

# **Positive effects on competition and Article 101 TFEU**

LLM – Dissertation

Word count: 14 784

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## **Abstract**

The Commission say explicitly in their Guidance on the application of Article 81(3) that in the assessment in Article 101(1) TFEU of whether or not an agreement "restrict [...] competition", only *restrictions* on competition are relevant and any positive benefits stemming from an agreement are to be balanced against these restrictions within the limits provided in Article 101(3). However I find and argue that the EU-Courts case law seem to make this balance within the Articles first paragraph, opening up for a discussion on where positive effects on competition should be argued.

After the modernisation process in 2004 the separation between the two paragraphs in Article 101 got less distinctive and clear. However, I find that it is necessary to distinguish the two paragraphs from each other in order to have a transparent rule and it is desirable to have a possibility to argue positive effects in Article 101(1); amongst other things, this has implications for undertakings incentives for entering into agreements.

With these suggestions come difficulties in setting up limits for what factors and positive effects should be argued in each paragraph of the article. I therefore suggest separating between allocative and productive efficiencies, as this will make a transparent rule and contribute towards a consistent practice throughout the European Community.

At last I find that the EU Commission and Community Courts have a responsibility to give out clear guidance which relates to all case law in such a way as to explain how the assessment of a "restriction [...] of competition" should be conducted.

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## Chapter 1 – Introduction

According to Article 101 TFEU “agreements between undertakings” which has as its object or effect the “prevention, restriction or distortion of competition within the common market is” automatically void<sup>1</sup>.

The same article’s third paragraph gives an exemption rule if the agreement meets four conditions. The main understanding of it is to determine pro-competitive benefits produced by the agreement and assess “whether these pro-competitive effects outweigh the anti-competitive effects”. Where this balancing tips in the direction of the benefit, the restriction is accepted<sup>2</sup>.

However, there is confusion around whether or not positive effects on competition can be argued against a “restriction [...] on competition” in Article 101(1).

I suggest that a ‘US-rule of reason’ is not adopted in the EU-antitrust regime<sup>3</sup>. However, there are situations in EU-case law where positive and negative effects on competition

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<sup>1</sup> The Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] Official Journal C115/47 (OJ), Article 101 (1) and (2). Every referral, throughout the dissertation, to Article 101 goes towards TFEU.

<sup>2</sup> Communication from the Commission, Notice ‘Guidelines on the application of Article 81(3) of the Treaty’ (2004) OJ C101/08 (Commission, *Article 81(3) Guidelines*), para 11.

<sup>3</sup> See below in para 1.2.

are weighed against each other in Article 101(1). If the Commission has discretion on finding these on a case by case basis, this creates problems and implications on the transparency of the article. EU-antitrust is a different system of law than that of the US, and it is unfortunate to apply the same vocabulary<sup>4</sup>. Doing so gives reflections towards a complex set of US-rules. Whish and Sufrin suggest such vocabulary “invites to misleading comparison with antitrust law analysis in the United States” and that “comparative analysis should be undertaken with great caution”<sup>5</sup>. The problem therefore lies in setting down our own rules and limits within the EU for such balancing under Article 101(1).

The main question to be asked in this regard is what really is the scope of Article 101(1) and its wording when asking for a “restriction [...] of competition”.

Theoretically it is of significance to understand the approach needed and the actual task and meaning of the two paragraphs in an important EU-rule. As I will look closer into in chapter 3, there are also several practical reasons making the distinction necessary. The burden of proof shifts from the enforcer in Article 101(1) to the undertaking in 101(3)<sup>6</sup>. Because of this the undertaking has an easier task if they can argue benefits towards competition in Article 101(1). This has implications for the incentives to enter into agreements<sup>7</sup>. The burden of proof is also a reason for having clear distinctions as positive effects Article 101(1) might make it too easy to get agreements approved.

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<sup>4</sup> For more on this, see Richard Whish and Brenda Sufrin, *Article 81 and the Rule of reason* (1987) 7(1) Yearbook of European Law 1-38.

<sup>5</sup> Ibid page 37.

<sup>6</sup> Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, (Commission, *Council Regulation 1/2003*), article 2.

<sup>7</sup> See Chapter 3.2.

## 1.1 – Limitations

I have chosen to take the view, as the Commission in their guidelines that the objective of Article 101 is to “protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources”<sup>8</sup>. I therefore decide not to comment on discussions on the relevance of other public policies in Article 101<sup>9</sup>.

## 1.2 – Background.

To fully understand the topic it is necessary to start by looking at the American ‘rule of reason’ and the discussion around this in EU-law.

Section 1 of the 1890 US Sherman act provide: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade [...] is hereby declared to be illegal”.

The prohibition contains no exemptions, and was seen as a ‘per se’ prohibition with extensive application areas. In order to narrow down its scope, US-Courts developed two separate approaches for determining whether or not agreements restrain competition, a ‘per se’ rule and the ‘rule of reason’. Since the end of 1970s the prevailing standard has been the ‘rule of reason’ where agreements are assessed holistically and in full economic context to determine “whether the restraints imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may

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<sup>8</sup> Commission, *Article 81(3) Guidelines*, (n 2), para 13.

<sup>9</sup> For more information on this discussion, see Christopher Townley, *Article 81 EC and public policy* (Hart publishing 2009).

suppress or even destroy competition”<sup>10</sup>. Thus, the ‘rule of reason’ gives systematically weighting of pro- and anti-competitive aspects of an agreement in all assessments to make a decision on whether it is illegal under the Sherman Act.

The debate about the existence of a ‘rule of reason’ in EU-antitrust seems to be never ending<sup>11</sup>. This controversy met its stand in the *Métropole*-case<sup>12</sup>. Court of First Instance (CFI) explicitly rejected adoption of the ‘US-style rule of reason’ when saying “the existence of such a rule has not, as such, been confirmed by the Community Courts”<sup>13</sup>. The Commission picked up this, and suggested a strict assessment without possibility to argue any positive factors within Article 101(1)<sup>14</sup>. Chapter 2 shows why I am of the opinion that the Commission goes further than what can be derived from the Community Courts and chapter 4 try to show how the wording of the Article itself support this.

The *Wouters*-case<sup>15</sup> light up the discussion. The case shows that the European Court of Justice (ECJ) weights positive and negative effects on competition and the question becomes practical on what factors are relevant in Article 101(1) with regard to the economic assessment and not so much theoretical on the adoption of a ‘US-rule of reason’.

I pursue this latter question of the distinction between Article 101(1) and 101(3). I use the ‘rule of reason’ in order to distinguish between different types of balancing and to show whether EU-practice give rise to something similar to the practical balance in the US-rule. I leave the question on the **existence** of the ‘US-rule of reason’ as I find the EU-antitrust regime should focus on own practice and find their own way rather than ‘copy’

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<sup>10</sup> *Chicago Board of Trade v. US*, 246 US 231 (1918)

<sup>11</sup> Whish and Sufrin (n 4); Case T-112/99 *Métropole télévision (M6) v. Commission* [2001] ECR II-2459 (*Métropole*).

<sup>12</sup> *Métropole* (n 11).

<sup>13</sup> *Métropole*, (n 11), para 72.

<sup>14</sup> Commission, *Article 81(3) Guidelines*, (n 2), para 11.

<sup>15</sup> Case 303/99 *Wouters v. Algeme Raad van de Nederlandse Order van Advocaten* [2002] ECR I-1577 (*Wouters*).

a vocabulary bringing with many different considerations<sup>16</sup>. Looking at case law, and Commission statements it seems unclear how the assessment should be carried out and what an analysis in the agreements economic context entails. There need to be a clear and consistent approach and distinction on where different factors should be argued. This is the only way to understand if an agreement is in including a restriction on competition. I focus on the case law and Commission statements in chapter 2, and possible ways to conduct an assessment in Chapter 4.

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<sup>16</sup> Whish and Sufrin (n 4).



## **Chapter 2 – Is Balancing of positive and negative competitive effects from the agreement currently conducted Article 101 (1), by the Community Courts and the Commission?**

### **2.1 – Introduction**

This chapter looks at case law and Commission statements to see how the Courts have solved the question of balancing positive effects in Article 101(1), and how the Commission relates to the matter. The review shows that overall positive competitive effects are given relevance in order to assess whether or not Article 101(1) is applicable. However, limits for how this should occur are not commented.

National authorities and courts are bound in their application of the EU-rules by the practice laid out by the Community Courts and such practice is therefore significant in understanding how the law is to be understood.

Commission statements and guidelines are not legally binding<sup>17</sup>. However, they are the enforcers of Article 101 and have their interpretations of the case law which they use as guidance when deciding cases. Because of this, their statements have practical importance.

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<sup>17</sup> Commission, *Article 81(3) Guidelines*, (n 2), para 4; this is also stated in most guidelines and notices. See for instance Commission, *Notice on agreements of minor importance* C-368/13, OJ 2001, para 4.

## 2.2 – The EU-Courts.

This review examines some of the EU-Courts case law which together gives an adequate image of the overall practice.

*Société Technique Minière*<sup>18</sup> revolves around an exclusive distribution agreement containing a non-compete clause giving a French company exclusive rights to distribute in France the equipment of a German producer creating restriction of competition in the downstream level of trade.

ECJ assert that in situations where agreements do not have as object the restriction of competition, its “consequences” need to be analyzed in order to know whether competition is distorted to an “appreciable extent”<sup>19</sup>. This question, of whether an agreement has as object or effect the restriction of competition, must be understood “within the actual context in which it would occur in the absence of the agreement in dispute”<sup>20</sup>. ECJ list several important economic factors relating to the restriction, which should be part of the assessment<sup>21</sup>.

However, the Court also suggests that, it may “be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking”<sup>22</sup>.

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<sup>18</sup> Case 56/65 *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU)* [1966], ECR I 235, (STM).

<sup>19</sup> Ibid page 249.

