'An evaluation of the extent to which the Court of Justice of the European Union's interpretation of Article 101 TFEU has been effective in tackling restrictive agreements.'

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The focus of this essay is to critically asses what Article 101 TFEU provides and analyse some important cases related to infringement of Article 101. It will also provide an evaluation of the Court of Justice of the European Union's (CJEU) interpretation of the article in question, and measures adopted to tackle agreements restricting competition. The aim is to determine the efficiency of the Court of Justice in tackling restrictive agreements through its interpretation of Article 101 and to analyse the impact of the new Regulations adopted by the Commission. To do so it is important to understand what Article 101 TFEU provides and determine its applicability. Also, it is essential to understand the meaning of restrictive agreements and how they influence the competition within the internal market.

As per Article 101, *'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 […]'*[1] As the Treaty does not define an "undertaking", the EU Courts have to clarify its meaning.[2] Perhaps one of the most basic definition[3] provided by the CJEU comes from the case of *Höfner and Elser v Macrotron GmbH* where the Courts held that: '*the concept of an 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.'*[4] In a later case of *Pavlov*, the Court added a clarification on the concept of "economic activity" and stated that: '*It has also been consistently held that any activity consisting in offering goods or services on a given market is an economic activity.'*[5] In addition to that, in the case of *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, the Court held that the competition rules: '*do not apply to*

[1] Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/88 art 101(1)
[2] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 85
[3] *Ibid.* 86
[4] Case C-41/90 [1991] ECR I-1979, para 21
[5] Case C-180/98 etc [2000] ECR I-6451, para 75

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 the powers of a public authority.'[6] The three paragraphs of Article 101 TFEU can be separated into three categories as follows:

1. The Prohibition – the following must be established for the prohibition in Article 101 to be applied:[7]

- Agreement or concerted practice between two or more undertakings or a decision by an association of undertakings;[8]
- Collusion which restricts competition which has its object or effect the prevention, restriction, or distortion of competition;[9]
- An appreciable effect on trade between Member States.[10]

2. Nullity – Article 101(2) states that an agreement, decision, or concerted practice prohibited by Article 101(1) is automatically void. But in the case of *Société Technique Minière v Maschinenbau Ulm GmbH*, the Court of Justice held that the nullity affects only the clauses in the agreement prohibited by the provision.[11] The agreement is void only if the prohibited clauses cannot be served from the remaining terms of the agreement.[12]
3. Legal Exception – Until 2004 agreements could benefit from Article 101(3) only if they were specifically exempted from the Article 101(1) prohibition by virtue of either an individual exemption granted by the Commission or a block exemption granted by EU regulation. The Commission had sole power to declare Article 101(1) inapplicable to individual agreements. However, since 2004 it has not been

[6] Case C-309/99 [2002] ECR I-1577, para 57
[7] Alison Jones and Brenda Sufrin, *EU Competition Law* (5th edn, Oxford University Press 2014) 124
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] Case 56/65, *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235
[12] Alison Jones and Brenda Sufrin, *EU Competition Law* (5th edn, Oxford University Press 2014) 124

possible to exempt individual agreements from the Commission as this competence to apply Article 101(3) has been removed.[13]

'The application of Article 101 TFEU depends on a series of distinct conditions being satisfied. For ease of analysis Article 101 TFEU may be divided into four main questions:

1. Is there an agreement between undertakings, decisions by associations of undertakings or concerted practices?
2. Is it object or effect of prevention, restriction or distortion of competition within the Internal Market?
3. Does it affect trade between Member States?
4. Could it benefit from an exemption under Article 101(3) TFEU?'[14]

A good example of an agreement of undertakings or a cartel is the case of Polypropylene arising from investigations made in October 1983 under Article 14(3) of Council Regulation N° 17 with most of the producers of the bulk thermoplastic polypropylene supplying the EEC market.[15] During the investigations, the Commission discovered documents showing that the main suppliers of polypropylene within the EEC had participated on a regular basis since end of 1977 in a system of meetings between representatives of the producers from 8 Member States. These meetings were held twice a month and were supplemented by ad hoc local meetings for each Member State.[16] The producers developed a system of annual volume control to share out the available market between themselves according to agreed percentage or tonnage targets and regularly set target prices which were implemented in a series of so-called price 'initiatives'.[17] The four major producers, ICI, Hoechst, Montepolimeri and Shell formed an unofficial directorate known as the 'big

