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The Interpretation of Article 101 (3) of the TFEU by the European Commission

Abstract

It should be noted that the wording of the primary law provision in Article 101 (3) TFEU is in fact open to classification both as a legal exception and as a general prohibition subject to authorisation. In fact, the interpretation of the primary law provision is strongly influenced by the perspective of secondary law. The purpose of this article is to provide an interpretation of Article 101 (3) TFEU. In the following, the factual requirements will be described from a general perspective in order to facilitate a later understanding of the interpretation of Article 101 (3) TFEU for different types of agreements.

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1 Introduction

This article examines the antitrust challenge of finding scenarios that qualify for an exemption from the ban on cartels under Article 101 (3) TFEU. Before the actual problems of the exemption can be addressed, the legal nature and the requirements of Aricle 101 (3) TFEU must first be explained (Whish and Bailey, 2021). Article 101 (3) TFEU reads:

„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".

1.1. Objective and methodology

The main objective of this paper is to provide an interpretation of Article 101(3) TFEU. In the following, the factual requirements are described in a general perspective in order to enable a later understanding of the interpretation of Article 101 (3) TFEU for different types of agreements. With regard to the characteristics of this article, we apply the scientific methods of knowledge. Apart from the scientific methods of knowledge, we have also used the analytical and descriptive method to approach and analyze the legal situation. We have presented different views on the legal regulation and interpretation of the studied terms. In order to achieve our goal, we

studied the legislation, scientific literature, and case law. The data were collected from the scientific literature through in-depth document analysis. This allowed us to reach reliable and valid conclusions and results.

2 Legal nature of Article 101 (3) TFEU

The legal nature of Article 101(3) TFEU has been disputed since the deliberations on the introduction of the legal norm. The discussion lasted until the deliberations on Regulation No. 17/62. In addition, the adoption of the block exemption regulations can also be understood as an approximation of the exemption system, although here too the idea was not fully implemented due to the lack of direct application of Article 101 (3) TFEU. It remains to be noted that the wording of the primary law provision of Art. 101 (3) TFEU is actually open to both classification as a legal exception and as a general prohibition subject to authorisation[1]. In fact, the interpretation of the primary law provision is strongly influenced by the perspective of secondary law. With the Regulation No. 1/2003 and the accompanying procedural „introduction" of the legal exemption, secondary law is still the driving force, as before. In the day-to-day work with Article 101 (3) TFEU, the individual exemption is treated as a legal exception under Union law.

2.1. Understanding of the requirements of Article 101 (3) TFEU

The starting point for the considerations will be the guidelines established by the European Commission for the interpretation of Article 101 (3) TFEU. This starting point is deliberately chosen here as well as in the further course of the work. The author is aware that the approach is open to criticism insofar as Article 101 (3) TFEU – in its nature as EU primary law – is to be interpreted on its own and, moreover, on the basis of systematic and teleological position in the EU Treaty[2]. However, this fact does not alter

1 Rastislav Funta, Liudmyla Golovko, Filip Juriš, *Európa a Európske právo*. 2. doplnené a rozšírené vydanie, Brno: MSD, 2020.

2 Davies Gareth, „Does the Court of Justice own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation" *European Law Journal*, (2018):

the practical need for reliable guidance in the interpretation of the exception rule. For example, when dealing with the question of an individual exemption in relation to a specific factual situation, we should always seek legal guidance by consulting the relevant publications of the European Commission. In a second step, if the facts of the case are not clear or the result is not satisfactory from a legal point of view, the case law of the ECJ will also be consulted in order to provide a positive answer to the client's request. However, this fact does not change the practical need of the legal user for a reliable guideline in the interpretation of the exemption standard.