<sup>20</sup> Ibid page 250.

<sup>21</sup> Ibid

<sup>22</sup> Ibid

Penetration of a new market increases competition between producers on that market and in the end benefits consumers. The statement can therefore be interpreted as supportive of including certain positive competitive effects within the assessment of the agreement in its “actual context”<sup>23</sup>, in this case the entrance on a market creating new competition. This corresponds with the Commission guidelines paragraph 18 (2)<sup>24</sup> on intra-brand competition explaining how some restrictions may be justified if they are “objectively necessary”<sup>25</sup>.

Later cases by the ECJ follow this path of arguing<sup>26</sup>.

In *Metro*<sup>27</sup> ECJ recognized simple selective distribution systems as non-restrictive as long as resellers are chosen on objective criteria<sup>28</sup>. ECJ finds such distribution systems having certain negative effects on price-competition in general, but they go on to emphasize that “price-competition does not constitute the only effective form of competition” within article 101(1)<sup>29</sup>. They then argue that some factors, such as the desire to preserve, in the interest of the consumers, the possibility of one certain distribution type, is in fact something which can be argued under art 101 (1). This argument gets strengthened if such conditions “promote improved competition inasmuch it relates to factors other than price”<sup>30</sup>.

ECJ supports earlier statements in *STM*<sup>31</sup> and gives clear impression of the necessity to consider several factors of the agreements effect on competition in Article 101(1) analysis. *Nazzini* make this point and takes it further, saying that ECJ clearly weighs

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<sup>23</sup> Ibid.

<sup>24</sup> Commission, *Article 81(3) Guidelines*, (n 2).

<sup>25</sup> See Chapter 2.4 for more on this; Ibid para 18(2).

<sup>26</sup> For further cases, see Case 399/93 *Oude Luttikhuis and Others* [1995] ECR II-759; Case 161/84 *Pronuptia* [1986] ECR 353; Case 258/78 *Nungesser and Eisele v Commission* [1982] ECR 2015; Case 262/81 *Coditel and Others* [1982] ECR 3381. All of these mentioned by the CFI in *Métropole* (n 11) as examples of flexible interpretations of Article 101 by the ECJ.

<sup>27</sup> Case 26/76 *Metro SB-Grossmärkte GmbH & Co m KG v Commission* [1975] ECR I 1875, (*Metro*).

<sup>28</sup> Ibid para 20.

<sup>29</sup> Ibid para 21.

<sup>30</sup> Ibid.

<sup>31</sup> *STM* (n 18).

positive and negative effects of the selective distribution system<sup>32</sup>. ECJ use positive competitive effects from the existence of the distribution system, such as for example better service and use of products, as factors in the assessment to justify the restriction which comes with selectivity in distributors. In other words, other factors than price, contributing to competition can be argued within the scope of Article 101(1). This contradicts a suggestion that only the restrictive effects are relevant.

*European Night Services*<sup>33</sup> is said by Nazzini to be the “high point of the trend in the case law requiring that the overall anti-competitive effects of agreements be assessed in their economic context”<sup>34</sup>, where this mean weighing of positive and negative competitive effects in Article 101(1). The case concerned a cooperative joint venture, found by the Commission to have the effect of restricting competition. They had given an exemption under Article 101(3), but for a shorter time period than the duration of the venture and subject to several conditions.

In stating the general rule for application of Article 101 (1), CFI says:

*“in assessing an agreement under Article 85(1) of the Treaty, **account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned** [...], unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets [...]. **In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1)**”<sup>35</sup>.*

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<sup>32</sup> Renato Nazzini, ‘Article 81 between time present and time past: a normative critique of “restriction of competition” in EU law’ (2006) 43 Common Market Law Review, 497-536, page 510.

<sup>33</sup> Joined Cases T-374/94, 375/94, 384/94 and 388/94 *European night services Ltd (ENS) v. Commission* [1998] ECR II-1533, (*European night services*).

<sup>34</sup> Nazzini (n 32) page 515.

<sup>35</sup> *European Night Services* (n 33) para 136, (my emphasis).

Nazzini understand this statement as CFI implicitly accept that outside object restrictions, thus in effect analysis, balancing of welfare-enhancing effects against welfare-reducing, should be carried out in Article 101(1)<sup>36</sup>. Whether or not CFIs wording can be read as literal as Nazzini suggests, it can be questioned what CFI means with an assessment in the agreements “economic context” and whether this entails pro-competitive effects. If they did not mean that the same rule counts for both object- and effect restrictions, they could have commented on this. CFI had a possibility to reject positive factors within Article 101(1) but instead reserves its statement for object restrictions. I therefore find the case contributing in the debate by holding the matter untouched and that it cannot be interpreted as Nazzini suggests.

In *Métropole*<sup>37</sup> the question of balancing pro- and anti-competitive effects was explicitly addressed by CFI. The case was about the creation of a joint venture by six television companies in France, TPS, to devise, develop and broadcast digital pay-TV services in French in Europe. The parties argued that the different clauses restricting competition also enabled them to penetrate a new market and create competition. They argued that because of a ‘rule of reason’ in the EU-competition law, the Commission had made an error in assessment of article 101(1) when considering the two clauses in question, the clause relating to special-interest channels and the exclusivity clause without including a weighing of positive and negative effects in Article 101(1).

CFI responded to this by acknowledging that earlier case law shows “flexible interpretation” of article 101 (1)<sup>38</sup>. However, CFI goes on expressly saying this cannot “be interpreted as establishing the existence of a rule of reason”<sup>39</sup> but the cases should be understood as part of a trend showing “it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught” by article 101 (1). They further stress that account should be taken of the “actual conditions in which it

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<sup>36</sup> Nazzini (n 32) page 516.

<sup>37</sup> *Métropole* (n 11).

<sup>38</sup> Ibid para 75.

<sup>39</sup> Ibid para 76; see Chapter 1.2.

functions, in particular the economic context in which the undertaking operate, the products or services covered by the agreement and the actual structure of the market concerned”<sup>40</sup>.

CFI expressly reject the ‘rule of reason’, but at the same time open for consideration of different economic factors. They emphasize that such evaluation does not make it necessary to “weigh the pro and anti-competitive effects of an agreement” when determining whether Article 101(1) applies. This rejection of a general ‘rule of reason’ in EU-competition law has been interpreted as a rejection of all weighing of pro- and anti-competitive factors in Article 101(1)<sup>41</sup>. However, one can argue that CFI only reject the consistent adoption of a ‘rule of reason’ and not all weighting of positive effects. In other words, the Court is explicitly saying there is no **obligation** on the Commission to **always** consider positive factors in Article 101(1). They are not saying explicitly that this may never occur. In fact they say the Commission correctly applied Article 101(1) “inasmuch as it was **not obliged** to weigh the pro and anti competitive aspects of those agreements” outside the framework of Article 101(3)<sup>42</sup>. It can therefore be argued that CFI do not contradict ECJ where positive factors seem to have relevance. They are only stating that such balancing is not a ‘rule’ with systematically use in every assessment, and that the US-version if this rule is not adopted.

Case law shows a pattern from ECJ making overall assessments to see whether an agreement, as a whole, falls within the prohibition of Article 101 (1). ECJ do not use the wording ‘assessment in the agreements economic context’, in the same way as CFI<sup>43</sup>, but it is clear that they see the relevance of other factors, and not only the restriction strictly

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<sup>40</sup> *Métropole* (n 11) para 76.

<sup>41</sup> See Richard Whish and David Bailey: *Competition Law*, 7<sup>th</sup> ed, Oxford University press 2012, page 136, where they suggest that the “Commission and the Courts should be ‘reasonable’ when applying Article 101(1), but that does not mean that they should import the method of analysis adopted in the quite different context of the Sherman Act”.

<sup>42</sup> *Métropole* (n 11) para 78, (my emphasis). This interpretation is inline with both the Swedish and Danish translations of the case. In the Danish version the translation is using the word ‘påhviledet’ instead of the English version ‘obliged’, which directly translated to English means the same as saying the Commission was ‘obliged’ to weigh pro and anti competitive effects only within the scope of Article 101(3).

<sup>43</sup> See *STM* (n 18), where ECJ refer to the “consequences” of the agreement; *Metro* (n 26) where they highlight other competition effects other than price.

isolated. *Métropole* might make the picture of what assessment lies within the “economic context”<sup>44</sup> of the agreement more uncertain. However, in my opinion, one need to distinguish between having a systematically used ‘US-rule of reason’ demanding a balancing and weighing in Article 101(1) in every assessment, and the possibility to balance some pro-competition factors within Article 101(1) where this falls within the “economic context in which the undertaking operate”<sup>45</sup>. It is the former which is rejected by CFI. In this way, *Métropole* cannot be said to directly contradict the case law. However, such a divide comes with difficulties when trying to find what situations enable such balancing within the first paragraph of Article 101<sup>46</sup>.

CFIs ruling in *Métropole* raises the question of whether or not the pattern in the case law has changed the way Article 101(1) should be understood. This might have been a reasonable conclusion if CFI was clear in its statements and had support from other cases. However, in *Wouters*<sup>47</sup> ECJ shows balancing of positive and negative effects. This case therefore substantiates my suggestion of having some balancing in Article 101(1).

In *Wouters*, the Netherlands bar association adopted a Regulation in 1993 prohibiting all multi disciplinary partnerships between accountants and lawyers.

ECJ conclude in paragraph 86 saying that “the national legislation in issue in the main proceedings has an adverse effect on competition and may affect trade between Member States”. In paragraph 90 they explicitly refer to the 1993 Regulation as “liable to limit production and technical development within the meaning of Article 85(1) (b) of the Treaty”. Thus, they find a “restriction [...] of competition” with regard to Article 101(1).

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<sup>44</sup> *Métropole* (n 11) para 76; *European Night Services* (n 33) para 136.

<sup>45</sup> *Ibid* para 76.

