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# What does an appreciable negative effect on competition mean?

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**Throughout the years, much intellectual energy has been invested into drawing the line between being anti-competitive by *object* or by *effect*, ignoring that an infringement must also be *appreciable*. Most likely based on a presumption that this is no longer a separate requirement, but part of analyzing the former. However, case law does not render full support for this, thus making it necessary to revisit the issue of being appreciable as a potential separate requirement.**

Article 101 (1) refers to agreements restricting or distorting competition by object or effect, which has been read to include that this also must be done in an *appreciable* manner. While a pattern has emerged giving content to what to consider anti-competitive by *object* or by *effect*, little attention has been allotted to the matter of when to consider this as *appreciable*. It is correct that newer case law appears to accept this for agreements being anti-competitive by object and otherwise requests it to be contemplated as part of establishing an anti-competitive effect.<sup>1</sup> This indicates that the concept is either obsolete or absorbed into the distinction between anti-competitive by object or effect.

While tempting to ignore the matter of an appreciable negative effect as a separate requirement under Article 101 (1), this would not be prudent. Not only as the line between by *object* vs by *effect* remains blurred, allowing the matter of an appreciable effect to help secure an overall correct result. But also, as case law is more complex and does not allow for ignoring the matter if considered more carefully. Even traditional hardcore infringements of Article 101 (1) are occasionally accepted as outside the realm of anti-competitive by object, indicating a more complex interaction and need for avoiding shortcuts. Enforcers should therefore always be called to establish how a restriction would thwart competition in an appreciable manner, even when confronted with object-restrictions subject to a strict review and normally presumed in defiance of Article 101 (1).

<sup>1</sup> See e.g. case C-67/13P - *Groupement des cartes bancaires*, para 52 and case C-32/11 - *Allianz Hungária*, para 34.

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Contemplating the matter of being *appreciable* further indicates how restrictions would, or should, elude Article 101 (1) by virtue of their:

- 1) *content*, covering many quality-based requirements in vertical distribution agreements and other provisions necessary to secure objectives, provided these are compatible with Article 101 (1),
- 2) *limited impact*, allowing agreements concluded between small undertakings with insignificant market positions to be considered too trivial to have a negative impact, normally referred to as *de minimis*,
- 3) *context*, covering restrictions rendering support to the implementation of other agreements and thus ancillary to these, provided they are proportional and the underlying agreement is compatible with Article 101 (1).

The assessments are made to the agreements, and the restrictions incorporated into these, in conjunction with the market position of the involved undertakings. Further, if competition already is reduced or eliminated through regulation, this translates into the analysis.<sup>2</sup> Obviously, there must be competition to prevent, restrict or distort as expressed in Article 101 (1). Below, the matter of an appreciable negative effect on competition is explored further against the suggested three legs appendant to the concept. Embedded in this analysis, is that the matter remains a separate requirement under Article 101 (1), which ultimately rests with enforcers to establish.<sup>3</sup>

### **1. Restrictions that elude by virtue of content**

It was established in early practice that not all forms of restrictions would be covered by Article 101 (1), giving ground for an understanding that these had to be of some substance, allowing e.g. quality based requirements to fall outside.

In *Société Technique Minière*,<sup>4</sup> the Court of Justice, when reviewing an exclusive agreement, explained the need to take into account the context of the agreement. This was developed further in *Brasserie de Haecht*,<sup>5</sup> also involving exclusivity. Here, the Court of Justice held it pointless to consider an agreement by reason of its effect if done distinctly from the market in which it operates and its factual and legal circumstances. In *Prenuptia*,<sup>6</sup> which involved a dispute over franchise fees, the Court of Justice refused to hold franchise as anti-competitive in

<sup>2</sup> C.f. case T-360/09 - *E.ON Ruhrgas*, para 84, 97-117.

<sup>3</sup> Recent cases as case C-67/13P - *Groupement des cartes bancaires*, para 52 and case C-32/11 - *Allianz Hungária*, para 34 does not support this. However, as outlined in this paper can some of the possible legs be invoked against by object restrictions, indicating the matter of an appreciable effect as a separate requirement.

