCard*, an effect in competition is present when the agreement is liable to have an appreciable adverse impact on the parameters of competition, such as the price, quantity and quality of the goods or services[69]. The effect on competition assessed is primarily the actual effect though potential effects may also be taken into account[70]. However, the General Court in the *Krka* case has ruled that where the clauses of an agreement have been implemented and their impact on the competition may be measured by taking into account the relevant factual developments, it is "*paradoxical*" to allow the Commission to demonstrate merely the anticompetitive effects that such clauses are likely to have and not on whether they had such effects. The Court continued, ruling that if the Commission relied, solely on the effects that agreements which have been implemented are likely to have, to demonstrate that they had an anticompetitive effect, the distinction between restrictions of competition by object and by effect, established by Article 101(1) TFEU, would lose its relevance as the burden of proving the anticompetitive effects of an agreement may be waived only in the case of a restriction of competition by object[71].

Naturally, the process of determining whether an agreement falls into the restriction by effect category may often be very complex, as multiple factors must be considered including the agreement or the clause in the agreement that is said to produce the restrictive effect, an assessment

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[63] Case C-29/83 and 30/83 CRAM, III para 4
[64] Case C-41/69 ACF Chemiefarma
[65] Case 56-65 L.T.M., para 29.
[66] Case C-8/08 T-Mobile, para 47
[67] Case 56/64 and 58/64, Consten and Grundig, para
[68] Whish R. & Bailey D. (n. 19), p. 136, Fig 3.2
[69] Case C-382/12 MasterCard, para 93; The Commission in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, explained that restriction by effect takes place when an agreement is likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality and variety, or innovation.
[70] Case C-1/12 OTOC, para 71; See also Case C-7/95 Deere
[71] Case T684/14 Krka, para 360-361. The case is on appeal to the Court of Justice, C-151/19 not yet decided.

of the relevant product or geographic markets in which the effects take place[72], the harm factor showing how and why the agreement has or is likely to have negative effects on competition and the available evidence[73]. Additionally, it is very important to establish a counterfactual meaning that the competition in question, threatened by the agreement, should be assessed within the actual context in which it would occur in the absence of the agreement in dispute[74].

1.2.3 Effect on the trade of the Member States

An important element to define is also the effect on trade between the Member-States, setting a limit to the prohibition laid down in Article 101. This means that an "*EU perspective*" is added to the prohibition given that agreements are prohibited when, among the other conditions discussed above, have some level of cross-border effects within the EU, appreciably affecting trade between Member-States[75]. The Court has ruled that this condition is satisfied not only when there is an actual impact on cross-border trade but also when the potential effect is identified[76]. However, where the effects of an agreement, or conduct, are confined to one Member State, the EU Courts have no jurisdiction[77]. The concept of trade does not include only the usual and traditional definition of the exchange of goods and services across borders. All cross-border economic activity is concerned, including, for example, the establishment of agencies, branches or subsidiaries in other Member-States by undertakings. Therefore, the effect on trade factor is satisfied when an agreement interferes with the normal pattern of trade between Member-States, causing an impact on the flow of goods and services or other relevant economic activities. Additionally, trade could be affected when by a particular practice, such as an agreement, even if it covers only the territory of one country, given that such practice makes it more difficult for foreign companies to penetrate the national market[78] or if it gives rise to a cumulative effect, leading to, at least, a potential effect on cross-border trade between Member- States.

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[72] Case C-234/89 Delimitis, para 13
[73] Whish R. & Bailey D. (n. 19), p. 138
[74] Case C-382/12 MasterCard, para 161.
[75] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty,OJ C 101, 27.4.2004, para 13
[76] Joined Cases 56 and 58/64 Grundig/Consten, para 6 of the Summary
[77] Case 22/78 Hugin, para 17.
[78] See Case 8/72 Vereeniging van Cementhandelaren.

2. The legal exemption; Agreements exempted by application of Article 101 (3) TFEU.

2.1 Introduction

2.1.1 Introductory remarks

Article 101 (3) TFEU introduces a legal exception to the prohibition of 101 (1) TFEU. This means that an agreement concluded by two undertakings is not always unlawful given that certain criteria are satisfied, which will be discussed in the following chapter. This exception covers agreements, decisions or concerted practices, or categories of agreements, decisions or concerted practices that satisfy the four conditions laid out by the wording of Article 101 (3). The first and second conditions set that, the agreement under examination must contribute to improving the production or distribution of goods or to promoting technical or economic progress and that consumers must receive a fair share of the resulting benefit. The third and fourth conditions introduce that the restriction of competition must be indispensable to the attainment of these objectives[79] and, finally, that the agreement must not afford the parties the possibility of eliminating competition in a substantial part of the products in question. After Council Regulation 1/2003 these criteria are rendered directly without the prior decision of the Commission, substituting the previous situation where the Commission granted "individual exemptions" under Article 101 (3)[80]. For the effective application of Article 101 (3), the commission has published *Guidelines on the application of Article [101 (3)] of the Treaty*, which set out an interpretation of how exemptions must be determined and provide guidance to national Courts and National Competition Authorities (Hereinafter: "NCAs") on how to apply Article 101(3) in individual cases. The application of these Guidelines, which are cited in several decisions by the Commission[81], should be "*reasonable and flexible*" in light of the circumstances specific to each case, excluding a mechanical application[82].

2.1.2 Burden of Proof

As the application of this exception very often comes down to a balance of pro- and anticompetitive effects of the agreements, the violation or not of the prohibition of Article 101 (1) is a matter of proof. The burden of proving an infringement of Article 101 (1) rests on the authority or the party, such as the Commission, the NCAs or the person alleging the infringement, while undertakings claiming that an agreement is covered by the benefits of Article 101 (3) has the burden to prove that the conditions of this provision are fulfilled with convincing arguments and evidence[83], although national rules on burden of proof apply during procedures with the NCAs[84]. If the Commission, after examining the arguments and evidence provided, is unable to refute them, the burden of proof is relieved from the undertakings[85]. In this process, the Commission examines only the justifications for an argument that has been raised by the parties and not those that could conceivably be raised[86]. An interesting analysis of the balancing exercise between the pro- and anticompetitive effects was given by the Supreme Court of the United Kingdom, suggesting that the application of Article 101 (3) requires cogent empirical evidence to show the fulfilment of the conditions and that where evidence is not yet available, because, for instance, the agreement has

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[79] In the treaty this condition is formulated negatively: "[…] which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives"

[80] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 87

[81] See for instance Commission Decision of 8 December 2017, International Skating Union (Case AT.40208), paras 290-292

[82] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 6.

[83] Case C-68/12 Protimonopolný úrad Slovenskej republiky, para 32

[84] See Regulation 1/2003, rec. 5

[85] Cases C-501/06 etc GlaxoSmithKline, paras 82-83

[86] Case T-357/06 KWS, para 122

not yet been implemented, the "*likelihood and magnitude*" of the anticipated efficiencies must be substantiated[87].

2.1.3 Agreements that are covered by the exception

The exception of Article 101 (3) TFEU covers all types of agreements that have as a result restriction of competition, regardless of the type of agreement or whether they restrict competition by their object or by effect. The Court has ruled that an undertaking has the option, in all circumstances, to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU[88]. The Commission for example has authorized an agreement restrictive of competition by object in its *Air France/Alitalia* decision which authorized a strategic alliance between two airlines[89]. Non-hardcore price fixing has also been allowed in instances by the Commission as a result of Article 101 (3) application. Of course, these agreements did not concern agreements among undertakings to fix prices related to customers but network industries where that network supplied services to one another, a form of business-to-business price fixing. This was the case in the *REIMS II*[90] Decision where the commission viewed that these agreements restricted competition by effect with the Commission identifying the efficiencies that would result from this unusual price fixing[91].

As stated above, Article 101(3) does not exclude a priori certain types of agreements from its scope, covering all restrictive agreements that satisfy the four conditions set. However, some hardcore restrictions of competition, such as price fixing concerning customer prices, are unlikely to fulfil these conditions, as the very nature of these agreements generally goes at least against the two first conditions (creation of objective economic benefits and being beneficiary to consumers)[92].

2.2 Criteria for the application Article 101 (3) – Affirmative and Negative requirements.

In this Chapter, the four requirements for the application of Article 101 (3) will be examined in conjunction with the Guidelines issued by the Commission. From the wording of Article 101 (3) TFEU, a distinction between the first two affirmative and the two negative conditions is apparent. This chapter will follow this distinction deriving from the original text of the Treaty, though in the Guidelines the analysis of the second and third conditions is inverted. The Commission decided that this reverse analysis is useful as the analysis of an exemption requires a balancing of the negative and positive effects of an agreement on consumers which should not include the effects of any restrictions that already fail the indispensability test and which for that reason are prohibited by Article 101 (3)[93].

2.2.1 Affirmative requirements for the application of Article 101(3) TFEU.

2.2.1.1 Improvement in production or distribution of goods or technical or economic progress.

[87] [2020] UKSC 24, Sainsbury's Supermarkets Ltd v Visa Europe Services LLC, para 131 citing para 58 of the Guidelines.
[88] Case C-439/09 Pierre Fabre Dermo-Cosmétique, para 57
[89] Commission Decision of 7 April 2004, Société Air France/Alitalia Linee Aeree Italiane SpA (COMP/A.38284/D2)
[90] Commission decision of 15 September 1999, Case No IV/36.748 — REIMS II
[91] Ibid, paras 69-76
[92] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 46
[93] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 46.

(i) General remarks – Objective advantages produced by the agreement

The first condition of Article 101 (3) TFEU stipulates that the restrictive agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. The Commission explains in the Guidelines that although the provision refers expressly only to goods, the same applies by analogy to services[94]. The case law of the Court has repeatedly reaffirmed that the improvement an agreement produces must be displayed in the form of appreciably objective advantages[95]. This means that efficiencies should not be assessed from the subjective point of view of the parties[96] or create a benefit to the parties themselves[97] or arise simply from the exercise of market power[98] but compensate for the disadvantages which that agreement entails for competition. Practically, it is impossible to achieve an overall benefit given when the assessment of an agreement is complicated due to various effects[99]. The appreciable objective benefits must at least outweigh the detriments to competition and the negative aspects of the agreement[100].

The benefits that are taken into account are listed expressly in the article and must be related to an improvement in the production or distribution of goods or technical or economic progress. In some cases, a benefit corresponds with a certain type of agreement (distribution agreements, for example naturally fall into the improvement in distribution benefit). It is, however, possible that benefits overlap and the Commission has decided that an agreement may satisfy more than one (even all four) benefit[101].

(ii) Narrow or broad view of benefits?

When dealing with the concept of "benefits", the question arises of how broad the criteria for the application of the first condition of Article 101 (3) TFEU are. To properly apply the legal exception of this Article to an agreement, the circumstances under which a "benefit" may justify exempting an agreement from the general prohibition of Article 101 (1) must be clarified. Benefits resulting from agreements between undertakings can be economic (direct or indirect) or non-economic. Firstly, direct economic benefits may be considered the cost and qualitative efficiencies occurring to consumers of the product, affecting the price of the product or providing otherwise non-price value for consumers, namely, new products, quality improvements and/or increase in product variety[102]. Secondly, indirect economic benefits include cost and qualitative efficiencies that arise outside of the market that the agreement directly impacts. In two-sided markets, these benefits are likely to occur as often consumers on the one side of the market benefit from an agreement concluded by undertakings on the other side of the market[103]. Finally, non-economic benefits are not directly connected to the characteristics of the product affected by the agreement. Non-pecuniary benefits such as cultural interests, environmental efficiencies and promotion of national

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[94] Ibid. para 48.
[95] Case 501/06 Glaxo, para 93;
[96] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 49
[97] C-382/12 MasterCard, para 234
[98] Case 501/06 Glaxo, paras 89-96
[99] Frenz W., Handbook of EU Competition Law, Springer-Verlag Berlin Heidelberg, 2016, p. 475
[100] Case 75/84 Ford, para 49-67
[101] Commission Decision of 23 December 1975 United Reprocessors GmbH (IV/26.940/a), title III where the Commission found that all four of the benefits were fulfilled.
[102] Brook O., Struggling with Article 101(3) TFEU: Diverging Approaches of The Commission, EU Courts, And Five Competition Authorities. Common Market Law Review, 56 (1), 2019, p. 5
[103] Ibid. Examples of two-sided markets include: credit cards (composed of cardholders and merchants), search engines (advertisers and users) and others

interests and policies are some examples of benefits not related to increased economic efficiency when not valued directly by the consumers in the relevant market of the product or service[104].

This topic is particularly interesting as the enforcement of EU competition law rules has become increasingly decentralized, with the NCAs being responsible for the vast majority of competition investigation cases[105] through the European Competition Network (ECN) mechanism. As the Treaties provide and generate the obligation to apply the same set of provisions it is expected that uniform enforcement and administration of EU competition law is possible. However, the rise of broader interpretations of economic and, more importantly, non-economic benefits has attracted attention as a risk of inconsistent application of the Article 101 (3) criteria is apparent[106]. The NCAs' national, economic, and political traditions are thus likely to result in a fragmented interpretation of the EU competition provisions which offer a wide margin of discretion for their application[107]. In the following paragraphs, the narrow and broader view of Article 101 (3) will be discussed.

(a) The narrow view of Article 101 (3) TFEU

The narrow view of Article 101 (3) stems from the wording of the Article itself. The only agreements that are permitted through this approach are agreements that would generate improvements in economic efficiency introducing an efficiency standard in the form of *"an improvement in production or distribution of goods or in technical or economic progress*". If this methodology is followed then the balancing of the restrictive effects against the positive impact of the agreements has to be determined by whether they lead to increased efficiency, excluding other positive effects of the agreement that may not be classified as economic benefits[108]. According to this view, the other conditions fulfil the role of ensuring that consumer welfare is positively affected by the economic efficiencies resulting from the agreement. Some argue that to support this approach, Article 101 has to be viewed as a whole, in the sense that the main concern of the prohibition is whether an agreement leads to allocative economic inefficiency. Therefore, Article 101 (3) exists to permit an agreement when the agreement results in a compensating enhancement of productive efficiency[109]. Furthermore, it is argued that a narrow view of the first condition of this Article will help clarify the limits of its application by national actors such as NCAs and national courts[110]. As it will be discussed in sub-part (c), national actors have relied on the open-textured wording of this provision to adopt various divergent interpretations of Article 101(3) creating an unstable environment. Using the narrow approach national courts NCAs and undertakings will know the limits and the exact elements that grant an exemption based on Article 101(3) before they enter a competition-restricting agreement.

Some indicators in favour of the narrow view of Article 101 (3) are the Commission's *White Paper on Modernisation*, which highlights the danger of allowing the application of the competition rules to be "set aside because of political considerations"[111], and the *Guidelines* themselves as they are

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[104] Ibid.
[105] Data available at the ECN Statistics website: https://competition-policy.ec.europa.eu/european-competition-network/statistics_en
[106] Whish R. & Bailey D. (n. 19), p. 162
[107] Brook O. (n 105) p. 3
[108] Kjolbye L., The new Commission Guidelines on the Application of Article 81/3: An Economic Approach to Article 81, European Competition Law Review, 2004
[109] See Whish R. & Bailey D. (n. 19), p. 163 citing Odudu O., The Boundaries of EC Competition Law: The Scope of Article 81, Oxford University press, 2006, ch. 6
[110] Whish R. & Bailey D. (n. 19), p. 165
[111] White paper on modernisation of the rules implementing articles 85 and 86 of the EC Treaty, Commission Programme No 99/027, para 57

drafted in terms of economic efficiency[112] stating that non-economic benefits should only be taken into account if they are goals pursued by other Treaty provisions and only to the extent that they may be "*sub-summed*" under the four conditions of Article 101 (3)[113]. The Guidelines' paragraphs 48-72 discuss the issue of the first condition of Article 101 (3), only under the specific term of "efficiency gains", undoubtedly promoting that other non-economic efficiencies or benefits may not be relevant to the assessment. These efficiencies are part of two broader categories consisting of Cost efficiencies and Qualitative efficiencies with the commission acknowledging that there is no need to draw a clear distinction between them[114]. Additionally, Article 51 of the Guidelines underlines 4 crucial elements when assessing the efficiency gains in the process of Article 101 (3). These elements are needed to substantiate the efficiency claims in terms of the *nature* of the claimed efficiencies, the *link* between the agreement and the efficiencies, the *likelihood* and *magnitude* of each claimed efficiency and *how* and *when* each claimed efficiency would be achieved. Consequently, according to this view, only economic efficiencies are likely to be substantiated through these four elements as their value must be assessed by the Courts or the Commission[115] with mere speculation or conjecture being insufficient[116].

