10

Efficiency and technological progress in the internal market: Good reasons for exemption from prohibition on restrictive agreements?

ANITA PELLE*

ABSTRACT

The two substantial pillars of European regulation on restrictive agreements have from the beginning been prohibition and exemption. Ensuring competition has been one of the prior objectives of integration; however, there are further interests. Also, according to the "Schumpeterian" philosophy, research is most fruitful if carried out in a somewhat protected environment. Prohibition is general but not absolute. The improvement of the production or distribution of goods, and the promotion of technical and economic progress are crucial parts of the conjunctive set of criteria for exemption. Research and development agreements and technology transfer agreements are regulated by separate block exemption regulations but efficiency and technological progress are key factors in both. In fact, these exemption criteria are the most pro-competitive in nature. Efficiency can take various forms, e.g. cost-effectiveness, realising synergies, or integration of resources. Technological progress is also interpreted in a broad sense. Based on the block exemption regulations, agreements fulfilling the requirements are automatically exempt from prohibition but remain subject to continuous control. An exciting question is how the results of such agreements are expected to be exploited by the participating parties.

KEYWORDS: European integration, competition policy, restrictive agreements, efficiency, technological progress.

* University of Szeged. This research was supported by the European Union and the State of Hungary, co-financed by the European Social Fund in the framework of TÁMOP 4.2.4. A/2-11-1-2012-0001 'National Excellence Program'. The author is highly grateful to the organisers of the conference 'Fostering growth: reinforcing the EU internal market', held at CEU San Pablo University on 28-29 October 2013. During the discussion of the paper on which this work is based, Piet Jan Slot provided invaluable insight and helped in placing its contents in their full context. Contact: pelle@eco.u-szeged.hu

1. Introduction

The Treaty establishing the European Coal and Steel Community[1] (ECSC) signed in 1951 by the six countries later founding the European Economic Community (EEC), with the aim to strengthen cooperation in the coal and steel industry, already stated[2] that restrictive practices leading to the segmentation or exploitation of the market were incompatible and were therefore prohibited. The ECSC Treaty then introduced the prohibition on restrictive agreements in the coal and steel industry.[3] When signing the Treaty establishing the EEC[4] in 1957, the contracting parties were driven by the experience that the ECSC Treaty fulfilled expectations already in a few years' time. The Benelux Memorandum and the Messina Declaration were also documents emphasising that the improvement of European productivity can only be achieved by the intensification of inner market competition.[5]

The 1955 Spaak Report[6] preparing the EEC Treaty already mentioned the significance of competition law. The report identified three basic types of behaviours restricting competition in the market: market segmentation by agreement; restrictions on production, development and investment by agreement; and the exploitation of dominant market position contrary to public interest. Despite the general consensus on the principles, it proved to be rather difficult to agree on the specific text of the Treaty. Paragraph (3) of current Article 101 (that is, the definition of categories of restrictive agreements exempt from prohibition) was especially highly debated. In fact, this is the part of European competition regulation where the different approaches are most evidently contradicted.

---

1 Date of signature: 18/04/1951, entry into force: 23/07/1952, expired on: 23/.07/2002, was not published in the Official Journal.

2 Article 4, paragraph (d) of ECSC Treaty.

3 Article 65 of ECSC Treaty.

4 Date of signature: 25/03/1957, entry into force: 01/01/1958, was not published in the Official Journal.

5 János Zsúgyel, *Az európai integráció és intézményeinek története* (Miskolci Egyetem, Miskolc, 2000).

6 *Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères (*Comité Intergouvermental Créé par la Conférence de Messine, Bruxelles, 1956).

We are convinced that a given competition regulation system is never independent of its direct socio-economic and theoretical environment but is always an answer to that.[7] The philosophy of the EEC has from the beginning relied mainly on the idea of the free market economy: real economic competition in the whole of the Community's territory.[8] However, besides stressing the importance of competition and freedom, the EEC has, from the beginning, distinguished itself from the American view of competition being the ultimate goal in itself.[9] In light of this distinction, the EEC Treaty considers competition as a tool, but not the sole one. The objectives of the creation of the Community are laid down in Article 2 of the Treaty:

> "The Community shall have as its task, by establishing a common market and by the constant convergence of the economic policies of its Member States, to promote throughout the Community a harmonious development of economic activities, a sustainable and balanced growth, a higher level of stability and the raising of the standard of living and quality of life, and stronger solidarity among Member States." Then, Article 3 lists the activities resulting in the achievement of these objectives in 11 points, of which the sixth in the row is the introduction of "a system ensuring that competition in the common market is not distorted".

The EEC Treaty is special also in legal terms as it unifies certain civil and public law systems in international law, which is then applied in a special administrative law. This way it tries to integrate laws with different cultural backgrounds, including the differences in the concepts of competition, in the cases of infringement of competition regulation, and the differences in competition law enforcement.[10]

When examining the environment of early European competition regulation, Europe's intention to find its own place between the US and the Soviet Union[11] should not be ignored. In the US, by this time, intensive

---

7 Imre Vörös, *Az európai versenyjogok kézikönyve* (LOGOD, Budapest, 1996).

8 Walter Hallstein, 1961 'Wirtschaftliche Integration als Faktor politischer Einigung' in Franz Greiss and Fritz Walter Meyer (eds.), *Wirtschaft, Gesellschaft und Kultur. Festgabe für Alfred Müller-Armack* (Duncker & Humblot, Berlin, 1961) 267:278. Walter Hallstein was a West German politician, the first President of the European Commission (1958-1967), also known for the Hallstein doctrine.