<sup>4</sup> Case C-56/65 - *Société Technique Minière*, p. 250.

<sup>5</sup> Case C-23/67 - *Brasserie de Haecht*, p. 415.

<sup>6</sup> Sag C-161/84 - *Prenuptia*, para 15-23.

itself, but then went on to extend this to restrictions directed at protecting the concept and know-how. A ruling subsequently giving ground for a presumption that many restrictive elements associated with franchise, and selective distribution, would fall outside of Article 101 (1).<sup>7</sup>

The doctrine outlined by early cases, such as *Société Technique Minière* and *Brasserie de Haecht*, never came into fruition, but were absorbed into the distinction between restrictions by object vs effect,<sup>8</sup> where agreements covered by the former always had an appreciable anti-competitive effect; while the latter had to be assessed further and against its content and objective. However, the doctrine appears to imply that restrictions of an indirect nature, and many in-trabrand restrictions, would fall outside of Article 101 (1), but the doctrine is not limited to this and would be applicable broadly, provided that the restriction is justifiable. This could e.g. be the opening of new markets for the benefit of competition or securing of media plurality.

In *Société Technique Minière*<sup>9</sup> and *Nungesser*,<sup>10</sup> involving the distribution of machines and granting of an IP license, the Court of Justice expressed support for the use of exclusivity provisions to open new markets. An understanding most likely embedded on the clauses as unable to thwart competition in an appreciable manner taking into consideration their purpose of introducing a new competitors into the market. In *Binon*,<sup>11</sup> a news distributor had utilized a system of retail price maintenance clauses when selling newspapers and magazines to support that unsold numbers could be returned. The latter was considered a precondition for effective distribution of papers and magazines and, thus, essential for securing media pluralism. The Court of Justice held the price clauses incompatible with Article 101 (1), but accepted that Article 101 (3) might be applicable. However, it rested with European Commission to formally decide on this.

The lenient treatment of restrictions directed at opening new markets and protection of IP rights is understandable, as the alternative might mean less, rather than more, competition. Further, in the *Vertical Guidelines*,<sup>12</sup> it's even accepted that price maintenance clauses directed at supporting the introduction of new products would be permissible under Article 101 (3), expanding on the principles laid down in *Binon*. While this is related to exemption under Article 101 (3), the arguments

<sup>7</sup> *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, recital 175 and 190.

<sup>8</sup> In e.g. case C-234/89 - *Delimitis*, did the Court refuse to label an exclusive agreements as anti-competitive by object commanding a review of its effect.

<sup>9</sup> Case C-56/65 - *Société Technique Minière*, p. 250.

<sup>10</sup> Case C-258/78 - *L.C. Nungesser KG og Kurt Eisele*, para 57-58.

<sup>11</sup> Case C- 243/83 - *Binon*, para 44-47.

<sup>12</sup> See e.g. *Guidelines on Vertical Restraints*, recital 223-225. Here the matter is referred to review under Article 101 (3) but it's not obvious that an infringement of Article 101 (1) should be accepted, as all the arguments could feed directly into the review here.

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could easily feed directly into the analysis under Article 101 (1), thus making it apparent that exemption under Article 101 (3) might not be required, even for traditional hardcore restrictions as price maintenance clauses.

#### *1.1. A broader doctrine that still has relevance*

Revisiting *Prenuptia* and *Nungesser*, it appears that the Court of Justice allotted a level of immunity to restrictions directed at protecting the concept and know-how and opening of new markets. Potentially, this could also involve elements normally considered anti-competitive by object, giving the doctrine separate relevance. This could explain why even traditional hardcore infringements of Article 101 (1), such as price agreements, could elude labelling as anti-competitive by object if concluded within joint production, research or purchase arrangements<sup>13</sup> or for the purpose of public safety or health.<sup>14</sup>

This leniency should also apply to market sharing that follows from a trademark assignment,<sup>15</sup> and it has even been held that a form of market sharing normally would be inherent in IP settlements,<sup>16</sup> making it unlikely that it should be considered anti-competitive *per se*. Obviously, the scope of a doctrine allowing restrictions to elude Article 101 (1) by virtue of their content is difficult to separate from the matter of being anti-competitive by object vs effect. However, it would have particular relevance as a supplement to the former, allowing restrictions normally considered anti-competitive by object to elude being labelled as such, subject to a strict review, by virtue of the content of the agreement.