It is argued that two recent Commission documents strengthen this narrow view of the competition benefits of an agreement. The Commission in the Regulation on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices[117] and in the Guidelines on vertical restraints, approaches the positive effects of vertical agreements solely from an economic efficiency standpoint. In the Regulation, the Commission underlines that vertical agreements may lead to a reduction in the transaction and distribution costs of the parties and an optimization of their sales and investment levels, improving economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings[118].

It should be noted, however, that in the Guidelines on vertical restraints, the Commission specially addresses sustainability agreements noting that the specific object they pursue will be taken into account when assessing the agreement. Even if the economic positive effects of sustainability agreements are primarily taken into account, including lower prices, the promotion of non-price competition and improved quality of services[119], sustainability is in this way recognized as being capable of constituting an efficiency under Article 101(3) with sustainability agreements being exempted by the Block Exemption if they meet the other conditions[120].

The EU courts despite having dealt with numerous cases on the matter have not yet adopted explicit or detailed guidance on the interpretation of the first condition regarding non-economic benefits. However, in major cases such as *GlaxoSmithKline, MasterCard, Cartes Bancaires, Generics and Niche* the CJEU was satisfied focusing solely on the economic efficiencies when examining the benefits resulting from an agreement under Article 101 (3)[121]. In some other cases,

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[112] Whish R. & Bailey D. (n. 19), p. 162

[113] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 42

[114] Ibid. paras 59, 64-72

[115] Ibid. paras 55-58

[116] Case C-501/06 Glaxo, para 82

[117] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

[118] Ibid, preambulatory clauses 6

[119] Guidelines on vertical restraints (2022/C 248/01), para 12

[120] Ibid, para 8;

[121] See Cases C-501/06 Glaxo, C-382/12 MasterCard, T-491/07 Cartes Bancaires, T-469/13 Generics, T-701/14 Niche (appeal pending)

under Regulation 1/2003, the Commission and the CJEU have adopted this narrow economic approach, rejecting, for example, the basis of wider public interest[122] and the need for a well-organized sports calendar[123].

(b) A broader view of Article 101 (3) TFEU

If the first condition of Article 101(3) is approached broadly, other policies than strictly economic efficiencies may be taken into account when deciding if an agreement restricting competition may benefit from the exception of Article 101(3). Therefore, an agreement that produces a substantial benefit to any of the public EU policies, justifies a restriction of competition given that these policies are not bound exclusively by the enhancement of economic competition and that it is possible to take into account both economic and non-economic considerations under Article 101(3)[124].

The first case to formally establish the possibility of including broader non-economic types of benefits was Metro I[125]. In this particular case, the Commission based the exemption on direct economic benefits, while the Courts interpreted Article 101 teleologically stating that it should be read together with Article 3 EEC, which laid down a list of the Community "*activities*". The Court then introduced the concept of "*workable* competition", explaining that perfect competition is not necessarily the appropriate standard for an exemption and that Article 101 protects the degree of competition that is "*necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty*"[126]. The Court continued ruling that the safeguarding of objectives of a different nature may be "*reconciled*" with the requirements for the maintenance of workable competition allowing certain restrictions on competition, only if these restrictions are "*essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market*"[127]. As a consequence, the Court found that non-economic benefits which, in this case, were related to stabilizing the provisions of employment, justified granting an exemption.

Other judgments by the Court and decisions of the Commission have furthermore indicated the influence of non-economic benefits under Article 101(3). In *Stichting Baksteen*, the Commission took into account industrial policy efficiencies when deciding on coordinated closures by the Dutch brick industry[128], whereas reducing regional disparities and harmonious regional development played a crucial role in the "exceptional circumstances" a production joint venture was approved in the *Ford/Volkswagen* decision[129]. Cultural aspects have also been taken into account including solidarity in sports in the decision concerning the joint selling of the commercial rights of the UEFA Champions League noting the financial solidarity that supports the development of European football[130], while the Court in *Piau* sided with the view of FIFA supporting the raising of "*professional and ethical standards for the occupation of players' agents*" as contributing to economic progress[131]. Finally, public interest was also assessed under

[122] Case T-472 Lundbeck, paras 706-720
[123] Commission Decision of 8 December 2017, International Skating Union (Case AT.40208), paras 293-301
[124] Whish R. & Bailey D. (n. 19), p. 163
[125] Case C-26/76 Metro
[126] ibid, para 20 (emphasis added)
[127] Ibid paras 21-22
[128] Commission Decision of 29 April 1994 Stichting Baksteen (IV/34.456)
[129] Commission Decision of 23 December 1992 Ford Volkswagen (IV/33.814)
[130] Commission Decision of 23 July 2003 UEFA, 2003/778/EC
[131] Case T-193/02 Piau, para 102

Article 101(3) in the *Métropole Télévision* case, where the General Court said that considerations "connected with the pursuit of public interest", may be used as a basis for an assessment by the Commission, to grant an exception [132].

Recently, the concept of "*sustainability*" has renewed interest in the broader view of Article 101(3). Sustainable economic development has been an important part of many undertakings policies seeking to do business in a way that will not compromise the ability of future generations to meet their needs, including policies like sustainable agriculture, anti-poverty and anti-inequality initiatives, supporting clean and renewable energy and combatting climate change[133]. These policies sometimes require collaboration on a certain level between companies to reach sustainability targets, introducing questions about their eligibility for exemption under Article 101(3) and the value of efficiency gains generated by this collaboration regarding economic and non-economic benefits. If, for example, an agreement between fishermen reduces supply and may lead to price increases but aims primarily to reduce overfishing by preventing depletion of the fish stock in question, it yields an important environmental and sustainability benefit by ensuring the future of the fishing industry and the preservation of fish population for the future consumers. The broader view of Article 101(3), makes sure that the non-economic positive benefits with unclear market value yielded by the agreement between undertakings will be quantified and assessed using valuation techniques. The Wouters Doctrine may be helpful in this effort, as it does not require quantification of benefits[134] while others propose a cost-benefit analysis (CBA) based on a wide notion of human well-being (HWB) which is not solely related to monetary well-being[135].

Sustainability and environmental protection have been priorities of the European Commission mainly through the European Green Deal[136] introducing a new dynamic between competition law and environmental protection. The *CECED* Decision[137] was the first to consider broader environmental benefits from a competition law point of view when an individual exemption was granted by the Commission in regards to an agreement between an association of manufacturers of domestic washing machines to cease producing and importing the least energy efficient washing machines, promoting lower CO2 emissions. The Commission took into account both types of benefits produced by the agreement, pointing not only to the direct benefits to consumers in the form of lower energy costs and bills but also to collective (non-economic) environmental benefits resulting from a reduction in energy consumption, such as the agreement's significant contribution to the management of energy resources, reduction of CO2-emissions and efforts to combat global warming[138]. Despite the clear notion in this decision regarding the value of non-economic benefits, It is unclear if these benefits are, in general, invoked by the Commission as obiter dicta to provide political support for the legitimization of an exception, as "*tiebreaker*" when in some cases the harm to competition was equal to the economic benefits yielded by an agreement, or as interests

[132] Case T-528/93 Métropole Télévision, para 118
[133] Van der Veer J. P., Art 101(3) and sustainability – new developments in the Netherlands (RBB Economics), Kluwer Competition Law Blog, 2014
[134] Van der Zee E., Quantifying Benefits of Sustainability Agreements under Article 101 TFEU in terms of Human Well-being, Working Paper No. 31, 2020, p. 6.
[135] ibid
[136] COM(2019) 640 final
[137] Commission Decision of 24 January 1999 CECED (IV.F.1/36.718.)
[138] Ibid, paras 52-57

having independent value and equal footing to the main economic benefits that have vindicated an exemption[139].

The aforementioned dynamic became apparent in the Competition Policy Brief (Brief) published by the Commission in 2021[140], where the commission, among other competition law aspects, also assesses the issue of antitrust, regarding clarification on whether and how sustainability benefits are assessed. Focusing on examples of how sustainability goals may be achieved, cooperation agreements, such as joint production/purchasing agreements are examined in this brief, citing that it has been difficult for stakeholders to provide real-life examples of sustainability initiatives obstructed by the risk of potentially applying competition rules.[141]. The brief then looks into the assessment of benefits under Article 101(3) TFEU noting that sustainability benefits may be taken into account as "qualitative efficiencies". Specifically, the Brief describes that such benefits may result in increased quality or longevity for products giving the example of replacing plastic with wood in toys or using recycled materials for clothing. Additionally, these benefits may be potentially passed on as cost efficiencies to consumers when, for example, the cost of materials, transport, and storage is reduced by limiting plastic packaging. The Commission considers the consumers' attitude regarding sustainability benefits supporting that they do not need to be direct or to immediately cause noticeable product quality improvements or cost savings, as long as the consumers appreciate the sustainability benefits regarding the production and distribution of the product and are willing to pay a higher price for this reason alone[142]. These considerations, according to the Brief, ensure that Competition rules remain "*anchored*" to the consumer welfare standard while at the same time taking into account sustainability benefits which are of interest to society as a whole. The harmed consumers should, however, be "*fully compensated*" by the apportionment of a fair share of the significant benefits to them. Finally, the Commission reiterates its ability to adopt decisions, where the public interest so requires, finding that sustainability initiatives are not caught by competition rules, according to Article 10 of Regulation 1/2003. This new approach by the Commission, although unofficial, seems to be promising and may give reassurance to businesses also unlocking further investments and initiatives. As there have not been "*pure*" sustainability-related cases under these recent developments it is for the near future to demonstrate how these efficiencies will be considered by the Commission[143].

(c) National Approach

On a national level, the NCAs may since Regulation 1/2003 apply Article 101(3) directly and, although they don't have the authority to adopt a positive decision that an agreement is compatible with Article 101 TFEU, which still lies within the Commission's powers[144], NCAs may still find whether there are grounds for action on a national level[145]. Accordingly, NCAs may examine the information they are provided with by the undertakings and decide that an agreement does not

[139] Brook O., Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU, Cambridge University Press, 2022, p. 114-115

[140] European Commission, Competition policy brief. 2021-01, September 2021; available at: https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1

[141] Ibid. p.2

[142] Ibid. p. 6

[143] Malinauskaite J. Competition Law and Sustainability: EU and National Perspectives, Journal of European Competition Law & Practice, Volume 13, Issue 5, 2022

[144] EC Regulation 1/2003, Article 10

[145] See Case C-375/09 Tele2 Polska, para 15

result in an infringement of the prohibition in Article 101[146]. Although the limitation of powers of NCAs guarantees a level of uniform application of European competition law rules and despite the non-binding nature of the no-grounds-for-action decisions, NCAs have adopted different approaches concerning the broad or narrow interpretation of the benefits yielded by agreements between undertakings.

In this context NCAs have adopted one of three stances: firstly, NCAs that follow the narrow approach, applying the Article when direct economic benefits are concerned, namely the UK (before Brexit) and Hungarian NCAs; secondly, NCAs that adopted the broader view of Article 101(3) TFEU, taking into account indirect and non-economic benefits, such as the French, Dutch and Greek NCAs; thirdly, NCAs that approached the matter on an intermediate way, such as the German NCA. Regarding the first group, in *Modeling Sector* the UK NCA, following the *Guidelines* declared that non-economic benefits, here the models' working conditions, are not examined under Article 101(3) contrary to economic benefits affecting consumers such as price reductions[147]. In the same spirit, the Hungarian NCA in the Hungarian Association of Book Publishers and Book Retailers rejected the incorporation of non-economic benefits, namely, employment efficiencies, stability of prices, literature diversity, promotion of research and education and freedom of the press in the benefits assessed when examining an exemption under Article 101(3) accepting arguments providing economic benefits[148]. In the second group of NCAs, limiting overfishing was a crucial point in the *MSC Shrimp Fishery* opinion of the Dutch NCA citing, however, that this restriction should be indispensable to meet the sustainability standards and that no further restrictions are justified[149]. Additionally, in 2014, a set of policy directions was issued by the Dutch Government and a "*Vision Document*" was published by the Dutch NCA, concerning the application of National law granting exemptions equivalent to Article 101(3) regarding sustainability initiatives, both advocating for an adoption of a broad welfare perspective including environmental and other non-economic aspects[150]. The Greek NCA (HCC) has also examined the issue of the interaction between competition law and sustainability, citing that it is essential to "consider the broader constitutional and regulatory context" of this issue in its Staff Discussion Paper on Sustainability and Competition law[151]. HCC takes a pro-quantification of non-economic benefits stance, saying that classifying sustainability or any other benefits as 'indirect economic benefits' or 'non – competition' concerns, is "factually wrong"[152]. By pointing to the possible monetization of sustainability benefits and costs using "environmental and ecological economics", the HCC proposes that the totality of benefits of an agreement to all users should be taken into account shifting the discussion on the method needed to calculate the

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[146] Ibid, Article 5

[147] CE-9859/14 Modelling Sector, paras 4.164 and 4.170

[148] Vj-47/2004 Hungarian Association of Book Publishers and Book Retailers, paras 103, 109, 111; see on this case: Bassola B., "The Hungarian NCA holds that the professional rules of book publishers and retailers' association restrict competition" available at: https://www.concurrences.com/en/bulletin/news-issues/april-2006/The-Hungarian-NCA-holds-that-the

[149] 7011/23.837/2011 MSC Shrimp Fishery; A competition restricting measure might be necessary in the future although the NCA did not find that population was facing danger.

[150] (in Dutch) Autoriteit Consument en Markt, Visiedocument Mededinging & Duurzaamheid, p. 13-14; Decree of the Minister of Economic Affairs of 6 May 2014, no. WJZ / 14052830, containing a policy rule regarding the application by the Authority for Consumers and Markets of Article 6, paragraph 3, of the Competition Act in anti-competitive agreements made for the purpose of sustainability, Article 2.

[151] Hellenic Competition Committee, Draft staff discussion paper on sustainability issues and competition law, 2020; available at: https://www.epant.gr/en/enimerosi/competition-law-sustainability.html

[152] Ibid. p. 27

monetary impact of these benefits. Finally, the German NCA has followed an intermediate approach restricting the nature of benefits but allowing the exemption of Article 101(3) to be applied when wider national schemes are concerned[153]. More specifically, the German NCA has decided that non-economic benefits, such as the avoidance of risky investments or indirectly improving Research and Development efforts, are not to be taken into account as relevant under Article 101(3)[154] while also German Courts have rejected environmental sustainability concerns as relevant with Article 101(3)[155]. However, the German NCA has also applied Article 101(3) to exempt agreements that are part of the implementation of a national scheme. In *Coordination of tenders for sales packaging waste collection services by compliance schemes*, the NCA accepted a restriction in competition in the form of an agreement based on Article 101(3) since it was a required element of a German Packaging Ordinance amendment stipulating the tender coordination through the establishment of a joint body[156].

(d) Comment

As it is apparent the aims of Article 101(3) concerning the nature of the benefits produced by a competition-restricting agreement have been, especially taking into account recent developments, not clear. As the NCAs' interpretations of Article 101(3) are not systematically reviewed by the Commission the danger of a completely fragmented application of EU law is imminent with clear consequences concerning the effectiveness of enforcement, uniformity of application and legal certainty among undertakings[157]. Should the legal regime remain unclear, then competition will not be fully protected across the EU as NCAs will have the ability to take into account various economic, social or political interests, with different standards in every MS dependent on which NCA examines a case.