<sup>46</sup> Chapter 3 and 4.

<sup>47</sup> *Wouters* (n 15).

Then, in paragraph 97 ECJ turn and, from being clear in their argumentation, they say “not every agreement between undertakings [...] which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1)”. They go on saying that “account must first of all be taken of the overall context” of the questioned rule, and in particular “account must be taken of its objectives”<sup>48</sup>.

These words resemble earlier case law, especially *Métropole*. One needs to look at the “economic context” and make an overall assessment. ECJ is explicitly using the wording as done earlier by CFI<sup>49</sup>.

ECJ goes on to evaluate the objectives in this case. The objective is the need to make rules relating to “organization, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience”<sup>50</sup>. The Court points out pro-competitive effects when referring to the object of ensuring benefits for the ultimate consumer, and arguably a public policy-effect when referring to the sound administration of justice. I will only discuss the competition aspect and refrain from debates regarding possible use of public policies<sup>51</sup>.

ECJ seem to recognize the need to consider pro-competitive aspects from the rule adopted by the bar-counsel. The rule benefits ultimate consumers by making sure legal services offered have the best qualifications on the market and are not distorted by other values inherent in the work relating to accountants<sup>52</sup>. The Court find the regulation compatible with Article 101(1) “despite the effects restrictive of competition

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<sup>48</sup> *Wouters* (n 15) para 97.

<sup>49</sup> See *Métropole* (n 11) para 76.

<sup>50</sup> *Wouters* (n 15) para 97.

<sup>51</sup> For further reading on this discussion, see Townley (n 9).

<sup>52</sup> *Wouters* (n15) para 100-110.



that are inherent in it” because it is necessary in order to ensure “proper practice of the legal profession”<sup>53</sup>.

Weighting in this case does not occur explicitly. However ECJ are explicit when saying the rule in question is a restriction since it has “adverse effect on competition”<sup>54</sup>. And they are explicitly using positive effects stemming from the restrictive rule when finding it to make Article 101(1) non-applicable. A balance occurs, and ECJ finds this positive effect to outweigh the restriction.

Recent case law show that ECJ still take these overall assessments in spite of confusion made by *Métropole* and, as discussed later, the Commission statements in their guidelines<sup>55</sup>.

In *Pierre Fabre*<sup>56</sup>, ECJ explicitly argue, with resemblance to *Metro*<sup>57</sup>, that selective distribution systems are considered “in the absence of objective justification, as restrictions by object”<sup>58</sup> and therefore within the scope of Article 101(1). They go on to say that “it has always been recognized in the case-law of the Court that there are legitimate requirements [...] which may **justify a reduction of price competition in favour of competition relating to factors other than price**. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal **capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 101(1) TFEU**”<sup>59</sup>.

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<sup>53</sup> Ibid para 110.

<sup>54</sup> Ibid para 86.

<sup>55</sup> See Chapter 2.4.

<sup>56</sup> Case 439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi* [2011] ECR I-0 (*Pierre Fabre*).

<sup>57</sup> *Metro* (n 27).

<sup>58</sup> *Pierre Fabre* (n 56) para 39.

<sup>59</sup> Ibid para 40, (my emphasis).

Pierre Fabre relates to a selective distribution system banning all internet sales. ECJ finds this ban to be an object restriction. In this way, the case differs from Metro which regarded a straight forward selective distribution system without restrictive conditions within the system itself.

ECJ explicitly say that positive competitive effects regarding several factors should be balanced in Article 101(1) and might outweigh restricting effects relating to price. They hold on to their practice from Metro<sup>60</sup> and look at the overall effect stemming from the agreement.

Because this case includes an object restriction, ECJ's statements regarding acceptance of positive factors within Article 101(1) distinguishes itself from other cases where the assessment is related to an effect analysis, and it supports the idea that positive effects is relevant in the overall assessment. In fact, when ECJ relates positive effects to an object case, they seem to go against CFI in *European Night Services* which said all weighing of positive and negative effects in object cases was reserved for Article 101(3)<sup>61</sup>. As such, this case stands out in the discussion of whether or not any balancing should be conducted in Article 101(1) and might widen the scope to include object cases. However, it does not say anything explicit about how balancing should be conducted.

The practice in *Pierre Fabre* and *Metro* sets out the question of whether or not selective distribution systems give rise to their own 'set of rules' in the Article 101(1) assessment, where all elements of competition are relevant, and where such factors justify reductions on price-competition with regard to certain products. However, in *Wouters*<sup>62</sup> restrictions on quality of services had significance, and the desirability of having a sound legal practice was relevant as a benefit. *Metro* and *Pierre Fabre* therefore does not stand out proposing an area with separate rules in the same way as inter-brand against intra-

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<sup>60</sup> See about *Metro* Chapter 2.2.

<sup>61</sup> *European night services* (n 33) para 136; Chapter 2.2.

<sup>62</sup> *Wouters* (n 15) para 97.

brand competition<sup>63</sup>, but one can argue that when it comes to selective distribution systems, this is an area of competition law with higher degree of consistency showing a clear path of balancing in Article 101(1)<sup>64</sup>. Further, the two cases highlight the point that in a balance of positive and negative effects, other factors than price has relevance.

### 2.3 – Are there other explanations?

#### EU case law and the ‘ancillary restraint doctrine’

The ‘ancillary restraint doctrine’ allows for certain restrictions on competition to fall outside Article 101(1) if they are “objectively necessary [and proportionate] for the implementation of a main operation”<sup>65</sup>. In a number of EU-cases, ECJ and CFI have used language which might imply use of this doctrine. For example in *Metro*<sup>66</sup>, *STM*<sup>67</sup> and *Wouters*<sup>68</sup>, ECJ use language which implies focusing on the necessity of the restriction in question<sup>69</sup>. This doctrine has been argued as explanations to the Courts assessments in cases where balancing of positive and negative effects on competition seems to occur<sup>70</sup>. It focuses on the existence of a main transaction, which necessitates restrictions on competition in order to be implemented. This way it is used as almost weighing the main transaction against the restriction. The main view seems however to be that it does not entail any balancing of positive and negative effects, but a “relatively abstract” assertion of the necessity of the restriction in order to implement the main operation, and not the

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<sup>63</sup> See chapter 4.4.

<sup>64</sup> See chapter 2.3 and 4.5.

<sup>65</sup> *Métropole* (n 11) para 106.

<sup>66</sup> *Metro* (n 27).

<sup>67</sup> *STM* (n 18).

<sup>68</sup> *Wouters* (n 15).

<sup>69</sup> A distribution system was necessary in *Metro*, a Joint Venture in *STM* and a rule prohibiting partnerships to ensure the quality of legal practice in *Wouters*.

<sup>70</sup> Wish and Bailey (n 41) page 129; Jonathan Faull and Ali Nikpay: *The EC Law of Competition*, 2<sup>th</sup> ed, Oxford University press 2007, para 3.182 – 3.214.

indispensability for the operations commercial success<sup>71</sup>. The topic is controversial and highly debated<sup>72</sup>.

In order to conclude on whether or not a restriction is ancillary and fall outside the scope of Article 101(1), one will in my opinion need to assess the legitimacy of the main objective in its self. Inherent in this assessment it must lay a consideration of its desirability. In situations where the main objective has positive effect on competition it seems difficult not weighing this against the negative effect of the restriction which comes with it<sup>73</sup>. I am therefore of the opinion that whether or not the mentioned cases above use the ‘ancillary restraint doctrine’, this has no significance in the debate on whether balancing of positive and negative competitive effects are currently practiced in Article 101(1).

### Selective distribution systems and the ‘Metro-doctrine’

The *Metro-case*<sup>74</sup> is said to give rise to the ‘Metro-doctrine’ which approves selective distribution systems if they meet three criteria. One of these is that the product must be of a type to necessitate selective distribution<sup>75</sup>. In other words, if the product necessitates special distribution, within given limits, the benefits from achieving this justifies restriction on price-competition. The ‘Metro doctrine’ has been consistently used by EU-Courts<sup>76</sup>. One can question whether selective distribution systems therefore

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<sup>71</sup> *Métropole* (n 11) para 109.

<sup>72</sup> Especially debated is ECJs assessment in Wouters: Nazzini (n 32) page 521-527, para 5; Whish and Bailey (n 41), page 130; Allison Jones and Brenda Sufrin: *EU Competition Law*, 4<sup>th</sup> ed, Oxford University Press 2011, page 231, chapter 4, para 3, section D (vii).

<sup>73</sup> Supportive of this statement: Faull and Nikpay (n 70) para 3.249, where they suggest “balancing of pro- and anti-competitive effects is inherent in” the ‘ancillary restraint doctrine’ and in their suggested ‘necessity for supply doctrine’ (‘ Chapter 4.4); Jones and Sufrin (n 72) page 232, say it is “hard, if not impossible, to square [the ancillary restraints doctrine] with the view that pro- and anti- competitive effects cannot be weighed against anti-competitive effects identified in the context of Article 101(1)”.

<sup>74</sup> *Metro* (n 27)

<sup>75</sup> Whish and Bailey (n 41) page 642.

<sup>76</sup> See Case 99/79 *Lancome SA v Etos BV* [1980] ECR 2511; Case 31/80 *L’Oreal NV v de Nieuwe AMCK* [1980] ECR 3775; and latest *Pierre Fabre* (n 56) as mentioned in this chapter.

are in their own category when it comes to relevance of positive effects on competition in Article 101(1).

Whish and Sufrin argue that selective distribution systems are “a separate branch of EEC competition law, which has been carefully developed by the Court of Justice and Commission”<sup>77</sup>. It seems like they rely on this as argument supportive of the statement that EU-competition law does not involve ‘US-rule of reason’ analysis. I am of the opinion that even with a separate doctrine with regard to selective distribution, it is not possible to conduct this assessment without balancing the benefits from non-price factors against the restrictive distribution. This balance is exactly what ECJ refers to when saying that factors other than price “may **justify** a reduction of price competition in favour of competition relating to factors other than price”<sup>78</sup>.