9 Joanna Goyder and Albertina Albors-Llorens, *Goyder's EC Competition Law* (Clarendon Press, Oxford, 1992).

10 Philip Marsden, 'Checks and Balances – European Competition Law and the Rule of Law' (Lecture told at the Third Annual Antitrust Marathon, Boston, 17 April, 2009).

11 László J-Nagy, *Az európai integráció politikai története* (JATEPress, Szeged, 2005).

concentration had taken place. Western Europe also showed similar concentration tendencies but smaller in extent.[12] For the EEC, outside the exploitation of comparative advantages in the international arena, further factors like political independence or social security also played a role. With including the integration objective, the EEC goes beyond the traditional scope of competition, but also beyond basic economic policy objectives. So, European competition policy has implicitly presumed that, once the common market would be established, the development or sustainment of restrictive or discriminative institutions should be impeded.

All in all, the competition regulation of the EEC, at least in the early phase of integration, did not consider intensified competition as the single tool in the common market to reach its complex set of objectives.[13] This conviction is crucial in understanding the complex set of prohibition and exemptions that have characterised European competition policy all through the decades of European integration. The Commission's position paper on the concentration of undertakings published in 1966[14], for example, justified exemptions from the prohibition on restrictive agreements by declaring that these agreements serve the fight against concentration, the strengthening of the SME sector and entrepreneurial activity in general terms, and, as such, (indirectly) contribute to the fulfilment of the EEC's objectives. The Commission found it necessary at that time that European large companies of key industries would participate in the global market and would be ready to cope with global competition. The memorandum also pointed out that European concentration tendencies had been driven by American companies through joint ventures and the global market liberalisation processes.[15]

The combined application of tools in the field of regulation on restrictive agreements (that is, prohibition and exemptions) has from

---

12 Alexis Pierre Jacquemin and Henk Wouter De Jong, *European Industrial Organisation* (Macmillan, London : Basingstoke, 1977).

13 Ulrich Immenga, 'Wettbewerbspolitik contra Industriepolitik nach Maastricht' in Lüder Gerken,(ed), *Europa 2000 – Perspektive wohin? Die europäische Integration nach Maastricht (*Rudolf Haufe Verlag, Freiburg, 1993).

14 Commission of the European Community, *Concentration of firms in the Common Market* (Information Memo, P-1/66, Brussels, January 1966).

15 Dennis Swann, 'Concentration and Competition in the European Community' [1968] 13 *Antitrust Bulletin* 1473:1491.

the beginning required the implementation of sophisticated practices. Inconsistencies have, however, occurred, partly as a result of the inner contradictions of the regulatory scheme. Moreover, the EEC (the EU) often gets into contradiction with its own policies applied in parallel.[16] The objectives of competition policy regularly conflict industrial, agricultural, regional or social policy objectives.[17] Still, it is important to clearly distinguish among the functions. For this reason, the objectives that competition policy should foster and those that it should not, have to be laid down explicitly. There is a general consensus that territorial development, full employment, or price stability are not the tasks of competition policy. However, Motta[18] for example thinks that competition regulation should operate exclusively in favour of competition and all other aims should be addressed by other tools (e.g. fiscal policy). As a matter of fact, the EEC's (EU's) regulation on restrictive agreements has never followed this latter approach.

Eventually, despite the institutionalisation of exemptions in the regulation on restrictive agreements, European integration has resulted in an intensification of competition in Europe not seen since the liberalisation movements of the 1860s and 1870s.[19] At the same time, intensifying competition has led to an increased economic uncertainty to which companies have, logically, reacted with efforts to regain control over market forces mainly by new (or even new types of) restrictive agreements and by strong waves of mergers. The former processes called for the improvement of regulation on restrictive agreements[20] while the latter tendencies were limited first in 1989, by the adoption of the merger control regulation. The greatest impetus to the adoption of the merger

16 Roger van den Bergh, 'The 'More Economic Approach' and the Pluralist Tradition of European Competition Law' in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (Mohr Siebeck, Tübingen, 2007) 7:26.

17 Willem Molle, *The Economics of European Integration – Theory, Practice, Policy (*Ashgate, Aldershot : Burlington USA : Singapore : Sidney, 2001).

18 Massimo Motta, *Competition Policy – Theory and Practice* (Cambridge University Press, New York, NY, USA, 2004).

19 Jorgo Chatzimarkakis, 'Vier-Ebenen-Modell als ordnungspolitischer Ansatz für Europa' in Lüder Gerken and Otto Graf Lambsdorff, (eds), *Ordnungspolitik in der Weltwirtschaft (*Nomos Verlagsgesellschaft, Baden-Baden, 2001) 192:208.

20 Maarten Pieter Schinkel, 'Effective Cartel Enforcement in Europe' in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (Mohr Siebeck, Tübingen, 2007) 131:170.

regulation was, paradoxically, provided by the deadline set in the Single European Act: 1992 was the date for the completion of the single European market. This deadline was believed to have started a wave of mergers that would not have served inner market competition any more.[21]

2. The general prohibition

Paragraph (1) of Article 101 of the Treaty per se prohibits restrictive agreements:

> "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

The most relevant element of the article is the general prohibition (general clause). The article specifies a number of prohibited behaviours ((a) to (e)) which can be regarded as an exemplificative list in the sense that everything listed is definitely prohibited but other behaviours may also be found as subjects to the general prohibition.[22] Regulation addresses three types of agreements: restrictive agreements; decisions of associations of companies that have a restrictive aim or impact; and concerted practices of a similar nature.[23] The concept of 'agreement' should be interpreted functionally and broadly: it involves the classical contract covering a mutual and unanimous declaration of will, just as an implicit unity of will. The agreement may take any form and the way it is

21 Theo Hitiris, *European Community Economics* (St. Martin's Press, New York, NY, 1991).

22 Marc van der Woude, Christopher Jones and Xavier Lewis, *E. C. Competition Law Handbook* (Sweet&Maxwell, London, 1994).