The arguments calling for a broader view of Article 101(3) seem more compelling as they are founded on a "constitutional" base (the Treaties) and decisions of the Commission as well as various statements. The EU entered a new environmental protection phase with the adoption of the European Green Deal, which sets sustainability and the efforts against climate change as a priority in the EU Agenda. The narrow view of Article 101(3) would, thus, lead to the unfortunate event of Competition law hindering initiatives with environmental aims in the form of cooperative agreements, which could contribute to achieving sustainability goals. This is also the spirit of Article 11 TFEU calling for the integration and implementation of environmental protection requirements in all the Union policies and activities. Additionally, as observed in the *CECED* case, the Commission may also find satisfying justification to take into account environmental benefits, incorporating the collective social benefits (in this case a reduction in energy consumption) into the assessment of the cost-benefit analysis. In the past, the Commission has also stated that: "*improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress*" and although some say that these statements predate the "*modernization*" around the year 2000[158], still the new developments in the field of environmental protection call for renewed cooperation with the rules of Competition law.

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[153] Brook O. (n. 105), p. 28
[154] B1-62/13 Rental of retail space in factory outlet centres, para 323; B4-1006/06 Container glass, paras 181-186; B3-11/13 and B3-11/13 Ophthalmologists, paras 41-42; and para 61.
[155] VI-Kart 10/15 (V) Round timber in Baden-Württemberg, para 327-328.
[156] B4-152/07 Coordination of tenders for sales packaging waste collection services by compliance schemes, p. 6
[157] Brook O. (n. 105), p. 35
[158] Holmes S., Climate change, sustainability, and competition law, Journal of Antitrust Enforcement, 2020, p. 374

More recently, Commissioner Vestager has stated that in light of the Green Deal the Commission took the initiative to launch a debate resulting in the Policy brief discussed, to see how Competition Law and green policies could "*work together*" while Competition policy focuses on its "*fundamental task*" of keeping markets open and competitive[159].

Concluding, the opinion that a further reboot of competition policy is needed to adapt to current realities and modern political, economic and environmental priorities is popular[160]. Still, the EU Courts have not taken a clear stand on those matters (characterized by some as vague and general statements), missing the opportunity to reach a harmonized and uniform interpretation of Article 101(3) TFEU, to increase legal certainty[161]. How the relationship between Article 101(3) and non-economic goals will evolve, especially concerning environmental benefits, in the CJEU case law and the Commission's Decisions remains to be seen.

(iii) Proof of benefits.

Article 2 of the Regulation 1/2003 states that undertakings bear the burden of proving satisfaction with the requirements of Art. 101 (3) TFEU if they intend to rely on this provision. As the Court has ruled, the examination of the benefits of the first condition of Article 101 (3) and whether appreciable objective advantages were generated by the agreement, "must be undertaken in the light of the factual arguments and evidence provided in connection with the request for exemption"[162]. The Court ruled that it was not excessive standard of proof the fact the Commission demanded a "*detailed, robust and compelling analysis*" regarding the evidence submitted, which should rely on empirical data and facts[163].

2.2.1.2 The agreement allows consumers a fair share of the resulting benefit.

In the process of granting an exemption to an agreement restricting competition, the undertakings concerned, must prove that a fair share of the benefits yielded from the agreement, will accrue to the consumers. This requirement may be considered a pass-on requirement as the concept of "*fair share*" acts as a guarantee of consumer welfare. Given that the main goal of the EU Competition policy is the protection of the consumers, the yielded benefits must at least compensate (as we saw in the Policy Brief in the previous requirement) the consumers for any likely harm or negative impact as a result of a cooperation agreement[164]. The *Guidelines* state that the concept of "*consumers*" of Article 101(3) is not limited to final consumers but encompasses all direct or indirect users of the products or services covered by the agreement including producers that use the products as an input, wholesalers and retailers[165].

To prove that a fair share of the benefit is allocated to the consumers, the overall effect on all consumers in the relevant markets of the product must be taken into account, and not the effect on each member of that category of consumers[166]. If two groups of consumers are affected by the

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[159] Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, delivered by Inge Bernaerts, Director, DG Competition.
[160] Holmes S. (n.156), p. 373
[161] Brook O. (n. 105), p. 35
[162] Case C-501/06 Glaxo, para 102 (emphasis added)
[163] Case T-111/08 MasterCard upheld on C-382/12, quotation taken from Commission Decision of 19 December 2007, para 690.
[164] Whish R. & Bailey D. (n. 19), p. 169
[165] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 84.
[166] C-238/05 Ausbanc, para 70

agreement, the undertakings must show that both groups are benefitted from the agreement[167]. The negative effects on consumers in one geographic market or product market may not be in principle balanced by positive effects for consumers in another unrelated geographic market or product market. However, if two markets are related, the efficiencies that were yielded on separate markets may be taken into account if the group of consumers, who were affected by the restriction and who benefit from these efficiency gains, are "substantially the same"[168].

The Court has ruled (before the *Guidelines*) that the Article does not require that benefits are "*linked to a specific market*" and that benefits in every other market on which the agreement might have beneficial effects or, more generally, any improvement in the quality or efficiency of any service as a result of the existence of that agreement must be taken into account[169]. Furthermore, the *Guidelines* note that in some cases, such as purchasing agreements, the impact assessed concerns only consumers in a downstream market who are affected by the agreement[170]. A notion of "*considerable commonality*" between consumers of different markets was used by the Commission in *Star Alliance* to the inclusion of "*out of market efficiencies*" in the assessment of the fair share[171]. An interesting point on this matter was made by AG Mengozzi in his Opinion on *MasterCard.* According to the AG, in a reasoning that seems to be following the *Guidelines*, the term "*consumers*", which the second condition refers to, concerns the direct or indirect consumers of the goods or services covered by the agreement. It is these consumers that need to be compensated in full for the adverse effects of a competition-restricting agreement with a fair share of the benefit resulting from the agreement as the second condition of Article 101(3) stipulates. AG Mengozzi proceeds to the assessment of advantages resulting from an agreement for one category of consumers to counterbalance the negative effects on another category as this would cause a favourable treatment of this one category of consumers to the detriment of the other. The AG concludes that it is the purpose of competition law to protect the structure of the market in the interest of competitors and consumers rather than permit anti-competitive practices to harm consumers in one market for the sake of providing benefits to those in another[172].

For consumers not to be harmed by the agreement, the assessment giving the net effect between the negative anti-competitive effects to consumers and the benefits from its implementation must be at least neutral or the positive effects should outweigh the negative effects from the point of view of those consumers. This means that if such consumers are worse off following the agreement, the second condition of Article 101(3) is not fulfilled[173]. Consumers, though, do not have to benefit from every efficiency achieved by the agreement if a fair share of the overall benefits is allocated to them[174]. Early access to efficiencies may also be of importance when the agreement leads to earlier access to consumers than otherwise possible, taking into account the negative impact on the relevant market once this lead time has lapsed, even if the price of the product is higher. The Guidelines note that the benefit to consumers should be of "*equal significance*" to the higher price of the product as a result of the stronger position on the market for the undertakings concerned[175], a view further supported in *MasterCard*, where the Commission

[167] Case T-111/08 MasterCard, para 228; not discussed on the ECJ's judgment C-382/12.
[168] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 43
[169] Case T-86/95, Compagnie Générale Maritime, paras 343 to 345; the Compagnie Générale Maritime, paras 343 to 345; the affected group of consumers was the same.
[170] Ibid. See also
[171] Commission Decision of 23 May 2013, Star Alliance, (Case AT.39595), para 10.
[172] Opinion of Advocate General Mengozzi, Case C-382/12 P MasterCard, paras 156-158
[173] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 85
[174] Whish R. & Bailey D. (n. 19), p. 169, citing UKSC 24/2020, para 174
[175] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 89

said that if an agreement leads to higher prices, then consumers must be compensated through increased quality or other benefits[176].

The apparent weighing of the restrictive effects on competition against the efficiencies and the pass on to consumers is, therefore, a crucial point for the fulfilment of the second condition of Article 101(3). A detailed analysis of the second condition is not necessary when the restrictive effects of an agreement are relatively limited compared to substantial efficiencies but, in the opposite case, the second condition is very unlikely to be satisfied as the graver the impact an agreement has on competition, the more likely that consumers will face negative consequences on the long run[177]. An agreement which has both substantial anti-competitive effects and substantial pro-competitive effects requires a thorough analysis, considering that competition is an important "*long-term driver of efficiency and innovation*", applying especially to dominant firms which may have less incentive to maintain or build on the efficiencies[178]. Cost efficiencies and qualitative efficiencies are then discussed in detail in the Guidelines in two sections. It is noted that the importance of this analysis lies in cases where the balance between the competitive restrictions and the benefits to consumers is not obvious. Given that an accurate calculation of the consumer pass-on rate and other types of benefits to consumers is difficult and speculative, the *Guidelines* state that the claims made by undertakings regarding these topics are needed to be substantiated to the "*extent reasonably possible*" by providing estimates and other data, assessing the circumstances present in each case[179]. Following the Commission's Guidelines, a brief analysis of the "*cost efficiencies*" and "*qualitative efficiencies*" concepts will be discussed.

(i) Cost efficiencies

The balancing and pass-on of cost efficiencies are discussed in paragraphs 95-101 of the *Guidelines*. Cost efficiencies may lead to increased output and lower prices for the affected consumers creating a pass-on benefit, taking into account the following factors: the characteristics and structure of the market, the nature and magnitude of the efficiency gains, the elasticity of demand and the magnitude of the restriction of competition. Residual competition after the agreement is also relevant as the attempt to increase sales by passing on cost efficiencies to consumers by undertakings is more likely to happen when residual competition is of a higher degree[180]. A distinction is then made between competition on a price or capacity basis. Whereas undertakings compete mainly on price the occurrence of pass-on may be relatively quick. Additionally, according to the Commission, in a market susceptible to "*tacit collusion*", pass-on may be slower. In other words, if competitors are likely to retaliate against the increased output without resorting to an explicit cartel agreement, undertakings involved in the agreement may not have the incentive to increase output, unless they gain such a significant advantage in the form of efficiencies, that offers them the possibility to break away from the common policy of the market[181].

An important aspect of the efficiencies is also their nature concerning fixed (costs that do not vary with the rate of production) and variable costs (costs that vary with the rate of production). Consumers are more likely to receive a fair share of the cost efficiencies from a reduction in variable costs, since variable costs and demand conditions mostly determine pricing and output decisions, for example when through a specialization the undertakings may reduce variable input

[176] Commission Decision of 19 December 2007, MasterCard (2009/C 264/04), para 734
[177] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 90-91
[178] Ibid, para 92
[179] Ibid, paras 93-94
[180] Ibid, paras 97
[181] Ibid

and stocking costs, influencing the marginal costs of production[182]. In paragraph 99, the Commission points to the elasticity of demand as the main factor determining the pass-on rate. When consumers respond to the changes in prices by increasing their demand for a product of reduced price, the pass-on rate is higher and the increase in sales will compensate the undertakings for the loss of revenue caused by the lower price. However, where undertakings may charge different prices to different customers (price discrimination), then only price-sensitive consumers may benefit from the price efficiencies. Finally, paragraph 101 highlights that agreements that are examined in under this procedure to be granted an exemption, are agreements that in principle restrict competition. This fact means that undertakings may have the ability to raise the prices as a result of their increased power, calling for balancing these restrictions against an incentive to reduce prices, which will benefit consumers. As the Guidelines set it, a substantial reduction in competition may require an extraordinarily large cost efficiency for the second condition of Article 101(3) to be satisfied.

(ii) Qualitative efficiencies

Price reductions and cost efficiencies in general do not guarantee that the consumer will receive a fair share of the benefits of the product quality is decreased, given that the value of a product for the consumer does not consist only of its price but also from the underlying quality[183]. The relation between price and constant levels of performance means that a positive effect as a result of cost efficiencies has meaning if it is accompanied by adequate preservation in terms of quality. Pass-on of efficiencies, therefore, is not to be understood only in monetary terms but includes also improvements in the quality of products or services, such as consumers having access to more technologically advanced products[184] or in the form of a wider range of choices as a result of the agreement[185]. Additionally, benefits passed on to the consumers include an improvement in supplies[186] or an increase in the number of locations where the good is available and offered[187]. Paragraph 103 of the Guidelines concedes that the assessment of qualitative efficiencies requires value judgment and that it is difficult for precise values of dynamic efficiencies to be assigned. In paragraph 104 the Commission acknowledges that new and improved products are an important source of consumer welfare but states that if the agreement leads to increased prices a careful assessment must take place to examine whether the claimed efficiencies will create "*real value*" for consumers to compensate for the price increase.

(iii) "*Fair share*" in Sustainability agreements?

Regarding the topic of sustainability agreements discussed in the first condition, the benefits of sustainability may be incompatible with a narrow view of the "*consumer*" concept. If it is accepted that consumers consist only of current or subsequent purchasers of products or services in the same relevant market, agreements yielding sustainability benefits for the economy or broader environmental benefits may not satisfy the second condition of Article 101(3)[188]. Again, in this topic, the Dutch NCA[189] advocates for a wider approach, departing from the principle of full or "*at least*" full compensation, if obvious environmental damage is prevented or limited as a result of the agreement and if the agreement offers an efficient contribution to the compliance with an

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[182] Ibid, para 98
[183] Frenz W. (n. 102), p. 496
[184] Commission Decision of 13 July 1983, Rockwell/Iveco (IV/30.437), para 9
[185] Commission Decision of 18 October 1991, Eirpage (IV/32.737), para 16
[186] Case 26/76 Metro, para 48
[187] Frenz W. (n. 102), p. 497
[188] Hellenic Competition Committee (n. 155), para 69
[189] ACM Legal Memo, 27 September 2021; available at: https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf

international or national standard for preventing environmental damage. Using the MasterCard Case law, the Dutch NCA observes that while out-of-market benefits may not in themselves compensate consumers for in-market disadvantages, it is not stated by the Court that consumers who are negatively affected must always be fully compensated by in-market benefits leading to the conclusion that the concept of "*fair share*" requires appreciable objective advantages and not necessarily full compensation. The Dutch NCA concludes that out-of-market benefits and efficiencies benefiting other consumers may be regarded as compensation for the consumers negatively affected and that it is not required for consumers to receive full compensation, just conferral of appreciable objective advantages. Finally, according to the ACM, although *MasterCard* may be context-specific based on the special case of two-sided respectively vertically related markets, they may be used in establishing the relevance of out-of-market broadly felt sustainability benefits and the bending of the full compensation principle.

Advocates of a wider approach to Article 101(3) accept that some limits to the consumers in question regarding sustainability or environmental benefits must be set, as a "*necessary price to pay*" for a more progressive approach to sustainability in the fight against climate change and environmental problems[190]. According to them, to this approach point also the Treaties which make clear that environmental protection and sustainable development are benefitting for the Union as a whole and, therefore, the consumers, leaving only the assessment of whether these benefits outweigh the negative effect on competition by the agreement. In this case, an interpretation is needed in a manner that is slightly inconsistent with the literal wording of the Article, a process requiring sanctioning by the CJEU in future case law[191].

2.2.2 Negative requirements for the application of Article 101(3) TFEU

2.2.2.1 Indispensability of the restrictions

Article 101 (3) TFEU in its first condition worded negatively stipulates that an agreement must not "*impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives*". This means, positively, that if an agreement has as a result a restriction of the freedom of competition this impairment must be indispensable for achieving the desired objective for the agreement to be considered for an exemption. Agreements therefore not only need to be beneficial for the consumers and provide efficiencies but also be strictly necessary according to the text of the Article[192]. Accordingly, the achievement of desired objectives should be impossible or impossible to the desired degree, time frame or certainty without the restriction of the competition in question[193]. This condition has been described as "*an expression of the proportionality principle of EU law*" in the context of Article 101(3)[194].

The *Guidelines* state that the actual economic environment in which the agreement is concluded is relevant to examine the resulting economic risks and incentives. If the degree of uncertainty related to success is high, then so should be the required degree of necessity concerning the impairment of competition[195]. Indispensability must be distinguished from the ancillary restrictions to an agreement restrictions concept which requires "*objective necessity*". The Court has ruled that "*objective necessity*" is not satisfied when the operation of the agreement is simply

[190] Holmes S. (n. 156), p. 379-381
[191] Blockx J., Should European competition law only care about clean air for Europeans? – A comment on paragraph 604 of the European Commission's draft Guidelines on horizontal co-operation agreements, Kluwer Competition Law Blog, 2022
[192] Case T-66/89 Publishers Association, para 116
[193] Frenz W. (n 102), p. 501
[194] Holmes S. (n. 156), p. 381
[195] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 80

difficult to implement or even less profitable without the restriction concerned as such an interpretation would include restrictions which are not strictly indispensable to the implementation of the main operation in both cases[196]. However, the two concepts, according to the Court, should not be confused as they have different objectives. The indispensability requirement in Article 101(3) involves a balancing of pro- and anti-competitive effects, whereas in the ancillary restraints doctrine in the context of Article 101(1) TFEU the Court demands that if the restriction is absent then the main operation of the undertakings is "*likely not to be implemented or not to proceed*".