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One cannot explain what is occurring in these cases by referring to a given doctrine. Even if EU-competition law has doctrines with separate rules for solving different situations, these cannot hide the fact that positive effects on competition seem to have relevance within Article 101(1). It is necessary to separate the use of a given doctrine from what the Court in reality do when making the assessment. If anything, it is of my opinion that these doctrines show different situations where positive effects in Article 101(1) gets accepted and therefore contributes in distinguishing situations which necessitate a balance in Article 101(1) contrary to 101(3)<sup>79</sup>.

## 2.4 – The Commission

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<sup>77</sup> Whish and Sufrin (n 4) page 23.

<sup>78</sup> *Pierre Fabre* (n 56) para 40.

<sup>79</sup> See chapter 4.5.

The Commission has several times shown its opinion on the assessment in Article 101(1). I focus on its comments in relation to the modernization of the competition system within EU.

In 1999 the Commission adopted its White paper on Competition rules<sup>80</sup> which sets out their views on modernization and proposes different systems which “meet the objectives of rigorous enforcement of competition law, effective decentralization, simplification of procedures and uniform application of law and policy development throughout the EU”<sup>81</sup>. In chapter II, the Commission give thoughts on the need for reform and how competition rules should be understood to ensure “effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other”<sup>82</sup>.

They discuss adoption of a ‘US-rule of reason’ as a suggestion to ease requirements on undertakings. However, they promptly reject this and support it by saying Article 101(3) “contains all the elements of a ‘rule of reason’”<sup>83</sup>. A “systematic” balancing in Article 101(1) of the pro- and anti-competitive aspects of a restrictive agreement, which the ‘rule of reason’ represent, would “run the risk of diverting Article 85(3) from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations”<sup>84</sup>. As such, the Commission rejects the ‘rule of reason’ as a general rule in EU-competition law in line with statements in the later *Métropole*-case. However, by their wording they are not rejecting all weighing of pro- and anti-competitive effects in Article 101(1), and their statements cannot be taken as support for the view that an assessment in an agreements economic context never includes positive effects on competition.

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<sup>80</sup> Commission, ‘*White paper on modernization of the rules implementing articles 85 and 85 of the EC-Treaty*’ (1999) OJ C132/01 (Commission, *The White Paper*).

<sup>81</sup> *Ibid*, executive summary para 11.

<sup>82</sup> *Ibid* para 41.

<sup>83</sup> *Ibid* para 57.

<sup>84</sup> *Ibid*.

The Commission adopted Guidelines on the application of Article 81(3)<sup>85</sup> in 2004. In paragraph 11 they explicitly address the question of positive effects in Article 101(1) by saying that “the balancing of anticompetitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 81(3)”. Their wording cannot be interpreted any different ways, thus they reaffirm and strengthen earlier statements in the White Paper.

This firm statement from the Commission has the power to make the assessment in Article 101(1) more or less a yes/no rule, blurring the distinction between an object-restriction where effects of the agreement is non-relevant, and an effect-assessment where several considerations is taken into account. If no benefits are to be considered in this first assessment, every agreement which has some sort of restriction on either of the parties in relation to competition is found to fall under Article 101(1), and then maybe get exempted by 101(3) on the grounds that it after all promotes competition. This resembles the Commissions earlier stringent practice, in which a modernization was necessary<sup>86</sup>, and which has been subject to critique<sup>87</sup>.

However, in the Guidelines paragraph 18, the Commission set out two tests for assessing agreements under Article 101(1). They distinguish between inter-brand and intra-brand competition. With regards intra-brand competition<sup>88</sup> they say “certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or nature”<sup>89</sup>. They open for arguments related to existence of competition. Restrictive agreements *creating* competition on the market, makes Article 101(1) non-applicable. The guideline uses the example of agreements necessary to penetrate new markets, but which includes territorial protection for one of the parties<sup>90</sup>. Without the restriction, the agreement might not be entered into; hence the competition made by the new competitor on the market will not

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<sup>85</sup> Commission, *Article 81(3) Guidelines* (n 2).

<sup>86</sup> In this view: Jones and Sufrin (n 7255) page 192.

<sup>87</sup> Okeogene Odudu 'A new economic approach to Article 81(1)?' (2002) 27(1) *European Law Review* 1-5, page 3.

<sup>88</sup> Competition within the same brand but between different distributors.

<sup>89</sup> Commission: *Article 81(3) Guidelines* (n 2) para 18(2).

<sup>90</sup> *Ibid.*

exist. We recognize this from *STM*<sup>91</sup> where ECJ suggests that the agreement fall outside Article 101(1) because of the possibility to penetrate a new market and create new competition. Thus, even if the Commission in paragraph 11 of the guidelines strictly forbids balancing in Article 101(1), they also show reconciliation with ECJ case law.

It can be argued that the Commission suggests a more economic approach in line with case law, saying not all restrictive factors amounts to a restriction. Their statement might even so relate to the suggested view of a yes/no assessment. The question of whether a restriction is “objectively necessary” for the existence of an agreement will necessitate a yes/no answer. However, in order to come to a conclusion, one needs to assess whether or not creating competition justifies the necessary restriction. This cannot be answered by only yes or no but need further analysis.

Penetration of new markets is a positive competitive effect. Understanding earlier statements in the guidelines, this is reserved for Article 101(3). Thus the Commission give a clear main rule, but seems to have exemptions with regards at least intra-brand competition. Therefore, I find the Commission Guidelines unclear with regard to the distinction of assessment and factors in the two paragraphs. This supports my suggestion that some positive factors are relevant in the assessment in Article 101(1).

## **2.5 – Conclusion Chapter 2**

Having looked at the EU-Courts and the Commissions statements, it seems that EU-competition law has not adopted a US-style ‘rule of reason’. However, it is also clear that the type of assessment resembling the US-rule, weighing positive and negative effects on competition, does occur under Article 101(1). Practice from ECJ seems consistent. They

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<sup>91</sup> *STM* (n18) page 250.



take an overall assessment and conclude on whether or not the agreement has an effect falling within Article 101(1). In this assessment they have included necessity to penetrate new markets<sup>92</sup>, and the possibility for other competitive effects than only price to emerge<sup>93</sup>. They show balancing in *Wouters* where positive effects outweigh the restrictive nature of the rule in question. The practice is followed in the latest case law as shown in *Pierre Fabre*.

Only CFI and the Commission have been explicit about having a prohibition of balancing pro- and anti-competitive effects against each other in Article 101(1). However, these statements seem to either relate towards the 'rule of reason' or have inner contradictions, making it difficult to find straight lines of reasoning. Practice and theory seems to agree that demanding systematically balancing in Article 101(1) in resemblance to the 'US-rule' is not adopted in EU-law. There is no duty to balance in 101(1).

Advocate General Lèger suggests ECJ has made limited application of the 'rule of reason' in some judgments, and that they use what he calls a "competition balance sheet". Where the balance is positive, ECJ have held that clauses necessary to perform the agreement falls outside Article 101(1)<sup>94</sup>. This supports my suggestion of having the possibility to balance positive and negative in some situations, and resembles the suggestion from the Commission in their guidelines.

Having said this, such use of the article creates difficulties. A distinction between situations where positive effects have relevance within Article 101(1) and 101(3) has been given little attention. If this is something within the discretion of the Commission, thus something they are to decide from case to case, Article 101 might end up being less transparent than before the modernization in 2004. It will be next to impossible to have consistent practice in the Union. In order to have legal certainty and consistent

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<sup>92</sup> See *STM* (n 18).

<sup>93</sup> See *Metro* (n 27); *Pierre Fabre* (n 56).

<sup>94</sup> *Wouters* (n 15), Opinion of AG Lèger, para 103.

framework for undertakings and enforcers to relate to, it is desirable to get more clarity on this.

This is why this paper look further into whether or not such balancing desirable in Article 101(1)<sup>95</sup> and finally how this idea can be implemented. In other words, how should the separation and distinction be between the two parts of Article 101(1) and 101(3)?<sup>96</sup>

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<sup>95</sup> Chapter 3.

<sup>96</sup> Chapter 4.

## Chapter 3 – Should there be balancing in Article 101(1)?

### 3.1 – Introduction – Assessment in the agreements economic context.

EU-Courts have set out a standard they see fit for assessing agreements with regard to Article 101(1). Already in *STM*, ECJ stress the need to examine the agreement in its economic context in order to determine its effect on competition<sup>97</sup>. The economic approach towards the assessment continues by CFI in *European Night Services and O2*<sup>98</sup> where the Commission was found to lack sufficient economic analysis and fail in their reasoning.

The assessment requires understanding of competition within the context it would occur in the absence of the agreement in dispute<sup>99</sup>. Then, consideration needs to evolve around the impact of the agreement on existing and potential competition<sup>100</sup>.

It seems like ECJ sets a rule looking at all consequences on the market, restrictive and beneficial towards competition. It can be argued that in order to get a total

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<sup>97</sup> *STM* (n 18) page 249 the Court stress that the “consequences of the agreement” should be considered and page 250 where they say that the competition in question must be understood within the “actual context in which it would occur”.

<sup>98</sup>Case T 328/03 *O2 (Germany) GmbH & Co OHG v. Commission* [2006] ECR II-1231 (*O2*).

<sup>99</sup> *STM* (n 18) page 250.

<sup>100</sup> *O2* (n 98) para 71-72.

understanding of an agreement, one cannot only take into consideration negative factors; this might construe the agreement leaving out things which of importance on the total effect.

This way of interpreting the assessment in an economic context is supported by ECJ. *STM*<sup>101</sup> and *Wouters*<sup>102</sup> show that effects stemming directly from restrictive and beneficial parts of the agreement are considered when ECJ assess Article 101(1).