#### **2. Restrictions that elude by virtue of *de minimis***

Provided the market functions normally and supports a healthy level of competition, it should be obvious that the position of some undertakings would be too trivial to have appreciable negative effects on competition, thus giving ground for the concept of *de minimis*. This has been embraced, and developed, in case law.

In *Völk*,<sup>17</sup> involving an exclusivity agreement, the Court of Justice held that agreements fall outside Article 101 (1) if they have an insignificant effect on the markets, taking into account the weak position of the parties. In *Night Service*,<sup>18</sup> where the European Commission had held

<sup>13</sup> *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*, section 2.

<sup>14</sup> C.f. *Guidelines on Vertical Restraints*, recital 60 and *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*, section 1.

<sup>15</sup> See C-9/93 - *IHT Internationale Heiztechnik GmbH*, para 59.

<sup>16</sup> Case T-684/14 - *Krka Tovarna Zdravil*, para 140. Under appeal as case C-151/19P – *Commission v. Krka*.

<sup>17</sup> Case C-5/69 - *Franz Völk*, para 5-7.

<sup>18</sup> United cases T-374/94, T-375/94, T-384/94 and T-388/94 - *European Night Services*, para 102.

a joint venture anti-competitive, the General Court rebutted that a presumption of being anti-competitive could be tabled solely due to not being de minimis. Finally, the Court of Justice in *Expedia*<sup>19</sup> ruled that the concept of de minimis did not apply to restrictions by object, as these always restricted competition.

While case law had established a concept of de minimis, it would rest with the European Commission to provide further guidance on the matter. This was set out in a series of successive notices explaining how the concept would be enforced. This generally involves reserving intervention for situations where the aggregate market share by the parties to the agreement exceeds 10 %, if competitors, and otherwise 15 %, unless the agreement pursues an anti-competitive object.<sup>20</sup>

### 2.1. *Not obvious that object restrictions cannot be de minimis*

While the preclusion of object-restrictions from being de minimis rests firmly on established case law, in *Expedia*, there is something fundamentally broken in the line of reasoning. Although justification<sup>21</sup> for having a category of object infringements has been provided by referring to the concept of “risk offences” in general criminal law, e.g. driving under influence of alcohol or drugs, it still appears difficult to accept that small and insignificant agreements can thwart competition in the first place. This becomes even more apparent if turning to the matter of being *appreciable* when it comes to affecting trade between member states, which is also a requirement for bringing Article 101 (1) into action. Here, it has been accepted that agreements involving undertakings with markets shares and turnover below 5 % and 40m euro respectively would not be capable of *appreciably* affecting trade between member states,<sup>22</sup> thus eluding Article 101 (1) by virtue of this. Even if such agreements include the equivalence of object restrictions. Naturally, restricting *trade* and *competition* are two separate requirements under Article 101 (1), but for all practical purposes the involved analysis should be largely overlapping, making it clear that, regardless of *Expedia*, the matter should not be considered finally closed. Or, perhaps more precisely, that ground for revisiting the matter remains at a convenient time and opportunity.

### 3. **Restriction that elude by virtue of context**

Case law has given rise to a number of doctrines, according to which restrictive elements are seen as ancillary if a) objectively necessary for the implementation

<sup>19</sup> Case C-226/11 - *Expedia*, para 35-37.

<sup>20</sup> See *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)*, recital 2.

<sup>21</sup> Opinion by Advocate General Kokott in case C 8/08 - *T-Mobile Netherlands*, para 47.