As a result of this analysis, a two-fold test, described in Paragraph 73, is needed to decide the fulfilment of the third condition. First, it must be examined whether the agreement posing restrictions is itself necessary to achieve the efficiencies proposed and, secondly if the individual restrictions are necessary for the attainment of said efficiencies.

Regarding the first stage of the two-fold test, according to the *Guidelines*, the efficiencies have to be specific to the agreement in question, meaning that there are no other economically practicable and less restrictive means of achieving the efficiencies taking into account dynamic market conditions and business realities. Uncertainty is, therefore, a major factor in this test as success must be estimated with specificity related to the restrictions of competition posed by the agreement. Especially in the field of new product development, the acceptance and success of the market are highly uncertain, which may be the reason for cooperation in some stages of production, such as the limitation of start-up costs not affordable by the producing undertaking alone. In this case, even if each undertaking could financially and technically develop and bring the relevant product to the market, collaboration may be indispensable[197].

The undertakings involved are not required to consider hypothetical or theoretical alternatives and the Commission will only intervene if there were realistic and attainable alternatives to the imposed restrictions, while the parties may explain the rejection of these alternatives on efficiency grounds[198]. The main point of the first stage, according to the Commission is to decide whether the same efficiencies yielded by the agreement could have been achieved at the same time through less restrictive types of agreements, or if the undertakings acting alone could have achieved said efficiencies.

Concerning the second stage of the two-fold examination, the indispensability of each restriction is assessed. The nature and the necessity of the restriction have to be substantiated by the undertakings to prove that each restriction is reasonably necessary to produce efficiencies[199]. The parties must, therefore, prove that the absence of the restriction would eliminate, significantly reduce or impede the materialization of the efficiencies resulting from the agreement. This stage requires an assessment of improving actual and potential competition if a particular restriction is eliminated or if a less restrictive alternative is implemented, with the test being stricter when dealing with more restrictive consequences of an agreement. Blacklisted restrictions of Block Exemption Regulations and hardcore restrictions are unlikely to satisfy the indispensability condition[200]. Again, the actual context regarding the structure of the market, the economic risks related to the agreement as well as the incentives of the undertakings are involved in the

[196] Case C-382/12 MasterCard, para 92-94
[197] Commission Decision of 18 May 1994, Exxon/Shell (IV/33.640), para 74; Commission Decision of 12 December 1994 Fujitsu AMD Semiconductor (94/823/EC), para 42
[198] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 75; in other fields such as fundamental freedoms, positive evidence is required in proving that an objective could not be achieved by any other available means under the same conditions.
[199] Ibid, para 78
[200] Ibid, para 79

indispensability assessment. The Guidelines note that in a highly volatile market where the success of a product is uncertain, a wider restriction may be required to ensure that the efficiencies of the agreement will materialize. Alignment of incentives may also contribute to the indispensability of restriction to ensure that the efforts of undertakings the implementation of the agreement are concentrated. Timing and geographic factors are also relevant during the examination process. A restriction may be indispensable only for a certain period, including the time required for the parties to achieve the efficiencies and the timeframe for the return of the investment made by the parties, forcing the exception of Article 101(3) to apply only in this period[201]. For example, only the start-up phase of development where fundamental know-how is exchanged for undertakings to get the needed knowledge to develop a product may require a restriction. The assessment will be done based on a forecast for various aspects, such as the timeframe for market entry and returns, as the actual circumstances regarding an agreement are often apparent only after-the-fact[202]. Accordingly, accepted restrictions of competition should be limited to the regions of the EU where they are indispensable. If, for example, one undertaking may independently expand into the markets of another MS, given that collaboration in one MS is already sufficient for market access, the coordination of distribution is not necessary[203].

In the field of sustainability agreements, the application of this condition has led to several environmental agreements failing the exemption test in the context of Article 101(3)[204]. Especially regarding the uncertainty of forecasts to determine indispensability, environmental benefits are often very difficult to calculate due to their long-term nature[205]. Recently, in the *German Car Manufacturers* case, the Commission found that the conduct of the undertakings agreeing on certain tank sizes or refill ranges as well as exchanging insufficiently anonymized or aggregated information was not indispensable regarding the promotion of the building of AdBlue infrastructure resulting in environmental benefits[206].

According to one view, the indispensability requirement invites the consideration of less restrictive ways to reach sustainability goals as undertakings need to demonstrate the necessity of the agreement, the indispensability of the restrictions and the sustainability efficiencies may not be attained without the agreement to the same extent[207]. Others, however, argue that the meaning of the term "*indispensable*" is strict and may not be downplayed accepting "*useful impairments of competition*" for reasons of effectiveness[208]. According to them, indispensability may not be partially reduced based on the "*polluter pays*" principle of environmental law as this would result in sector-specific application.

2.2.2.2 No elimination of competition in a substantial part of the market

The fourth condition of Article 101(3) stipulates that competition must not be eliminated in a substantial part of the market as a result of the implementation of an agreement. This condition acts as a protection mechanism for the already established competition in a relevant market, recognizing that the competitive process and, thus, economic efficiency and innovation are only safeguarded when a healthy "*rivalry*" between undertakings exists. Short-term pro-competitive efficiency gains are outweighed by longer-term losses stemming from the consequences of

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[201] Ibid, para 81; See also T-374/94, Joined Cases T-375/94, T-384/94, T-388/94, European Night Services, para 230
[202] Frenz W. (n 102), p. 509
[203] Ibid, p. 510
[204] See Kingston S., Greening EU Competition Law and Policy, Cambridge University Press, 2011, p. 280–87
[205] Frenz W. (n 102), p. 513
[206] Commission Decision of 8 July 2021, Car Emissions (AT.40178), paras 133,174-175
[207] Holmes S. (n. 156), p. 381
[208] Frenz W. (n 102), p. 510; citing also Ehle (1996)

eliminated competition namely rent-seeking, misallocation of resources, reduced innovation and higher prices[209].

The Guidelines note that the concept of ensuring some degree of the residual competition after coordination is autonomous in EU Law specific to the application of Article 101(3) TFEU but recognizes a relationship between Articles 101(3) and 102 TFEU. This happens because the decisive factor when deciding on the fulfilment of this condition is a forecast on the position of the undertakings coordinating their actions resulting from or after the beginning of their collaboration, involving examining whether undertakings will have the ability to act independently of other competitors and consumers[210]. The Case law of the Court dictates that the application of Article 101(3) does not prevent the application of Article 102[211] and that, since this condition aims to protect effective competition on the market, a consistent approach also endorsed by the Court would require that the application of Article 101(3) is precluded when dealing with restrictive agreements that lead to an abuse of dominant position, which is a hard-core restriction[212], as the prohibition against eliminating competition is a "*narrower concept*" than the existence or achievement of a dominant position[213], though not all agreements causing restriction and which are concluded by a dominant undertaking constitute an abuse of a dominant position[214].

The *Guidelines* provide also an explanation for determining whether competition will be substantially eliminated as a result of the agreement. First of all, according to paragraph 107, it is necessary to evaluate the extent to which competition will be reduced by the implementation of the agreement. This will be done by assessing the degree of competition before the agreement and the impact which the agreement itself causes. If competition is already weakened in the market concerned, the more the agreement will reduce competition on the market, the higher the likelihood of the agreement causing substantial elimination of competition. Moreover, if the degree of substitutability is high between the products covered by the agreement, then competition is more likely to be eliminated[215]. The horizontal or vertical character of the agreements is also of importance. Concerning vertical agreements covering different distribution systems, the relevant level to examine residual competition, is the level to which the agreement applies. If the agreement establishes a distribution system for the products of a manufacturer, a sufficient degree of competition must remain in each level of trade for the products covered by the agreement[216]. In the assessment both actual and potential competition should be taken into account focusing on three factors: firstly, a "*realistic analysis*" of the various sources of competition in the market, secondly the degree of competitive constraint imposed by the agreement and, thirdly, the impact of the agreement regarding this competitive constraint[217]. Additionally, qualitative and quantitative analysis is often needed as the degree of remaining actual competition in the market may not be assessed exclusively based on market share. The elimination of competition is, according to the Commission, also important as the exception of an agreement is unlikely if it eliminates competition in one of its "*most important expressions*", such as price competition, or competition regarding innovation and development of new products[218]. The impact of the agreement may also

[209] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 105
[210] Frenz W. (n 102), p. 515
[211] See Joined Cases C-395/96 P and C-396/96 P Compagnie maritime Belge
[212] Joined Cases T-191/98, T-212/98 and T-214/98 Atlantic Container Line, para 1456
[213] Case T-395/94 Atlantic Container Line, para 330
[214] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 106
[215] Frenz W. (n 102), p. 518; See also ibid, para 113
[216] Commission Decision of 2 December 1981, Hasselblad (82/367/EEC), para 74
[217] Ibid, para 108
[218] Ibid, para 110

be assessed after its implementation about the market conduct the undertakings involved follow or past competitive interaction as paragraphs 111 and 112 show. Price increases without the sacrifice of market share following the agreement could be an indication of the lack of real competitive pressure and substantial elimination of competition as it proves a substantial degree of market power is amassed by the undertakings. Accordingly, undertakings may resort to agreements with potential competitors that had occupied a significant proportion of the market share in the past with an incentive to neutralize an important source of competition. Finally, the *Guidelines* set out a series of factors that concern potential competition that should be assessed when examining entry barriers and the possibility of entry for new competitors. This section is important as new competitors must have the opportunity to access the market, contrary to a closed-off system accessed only by the undertakings participating in the agreement. The factors included by the Commission regarding new market entry concern, among others regulatory framework, cost of entry including sunk costs, the minimum efficient scale within the industry, the competitive strengths of potential new entrants, the response of customers and incumbents to a new entry, and past data on market entry on a significant scale or the absence thereof.

3. Exceptions not deriving from the Treaties: Agreements exempted through Block Exemption Regulations, the De Minimis doctrine and the case of collective agreements.

3.1 Block Exemptions

3.1.1 Introduction

Block Exemption Regulations (BERs) are a tool used by the Commission in the framework of EU law, which contains a carve-out for certain categories of agreements and practices[219] restricting competition[220]. This means that the Commission lays the conditions under which categories of agreements are in advance permitted under Article 101 TFEU increasing legal certainty for the undertakings concerned. In the case of Block Exemptions, the undertakings which have concluded the agreement, are thus relieved from the burden of proof showing that their conduct satisfies the conditions of Article 101(3), resulting from the presumption that all agreements restricting competition covered by a Block Exemption fulfil the conditions of Article 101(3) TFEU[221]. The parties, therefore, only have to prove that the agreement they concluded falls within the scope of the application of a Block Exemption speeding up the exemption process and relieving the Commission of the workload needed to engage in a detailed case-by-case analysis[222]. The legal certainty aspect stems from the fact that Block Exemptions are pieces of EU legislation which are directly applicable under Article 288 TFEU and an agreement that benefits from a block exemption may not be declared invalid by a national court. However, a BER may, under conditions, be formally withdrawn by the Commission or an NCA prohibiting the agreements covered for the future[223].

3.1.1.1 The impact of Regulation 1/2003 on Block Exemption Regulations

BERs are a legislative tool having an administrative and procedural dimension which aims at reducing the workload of both the Commission and the NCAs while providing legal certainty for undertakings. Before the introduction of this concept, the old regime of competition enforcement was described in Regulation 17/62, which stipulated that all undertakings must notify their agreements to the Commission before the implementation. The Commission then decided on the agreement either founding it incompatible with competition rules or granting an exemption[224]. However, since the adoption of Regulation 1/2003, the old system of notification was abolished, effectively decentralizing the enforcement of competition rules[225]. The Guidelines state in paragraph 2 that Regulation 1/2003 does not affect the validity and legal nature of block exemption regulations and that all agreements that are covered by a block exemption are "*legally valid and enforceable*". However, the innovation that was introduced by Regulation 1/2003 was seen as pushing aside the concept of BERs. This happens because the enforcement system shifted to self-assessment as a result of decentralization and agreements that satisfy the four conditions of Article 101(3) are automatically accepted. Therefore, the Commission does not have the burden of responding to undertakings' notifications and, consequently, BERs lost their workload-reducing function. This is further proven by the fact that through the modernization of EU competition law, only on very few occasions the application of BERs to a specific agreement was discussed by the Commission and NCAs and on even fewer the agreement was declared to be covered and allowed

[219] In this Chapter the term "agreement" will be used in substitutability with the term "concerted practices" as in the previous Chapter covering 101(3) TFEU
[220] Van de Gronden (n 1), p. 78
[221] Case 32/65 Italian Republic v Commission pp. 404
[222] Lorenz M., Possibilities for cooperation under Article 101 TFEU In: An Introduction to EU Competition Law (pp. 128-187). Cambridge: Cambridge University Press, 2013, p. 128
[223] Ibid; See also Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 2
[224] Council Regulation 17/62/EEC First Regulation implementing Articles 85 and 86 of the Treaty
[225] Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty

by a BER[226]. Critics of BERs used in modern EU competition law argue that Block Exemptions are a "*fossilized*" administrative instrument and a "*relic from the past*" as they provide different sectors or practices a unique competition analysis, distorting consistent enforcement among EU markets and sectors without any proper economic justification[227]. As it is apparent, the criticism of BERs was directed mainly at sectoral regulations applying to sectors rather than practices, viewed as means of market regulation and protectionism not compatible with modern enforcement of EU competition law rules.
On the opposite side, supporters of the BERs do not focus solely on the procedural-administrative character of BERs or their workload reduction function[228]. According to them instead of the aforementioned functions we should also focus on the transparent and balancing aspects and the fact that they are based on EU-wide consensus, which not only protects EU competition law's political accountability and legitimacy but also promotes uniformity and legal certainty. Through the adoption of BERs, compliance and enforcement costs are reduced and their temporary character promotes regulatory experimentalism and flexibility in the process of the adoption of more effective rules[229]. Additionally, supporters argue that the adoption of soft-law Guidelines may not replace effectively BERs. This is because guidelines should, according to this opinion, be used to supplement and explain BERs, but they don't offer compelling substitution balancing competition law and public policy considerations. Guidelines, despite a usual broad consultation, are at the end adopted by the Commission alone and, consequently, do not rely on the aforementioned union-wide consensus and the democratic adoption cycle of the BERs[230]. This is also proved by the recent consultations over Horizontal BERs which expire on December 2022, where the Commission gathered feedback from stakeholders in Horizontal BERs of R&D and Specialization Agreements, regarding issues and the evaluation of current rules showing that HBERs remain relevant[231]. This process of law development using a legal, economic, and public debate is helpful for the improvement of Competition rules as the evaluation showed areas that, according to stakeholders need improvement in effectiveness, relevance, clarification and coherence. Moreover, a problem lies with the perceived binding nature of Guidelines versus the Direct Effect of the BERs. Guidelines as a soft law instrument are binding solely on the Commission bringing limited uniformity of application and, consequently, legal certainty. Only if the EU Courts explicitly apply the provision of Guidelines to an individual case, the degree of deviation to their application by the NCAs and National Courts may be limited[232]. Additionally, compliance and enforcement costs are not reduced, given that undertakings must conduct self-assessment taking into account multiple approaches and interpretations, without having the legal certainty that a practice permitted by the Commission's guidelines is also tolerated by different NCAs[233].

3.1.1.2 Current Block Exemptions legal framework.

Since the first regulation in 1967 concerning certain categories of exclusive dealing agreements, the Commission has used its power to power to adopt Block Exemption Regulations in several areas concerning categories of both horizontal cooperation agreements and vertical agreements.