However, CFI in both *Métropole*<sup>103</sup> and *O2*<sup>104</sup>, reject the need to consider pro-competitive effects within an agreements economic context. As mentioned with regards to *Métropole*, I suggest this case only shows rejection of the ‘rule of reason’ and not complete rejection of all balancing. Even so, the Court says an overall assessment in the agreements economic and legal context does not necessitate considering pro- and anti-competitive effects against each other<sup>105</sup>, contradicting my earlier statements of how to understand ECJ’s suggestion of having an overall assessment.

Because of this uncertainty of what lies within an assessment of the agreements economic context, it is of value to look into the necessity of having a distinction between Article 101(1) and 101(3), and if necessary, the desirability of arguing positive effects in the first paragraph. The discussion of positive effects in Article 101 has no relevance if a distinction between the two paragraphs is not necessary.

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<sup>101</sup> *STM* (n 18).

<sup>102</sup> *Wouters* (n 15).

<sup>103</sup> *Métropole* (n 11).

<sup>104</sup> *O2* (n 98)

<sup>105</sup> *Métropole* (n 11), para 77.

**3.2 – Is it necessary and desirable to have a distinction between the assessment in Article 101(1) and Article 101(3) with regard to positive effects on competition? – looking from a legal and practical point of view.**

The definition of Article 101 and what factors are relevant has relations to the objectives of the Treaty on the Functioning of the European Union as a whole. It is therefore important to have a legal framework showing consistency through laws given, cases from Community-Courts and regulations and guidelines from the Commission.

After the modernization and implementation of Regulation 1/2003<sup>106</sup> two main changes in the application of Article 101 was implemented. First, decentralization of the enforcement to include National Courts and competition authorities was formalized<sup>107</sup>. Secondly Article 101(3) is now meant to have direct effect in Member States<sup>108</sup>. This latter change mean that, as well as assessing whether or not an agreement falls within the prohibition in Article 101(1), undertakings now also make the assessment of whether or not the agreement complies with the tests set out in 101(3), and get automatic exemption. From this, the practical necessity of distinguishing between first and third paragraph has sunk. The result at the end of Article 101 is the same, regardless of where positive effects on competition are argued. This is an argument against the necessity of having a specific distinction between the two paragraphs, and therefore against the debate of what factors is relevant in each of them.

However, reasons for why this distinction still has practical importance and therefore is necessary can be pointed out.

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<sup>106</sup> Commission, *Council Regulation 1/2003* (n 6).

<sup>107</sup> Commission, *The White Paper* (n 80) para 42.

<sup>108</sup> Commission, *Council Regulation 1/2003* (n 6), article 1.

First, it is the “party or the authority alleging the infringement” which has the burden of proof in Article 101(1)<sup>109</sup>. Parties to the agreement “bear the burden of proving that the conditions of [Article 101(3)] are fulfilled”<sup>110</sup>. In other words, the burden of proof shifts when the restriction has been shown. Therefore it has significant importance to know if enforcers need to balance positive and negative effects on competition against each other when considering whether restriction on competition exist, or if positive effects from the agreement is something the undertakings need to show direct proof of when arguing Article 101(3). With no positive effects in Article 101(1) this makes the alleging authorities’ job easier as they only need to point out restrictive parts of the agreement and not make any further assessment. Seen from the other side, this also makes an argument towards having limits for what factors is welcomed in the first paragraph compared to the third. If all benefits stemming from an agreement can be argued in Article 101(1) this opens for extensive analysis on the enforcer which again might give undertakings an undue advantage. This is why a set of rules limiting and distinguishing different arguments relevance in each paragraph is necessary.

Without clear distinction between the arguments relevant in each part of the Article one might end up giving discretion to the Commission on a case by case basis. This has implications on transparency and consistency of the Article throughout the EU. National courts and competition authorities lack guidance in order to properly assess on a consistent basis and if the Commission is in a situation where they almost can do what they feel in given situations, this will only make the antitrust-regime more unclear.

If pro-competitive factors are to be weighed against negative factors in Article 101(1) this leads to a less restrictive path in giving positive effects weight in the balance than what would if such factors only could be considered in Article 101(3). Article 101(3) sets out three more conditions in addition to the first test, which gives the main ‘balancing-test’. This test would be the same in both paragraphs; the positive factors need to outweigh the negative for the agreement to fall outside the scope of the Article. If

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<sup>109</sup> Ibid article 2.

<sup>110</sup> Ibid.

balancing of positive and negative effects is to be done in Article 101(1), it is not necessary to test the restriction against anything else. In other words, it is “easier” to find Article 101(1) non-applicable if pro-competitive factors can be balanced against negative in Article 101(1), than it is to give exemptions to restrictive agreements in 101(3). It is therefore necessary to know which one of these two paths one need to embark on when deciding on entering into an agreement.

The necessity to separate between the assessment in Article 101(1) and 101(3) opens further debate on whether the possibility to assess positive factors in the first paragraph is at all desirable.

One of the main arguments against having a ‘US-rule of reason’ was that the EU-antitrust regime was not ready to give undertakings such responsibility. This argument relates back to the time before the modernization when Article 101(3) was exclusively for the Commission and therefore has no weight in a discussion of the desirability of balancing within Article 101(1) anymore. National authorities now have a role to play within the entire Article 101. However, because the provision is directly applicable, limits for when to apply positive effects in Article 101(1) cannot only lie within the Commissions discretion, there need to be sufficient guidance to ensure transparency and consistency throughout the EU-Community. This is an argument against the desirability of positive effects being relevant in Article 101(1) as such limits are hard to find<sup>111</sup>.

The fact that the burden of proof shifts from the enforcer to the undertaking gives reasons for having balancing in the first paragraph as this makes it easier for undertakings to argue that an agreement should be accepted. Lack of guidance on how to carry out balancing in Article 101(3) makes the analysis difficult and undertakings might resist taking the chance on entering into agreements which might not be eligible to exemption. Assessment under Article 101(1) gives an easier overall view of

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<sup>111</sup> Argued by Whish and Sufirin (n 4) as a reason for why a ‘US-rule of reason’ should not be part of EU-antitrust.

agreements consequences. Of course, this argument can be exaggerated. Article 101(3) exists for a reason and undertakings cannot excuse themselves because of difficult analysis. In the prolonging of this one can argue that Article 101(3) set out conditions which in certain situations can give too strict rules on when exemptions should be given. For example, one can argue that agreements with small restrictions<sup>112</sup> on competition, but major benefits on other factors of competition such as production, will not get exempted because one could achieve the benefits with other less restrictive agreements<sup>113</sup>. Even if undertakings should aim to agree upon as small restrictions as possible, this might mean significantly more work and thus make it more of an effort to enter into the agreement in the first place. In such situations, arguable it seems fairer to the parties and to the quest of achieving benefits for consumers through efficiency gains, that such benefits get weighed in the assessment in Article 101(1) with regards if it is a restriction of competition in the first place.

On this background it can be argued that if a certain balancing occurs in Article 101(1) this has implications on undertakings incentives to take chances on entering into agreements even if they consists of certain restrictions on competition because they, in the end, adds consumer benefits. In this way, it is desirable to have the possibility to argue positive benefits in Article 101(1) in certain situations.

A supportive argument to the desirability of positive effects role in Article 101(1) can be showed by imagining the situation if the Commissions firm statement in their guidelines were to be strictly followed. The consequence might be to have a yes/no rule which already is shown to be undesirable<sup>114</sup>.

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<sup>112</sup> However, large enough not to fall within the scope of the Commission, *Notice on agreements of minor importance* C-368/13, OJ 2001.

<sup>113</sup> The agreement does not meet the indispensability test in Article 101(3).

<sup>114</sup> Commission: *Article 81(3) Guidelines*, para 11; For more in this see Chapter 2.4



### 3.3 – Conclusion chapter 3

As seen, a formalistic approach towards the application of Article 101 has implications further than only the theoretical aspect.

Case law shows uncertainty in its description of an assessment in the agreements economic context. ECJ shows that one should consider all aspects of the agreement including positive effects. CFI contradicts this when saying such assessment does not necessarily need balancing of positive and negative factors. As seen by going through the necessity and desirability of having balancing of positive factors in the main assessment, the suggestion by CFI seems to stem from a misconception of how agreements in reality is conceived. When undertakings cooperate and make agreements, it is deceptive to think they explicitly agree upon separate conditions as restrictions on competition. One usually think of an agreement as a total package, and it is therefore desirable to know whether or not this is how one should assess the agreement when considering its effects in the view of Article 101, or if the assessment requires a breakdown of all different elements to be considered separately.

However, my interpretation and suggestion creates difficulties and challenges when laying down guidelines for using the provision. But this argument does not change the fact that such divide between the two paragraphs seem to exist and that we therefore need better guidance on how to separate them. In the next chapter I therefore try to suggest different ways of conducting a separation between positive effects which should be balanced in Article 101(1) and the ones belonging in 101(3).

## **Chapter 4 – How can a balancing of positive and negative effects on competition be conducted within Article 101?**

### **4.1 – Introduction**

We saw in chapter 2 that case law and guidelines within the EU shows uncertainty regarding whether positive effects should be weighed against restrictive effects within the scope of Article 101(1), or within the limits set out in Article 101(3), and an uncertainty with regard how such balancing should be conducted.

As shown in chapter 3, there are practical and theoretical reasons for arguing that a balancing of positive and negative effects should occur within the scope of Article 101(1).

Because of this uncertainty as to what and where different arguments belong, I hope to give reasoning to the distinction between the two parts of Article 101 and to which factors might be relevant within 101(1) and which is reserved to the limits of 101(3).

## **4.2 – Considerations**

When trying to conduct a suggestion to how balancing of positive and negative effects on competition can be implemented within Article 101(1) different things are important to remember.

Article 101(1) is used by both enforcers and undertakings. One needs to have this in mind when setting up rules for understanding and compliance. Because of the increasing use by national authorities, the need to have a consistent framework is even more important in order to ensure similar interpretation in the entirety of the EU.