2.2. Improving the production or distribution of goods or promoting technical or economic progress

The first exemption requirement set out in Article 101 (3) TFEU[3] is divided into four variants that are equivalent to each other. According to this, as a result of the agreement, there must be either an improvement in the production of goods (i) or an improvement in the distribution of goods (ii) or the promotion of technical progress (iii) or the promotion of economic progress (iv). First of all, the European Commission makes it clear that the first exemption condition does not only cover improvements in the field of goods, but it is of course also possible to cover progress in the field of services. On the one hand, it is undoubtedly correct and not objectionable from the point of view of competition theory that cost savings generated solely on the basis of market power cannot lead to an individual exemption[4]. Similarly, the European Commission is not wrong when it states that market sharing and price fixing are not pro-competitive and therefore cannot be taken into account as an individual exemption under Article 101 (3) TFEU. Cost savings that have only been achieved as a result of

358–375.

3 András Osztovits, „Quantifying Harm in Action for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union – Some Remarks on the Draft Guidance Paper of the European Commission", [in:] *Recent Developments in European and Hungarian Competition Law*, ed. András Osztovits. Károli Gáspár Református Egyetem Állam-és Jogtudományi Kar. 2012.

4 Jiří Kindl, Jan Kupčík, Stanislav Mikeš, Pavel Svoboda, *Soutěžní právo*. Praha: C.H. Beck. 2021.

market power may very well be efficiency gains on the basis of a systematically correct interpretation of the first exemption requirement. However, they are not sufficient for an affirmation of Article 101 (3) TFEU. This follows from the fact that, due to the market power[5] of the parties it is unlikely that the gains are passed on to consumers in the form of price reductions, as there is insufficient competitive pressure to do so. In addition, market power becomes relevant in the fourth condition of the exemption. In this case, the market power of the parties to the agreement may be such that they are not only able to set prices autonomously without opposition from competitors or the other side of the market in the form of consumers.

2.2.1. Method for determining efficiency gains

In the European Commission's view, the starting point for determining the efficiency gains is to examine the link between the agreement and the claimed efficiency gains, as well as their value, in order to be able to carry out the balancing of pro- and anti-competitive effects required by Article 101 (3) TFEU.

It is interesting to note at this point that the European Commission assumes that the overall task of Article 101 (3) TFEU is to enable a „balancing" of the positive and negative effects of Article 101 (3) TFEU. This balancing process is thus not to be located at one of the conditions for exemption or to stand "above" Article 101 (3) TFEU as such. Rather, according to the wording of the guidelines, the European Commission assumes that the examination of the four conditions laid down by primary law in the form of the TFEU represents the balancing of the anti-competitive effects with the pro-competitive effects[6]. In this context, each of the conditions has its own function.

But what are efficiency gains? At this point, one might be tempted to equate the distinction between objective and subjective efficiencies as the distinction between economically beneficial (and thus exempted under Article 101 (3) TFEU) and (merely) economically beneficial (thus, however, not exempted) advantages. However, the European Commission does not qualify subjective efficiencies as efficiency gains worthy of consideration

5 John Lopatka, „Market Definition?" *Review of Industrial Organization*, 39 (1) (2011): 69–93.

6 Peter Miskolczi-Bodnár, Robert Szuchy, „Joint and Several Liability of Competition Law Infringers in the Legislation of Central and Eastern European Member States" *Yearbook of Antitrust and Regulatory Studies*, vol. 10 (15) (2017): 85–109.

under the first exemption condition of Article 101(3) TFEU[7]. The European Commission's guidelines do not mention the eligibility of subjective efficiencies (at least under the first exemption condition).

First, it is not necessary to try to exclude horizontal price agreements or even market sharing (as typical examples of hardcore restrictions) from the scope of the first condition. This is because these are in fact per se prohibited agreements which must be excluded from the scope of the individual exemption by the second and fourth conditions respectively. On the other hand, the view that the economic benefits of the parties to the agreement cannot be subsumed under the first condition of the individual exemption must be countered by the fact that it would then not be possible to exempt, for example, classically exempted situations in the area of purchasing or marketing agreements in which the parties to the agreement achieve improvements within the meaning of the first condition of the individual exemption solely through economic efficiency in the form of economies of scale[8].