[226] Brook O., Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU, Cambridge University Press, 2022, figs 4.1, 4.5.
[227] Marcos F. and Sanchez-Graells A., A Missing Step in the Modernisation Stairway of EU Competition Law: Any Role for Block Exemption Regulations in the Realm of Regulation 1/2003?, 2010, Competition Law Review 183, p. 190-200.
[228] For an extensive discussion on the matter see: Brook O., Block Exemption Regulations and Public Policy in The Defence of BERs, Cambridge Yearbook of European Legal Studies, 2022
[229] Ibid, p.32
[230] Ibid, p.30
[231] EC, Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines; available at: https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en
[232] Horizontal BERs Consultation of 2021, p. 7, 21
[233] Brook O. (n. 232), p. 31

Currently, the BERs in force are The Vertical Block Exemption (VBER) accompanied by Vertical Guidelines; the Technology transfer (including licensing) block exemption accompanied by Technology Transfer Guidelines; the Horizontal block exemptions (HBERs) including the R&D block exemption and the specialization block exemption; and Sector-specific block exemptions including the insurance sector, the Motor Vehicle block exemption, the Liner Shipping block exemption and the Air Transport block exemption.

The horizontal block exemptions have been supplemented by the Guidelines on the applicability of Article 101 of the TFEU to horizontal cooperation agreements. These Horizontal Guidelines set out the principles for the assessment of agreements as well as an individual assessment of R&D and specialization agreements and other forms of horizontal cooperation such as information exchange, production agreements, joint purchasing agreements, commercialization agreements and standardization agreements. It is important to mention that the HBERs will expire on 31 December 2022. They are therefore currently under review following a public consultation[234].

It should be noted, however, that there is no Block Exemption Regulation covering Horizontal Agreements as a whole. This seems logical in the context of EU competition law, as agreements that are concluded between competitors operating on the same level of the market are normally more prone to restrict competition substantially than vertical agreements. However, the Commission found that some horizontal agreements may be more beneficial than harmful, leading to efficiencies that benefit the consumers and the function of the market as is the case with R&D and specialization agreements.

The Commission published on 10 May 2022 a new Vertical Block Exemption Regulation and guidelines on vertical restraints that entered into force on 1 June 2022. The changes introduced in this new package concern changes for the treatment of distribution agreements and more specifically the combination of several different distribution systems, dual distribution, dual pricing and parity obligations. The new HBERs and Horizontal Guidelines are expected to enter into force in January 2023.

3.1.1.3 Conditions for the application of a Block Exemption Regulation.

A BER, as stated above, specifies the categories of agreements that are exempted from the prohibition of Article 101(1) TFEU, lining out the special features that the agreement concerned must have. Furthermore, BERs also contain market thresholds, defining the percentage of allowed market coverage and an excess which impedes the granting of an exemption. Additionally, specific clauses are banned in the framework of Block Exemption regulations creating a list of "*black-listed*" and "*grey-listed*" clauses. If a blacklisted clause is incorporated into an agreement, the exemption immediately does not apply to the agreement. In this case, the entire agreement falls outside of the benefit of the BER exemption, meaning that all provisions of the agreement must be reviewed again. However, if a clause is "*grey-listed*" then only this clause is not covered by the scope of the Block Exemption (if it is severable from the agreement) but the other provisions of the agreement may still benefit[235].

Although affirmative conditions for the exemption of agreements are part of the examination by this dissertation, this type of condition is no longer present in BERs. "*White-list*" clauses were contained in the past, defining which types of clauses should be included in an agreement to be exempted. This type of clause received criticism in the sense that it dictated a specific course of

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[234] For a detailed analysis of the review process along with its findings see: Commission Staff working document, Evaluation of the Horizontal Block Exemption Regulations (SWD/2021 104 final)

[235] Van de Gronden (n 1), p. 78

action, not allowing room for different competitive maneuvers by the undertakings in the process of an agreement. In the newer Regulations, this practice has been abandoned and undertakings should assess now only the negative conditions stipulated by each exemption.

In general, concerning horizontal agreements, blacklisted clauses include price-fixing agreements, production limitations and market/customer distribution clauses whereas in vertical agreements hardcore restrictions include clauses concerning fixed fees, minimum resale prices absolute territorial protection and limitations on passive sales[236].

In the following paragraphs, the conditions for the application of the new Vertical Block Exemption Regulation, and the Horizontal Block Exemption Regulations on specialization and R&D will be analyzed.

3.1.2 The new Vertical Block Exemption Regulation

A new Vertical block exemption regulation was adopted by the Commission and entered into force on 1st June 2022 after the expiration of the previous Regulation on 31 May 2022 creating a safe harbour exemption for agreements caught by the prohibition of Article 101(3)[237]. Along with the Regulation, the Commission issued also the Guidelines on the application of the VBER to help undertakings self-assess the compatibility of agreements with the VBER. The new will be valid for 12 years and an evaluation report is scheduled after eight years of application. A one-year transitional period was also included for agreements already in force by the end of the 2010 VBER that satisfied the conditions for exemption under the previous Regulation but may not satisfy the renewed conditions of the new VBER. Before the adoption of the new VBER and Vertical Guidelines, the EC undertook an extensive evaluation exercise over the previous years. This evaluation focused on current developments and adaptation to changes that resulted from the increasing growth of online sales and the emergence of new market players including online platforms[238]. Additionally, the new regulation also took into accounts economic and social developments such as digital transition and the European Green Deal.

Sustainable development, together with digitalization, is addressed by this regulation and is characterized by the Annex to the Guidelines for Vertical restraints as a "*priority objective*" for the policies of the Union for a resilient market[239]. The concept of sustainability in this framework includes actions to combat climate change (ex. Reducing greenhouse gas emissions), limiting the use of natural resources, reducing waste and promoting animal welfare[240]. Efficient supply and distribution agreements between undertakings may safeguard the Union's sustainability and resilience and, therefore, vertical agreements which pursue sustainability objectives although not belonging to not a distinct category of vertical agreements under EU competition law must be assessed taking into account the specific objective that they pursue according to the principles set out in the VBER Guidelines. Accordingly, the Guidelines stipulate that the exemption provided by Article 2(1) of the VBER applies to vertical agreements that pursue sustainability, resilience and digital objectives, provided that they meet the conditions of the Regulation[241].

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[236] Tzouganatos D. (in Greek), Competition Law, Nomiki Bibliothiki, 2020, p. 376

[237] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

[238] Czapracka K. Kuhn T. Sakellariou-Witt S. Citron P., New EU competition rules for distribution agreements; available at: https://www.whitecase.com/insight-alert/new-eu-competition-rules-distribution-agreements-0

[239] Communication from the Commission – Commission Notice - Guidelines on vertical restraints (2022/C 248/01)

[240] Communication from the Commission of 5 May 2021 on Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery (2021/350 final)

[241] Guidelines on vertical restraints (n. 243), para 8

The Regulation describes in Articles 4 and 5 the black- and grey-listed clauses covered by this agreement, namely the "*Restrictions that remove the benefit of the block exemption - hardcore restrictions*" (Article 4) and the "*Excluded restrictions*" (Article 5). However, the paragraphs of other Articles, especially Article 3 containing the threshold requirements, are relevant to the topic examined in this dissertation and will be mentioned. It is obvious that if the negative requirements are not satisfied then the agreement is prohibited under Article 101(1) TFEU though, even in this case, it should be examined whether the agreement individually fulfils the conditions of the exception provided by Article 101(3) of the Treaty[242].

3.1.2.1 General remarks on the Exemption

In Article 2, the Regulation describes the scope of application of the Block Exemption to Vertical Agreements defining the categories of agreements that are covered by the VBER introducing some first negative requirements on its application. First, in the case of vertical agreements entered into between an association of undertakings and an individual member or an individual supplier, the agreement is exempted unless an individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million[243]. Additionally, concerning provisions of vertical agreements on the use of intellectual property rights, these provisions should not constitute the primary object of such agreements and must not include restrictions of functioning the same as vertical restraints which are not exempted under the VBER[244]. An important negative requirement is also introduced in Article 2, according to which the VBER does not apply to vertical agreements concluded between competing undertakings. Only non-reciprocal vertical agreements between competing undertakings may be exempted if the undertakings do not compete on the upstream level where one of them buys the contract goods or if the supplier of services does not compete with the buyer at the level of trade where it purchases the contract services. It should be noted, however, that these exceptions do not apply where the exchange of information between the supplier and the buyer is either not directly related to the implementation of the agreement or is not necessary to improve the production or distribution of the contract goods, or in some cases of online intermediation services[245]. Finally, agreements falling within the scope of any other block exemption regulation are outside of the scope of the VBER.

3.1.2.2 Requirements on Market Threshold

The Regulation sets in Article 3 the Market Threshold requirements that must be followed for the exemption of an agreement, the same as the previous Regulation featured, manifesting the "*economics-oriented*" approach of Block Exemptions for vertical agreements[246]. The calculation of the market share sits at the heart of the Regulation's economic analysis, assessing in the closest way the elusive concept of market power.

The VBER stipulates that the supplier must not hold a market share greater than 30% of the relevant market on which it sells the contract goods or services and the buyer should not hold more than 30% of the relevant market share on which it purchases the contract goods or services. If either of these thresholds is exceeded then the agreement is prohibited according to Article 101(1)[247]. The Guidelines explain that if a vertical agreement is examined involving three parties, which operate at different levels of trade, the market share of each party involved must not exceed

[242] Ibid, para 7
[243] Commission Regulation (EU) 2022/720, Art. 2(2)
[244] Ibid. Art. 2(3)
[245] Ibid. Art. 2(5) and (6)
[246] Whish R. & Bailey D. (n. 19), p. 694
[247] Cases (under the previous Regulation) where the undertakings were denied an exemption pursuant to this negative requirement include the JCB and Telenor Decisions.

30 % for the VBER to apply[248]. Article 8 contains a method for the calculation of the market shares based on value data, taking into account all sources of revenue generated by the sale of the goods or services. If it is not available to obtain value data, substantiated estimates take their place based on reliable market information, for example, volume figures. The Guidelines also add that in-house production may be relevant and independently assessed on a particular case but is not taken into account in defining the market or for the calculation of market shares under the VBER. The application and inclusion of the buyer's market share cap give rise to compliance issues regarding vertical agreements. Based on the rules for the market share percentages, it is natural to assume that the supplier undertaking must ask each of its buyers for market information regarding the market share in the buyer's relevant market, information which may change over time or be the result of rough estimates, creating the obligation for the supplier to check possible fluctuation or even their veracity[249]. Consequently, the supplier may need to apply different agreements in the case of buyers who exceed the market share allowed and in the case of buyers who do not. Finally, the supplier must keep in mind that individual negotiation is also needed to avoid any possibility of accidental participation in a horizontal concerted practice between the retailers caused by their respective communications with the supplier, a practice named "*hub-and-spoke agreements*"[250].

3.1.2.3 Restrictions that remove the benefit of the block exemption (Hard-core Restrictions)

Article 4(1) of the Regulation states that the exemption of the VBER will not apply to any vertical agreements which, "*directly or indirectly, in isolation or combination with other factors under the control of the parties*" contain several restrictions as their object that distort competition significantly irrespective of the market share the undertakings possess. According to the Commission, consumer protection is the reason for the placement of these negative requirements, as the serious restrictions described may cause significant consumer harm. As mentioned above, the presence of one or more clauses that fall into this category renders the whole agreement inapplicable under the VBER. The restrictions described by Article 4, are mainly restrictions by objects considered harmful by their very nature to the proper functioning of normal competition, falling under the scope of the prohibition of Article 101(1) TFEU[251] but a hard-core restriction may not be covered by this prohibition if it does not have an appreciable effect on inter-state trade[252]. The Guidelines in paragraph 180(b) state that an agreement that includes a hardcore restriction in the meaning of Article 4 of the VBER is also unlikely to fulfil the conditions of Article 101(3) of the Treaty given its restrictive nature. Additionally, as the Court has ruled, an assessment of the effect of agreements containing these restrictions is unnecessary considering the sufficient degree of harm to the competition they encompass[253]. However, if an undertaking demonstrates pro-competitive effects under Article 101(3), an individual assessment by the Commission on assessing the negative impact on competition of this agreement including the hardcore restriction is possible to determine whether the agreement fulfils the conditions of Article 101(3).

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[248] Guidelines on vertical restraints (n. 243), para 171-173
[249] Whish R. & Bailey D. (n. 19), p. 695
[250] For an analysis see OECD, Hub-and-spoke arrangements in competition, 2019; available at: https://www.oecd.org/competition/hub-and-spoke-arrangements.htm
[251] Case C-373/14 Toshiba Corporation, para 26
[252] See Case C-306/96 Javico,
[253] Case C-228/18 Budapest Bank, paras 35-37 and case law cited

Article 4(a) concerns resale price maintenance ('RPM') and provides that the block exemption will not cover agreements where the buyer's ability to determine the sale price is restricted. This requirement does not include the placement of a maximum sale price[254] or a recommended sale price[255], if the recommendation does not amount to a fixed or minimum sale price, being the result of pressure or incentives offered by any of the parties. It is noted, however, that maximum resale prices or recommended prices could act as a focal point for resellers, followed by all of them softening competition or facilitating collusion between suppliers. The provision, therefore, covers both direct and indirect means of RPM, such as imposing minimum advertised prices ('MAPs') and threatening or intimidating buyers, warnings, penalties, delay or suspension of deliveries or contract terminations concerning the observance of a given price level[256]. The Court in its case law has held RPM restricts competition by an object falling under the prohibition of Article 101(1) of the Treaty[257]. Price monitoring is increasingly used along with RPM, especially in the field of e-commerce where the use of price monitoring software by both suppliers and retailers is common, allowing manufacturers to effectively track the resale prices in their distribution network[258]. However, the Guidelines state that, on their own, price monitoring and price reporting are not RPM. The reasoning behind the inclusion of RPM in the hardcore restrictions category is the impairment of inter-brand competition by preventing some or all distributors from lowering their sale price for the brand concerned, thus resulting in a price increase for that brand[259]. Additionally, the Guidelines give more reasons for the prohibition of RPM, for example concerning markets prone to collusive outcomes, RPM makes it easier to detect whether a supplier is deviating from the collusive equilibrium by cutting its price. Moreover, well-organized buyers could convince their suppliers to apply a fixed resale price above the competitive level, thereby helping the buyers reach or stabilize a collusive equilibrium between buyers at the distribution level. RPM could also hinder innovation at the distribution level by preventing the entry and expansion of new or more efficient distribution formats, or it could be implemented by a supplier with market power to foreclose smaller rivals[260].

Article 4(b), (c) and (d) concern exclusive distribution (only one distributor, retailer or wholesaler), selective distribution (more than one authorized distributor) and free distribution systems. These Articles contain a list of hardcore restrictions and exceptions and concern agreements that have, directly or indirectly, the object of restricting the territory into which or the customers to whom the buyer or its customers may sell the relevant goods or services. This exclusivity could be the result of direct or indirect measures and obligations. Direct restrictions may refer to the obligation not to sell to particular territories or customers, or the obligation to refer orders from such customers to other distributors. The Court has ruled that the supplier may also apply indirect measures to induce the buyer not to engage in the practices, such as requiring the supplier's prior approval for sales to such customers[261], refusing or reducing bonuses or discounts in these cases[262], threatening to terminate the agreement concluded or not to renew it if the buyer sells to such customers[263], charging a higher price to the distributor for products that are to be sold to such

[254] Commission decision of 5 July 2000, Nathan-Bricolux (COMP.F.1/36.516), para 87
[255] Case 161/84 Pronuptia de Paris, para 25
[256] Guidelines on vertical restraints (n. 243), para 187
[257] See Cases C-243/83 Binon, para 44; C-311/85 VVR, para 17; C-27/87 Erauw-Jacquery, para 15
[258] Commission Decision of 24 June, Pioneer (Case AT.40182), paras 136 and 155
[259] Guidelines on vertical restraints (n. 243), para 196(g)
[260] Ibid. points (a-f)
[261] Case T-77/92 Parker Pen, para 37
[262] Case T450/05 Peugeot, para 47
[263] Case T-62/98 Volkswagen, para 44

customers[264], the prevention from using more languages on the packaging or for the promotion of the products[265], the obligation to pass on to the supplier profits from such customers[266] and the exclusion of products from a Union-wide guarantee service reimbursed by the supplier for the products resold outside of the buyer's territory or products that are sold in the buyer's territory by buyers located in other territories[267].

