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Interpretation of Articles 101 & 102 of TFEU

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Abstract:

This paper aims to analyze the historical development of competition law in the European Union, the EU treaties, regulations and directives, which guarantee the protection of competition in the European Community. Special overview is given to Articles 101 and 102 of the Treaty on the Functioning of the European Union, concerning prohibited agreements, mergers between companies and abuse of dominant position.

National competition authorities of EU member states are tasked to implement Article 101 and 102 of the Treaty on the Functioning of the EU to guarantee the competition right in their respective countries. The courts of the Member States may also apply directly the articles of this treaty if the rights of the competition in the community are violated. Competition legislation of EU member states should have approximation with the community legislation.

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Articles 101 and 102 TFEU are the most prominent Treaty provisions on competition. In this paper it will discuss the general framework of both articles by analyzing all the elements of the articles, such us: undertakings, agreements, decisions, member states, object, effects of restrictions, notice de minimis, dominance position, etc.

Key words: EU Competition law, article 101 & 102 TFEU, cartels, dominance position.

1. INTRODUCTION OF THE EVOULTION OF THE COMPETITION LAW IN EUROPEAN UNION

Antitrust law emerged in the late nineteenth century as a response to the growth of the trusts and their power in the American economy. In that period, the prevailing ideology of government's role in the economy was *laissez faire*, but it had recently been attacked by a variety of progressive social movements that advocated greater governmental intervention (Fine 1956, 1865-1901). The trusts and other social injustices, however, gave ammunition to reformers who sought to intervene in the market, often to redistribute wealth or limit private power in the interests of fairness.

Since the passage of the Sherman Act in 1890, antitrust law has always revolved around the core Economic concepts of competition and market power. For over a century, it has been illegal in the United States for competitors to enter into price-fixing cartels and related schemes and for a Monopolist to use its market power to stifle competition (Kaplow and Shapiro 2007, 3).

But what happened in Europe? When was antitrust law established in the European Union?

Since its inception in 1951, the European Union has came a long way; it has matured and developed from a Community of like-minded states into a Union of a greater diversity of status, with a comprehensive legal system which is

increasingly penetrating the national legal systems of Member States.

However, the original community was set up for sound political reasons which since then have undergone profound changes. As a result, the community, which has now finally become the European Union ofer the ratification of the Treaty of Lisbon, has developed and has turned into something quite different from the model to which many, originally aspired (Horspool and Humphreys 2012, 2).

The establishment of the European Community was carried out by a large number of acts of law. The first actions in this direction were taken in 1951 with the signing in Paris of the Treaty of the European Community for Coal and Steel. The origine of EU Competition law was in the Treaty of the Community for Coal and Steel (1951). Article 65 of the Treaty did prohibite the cartels, while Article 66 measured to appoint concentrations, mergers and abuse of dominant position of the companies (Papadopoulos 2010). On this occasion, for the first time the principles of competition law were involved in a multilateral regional agreements, establishing the trans-European model of competition law.

In 1957 was signed in Rome by six founding states (Germany, France, Italy, Belgium, Netherlands, Luxembourg) the Treaty of the European Economic Community and the European Community of the Atom. The Treaty of Rome laid the competition law at the center of its objectives, through the "establishment of a system ensuring that competition in the common market is not distorted". The Article 85 of this treaty prohibited the agreements that violate competition, and Article 86, prohibited the abuse of a dominant market position. The Treaty established the principles of competition law for member states. Over the years, the European Union member states have realized that economic integration need also some political change. This type of cooperation mechanism was created with the Single European Act in 1986 (Papajorgji 2013, 13).

Several years later, prime ministers of member states of the European Union organized two parallel conferences, which aimed on the one hand creating an Economic and Monetary Union and in the other hand creating a Policy Monetary Union. The Treaty on European Union, also known as the Maastricht Treaty, which were realized both above goals came into force in November 1993.[2]

While in 1999 it came into force the Treaty of Amsterdam, which paid particular attention to principles such as freedom, democracy, the preservation of human rights and fundamental freedoms of the internal market. In 2001, was signed the Treaty of Nice, which aimed the enlargement to the east, the design of the institutional reforms, especially strengthening and extension of the majority decision. Upon completion of the Nice conference, countries' prime ministers threw the idea of creating an EU constitution and in 2007 the Treaty of Lisbon was signed by the member states of the EU. This treaty plays an important role in the regulation of EU competition law. The Treaty of Lisbon contains rules governing Cartels and Competition for the simple fact that the treaty did not believe in the legal regulations of member states (Papajorgji 2013, 36).