<sup>22</sup> See *Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, recital 52-53.

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of the main operation, and **b**) proportionate to this.<sup>23</sup> Under this doctrine, restrictions might not infringe Article 101 (1) by virtue of their context and status as either *commercial* or *regulatory ancillary*.

#### *3.1. Commercial ancillary*

A doctrine has emerged involving certain commercial restrictions and obligations linked to horizontal joint purchase agreements that neither can nor should be appraised in isolation from the underlying arrangement.

In *Gøttrup-Klim – DLG*<sup>24</sup> and *Metropole*,<sup>25</sup> involving partnerships regarding joint purchasing and satellite-tv respectively, different purchase and non-compete clauses had been adopted. While restricting the parties' vis-vis third parties they were held necessary for bringing the partnerships about and therefore ancillary to this.

The doctrine of commercial ancillary has been detailed by the Court of Justice,<sup>26</sup> which has accepted that restrictions might elude Article 101 (1) by virtue of being ancillary to a main operation, provided:

*“...that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the ‘objective necessity’ required in order for it to be classified as ancillary.”*

From this follows that restrictions are considered ancillary to a main operation if **i**) directly linked to this, **ii**) necessary for the implementation, and **iii**) proportionate to it.<sup>27</sup> It should also carry some weight if the restriction is **iv**) adopted with the main operation (and not subsequently),<sup>28</sup> and **v**) confined to the parties not limiting the commercial freedom of third parties.<sup>29</sup> Finally, **vi**) the main operation must be pro-competitive or neutral, as the assessment ultimately would follow this, and **vii**) the assessment made objectively and isolated from the parties' subjective view.<sup>30</sup>

<sup>23</sup> See case T-111/08 - *MasterCard*, para 77-79 and case T-112/99 - *Metropole*, para 106.

<sup>24</sup> Case C-250/92 - *Gøttrup-Klim - DLG*, para 45

<sup>25</sup> Case T-112/99 - *Metropole*, para 115-117.

<sup>26</sup> Case C-382/12P - *MasterCard*, para 89 and 91.

<sup>27</sup> See *Guidelines on the application of Article 81(3) of the Treaty*, recital 28-31. For further analysis see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3<sup>rd</sup> edition, Oxford 2014, pp. 255-260.

<sup>28</sup> Case C-179/16 - *F Hoffmann-La Roche*, para 73.

<sup>29</sup> Case C-179/16 - *F Hoffmann-La Roche*, para 72.

<sup>30</sup> *Guidelines on the application of Article 81(3) of the Treaty*, recital 18 (2).

The doctrine on commercial ancillary is not limited to agreements between competitors, but also covers non-horizontal agreements, e.g. vertical distribution agreements concluded as part of a distribution or sales chain.

In *Metro*<sup>31</sup> and *Pronuptia*,<sup>32</sup> where restrictive elements supported a system of selective distribution and franchise respectively, the Court of Justice held that these eluded separate assessment under Article 101 (1) if directed at protecting know how or the uniformity of the concept.<sup>33</sup> The assessment of the restrictions therefore followed the main operation and should not be reviewed separate from this.

Revisiting cases outlined earlier as *Société Technique Minière*<sup>34</sup> and *Nungesser*,<sup>35</sup> involving the use of exclusivity arrangements to open new markets, such elements could also fall within the concept of ancillary. Further, as elements of the doctrines would feed into the contrafactual analysis for restriction by effect, it would predominantly have relevance for restrictions by object. Under this, some restrictions must be viewed in their *context* rather than for their naked (and problematic) appearances.

### 3.2. Regulatory ancillary

It has been contemplated<sup>36</sup> whether a doctrine of regulatory ancillary can be tabled, which would allow restrictions directed at implementing regulatory obligations to elude Article 101 by virtue of being unrelated to the operation of economic activities. However, the scope of the doctrine remains open and rests on a single ruling from the Court of Justice that has not been embraced subsequently.

In *Wouter*,<sup>37</sup> a Dutch ban on interdisciplinary partnerships between lawyers and accountants was presented before the Court of Justice. In contrast to other countries, the ban was not adopted by law, but decided by the national association of lawyers that had been delegated to regulate the matter and opted for a ban. In reply to a request for clarification, the Court of Justice found that this fell outside of Article 101 when taking into account its objectives, the

<sup>31</sup> Case C-26/76 - *Metro SB*, para 27.

<sup>32</sup> Case C-161/84 - *Pronuptia*, para 14, 15, 24 and 27.

<sup>33</sup> See also case C-262/81 - *Coditel*, para 19-20 and case C-27/87 - *SPRL Louis Erauw-Jacquery*, para 10-11 relating to the exercise of IP Rights.

<sup>34</sup> Case C-56/65 - *Société Technique Minière*, p. 250.

<sup>35</sup> Case C-258/78 - *L.C. Nungesser KG og Kurt Eisele*, para 57-58.

<sup>36</sup> See e.g. Richard Whish & David Bailey, *Competition law*, 9<sup>th</sup> edition, Oxford 2018, pp. 138-141 and Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3<sup>rd</sup> edition Oxford 2014, pp. 253-255.

<sup>37</sup> Case C-309/99 - *Wouters*, para 97 and 107. Some of the same considerations can be seen in case T-144/99 - *Institute of Professional Representatives*, para 78; case C-184/13 - *API*, para 48 and 55; case AT.40.208 - *ISU*, pkt. 210-266 and united cases C-427/16 og 428/16 - *CHEZ Elektro Bulgaria*, para 54.

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need to regulate professional services, and its inherent nature. In *Meca-Medina*,<sup>38</sup> the General Court applied these principles to a self-regulatory sports body, finding that adopted rules on doping also fell outside of Article 101, as the campaign against doping did not pursue any economic objectives and therefore was not covered by EU Competition law. The Court of Justice, on appeal, overturned this, holding that the anti-doping rules in question were covered by Article 101, but did not restrict competition in manners conflicting with Article 101 (1). In *ISU*,<sup>39</sup> the EU Commission acted against a skating union, which had banned members from participation in tournaments with competing unions. An initiative that served no legitimate purpose but the fiscal interests of the union and could lead to foreclosure of competing unions. By virtue of this, it fell outside any window available from *Wouter* and *Meca-Medina*.

The European Commission<sup>40</sup> has added further to the developing of a doctrine on regulatory ancillary by noting that restrictions directed at protecting public safety and health can be permissible under Article 101 (1), even where the restrictions involved can otherwise be seen as restrictions by object. While it is difficult to identify a coherent doctrine, *Wouter* and *Meca-Medina* do indicate how restrictions directed at implementing regulatory obligations would elude Article 101 (1). This would cover different self-regulatory bodies, provided the restrictions are **i)** pursuing legitimate objectives, **ii)** inherent for the pursuit of these, **iii)** proportionate to them, and **iv)** not directed at protecting fiscal interests.<sup>41</sup> However, the doctrine remains open-ended and subject to lacunas, but appears real and available if warranted.

<sup>38</sup> Case T-313/02 - *David Meca-Medina and Igor Majcen*, para 42-47. Overturned by case C-519/04P - *David Meca-Medina and Igor Majcen*, para 30-34.

<sup>39</sup> Case AT.40.208 - *ISU*, recital 154-160 (principles), 161-188 (restriction by object), 189-208 (restriction by effect) and 210-266 (not covered by the any regulatory exemption). Upheld in substance by case T-93/18 – *International Skating Union*.

<sup>40</sup> See *Guidelines on Vertical Restraints*, recital pkt. 60 and *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*, section 1. See also *Guidelines on Vertical Restraints*, recital 60.

<sup>41</sup> Case AT.40.208 - *ISU*, recital 210-266. See also case C-1/12 - *Ordem dos Técnicos Oficiais de Contas*; para 54-59, 95-103 and case C-136/12 - *Consiglio nazionale dei geologi*, para 45 and 53-57.