Novelties introduced by the new VBER include the update of these direct or indirect restrictions concerning internet sales as described in point (e) of Article 4 of the new VBER. Requiring the buyer to prevent customers located in another territory from accessing their website/online store or to re-route customers to the online store of the manufacturer or another seller is an example of hardcore restrictions imposed on a digital level[268].

Furthermore, an obligation imposed on the buyer to sell the contract goods or services only in a physical space or in the physical presence of specialized personnel excluding the digital markets[269] and the prohibition from establishing or operating an online store is also a significant restriction of competition according to the Commission. The Guidelines establish also a hardcore restriction when suppliers prevent buyers from using entire online advertising channels, such as search engines or price comparison services[270] or indirect restrictions concerning the use of these channels. The Guidelines note that these restrictions limit the buyer's ability to target customers beyond its physical trading area by using the internet effectively and online marketing tools to sell the contract goods or services to particular territories or customers. However, it is mentioned that the prohibition of the use of particular price comparison services or search engines is not considered generally a hardcore restriction if other alternatives are available, and capable of attracting customers. Accordingly, restrictions on the use of the most popular advertising services in a particular online advertising channel may amount to a hardcore restriction as alternatives may be de facto not as effective at attracting the company's target group of customers[271].

Not included as hardcore restrictions, thus benefitting from the Block exemption, are restrictions imposed on the buyer concerning how the contract goods or services are to be sold physically or digitally irrespective of the type of distribution system. In particular, the imposed restrictions may be related to quality, imposing requirements relating, for example to the minimum size and appearance of the buyer's shop or the product's presentation[272]. In the same sense, if the restrictions do not prevent the buyer from making effective use of the internet, online sales restrictions, such as obligations aimed at ensuring the quality, or a particular appearance of the buyer's online store, are not hardcore restrictions benefitting from the Regulation as long as the

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[264] Commission Decision of 30 January 2020, Film merchandise (Case AT.40433), para 54.

[265] Ibid, paras 52-53

[266] Commission Decision of 25 March 2019, Ancillary sports Merchandise (Case AT.40436), para 57

[267] Commission Decision of 16 July 2003, Yamaha (Case AT.37975), paras 111-112 However, if one distributor makes a sale to a territory that has been allocated to another distributor, the first distributor must pay the second distributor a fee (Case T-67/01 JCB, paras 136 - 145).

[268] Guidelines on vertical restraints (n. 243), para 206(a); see also Article 3 of Regulation (EU) 2018/302. Obliging the buyer to offer links to the online stores of the supplier or of other sellers is not a hardcore restriction according to the Guidelines

[269] Case C-439/09 Pierre Fabre Dermo-Cosmétique, paras 36-37

[270] Commission Decision of 24 July 2018, Pioneer (Case AT.40182), paras 118 - 126.

[271] Guidelines on vertical restraints (n. 243), para 206(g)

[272] Ibid, para 207

freedom of the buyer remains to operate its online store[273] and to advertise online[274] is not restricted.

Concerning the exceptions included in Article 4(b), (c) and (d) the new VBER introduces some changes on allowed restrictions in vertical agreements. These exceptions cover the possibility of maintaining up to five distributors for one territory or customer group within the exclusive distribution system[275], specifications for protection against active and passive sales from original distributors and their customers to unauthorized distributors, restrictions on the distributor's place of establishment (location clause), restrictions of active or passive sales to end users and, finally, restrictions on reselling components to competitors of the supplier which would be used in manufacturing the same type of goods as those produced by the supplier[276].

3.1.2.4 Restrictions that are excluded from the benefit of the Block Exemption (Gray Clauses)

Article 5 of the Regulation contains some obligations that are excluded from the benefit of the block exemption, if they are included in a vertical agreement, regardless of whether the market share thresholds are exceeded or not. The Regulation excludes these conditions attached to the agreement as it may not be assumed that they satisfy the conditions of Article 101(3). However, it should be noted that it is not to be presumed that the elements listed in Article 5 are prohibited by Article 101(1) or do not necessarily satisfy the conditions of Article 101(3) but, given their nature, they are subject to an individual assessment under Article 101. The core difference between these clauses and the hardcore restrictions mentioned above is that, unlike hardcore restrictions, the exclusion of an obligation under Article 5 is limited to this specific obligation. Provided that the obligation in question is severable from the rest of the vertical agreement, the remainder of the vertical agreement may benefit under the Block exemption[277]. The grey clauses of Article 5 apply to non-compete obligations exceeding five years, post-term non-compete obligations, non-compete obligations imposed on members of a selective distribution system and across-platform retail parity obligations[278].

Non-compete obligations under Article 5 are clauses that introduce an obligation not to manufacture, purchase, sell or resell goods or services. This definition is complemented by Article 1(1)(f) including arrangements that oblige the buyer to purchase more than 80% of the buyer's total purchases of the contract goods and services and their substitutes during the preceding calendar year from the supplier or another undertaking designated by the supplier. "*Tacitly renewable*" non-compete obligations extending beyond a period of five years may be exempted, provided that the vertical agreement containing the obligation may effectively be renegotiated or terminated with a reasonable period of notice and at a reasonable cost allowing for the effective switch of suppliers after the 5 years[279]. Article 5(2) adds that longer periods fall under the scope of the exemption if the contract goods or services are resold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties, excluding cases of "*artificial ownership constructions*", (ex. transferring the proprietary rights to the supplier for only a limited period to avoid the 5-year limitation). The Court has ruled that the terms "*land*" and "*premises*",

[273] Case C-439/09 Pierre Fabre Dermo-Cosmétique, paras 56-57
[274] Commission Decision of 24 June, Pioneer (Case AT.40182), paras 118-126
[275] Guidelines on vertical restraints (n. 243), para 219
[276] Ibid. discussed extensively in chapter 6.1.2.3.
[277] Ibid, para 5
[278] Commission Regulation (EU) 2022/720, Art. 5(1)
[279] Guidelines on vertical restraints (n. 243), para 248

refer to a part of a building and a parcel of land, not the entire territory allocated to a distributor[280]. Under Article 5(1)(b) post-term non-competes are also excluded from the exemption with one derogation related to protecting know-how described in paragraph 2. For a limited period of 1 year and provided that this obligation is indispensable to protect know-how transferred by the supplier to the buyer, limited to the point of sale the buyer has operated from, such clauses are exempted. Regarding Article 5(1)(c), a clause obliging the members of a selective distribution system not to sell the brands of particular competing suppliers is also excluded, useful mainly in situations where multiple suppliers use the same selective distribution outlets. Lastly, the new VBER addressed the issue of across-platform retail parity obligations in Article 5(1)(d). Suppliers of online intermediation services may not impose restrictions on buyers on not using competing for online intermediation services to offer, sell or resell goods or services to end users under more favourable conditions.

3.1.3 Horizontal Block Exemption Regulations: Specialization Agreements BER and Research and Development BER

3.1.3.1 Introduction

As mentioned in Chapter 3.1.1.2 above, there is no general BER for horizontal agreements in place. The nature of horizontal agreements, concluded between same-level competitors gives rise to serious competition concerns not present in vertical agreements. Nevertheless, the efficiencies that some categories of horizontal agreements produce justify their exemption under conditions and, for that reason the Commission adopted BERs for specific types of horizontal agreements with the main being the specialization agreements BER and Research and Development (‘R&D) BER. Additionally, the Commission published in January 2011 general Guidelines on horizontal agreements, providing binding guidance on the Commission for the interpretation of the HBERs and for the application of Article 101 of the Treaty to horizontal agreements replacing the 2001 Horizontal Guidelines, to explain the conditions of application of the HBERs to bring more legal certainty to the legal framework surrounding horizontal agreements and matching new market developments and responding to the needs of modern businesses. Moreover, the Commission also intended to improve innovation and competitiveness between undertakings by limiting agreements which are prohibited as anti-competitive[281]. The Horizontal Guidelines provided analytical information for common types of horizontal cooperation agreements, such as research and development, production, purchasing, commercialization, standardization, and information exchange.

Given that the HBERs will expire on 31 December 2022, they are under review following an extensive procedure divided between two phases, the evaluation phase and the impact assessment phase to allow to determine whether the Commission should let the two Regulations lapse, prolong their duration or revise them[282]. Regarding the two phases, the evaluation phase aims to collect evidence concerning the function of the current HBERs and Guidelines using the five criteria of effectiveness, efficiency, relevance, coherence and EU-added value. This phase includes also a stakeholder public consultation process, in the form of individual submissions or activities such as workshops[283], for feedback and suggestion gathering drawing additional data from the

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[280] Case C-117/12 La Retoucherie de Manuela, para 29

[281] Seitz C., One Step in the Right Direction – The New Horizontal Guidelines and the Restated Block Exemption Regulations, Journal of European Competition Law & Practice Vol. 2 No. 5, 2011, p. 452

[282] For more information see: EC, “Review of the two Horizontal Block Exemption Regulations” and files attached; available at: https://competition-policy.ec.europa.eu/public-consultations/2019-hbers_en

[283] On 13 September 2022, the Commission an online workshop was organized by the EC to consult stakeholders on proposals for revising the R&D Block Exemption Regulation and on 1 March 2022, the Commission launched a public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines.

Commission's and NCA's recent practices and decisions concerning horizontal cooperation. The next phase is called the impact assessment phase aimed at informing and supporting the decision of the Commission on the future of the regulation and will verify the existence of any functioning problems identified during the evaluation phase. Additionally, they assess if EU action is needed and analyze the advantages and disadvantages of available solutions. On 1 March 2022, the Commission launched a public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines and on 13 September 2022, an online workshop was organized by the EC to consult stakeholders on proposals for revising the R&D Block Exemption Regulation.

3.1.3.2 Specialization agreements

Agreements on specialization concern coordination in the production or the preparation of services and may benefit from the Block exemption if they are likely to contribute to the improvement of production or distribution when the parties have complementary skills, assets or activities[284]. A specialization agreement aims to concentrate on supplying a specific product that will be purchased by other companies bundling expertise and skills in one or a limited group of undertakings. The regulation recognizes three types of specialization agreements. Firstly, unilateral specialization agreements exist when one party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party. For example, the BER allows a company that has two production plants for a certain product to close down one of its plants in favour of outsourcing. Secondly, when each party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party, reciprocal specialization agreements are in place between undertakings. Lastly, joint production agreements are present when parties undertake to jointly manufacture certain products or prepare certain services[285]. Following the procedure mentioned above the Commission published a draft revised regulation on specialization agreements. The new version of the regulation will expand slightly its scope to cover more than two parties in unilateral specialization agreements and include horizontal subcontracting agreements in general[286].

These "*safe harbours*" are provided with the first condition being that the combined market share of the parties does not exceed 20% on any relevant market under Article 3 of the HBER Regulation, showing that the Commission recognizes a closing off risk for competitors at the level of the downstream products if the percentage is higher. In the calculation of the market share the aggregate market share of all undertakings participating in the agreement must be taken into account[287]. Additionally, Article 5 stipulates that when the market share threshold is initially under 20% without exceeding 25%, the exemption shall continue to apply for a period of 2 consecutive calendar years and, if it rises above 25%, the exemption shall continue for 1 calendar year.

The Regulation on Specialization BERs also involves particular practices that are black-listed under Article 4 of the Regulation. Excluding the whole agreement from the safe harbour are the hardcore restricting practices of price fixing, the limitation of output for sales and the allocation of markets or customers. Concerning the limitation of output for sales, a clause in the agreement is not black-listed when it relates to an agreed number of products in the context of unilateral or

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[284] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, para 6.
[285] Ibid, para 7.
[286] Kuhn T., Sakellariou-Witt S., Citron P., The new draft EU horizontal antitrust rules – A snapshot overview, 2022; available at: https://www.whitecase.com/insight-alert/new-draft-eu-horizontal-antitrust-rules-snapshot-overview
[287] Van de Gronden (n 1), p. 87

reciprocal specialization agreements or the setting of the capacity and production volume in the context of a joint production agreement or the setting of sales targets in joint distribution agreements[288]. These exceptions are facilitating the arrangements made between the parties on the number of units of a certain product that must be produced as a firm specializing in the production of said goods must know how many units will be purchased by the other undertaking participating in the agreement[289]. The Regulation on specialization agreements does not contain a list of grey-listed clauses, leaving only the positive threshold requirements and the negative hardcore restrictions requirements as prerequisites for the exemption of a specialization agreement.

3.1.3.3 Research and Development Agreements

Undertakings under normal circumstances compete also in the field of Research and Development ('R&D') focusing on bringing new products and processes to the market, enhancing innovation and benefitting the consumers. Naturally, an arrangement in the form of an agreement between competitors not to compete on the said field is harmful to competition and, therefore, infringes Article 101(1) TFEU. Nevertheless, it is possible that companies which possess complementary skills, know-how and experience may produce greater efficiencies under a form of coordination than in their individual efforts. According to the Guidelines on horizontal agreements, most R&D agreements do not fall under the prohibition of Article 101(1)[290]. This is the case for R&D agreements at a rather early stage, R&D agreements between non-competitors unless there is a possible foreclosure effect, agreements for the outsourcing of R&D to institutes and academic bodies and "*pure*" R&D agreements not intended to be followed by joint exploitation of the results if they do not reduce appreciably effective competition in innovation[291]. Notwithstanding, the Guidelines also discuss three possible anti-competitive effects of R&D agreements: a reduction or slowing down of innovation, a restriction of competition or the facilitation of coordination between the parties in markets outside the scope of the agreement and, in the case a party has significant market power, a foreclosure of access to the market[292].

Article 3 of the Regulation on R&D agreements introduces some affirmative conditions for the exemption of an agreement. An agreement has to comply with these requirements if it infringes Article 101 TFEU. R&D agreements not restrictive in the sense of Article 101(3) do not have to comply with Article 3 of the Regulation[293]. Article 3(2) of the Regulation provides that all the parties must have full access to the final results of the joint or paid-for R&D, including any resulting intellectual property rights and know-how. Additionally, if rights of exploitation are limited by the parties, access to the results of exploitation may be limited accordingly. Participating research institutes, academic bodies, or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results may agree to confine their use of the results for further research and not exploit these results commercially. According to Article 3(3), if particular know-how is indispensable for the exploitation of the results, each party must be granted access to any pre-existing know-how of the other parties with compensation for such access is possible. Under Article 3(4) exploitation is permissible only when it relates to results which are protected by intellectual property rights or constitute know-how and which are indispensable for the manufacture of the contract products or the application of the contract technologies, limiting the exploitation to the cases where joint R&D led to economic

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[288] Regulation (EU) No 1218/2010, Article 4(b)(i) and (ii)
[289] Van de Gronden (n 1), p. 87
[290] Communication from the 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), para 129
[291] Ibid, paras 129-133
[292] Ibid, paras 127-140
[293] Whish R. & Bailey D. (n. 19), p. 624

benefits. Lastly, Article 3(5) applies specialization principles stating that undertakings charged with the manufacture of the contract products by way of specialization must be required to fulfil orders for supplies of the contract products from all the parties.

The topic of market thresholds is addressed in Article 4 of the Regulation. Article 4(3) provides that, at the end of the seven years for agreements between non-competing undertakings where the results are jointly exploited, the exemption will continue as long as the parties' combined market share does not exceed 25% irrespective of the market share at the start of the agreement. However, if the parties are competing undertakings, the block exemption applies only if the share of the parties is, at the time they enter into the agreement, lower than 25%. In the cases of paid-for R&D, the combined market share of the financing party is also taken into account[294].

Article 5 cites the hardcore restrictions the R&D agreement must not impose to benefit from the exemption and is shorter and less restrictive than the previous block exemption on R&D agreements. Firstly, severe restrictions of competition are clauses that restrict the freedom of the parties to carry out R&D in a field unconnected with that covered by the agreement. The agreement may also not put a limitation on output or sales, with some exceptions concerning production targets, practices constituting specialization in the context of exploitation and non-competition clauses during the period of joint exploitation. In the general spirit of horizontal agreements, price fixing when selling the contract product or licensing the contract technologies to third parties is also a hardcore restriction with an exception of fixing prices or royalties charged to immediate customers in the event of joint exploitation or distribution. The agreement must also not include any provisions related to a restriction of the sales territory, except for the requirement to exclusively license the results to another party, or restrictions in active sales of the products in territories not exclusively allocated to one of the parties by way of specialization or requirement to refuse to meet demand from customers in the parties' respective territories. Finally, refusals to meet demand in the form of orders from customers who would market the contract products in other territories also exclude the whole agreement from the benefit of the block exemption. Where such provisions are present it is less likely that the agreement may be individually exempt under Article 101(3) but the undertakings may be able to demonstrate the indispensability of these restrictions to an R&D agreement[295].