23 Tihamér Tóth, *Az Európai Közösség versenyjoga* (CompLex, Budapest, 2007).

expressed is also irrelevant (e.g. invoice, cover letter, bill of freight etc.). At the same time, unity of will has to be proved.[24]

Concerted practices are the most typical manifestations of restrictive agreements. Concerted practices are, inter alia, so 'popular' because they are the most difficult to disclose and prove legally. It may even occur that, due to legal difficulties, the companies in question consciously substitute agreement by concerted practice. Moreover, some types of market behaviours appearing as concerted practices are natural: they derive from the fact that actors of the market pay attention to one another.[25] The legal category of concerted practice presumes some 'section of wills' that is primarily manifested in market behaviour. Any cooperation that, effectively or potentially, endangers competition, can be regarded as concerted practice.[26] In light of EU competition case law, two substantive criteria should be met: firstly, a mental consensus embodied in practical cooperation should occur. Secondly, the consensus realised in direct or indirect contact has to be proved.[27]

Restricting competition is in fact restricting the freedom of market actions. On the whole, the Treaty protects all forms of competition, even potential competition. Article 101 lacks expressions like 'excessive' or 'unreasonable', which is an obvious distinction from the rule-of-reason approach of US regulation.[28]

3. The institution of exemptions

The most debatable (and in fact debated) part of Article 101 of the Treaty is paragraph (3) which introduced the institution of exemption from the general prohibition laid down in paragraph (1), already in 1957:

---

24 Ern Várnay and Mónika Papp, *Az Európai Unió joga* (KJK-Kerszöv, Budapest, 2005).

25 Piet Jan Slot and Angus Johnston, *An Introduction to Competition Law* (Hart Publishing, Oxford: Portland, OR, 2006).

26 Christopher Decker, *Economics and the Enforcement of European Competition Law* (Edward Elgar, Cheltenham, UK : Northampton, MA, USA, 2009).

27 Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (Sweet&Maxwell, London, 1994).

28 András Osztovits (ed), *Az Európai Unió alapító szerzõdéseinek magyarázata 1. Szerzõdés az Európai Közösség létrehozásáról* (CompLex, Budapest, 2008).

"The provisions of paragraph (1) may, however, be declared inapplicable in the case of:

– any agreement or category of agreements between undertakings,
– any decision or category of decisions by associations of undertakings,
– any concerted practice or category of concerted practices,
– which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

So, prohibition is general but not absolute. Paragraph (3) of Article 101 is based on the theoretical conviction that some economic objectives (obviously other than competition itself) cannot be reached without restricting competition. The conviction relies on a complex economic philosophy, mainly rooted in German economic thinking.[29] So, the Treaty does not deny that any cooperation among companies may include restrictive features but rather implies that, besides competition, there are other favourable economic objectives, to which competition appears subordinated, with certain conditions, of course. The reasoning is the same as that of German competition regulation distinguishing between cooperation agreements and cartels.[30] From this viewpoint, exemption is not only justified but also necessary.

As we can see, exemption is bound to four conjunctive conditions[31]:

– improvement of conditions, technical-economic development (effectiveness);
– fair share to consumers (the concept of consumer is not restricted to natural persons);
– the extent of restriction is minimal (indispensable) in light of the objective to be reached;
– competition is not eliminated in a substantial part of the market..

29 Anita Pelle, The German Roots of the European Community's Cartel Regulation – From a Historical and Theoretical Perspective (Lambert Academic Publishing, Saarbrücken, 2011).

30 Kai-Uwe Kühn, 'Germany' in Edward Montgomery Graham and David J. Richardson, (eds), *Global Competition Policy* (Institute for International Economics, Washington, DC, 1997) 115:150.

31 Judit Dán, *Bevezetés az Európai Közösség versenyjogába* (SZTE ÁJTK, Szeged, 2005).

Two of the conjunctive conditions contain a positive statement while two of them imply a negative approach. At the same time, conditions are equal (if either of them is not met, no further investigation is needed) and exhaustive (if all four conditions are met, the agreement is exempt). Let us examine them in detail[32]:

– Effectiveness includes the improvement of the production or distribution of goods and the fostering of technological and/or economic development. Impact has to be connectible to the given agreement, it has to be justifiable and has to, at least partly, serve the benefit of consumers. To this end, investigation addresses the nature of effectiveness, its relation to the agreement, its probability and size, and when and how it will be realised. The improvement in effectiveness has to be objective. It can be cost-effectiveness but may be manifested in the economies of scale, in the richness of varieties, in an improved processing or a more effective use of capacities. It can also be of a quality nature: cooperation which leads to the development of a better or a new product. The burden of proof of effectiveness is on the parties.

– Behind the condition of a fair share to consumers lies the conviction that consumers have to be at least compensated for restrictions, and the overall impact has to be at least neutral. 'Fair' implies that the greater the extent of restriction or the more distant the realisation of effectiveness, the greater the consumers' benefit should be.