Therefore, in suggesting a distinction between Article 101(1) and 101(3), having a feasible rule with transparent and logical solutions are one of the things which must be considered in order to see if the suggestion is something to rely on in practice, and not only in theory.

## **4.3 – Understanding Article 101**

The wording in Art 101(1) set out that all agreements with the effect of “prevention, restriction or distortion of competition” fall within its scope. First paragraph, read individually, does not give any direct help in the question of what factors are included in the assessment. It can be understood two different ways. Including only restrictions on competition, or pointing at an overall assessment where both positive and negative effects gets weighed against each other towards a net effect which either restrict is neutral or benefits the competition on the market.

When looking at the third paragraph in Article 101, it sets out four tests which all need to be met in order to exempt agreements. The first and second of these are often referred to as the ‘balancing act’ where benefits contributing to “improving the production or distribution of goods or to promoting technical or economic progress” are to be balanced against the restriction found in the first paragraph, in order to make sure that it allows the consumer a “fair share” of the resulting benefit<sup>115</sup>. The Commission says this is to make sure pass-on effects that “at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1)”<sup>116</sup>. If this balance ends up positive or neutral for the consumer the agreement is exempted if the restriction also is indispensable to attain the benefit and it does not give the undertaking the opportunity to eliminate competition<sup>117</sup>.

Article 101(3) is sometimes said to be EUs answer to the ‘rule of reason’<sup>118</sup>, where one can argue positive effects. However, looking at the wording in the article, it is not clear that the third paragraph opens up to a balancing, or that all factors are welcomed. This suggests that Article 101(1) might be better and more suitable for some factors and it is worth taking a closer look at Article 101(3) to see whether or not this can be understood in any way supportive of one or the other solution.

The wording in Article 101(3) says that agreements contributing to improve “the production or distribution of goods” or agreements that promote “technical or economic progress” might be exempted as long as a “fair share” of the benefit is directed to the consumer.

First of all it is interesting to see that the wording does not actually point to a balancing of the benefit against the found restriction. It does not explicitly say that the benefit

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<sup>115</sup> See Commission, *Article 81(3) Guidelines* (n 2) chapter 3.2 and 3.4.

<sup>116</sup> *Ibid* para 85

<sup>117</sup> See: Article 101(3) TFEU (n 1); Commission, *Article 81(3) Guidelines* (n 2) para 85.

<sup>118</sup> Commission, *The White paper* (n 80) para 57.

found in Article 101(3) `s first test needs to be balanced against the restriction and outweigh this so that consumers are better off in the end<sup>119</sup>. It only points out that any benefit found needs to allow a “fair share” to contribute towards consumers. As seen later, Nicolaides<sup>120</sup> agree with this point suggesting a slightly different approach towards the article.

Secondly, the wording in the Article itself suggest that the benefits argued do not have as their only object to benefit *consumer* welfare, as is the case with the assessment in Article 101(1)<sup>121</sup>. When Article 101(3) demands that a “fair share” of the benefit goes to consumers, this suggests that the exemption relates to benefits directed towards producers, or at least not benefits directly and only towards consumers.

Nicolaides has a slightly different approach, but says Article 101(1) seeks to determine the “overall, actual, potential and inter-temporal effect of an agreement on competition”, and Article 101(3) on the other hand, asks whether an agreement with overall anti-competitive effects should be allowed to go ahead, because it generates sufficient gains for consumers<sup>122</sup>. “In other words, Article 81(3) evaluates the desirability of the agreement from the point of view of consumers”<sup>123</sup>. He suggests there is no actual balancing in Article 101(3), but that this part of the article only filters out and eliminates certain types of anti-competitive agreements. He suggests that the second condition in Article 101(3), a fair share of benefits towards the consumers, is a filter, eliminating agreements “that fail to provide sufficient benefits to consumers”. This assessment is done by asking if whether “the agreement leads to higher prices, does it also lead to higher quality and/or innovation?”<sup>124</sup>. If the answer to this is yes, then the agreement is exempted if it also meets the fourth test of not eliminating competition. It seems like he does not recognize any balancing of the argued improvement of quality and innovation

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<sup>119</sup> In controversy with Commission, *Article 81(3) Guidelines* (n 2), para 85.

<sup>120</sup> Phedon Nicolaides ‘The *balancing myth: The Economics of Article 81(1) & (3)*’ (2005) 32(2) *Legal Issues of Economic Intervention*, 123-145.

<sup>121</sup> Commission, *Article 81(3) Guidelines* (n 2) para 13.

<sup>122</sup> Nicolaides (n 120) page 134.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid* page 143.

against the restriction found in paragraph one of Article 101. In his view, it seems enough that benefits towards consumers exist.

It is of my opinion that Nicolaides' description of Article 101(3) lacks several factors. First, he does not separate the two first tests in the paragraph, finding a benefit and the impact this has on the consumer. Secondly, he does not separate between benefits of different desirability. It seems like, in his mind, all agreements which include benefits meeting the first tests conditions will automatically benefit the consumer. However, there might be situations where agreements mainly give positive effects to producers. In these circumstances, it is of my opinion that the second test in Article 101(3) provides limits for allowing such agreements. With this interpretation, Article 101(3) will have as its main objective to distinguish agreements which, even if the main goal is not to increase consumer welfare, it still provides enough benefits for the consumer to allow exemption under Article 101(3).

This leads towards a possible distinction between the two paragraphs. Allocative efficiencies mainly relating directly towards consumers can be separated from other productive efficiencies relating towards the process of creating products on the market. Productive efficiencies might cast light on producers more than consumers. However, in the long run, such benefits for producers will often in some implicit way enable higher levels of consumer welfare. Odudu suggest this distinction can be read directly from CFIs statements in *Métropole*<sup>125</sup>. He suggests that CFI is answering critics of their former practice<sup>126</sup> by implicitly saying that the prohibition in Article 101 relates to “allocative inefficiency whilst exemptions are made on productive efficiency grounds”<sup>127</sup>. It is of my opinion that Odudus interpretation is difficult to square with the Courts explicit

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<sup>125</sup> Odudu (2002) (n 87).

<sup>126</sup> Ibid: Critique often directed towards the illogicality of exempting an agreement that is prohibited as anti-competitive on the grounds that it promotes competition.

<sup>127</sup> Ibid page 3. However, Odudu has given the view that “since a restriction of competition can always and only be said to exist when collusion causes allocative inefficiency, restriction of competition as a substantive element in Article 81(1) EC and allocative inefficiency are synonymous”. See Odudu: *the Boundaries of EC Competition law: the scope of Article 81*, Oxford University Press 2006, page 98. This is different from my suggestion as I do not relate the distinction to what factors has relevance with regards to **anti**-competitive effects from the agreement.

statements<sup>128</sup>. However, the case does seem to be in line with an understanding of how to interpret and use Article 101(1) and 101(3) such as Odudu is suggesting<sup>129</sup>.

Allocative efficiency is the result achieved when a product is produced in the quantity valued by society, so the price on the product equals the price consumers are willing to pay, not more or less. In this way consumers decide what product they want, and the products gets distributed the most efficient way<sup>130</sup>. When an agreement contributes towards a higher degree of allocative efficiency it thus relates directly to a higher degree of consumer welfare as this efficiency push prices down towards a minimum or the quality of the product to a maximum.

Productive efficiencies are achieved when producers are able to produce goods at lowest cost possible. This means that as little as necessary of society's wealth is expended in the production process<sup>131</sup>. Productive efficiencies gets established because of continuing fear amongst producers to loose customers to others, and continuing pressure to always be innovative, develop and produce more efficiently. One sees such efficiencies when producers agree to cooperate in order to increase capacity, or when a producer is able to save cost in order to develop new and better products. This may harm competition on the market because prices must rise in order to achieve such efficiencies and in the short run, only benefits for producers might be visible. However in the long run it increases consumers' choice and thus implicit benefit consumer welfare.

We see from this that productive efficiencies often provide benefits toward consumer welfare, but this often comes with benefits towards producers, and not mainly the consumer. This is why such benefits may go better with the wording in Article 101(3)

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<sup>128</sup> See Chapter 4.3.1 (n 130)

<sup>129</sup> See Chapter 4.3.1.

<sup>130</sup> Jones and Sufrin (n 72) page 8; Whish and Bailey (n 41) page 4.

<sup>131</sup> Whish and Bailey (n 41) page 5.

where the second test provides the certainty that also consumers are allowed a share of the argued benefit in the agreement.

In Article 101(1) one assesses possible restrictions on competition by thinking of the level of consumer welfare alone<sup>132</sup>. As seen from case law, such assessments should occur within the agreements economic context. One needs to focus on all factors contributing towards a restriction, such as amongst other things the parties' market power and their possibility to use the agreement detrimental towards consumers. Benefits directly pointed towards consumers, such as penetration of new markets and higher quality on products and service, which is created with consumers in mind, allows competition on that market to grow. If these benefits in a balance outweigh other restrictions on competition, it seems illogical to say that the agreement overall restrict competition on the market. My suggestion is therefore to apply balancing of allocative efficiencies, meaning the efficiencies allowing the best distribution towards consumers, to be assessed in Article 101(1).

On the other side, one can argue that if there is competition on the market, then producer surplus automatically gets pushed down towards consumers, creating consumer surplus. A separation between the two paragraphs relating to these efficiencies might therefore be difficult to find in practice. However, in the first paragraph of Article 101 it is the consumer welfare which is in focus, and only this<sup>133</sup>. When it comes to producer surplus, benefits comes from agreements entered into because of the productivity, providing benefits to the parties of the agreement, the consumer surplus comes in as a 'positive extra'. This 'positive extra' towards consumers enables the agreement to get exempted from an otherwise prohibition in the first paragraph.

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<sup>132</sup> Commission, *Article 81(3) Guidelines* (n 2) para 13.

<sup>133</sup> *Ibid.*



The question is then whether or not Article 101(3) becomes superfluous, as often argued towards suggestions of balancing positive factors in Article 101(1)<sup>134</sup>. In my opinion, the answer to this is no. The separation allows exemptions to agreements with other benefits than those directly aimed at the consumer. This is the task reserved for Article 101(3). In this way Article 101 gets logically separated between factors relating mainly toward consumers and factors relating towards producers but implicitly benefits consumers in the long run, such as agreements to increase prices in order to develop new products with better quality. This last point, benefits towards consumers in the long run, enable the agreement to meet the second test in Article 101(3), that a fair share of the agreement benefits consumers. If an agreement only has contributions and advantages towards producers, then it falls through and an exemption is out of the question.

#### **4.3.1 – How does my suggestion fit with the case law?**

The case law is unclear regarding what to include in an economic assessment. When looking at the cases it seems like ECJ, in STM<sup>135</sup>, Metro<sup>136</sup>, Pierre Fabre<sup>137</sup> and Wouters<sup>138</sup>, balance positive competitive factors directly related to benefits for the consumer in Article 101(1), in other words, allocative efficiencies. In STM, they talk about penetration of a new market which directly contributes to a higher level of competition. In Metro and Pierre Fabre, the possibility to argue other factors than price to justify selective distribution systems, relates directly to making the product in question more desirable for consumers. At last, in Wouters, ECJ relates the balancing towards benefits for the ultimate consumers by making sure legal services have the best qualifications on the market, not distorted by other values inherent in the work relating to accountants.

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<sup>134</sup> Mètrropole (n 11) para 77; Commission, *Article 81(3) Guidelines* (n 2) para 11; Commission, *The White Paper* (n 80) para 57.

<sup>135</sup> STM (n 18).

<sup>136</sup> Metro (n 27).

<sup>137</sup> Pierre Fabre (n 56).

<sup>138</sup> Wouters (n 15).

We see that benefits in these cases relate to the consumer directly and not first and foremost towards the parties making the agreement, through better production or innovation.

As I have suggested, *Métropole* can be interpreted as relatively neutral in the discussion on whether or not positive factors might be argued in Article 101(1). Despite this, the fact remains that CFI come to the conclusion that the Commission did not do an error in its assessment when they did not do *any* weighting of positive factors. Odudu is of the understanding that CFI's ruling implicitly points out a separation between allocative and productive efficiencies<sup>139</sup>. I mean, however it is construed to read this from the case when the Court is so direct in its statements rejecting the necessity of positive effects in Article 101(1).

The assessment CFI suggests is an assessment in the agreements economic context. They come to the conclusion that the Commission has done such assessment to an appreciable extent. It might be that CFI recognize the possibility of balancing positive factors in Article 101(1), but in the choice of actually doing so, they give the Commission wide margin of appreciation.

*Métropole* related to the creation of a Joint Venture and CFI considered in this regard whether or not the three restrictive clauses in the agreement could be said to be ancillary to this main objective. An explanation of why CFI rejected to perform a balancing might be related to this. They found one of the clauses, the non-compete clause, to be directly related and necessary to the implementation of the operation of creating the Joint Venture, and therefore an ancillary restriction which fell outside Article 101(1) as long as it was limited to three years.

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<sup>139</sup> Odudu (2002) (n 87).

The ‘ancillary restraint doctrine’ relate to finding restrictions of competition being necessary in order to implement some other non-restrictive objective before making a proportionality test<sup>140</sup>. When making this first assessment, the necessity-assessment, one will implicitly balance the restriction against the positive effects of creating the main objective<sup>141</sup>. The Court in *Métropole* seems to contradict this when they suggest no balancing is necessary when assessing the application of the ‘ancillary restraint doctrine’<sup>142</sup>. However, such implicit balancing must lie inherent in the question of whether or not the main operation is a legitimate goal in which one will accept restriction on competition at all<sup>143</sup>.

When assessing the clause relating to the special-interest channels and the exclusivity clause, the Commission and CFI in *Métropole*, found both of them to go further than what was proportionate to the objective of the creation of TPS (the joint venture). Before concluding on this, an assessment of the necessity towards implementation of the main objective had been concluded. The clauses had therefore been assessed in relation to the non-restrictive main objective of the transaction, where the clause relating to the special interest channels was found to be necessary and positive whilst the exclusivity clause was rejected as necessary to implement the joint venture and therefore not an ancillary restraint.

It can be argued that CFI recognized that the Commission had already done an overall assessment of the restrictions in the agreements “economic and legal context” by doing this preliminary assessment, and thus did not see the necessity of doing an explicit balancing one more time and settled with stating that the Commission was not “obliged” to make such balancing<sup>144</sup>. This is in line with CFI’s statements when looking at paragraph 107-109 and comparing them to paragraph 76 and 77. In the former they suggest that only an abstract assessment with regards the ancillarity of a restriction should occur in Article 101(1) as this preserves the effectiveness of Article 101(3).

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<sup>140</sup> *Métropole* (n 11) para 104 – 106.

<sup>141</sup> See Chapter 2.3.

<sup>142</sup> *Métropole* (n 11) para 107.

<sup>143</sup> See chapter 2.3.

<sup>144</sup> See *Métropole* (n 11) paras 78 – 79.

Comparing this statement with paragraph 76 and 77 where the Court rejects the 'rule of reason' in order to preserve the effectiveness of Article 101(3), gives the suggestion of having an abstract and similar analysis also outside the ancillary restraint assessment. In this way, any in debt analysis is reserved for Article 101(3) and it would be superfluous to make such abstract analysis several times with regards the same restriction.

The question of how to understand and use Article 101 is highly debated and a difficult topic of assessment and it is therefore many ways of trying to explain how the Courts statements should be understood. I have tried to give one such explanation.

The CFI in *Métropole* had the assignment of assessing whether or not the Commission had done such an error in its considerations to annul its findings. CFI do not find such errors, and has no obligation of giving more explanation than to say that the Commission conducted a sufficient assessment. It is then up to us as interpreters to try to analyze the case and give reason to the Courts statement, even if in the end, such reasoning is difficult to find.

After this review, it is of my opinion that the mentioned case law can be compared and seen next to my suggestion of separating Article 101(1) and 101(3) between allocative and productive efficiencies. It is also a suggestion which can give clear distinction between the paragraphs and thus make Article 101 more transparent with regard to achieving a consistent practice throughout the EU.

#### **4.4 – Alternative distinction in Article 101(1) – Inter-brand and intra-brand competition.**

In its guidelines on the application of Article 101(3) the Commission says explicitly in paragraph 11, that “balancing of anticompetitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 81(3)”. This suggests a strict approach towards the assessment. However, as earlier mentioned, they later open for taking into consideration whether or not the restricted competition would have existed at all, in the absence of the contractual restraint<sup>145</sup>. In such situations it seems like the Commission accepts the fact that the restriction is “objectively necessary” for the creation of competition, as justification for making Article 101(1) non-applicable<sup>146</sup>. They use the example, similar to the situation in *STM* that a territorial restraint may fall outside the scope of the prohibition if the restraint is objectively necessary in order for a distributor to penetrate a new market<sup>147</sup>. Thus, they find that restrictions on intra-brand competition<sup>148</sup> will be justified if necessary to enable inter-brand competition<sup>149</sup> where such competition otherwise would not exist. This leads us onto another possible approach to the situation, a separation on positive effects on the creation of inter-brand competition assessed in Article 101(1), whilst benefits on intra-brand competition and other already existing inter-brand competition is reserved for Article 101(3).

Nicolaides follows this approach when he suggests different situations showing balancing in Article 101(1)<sup>150</sup>. He says that in situations where competition would not otherwise emerge independently without the contractual restraint, the restriction does not automatically fall within the scope of Article 101(1). One needs to assess the necessity of the agreement against the restriction within Article 101(1)<sup>151</sup>.

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<sup>145</sup> Commission, *Article 81(3) Guidelines* (n 2), para 18(2).

<sup>146</sup> *Ibid.*

<sup>147</sup> *STM* (n 18) page 250.

<sup>148</sup> Competition between distributors of the same brand

<sup>149</sup> Competition between suppliers of competing brands

<sup>150</sup> Nicolaides (n 120) page 133

<sup>151</sup> *Ibid.*

It can be argued that inter-brand competition is seen as more valuable than intra-brand competition with the consequence that positive effects on inter-brand can have impact on whether or not one accepts restrictions on intra-brand competition<sup>152</sup>. This separation can be compared with the separation between horizontal- and vertical agreements. Vertical agreements are given an exemption rule and normally fall outside the scope of Article 101(1)<sup>153</sup>. Intra-brand competition problems usually arise from vertical agreements and are thus given a lighter regime.

In *Consten and Grundig*<sup>154</sup>, ECJ mention the distinction between intra-brand and inter-brand competition, but clearly set out that “although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article 85 (1) merely because it might increase the former”<sup>155</sup>. Thus, it might be to push the limits to say that intra-brand competition *always* should be balanced in Article 101(1). However, as the Commission suggests, sometimes a restriction is necessary in order to actually have any competition at all, because without the restriction there would be no competition to talk of. In these situations it might seem odd to prohibit a restriction for restraining the competition it is creating.

Faull and Nikpay suggest a doctrine similar to my suggestion as explanation for all vertical agreements falling outside the scope of Article 101(1) because of the market context in which they were applied<sup>156</sup>, where agreements create competition that would not otherwise occur at all but for the restrictive clause. The ‘necessity for supply’ doctrine applies where a restriction falls outside Article 101(1) if it is clear that

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<sup>152</sup> Joined cases C- 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299 (*Consten and Grundig*), page 342: The case might suggest such a view when the Court says that the competition between producers is “generally more noticeable than that between distributors of products of the same make”.

<sup>153</sup> Commission, *Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices* [2010] OJ L102/1.

<sup>154</sup> *Consten and Grundig* (n 152) page 342.

<sup>155</sup> *Ibid.*

<sup>156</sup> Faull and Nikpay (n 70) para 3.214

undertakings could not, or would not, supply goods or services or enter the market in the absence of some sort of exclusivity given the commercial risks involved<sup>157</sup>. They apply this doctrine in vertical agreements, thus in situations where inter-brand competition would be benefited because of the entry of new competitors in the market, at the detriment of intra-brand competition, through exclusive supply agreements. The authors suggest this doctrine as explanation for CFI's suggestion in *STM* where they open up for accepting an agreement of exclusive distributorship where this is "really necessary for the penetration of a new area"<sup>158</sup>.

This suggestion of making up a way to balance positive and negative effects with a distinction between creation of inter-brand competition in Article 101(1) and already existing inter-brand, together with intra-brand competition in Article 101(3), would only apply to vertical agreements. This is because intra-brand competition, that is competition between distributors of the same brand, will be affected through vertical arrangements between the producer and the distributor. The suggestion is therefore limited in scope with regards to other situations might appearing on a horizontal level between producers.

Faull and Nikpay suggest the doctrine of 'necessity of supply' together with the 'ancillary restraint doctrine' as explanation for all horizontal and vertical restrictive clauses falling outside Article 101(1) because of the market context the agreements are applied in. In this way they cover all agreements, not only vertical agreements. They do as I, agree upon the view that EU-antitrust has not adopted a 'rule of reason', but they suggest these two doctrines as having some balancing inherent in their assessment and that most cases where balancing is shown can be seen and understood from these two views. The authors explain all cases earlier mentioned<sup>159</sup> with the view that they either belong under the 'ancillary restraint doctrine' or the 'necessity for supply doctrine'<sup>160</sup>. In other words, that they either were necessary for the implementation of a legitimate

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<sup>157</sup> *Ibid.*

<sup>158</sup> *STM* (n 18) page 250.

<sup>159</sup> *STM* (n 18); *Métropole* (n 11); *Metro* (n 27); *European Night services* (n 33); *Wouters* (n 15); *O2* (n 98).

<sup>160</sup> Under this doctrine they find *STM* (n 18) and *O2* (n 98), whilst most cases they find see under the 'ancillary restraint doctrine'.

commercial purpose ('ancillary restraint doctrine') or necessary for goods or services to be supplied at all because of the commercial risks involved ('necessity for supply doctrine').

In my opinion it is a too bold statement saying all agreements where the question of balancing and weighting has appeared, can be put into 'boxes' and be said to belong under given doctrines<sup>161</sup>. It might not be that all future cases match one of these doctrines and one might end up with even more debates when trying to explain how and why a case is how it is and how one could enable one of the 'box'-categories to fit. I therefore find it better to look at what actually occurs and relate to these facts rather than maybe making unnecessary interpretation problems. Whatever 'rule' the cases do or does not follow, the authors and I do agree on the fact that balancing in Article 101(1) does occur. Whether or not this is within a given doctrine does not have that big significance other than giving support to my suggestion of how a balancing exercise might occur within Article 101(1).

On the other side, and against my suggestion, this type of separation might be difficult to reconcile with a transparent and practical approach to creating a specific rule on how a balancing exercise can be carried out. The suggested approach will, as mentioned, only apply to vertical agreements and will therefore leave out significant other areas. Secondly, the distinction between which factors are relevant in Article 101(1) might seem hard to point out. In agreements where beneficial effects might occur both towards intra-brand and inter-brand competition it seems odd to be able to argue only some of the benefits in Article 101(1) with the justification that such competitive effects are more worth than others. In addition, one will need to separate between effects which benefits new competition and effects which strengthen already existing competition on the same market. One can imagine situations with benefits stemming from an agreement, beneficial towards both existing and new competition between the producers, and also beneficial towards competition between the distributors. In such

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<sup>161</sup> See Chapter 4.5.



situations it seems artificial to separate the effects and argue some in the first paragraph and some in the third and not look at everything together.

The conclusion to this suggestion needs to be somewhat double sided. On one side it goes well with the Commissions statements in their guidelines to have the possibility to look at benefits towards inter-brand competition in Article 101(1). On the other side one must remember the need for consistent rules which are easy for enforcers and undertakings to relate to and understand. As mentioned above, it seems difficult to create an easy rule which can be followed in most cases where both inter-brand and intra-brand competition occurs. Therefore, in my opinion, an opening for balancing some inter-brand benefits within Article 101(1) seems to be blurring the picture of a consistent and easy antitrust regime.

#### **4.5 – Two situations where positive effects have relevance.**

As mentioned in chapter 2, EU-competition law has different doctrines with separate rules for how to solve different situations. I find the two mentioned doctrines, the ‘Metro-doctrine’ and the ‘ancillary restraint doctrine’ to have some balancing of positive factors inherent in them and therefore suggest that these doctrine sets out two situations where positive factors have a role within Article 101(1).

The doctrines, as I explain them in chapter 2, do not give guidance on how the actual balancing should occur or to a distinct separation between factors relevant in one paragraph next to the other. In this way, the doctrines are inadequate in giving a sufficient ‘rule’ for others to follow. However, in the situation that positive factors only have relevance in Article 101(1) in certain *situations*, the two doctrines give guidance on showing two of these.

In the 'Metro-doctrine' positive effects from non-price factors are relevant when justifying a selective distribution system<sup>162</sup>. As a preliminary point in the 'ancillary restraint doctrine', when the main transaction benefits competition, one need to balance positive effects from having this main transaction implemented against the restriction, as this is the only way to find that main transaction justifying the restriction. Assessment of its necessity and proportionality comes later<sup>163</sup>.

In this way, the two doctrines contribute in their own way in finding situations where positive effects has a role in Article 101(1), and they set out two specific situations in this regard.

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<sup>162</sup> See Chapter 2.3.

<sup>163</sup> Ibid.

## Chapter 5 – Conclusion

This dissertation has considered the distinction between the two paragraphs in Article 101 TFEU with regard to whether or not positive effects on competition, stemming from an agreement, should be argued in Article 101(1), and how this might occur. There are two possibilities, either an overall assessment in Article 101(1) to find whether or not the agreement culminates in a “restriction [...] of competition”, or having all positive effects on competition strictly reserved for Article 101(3) towards an exemption as the end result.

In chapter 2 I show that weighing is conducted in Article 101(1) by EU-Courts. ECJ conducts overall assessments, and CFI practice does not change this view when they refuse the adoption of the ‘rule of reason’ within EU-antitrust law. Further I show how the Commission confuses the image when they, in their guidelines, strictly say all positive benefits belong in Article 101(3) but at the same time open up for positive effects on inter-brand competition in Article 101(1).

When finding this uncertainty amongst EU-practice I went on to look at the necessity and desirability of having a weighting in Article 101(1). If it is not necessary to distinguish the two paragraphs, then it is no point discussing the desirability. If it is not desirable, then the Commission statements should be taken as they are, and the practice should change towards a ‘straight to the point’ approach. However, as chapter 3 shows, the distinction between the two paragraphs has both practical and theoretical significance. Having a balancing of positive effects against the negative in Article 101(1)

will incentivize beneficial agreements because it is easier for undertakings to be sure of the legality of their decisions. They can make holistically views when considering whether or not to enter into agreements which might include both benefits and restrictions towards the consumers and competition.

Once we see that consideration of positive effects within the assessment in Article 101(1) is desirable it is of significance to have a clear perception on how this weighting and distinction should be conducted in order to have consistency in practice. There is, as anticipated, little guidance from neither EU-Courts nor the Commission in this regard. I have therefore suggested two possible solutions for how a weighting could be included. I find one of these to have the content and effect to enable an assessment worthwhile when considering the desire to have an easy and understandable rule to relate to. A separation between allocative efficiencies and productive efficiencies allows the assessment in Article 101(1) to include both positive and negative effects on the consumer, whilst other benefits, not directly aimed for the consumer will have relevance under Article 101(3). This is inline with practice of the EU-Courts and would make for an overall more transparent and clear assessment.

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I believe the Commission and the EU-Courts have a role to play here. As seen, balancing occur in Article 101(1) and the longer it takes to give substantial guidance on how this should be included by the enforcers and undertakings, the more uncertainty will develop when it comes to how a “restriction [...] on competition” is to be understood.

The Commission says in their guidelines that all positive effects are reserved for Article 101(3)<sup>164</sup>. However, at the same time they open for an assessment of positive effects on

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<sup>164</sup> Commission, *Article 81(3) Guidelines* (n 2) para 11.

inter-brand competition within Article 101(1)<sup>165</sup>. If they are of the opinion that no considerations of positive effects should be included in an assessment within Article 101(1), it is necessary to go thoroughly through cases and their own statements and explicitly comment on what their opinion is.

Saying this, it is not the role of the Commission to tell what the law is, but they have the role of giving guidance for others to relate to. However, it is not enough that the Commission suggests how the Article is to be understood; the ECJ and CFI need to comment explicitly on what they see as part of an assessment in the agreements economic context<sup>166</sup>, and how a weighing is to be conducted. If they find, as the Commission, that no positive effects from the agreement have a role to play in this assessment, they need to start practice as they speak. If not the national enforcers as well as the Commission, need to get explicit guidance on how a weighting should be included and what role the two paragraphs in Article 101 has in relation to each other. It is not enough to practice an assessment looking at the overall picture of the agreement, but never comment on how to conduct the final analysis when deciding what factors should be looked at and how much they should be given weight compared to each other.

Before such guidance is given from the Commission and EU-Courts on this topic, I am of the opinion that the question regarding the substance of a “restriction [...] of competition” in Article 101(1) TFEU will not get clearer and we will not accomplish a consistent implementation by the EU-nations.

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<sup>165</sup> Ibid para 18(2).

<sup>166</sup> Chapter 3.1.

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