Currently, the Treaty of Lisbon prohibits anticompetitive agreements in Article 101 (1), including price fixing. Under Article 101 (2), such agreement is automatically not valid. Article 101 (3) includes exceptions if used collusion for distribution of technological innovation, and enables customers a "fair share" of benefits.

Article 102 prohibits the abuse of a dominant position, as price discrimination and exclusive agreements. Article 102 allows the regulation of the Council of the EU to lead mergers between firms (the current regulation is the Regulation 139/2004), (Council Regulation (EC) No 139/2004). In the European Union, the Modernisation Regulation 1/2003 (Council

[2] The Treaty of the European Economic was renamed TBE.

Regulation (EC) No 1/2003) provides that the European Commission is not the only law enforcement institution of the EU. It is designed to facilitate a quick solution of the investigation of competition issues. In 2005 the Commission presented a Green Paper on the harmful actions for the violation of the rules of EU Competition Law, suggesting concrete ways for claiming personal damages against cartels (European Commission Green Paper on Damages Actions for Breach of EC Treaty anti-trust rules).

The competition concept lies at the heart of European integration. The main task of the EU cartel is to protect and stimulate free competition, and to guarantee the functioning of the internal market and to ensure an efficient allocation of resources.

The community, transformed into the Union, has now been in existence for nearly 60 years. It has contributed to peace, stability and prosperity in Europe, and there is no doubt that Europe might look very different today if there had not been a Union in its present form. It was born out of the wish never to have war again between major powers in Europe, coupled whith the perceived need to achieve self- sufficiency in the provision of food, and this goals must be said to have been attained (Horspool and Humphreys 2012, 9).

2. AN OVERVIEW OF ARTICLES 101 & 102 OF THE TFEU

From the inception of the European Economic Community (EEC), competition policy has always been considered on important element in the creation of the common market. EU competition policy also pursues the aim of protecticting consumer welfare (Horspool and Humphreys 2012, 429).

The benefits of a successful competition policy therefore include lower prices, better quality goods, a wider choice of products and the stimulation of productive efficiency and innovation by undertakings; the benefits of all of these will be

enjoyed by the consumer. In its Notice on the Application of the Article 81 (3) EC (2004), now article 101 (3) TFEU, the Commission includes the statement that: "The objective of Article 101 TFEU is to protect competition on the market as a means of enhancing consumer welfare and of ensuring on efficient allocation of resources (Horspool and Humphreys 2012, 430).

Article 101 & 102 TFEU prohibit two separate forms of anti-competitive behaviour: Article 101 (1) TFEU prohibits anti-competitive collusion between undertakings which, to an appreciable extent, prohibits restricts or distorts Competition within the EU.

Article 102 TFEU, by prohibiting abuse of a dominant position by one or more undertakings, controls "abuse" behaviour by an undertaking, or undertakings, which have significant market power. In both cases, for EU law to apply at all, there must be the possibility of an effect on trade between Mamber States. Article 101 (3) TFEU provides for the possibility of exemption for behaviour caught by article 101 (1) where an agreement, despite its uncompetitive effect, fulfils creation conditions. If no exemption is granted under Article 101 (3), then the agreement is void under article 101 (2) (Horspool and Humphreys 2012, 431).

Article 101 TFEU is one of the most prominent Treaty provisions on competition in view of the fact that it is quite frequently applied, and tends to result in high-profile decisions that often involve the imposition of significant fines. These fines are often used to punish those involved in hard core restrictions more colloquially referred to as cartels. At the same time it is a provision that concerns a practice that is the life-blood of any company in any market: the conclusion of agreements. All agreements seek to coordinate the behaviour of the parties to that agreement. This reduction of the commercial independence or freedom of these parties can be construed as a restriction of competition. Furthermore, these agreements may impact the output, prices or innovation of the products and

parties involved, impacting consumer welfare. Ultimately, therefore, competition is a primarily economic phenomenon, that can be understood, measured and appraised in myriad ways (Busscher, Herz and Vedder 2016).