[13] *Ibid*. 124-125
[14] Ariel Ezrachi, *EU Competition Law* (5th edn, Hart Publishing Ltd 2016) 56-57
[15] 'EUR-Lex - 31986D0398 - EN - EUR-Lex' (*Eur-lex.europa.eu*) <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31986D0398> accessed 24 April 2017.
[16] *Ibid.*
[17] *Ibid.*

four', with the perceived task of leading and encouraging the smaller producers in implementing the various schemes. Although several producers argued that the lack of commitment of the participants should not be considered as an agreement *per se*, the Commission established that even where agreements are not reinforced by such express declarations of 'commitment', the documentary evidence shows that agreement between producers was not merely illusory, as some have claimed. The infringement carried on for a substantial length of time, having begun in 1977. For the purposes of Article 15(2), the Commission considered that the most serious aspects were manifested from the end of 1978 and the beginning of 1979 when quota or volume control schemes were established to reinforce price initiatives. The meetings continued at least until the Commission investigations. Despite the fact that there is no substantive evidence to show that the infringement has been terminated, the Commission assessed fines on the basis of the operation of the cartel only up to late 1983.[18]

Another aspect about Article 101 that is worth mentioning is the "object or effect" of preventing, restricting or distorting competition within the internal market. Here it is important to understand the meaning of the two words: "object" and "effect" in the Article 101(1).[19] From the wording of the article, it is clear that the two terms mentioned are alternative and not cumulative which means that it is only required one of the two to constitute an infringement of Article 101.[20] In the case of *Société Technique Minière v Maschinenbau Ulm GmbH*, the Court of Justice stated that the two words were to be read disjunctively which means on a practical side that if an agreement is meant to restrict competition it is unnecessary to prove that its effect will actually cause restriction of competition.[21]

[18] *Ibid*.
[19] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 123
[20] *Ibid*.
[21] *Ibid*.

The restriction of competition by object it is still a controversial subject as the Commission's decisions can take years for some cases. The concept of restrictive agreements has been defined in the case of *Bayer AG v Commission*[22] where it is said that the proof of an agreement must be founded upon 'the existence of the subjective element that characterizes the very concept of the agreement, that is to say a concurrence of wills between economic operators on the implementation of policy, the pursuit of an objective, or the adoption of a given line of conduct on the market.'[23] In order to be an agreement, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way.[24]

A case of great interest in terms of vertical restrictive agreements on competition is *Consten and Grundig*[25]. *Grundig*, a company based in Germany decided to make exclusive distribution agreements to distribute its products in every country. *Consten*, the distributor of *Grundig*'s products in France committed to assume the costs of local advertising and refrain from selling products from *Grundig*'s competitors. In return, *Grundig* agreed to sell its products in France only through *Consten*. Each distributor in Europe was bound under a contract which will not allow them to sell *Grundig*'s products in other countries. Despite the restrictive agreements between *Grundig* and its distributors, some set out to deliver *Grundig*'s products outside the distribution zones agreed on. In 1961, the UNEF company started buying *Grundig* products in Germany from one of the resellers. Once UNEF became a "parallel importer" obtaining products outside the circle laid out by the exclusive agreements, *Consten* took legal proceedings in France. UNEF brought the case to the Commission of the EEC to argue that exclusive rights should be regarded as void according

[22] Case T-41/96, Bayer AG v. Commission [2000] ECR II-3383 para 67
[23] Alison Jones and Brenda Sufrin, *EU Competition Law* (5th edn, Oxford University Press 2014) 150
[24] *Ibid*.
[25] Case 56 and 58/64, *Consten and Grundig* [1966] ECR 299

to Article 101 TFEU. This restrictive agreement limits competition between distributors and consequently affects consumers' rights. Having backed this thesis, the Court of Justice creates a precedent to be referred to in regard to competition law and restrictive agreements for many other future cases.[26]