The Regulation contains also two grey-listed excluded restrictions in Article 6 which are not block exempted but, if they are severable, the remaining parts of the agreement may benefit from the exemption. Interestingly, under the previous Regulation, both obligations were regarded as "*hard-core*" restrictions. The first grey-listed clause relates to obligations not to challenge the validity of intellectual property rights following the conclusion of the R&D or after the expiry of the agreement, without prejudice to the right to terminate the agreement in the event of such a challenge. The intellectual property covered must have significance for R&D activity (background intellectual property) or the protection of the R&D results[296]. Lastly, an arrangement not to grant licenses to third parties to manufacture the products or use the contract technologies related to the R&D agreement is excluded, unless the agreement provides for the exploitation of the results by at least one of the parties and such exploitation takes place in the internal market vis-a-vis third parties[297].

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[294] Commission Regulation (EU) No 1217/2010, Article 4
[295] Guidelines on horizontal co-operation agreements, para 142
[296] Frenz (n. 102), p. 464
[297] Commission Regulation (EU) No 1217/2010, Article 6

3.2 The De Minimis doctrine

3.2.1 Introduction

Firstly formulated by the Court in the *Franz Völk* case[298], according to the De Minimis doctrine agreements that do not have an appreciable impact either on inter-state or on competition are not caught by the prohibition of Article 101(1) TFEU. De Minimis is therefore a rule of double appreciability demanding impact on both the trade between member states and on the competition[299]. It should be noted however that the Court waived the test of double appreciability for object restrictions, which are automatically perceived to violate Article 101(1) without the need to demonstrate the effects on competition due to their severely restrictive nature[300]. Arguably, the main benefit of the De Minimis concept is reduced centralization in the field of competition law as the Notice may serve as guidance to the national courts and authorities.

The main documents for guidance on appreciability issues are the Guidelines on the Effect on trade concept contained in Articles 101 and 102 and the Notice on Agreements of minor importance, revised after the Expedia judgement[301].

3.2.2 The Commission's Notice on Agreements of minor importance (De Minimis Notice)

In 2014 the Commission published the "*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)*". This Notice is divided into two parts, the first contains statements on the application of the De Minimis doctrine and the second contains the main provision of the notice explaining the cases of non-appreciable restrictions of competition and providing market share thresholds.

In the first part, the Commission explains the concept of the De minimis doctrine and appreciability, referring to the case law of the Court on appreciability stating that the doctrine does not apply to restrictions by object citing the Expedia judgement[302]. In paragraph 3 the Notice indicates the use of market share thresholds on the examination of an agreement which may fall under the doctrine, pointing to a negative definition of appreciability which, however, does not imply that agreements between undertakings which exceed the thresholds constitute always an appreciable restriction of competition and are caught by Article 101(1) as they may still have only a negligible effect on competition[303]. In other words, the Notice establishes a safe harbour for agreements below the threshold but not a "*dangerous*" one for agreements that exceed them. A distinction is made in paragraph 4 between the De minimis principle and the non-appreciable effect on the trade between Member States, clarifying that the Notice does not indicate what constitutes an appreciable effect on trade between Member States. Paragraph 5 of the Notice clarifies that when agreements are covered by the Notice, the Commission will not institute proceedings either upon a complaint or on its initiative. Furthermore, if undertakings may demonstrate that the agreements were concluded in good faith regarding the exceedance of market shares the Commission will not impose fines. The first part finishes with the statement that although not binding the Notice may serve as guidance for national courts and NCAs and that the Notice is without prejudice to any interpretation of Article 101 given by the CJEU.

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[298] See Case 5/69
[299] Case C-226/11 Expedia, para 16
[300] Ibid, para 35
[301] Communication from the Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01)
[302] Ibid, paras 1-2
[303] Cases C-215/96 etc. Bagnasco, paras 34-35

The second part of the notice contains the main provision in paragraph 8 which sets the thresholds for agreements that are not appreciably restricting competition. The "*weak position*" notion of the Court in the *Franz Völk* case needs clarification, highlighting the need for these thresholds to effectively give expression and clarity to the De Minimis doctrine. Firstly, if an agreement is concluded between actual or potential competitors on any of the relevant markets affected by the agreement, the aggregate market share held by the parties must not exceed 10%, applicable also if it is difficult to classify the agreement as either concluded by competitors or non-competitors. In cases of agreements between non-competitors, the market share held by each of the parties to the agreement should not exceed 15 %. A problem may arise in some sectors where the cumulative effect of multiple vertical agreements may lead to market foreclosure. This is the reason why the Notice provides in paragraph 10 guidance on the appreciability of this situation by indicating when it is likely for cumulative foreclosure effect to occur and by providing specific market thresholds showing whether particular agreements contribute to this effect. The cumulative foreclosure effect is, according to paragraph 10, unlikely to exist if less than 30 % of the relevant market is covered by parallel agreements having similar effects and if the such effect exists, individual suppliers or distributors with a market share not exceeding 5 % are covered by the De Minimis doctrine. Marginal relief on firms that may outgrow the market share thresholds established in the Notice is provided in paragraph 11, where companies are covered if their respective market share corresponding to the type of agreement is not exceeded during two successive calendar years by more than 2 percentage points. Nevertheless, the Notice does not inform on what happens to an agreement that further outgrows the thresholds established. Two reasonable possibilities include the retrospective invalidity of the agreement or the unenforceability of the agreement from the moment that the Notice ceases to cover it[304].

As mentioned above, since the *Expedia* ruling, the De Minimis doctrine does not apply to agreements that have as their object the restriction of competition. The Notice explicitly states in paragraph 13 that such agreements are not covered, irrespective of the exceedance or not of the market share thresholds described in paragraphs 8, 9, 10 and 11. More specifically, agreements concerning the basic hardcore restrictions of horizontal agreements -price fixing, limitation of output or sales and allocation of markets or customers- and other hardcore restrictions, but not excluded or "*grey-listed*" restrictions, included in any current or future Commission BERs are not able to benefit from the exemption provided by the De Minimis Notice.

3.3 Collective bargaining agreements – New developments

3.3.1 Definition

Collective bargaining is an umbrella term for all negotiations between the representatives of workers, mainly trade unions, and employers to determine workplace-related issues such as working conditions, terms of employment, payment and regulating relations between employers and workers[305]. Competition law concerns arise when trade unions and employers conclude agreements that may, among other things, aim to eliminate wage competition by setting concrete conditions on wages, thus fixing the labour price in a way that may infringe on competition law and, particularly, with Article 101 TFEU prohibiting anti-competitive agreements. This happens because trade unions are essentially unions of workers which could operate as a labour cartel, impeding the free operation of the market regarding the service offering terms in the market they

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[304] Whish R. & Bailey D. (n. 19), p. 147

[305] EurWORK, Collective bargaining and competition law; accessible at https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/collective-bargaining-and-competition-law

operate[306]. Therefore, the low-cost efficiency model protected by the provisions of competition law may be threatened by such agreements and one could argue that the EU's prohibition on competition-restricting agreements applies and nullifies collective labour agreements.

A crucial difference, however, between collective labour agreements and normal antitrust agreements concluded between undertakings, is that the main purpose of the former is social policy goals by protecting their members' interests, asking for higher wages and greater employment protection. Given this unique nature, a possible application of the prohibition of Article 101 TFEU to collective agreements may significantly affect the human rights and social policy objectives pursued[307]. Consequently, trade unions could be seen as unlawful cartels and the social institution of collective bargaining could disappear if the risks involved would outweigh the relevant benefits. Additionally, more serious concerns arise considering the nature of an employment relationship, where workers find themselves dependent on the employer with a possible restriction of collective agreements infringing on Article 28 of the Charter of Fundamental Rights of the European Union which recognizes the right of collective bargaining and action and undermining the solidarity, social justice and social cohesion goals of EU social policy[308].

3.3.2 Relationship with EU competition law – The Albany Case

In the *Albany* judgement, the Court answered the question that arose from the concerns described previously regarding the extent to which EU competition law applies to collective labour agreements. The Court took the EU's social policy objectives into account and ruled that agreements concluded in the context of collective negotiations between management and labour or their representatives, should be regarded as falling outside the scope of Article 101(1) TFEU[309]. From the wording of the judgment, we could assume that the Albany exemption potentially covers collective agreements extending beyond the employer's workers, as the judgment does not limit the agreements exempted to only when they are concluded between an employer and its workers, but cites agreements between management and labour more generally. However, the judgement also issues conditions on a possible exemption. The agreements exempted must by their nature and purpose, be aimed at improving working terms and conditions. The court opted not to give a full exemption to trade unions from the provisions of competition law but opted for a conditional exemption on collective labour agreements setting two cumulative criteria. Firstly, the agreement must be the result of social dialogue between workers' organizations and employers' organizations (nature criterion) and, secondly, the agreement must aim to improve the working conditions of workers (purpose criterion)[310].

AG Jacobs in his opinion in *Albany* proposed that no general exemption for the social provisions of the Treaty from the EU competition rules should be provided[311] arguing that contrary to the opinion that the social field is not subject to the competition rules because of the special features of that area stands the CJEU's case law according to which were the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that

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[306] McCrystal S. and Syrpis P., Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union, Voices at Work, Oxford University Press, 2014, p. 421
[307] Bradshaw S., Collective Agreements and EU Competition Law: Do we need an exemption?, UEA Law School, 2019, p. 7
[308] See the European Pillar of Social Rights, para 8; available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en
[309] Case C-67/96, Albany International BV, para 60
[310] Case C-67/96, Albany International BV, paras 60-63
[311] AG Jacobs' opinion in Albany, para 130

effect[312]. However, regarding particularly collective agreements, AG Jacobs stated that the EU legal order encourages collective bargaining presupposing that collective agreements are in principle lawful. Therefore, the prohibition of Article 101(1) may not have been intended to apply to collective agreements on core subjects such as wages and other working conditions. Accordingly, collective agreements on these matters should enjoy automatic immunity from antitrust scrutiny[313]. The AG proposed however three conditions that must be met before applying for the exemption. First of all, the agreement should be concluded "*within the formal framework of collective bargaining between both sides of industry*" excluding unilateral coordination between employers unconnected with the collective bargaining process[314]. Secondly, the agreement should be concluded in good faith paying attention to agreements that may function as cover for a serious restriction of competition between employers on their product markets[315]. Lastly, the collective agreement should concern core subjects of collective bargaining and not directly affect third markets and third parties[316].

This exemption, however, did not provide legal certainty to the self-employed in various sectors (ex. arts, culture, and media) as, even after *Albany*, they qualify as undertakings for EU competition law but do not benefit from being "*workers*" or "*labour*" in the context of Albany. Consequently, their representative organizations which carry out negotiations acting in the name of self-employed persons who are its members do not act as a trade union association but as an association of undertakings[317]. An attempt, therefore, to organize or participate in existing collective labour agreements, could lead to EU competition law violations. However, in FNV Kunsten the Court created the concept of false self-employed persons, as opposed to genuine self-employed persons, in the sense that they may choose their activity, place, time and manner of work freely and carry it out at their own risk[318]. In this case, the Court said that, although not covered by the *Albany* exception, agreements on behalf of "*false self-employed*" persons would be exempt as these persons often find themselves in a working situation very similar to that of a worker[319].

Again, this concept did not offer definite legal certainty, given that the labour situation of the self-employed person in question should be examined and assessed by courts. As a consequence, if the self-employed do not fall into the "*worker*" or "*false self-employed*" definitions, the prohibition of Article 101(1) could be applied with serious effects on the ability to exercise a fundamental right[320]. An important factor enhancing the relevance of this issue and calling for new developments in the field of self-employed persons is the rapid growth of self-employment, especially in digital platforms.

3.3.3 The EC Guidelines on collective agreements regarding the working conditions of solo self-employed persons

The concerns described above prompted the Commission to take action in clarifying the scene of collective agreements regarding the working conditions of solo self-employed persons, releasing a first draft of the "*Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons*" as part of a package including a

[312] Joined Cases 209/84 to 213/84 Ministère Public, para 40
[313] AG Jacobs' opinion in Albany, para 179
[314] Ibid, 191
[315] Ibid, 192
[316] Ibid, 193
[317] Case C-413/13 FNV Kunsten, para 28
[318] Ibid, para 37
[319] Ibid, para 42
[320] Daskalova V., Rethinking Collective Bargaining for the Self-Employed: European Commission publishes Guidelines on Exemption and Non-Enforcement, Kluwer Competition Law Blog, 2022

proposed Directive on platform work, finally approving it on September 29th 2022. The scope of the Guidelines does not cover only the self-employed in digital platforms but solo self-employment in general and is considered an important step to solve the problems between the right to collective bargaining and EU competition law.

In these Guidelines, the Commission refers to the Courts case law, legal developments in the EU and the Member States as well as recent fundamental changes in the labour market, such as subcontracting and outsourcing business and personal service activities, digitalization of production processes, the rise of the online platform economy and the consequences of the COVID-19 pandemic in the labour market. The Guidelines then articulate an exemption from the prohibition of Article 101(1) TFEU for collective bargaining agreements regarding the improvement of working conditions of solo self-employed who are in a comparable situation to workers. Furthermore, the Commission makes a promise in the Guidelines to not intervene in some additional cases of collective agreements concluded in the name of solo self-employed who are not in a comparable position to workers[321].

The two Albany criteria on nature and purpose are reiterated in the Guidelines as the main conditions an agreement must fulfil to benefit from the exemption[322]. To satisfy the first criterion the agreement must be concluded between workers or their representatives and employers following any form of recognized collective bargaining. The Guidelines also provide that this exception is provided in cases where the self-employed request to be included in an already existing agreement between the same employer and another group of workers or solo self-employed persons[323]. However, the Guidelines explicitly state the horizontal agreements outside of the context of negotiations that go beyond the regulation of working conditions, for example, a decision by an association of self-employed people to apply the same price for their services or a decision by employers for maximum remuneration on services offered by the solo self-employed, are not exempt by the Guidelines[324]. Additionally, the Guidelines also incorporate the second Albany condition. The agreement, according to the Commission must have as its purpose the improvement of working conditions, further specified by the Guidelines defining the term "*working conditions*" to include, matters such as "*remuneration, rewards and bonuses, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social security*" and other conditions under which the self-employed are entitled to cease providing their services[325]. However, the Guidelines state that agreements concluded between solo self-employed persons, in which they collectively decide against providing services to particular employers, require an individual assessment. This restriction of the supply of labour could give rise to competition concerns and, therefore, should be individually assessed based on necessity and proportionality.

Regarding the issue of solo self-employed providing services via digital labour platforms, the Guidelines consider that their situation is comparable to that of workers, noting also the dependency of digital platform workers on the platform when it comes to customer outreach and the imposition of "*take it or leave it*" work offers unilaterally without scope for negotiation[326]. A

[321] Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 123/01), para 10
[322] Guidelines on collective agreements, para 2(c)
[323] Ibid, para 14
[324] Ibid, para 18
[325] Ibid, para 16
[326] Ibid, para 28; The Commission also cites national case law on the recognition of the status of digital platform employees as workers.

digital labour platform in order to be covered by the scope of the Guidelines must provide a commercial service, meeting the requirements of being provided through electronic means at the request of a recipient of the service and having an organization of work performed by individuals[327].