Article 102 of the Treaty of Lisbon prohibits the abuse of a dominant market position and bring examples of such a position. The violation against the right of EU cartel is associated with sanctions by the EU Commission. On 1.5.2004 entered into force the Notice No.1 / 2003 which determined the new framework of the implementation of Article 101 and 102 of the Treaty of Lisbon. This Notice abolished the previous system of reminders to the Commission. Companies were not force to tell the Commission if they were faceing a merger, but they should have commit themselves to control the violation of competition in their agreements. Article 3 of the Notice no. 1/2003 regulates the parallel application of domestic and European regulations of the cartel within the scope of the competition. If the competition authorities of the Member States and their courts apply national rules within the proceedings with interstate elements, then they should apply at the same time the Articles 101 and 102 of the Treaty of Lisbon. It is noteworthy that the cartel prohibition of Article 101 has priority as the right of the Union compared to the national law of member states (Papajorgji 2013)

2.1 A Commentary on Article 101 TFEU

Article 101 TFEU – The Prohibition of Agreements that Restrict Competition

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

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary
obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101 TFEU features in the Treaties in unchanged form since 1957.[3] The provision itself consists of a broadly

[3] Article 85 EEC and 81 EC.

formulated prohibition enshrined in the first paragraph and a justification contained in the third paragraph. The latter is equally broadly construed using ill-defined and ultimately economic terms such as 'improving the production or distribution of goods' and 'economic and technological progress.' These two paragraphs can be seen as the substantive parts of Article 101, as they contain the rule and the exception to it. They are compounded by the second paragraph that provides for automatic nullity as a 'civil sanction' for violating Article 101.

The Treaty framework of Article 101 TFEU relies on its enforcement in part by means of direct actions and in part by means of the adoption of acts that enable the Commission to operationalise this provision. Such direct enforcement actions follow largely from the direct effect of this provision (Busscher, Herz and Vedder 2016), whereas the enforcement by the Commission has been enabled by the adoption of Regulation 1/2003 on the basis of Article 103 TFEU. Commission is still the most important institution to apply and to enforce Article 101 and in many respects it stands at the helm of the policy changes involved in this provision. In many national cases, judges and national competition authorities often use the Commission's guidance for the interpretation of Article 101 TFEU. This central role for the Commission is all the more noticeable for Article 101(3) TFEU in view of the relative dearth of Court cases on that provision.

Article 101(1) contains a prohibition of all forms of coordination between undertakings that have as an object or effect the restriction of competition.

For a better understanding of the prohibitions below it is analysed the various elements of Article 101(1) TFEU.

Key elements of article 101 (1)

The key elements of Article 101 are not defined in the treaty itself, the Commision & EU courts have provided the

definitions. To found a breach of Article 101, it is necessary to establish that there is:

- Either an agreement between undertakings, or a decision by an association of undertakings, or a concerted practice between undertakings.
- Which may affect trade between Member States;
- That the agreement, decision by an association of undertakings or concerted practice has as its object or effect the prevention, restriction or distortion of competition within the internal market (Horspool and Humphreys 2012, 434).

I. Undertakings

Article 101, as well as the other competition provisions, only applies to undertakings. This is construed broadly as encompassing any entity 'engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed' (Busscher, Herz and Vedder 2016). In the absence of a legislative definition, the Commission & the Court have stated that 'the concept of undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed. Examples of undertakings for the purposes of EU competition law include limited companies partnerships, trade associations, agricultural cooperatives, sole traders, even opera singers & state companies engaged in all economic sectors (Horspool and Humphreys 2012, 435).

Every entity engaged in economic activity does so as an undertaking. Some sorts of undertakings are:

a. Offering goods or services on a given market is an economic activity (Whish and Bailey, 2015, 87).
b. No need for a profit motive or economic purpose. The fact that an organization lacks a profit-motive or does not have an economic purpose does not in it self, mean that an activity is not economic. Example FIFA is an association of undertakings.

c. Regardless of the legal status of the entity and the way in which it is financed. An entity is an undertaking whenever it is engaged in economic activity; its legal form is irrelevant. Companies and partnerships of course can qualify as undertakings, but so too can other entities such as agriculture cooperatives and trade associations (Whish and Bailey, 2015, 88).