Another important case of *Volk v Vervaecke*[27] provided the basis for the Court of Justice to introduce the *De Minimis* doctrine. This principle provides that agreements which fall outside the scope of Article 101 will not be caught where they do not have an appreciable impact either on trade between Member States or on competition.[28] In this case the Court of Justice states that: '*If an agreement is to be capable of affecting trade between member states it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states in such a way that it might hinder the attainment of the objectives of a single market between states. Moreover, the prohibition in Article 85(1) 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 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.*'[29] In this case the Court acknowledged the fact that an exclusive dealing agreement has been established with an absolute territorial protection which constitutes a breach of Article 101(1) but decides that due to the

[26] Cécile Philippe, Valentin Petkantchin and Xavier Méra, 'The Banning Of Vertical Agreements In Europe: An Anti-Competitive Policy' [2007] Institut Economique Molinari
[27] *Volk v Vervaecke* (Case 5/69) [1969] ECR 295
[28] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 148
[29] 'EUR-Lex - 61969CJ0005 - EN - EUR-Lex' (*Eur-lex.europa.eu*) <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1493292369222&uri=CELEX:61969CJ0005> accessed 27 April 2017.

small market share of *Volk*, the agreement has an insignificant effect on the market. To clarify this doctrine, the Commission provided a Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU as a guidance for the national competition authorities. '*In this Notice the Commission indicates, with the help of market share thresholds, the circumstances in which it considers that agreements which may have as their effect the prevention, restriction or distortion of competition within the internal market do not constitute an appreciable restriction of competition under Article 101 of the Treaty.*'[30] In the case of *Volk v Vervaecke*, the Court referred to the weak position that the persons had on the market in question. However, it should be noted that appreciability may be relevant to the application of Article 101(1) in a different way. There are cases in which it was concluded that the restriction of competition was not appreciable not because the parties involved lacked the market power, but because the restriction itself was insignificant in a qualitative sense.[31] In *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten*[32] the Court of Justice decided that the decision by the medical specialists to set up a pension fund entrusted with the management of a supplementary pension scheme did not appreciably affect competition within the internal market. This conclusion was not in any way linked with the market power of the specialists.[33] Another example where the non-appreciability of restrictions was not related to the market power of the parties is in the case of *Irish Bank's Standing Committee*[34]. Here the Court concluded that an agreement on the opening hours of Irish banks did not appreciably restricted competition[35].

[30] 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] OJ C 291/1
[31] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 151
[32] Case C-180/98 [2000] ECR I-6451; Case C-184/98 [2000] ECR I-6451
[33] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 151-152
[34] *Irish Bank's Standing Committee* OJ [1986] L 295/28
[35] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 152

Significant changes to the application of competition law and consequently to the way the Court of Justice interprets restrictive agreements, were made by the Regulation 1/2003. Perhaps the most important aspects provided by the Regulation 1/2003 are in conferring direct effect upon all of Article 101, and setting out clear rules on the relationship between national and EU law.[36] The core elements provided especially in Article 3 of the Regulation can be defined as follows:

- '*In any situation in which Article 101 is relevant it shall be enforced, even if national law is also being applied;*
- *National law cannot reach a different result, and in particular it may not prohibit an agreement that is permitted under Article 101;*
- *Article 101 shall be applied even if national law is also being enforced, but national law may be stricter than Article 102; and*
- *Where objectives which are not competition objectives are present, such as for example the social objectives that accompany a universal provision requirement, it is not necessary to apply Articles 101 or 102.'*[37]

The fact that undertakings can no longer notify agreements to the Commission and await an administrative approval certifying that the criteria of Article 101(3) is satisfied means that they must now be self-reliant and conduct their own 'self-assessment' of the application of that provision. There are, however, cases where there is uncertainty whether an agreement infringes Article 101(1) or satisfies Article 101(3). Regulation 1/2003 provides three ways in which cases might be resolved following Commission intervention: the acceptance of legally-binding commitments under Article 9; a finding of inapplicability under Article 10; and the provision of informal guidance.[38]

[36] Sandra Marco Colino, *Competition Law Of The EU And UK* (7th edn, Oxford University Press 2011) 50
[37] *Ibid.* 51
[38] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 176