– Inevitability refers to the extent of restriction of competition; it should be minimal. The extent of restriction should be proportionate to the advantages. The inevitability criterion has to be interpreted in light of the improvement in effectiveness; these two conditions are interrelated. In the course of investigation, the core question is always whether the same effectiveness can be reached by an alternative scenario where restriction is

[32] Based on: Ádám Remetei-Filep, 'Versenypolitika' in Attila Marján (ed), *Az Európai Unió gazdasága – minden, amit az EU gazdasági és pénzügyi politikáiról tudni kell* (HVG-ORAC, Budapest, 2005) 284:308.

smaller (or none). The moment it is proved, the agreement is not inevitable.

– In respect of elimination of competition, investigation addresses the remaining sources of competition after the agreement. At this point, potential competition also plays a part. When assessing expected future competition, barriers to entry also have to be examined.

The need for a unified regulation on exemptions was articulated already in the 1960s, due to the large number of requests and the limits to the Commission's capacities, and also because there are certain types of behaviours carrying similar characteristics. The Commission was entitled to draft a regulation allowing block exemption[33], and the adoption of the first such regulation occurred in 1967.[34] Block exemption regulation on horizontal agreements exists only in the EU.[35] The legal policy basis for block exemption is the following: if the parties agree in a way which is compatible with the regulation in its contents, they may regard their contract as valid. This logic has induced a long process of willingness to comply on behalf of undertakings, thus shaping market behaviours in a pro-competitive manner. In our view, this is the major impact of the institution of exemptions on European markets.

Block exemption regulations have shown certain similarities all through their development:

– they bind exemption to certain proportions of market share;
– they contain a so-called black list (excluding conditions and behaviours already restrictive in their objectives);
– they regulate the withdrawal of allowances.

Block exemption regulations currently in force can be categorised into three groups: there are the horizontal type regulations (research and development agreements, specialisation agreements); regulations on

33 Based on Regulation No 19/65/EEC of the Council of 2 March 1965 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (OJ P 36, 6.3.1965, p. 533).

34 Pál Béla Szilágyi, 'A közösségi versenypolitika (antitröszt jog) 50 éve – Mekkától Medináig, és tovább Párizsba?' [2007] Iustum Aequum Salutare, III, 4, 145:164.

35 Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart Publishing, Portland, OR, 2007).

vertical agreements; and the ones applying a sectoral approach (especially branches of the service sector[36]).

4. Application of the rules on research and development agreements

As for the primary law, the Single European Act[37], signed in 1986 and enforced in 1987, was the first legal source referring to the necessity to harmonise research and development objectives with competition policy, in Article 130f(1):

> "The Community's aim shall be to strengthen the scientific and technological basis of European industry and to encourage it to become more competitive at international level. (...) In the achievement of these aims, special account shall be taken of the connection between the common research and technological development effort, the establishment of the internal market and the implementation of common policies, particularly as regards competition and trade".

The declaration of intent is relevant but, as we saw above, competition policy had already provided the possibility to apply development policy objectives. Research and development agreements between companies, with an effect on trade between the member states and above a certain threshold in size and market share, are subject to Community regulation on restrictive agreements. In this regard, the relevant Commission Guidelines on horizontal cooperation agreements[38] should be used as the main compass in interpreting primary law. According to the Guidelines,

> "co-operation is of a 'horizontal nature' if an agreement is entered into between actual or potential competitors. (...) Horizontal co-operation agreements can lead to substantial economic benefits. (...) On the other hand, horizontal co-operation agreements may lead to competition problems. (...) The Commission, while recognising the benefits that can be generated by horizontal co-operation agreements, has to ensure that effective competition is maintained".

---

36 Anita Pelle, 'Az Európai Unió versenyszabályozása a kutatás-fejlesztés és az innováció szolgálatában a csoportmentességi rendszereken keresztül' in Buzás Norbert (ed), *Tudásmenedzsment és tudásalapú gazdaságfejlesztés* (JATEPress, Szeged, 2005) 63:73.

37 http://ec.europa.eu/economy_finance/emu_history/documents/treaties/singleuropeanact.pdf

38 Communication from the Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (Text with EEA relevance) (2011/C 11/01).

These introductory sentences highlight the complex approach of the Commission: certain horizontal cooperation agreements can be justified based on the economic benefits they yield. However, such agreements and especially their anti-competitive dimension need to be kept under cautious scrutiny.

Regarding the types of agreements that may enjoy exemption, the Commission acknowledges that:

> "Given the potentially large number of types and combinations of horizontal co-operation and market circumstances in which they operate, it is difficult to provide specific answers for every possible scenario. These guidelines will nevertheless assist businesses in assessing the compatibility of an individual co-operation agreement with Article 101. Those criteria do not, however, constitute a 'checklist' which can be applied mechanically. Each case must be assessed on the basis of its own facts, which may require a flexible application of these guidelines".

So, when applying Article 101 paragraph (3), the case-by-case approach is encouraged. This suggests that the basically per se type of European competition policy in fact contains clearly rule-of-reason elements.[39] Nevertheless, the Commission continues to face the difficulty of finding the borderline between the two approaches.[40]

Regarding the basic principles for the assessment under Article 101, the Guidelines again defines a clear setting:

> "The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential restrictive effects on competition. The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3). If the pro-competitive effects do not outweigh a restriction of competition, Article 101(2) stipulates that the agreement shall be automatically void".

---

39 Christian Kirchner, 'Goals of Antitrust and Competition Law Revisited' in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (Mohr Siebeck, Tübingen, 2007) 27:36..

40 Ernest Gellhorn, William Evan Kovacic and Stephen Calkins, *Antitrust Law and Economics.* (Thomson West, St. Paul, MN, 2004).