Activities that are not economic

Three activities have been held to be non economic; those provided on the basis of solidarity; the exercise of public power and procurement pursuant to a non-economic activity (Whish and Bailey, 2015, 91).

Related to the nature of activities, an interesting article by Chris Townley, *Which goals count in article 101 TFEU*, explains if all the goals are based on economic effects or we can also include a type of non-economic goals, such as culture (Townley 2011).

The Office of Fair Trading (OFT) Discussion Paper, UK highlights several advantages of considering non-economic goals in article 101:

(a) consumers are not denied significant benefits;
(b) competition law does not block government goals;
(c) consistency with standard cost-benefit analysis; and
(d) market integration and the harmonious development of the European Union.

The OFT Discussion Paper also highlights several disadvantages of considering non-economic goals in article 101 TFEU:

(a) quantification problems (The OFT Discussion Paper says that non-economic issues, such as social tension are: (i) not easy to measure; (ii) firms will be biased towards over-estimating these benefits; (iii) competition authorities are unlikely to have the relevant expertise to assess the parties' submissions; and (iv) heavy reliance on competition policy to achieve non-

economic benefits may mean more appropriate options are ignored.
(b) inconsistency of costs and benefits measured; and
(c) institutional concerns.
It argues that direct economic benefits are both more objective and amenable to quantification (Townley 2011).

II. Effect on trade between Member States

Article 101, or any of the Treaty rules on competition for that matter, will only apply if there is an effect on trade between Member States. This builds on the text of Article 101(1) that requires that trade must be affected, i.e. suggesting a negative effect. The Court gave short shrift to this argument and held that such positive effects do not exclude the applicability of Article 101(1) in particular in view of the fact that the agreement concerned the import and parallel trade in goods between two Member States (Busscher, Herz and Vedder 2016).

The relationship between national and EU competition laws is central to the process of European integration. To he extent that a co-ordinated system of Community and national competition laws is developed and is seen as effective in preventing national distortions within the 'unified' market, and in protecting against restraints of competition, this will be a major support for the process of integration. If on the other hand, efforts to create such a system fail or should such a system not be seen as effective, the negative repercussions for the process of integration may be severe (Gerber 1998, 416).

III. Agreements, decisions and concerted practices

Agreements

We can say that a coordinated behavior violate the cartel prohibition under Article 101 paragraph 1 of the Treaty of Lisbon, if it comes to an agreement, a decision or a coordinated behavior between the two companies. An agreement in terms of the right of EU cartel exists if it is a match between at least 2

undertaking's goals. An agreement between two parties can be accepted if it can be proved at least a statement in silence. This definition of EU law for the koncept of agreement is independent from the national laws.

A coordinated behavior between the companies is defined as: a form of coordination between the two companies, which did not reach the form of a contract, but is a practical cooperation that reduces competition (Papajorgji 2013). In order to prove the existence of an agreement, all that matters is evidence of a concurrence of the wills, irrespective of the form insofar as this form constitutes the faithful representation of the parties intentions. We can find agreements in two forms: vertical cooperation, i.e. between a producer, distributor and a retailer, and horizontal cooperation: i.e. coordination between undertakings in the same market (Busscher, Herz and Vedder 2016).

Decisions by association of undertakings

The phrase "decisions by associations of undertakings" has been interpreted by the court to encompass a non-binding recommendarion for target proces by a trade association to its members (Horspool and Humphreys 2012, 440). The decision is a faithful representation of the wills of the member undertakings. This also makes sense in view of the fact that both the agreement and the decision are forms of coordination that are relatively apparent and easily identifiable because they will often take a written and formalised form. In this regard, most problems arise in relation to the least well-defined and most openly-ended form of coordination: the concerted practice.

It has been held that the constitution of a trade association is itself a decision, as well as regulations governing the operation of an association. A decision, as well as regulations governing the operation of an association. A decision dose not require immunity simply because it is

subsequently approved and extended in scope by a public authority.