When reflecting on the goals of competition law, Dr Ioannis Lianos states that EU competition law followed the path of economic analysis by adopting more economically-oriented block exemption regulations and using more economic and empirical evidence in the competition law decisions, at least at the Commission's level. Therefore, the Court had to compare the possible benefits for consumers of restrictions to parallel trade with possible intrusion of the internal market principle.[39] The block exemptions were important from the Commission's point of view to reduce the huge number of notifications received for individual exemption. Paragraph 2 of the Commission's Article 101(3) Guidelines points out, the system of block exemptions remains in effect, notwithstanding the abolition of individual exemptions as a result of Regulation 1/2003. It also points out that an agreement that is covered by a block exemption cannot be declared invalid by a national court. Article 29 of that Regulation provides the Commission, in certain circumstances, with a power to withdraw the benefit of a block exemption in an individual case. However, paragraph 31 of the Guidelines explains that a national court cannot withdraw the benefit of a block exemption.[40] It is nevertheless true that the scope behind competition law and consequently Article 101 in this case, has as its main objective the interest of the consumer's welfare. There is however a risk of collision with the policy of market integration[41]. This issue can be extended to further and fundamental implications and generate contradiction to the doctrine of the law *per se*. A deeper analysis of the legal doctrine behind this aspect can be conducted on a different occasion. However, it is important to mention the risk of adopting a far wider view than initially expected or planned regarding exemptions whether by the application of Article 101(3), Regulation 1/2003 or others, can lead to gaps in the law of

[39] Ioannis Lianos, 'Some Reflections On The Question Of The Goals Of EU Competition Law' [2013] SSRN Electronic Journal 41
[40] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 178
[41] Ioannis Lianos, 'Some Reflections On The Question Of The Goals Of EU Competition Law' [2013] SSRN Electronic Journal 41

which object is to tackle restrictive agreements. In the case of *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*[42], 'the Court of Justice considered that employment was a relevant factor under the first condition of Article 101(3) TFEU. Employment considerations constitute a non-efficiency variable which the court considered relevant in balancing the anticompetitive effects of the agreement under Article 101(3). Contrast with the General Court comment in the case of *Matra Hachette SA v Commission*[43] where in paragraph 139 it suggests that considerations to public infrastructures or employment were external to the analysis of Article 101(3). This broad approach opens the door to variables that are not directly linked to efficiencies.'[44]

It is argued by Dr Ioannis Lianos that the weaknesses of an economic welfare approach, as well as the normative objections in the implementation of EU competition law have proved that the case law is rather ambiguous.[45] EU competition law on vertical restraints has created negative side effects, argues Van den Bergh. 'It has put an end to experimentation and innovation of competition rules at the Member States level and induced private interest groups to spend a lot of effort in lobbying national regulators. Several of these pitfalls have been indicated by Richard Markovits in his treatise on U.S. antitrust law and EU competition law.'[46] Yet the question is how does all this affect the Court of Justice when it comes to effectively tackle restrictive agreements on competition? If from an economist point of view the effectiveness of the Court of Justice can prove to be inconsistent and very often restrictive against economy, from a lawyer's perspective it can mean several other things. Judging by the wording of Article 101(1), the provisions are clearly

[42] Case 26/76 [1977] ECR 1875, [1978] 2 CMLR 1
[43] Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595
[44] Ariel Ezrachi, *EU Competition Law* (5th edn, Hart Publishing Ltd 2016) 131
[45] Ioannis Lianos, 'Some Reflections On The Question Of The Goals Of EU Competition Law' [2013] SSRN Electronic Journal 64
[46] Roger Van den Bergh, 'Vertical Restraints' (2016) 61 The Antitrust Bulletin.

prohibiting restrictive agreements. This prohibition is later given a legal exception in Article 101(3). This, however, forms a foundation for the introduction of the *De Minimis* doctrine and later on Regulation 1/2003 which was meant to clarify and give instructions on the exemptions from Article 101(1). Although Regulation 1/2003 provides a wide list of instructions to the interpretation of Article 101 and 102 it causes a variety of problems including case interpretation difficulties for the Court of Justice, which weakens its effectiveness, but also ambiguity in the case law and perhaps most important a contradiction to the fundamental doctrine of the law itself.

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