The text of the Guidelines is rather suggestive by literally speaking about putting the pro-competitive and anti-competitive elements of an agreement into the two pans of the scale and looking at which pan weighs more. However, it is not at all easy to define those 'elements' that should be put in the pans, especially in a measurable and comparable way. Even if so, very rarely does it happen that an exempt agreement is ex-post found to be subject to prohibition.

All in all, the Guidelines strives for indicating the borderlines of restriction as clearly as possible:

> "For an agreement to have restrictive effects on competition within the meaning of Article 101(1) it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. (...) Restrictive effects on competition within the relevant market are likely to occur where it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation. (...) Horizontal co-operation agreements between competitors that, on the basis of objective factors, would not be able to independently carry out the project or activity covered by the co- operation, for instance, due to the limited technical capabilities of the parties, will normally not give rise to restrictive effects on competition within the meaning of Article 101(1). (...) Horizontal co-operation agreements may limit competition in several ways. The agreement may be exclusive (...), require the parties to contribute such assets that their decision-making independence is appreciably reduced; or affect the parties' financial interests in such a way that their decision-making independence is appreciably reduced".

The Guidelines also describes the possible restrictions on competition, both from the objective and impact points of view. The conclusion is drawn that a major factor to be investigated is how the agreement influences (potentially: reduces) the independence of the actors.

Regarding exemptions, efficiency gains enjoy special attention:

> "Information exchange may lead to efficiency gains. Information about competitors' costs can enable companies to become more efficient if they benchmark their performance against the best practices in the industry and design internal incentive schemes accordingly. Moreover, in certain situations information exchange can help companies allocate production towards high-demand markets (for example, demand information) or low cost companies (for example, cost information). The likelihood of those types of efficiencies depends on market characteristics such as whether companies compete on prices or quantities and the nature of uncertainties on the market. (...) Exchange of consumer data between companies in markets with asymmetric information about consumers can also give rise to efficiencies".

What we see in this passage of the Guidelines is the very reasoning for exemptions based on potential pro-competitive effects.

Turning our attention to the research and development agreements potentially exempt from prohibition, the Guidelines states that:

> "A research and development agreement may bring together different research capabilities that allow the parties to produce better products more cheaply and shorten the time for those products to reach the market".

A separate chapter (Chapter 3) is dedicated to research and development agreements. It starts with the definition of the concept:

> "R&D agreements vary in form and scope. They range from outsourcing certain R&D activities to the joint improvement of existing technologies and co-operation concerning the research, development and marketing of completely new products. They may take the form of a co-operation agreement or of a jointly controlled company. This chapter applies to all forms of R&D agreements, including related agreements concerning the production or commercialisation of the R&D results".

The definition is rather clear. However, it calls for cautiousness about the relations of such agreements to intellectual property rights as these may appear as barriers to entry to markets.[41] Accordingly, impact on competition in innovation is crucial. In this respect, the Guidelines states that:

> "R&D co-operation may not only affect competition in existing markets, but also competition in innovation and new product markets. This is the case where R&D co-operation concerns the development of new products or technology which either may –if emerging– one day replace existing ones or which are being developed for a new intended use and will therefore not replace existing products but create a completely new demand. The effects on competition in innovation are important in these situations, but can in some cases not be sufficiently assessed by analysing actual or potential competition in existing product/technology markets. In this respect, two scenarios can be distinguished, depending on the nature of the innovative process in a given industry".

The Commission seems to be aware of the potential restrictive effects of research and development agreements, including foreclosure problems:

> "R&D co-operation can restrict competition in various ways. First, it may reduce or slow down innovation, leading to fewer or worse products coming to the market later than they otherwise would. Secondly, on product or technology markets the R&D co-operation may reduce significantly competition between the parties outside

[41] Steven Anderman, *The interface between intellectual property rights and competition policy* (Cambridge University Press, Cambridge – New York, NY, 2007).

> the scope of the agreement or it may make anti-competitive coordination on those markets likely, thereby leading to higher prices. A foreclosure problem may only arise in the context of co-operation involving at least one player with a significant degree of market power (which does not necessarily amount to dominance) for a key technology and the exclusive exploitation of the results".

On the other hand, the potential pro-competitive effects are also revealed:

> "Many R&D agreements –with or without joint exploitation of possible results– bring about efficiency gains by combining complementary skills and assets, thus resulting in improved or new products and technologies being developed and marketed more rapidly than would otherwise be the case. R&D agreements may also lead to a wider dissemination of knowledge, which may trigger further innovation. R&D agreements may also give rise to cost reductions. (...) In general, it is more likely that an R&D agreement will bring about efficiency gains that benefit consumers if the R&D agreement results in the combination of complementary skills and assets. The parties to an agreement may, for instance, have different research capabilities. If, on the other hand, the parties' skills and assets are very similar, the most important effect of the R&D agreement may be the elimination of part or all of the R&D of one or more of the parties".

Research and development agreements are regulated in a block exemption regulation.[42] The regulation replaced its predecessor[43] in 2010, without changing its philosophy, basic approach or general framework. The (original) block exemption regulation was called forth by the double requirement of protecting competition and ensuring the legal security for R&D. The regulation (both the old and the new one) manifests this dichotomy as the conditions of exemptions aim at ensuring that

- the agreement is in fact a research and development agreement;
- that it strives for reaching and harvesting the joint R&D objectives;
- and that it does not perform any of the characteristics of hard-core restrictions.

Conditions for exemption can be summarised as follows:

- agreements should not restrict any other activities of the parties (including other R&D activities);

---

[42] Commission Regulation (EU) No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (Text with EEA relevance) (L 335/36).

[43] Commission Regulation (EC) No 2659/2000 on the application of Articles 81(3) of the Treaty to categories of research and development agreements (L 304/7).

- parties may utilise results of the agreement freely and independently of the other party;
- no restriction may be prescribed for the time period after the expiration of the agreement;
- agreement should not prescribe conditions for output or distribution;
- agreement should not aim at fixing prices;
- consumer choice should not be violated due to the agreement;
- agreement should not aim at division of markets;
- agreement should have as an objective the fulfilling of market needs.

Although not a case on restrictive agreements, the importance of consumers' access to and choice of innovative products and services is one of the Commission's major arguments in the ongoing investigation against Google.[44]

In relation to research and development agreements, the relevant block exemption regulation provides a rather clear scheme which companies are incited to comply to but some of the borderlines between encouraged and discouraged practices and, even more so, the answer to the question how the imagined beam of that imagined scale for measuring pro- and anticompetitive elements would eventually tilt, continue to be ambiguous.

5. Application of the rules on technology transfer agreements

The regulation on technology transfer agreements currently in force[45] was adopted in the course of the latest major competition policy reform in 2014. The regulation's starting point is rather different as that of the regulation on research and development agreements by declaring that technology transfer agreements in general foster economic efficiency

44 Case No. Antitrust 39740, Google.

45 Commission Regulation (EU) No 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (L 93/17).

and competition by reducing parallelism in R&D activities while, at the same time, foster corporate R&D activities, promote innovation, and encourage the dissemination of innovation and know-how, thus resulting in an enhanced competition in product markets.[46] Together with the regulation, the Commission also published a Guidelines on technology transfer agreements[47]. Just like the Guidelines on horizontal cooperation agreements, it states that

> "Each case must be assessed on its own facts and these guidelines must be applied reasonably and flexibly".

So, there is again room for case-by-case investigation and rule-of-reason policy application.

The Guidelines defines the relevant factors to be investigated:

> "In the application of Article 101 of the Treaty to individual cases it is necessary to take due account of the way in which competition operates on the market in question. The following factors are particularly relevant in this respect:
>
> (a) the nature of the agreement;
>
> (b) the market position of the parties;
>
> (c) the market position of competitors;
>
> (d) the market position of buyers on the relevant markets;
>
> (e) entry barriers and;
>
> (f) maturity of the market;"

Technology transfer is grabbed in a broad sense:

> "The concept of 'technology rights' covers know-how as well as patents, utility models, design rights, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, plant breeder's certificates and software copyrights or a combination thereof as well as applications for these rights and for registration of these rights. (...)The concept of 'transfer' implies that technology must flow from one undertaking to another".

Similarly to the approach to horizontal cooperation agreements, hard core restrictions are in any circumstances prohibited. Regarding other possible negative effects, these include the following:

> "1. reduction of inter-technology competition;

---

46 Steven D. Anderman and John Kallaugher, *Technology transfer and the new EU competition rules – Intellectual property licencing after modernisation* (Oxford University Press, Oxford 2006).

47 Commission Notice, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (Text with EEA relevance) (2004/C 101/02).

2. foreclosure of competitors by raising their costs, restricting their access to essential inputs otherwise raising barriers to entry; and
3. reduction of intra-technology competition."

The Guidelines implies that a thorough knowledge on the relevant market(s) and the relevant technology/technologies is essential when assessing technology transfer agreements.

As regards the potential positive effects, there are many of these mentioned and described in the Guidelines. Related to the efficiency criterion, the Commission's approach is as follows:

> "It is thus presumed that the agreements give rise to economic efficiencies, that the restrictions contained in the agreements are indispensable to the attainment ofthese efficiencies, that consumers within the affected markets receive a fair shareof the efficiency gains and that the agreements do not afford the undertakings concerned the possibility of eliminating competition. (...) Even restrictive licence agreements often also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. (...) Licence agreements have the potential of bringing together complementary technologies and other assets allowing new or improved products to be put on the market or existing products to be produced at lower cost. (...) Another example of potentially efficiency enhancing licensing is where the licensee already has a technology and where the combination of this technology and the licensor's technology gives rise to synergies. (...) Such efficiencies can take the form of cost savings or the provision of valuable services to consumers. (...) A further example of possible efficiency gains is to be found in agreements whereby technology owners assemble a technology package for licensing to third parties. Such pooling arrangements may in particular reduce transaction costs".

As the previous block exemption regulation on technology transfer agreements expired on 30 April 2014, the Commission carried out a public consultation on the topic between 6 December 2011 and 3 February 2012.[48] The results of the consultation were assessed and a proposal for a new regulation was drafted and consulted.[49] The newly drafted proposed block exemption regulation and guidelines appear to be substantially similar to the current ones. However, there are a few notable changes[50]:

– Passive sales exhausting certain conditions are to be subject to a case-by-case investigation.

48 http://ec.europa.eu/competition/consultations/2012_technology_transfer/index_en.html

49 http://ec.europa.eu/competition/consultations/2013_technology_transfer/index_en.htm

50 http://www.sjberwin.com/insights/2013/07/26/changes-to-the-technology-transfer-block-exemption

- Exclusive grant-backs would also require individual assessment in the future.
- Amendment has been made to the provisions on no-challenge clauses.
- The revised block exemption regulation clarifies that it will only apply if other potentially applicable block exemptions, being those covering R&D and specialisation agreements, do not apply.
- Certain settlement agreements may contravene Article 101.

As we can see, the proposed changes are of a technical nature and target minor issues compared to the objective and scope this part (starting with paragraph As the) should be put before the quotes from the Guidelines. An exciting new issue brought into the assessment of technology transfer cases is the encouragement of application of the FRAND (fair, reasonable, and non-discriminatory terms) approach on behalf of the Commission, connected to the "patent ambush" challenge. As Commissioner Almunia phrased it:[51]

> "Both competition authorities and the courts should intervene to ensure that standard-essential patents are not used to block competition."

The most plausible example for the application of the approach is the currently ongoing case of the US-based software company MathWorks.[52] Under EU antitrust legislation, the Commission is investigating whether the company has restricted competition through end-user licences and interoperability information. In the investigation, the Microsoft case[53] serves as an important benchmark.

6. Conclusion

If we examine the development of European economic integration, we can see that it has always been put forth by a constant political will. Where are we today in this respect? There are clear signs that the common political will is highly challenged these times. Whatever the

---

51 Joaquín Almunia, *Higher Duty for Competition Enforcers*, speech told at the International Bar Association Antitrust Conference in Madrid on 15 June 2012, European Commission SPEECH/12/453.

52 Case No. Antitrust 39840, MathWorks.

53 Case COMP/C-3/37.792.

stance, competition can still be enhanced further. At the same time, the exploitation of competitive advantages deriving from integration and the common market varies by Member States.[54] Nevertheless, it is undisputable that European integration has been based on competition and has fostered its intensification.[55]

If competition authority does not condemn restrictive agreements categorically but encourages them instead (e.g. by exemptions), there is the threat that the authority itself fosters cartelisation.[56] Comparing American and European competition regulation schemes in a historical perspective, Europe has shown, compared to the US, a vast and persistent confidence towards governments and great tolerance towards economic dominance, explaining why legal possibilities for exemption could endure for such a long time.[57]

When examining the broader economic policy context, we see that, after 2000, the economic policy strategies of the EU (Lisbon Strategy and its restart in 2005 or, most recently, the Europe 2020 strategy) handle competition policy as of strategic importance: by now, inner competition has evidently become a tool for international competitiveness. The renewed strategy explicitly emphasises the importance of competition in respect of growth and the creation of workplaces.[58] The Commission is striving for shaping European regulatory environment so that it provide answers to the challenges imposed by today's economy that is more and more knowledge- and technology-based. How do we use this tool? At present, the member states are showing a rather large dispersion in their one word![59] Such dispersion is a challenge in itself that should be

54 Giuliano Amato, *Antitrust and the Bounds of Power – The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing, Oxford, 1997).

55 Roland Vaubel, 'Ordnungspolitische Konsequenzen der europäischen Integration' in Lüder Gerken and Otto Graf Lambsdorff (eds), *Ordnungspolitik in der Weltwirtschaft* (Nomos Verlagsgesellschaft, Baden-Baden, 2001) 188:191.

56 Eleanor Morgan, 'Controlling Cartels – Implications of the EU Policy Reforms' [2009] European Management Journal, 27, 1, February, 1:12.

57 Clifford Jones, 'Foundations of Competition Policy in the EU and USA – Conflict, Convergence and Beyond' in Hans Ullrich (ed.): *The Evolution of European Competition Law (*Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2006) 17:37.

58 European Commission, *Working together for growth and jobs – A new start for the Lisbon Strategy*. COM(2005) 24, Brussels.

59 For more information, see: http://ec.europa.eu/europe2020/making-it-happen/key-areas/index_en.htm

addressed, and in a complex approach, in which competition policy has a part.[60]

European regulation on restrictive agreements has still not turned away from the original objectives stemming from an attitude based on permissiveness. As a matter of fact, this has been the very acknowledgement of diversity and complexity. Nevertheless, we continue to face a delicate issue in this respect as cooperation among competitors has been substantially problematic, as acknowledged by the EEC Treaty already. Still, European competition regulation does not exclude the possibility that such cooperation may result in efficiency. Efficiency may derive from the joint development of standards, from the harmonisation of procedures (which thus become more transparent), and from economies of scale. The history of European competition regulation shows that these convictions have enjoyed wide acceptance and support. Even the 2011 Guidelines on horizontal cooperation agreements[61] highlights the positive impacts. The philosophy is spectacularly manifested in the Commission's latest decision on 4 December 2014 by clearing the acquisition of Nokia's mobile device business by Microsoft.[62]

It is rather clear that the European Commission has repeatedly strengthened the legitimacy of exemptions from the prohibition on restrictive agreements. The Commission Communication of 2001[63] preceding the current one and basically stating the same served as a significant ground for leaving the respective article of the Treaty unchanged during the adoption of the Lisbon Treaty[64].

On the other hand, Article 101, and especially paragraph (3), has constantly been scrutinised. Critiques have usually pointed out that the European regulation on horizontal restrictive behaviours is in fact

60 WEF, *The Europe 2020 Competitiveness Report: Building a More Competitive Europe* (World Economic Forum, Geneva, 2012).

61 Communication from the Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (Text with EEA relevance) (2011/C 11/01), analysed in Chapter 4 detail.

62 Case No. M.7047 Microsoft/Nokia.

63 Commission Notice, *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* (Text with EEA relevance) (2001/C 3/02).

64 *Consolidated Version of the Treaty on the Functioning of the European Union* (C 115/49).

an active industrial policy instrument which serves the strengthening of the SME sector and outward competitiveness.[65] Therefore, the substantial question behind the logic of Article 101 paragraph (3) is whether positive outcomes outweigh the negative effects of restriction, and whether they really contribute to competitiveness. In this respect it is somewhat calming that hard-core restrictions will most probably never enjoy exemption as paragraph (1) specifies these as prohibited practices. Still, cooperation agreements enjoying exemption may raise doubts in cases when the objective is not to fix the price, the output, or the segmentation of the market but such impacts occur while companies successfully argue in favour of their agreement. Another case is when, 'thanks to' automatic exemption, companies pretend pro-competitive cooperation to hide restriction and thus escape sanctions.[66]

The next dilemma is that of Schumpeter: what serves innovation better, competition or protection? The question gains a new interpretation with the development of intellectual property rights. The problem has been appreciated especially in the most recent times as technology plays an ever greater role in the global economic performance.[67] The competition regulation issue connected to property rights, still waiting to be fully answered, is whether patents create barriers to entry and, if yes, how regulation should handle these. The justification of the protection of know-how dates back to 1986 with the Pronuptia judgment of the European Court.[68] At the level of policy objectives, competition and innovation policies are in fact closely related as both of them aim at promoting economic welfare. Regulation should be rooted in these close relations.[69]

---

65 Wulf-Henning Roth, 'Strategic Competition Policy – A Comment on EU Competition Policy' in Hans Ullrich (ed), *The Evolution of European Competition Law* (Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2006) 38:52.

66 Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart Publishing, Portland, OR, 2007).

67 Phillip Beutel, 'The Intersection of Antitrust and Intellectual Property Economics – A Schumpeterian View' in Lawrence Wu (ed), *Economics of Antitrust – New Issues, Questions, and Insights* (NERA Economic Consulting, White Plains, NY, 2004) 131:140.

68 Judgment of the Court of 28 January 1986, Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis, Case No. 161(84.

69 François Lévêque and Howard Shelanski (eds), *Antitrust, Patents and Copyright. EU and US Perspectives* (Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2005).

Eventually, we come back to the principal question[70]: should competition policy serve industrial policy objectives (as well)? We could see that European competition policy has never been 'clean' competition policy but has encompassed industrial, economic, or even integration policy elements. Buigues, Jacquemin and Sapir grasped the core of this dilemma back in 1995[71] when they claimed that, as all the EU policies refer to the same economy, the emphasis should be put on policy harmonisation. Their conclusion is perhaps more adequate in our post-crisis times than ever before as lack of successful harmonisation results in loss of efficiency, credibility is questioned, and uncertainty arises for private and public actors as well. Petit reframes the issue by asking whether competition policy supports or undermines other policies that seek to foster innovation, e.g. IPR policy.[72] Anyhow, the optimum is realised through a policy mix – not an easy task to commingle the right elements in the right proportions and to maintain the combination ever-optimal. This definitely gives legitimacy for an active competition policy on the European policy palette.

The EU has lately been on the position that competition regulation should exclusively aim at maximising consumer welfare[73], to which the Treaty in fact gives the basis, and that industrial policy objectives and competitiveness should be served this way.[74] Only such a decisive distinction makes it possible that competition regulation encourages companies to maintain or strengthen their positions by improving their own effectiveness. For this reason, the prevalence of economic aspects has been introduced in recent years' competition law investigations, under the scope of the 'more economic approach', a methodology under dynamic development.[75]

---

70 Ádám Török, *Ipar- és versenypolitika az Európai Unióban és Magyarországon – Helyzetértékelés.* (Integrációs Stratégiai Munkacsoport, Budapest, 1997).

71 Pierre Buigues, Alexis Jacquemin and André Sapir (eds), *European Policies on Competition, Trade and Industry – Conflicts and Complementarities* (Edward Elgar, Aldershot, 1995).

72 Nicolas Petit, *Does EU competition policy sufficiently promote companies' investment & innovation? R&D and technology transfer cooperation, abuse of dominant positions and merger control policy*, Speech told at the conference Fostering growth: reinforcing the EU internal market, held at CEU San Pablo University on 28-29 October 2013.

73 Katalin Judit Cseres, *Competition Law and Consumer Protection* (European Monographs, 49, Kluwer Law International, The Hague, 2005).

74 Jürgen Basedow, 'Konsumentenwohlfahrt und Effizienz – Neue Leitbilder der Wettbewerbspolitik?' [2007] *Wirtschaft und Wettbewerb,* 7, 8, 712:715.

75 Roger van den Bergh and Peter Camesasca, *European Competition Law And Economics – A Comparative Perspective* (Sweet&Maxwell, London, 2006).

As we could see, case-by-case investigations continue to enjoy certain freedom which requires great wisdom on behalf of competition authorities, be they national or Community level bodies. The Freiburg scholars knew as early as in the 1930s that such collective wisdom should be embodied in an economic constitution.[76] Based on the Freiburgian theoretic framework of Ordoliberalismus, the principles constructing the economic constitution should be applied in an active way, which they called Ordnungspolitik.[77] In some respect, the European competition regulation can be regarded as an economic constitution for the European internal market of the 21st century. On the other hand, impreciseness in the rules and in their application gives room for discretion, which is not necessarily favourable in the case of a constitutional framework.

[76] Nicola Giocoli, 'Competition versus property rights: American antitrust law, the Freiburg School, and the early years of European competition policy' [2009] Journal of Competition Law & Economics, 5(4), 747:786.

[77] Otto Schlecht, *Ordnungspolitik für eine zukunftsfähige Marktwirtschaft – Erfahrungen, Orientierungen und Handlungsemfehlungen* (Ludwig-Erhard-Stiftung, Bonn, 2001).