Any agreement entered into by an association might also be a decision. A recomendation made by an association has been held to amount to a decision: the fact that the recommendation is not binding upon its member's dose not prevent the application of Article 101 (1) (Whish and Bailey, 2015, 116).

Concerted practices

The Court of Justice defined it Concerted practices as a form of co-operation stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition. It is refered as 'less formalised' forms of coordination. This concept is very useful as it makes collusion illegal even where there is no evidence of an agreement, and it means that undertakings which collude to coordinate their behavior, perhaps in regard to setting prices or to share markets can not escape the reach of Article 101 simply by avoiding reaching on agreement (Horspool and Humphreys 2012, 440).

The Court of Justice said that the object of bringing concered practices within Article 101 was to prohibit: *a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between then for the risks of competition* (Whish and Bailey, 2015, 119).

IV. Object or effect of restricting competition

In a retrospective essay published in 1992 on his 30-year long career as an antitrust lawyer in Brussels, Don Holley wrote as follows: "*It was in 1962 that EEC competition lawyers began asking themselves in earnest by what criteria a contractual restriction should be judged under Article 85(1) of the EEC Treaty. They are still asking the question*".

Twenty years later, “the question” is still there: what is a restriction of competition under what has become Article 101 of the Treaty on the Functioning of the European Union (TFEU), that is according to which criteria an agreement between undertakings should be deemed restrictive of competition? The notion of restriction of competition in relation to agreements and other collaborative arrangements has been modified. To that effect, it first attempts to capture the transformation induced by the move toward the effects-based approach (part I) and then assesses the consequences thereof for the enforcement of Article 101 TFEU (part II) (Gerard, 2012).

Agreements which have as their object the prevention, restriction or distortion of competition are per se ilegal. It is a well-established principe that an agrement which would potentially fall within Article 101 (1) is not cought by the prohibicion of it dose not have an appreciable effect on competition (Horspool and Humphreys 2012, 453). To better understand the restriction of the competition it is necessary to analyse the concepts: market definition[4], market structure,[5] etc. In order to be considered unlawful, the agreement must substantially reduce competition. To help the companies to assess their position in the market if they have reduced competition or not, the Commission published the Notice "De Minimis" in 2001. In this notie the commission determined the limites of the percentage of participation in the market. In

[4] Market definition requires the definition of the relevant product market as well as the relevant geographical market. The definition of relevant market serves to determine which of the competing undertakings of the participating undertakings exceeds the limit of preventing and limiting competition. The produkt market consists of those goods and services which consumers see as substituted because of the characteristics, prices and intended use. Geographic market or the relevant territorial market is the area in which enterprises offer their products and services, in which the conditions of competition are homogenous and that differs from other territories through competition conditions.

[5] This refers to the barriers to entry, but also to the number and relative market shares of the undertakings active on the market.

order for an agreement to not significantly reduce competition, it is necesary that the market share for direct competitors not to exceed 10%, and companies which do not stand in direct competition with each other to not exceed 15%. If competition in a market is limited, then the restriction of other members of the market decreased by 5%. Agreements which contain the basic restrictions, can not benefit from the Notice "De Minimis". To them goes the assumption that they restrict significanly the competition (Papajorgji 2013, 45).

The object and effect are alternatives in the text of Article 101 TFEU. In the Court's recent jurisprudence the criterion for distinguishing between the object category and the effect category is explained as follows: […] certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers' (Busscher, Herz and Vedder 2016).

Essentially, the object category contains the cooperation where the effects on competition are so likely that they can be presumed, obviating the need to prove such effects.

The Court of Justice stated that the words object or effect were to be read disjunctively: this means that where an agreement has as its object the restriction of competition it is unnecessary to prove that it will produce anti-competitive effects. Only if it is not clear that the object of an agreement is to restrict competitionis it necessary to consider whether it might have the effect of doing so.

The object category includes agreements that have as their object the restriction of competition.

The effect category includes agreements that have as their effect the restriction of competition (Whish and Bailey, 2015, 123).

The object category

The term *object* in Article 101 means the objective meaning and purpose of the agreement considered in the economic contex in which it is to be applied. It is not necessary to prove that the parties have the subjective intention of restricting competition when entering into agreement (Whish and Bailey, 2015, 124). The essential criterion for identififying an object restriction is whether the coordination of conduct by undertakings reveals in itself a sufficient degree of harm to competition (Whish and Bailey, 2015, 125).

The Court of Justice in *Competition Authority v Beef Industry Development Society LTD* stated that the notion of restriction of competition by object can not be reduced to an exhoustive list, and that it should not be limited just to the examples of anti-competitive agreements given in Article 101 (1) itself. The contents of the "object" box can be depicted as shown below (Whish and Bailey, 2015, 132).

Horizontal agreements
• To fix prices • To exchange information that reduces uncertainly about future behaviour • To share markets • To limit output, including the removal of excess capacity • To limit sales • For collective exclusive dealing • To pay competitors to delay the launch of competing products
Vertical agreements
• To impose fixed or minimum resale prices • To impose export bans • Selective distribution agreements

On what grounds and reasoning a certain form of conduct falls in the object category. In other words: what test determines whether cooperation classifies as a restriction by object?

The test to determine whether or not the criterion is satisfied requires taking into account, inter alia, the objectives of the cooperation and the economic and legal context of which it forms a part. As part of determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (Busscher, Herz and Vedder 2016).

THE EFFECTS CATEGORY AND APPRECIABILITY

Regarding the object or effect of prohibition or restriction of competition, Article 101 paragraph 1 of the Treaty of Lisbon stipulates that the following behaviors aimed at limiting competition:

- Determination of the direct or not of the sales prices or conditions of business;
- Restriction or control of production, taxation, technical development or investment;
- Sharing markets or resources;
- The use of different terms for the same services against business partners by disadvantaged the competition.

If an agreement will not be classified as a deliberate restriction of competition, then it must determine the consequences or effects of the agreement.

Related to the consequences of the breach of competition, Article 101, paragraph 2 of the Treaty of Lisbon provides that the rules in the agreements, which are prohibited under Article 101 paragraph 1 of the Treaty and which are not covered by exclusion groups of the prohibition of cartel, are not valid or do not have any legal consequences (Papajorgji 2013, 51).

The Court answered in In *Völk v Vervaecke*, after discussing the effect-on-trade criterion:

'Moreover, the prohibition in Article 85(1) [101(1) TFEU] is applicable only if the agreement in question also has as its

object or effect the prevention, restriction or distortion of competition within the Common Market. *Those conditions must be understood by reference to the actual circumstances of the agreement.* Consequently an agreement falls outside the prohibition in Article 85 [101 TFEU] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question. Thus an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article 85(1) [101(1) TFEU]' (Wagner-von Papp, 2015).

Another concept related to restricting competition is appreciability.

Any effect on trade must be appreciable. The stronger the market position of the undertakings concerned, the likelier it is that any effect will be appreciable (Whish and Bailey, 2015, 155).

Appreciability is often referred to as a de minimis analysis to exclude competitive effects that do not warrant intervention. In this regard two perspectives on appreciability can be distinguished:

Quantitative and qualitative. In the quantitative analysis of appreciability, market shares are used to exclude effects on competition. Agreements between competitors with a market share not exceeding 10% are considered not to have appreciable effects. For coordination between noncompetitors the bar is put at 15%, unless the market exhibits cumulative effects, where the threshold is lowered to 5%. In the qualitative approach to appreciability the effects on competition are determined by appraising the importance of the subject of the restriction in relation to all other factors on which competition is possible. The final strand of the appreciability doctrine applies to the cumulative effect that may arise from the existence of bundles of similar contracts. This doctrine has been

developed most prominently in relation to beer distribution agreements inter alia in Delimitis (Wagner-von Papp, 2015).

Article 101(3) TFEU

All agreements that fall under the first paragraph are open to be justified under the third paragraph of Article 101 TFEU. This means that four cumulative conditions must be satisfied. Firstly, the cooperation must result in technical or economic progress or lead to better production or distribution. Basically, it entails objective efficiency gains arising from the cooperation. In order to ensure that economic efficiencies that only benefit the parties to the agreement do not qualify, the Treaty requires a fair share for consumers in the benefit identified under the first criterion. The third criterion intends to ensure the proportionality of the restrictions in view of the objectives set out under the first criterion. The fourth requirement ensures that sufficient residual competition remains (Busscher, Herz and Vedder 2016).

The application of Article 101(3) raises several difficulties that are of a fundamental nature. Firstly, the question arises how exact and certain the benefits taken into account under the first paragraph must be. Imperfect information underlies many business decisions and as a result, the 'technical and economic progress' may be difficult to substantiate ex ante, whereas the (effects of) the restriction of competition may be more readily accepted on the basis of past experiences. Secondly, the application of this provision may entail a transfer of welfare between groups of persons, where the costs arising from a restriction of competition accrue in another group than that which benefits from the fair share.

The Commission possessed the exclusive right to apply Article 101(3) until 2004, when Regulation 1/2003 entered into force.

2.2 A Commentary on Article 102 of the TFEU

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

Such abuse may, in particular, consist in:

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

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

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

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

Article 102 is designed to deal with monopoly & market power. It focuses not on agreements between undertakings (as article 101 dose) but on the unilateral behavior of undertakings which hold a "dominant position". It is important to note that Article 102 applies only to the conduct of undertakings which are already dominant & not to any anti-competitive conduct by which an undertaking achieves dominance, or to any other unilateral conduct by a non- dominant firm which causes harm to consumers despite that lack of dominance.

Article 102 prohibits undertakings from commiting an abuse of a dominant position held within the internal market or a substantial part of it where that abuse may have an effect on trade between Mamber States. Although sub-paragraphs (a) to (d) set out examples of abuses, they do not provide an exhaustive list. Article 102 contains no exception proivision equivalent to that in article 101 (3). It is however open to a dominant undertaking to pleas that its conduct is "objectively justified" (Jones and Sufrin 2014, 271).

Althought it must be established that the dominant position is held in a substantial part of the internal market & there must be an appreciable effect on inter Member State trade, there is no de minimis rule equivalent to that adopted by the ECJ in relation to Article 101 (1).

It can be seen from the text of Article 102 that five elements must be established before the prohibition applies. They are:

(a) One or more undertakings;
(b) A dominant position;
(c) The dominant position must be held within the internal market or a substantial part of it;
(d) An abuse &
(e) An effect on inter state trade.

A dominant position was defined in case 27/76 United Brands v Commission 1978 as a: Position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant marked by giving it the power to behave to an appreciable extent independently of its competitors, customers, & ultimetly of its consumers (Horspool and Humphreys 2012, 458).

It is not an offence to hold a dominant position as article 102 dose not prohibit the holding of a dominant position per se but only an abuse of it, but some behavior which may be competitive, or at least neutral from a competition perspective when engaged in by an undertaking on a competitive market may be prohibited when engaged in by a dominant undertaking (Jones and Sufrin 2014, 272).

Dominant position will be determined as a position of economic enterprise, which places it in a position to maintain an effective competition in the reduction of the relevant market, in which it enables competitors and its customers to behave independently. The most important factor to analyze the existence of a dominant position is the market share of an undertaking in the relevant market. Usually, if the market

share of an undertaking is about 50%, then it has a dominant position in the market.[6]

While the existence of a dominant position is not in itself prohibited, the abuse of its position under Article 102 of the Treaty of Lisbon establishes a violation of the right of EU cartel. In this sense Article 102 of the Treaty of Lisbon contains a list of behaviors that define an abuse of a dominant position. Such as:

a. Obligation of the direct or not direct of the irrational prieces of purchase and sale or other business conditions;

b. Limiting production, taxation or technical development to damave the consumers;

c. The use of different terms for the same services against trading partners, thereby reducing competition;

d. Extra condition involved in agreement, that parties undertake additional services that are not related to the purpose of the agreement (Papajorgji 2013, 60).

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[6] To determine whether a company has a dominant position in the market, it is needed to analyze the elements that constitute a relevant market, which are: the product market, the geographic market as well as the time factor. The definition of relevant market serves to determine which of the competing undertakings of the participating undertakings exceeds the limit of preventing and limiting competition. The produkt market consists of those goods and services which consumers see as substituted because of the characteristics, prices and intended use.

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