[327] The Guidelines specify that organization should be evident "at a minimum, a significant role in matching the demand for the service with the supply of labour by an individual who has a contractual relationship with the digital labour platform and who is available to perform a specific task"

4. Conclusion

Competition as an economic phenomenon is subject to the changes taking in an ever-evolving market, following economic, social and political developments. Competition law, the field concerned with the regulation of competition, has to adapt to these changes adjusting the regulatory framework to address new challenges and more effectively conclude its mission, the protection of consumers in a free market economy. This aim of consumer protection has led to competition law setting boundaries and limits to the freedom of the economic actors, the undertakings, to conclude agreements, adopt decisions or engage in concerted practices in an economic setting with other undertakings, which may restrict competition, diminishing the positive competitive effects on the economy and, ultimately, harming the consumers. These agreements are forbidden by the EU legal order under the Article 101(1) prohibition, which plays a crucial role in the preservation of a competitive environment, protecting the smooth operation of the market and the welfare of consumers by not allowing anti-competitive behaviour which may affect them in a negative matter.

Nevertheless, as this dissertation shows the EU legal order through the Treaties or other legal instruments such as regulations, guidelines and notices, has excluded some agreements from this prohibition based on their ability to be more beneficial than harmful to the consumers and the market. As we saw Article 101(3) TFEU, under certain affirmative and negative conditions, grants an exemption to otherwise restrictive agreements provided that they lead to a better economic and competitive situation.

The issues arising from the decentralized application of Article 101(3) and the different interpretation of benefits by various NCAs together with the increasing concern over sustainable development and environmental protection has led to a sharp debate on the inclusion of non-economic benefits to the efficiencies taken into account in the context of Article 101(3). The different approaches are not purely technical matters but have their roots in the interpretation of EU law concerning its nature and limits. The inclusion of a broader category of benefits might limit the application of competition law to promote other EU objectives while following a narrower view favors the more efficient application of competition interests. The Commission has, and rightfully so in my opinion, leaned towards the acceptance of non-economic benefits in the context of EU competition law, allying the scope of competition law with sustainability and departing from the traditional economic-only approach of competition contributing to the general European effort for sustainability. Provided that consumers have also to receive a fair share of the resulting benefits the traditional definitions of cost and qualitative efficiencies might have to be extended to include pass-on benefits in the cases of sustainability agreements. It remains to be seen if this approach will be also advocated by the Court in its future case law to offer additional legal certainty to the conclusion of sustainability agreements.

Article 101(3) is the basis of exempting agreements and has been given broader application in the Block Exemptions Regulations which contain a pre-determined carve-out for exempting certain categories of agreements and practices restricting competition. BERs are based on an EU-wide consensus while achieving multiple efficiencies such as increasing legal certainty, promoting the uniform application of competition law and reducing significantly compliance and enforcement costs. BERs have received significant criticism regarding their applicability and their place in the functioning of EU competition law after Regulation 1/2003 given that the application of BERs to specific agreements is, recently, a rare occasion and it has been questioned whether BERs have a place in modern EU competition law. More convincing seem the arguments of the supporters of BERs who indicate the multiple functions of BERs in a modern competition setting highlighting the temporary character of the Regulations which may promote regulatory experimentalism and flexibility in the process of adopting more effective rules. BERs include a variety of requirements

and conditions for their application listing market share thresholds and "*black-listed*" or "*grey-listed*" clauses categorized based on the severity of the restrictions they impose. The requirements of BERs are important as the inclusion of a clause that could be seen as a hardcore restriction may result in prohibiting the agreement as a whole. Therefore, undertakings have to carefully assess the conditions and requirements of each Block Exemption to ensure compliance with the rules and benefit from the exemption. The hardcore restrictions prohibition safeguards the orderly operation of the market and protects consumers as well as undertakings participating in the agreement from heavy restrictions and their consequences on the market.

The dynamic character of the BERs is particularly shown in the most recent VBER regulation which exemplifies the adaption of competition law regulations to the changes introduced by new factors affecting the market such as the rise of the digital economy and online sales. Keeping the same core provisions as the older regulation the new VBER added much-needed updates regarding internet accessibility and the use of online platforms in the field of hardcore restrictions. An important factor in the process of the adoption of new BERs is the public consultation procedure during which stakeholders may contribute to the forming of a new Regulation providing valuable market insights. This procedure has already yielded useful contributions in the coming new HBERs which will be introduced in 2023 and update the current 10-year-old regulation with modernized concepts such as digitalization and climate change.

The De Minimis doctrine further exempts agreements that do not have an appreciable impact either on inter-state or on competition introducing a rule of double appreciability while the application of De minimis promotes decentralization with the Notice serving as guidance to the national courts and authorities. The conditions in the application of the De Minimis doctrine are related to the exclusion of agreements restricting competition by object and compliance with the thresholds referred to in the notice. Additionally, hardcore restrictions included in any current or future Commission BERs are also excluded by the scope of De Minimis.
Lastly, the Commission recently adopted Guidelines addressing the issue of collective agreements between the representatives of workers and employers to determine workplace-related issues. These Guidelines aim to expand the exemption provided in the Albany case to solo self-employed people in various sectors including the rising number of self-employed in digital platforms while reiterating the two cumulative criteria the Court introduced in the Albany regarding the "*nature*" and the "*purpose*" of the collective agreements, for them to be exempted.

Bibliography

EU legal framework

European Commission, Fourteenth Report on Competition Policy, Publications Office, 1990

White paper on modernisation of the rules implementing articles 85 and 86 of the EC Treaty, Commission Programme No 99/02

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

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

Guidelines on the application of Article 101(3) of the Treaty (2004/C 101/08)

Communication from the 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)

Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements

Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements

Communication from the Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01)

The European Green Deal, COM(2019) 640 final

"Review of the two Horizontal Block Exemption Regulations" and files attached; available at: https://competition-policy.ec.europa.eu/public-consultations/2019-hbers_en

European Commission, Competition policy brief. 2021-01, September 2021

Communication from the Commission of 5 May 2021 on Updating the 2020 New Industrial

Strategy: Building a stronger Single Market for Europe's recovery (2021/350 final)

Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 123/01)

EC Guidelines on vertical restraints (2022/C 248/01)

Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

EC, Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines; available at: https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en

ECN Statistics website: https://competition-policy.ec.europa.eu/european-competition-network/statistics_en

Commission Decisions – NCAs Decisions

Commission Decision of 23 December 1975 United Reprocessors GmbH (IV/26.940/a)

Commission Decision of 9 July 1980 National Sulphuric Acid Association (IV/27.958)

Commission Decision of 2 December 1981 Hasselblad (IV/25.757)

Commission Decision of 13 July 1983, Rockwell/Iveco (IV/30.437)

Commission Decision of 18 October 1991, Eirpage (IV/32.737)

Commission Decision of 23 December 1992, Ford Volkswagen (IV/33.814)

Commission Decision of 29 April 1994, Stichting Baksteen (IV/34.456)

Commission Decision of 18 May 1994, Exxon/Shell (IV/33.640)

Commission Decision of 24 January 1999, CECED (IV.F.1/36.718.)

Commission Decision of 12 April 1999 P & I Clubs Pooling Agreement (Cases No IV/D-1/30.373 - P & I Clubs, IGA and No IV/D- 1/37.143)

Commission decision of 15 September 1999, REIMS II (IV/36.748)

Commission decision of 5 July 2000, Nathan-Bricolux (COMP.F.1/36.516)

Commission Decision of 16 July 2003, Yamaha (Case AT.37975)

Commission Decision of 23 July 2003, UEFA (COMP/C.2-37.398)

Commission Decision of 7 April 2004, Société Air France/Alitalia Linee Aeree Italiane SpA (COMP/A.38284/D2)

Commission Decision of 29 September 2004, Brasseries Kronenbourg - Brasseries Heineken

Commission Decision of 8 September 2010, Visa MIF (Case COMP/39.398)

Commission Decision of 23 May 2013, Star Alliance (Case AT.39595)

Commission Decision of 8 December 2017, International Skating Union (Case AT.40208)

Commission Decision of 24 July 2018, Pioneer (Case AT.40182)

Commission Decision of 25 March 2019, Ancillary sports Merchandise (Case AT.40436)

Commission Decision of 30 January 2020, Film merchandise (Case AT.40433)

Commission Decision of 8 July 2021, Car Emissions (AT.40178)

CE-9859/14 Modelling Sector

Vj-47/2004 Hungarian Association of Book Publishers and Book Retailers

7011/23.837/2011 MSC Shrimp Fishery

B1-62/13 Rental of retail space in factory outlet centres; B4-1006/06 Container glass,

paras 181-186; B3-11/13 and B3-11/13 Ophthalmologists

VI-Kart 10/15 (V) Round timber in Baden-Württemberg

B4-152/07 Coordination of tenders for sales packaging waste collection services by compliance schemes

Books

Kjolbye L., The new Commission Guidelines on the Application of Article 81/3: An Economic Approach to Article 81, European Competition Law Review, 2004

Odudu O., The Boundaries of EC Competition Law: The Scope of Article 81, Oxford University press, 2006

Kingston S., Greening EU Competition Law and Policy, Cambridge University Press, 2011

Lorenz M., Possibilities for cooperation under Article 101 TFEU In: An Introduction to EU Competition Law (pp. 128-187). Cambridge: Cambridge University Press, 2013

Frenz W., Handbook of EU Competition Law, Springer-Verlag Berlin Heidelberg, 2016

Lianos I. & Korah V. & Siciliani P., Competition Law, Oxford University Press, 2019

Jones A., Sufrin B. and Dunne N., Jones & Sufrin's EU Competition Law: Text, Cases, and Materials. 7th edn. Oxford: Oxford University Press, 2019

Triantafyllakis G., Δίκαιο Ελεύθερου Ανταγωνισμού [Competition Law], Nomiki Bibliothiki, 2020

Van de Gronden J. & Rusu C., "Competition Law in the EU: Principles, Substance, Enforcement", Edward Elgar Publishing, 2021

Whish R. & Bailey D., Competition law, 10th edn, Oxford University, Oxford, 2021

Brook O., Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU, Cambridge University Press, 2022

Articles

Bassola B., "The Hungarian NCA holds that the professional rules of book publishers and retailers' association restrict competition", Concurrences Antitrust Publications & Events, 2006

Marcos F. and Sanchez-Graells A., A Missing Step in the Modernisation Stairway of EU Competition Law: Any Role for Block Exemption Regulations in the Realm of Regulation 1/2003?, Competition Law Review 183, 2010

Seitz C., One Step in the Right Direction – The New Horizontal Guidelines and the Restated Block Exemption Regulations, Journal of European Competition Law & Practice Vol. 2 No. 5, 2011

McCrystal S. and Syrpis P., Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union, Voices at Work, Oxford University Press, 2014

Van Cleynenbreugel P., Article 101 TFEU and the EU courts: Adapting legal form to the realities of modernization?, Common Market Law Review 51: 1381–1436, 2014

Van der Veer J. P., Art 101(3) and sustainability – new developments in the Netherlands (RBB Economics), Kluwer Competition Law Blog, 2014

Van der Zee E., Quantifying Benefits of Sustainability Agreements under Article 101 TFEU in terms of Human Well-being, Working Paper No. 31, 2020

Lawrance S., Linsner M., Eturas – Any conclusions on platform collusion..?, Kluwer Competition Law Blog, 2017

Bradshaw S., Collective Agreements and EU Competition Law: Do we need an exemption?, UEA Law School, 2019

Holmes S., Climate change, sustainability, and competition law, Journal of Antitrust Enforcement, 2020

Blockx J., Should European competition law only care about clean air for Europeans? – A comment on paragraph 604 of the European Commission's draft Guidelines on horizontal co-operation agreements, Kluwer Competition Law Blog, 2022

Brook O., Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU, Cambridge University Press, 2022

Malinauskaite J. Competition Law and Sustainability: EU and National Perspectives, Journal of European Competition Law & Practice, Volume 13, Issue 5, 2022

Brook O., Block Exemption Regulations and Public Policy in The Defence of BERs, Cambridge Yearbook of European Legal Studies, 2022

Brook O., Struggling with Article 101(3) TFEU: Diverging Approaches of The Commission, EU Courts, And Five Competition Authorities. Common Market Law Review, 56 (1), 2019

Czapracka K., Kuhn T., Sakellariou-Witt S., Citron P., New EU competition rules for distribution agreements; available at: https://www.whitecase.com/insight-alert/new-eu-competition-rules-distribution-agreements-0

Kuhn T., Sakellariou-Witt S., Citron P., The new draft EU horizontal antitrust rules – A snapshot overview, 2022; available at: https://www.whitecase.com/insight-alert/new-draft-eu-horizontal-antitrust-rules-snapshot-overview

Daskalova V., Rethinking Collective Bargaining for the Self-Employed: European Commission publishes Guidelines on Exemption and Non-Enforcement, Kluwer Competition Law Blog, 2022; available at: http://competitionlawblog.kluwercompetitionlaw.com/2022/10/07/rethinking-collective-bargaining-for-the-self-employed-european-commission-publishes-guidelines-on-exemption-and-non-enforcement/

Court Cases

Case 56/64 and 58/64, Consten and Grundig

Case C-41/69 ACF Chemiefarma

Case 48/69 ICI

Case 8/72 Vereeniging van Cementhandelaren

Case 155/73 Sacchi

Case C-26/76 Metro

Case 22/78 Hugin

Case 258/78 Nungesser KG

Case C-61/80 Coöperatieve Stremsel

Cases 96/82 etc IAZ

Cases C-243/83 Binon

Case C-29/83 and 30/83 CRAM

Case C-170/83 Hydrotherm

Case 75/84 Ford

Case 161/84 Pronuptia de Paris

Cases 209/84 to 213/84 Ministère Public

Cases C-89, 104, 114, 116, 117, 125–129/85 Woodpulp II

Case C-311/85 VVR

Case C-27/87 Erauw-Jacquery

Case T-66/89 Publishers Association

Case C-234/89 Delimitis

Case C-41/90 Höfner

Case T-77/92 Parker Pen

Case C-199/92 Hüls

Case C-364/92 Eurocontrol

Case T-528/93 Métropole Télévision

Cases T-375/94, T-384/94, T-388/94, European Night Services

Case T-395/94 Atlantic Container Line

Cases T-25/95 etc. Cimenteries

Case T-86/95, Compagnie Générale Maritime

Case C-7/95 Deere

Case C-70/95 Sodemare

Case C-73/95 Viho

Case C-343/95 Diego Cali

Cases C-215/96 etc. Bagnasco

Cases C-67/96 etc. Albany

Case C-306/96 Javico

Joined Cases C-395/96 P and C-396/96 P Compagnie maritime Belge

Case T-62/98 Volkswagen

Cases T-191/98, T-212/98 and T-214/98 Atlantic Container Line

Case C-22/98 Becu

Case C-180/98 Pavlov

Case C-309/99 Wouters

Case C-475/99 Ambulanz Glockner

Case T-319/99 FENIN

Cases C-2 and C-3/01 Bayer

Case C-264/01 AOK Bundesverband

Case T-193/02 Piau

Case T-193/02 Piau

Case T-217/03 FNCBV

Case C-519/04 Meca-Medina v Commission

Case C-222/04 Cassa di Risparmio di Firenze

Case T-450/05 Peugeot

Case C-238/05 Ausbanc

Case T-357/06 KWS

Case T-386/06 Pegler

Cases C-501/06 etc GlaxoSmithKline

Case T-240/07 Heineken Nederland

Case T-491/07 Cartes Bancaires

Case T-83/08 Denki

Case C-8/08 T-Mobile

Case C-439/09 Pierre Fabre Dermo-Cosmétique

Case C-375/09 Tele2 Polska

Case C-226/11 Expedia

Case C-455/11 Solvay SA

Case C-68/12 Protimonopolný úrad Slovenskej republiky

Case C-117/12 La Retoucherie de Manuela

Case C-382/12 MasterCard

Case C-1/12 OTOC

Case C-413/13 FNV Kunsten

Case T-469/13 Generics

Case T-684/14 Krka

Case T-701/14 Niche

Case C-194/14 Treuhand

Case C-373/14 Toshiba Corporation

Case C-74/16 CEPPB

C-687/17 Aanbestedingskalender

Case C-228/18 Budapest Bank

Case T-93/18 International Skating Union

Case C-228/18 Gazdasági Versenyhivatal

Governmental publications

Hellenic Competition Committee, Draft staff discussion paper on sustainability issues and competition law, 2020; available at: https://www.epant.gr/en/enimerosi/competition-law-sustainability.html

Autoriteit Consument en Markt, Visiedocument Mededinging & Duurzaamheid: ACM Legal Memo, 27 September 2021; available at: https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf