The relationship between “object” restrictions and Article 101(3) TFEU: how did the Commission change its approach to Article 101(3) for “object” restrictions after the modernization?

MASTER THESIS

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Abstract

This thesis conducts a full-fled analysis of the Article 101(3) TFEU requirements interpretation and their relationship with notion object restriction of competition. In particular, it aims to examine how did the Commission change its view (in some cases, the change has come under the pressure of the European Courts’ judgements), in regard of how and when the conditions of Article 101(3) are satisfied towards these hard-core constraints. For this purpose, the used methodology has consisted of focusing on the issued Commission's soft law legislation, in particular, several Guidelines towards competition, decisions and the case-law of the European Courts. That allows a legal analysis of both the concept of object restriction and the requirements of Article 101(3), their implementation, the role and limits of competition law.

First, the paper presents the actual difference between the notions “object” and “effect”. The fact that these concepts are alternative and not cumulative ones. What is the difference in cases where the former or the latter concept has been established, regarding competition authorities and the parties in concern? Moreover, the paper examines the three approaches adopted by the European Courts for identifying an object restriction, and is it still possible to justify under Article 101(3) agreements containing such restraints. Discussion caused by the lack of exempting Commission decisions, concerning object restrictions, after the modernisation of European competition law. Secondly, this paper examined the advent of the effect-based approach as a central piece of the competitive analysis under Article 101 TFEU. Finally, it shows the changes in the interpretation and application of every one of the four conditions of Article 101(3).

Introduction

The year 2004 underlined a distinct chapter in the Commission’s role as the central enforcer of the EU’s competition law. The notification system was abolished as a result of The modernisation of EU competition law under Council Regulation 1/2003, and the application of Article 101 TFEU was decentralised. That means undertakings, no longer needed to notify their agreements. The Commission and National Competition Authorities and National Courts now had the authority to allow exemptions to the prohibition, so ending the Commission’s monopoly over Article 101(3) TFEU. Consequently, that modernisation process meant that the Commission was able to save its resources and to concentrated them towards investigating and uncovering cartels, typically forms of agreement that are restrictive of their object. As a result, nearly every decision issued by the Commission under Article 101 TFEU in the past ten years has been framed in object terms because of this priority enforcement modification and the absence of the notification system.¹ For some authors, competition authorities would rather to applying the object criterion, because it carries a burden of proof

that is easier to satisfy.\textsuperscript{2} In contrast to the effect cases given the level of economic assessment demanded by the European Courts.\textsuperscript{3} In this regard restrictions that fall into the former category are thus automatically seen as having the object of restricting competition under Article 101(1). As such, they are an ‘obvious’ infringement of competition, and these restrictions do not require their anti-competitive effects to be proven; therefore, they immediately fall under Article 101(1) TFEU.\textsuperscript{4} Nevertheless, those hard-core restraints are capable of producing and positive effects of competition alongside with the negatives.

One of the most interesting questions of the “object restrictions” consist in the uncertainty surrounding the appreciation of the possible pro-competitive effects associated with practices qualified as “object” restrictions, which is supposed to be fully part of the modern effect-based assessment of constraints to competition under Article 101 TFEU.\textsuperscript{5} Some authors like Gerard argued that “object” category includes a presumption of anti-competitive effects, and it is, in fact, unclear whether that presumption is rebuttable or not. If the presumption is deemed irrefutable, then Article 101(3) TFEU has essentially no place in the analysis and the “object” category amounts to one of “per se infringements” in US system.\textsuperscript{6}

Moreover, 2010 Vertical Guidelines take the view that “\textit{[w]here a hard-core restriction is included in an agreement,...it is presumed that the agreement is unlikely to fulfil the conditions of Article 101(3)}”.\textsuperscript{7} In this vein, in cases such as E.ON/GdF and ONP, the Commission specifically held that object restrictions were “in principle” not in a position to be exempted under 101(3) TFEU.\textsuperscript{8} However, the EU Courts, including the CJEU, incline to consider that object restrictions are in theory open to justification,\textsuperscript{9} but have never in recent years overturned a finding that they were not. At the same time, The Article 101(3) Guidelines stated that “\textit{Article 101(3), on the other hand, does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect}.”\textsuperscript{10} That could be seen, after all, as an indirect prove that the safe harbour of Article 101(3) covers object restrictions. Because of this, the logical question arises whether Article 101(3) TFEU could exempt an agreement that restricts competition by object.

\textbf{1. Chapter 1: “Object” restriction of Competition}

Article 101(1) TFEU prohibits all agreements which have as their object or effect the prevention, restriction or distortion of competition between the Member States. The Treaty

\begin{enumerate}
\item \textsuperscript{3} Case T-328/03 O2 (Germany) GmbH & Co, OHG v Commission [2006] 5 CMLR 258, 65-117
\item \textsuperscript{5} Gerard, D. M. B., 2013. supra 1 pp 17
\item \textsuperscript{6} Ibid pp 17
\item \textsuperscript{7} Commission Guidelines on Vertical Restraints [2010] O.J. C 130/1, para 47.
\item \textsuperscript{8} E.ON/GDF (Case COMP/39.401) para 265; \textit{Ordre National des Pharmaciens} (Case COMP/39.510) para 705.
\item \textsuperscript{9} Case T-17/93 Matra Hachette/Commission [1994] ECR II-595, para 85, Case C-439/09 Pierre Fabre [2011] ECR
\end{enumerate}
differentiates between two types of restrictions, by an object and by an effect. By the fact of the establishing of the former or the latter type of restrictions depend the “intensities with which particular market behaviour will be scrutinised by the Commission or national enforcement authorities.” In essence, that allows the Commission to condemn the specific agreement as restrictive, without examination of the effects which it generates on the market in question. So to speak, the object restrictions are a shortcut for the Commission and the national authorities to conclude that particular agreement should be prohibited. Although Article 101(1) contains examples of arrangements that could be caught, there is no exhaustive list of practices which falls as object restrictions, exactly the opposite the content of so-called “object box” had expanded last several years by adding new practices.  

1.1 “Object” and “effect” two different concepts

It is evident from the wording of Article 101(1) TFEU that object and effect are alternative requirements and not cumulative ones, and the European Courts affirmed this observation. In its judgement in BIDS, the Court interpreted the difference between the two concepts by holding that:

[The distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.]

Based on that, an interesting comparison between notions object and effect and criminal law could be drawn up. In the latter distinguish between two types of crimes exists – first one so-called offences of “simple action”, for example, unlawful possession of firearms or drunk driving. Such an offence applies regardless of whether any effects are resulting from that behaviour. Here, the public danger from that action is so high which provoked the authorities to prohibit such kind of conduct. Similarly, in EU competition law, once the competent authorities established that an agreement has as its object the restriction of competition, they do not need to display its effects. On the other hand, the second type of offences require some effects caused by the criminal act. An example of this type is the fraud, where this crime cannot be applied without the existence of financial loss. Likewise, when the object of an agreement is not the restriction of competition, for it to falls under Article 101(1), is necessary to be demonstrated anti-competitive effects which it is causing.

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12 Lundbeck, Case No. 39226, Commission Decision 19.06.2013 and Case C-32/11, Allianz Hungária Biztosító Zrt v Gazdasági Versenyhivatal, 14 March 2013
14 Case C-209/07 [2008] ECR I-8637, para 17
15 A.G. Trstenjak and Kokott made similar comparison; see Opinion of A.G. Trstenjak in Beef Industry Development Society, para 46 and Opinion of A.G. Kokott in T-Mobile, para 47
From the fact that object and effect are alternative concepts came maybe the biggest
difference between them – the need of proving the actual implications of the agreement.
Where it is found that an agreement has as its object restriction of competition, it is needless
to establish its anti-competitive effects. In this regard Bailey explains that the law creates a
legal presumption “based on the prospect of harm” and such an agreement “are or are likely
to be, anti-competitive in all, or almost all, instances and the prospect of that competitive
harm is deemed to be sufficient for Article 101(1) to apply.” The well-established case-law
supports this view, in Consten and Grundig the Court stated that: “for the purpose of applying
Article 101(1) TFEU, 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.”

However, the above does not mean that the effects of an agreement must never be shown
under the object notion. In European Night Services and Others v Commission the Court stated
the view that when assessing an agreement under Article 101(1), factors which should be
taken are: the actual conditions in which it functions, the economic context in which the
undertakings operate, the products or services covered by the agreement and the actual
structure of the market concerned, only where the agreement contains obvious restrictions
of competition for example - price-fixing, market-sharing such effects assessment is
unnecessary. Furthermore, in its opinion in GlaxoSmithKline Services Unlimited v
Commission A.G. Trstenjak explained this vision by stated that the object concept covers not
only hard-core restrictions but also:

“Agreements where a sufficiently deleterious effect on competition may be presumed on the
basis of economic analysis. Such an assessment of an agreement presupposes that it is
appraised in its legal and economic context. That situation therefore retains a certain
closeness in content to examination of the restrictive effects of the agreement.”

Consequently, it looks like object concept covers two types of agreements: first ones’
containing obvious restrictions (essentially, those that are listed in Article 101(1)), and others
where the establishing of the injurious effects of the agreement need at least some economic
analysis. However, here the difference between this second type of agreements and the
agreements which effect is the restriction of competition is that with the former “negative
interference with market conditions is so clear that the agreement can be presumed, without
any detailed market analysis, to have a restrictive effect.” In other words, the harmful
effects of the agreement seen true it’s legal and economic context are obvious enough that
it’s restrictive object could be alleged. On the other hand, with the agreements which effect

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16 Whish & Bailey, 2014 supra 4
Volume 49, pp. 564
18 Joined Cases C-56 & 58/64 [1966] ECR p342, see also Case C-8/08, T-Mobile Netherlands [2009] ECR I-4529
para 30; Joined Cases C-501, 513, 515 & 519/06 P, GlaxoSmithKline Services Unlimited v Commission, [2009]
ECR I-9291 para 55
20 Opinion A.G. Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P para 92
21 Ibid para 92
is the restriction of competition the negatives are not so clear as the former agreements, therefore, no such presumptions could be drawn. Hence, that’s why for the establishment of restrictive effects detailed market analysis is needed.

However, Schwarz points out that such an approach could be problematic if it is “interpreted to include an abridged analysis of the effects of an agreement.”²² Italiner stated that “analysing the effects of the agreement when it looked at the market structure, the functioning of the market, the degree of concentration, the market power”²³ as the Court did in Allianz Hungária²⁴ it gone too far from object restrictions and used the effects of the agreement to examine if its object is restriction of competition. Subsequently, this broad interpretation of object restriction of competition has been limited in Groupement des Cartes Bancaires v Commission by holding that this concept must be “applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.”²⁵

1.2 Meaning of object restriction

Goyder pointed out that it is hard to recognise straightforward the notion of “object restriction” in the practice because “no meaningful over-arching definition has emerged.”²⁶ Instead, the European Courts accepted three different methods that have been used to consider whether an agreement has as its object the restriction of competition. The first one is comparing the contract in question with the examples listed in the Treaty, block exemption Regulations and settled case-law. The second one examines the purpose of the agreement in the existing economic situation in which it will be applied. And finally, in Allianz Hungária the CJEU embodied the third method, that suggests looking at the effect of the agreement to determine if its object is restriction of competition.²⁷

1.2.1 Textual approach

Article 101(1) TFEU contains a list of practices which are designated as object restrictions of competition. Including those clauses in the agreement in question could easily identify the purpose of the latter. However, this list is not exhaustive, and it is not necessary for an agreement to be listed in Article 101(1) in order to contain object restriction.²⁸ Moreover, in its Guidelines on the application of Article 101(3), the Commission holds that “restrictions of competition by object are those that by their very nature have the potential of restricting

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²² Daniel Schwarz, “Object or effect: where do competition authorities need to draw the line?” pp 3
²⁴ Case C-32/11, Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal 14 March 2013, para 48
²⁵ Case C-67/13 P 11 September 2014, nyr.
²⁶ Goyder, J., 2011. supra, 2
²⁷ Bailey, D., 2012 supra 17, pp. 570
²⁸ Ibid pp. 572
competition.” and this definition is supported by a list of examples enumerated in a series of block exemption Regulations. In addition, with its ruling in *European Night Services* General Court defined “object” as “obvious restrictions of competition such as price-fixing, market-sharing and the control of outlets”. Afterward, it can be considered that under this approach “object” concept referred to “obvious restrictions of competition” or “hard-core restrictions”, as the Commission interpret them. The consequences of this are that each of these constraints will be considered as an object restriction without assessment of the economic and legal context. Using this method for assessment of the purposes of an agreement has benefits, including the strengthened of the principle of legal certainty. The existences of those predetermined examples of object restrictions are a helpful fact for the undertakings which are capable of conforming their own agreements and practices with Article 101(1) TFEU, and to understand when they cross the line.

Beside the fact of using the examples of restrictions listed in the Treaty and the other legislation, for judging specific clauses as object constraints, the CJEU often refer to its previous case-law to categorise restrictions by object. Example for that is the *GlaxoSmithKline* case where the Court held that:

“General Court had erred in concluding that Glaxo’s dual pricing policy did not restrict competition by object. The Court of Justice referred to its own case-law, which states that agreements aimed at prohibiting or limiting parallel trade are deemed to have as their object the restriction of competition and considered that this approach applies to the pharmaceutical sector as to any other.”

According to Bailey using the method of analogy has certain drawbacks as reducing legal certainty, and it is in practice inapplicable in cases involving clauses and practices which have never been previously examined. Furthermore, the cases are never identical, and it is possible small differences in the facts to lead to a completely different legal position, which is a premise for wrong legal assessment by the Court. In this regard, A.G. Trstenjak stated that “The content of an agreement must always be examined against the background of its legal and economic context.”

In conclusion, by following the textual approach, competition restrictions could be put into two separate boxes: the object box and the effect box. The European Courts’ case-law and the Commission’s decisions established the content of this “object box”. Respectively, all these agreements’ object is to restrict competition, regardless of the legal and economic context. The important thing is whether the agreement in concern is one of those put in the “object box”. It follows that textual approach does not accept the separation of the object

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29 Article 81(3) Guidelines, supra 10, para 21
30 Cases T-374/94 para 136
31 Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141 (ENS), para 136
32 Joined Cases C-501, 513, 515 & 519/06
33 Bailey, D., 2012. supra 17 , pp. 573, Bailey summarized the CJEU conclusions in *GlaxoSmithKline* C-501, 513, 515 & 519/06 para 58-61
34 Opinion of A.G. Trstenjak in *Beef Industry Development Society*, para 104
restrains pointed out by A.G. Trstenjak explained above. Consequently, if the agreement could not be recognised as one of the practices located in the object box, full effect analysis is needed, for it to falls under Article 101(1).

1.2.2 More contextual approach

The second method for recognising an object restriction does not depend only on a mechanical comparison between the agreement in question on the one hand and the existing law on the other. Instead account should be taken of “the objectives it [an agreement] seeks to attain and the economic and legal context of which it forms a part”. CJEU adopted this approach in a number of its rulings. The reason why the Courts applied it can be explained by the fact that not every object restriction is clearly visible, Italianer pointed out “We need to remember: restrictions by object are serious - but not necessarily obvious.” In support of that Article 101(3) Guidelines explains that “an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object.”

The core of this approach is to assess whether an agreement should be prohibited because its aim is to restrict competition, without examining its effects at the same time. That can be achieved by analysing the content of the agreement. Its terms must be considered in the context in which it was signed.

However, in determining the object of an agreement, the Commission is not obliged to examine the facts of the economic context which are related to an agreement’s effects. In Brasserie nationale v. Commission, the General Court stated that factors such as “market shares, the sector’s unique openness to imports, and the existence of a large number of outlets not tied to the parties” are associated with the effects. Therefore, they are inapplicable in the object assessment in the case.

It follows that there is a difference between the relevance of context to object and effects cases. The reason of this is the existing of the presumption of a restriction of competition in object cases. With such practices, the anti-competitive harm is not needed to be proved. Therefore, there is no need for a detailed market analysis, so the context should be only a subsidiary tool of analysis. Only elements of the legal and economic context which could cast doubt on the existence of a restriction of competition should be taken into account. In contrast with effect cases full analysis is needed for a restriction to be found. Consequently,

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37 Italianer, 2013, supra 23, pp5
38 Article 81(3) Guidelines, supra 10, para 22
39 Bailey, D., 2012. Supra 17, pp. 582
40 Joined Cases T-49/02 to T-51/02 Brasserie nationale v. Commission para 108
42 Bailey, D., 2012. Supra 17, pp. 583
43 Opinion of A.G. Trstenjak in Beef Industry Development Society, para 50
the context plays a central role in this assessment and covers broader factors such as the structure of the market.\textsuperscript{44}

Another factor which can be useful for recognising that agreement’s object is the restriction of competition is the intention of the parties. The notion subject’s intention should be interpreted as whether the intent of the contracting parties to an agreement is to restrict competition when they have signed it. European Courts’ case-law is clear that subject intention is not a decisive factor under the object assessment.\textsuperscript{45} Nonetheless, this does not mean that the parties’ intention should be left not investigated. Article 81(3) Guidelines explicitly stated that “Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor, but not a necessary condition.”\textsuperscript{46} Hence, the parties cannot save their agreement by arguing that they had no intention to restrict competition when they signed the contract. That is because Article 101(1) is triggered when restriction of competition is established, regardless of the intent of the parties. However, the existence of subject intention is used by the Courts as evidence to prove that the agreement’s object is to restrict competition.\textsuperscript{47}

Nevertheless, some scholars arguing that the mere existence of subject’s intention is sufficient evidence for object restriction of an agreement.\textsuperscript{48} In BIDS case, it looks like A.G. Trstenjek supports this view by pointed out “when acting rationally undertakings will expect the agreement to have the effects which can reasonably be assumed according to the circumstances, with the result that they intended those effects, at least to some extent.”\textsuperscript{49} However, the CIEU does not accept the thesis that subject’s intention should be a decisive factor for the finding of object restriction. Rather, the parties’ intention is only one of the aspects that should be taken into account when competent authorities investigate the legal and economic context of the agreement.

Another interesting question is whether an agreement can be condemned as object restriction where it also has another lawful purpose. It is evident from the settled case-law that an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.\textsuperscript{50} However, in such cases, the parties’ agreement may not infringe Article 101(1) if there is an objective justification for the object restriction.\textsuperscript{51} The Commission embedded this approach

\begin{thebibliography}{99}
\bibitem{44} Ibid, supra 7, pp 583
\bibitem{45} Joined Cases C-29 & 30/83, Compagnie Royale Asturienne des Mines SA (CRAM) and Rheinzink v Commission, [1984] ECR 1679 para 26, Case C-209/07, Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meals Ltd, [2008] ECR I-8637 para 21
\bibitem{46} Article 81(3) Guidelines, supra 10, para 22
\bibitem{47} Bailey, D., 2012 supra 17, pp 578, T-Mobile para 27
\bibitem{49} AG’s opinion in Case C-209/07 para 45.
\bibitem{50} Case C-551/03 P, General Motors v Commission, [2006] ECR I-3173 para64, Case C-209/07, Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meals Ltd, [2008] ECR I-8637 para 21
\end{thebibliography}
in the _Guidelines on Vertical Restraints_ where an example of such justification is provided - a public ban on selling dangerous substances to certain customers for reasons of safety or health."\(^{52}\)

Notwithstanding, a restriction cannot be justified just because the parties to the agreement considered that such a constraint is needed. Instead, "the legitimate objective sought must be of a public law nature and therefore aimed at protecting a public good and extend beyond the protection of the image of the products concerned or the manner in which an undertaking wishes to market its products."\(^{53}\) Therefore, an agreement will fall outside Article 101(1) if it pursues a legitimate objective of a public nature, and the restrictions do not go beyond what is necessary to achieve this purpose in compliance with the principle of proportionality.

### 1.2.3 Abridged competitive analysis approach\(^{54}\): effects as a tool for object recognition

The abridged competitive approach is a more elaborate method of analysis than the contextual one. It’s going few steps forward, then latter approach, and in an attempt to understand whether there is object restriction “a competitive analysis, abridged but real”\(^{55}\) including more closely assessment of the market power of the parties is needed.\(^{56}\)

Perhaps the most well-known case where the Court applied abridged approach was CJEU ruling in _Allianz Hungária_. In this case regarding bilateral vertical agreements between insurance companies and car repair shops, regarding the hourly charge for car repairs where the latter sold insurances on the behalf of the former.\(^{57}\) In essence the provisions of the agreements inducement the repair shops to sell insurances by Allianz and Generali to their customers. The question referred to the CJEU was whether these agreements contain object restrictions of competition.

Applying the abridged approach the CJEU started by referring to settled case-law defined object restrictions as “forms of collusion between undertakings... by their very nature, as being injurious to the proper functioning of normal competition.”\(^{58}\) The novelty comes from the factors, established by the Court, that should be examined for the object restriction to be reviled. These aspects include “the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned” where the result of their existence will lead to “having regard to the economic context, competition on that market would be eliminated or seriously weakened.”\(^{59}\) The mentioned aspects included in the analysis here are in contradiction with the contextual

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\(^{52}\) Guidelines on Vertical Restraints para 60  
\(^{54}\) Bailey, D., 2012 supra 17, pp. 585-586  
\(^{55}\) Case T-168/01, GlaxoSmithKline Services Unlimited v Commission, [2006] ECR II-2969 para 120  
\(^{56}\) Bailey, supra note 17 pp 586  
\(^{57}\) Whish & Bailey, 2014 supra 4, pp 131  
\(^{58}\) Allianz Hungária supra note 12, para 35  
\(^{59}\) Ibid para 48
approach examined in the previous section. The latter approach clearly established that the context in object cases should be just an ancillary instrument of analysis. The abridged approach blurs the difference between the relevance of context to object and effects cases established by the contextual analysis.

The including of those factors in the founding whether an agreement has object restriction is problematic by the fact that they are aspects that are “examined under the effects analysis afforded to ‘effect-type’ agreements.” In support of that statement, the factors added in object restrictions qualification are very similar to those adopted by the Court in Delimititis case that is a typical example of full effect analysis of vertical agreements.

The CJEU was heavily criticised for the employed approach in Allianz Hungária. Fears were raised that carrying out a “quick look” into the effects of the agreement for recognising object restrictions, will wipe already vague distinction between the two concepts. Another point is that if the contextual approach is not enough for revealing object restriction and abridged competitive analysis is needed, that is indication that the agreement is not part of the “object box”. In regard to that in Société Technique Minière v. Maschinenbau Ulm the CJEU stated that “where an analysis of the clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreements should then be considered and for it to be caught by the prohibition it is then necessary to find that these factors are present”.

The above three segments showed that the object definition dependents on the approach used by the Courts or competition authorities. The textual approach could be definite as simplistic one. The only important thing is whether the agreement can be recognised as one of the agreements found in the object box. If the answer is “yes” then its object is a restriction of competition, and if “no” full-fledged analysis is needed for its effects to be established.

The contextual approach is a more developed one, that allows better and deeper analysis considering the facts on a case by case basis. The context is useful to disclose a restrictive object that is not immediately apparent from a reading of the terms of an agreement, or the context of an agreement may exclude a prima facie finding of a restrictive object. However, we should bear in mind that in regard to the object cases the context should be only supplementary tool of analysis.

The abridged competitive approach goes a few step further of the previous approach. The former includes more effects analysis for the establishing of object restrictions. The problem is that such an analysis, mixing the already murky distinction between object and effect cases. Notwithstanding, it seems that the contextual approach is the one that succeeded in the case-law.

60 Nagy, C. I., 2013. The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?. World Competition, 36(4), pp. 559
61 Case C-234/89 paras 13-15
62 Harrison, “The Allianz Hungária case - The ECJ’s judgment could have ugly consequences”, (2013) pp 10
63 Case 56/65 ECLI:EU:C:1966:38 p. 249
64 Bailey, supra 17, pp 583
65 Joined Cases C-501/06, C-513/06, C-515/06 and C-519/06, GlaxoSmithKline v. Commission, [2009] ECR. I-9291, para 58; BIDS, supra 52, paras 16 and 21, supra 36, para 104
1.3 The relationship between object restrictions and Article 101(3) TFEU

Article 101(3) TFEU is the legal exception that allows for the parties to an agreement to save their contract and the latter will keep its legal validity, even when that agreement was found restrictive to competition. With the entry into force of Regulation 1/2003, the old system of notification of agreements to the Commission for exemption was replaced with the principle that firms need to decide for themselves if their agreements infringe or not Article 101. Besides, another new change was that Article 101(3) become directly applicable, without prior Commission’s decision and the latter, national authorities and the Courts share the competence to apply Article 101(3). Article 2 of Regulation 1/2003 reaffirms that it is for the competition authorities to prove infringement of Article 101(1), but it is to the undertakings claiming that Article 101(3) covers the agreement to prove that.

There is no doubt that all agreements can benefit from that provision. The General Court in *Matra Hachette v Commission* expressly stated that.66 Afterward, this position was reiterated by the CJEU in *Pierre Fabre*67, and by the Article 101(3) Guidelines which prescribe that not a single type of agreement falls outside its scope.68 However, despite this legal position that excludes “per se” illegality in the EU competition law, the percentage of the agreements containing object restrictions, permitted under Article 101(3) is low. The reason for that is because of the existence of a strong presumption that object restrictions will not satisfy the conditions of Article 101(3). This presumption is confirmed by the inapplicability of new BERs to agreements containing hard-core restraints and the lack of case-law that clarifies when agreements do not violate Article 101.69 BERs or block exemption Regulations, are legal tools used by the Commission to pass free certain categories of similar agreements that normally satisfying the requirements of Article 101(3). If an agreement meets the conditions drafted out in the block exemption, it is automatically exempt from the prohibition of Article 101(1). Those practices are important for the EU competition law by increasing the legal certainty.

Another point is the relationship between Articles 101(1) and (3) TFEU and the facts assessed under the both articles. Respectively, if an undertaking relies on Article 101(3) that means its agreement already has been found in violation of Article 101(1). In 2013 during its speech Fordham Competition Law Conference Alexander Italianer stated that in the Commission’s view:

*“under Article 101(1), no matter whether the restraint is by object or by effect, the contextual analysis never goes as far as balancing the anti- and pro-competitive effects. It only aims at*

66 Case T-17/93 para85  
67 Case C-439/09, supra 36, para 57  
68 Article 101(3) Guidelines para 46  
gauging the negative consequences of the restraint for the process of competition. In other words, the analysis under Article 101(1) deals exclusively with identifying competitive harm. The balancing between competitive harm and redeeming virtues is made exclusively under 101(3).”

Therefore, segmentation between Articles 101(1) and (3) TFEU exists. That means, paragraph 3 should be examined independently and irrespectively of the factors assessed under 101(1). However, under Article 101(1) for the finding of an object restriction, the possible benefits of competition resulting from an agreement must be assessed. In such situations, the same evidence and arguments can be raised again under 101(3) by the parties. Kolstad points out that anti-competitive agreement can be saved if “the efficiencies relevant under Article 101(3) outweigh the negative effects the restriction of competition has on competition and allocative efficiency.” Hence, under this “balancing test” for the application of Article 101(3), it is necessary to access the concrete effects on competition of agreements which object is the restriction of competition.

That is an interesting point for the examination of object restrictions under Article 101(3), because as already mentioned under the object concept under Article 101(1) the competition authorities or private claimants do not need to prove the existing effects of an agreement since the presumption of competitive harm exists. It is a huge benefit for the plaintiff, who can save money and work hours, and on the other hand, put extra pressure on the defendant who bear the burden to refute the presumption. Under 101(3) TFEU, the parties that seek to save an agreement must show that it meets all four conditions prescribed by the Article. The defendant “need to bring forward sufficient and verifiable evidence that a restraint is ultimately pro-competitive and beneficial for consumers.” Then is on the Commission to consider this evidence, and it cannot just reject them without analysis if they are relevant. “The Commission could not merely reject those arguments outright on the ground that the advantage...would not necessarily be achieved...but [is] required...to examine that the [claimed] advantages would be achieved or, on the contrary, that they would not.”

Another point regarding the application of Article 101(3) to object restrictions is whether the conditions of this provision are applied more closely for such infringements. In particular, some authors claimed that the Commission “significantly raised the bar for those seeking to rely on Article 101(3).” However, such an argument was rejected by the General Court in MasterCard. It pointed out that the Commission fulfilled its obligation to examine the arguments put forward by the parties, and the latter have failed to prove that their agreement meets the criteria of Article 101(3). Kolstad rejects the view of the different treatment of agreements, which object was found to be restrictive to competition, because Article 101(1)

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70 Italianer,2013 supra 23, pp 7
71 Kolstad, O., 2009. Object contra effect in Swedish and European competition law, Sweden: Konkurrensverket page 54
72 Ibid, page 55
73 Italianer, supra 23, pp 7
74 Case T-168/01, GlaxoSmithKline, supra 40, para 301
75 Jones, A., 2010, supra 69, pp 669
76 Case T-111/08 para 237
applies the same legal balancing test to all contracts that fall under its provisions. He maintains that the reason for the impression of stricter treatment is because object restrictions have great potential for anti-competitive harm. Consequently, they have little chance of realising the type of production efficiencies relevant under Article 101(3). Hence, because of this higher harm to competition, the produced efficiencies must be relatively substantial for the criteria in Article 101(3) to be fulfilled.

However, not all scholars are in consensus on this interpretation. Andreangeli states that different appraisal, about the seriousness of the infringement established under Article 101(1) is needed. She argued that regarding object restrictions the assessment under Article 101(3) would have to cover a wider range of issues than effects restraints. In such hard-core cases, factors such as “productive efficiency, public policy arguments, allocative efficiency benefits and gains arising from the agreement must be assessed”. Andreangeli submitted that applying a more extensive examination to object restrictions would be consistent with the existing case-law, which requires a ‘pressing justification’ to implement Article 101(3) to hard-core restraints.

1.4 Conclusion

The Commission alone had the competence on the application of Article 101(3) for decades. With the introduction of Regulation 1/2003, this situation was changed. The modernisation of European competition law pushed the Commission to “shifted its priorities to focus on the “most serious infringements” which are also the “most obvious” ones.” 17 out of the 18 infringement decisions issued since the first of January 2000 were framed in “object” terms. Despite, that extensive practice over object cases and the fact that such an agreements are capable of being saved under Article 101(3) the lack of exemption decisions from both the Commission and the Courts is evident. This leads some authors to wonder is this a death of Article 101(3). Concerns were raised that Article 101(3) will be left out of use if too much economic analysis under Article 101(1) is employed. Support for that statement is Metropole judgement where the Court reaffirmed that the balancing of pro and anti-competitive aspects of a restriction must be performed only under Article 101(3). However, this does not mean that the assessment of positives and negatives in some form under Article 101(1) will devoid

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77 Kolstad, O., 2009, supra 71 pp 55
78 Ibid, Kolstad pp 55
79 Ibid, Kolstad pp 55
80 Andreangeli, A., 2011. From Mobile Phones to Cattle: How the Court of Justice Is Reframing the Approach to Article 101 (formerly 81 EC Treaty) of the EU Treaty. World Competition, 34(2) pp 237-238
81 Ibid, Andreangeli pp 240
82 Ibid, Andreangeli pp 240
84 Ibáñez Colomo, P., 2011 The slow death of Article 101(3)
85 Gerard, D. M. B., 2013. supra 1, pp 16
86 Ibáñez Colomo, P., 2011, supra 84
87 Case T-112/99 para 74
the purpose of the former. The Metropole decision should be interpreted as an indicator which determined Article 101(3) as dominion where the parties can show “quantify efficiency gains and that the agreement is pro-competitive on the whole.” Therefore, such a separately assessment under Article 101(3) of a quantify efficiency gains of an agreement is needed where the latter “creates or strengthens market power beyond a certain degree...the context in which an agreement is concluded suggests the negative impact on prices and output may weigh more than the allocative efficiency gains achieved...or Article 101(3) is a right resort for understanding whether restraints go beyond what is deemed necessary to achieve the gains identified.”

Furthermore, the idea of Article 101(3) death was rejected by the Commission Director General for Competition. Italianer explicitly stressed that legal exemption is still a possibility for agreements with object restrictions. He pointed out, that “the Commission is ready to review its policy under 101(3) where this is justified and appropriate.”

Chapter 2: Effects-Based Approach in EU Competition law

The purpose of this chapter is to presents the advent of the effects-based approach in European competition law, and how it affects the current interpretation and scope of the conditions of Article 101(3) according to the Commission and the European Courts. Moreover, this chapter introduces the four conditions of Article 101(3) and examined their modern scope and application, in the light of the Article 101(3) Guidelines.

Until the entry into force of Regulation 1/2003 agreements could be saved from Article 101(1) prohibition only true individual exemption under Article 101(3) granted by the Commission, or if contracts’ parameters cover safe harbour’s requirements prescribed by special block exemption Regulations. This system encouraged a distortion of the analysis of Article 101, enticing the Commission to adopt a broad interpretation of Article 101(1). At the same time application of Article 101(3) TFEU, was entirely over the Commission’s monopoly. Moreover, the eventual application of Article 101(3) depended on the notification of the agreement to the Commission. Therefore, if the parties have missed that notification, and their agreement is found restrictive of competition, they are unable to rely on Article 101(3). However, this system was problematic because the Commission did not have the resources to deal with all notifications on time. As a result, the agreements have been divided by categories, that led to different sets of rules for agreements producing similar economic effects.

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89 Ibid pp 559
90 Ibid pp 559
91 Ibid pp 12
92 Jones, A., 2010, supra 69, pp 650
93 Ibid pp 651
That led to modernisation in which the Commission lost exclusive power to grant individual exemptions under Article 101(3). Since 2004 new self-assessment system replaced the old notification procedure. The meaning of this is that “firms themselves need to evaluate whether a given agreement is compatible with EC law. Firms themselves have to carry out the efficiency test and, clearly, this test must follow the same principles as those applied by the Commission or national competition authorities.”\textsuperscript{94} As a result of this change, the Commission also published Guidelines on the application of Article 101(3).

2.1 Guidelines on the application of Article 101(3) TFEU

In 2004 the Commission with the Article 101(3) Guidelines by following the advent of the effects-eased approach in EU competition law clarifying a new, “more coherent, economic framework for analysis of agreements under Article 101(1) and 101(3) and explicitly setting out that the objective of Article 101 should be competition and market integration as a means of enhancing consumer welfare.”\textsuperscript{95} In this regard, the Guidelines established as a successful benchmark for the covering of the requirements of Article 101(3), whether the positive economic effects of an agreement outweigh its restrictive effects.

Article 81(3) Guidelines aimed to facilitate the self-assessment by companies on the compliance of their agreements with Article 101 under the new system.\textsuperscript{96} They employ a balancing test between both paragraphs 1 and 3 of Article 101, which objective is weighing the positive and negative effects of an agreement and determining its “net effect” on the basis of market power as a key benchmark in this analysis.\textsuperscript{97} Article 101(3) containes four requirements two positive: agreements must contribute to improving the production or distribution of goods or to promoting technical or economic progress, and at the same time allowing consumers a fair share of the resulting benefit. The two other conditions are negative and prescribe that contracts must not impose on the undertakings restrictions which are not indispensable to the attainment of above objectives nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. As already mentioned the settled case-law reaffirmed that the balancing has to be carried out under Article 101(3). However, in reality, some authors pointed out that this “balancing is replaced by a series of tests or filters that eliminate either unnecessary restrictions or excessively restrictive agreements.”\textsuperscript{98}

\textsuperscript{94}COM(2006) Practical methods to assess efficiency gains in the context of Article 81(3) of the EC Treaty- final report 5 may 2006 pp 11
\textsuperscript{95}Jones, A., 2010, supra 69, pp 653
\textsuperscript{96}Gerard, D. M. B., 2013. supra 1 pp 8
\textsuperscript{97}Ibid pp 9
\textsuperscript{98}Nicolaides, P., 2005. The Balancing Myth: The Economics of Article 81(1) & (3). Legal Issues of Economic Integration, 32(2), pp 135
2.1.1 Efficiency Gains

The first condition requires some improvement or economic progress in other words agreements must lead to efficiency gains. Under that notion falls effects like “a reduction in costs, allowing for lower prices on the market or the introduction of a new product or product variety on the market.”\(^9\) However, savings which are the results of the parties’ market power exercise are not acceptable gains.\(^10\) Therefore, under this condition only benefits “that result from improvements in efficiency, quality or innovation”\(^11\) could be taken into account. Furthermore, the claimed efficiencies must be a direct result of the agreement in question, and it is for the parties to show how and when they will be achieved.\(^12\)

As has already been established in the previous chapter the balancing between claimed efficiencies and agreement’s restrictions must be carried out under Article 101(3). However, that balancing has some limitations, the weighting under Article 101(3) of negative and positive effects of an agreement must be performed on a “market by market” basis. In other words, this assessment will take into account only these efficiencies and restraints produced by the agreement within that same relevant market.\(^13\) Consequently, Article 101(3) Guidelines embodied the general rule that “Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market.”\(^14\)

However, this rule has an exception where two markets are related, and in reality “consumers affected by the restriction and benefiting from the efficiency gains are substantially the same.”\(^15\) The main advantage of this requirement of uniformity between the consumers, so for the exception to apply is the possibility of the Commission to avoid subjective evaluations and comparisons across different consumers.\(^16\) Nevertheless, that Commission approach is problematic, in particular, cases regarding “two-sided” markets where economic platforms sell two distinct but interdependent products or services to two different groups of consumers that provide each other with network benefits.\(^17\)

In such cases, if we follow Article 101(3) Guidelines for the parties to an agreement is impossible to rely on efficiencies produced in the first market as a counterweight to the restrictions formed in the second one because the affected consumers are not the same. Hence, by focusing only on the first group of consumers and not taking into account the relations with the other side of the market the chance of finding Article 101(3) inapplicable.

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\(^9\) COM(2006), supra 94, pp 61
\(^10\) Article 81(3) Guidelines, supra 19, para 49
\(^11\) Nicolaides, P., 2005, supra 98, pp 135
\(^12\) Ibid, pp135
\(^13\) Andreas Scordamaglia-Tousis & Claire-Marie Carrega. The Application of Article 101(3) in the Context of Multi-Sided Markets Following MasterCard pp2
\(^14\) Article 81(3) Guidelines, supra 19, para 43
\(^15\) Ibid para 43
\(^16\) A. Scordamaglia-Tousis & Claire-Marie Carrega, supra 103, pp 3
\(^17\) Ibid pp 3
increases because the Commission limits the scope of the benefits that can be demonstrated by the parties.\textsuperscript{108}

Afterward, the CJEU broadening the efficiency gain test regarding multi-sided markets. In \textit{MasterCard} the Court stated:

\textit{[I]n the case of a two-sided system such as the MasterCard scheme, in order to assess whether a measure...creates restrictive effects in regard to one of the two groups of consumers associated with that system — can fulfil the first condition laid down in Article 101(3) TFEU, it is necessary to take into account the system of which that measure forms part, including, where appropriate, all the objective advantages flowing from that measure not only on the market in respect of which the restriction has been established, but also on the market which includes the other group of consumers associated with that system, in particular where...it is undisputed that there is interaction between the two sides of the system in question.} \textsuperscript{109}

Consequently, lack of the uniformity between the consumers is not in itself a reason for the Commission to reject cross-market efficiencies. The second important point is that the Court requires “appreciable objective advantages” or in other words, minimum efficiencies in the market where the restrictive effects occur for the benefits in a related market to be relevant.\textsuperscript{110} That means the Commission in its assessment of the two-sided markets must take into account all objective advantages from both sides of the market.\textsuperscript{111} However, for this rule to be applicable, it is necessary a certain amount of the agreement’s efficiencies to arise on the same market where its restrictive effects occurred. If such minimum efficiencies are established the Commission must take into account, all objective advantages of all related markets regardless of any consumer commonality.

This interpretation of the relevant efficiency gains under Article 101(3) is in line with the Court’s broad interpretation when it establishes which negative effects must be included in determining whether there is a sufficient degree of harm to competition under Article 101(1) when concerning two-sided markets. The ECJ stated that in this analysis into account should be taken “all relevant aspects... it being immaterial whether or not such an aspect relates to the relevant market.”\textsuperscript{112} Therefore, it is logical where the Commission can rely on aspects of all sides of a multi-sided scheme to prove the existence of a restriction of competition, it is fair for an undertaking to be able to rely on pro-competitive effects stemming from all sides of that very same scheme.\textsuperscript{113}

Another important question is whether the parties to an agreement can rely on non-economic benefits under Article 101(3) to save their contracts. For many years, policies other than pure economic efficiency gains have been assessed when the Commission determined the exemption of agreements restrictive of competition. In a number of cases the CJEU counted

\textsuperscript{108} Ibid, supra 93, pp 4
\textsuperscript{109} Case C-382/12, para 237
\textsuperscript{110} A. Scordamaglia-Tousis & Claire-Marie Carrega, supra 103, pp 6
\textsuperscript{111} C-382/12 P - MasterCard and Others v Commission ECLI:EU:C:2014:2201 para 240
\textsuperscript{112} Case C-67/13 P, \textit{Groupement des Cartes Bancaires (CB) v Commission}, suprta 15, para 78
\textsuperscript{113} A. Scordamaglia-Tousis & Claire-Marie Carrega, supra 103, pp 6
that employment was a relevant factor under the first requirement of Article 101(3), the same is true about “collective environmental benefits” resulting from the agreement. In Ford/Volkswagen, the Commission took into account the significance of the investment, created new jobs, the promotion of the harmonious development of the Community and the reduction of regional disparities when performed the balancing test under Article 101(3). However, the common thing between all this case is that all of them were all decided before the modernisation. Nowadays, it is evidently from the wording of Article 101(3) Guidelines that the Commission’s view is that under Article 101(3) should be taken into account only agreements that would bring improvements in economic efficiency. The discussion about the first condition of Article 101(3) is specifically under the heading of “efficiency gains”, therefore removing any doubt, that the Commission considers other non-economic, benefits can’t apply to the assessment. However, the Guidelines provide that “Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3).” Consequently, under Article 101(3) assessment, there is no legal barrier prohibiting the acceptance of non-economic benefits; the only obstacle is the Commission’s interpretation of the Article 101 provisions. Said that it should be borne in mind that it is the Commission’s competence to base its assessment “on considerations connected with the pursuit of the public interest in order to grant exemption under Article 101(3).” However, this does not mean that it is obliged to do so, only where the refusal constitutes a “manifest error of appraisal” the Courts can intervene.

It is clear from the above that the notion efficiency gains under Article 101(3) stands only for economic benefits. The Commission’s new interpretation of this first condition excluded non-economic benefits from the efficiencies consideration under the exception clause. The second important point about the first condition of Article 101(3) is the CJEU broadening the “efficiency gain” test concerning multi-sided markets. We know that as a general rule, negative effects in one market cannot be balanced against positive effects in another market. Nevertheless, this test was relaxed regarding to two-sided markets by the inclusion of efficiencies from the both side of the market if exact conditions are met.

2.1.2 Fair Share for Consumers

The second condition of Article 101(3) prescribes that the consumers of the parties of an agreement will enjoy a fair share of the advantages that resulting from it. The Guidelines

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114 Case C-26/76, Metro SBGroßmärkte v Commission, [1977] ECR 1875, para 43
116 [1993], OJ L20/14, para 36
117 Whish & Bailey, 2015, supra 4, pp 169
118 Article 81(3) Guidelines, supra 10, para 42
120 T-528/93 Metropole Television S.A. [1196] ECR II-649, para 118
establish that notion “consumers” embodies “all direct or indirect users of the products covered by the agreement.” As an ultimate rule, the benefits should be passed along to all users, for example, in cases of the two-sided markets where there is more than one group of consumers a fair share of the benefits should be passed on to both groups. However, following the MasterCard case, the Commission relaxed its test regarding two-sided markets by accepting “of market efficiencies” where “considerable commonality” between consumers in different markets exists.

According to Nicolaides after the modernisation, the Commission attached considerable importance to the consideration of this requirement of Article 101(3), in contrast to its previous practice. As an example of this new approach, he pointed out that Guidelines on the Horizontal Mergers that established as a relevant benchmark for efficiency assessment is the consumers’ welfare before and after the merger.

To satisfy this criterion, benefits of all consumers in the relevant markets are in importance, and not the effect on each separate individual. The consumers are compensated for the negatives of the agreement when sufficient benefits are passed on to them. For this assessment two questions need to find their answers, “are the prices in the market likely to increase and if so, are such prices likely to be offset by product improvements and other efficiencies?” The fair share concept means no worsening consumer welfare, that excludes increasing prices of existing products. For Nicolaides, there is a difference if an agreement concerns existing or new product’s price increasing. Regarding the former category, he argued that only agreements which “do not result in the creation or strengthening of market power that brings about higher prices” should be exempted, this is because only the parties whose contracts strengthen their market power are able to raise prices. This leads to the conclusion that second and fourth conditions of Article 101(3) overlap. Regarding the new products, the price can be raised, but in such cases the consumers must be compensated with the increased quality or other benefits.

As an evidence of the new more elaborated Commission’s approach to this requirement of Article 101(3) is the abandoning of the presumption that “sufficient pass-on will normally occur if sufficient competition that effectively constrains the parties to keep to the agreement

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122 Article 81(3) Guidelines, supra 19, para 84
123 Case T-111/08 MasterCard v Commission EU: T: 2012:260, para 228
124 Continental/United/Lufthansa/Air Canada, 23 May 2013, COMP/AT.39595.
125 Nicolaides, P., 2005, supra 98, pp 135-136
127 Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc) (2006) para 85
129 Nicolaides, P., 2005, supra 98, pp 136
130 Ibid, pp 136
131 Whish & Bailey, 2014, supra 6 pp 173
is maintained on the market.” 132 Now, the Guidelines employs more weight to this condition by refusing to accept that existence of remaining competition is sufficient to ensure that consumers will indeed obtain a share of the benefits. 133

Once the Commission establishes that the price will increase as a result of the agreement, for the second condition to be satisfied improvements and other efficiencies, need to be achieved. In such cases, the Commission approach is to assume that “improvements in quality are sufficient to compensate consumers.” 134 In Reims II it concluded that:

“any increases in tariffs for cross-border mail... would be accompanied by improvements in the service rendered or by the maintenance of the quality levels already achieved. Consumers may therefore be expected to get a fair share of the benefits if the quality of the service improves.” 135

However, this raises the question how this condition should be assessed in the case of new or improved products where there is no comparison by which to consider if the quality of the service or the product was improved. Nocilaider considers that it will be difficult to apply this condition to agreements concerning new or improved products. When they are sell at higher prices than similar or older products, because the assessment of whether the benefits were passed on to consumers is very subjective and that the fourth condition still has an important role. 136 Article 101(3) Guidelines explains that the undertakings must demonstrate that consumers obtain countervailing benefits in such cases. Those benefits must create “real value” for the consumers that will compensate them for the higher prices, for example through increased quality. 137

2.1.3 Indispensability of the restrictions

The third condition of Article 101(3) requires that agreements should not contain restrictions which are not indispensable for the achievement of the improvements claimed by the parties. In practice, the issue of indispensability should be examined before the question of a fair share of consumers because the latter includes balancing of the negative and positive effects of an agreement to consumers, and such analysis will be pointless if the restrictions are indispensable. 138

The Guidelines establish two-fold test regarding the application of this condition: first, the restrictive agreement as such must be reasonably necessary to achieve the efficiencies and secondly, the individual restrictions that flow from the agreement must be reasonably

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132 J. Faull & A. Nikpay, supra 116, pp 308
133 Nicolaides, P., 2005, supra 98, pp 137
134 Ibid, pp 137
135 COMP/C/38.17, of 23 October 2003 para 120
136 Nicolaides, P., 2005, supra 98, pp 138
137 Article 81(3) Guidelines, para 86, 102 and 103
138 Ibid, para 39
necessary for the realisation of the efficiencies.\textsuperscript{139} It follows that parties must “demonstrate any causal link between the restriction of competition and the [claimed efficiencies under the first condition of Article 101(3)].”\textsuperscript{140} Moreover, the parties must consider least restrictive arrangement, and to show that they cannot achieve claimed efficiencies through other, less restrictive arrangements.\textsuperscript{141} The Commission approach is one of “reasonable necessity” which represents that this requirement is satisfied when there are no less severe means available to the parties.\textsuperscript{142} Nevertheless, a restriction is more likely to be indispensable if the claimed efficiency gains are more uncertain without the same anti-competitive restriction.\textsuperscript{143}

The second requirement of the test is the indispensability of individual restrictions resulting from the agreement. The parties must prove that both, the nature of the restriction and its intensity are reasonably necessary in order to produce the efficiencies.\textsuperscript{144} In other words, the undertakings must demonstrate that without the agreement the efficiencies that arise from it will be reduced or eliminate, or even that they will not happen at all.

However, in some cases such a demonstration is impossible. The parties of an agreement cannot rely on its indispensability regarding claimed efficiencies when the Community legislator already provided for measures, covered by the block exemption, which may be adopted to ensure the achievement of the same improvements. The General Court stated that in such cases:

“\textit{[I]t is for the applicants to make use, of the options provided for by the Community rules... The applicants' arguments seeking to show that those measures are more restrictive than the contested agreement cannot therefore succeed. If a measure is exempted by a Council Regulation, it is irrelevant to ask whether it is more or less restrictive for the purposes of Article 101(3) of the Treaty. The Commission was therefore entitled to find that the restrictions of competition in question were not indispensable given the existence of the measures laid down by [Community Regulation].}”\textsuperscript{145}

In essence, under the indispensability assessment the actual context in which the agreements operate, the structure of the market, the economic risks related to the agreement, and the incentives facing the parties are the factors that must be taken into account.\textsuperscript{146} An important feature of this condition, in contrast to other three, is the fact that it may be granted only for a certain period. Accordingly, an agreement is exempted for as long as the restrictions it imposes are necessary for the parties to realise the efficiencies and, where it is applicable, to obtain a reasonable return on their investments.\textsuperscript{147} Hence, once when the restriction is not

\begin{thebibliography}{99}
\item \textsuperscript{139} Ibid, para 73
\item \textsuperscript{140} Commission Decision \textit{GlaxoSmithKline}, 2001/791/ EC, [2001] OJ L302 para 179
\item \textsuperscript{141} Nicolaides, P., 2005, supra 98, pp 138
\item \textsuperscript{142} Ibid pp138
\item \textsuperscript{143} COM(2006), supra 94, pp 101
\item \textsuperscript{144} Article 81(3) Guidelines, para 78
\item \textsuperscript{145} Case T-86/95 Compagnie générale maritime and Others v Commission ECLI:EU:T:2002:50 para 184
\item \textsuperscript{146} Article 81(3) Guidelines, para 80
\item \textsuperscript{147} Nicolaides, P., 2005, supra 98, pp 139, see Article 81(3) Guidelines, para 81
\end{thebibliography}
necessary for the achievement of the benefits, or the investment was recovered this requirement is no longer satisfied.

The tension between the necessity of the constraints under this condition and the restrictions examined under Article 101(1) when the competition authorities decide whether there is restriction of competition, is not something new. Scholars like Korah criticised the Commission for its ambiguous view towards the indispensability criteria. She pointed out that the Commission considers restrictions to be restrictive of competition under Article 101(1) while at the same time finds them indispensable under Article 101(3).148 According to Nicolaïdes, this is not a problem anymore because the Commission employed the effect-based approach in its assessment of restrictions to competition. In his view, the necessity of the restrictions in Article 101(1) contains the question do the parties need to work together so as to place a product on the market and/or to restrict their freedom of action afterward so as to ensure the success of the cooperation.149 In contrast, under Article 101(3) indispensability concerns whether constraints resulting from the agreement are needed for the claimed efficiencies (without the agreement the parties are capable to put the product on the market but at higher costs.)150

2.1.4 No Elimination of Competition

The fourth condition of Article 101(3) requires that an agreement must not eliminate the effective competition in the substantial part of the market. In such cases the firms cannot rely on short-term efficiency gains resulting from the contract, they will be outweighed by long-term losses.151 The parties must show that the agreement does not hinder the remaining sources of actual and potential competition to function properly. In the past, the Commission handled elimination of competition and dominance under Article 102 TFEU as an equated situations.152 Consequently, in the past Article 101(3) was inapplicable if an agreement was found to constitute an abuse of a dominant position.

However, this conclusion was rejected by the European Courts. The General Court stated that:

“the prohibition on eliminating competition is a narrower concept than that of the existence or acquisition of a dominant position so that an agreement could be regarded as not eliminating competition within the meaning of Article 101(3) of the Treaty, and therefore qualify for exemption, even if it established a dominant position for the benefit of its members.”153

Accordingly, the mere finding of dominance is no sufficient to establish that the competition is eliminated, analysis into the degree of market power and the relationship between the

148 Ibid, pp 139
149 Ibid, pp 139
150 Ibid, pp 139
151 Article 81(3) Guidelines, para 105
agreement and such market power is needed. Consequently, there are no specific combined market shares above which an agreement tends to eliminate effective competition, however, the market share thresholds concerning dominance could be used as a sort of safe harbour for agreements not eliminating competition on the market. In this regard, the Commission considers firms with less than 40% market share unlikely to be dominant. Obviously, there is a close relationship between the elimination of competition and Article 102. The Guidelines prescribe that Article 101(3) applies to agreements concluded by dominant firms as far as the contract do not constitute an abuse of dominance. However, in cases where such abuse is found dominant firm cannot use Article 101(3) as a shelter from the application of Article 102, those agreements cannot be saved by the exception provision.

As a benchmark of whether an agreement eliminates competition the Guidelines establish “the degree of competition existing prior to the agreement and...the reduction in competition that the agreement brings about.” Hence, the weaker the competition, the lower is the framework in which an agreement must fit. The key to demonstrating that an agreement satisfies the fourth condition is to identify the important barriers and drivers to effective competition and to demonstrate that they are not significantly affected. As already mentioned, there is no established threshold on market share for prima face determination whether there is an elimination of competition. Therefore, an exhaustive analysis is needed of the source of restrictions concerning both the actual and potential competitors. This analysis concerns the same factors that are relevant under Article 101(1): the market position of the parties of the agreement and the competitors and their ability to compete, market position of the buyers and barriers to entry.

Although, it is clear that elimination of competition is assessed regarding “relevant market”, the fourth condition of Article 101(3) concerns “substantial part of the products in question” which is a different concept from the former notion. Based on that the Guidelines, in cases involving differentiated products, distinguish the competitive constraints according to the degree of substitutability between them. Consequently, the more substitutable the products, the greater the change brought about by the agreement regarding restriction of competition on the market and the more likely that competition in respect of a substantial part of the products concerned being eliminated.

154 J. Faull & A. Nikpay, supra 132, pp 310
155 COM(2006), supra 94, pp 102-103
157 Article 81(3) Guidelines, para 106
159 Article 81(3) Guidelines, para 107
160 COM(2006), supra 94, pp 101
161 J. Faull & A. Nikpay, supra 132, pp 311
162 Ibid, pp 312
163 Article 81(3) Guidelines, para 113
2.2 Conclusion

With the advent of the effects-based approach, the Commission recognised that its interpretation of Article 101(1) must be narrowed, it held that, correspondingly, the role and scope of Article 101(3) should be restricted too. To achieve this effect, the Commission used Article 81(3) Guidelines to introduce several novelties into its approach concerning the conditions of the exemption provision. The Commission’s new interpretation of the first condition of Article 101(3) excluded non-economic benefits as a relevant advantage that must be considered. It is a major shift as far as those benefits have been heavily accepted in the past. Another change is the broadened test established in Article 101(3) Guidelines that efficiencies that are generated in the markets other than the markets where negatives were identified should not be accepted into the weighing of the pro and anti-competitive effect. However, both CJEU and the Commission relaxed this test by accepting out of market efficiencies if specific conditions are met. Regarding the second condition current Commission’s approach establishes it as a measuring stick for efficiency assessment, and the Guidelines attach considerable importance to ensuring that consumers do indeed obtain a fair share of the benefits. The Commission interprets the indispensability criterion as two prong test: first whether there are other less restrictive means to achieve the claimed efficiencies. Secondly, undertakings must demonstrate that without the restrictions the efficiencies that arise from the agreement will be reduced or eliminate, or even that they will not happen at all. It is on parties to prove that there is a causal link between the restrictions and those efficiencies. The Commission shifted from its previous interpretation of the fourth condition of Article 101(3) too. There is no more equating between existence a dominant position and the eliminating competition concept. That’s why the Commission established as a relevant factor when assessing this condition, the degree of competition existing before the agreement and after it.

Chapter 3: Justifying object restrictions under Article 101(3)

The purpose of this chapter is to examine the application and scope of Article 101(3) towards object restrictions of competition. In particular, how did the Commission change its view regarding the requirements of the exemption clause, and how that shift led to the situation where cases concerning similar issues have been decided in opposite ways before and after the modernisation. It thus seeks to determine how this change have been implemented by the Commission and the European Courts in regarding the Article 101(3) conditions.
3.1 Multilateral interchange fees cases

These are fees charged by a cardholder’s bank (the issuing bank) to a merchant’s bank (the acquiring bank) for each sales transaction at a merchant outlet with a payment card.\(^{164}\) MIF are either agreed bilaterally, between issuing and acquiring banks, or multilaterally, by all banks participating in a payment card scheme.\(^{165}\) When a cardholder uses a payment card to buy from a merchant, the merchant receives from the acquiring bank the retail price less a merchant service charge, a large part of which is determined by the interchange fee. This merchant service charge is the price a merchant must pay to his bank for accepting cards as means of payment. The issuing bank, in turn, pays the acquiring bank the retail price minus the MIF. The retail price is deducted from the bank account of its customer.\(^{166}\) MIF is restrictive to competition because limits price competition between acquiring banks by artificially inflating the basis on which these banks set their charges to merchants. A MIF effectively determines a floor under the merchant service charge, and merchants are unable to negotiate a price below it, which expand the costs of payment card usage at merchant outlets.\(^{167}\)

In both Visa II and MasterCard, the agreements in question constituted agreed MIF rates paid by issuing banks to the acquiring ones. Although the facts of this two cases were alike, nevertheless the Commission used two absolutely different approaches for their assessment.\(^{168}\) On the wording of the Article 81(3) Guidelines, the agreements should automatically be recognised as having the object of restricting competition as they concerned what is, basically, price-fixing. However, in Visa II a case that was closed before the issuing of Article 81(3) Guidelines, the Commission reached the conclusion that the object of the Visa ‘s MIF system was not to restrict competition because of its pro-competitive effects: increase the stability and efficiency and indirectly to strengthen competition.\(^{169}\) Instead, the Commission concluded that the MIF restricted competition by effect but satisfied the conditions of Article 101(3). That conclusion is interesting and raise some questions about the legal certainty, because the Commission itself recognises that restrictions by object can also be achieved by “indirect means”.\(^{170}\)

In contrast, in MasterCard, The Commission followed a new approach and explicitly stated that “Agreements can be restrictive by object even if the parties to it are able to show that restricting competition was not their (primary) aim, or that they had other laudable motives.”\(^{171}\) With this the Commission rejected the idea of using the positive effects of an


\(^{166}\) Ibid, pp1

\(^{167}\) Ibid, pp2

\(^{168}\) Jones, A., 2010, supra 69 pp 665

\(^{169}\) Visa 2002/914/EC, supra 81 para 69

\(^{170}\) Vertical Guidelines both 1999 and 2010 para 48

\(^{171}\) MasterCard [2007] supra 80 para 402
agreement in such assessment. Instead, it argued that such pro-competitive aims and effects should be considered under Article 101(3). Consequently, the Commission concluded that for an agreement to fall into the category of restrictions by object, “it suffices that an agreement has by its very nature the potential for restricting competition, for instance, that it has the obvious consequence of fixing prices”. After that it established that the MIF has the result of fixing the fees charged by acquirers to merchants and, therefore, acts as a minimum price-fixing for both cross-border and domestic transactions.

Although, all those facts pointing out that MasterCard system was restrictive by object, the Commission decided it was “not necessary to reach a definite conclusion as to whether the MasterCard MIF is a restriction of object” as it has been established that the MIF had “the effect of appreciably restricting competition.”

3.1.1 Multilateral interchange fees under Article 101(3) TFEU

As already mentioned an agreement must fulfil four conditions if it is to benefit from Article 101(3). In Visa II, when considering the first condition, the Commission accepted that payment card schemes “represent as such considerable economic and technical progress” and came to the conclusion that the MIF contributed to that progress if several conditions were met. First, in that case, the Commission considered that both sides of the market (the acquiring and the issuing side) must be taken into account. Regarding to efficiency gains, the Commission concluded that such benefits would result from the MIF scheme “due to lower negotiation and transaction costs” compared to bilateral agreements. Furthermore, the Commission accepted that because of the existence of network externalities, interchange fees could deliver higher utility for both merchants and cardholders if the cost to each category of users is as closely as possible. Therefore in assessing MIF scheme’s rate, the types of costs, which are included in its calculation are in particular importance in determination whether it produces sufficiently efficiency gains. In Visa II, The Commission accepted three types of costs, which may legally be transferred from the issuing bank to the acquiring bank: the cost of processing transactions; (b) the cost of providing the ‘payment guarantee’ and (c) the cost of the free funding period.

In this regard, the Commission’s reasoning for accepting the ‘payment guarantee’ as insurance against fraud and cardholder default for merchants and as an element in Visa MIF is quite stunning. The Commission accepted that such a guarantee is a beneficial to merchants, because:

172 Ibid para 402
173 Ibid para 403
174 Ibid para 405-407
175 Visa 2002/914/EC, supra 81 para 81
176 Ibid, para 101
177 Ibid, para 83
178 Ibid, para 84-85
“No evidence has been provided to the Commission to suggest that in the absence of a payment guarantee, insurance against fraud and credit losses linked to international card payments would be widely available to retailers, or if so, that it would be available on terms affordable to medium-sized and small retailers.”

That statement is surprising, considering the fact that under Article 101(3) the burden of proof lies with the contracting parties, they must prove that their contract covers the four conditions in paragraph 3 in order to benefit from it. Basically, in this case, the Commission assumed the existence of specific positive effects for retailers, only because the evidence of the absence of such effects had not been shown, and not because the parties, proved that the costs of fraud and default are greater than the costs of the payment guarantee. Consequently, after the weighting between the pro and anti-competitive effects of the agreement, the Commission concluded that the former outweighed the latter and the agreement was exempted.

However, in MasterCard, the Commission abandoned that latter argument. In the statement of objections sent to MasterCard, it did not accept simple ‘plausibility’ but insisted for facts and evidence from the company, ‘in view of the fact that MasterCard seeks an exemption under Article 101(3)...it is incumbent on it to substantiate to what extent such a possible effect continues to exist in the single currency area at present.’

The above shows that in MasterCard case, the Commission’s approach MIF was far more rigid than the one in 2002 and nearly all efficiency gains accepted in Visa II was rejected. Such an observation is supported indirectly by the Commission itself. In 2007, it acknowledged that “the MasterCard decision reflects the Commission’s increased market knowledge on the effects of multilateral interchange fees since the Visa decision in 2002.”

First of all, in MasterCard decision, in contrast to Visa II, the Commission considered that the relevant market for MIF is only the acquiring side but not the issuing one. By doing so, it limited the efficiencies resulting from MIF that could be accepted and contra weighted to the restrictions on competition. Regarding the first condition of Article 101(3) in MasterCard the Commission abandoned its previous position that MIF per se could lead to efficiency of the card payment system. It claimed that “there is no presumption that MIF in general enhances the efficiency of card schemes just as there is no presumption that they do not fulfil the conditions of art. 101(3) of the Treaty and are therefore illegal.”

Thus, because the parties in the case failed to prove claimed efficiencies, their MIF scheme failed short to cover the first requirement of Article 101(3). Consequently, on appeal the General Court (whose judgement was confirmed by the CJEU) reaffirmed the Commission’s analysis, focused only on those efficiencies resulting specifically from the MIF and not from the MasterCard payment system.

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179 Ibid, para 86
180 Statement of Objections to MasterCard of 24 Sept 2003 Rec 142
182 EEA Multilateral Interchange Fees, supra 165, pp 8
183 MasterCard [2007] supra 80 para 730 see Visa 2002/914/EC, supra 81 para 81
as a whole because the fee in question is not an ancillary restriction in relation to the latter scheme.\textsuperscript{184}

Moreover, the Court rejected to accept the claim that MIF would contribute to the increasing of the system output. It decided that this fact is not relevant under Article 101(3) assessment because the primary beneficiaries of an increase in the system output are the MasterCard payment organisation and the participating banks. First, improvements that the parties obtain from the agreement cannot be taken into account, and the lack of objective advantages regarding merchants, as one of the two groups affected by MIF. Accordingly, by followed Article 2 of Regulation No. 1/2003, which establishes that it is parties’ obligation to prove that all the requirements are met for an agreement to benefit by the exception clause. The Court found that MasterCard had not provided empirical evidence to support its argument that the MIF has led to a rise of the efficiencies.

As to the second condition of Article 101(3): a fair share of benefit for the consumers, the Commission stated that although MIF resulted in enhanced network effects to the benefit of the issuers banks, those benefits could not offset the presumed consumer harm from the resulting inflation in the merchant fees.\textsuperscript{185} The reason for this is that in such kind of systems there were two separate consumers’ markets, and the Commission’s view, at this time, is that negative effects on consumers in one product market could not be compensated by positive effects in another related market. Therefore, all customers must benefit by MIF and not only those who are on the side of the scheme which receives the MIF.\textsuperscript{186} Consequently, the efficiencies on the issuing side of the market do not offset the negative effects on merchants. This approach is in the line with the Commission’s position established in Visa II where the MIF was exempted because it benefited merchants, due to MIF could not exceed a certain benchmark, which reflects the costs of services provided by the issuer bank to them.\textsuperscript{187} On the other hand, MIF benefits cardholders too because it could encourage more retailers to accept the Visa card, plus it leads to lower retail prices, reduced costs for merchants.\textsuperscript{188}

However, this strict Commission’s approach towards the application of the second condition of Article 101(3) in cases of multi-sided markets has been relaxed. The CJEU introduced the new interpretation by its judgement in the same dispute. The Court held that first, the Commission, in examining possible efficiencies in the two-sided markets, must take into account all the objective advantages flowing from both sides of the market,\textsuperscript{189} if appreciable objective advantages exist on the side in which the restrictive effects of the agreement occurred, irrespectively of the fact whether the consumers affected by the constraints and benefiting from the efficiencies are the same.\textsuperscript{190} Moreover, Article 101(3) Guidelines allows consumers a fair share if “the net effect of the agreement must at least be neutral from the

\textsuperscript{184} Case T-111/08 MasterCard supra 123, para 207
\textsuperscript{185} L. Vitzilaiou (2008), supra 180, pp 4
\textsuperscript{186} MasterCard [2007] supra 80, para 740
\textsuperscript{187} Visa 2002/914/EC, supra 81 para 92
\textsuperscript{188} Ibid para 94
\textsuperscript{189} C-382/12 P - MasterCard and Others v Commission ECLI:EU:C:2014:2201 para 240
\textsuperscript{190} For more robust analysis of the application of Article 101(3) in multi-sided markets see Chapter 2.1.1
point of view of those consumers directly or likely affected by the agreement”\textsuperscript{191} Thus, in cases like MasterCard and Visa II if the above two conditions are met there is no need that all consumers to benefit from the scheme as long as the undertaking concerned proves that efficiencies on the first side of the market offset the negative effects on the second side.

Regarding the indispensability condition in both decisions the Commission followed the same approach. In MasterCard and Visa II it explicitly pointed out that the point of interest is the indispensability for the achievement of the benefits claimed by the parties under Article 101(3). In the latter case the Commission concluded that the scheme was indispensable for the efficiency of the system, but not for its existence, as it allowed issuers to recover the costs of services provided to merchants, even in the absence of bilateral agreements between them.\textsuperscript{192} Accordingly, after the Visa proved an existence of a link between the restriction of competition and the claimed efficiencies, and that those benefits could not be achieved through others, less restrictive arrangements it’s MIF met the indispensability requirement.

In contrast, in MasterCard, the Commission stated that the latter “has not proven to the requisite standard that its current MIF is indeed indispensable to maximise system output and to achieve any related objective efficiencies”\textsuperscript{193}. Thus by failing to meet its burden of proof obligation under Article 2 of Regulation 1/2003 it was concluded that MasterCard MIF is not indispensable for the system. Here, the difference between both cases comes from the fact that the Commission in support of its view of non-indispensability of MasterCard MIF cited the existence of payment card schemes in the European Payment Area that operate without MIF.\textsuperscript{194} Nevertheless, those schemes were considered inapplicable for assessment of the indispensability condition in Visa II because of differences, which preclude any useful comparison between the systems.\textsuperscript{195} However, such a change in Commission perspective should be referred to its increased market knowledge on the effects of MIF, and not because of change of the interpretation of the third requirement of Article 101(3).

Finally, in Visa II the Commission held that the MIF agreement did not eliminate competition between neither issuers—since they could freely set their client fees—or between acquirers—since the MIF was only one component of the merchant service charge and they could still compete with the others.\textsuperscript{196} In MasterCard, the Commission did not discuss the fourth requirement.

It was mentioned above that the change of the Commission’s approach in MasterCard, was result of its better understanding on the effects of multilateral interchange fees. That resulted to one more rigid analysis; which outcome was the prohibition of the MasterCard’s MIF system. Several important points should be made when comparing the both cases: and they presuppose the different outcome of the two cases. The first one is that the Commission alter its view towards the relevant market. In MasterCard, in contrast to Visa II, the Commission

\textsuperscript{191} Article 101(3) Guidelines para 85
\textsuperscript{192} L. Vitzilaiou (2008), supra 180, pp 2
\textsuperscript{193} MasterCard [2007] supra 80, para 751
\textsuperscript{194} ibid
\textsuperscript{195} Visa 2002/914/EC, supra 81 para 100
\textsuperscript{196} Ibid para 106
considered that the relevant market for MIF is only the acquiring side. As a result, MasterCard was left with a limited source of efficiencies that could be contra weighted to the restrictions caused by the MIF. Secondly, in MasterCard, the Commission deserted from the “plausibility” that the MIF per se could lead to efficiency of the card payment system and insisted for evidence from the company, data that the latter failed to deliver. Thirdly, the Commission focused its analysis only on those efficiencies gains resulting only from the MIF and not from the MasterCard payment system as a whole because the fee in question is not an ancillary restriction in relation to the latter scheme.

3.2 Crisis Cartels

In this subchapter, I will continue to examine how did the Commission and European Courts approach change towards the application of Article 101(3) in cases of object restrictions. In so-called crisis cartels, as in the MIF decisions, it is observed similar situations in facts and law occurred before and after the modernised approach to Article 101(3), and once again the competent authorities concluded differently concerning the application of the exemption provision.

At the first place crisis cartels or also known as industrial restructuring agreements are contracts between undertakings in the same industry facing common economic problems which goal is to reduce overcapacity or competition and at the end to escape insolvency. However, it is believed that competition will correct the difficulties in the market and the CJEU case-law supports the view that creation of such an artificially maintained market structure cannot justify the formation of cartels.197 At second place, such an agreement has as its object and effect the restriction of competition even when “parties...acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector”.198 However, Article 101(3) is potentially at disposal to the parties of such an agreement to save it, and the Commission practice in the past gives such examples.

3.2.1 Pre-modernisation approach

In the 1980s and 1990s, the Commission was prepared to exempt under Article 101(3) agreements signed between competitors that aim was to ensure an orderly reduction of capacity between undertakings operating in an industry in crisis.199 The 1984 Commission decision in Synthetic Fibres200 and the 1994 Decision in Stichting Baksteen201 are the two

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198 Case C-209/07 [2008], supra 16, para 21
199 Jones, A., 2010. Supra 69, pp 670
leading cases in the Commission’s approach regarding Article 101(3) application to crisis cartels. In Synthetic Fibres, the Commission recognised that because the market forces have not achieved necessary capacity reductions. And in the free market economy, it is to the undertakings themselves to decide when overcapacity becomes unsustainable and needs to be reduced; the concerned producers are allowed as a result of this failure a response of their own to re-establish an effective competitive structure on the market.\textsuperscript{202} Regarding the first condition of Article 101(3), the Commission established the economic advantages arising from the agreement will shed the financial burden of underutilised, excess capacity, which would lead to the situation where the companies move their production to more effective plants and remove from the market inefficient ones.\textsuperscript{203} Moreover, specialisation on products for which the parties have the best plant and technology will help them to improve their technical efficiency.\textsuperscript{204} Consequently, the Commission concluded that production would be improved and technical and economic progress would be promoted too.\textsuperscript{205}

In respect to the second condition of Article 101(3) the Commission’s view was that consumers’ fair share of the benefits encompassed a re-emerging, healthier and more competitive industry, with better products thanks to greater specialisation.\textsuperscript{206} Furthermore, because the agreement was of short duration, it did not interfere with the parties’ freedom to determine their output or deliveries, and for it to succeed required strict compliance with its clauses the terms of the agreement were found to be indispensable.\textsuperscript{207} Regarding the fourth condition, the agreement did not eliminate “competition in respect of a substantial part of the products in question” because there was sufficient remaining competition from non-parties of the contract and the substitutable products like natural fibres.\textsuperscript{208}

Several years later, in its Decision in Stichting Baksteen, the Commission followed a similar evaluation towards the application of Article 101(3) to the agreement in question. In that case agreement between members of the Netherlands brick industry which aim was to reduce overcapacity and overstock was exempted. There were several common things between the cases first the Commission in both cases rejected initial parties’ plans because of the including of quota arrangements. Secondly, the two cases show the Commission’s willingness to take employment considerations into account. In its assessment of crisis cartels contained in XIV Report on Competition Policy, the Commission pointed out that among the advantages of the exempted Synthetic Fibres agreement was that it “provides for restructuring operations to be carried out in a socially acceptable way, by making suitable arrangements for the retaining and redeployment of workers made redundant.”\textsuperscript{209} In the XXIIIrd Report, the Commission stated that it would assess how a coordination in a sectoral restructuring agreement would “help mitigate, spread and stagger their impact on employment”\textsuperscript{210} as important considerations.
which the Commission would take into account in determining efficiencies gains and economic progress.

3.2.2 The post-modernisation approach

In 2009, the former Commissioner of competition Neelie Kroes stated that the Commission would not encourage cartels even the crisis ones because that could create more cartel and cartel cases into the future.\(^{211}\) Jones argued that ‘modernised’ approach to Article 101(3) set out in the Article 101(3) Guidelines would make it very hard for those seeking to justify a crisis cartel in the future.\(^{212}\) The reason for that is the heavily focusing on Article 101(3) assessment sole on economic goals. The Commission explained that by focusing on economic, will “not allow application of the competition rules to be set aside because of political considerations.”\(^{213}\)

The most interesting document after the modernisation that shows the Commission interpretation of Article 101(3) towards crisis cartels is its Observation under Article 15(3) of Regulation 1/2003.\(^{214}\) The purpose of the document was to clarify the Commission’s view concerning the application of Article 101(3) to crisis cartels in general. Regarding the possible efficiencies resulting from such an agreement, they could be split into two categories.\(^{215}\) First, the pro-competitive benefits could be achieved by removing inefficient capacity from the industry. The parties should establish that the agreement in question ensures that inefficient capacity will exit the market.\(^{216}\) About that efficiency, the Commission follows its pre-modernisation approach. Secondly, those undertakings which remain on the market may be able to increase output in, and because of that, there may be economic benefits through an increased capacity utilisation rate by the remaining players.\(^{217}\) Here comes the first big difference in the assessment of the efficiencies gains in the past and nowadays. There are two types of cost benefits that can arise from greater capacity utilisation fixed costs (costs which do not vary with the amount of produced goods) and variable costs (costs which vary with output). In its BIDS’ Observation, the Commission attached different value to them, by explicitly stated that fixed types of cost savings are unlikely to benefit consumers.\(^{218}\) Therefore, if nowadays parties want to defend their capacity reduction agreement under Article 101(3), they need to prove that the latter would lead to variable costs reductions. Otherwise, it would fall short under the second condition of the exemption clause. In contrast,

\(^{211}\) Speech of N Kroes, —Tackling Cartels—a Never-ending Task, 8 October 2009
\(^{212}\) Jones, A., 2010. Supra 69, pp 670
\(^{215}\) Ibid para 19
\(^{216}\) Ibid para 20
\(^{217}\) Ibid para 24
\(^{218}\) Ibid para 41
no such separation has been made in *Synthetic Fibres* nor in *Stichting Baksteen*, in the latter case, the Commission accepted the reduction of fixed costs as a benefit that was capable of being passed on to the consumers and assessed under the first two conditions of Article 101(3). Another problem with the above efficiencies is that they are resulting from future more efficiently operation in the industry. However, that means those benefits are not reality anymore, and the modernisation brought new more rigid Commission’s approach regarding the measurement of the efficiencies. That creates several problems.

First, the Article 101(3) Guidelines stated that purported efficiency gains must be susceptible to objective measurement, and unsubstantiated claims should be rejected.\(^{219}\) Secondly, the efficiency must be not just measurable, but they must be verifiable.\(^{220}\) Finally, there must be a direct causal link between the agreement and the claimed efficiencies.\(^{221}\) At the same time in *Synthetic Fibres*, the Commission concluded that the agreement in question restructures the industry and increasing the profitability of the parties, enabling them to offer better products to consumers.\(^{222}\) However, that is not anymore the case, Article 101(3) Guidelines explicitly established that such kind of link is not sufficiently direct to be taken into account in the context of Article 101(3).\(^{223}\) All of this put the parties who would want to rely on the second type of efficiencies established by the Commission in BIDS very hard, especially when those alleged benefits may\(^{224}\) arise in the future.

The other significant change after the modernisation is the fact that the Commission entirely excluded non-economic benefits from the Article 101(3) assessment. In the whole BIDS’ Observation, the Commission focused only on the evaluation the economic efficiencies. By contrast, in *Synthetic Fibres*, the Commission explicitly stated that it will take into account agreement’s results in both the economic and social fields.\(^{225}\) This change in the politic significantly reduces the chances of satisfaction of the first condition of Article 101(3) insofar as in both *Synthetic Fibres* and *Stichting Baksteen* employment was a huge factor in determining efficiencies gains and economic progress.

Regarding the fair share to consumers’ condition, Article 101(3) Guidelines paragraph 85 requires that the pass-on of benefits, must at least, compensate for any actual or likely negative impact caused to consumers by the restriction. However, in agreements in question, the cost efficiencies will not be passed to the consumers in the short or even medium span, exactly the opposite, the prices of the goods will rise.\(^{226}\) That is problematic because Article 101(3) Guidelines stated that "gain for consumers in the future...does not fully compensate for a present loss...for an appropriate comparison...the value of future gains must be discounted."\(^{227}\) Hence, the parties must demonstrate that greater amount of advantages are

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\(^{219}\) Article 101(3) Guidelines para 55

\(^{220}\) Ibid para 56

\(^{221}\) Ibid para 54

\(^{222}\) 1984 OJ L 207/17, supra 199 paras 36 and 39

\(^{223}\) Article 101(3) Guidelines para 54

\(^{224}\) The Commission BIDS’ Observation, supra 213 para 24

\(^{225}\) 1984 OJ L 207/17, supra 199, para 18(D)

\(^{226}\) Ibid para 41

\(^{227}\) Article 101(3) Guidelines para 88
passed to consumers in order to meet the latter rule. That statement makes the satisfaction of pass-on condition extremely hard. First, in Synthetic Fibres and the Stichting Baksteen cases the Commission concluded that the benefits passed to the consumers were the long-term, resulting competitiveness of the industry\textsuperscript{228} and the benefits to consumers from the cushioning of the social effects of redundancies in the sectors.\textsuperscript{229} After the modernisation non-economic benefits are no longer accepted. Therefore, no such gains could be passed on to the consumers. Secondly, as already mentioned in its BIDS' Observation the Commission concluded that reductions of fixed costs are unlikely to benefit the consumers and leaving only variable costs benefits on parties' disposal.

Regarding the third condition of Article 101(3), the modernised approach introduced two major changes. First, when assessing whether the restrictive agreement as such is indispensable, the focus is on whether there are "no other economically practicable and less restrictive means of achieving the efficiencies."\textsuperscript{230} Indispensability under Article 101(3) is not indispensability to the existence of the agreement itself, but indispensability for the achievement of the benefits identified under the first condition of that Article.\textsuperscript{231} That is an important shift because the Commission discussed the third condition as whether measures aimed at reducing capacity are indispensable to the attainment of that objective, but not in light of the benefits they produced in the two pre-modernisation decisions.\textsuperscript{232} The BIDS' Observation employed the second change, where the Commission introduced new requirement under the indispensability assessment. "\textit{In looking at the first limb of the indispensability condition, it would also have to be assessed whether there is a credible possibility that excess capacity could not be reduced by way of mergers or specialisation agreements.}\textsuperscript{233} The including of this assessment is logical, in a sense that the merger is capable of eliminating the inefficient competition because it allows the efficient companies to engross the ineffectual undertakings. Moreover, the merger can reduce overcapacity involving smaller market share than in a case of an industrial restructuring agreement.

3.3 Conclusion

There is no doubt that the modernisation process brought a new stricter approach to the interpretation of the conditions of Article 101(3). The Commission moved towards the view that consumer welfare should be the benchmark against which agreements are tested. That more economic approach reflects the fact that fewer agreements would be found in violation of Article 101(1), but at the same time narrows the scope and interpretation of the requirements of Article 101(3). This chapter demonstrated how this narrowing process happened true focusing only to the economic assessment of pro-competitive effects of an

\textsuperscript{228} Synthetic Fibres, supra 199, para 36 and Stichting Baksteen, supra 200, para 26
\textsuperscript{229} Synthetic Fibres, supra 199, para 37 and Stichting Baksteen, supra 200, para 27
\textsuperscript{230} Article 101(3) Guidelines para 75
\textsuperscript{231} The Commission BIDS' Observation, supra 213, para 31, see Visa 2002/914/EC, supra 81 para 98
\textsuperscript{232} Synthetic Fibres, supra 199, para 42 and Stichting Baksteen, supra 200, para 32
\textsuperscript{233} The Commission BIDS' Observation, supra 213, para 39
agreement, and accepting only economic benefits. This led to the position where the new approach significantly raised the bar for those seeking to rely on Article 101(3). A typical example for this is crisis cartels. This chapter showed how the parties of such agreements before the modernisation had in a disposal three different types of benefits (benefits from removing inefficient capacity; cost efficiencies; non-economic benefits in particular the employment) that could be balanced with the anti-competitive effects. However, this is no longer the case, because the Commission narrowed the scope of Article 101(3) by entirely removed the non-economic benefits from the picture. It distinguished two types of cost efficiencies and stated that one of them is irrelevant because it is unlikely to benefit consumers. In essence, the new Commission’s approach left available to the parties only one and a half types of benefits in contrast of previous three. Therefore, it is logical to understand why object cases haven’t been exempted after the modernisation. The next huge change is to the second Article 101(3) requirement. This chapter showed that this requirement has traditionally received less attention than the other conditions. However, after the modernisation, the Commission attaches considerable importance to ensuring that consumers do indeed gain a fair share of the benefits.

4. Conclusion

Since the modernisation of EU competition law started almost all Commission decisions issued were under the object “label”. Despite this practice the lack of Commission or CJEU’s decisions that exempted such kind of agreements is palpable. In this regard, some controversial Commission’s statements that in principle object restraints are not capable of being exempted under Article 101(3), raised the logical question is this the death of Article 101(3) towards object restrictions because the presumption of anti-competitive effects is not rebuttable. However, as a counterweight of the above, the CJEU explicitly stated that all types of agreements are capable of being exempted under Article 101(3). The Commission Director General for Competition confirmed that position himself. Despite all of that there are cases decided before and after the modernisation, which are similar in fact and law, but nevertheless conclusions about the application of Article 101(3) was different.

This paper has demonstrated that object restrictions are capable to satisfied Article 101(3) because after all the conditions of the latter provision apply indistinctively of the type of the agreement. Moreover, it was shown that the difference in the conclusion of Article 101(3) applicability is not because object restrictions are per se illegal, but because the employment of effect-based approach in EU competition law. The new approach narrowed the role and the scope of Article 101(3) as it was applied in the pre-modernisation period, not to mention the fact of a created strong presumption that such agreements will not satisfy the conditions of Article 101(3). Consequently, that significantly made it harder for those who want to use Article 101(3) as a shield. One of the major shifts in Commission’s approach was the focusing only into economic benefits that would be accepted. The leaving out of non-economic benefits is a huge blow, especially for the object restriction cases. In a sense, that they create huge anti-competitive effects, so they need to produce substantive benefits to offset the
former negatives. Therefore, by not accepting this type of benefits, it is tough for the parties to meet the first condition of Article 101(3). An example of that effect is the crisis cartel cases where the parties could have relied on three types of benefit before the modernisation, and only to one and a half after the modernisation. In addition to the benefits which could be accepted, the Commission hardened quantity of the efficiencies, providing that they must be susceptible to objective measurement, verifiable and their link to the agreement. This paper has shown how did the Commission change its interpretation to the second condition of Article 101(3) by making it the benchmark for the application of the exemption provision. This requirement received less consideration in the past because the Commission assumed that if competition were not eliminated, consumers would be given a fair share of the benefits. However, that has changed and led to striker Commission’s assessment of which benefits would be pass-on to consumers. The approach towards the third condition of Article 101(3) has been changed too. The Commission shifts its interpretation from the examination of the indispensability from whether the restrictions are really needed for the achievement of the agreement’s objectives to whether they are necessarily for the achievement of the benefits identified under the first condition of Article 101(3).
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