The European Commission's second condition is not entirely clear as to its relevance for the examination of the first condition. According to this condition the link between the agreement and the efficiencies has to be examined or, more precisely, the question whether there is a sufficient causal link between the anticompetitive agreement and the claimed efficiencies has to be answered. According to the European Commission, such a link is to be assumed if the efficiency gains are generated either on the basis of the respective economic activities of the parties to the agreement (licensing; joint research and development) (i) or otherwise in the relevant economic sector (reduction of costs in the relevant economic sector) (ii). This brings us to the second aspect of the case: When Henry Ford invented the assembly line, there was indeed a cost reduction in the entire automobile (manufacturing) industry. However, this did not occur through an (anticompetitive) agreement. The cost reduction in the entire passenger car sector followed the transfer of this new technology based on an invention by one company[9] (Peráček, 2020). In licensing the technology,

7 Alison Jones, Brenda Sufrin, Niamh Dunne, EU *Competition Law: Text, Cases, and Materials*. Oxford: Oxford University Press. 2019.

8 Alexander Maziarz, „Do Non-Economic Goals Count in Interpreting Article 101(3) TFEU?" *European Competition Journal*, vol. 10 (2), (2015): 341–359.

9 Tomáš Peráček, „The Perspectives of European Society and the European Cooperative as a form of Entrepreneurship in the Context of the Impact of European Economic Policy" *Online Journal Modelling the New Europe*, 34 (2021): 38–56.

however, Ford faced its competitors vertically, not horizontally. It is not for nothing that the Commission Regulation No. 772/2004 distinguishes between licensing agreements between competitors and those between non-competitors.

Thus, in the example of the introduction of the assembly line, it cannot be said that an improvement in the overall costs of an entire industry was a direct result of the beneficial effects of an otherwise anticompetitive agreement. The improvement was merely a consequence of the invention of the technology. Nor can the individual license agreement with the individual car manufacturer (to the extent that it contained restrictions of competition) be regarded as the basis for the improvement in the overall cost structure of the car industry, since it always only led to an improvement in the cost structure of the respective manufacturer taking the license[10].

With regard to the determination of the value of an efficiency gain, the European Commission itself refers to the explanations regarding appropriate consumer participation. According to the methods to be applied in the opinion of the European Commission, unsubstantiated claims of possible efficiency gains must be rejected.

2.2.2. Various efficiency gains

The European Commission assumes an umbrella concept of efficiency gains comprising the categories enumerated in Article 101(3) TFEU[11]. Instead of using the categories enumerated in Article 101(3) TFEU, the European Commission uses its own subdivision of supersets of efficiencies and distinguishes between cost savings (i) and qualitative efficiencies (new, better products, etc.). The European Commission emphasizes that the types of efficiencies should not be regarded as an exhaustive list, but merely as examples. Since the European Commission explicitly refers to „types" of

10 Tomáš Peráček, František Vojtech, Mária Srebalova, Bernard Pekar, Beáta Mikusova-Merickova, Matej Horvat, „Restriction on the Re-Export of Medicinal Products and the Supervision of Compliance with it by Public Administration Bodies" *European Pharmaceutical Journal*, vol. 65 (2017): 24–30.

11 Pieter Cleynenbreugel, „Article 101 TFEU's Association of Undertakings Notion and Its Surprising Potential to Help Distinguish Acceptable from Unacceptable Algorithmic Collusion" *The Antitrust Bulletin*, (2020): 423–444.

efficiencies at this point, this can only be understood in the systematics of the guidelines as meaning that the European Commission assumes that there are other types of efficiencies in addition to cost savings and qualitative efficiencies, but that these are not addressed in the guidelines.

2.2.2.1. COST SAVINGS AND QUALITATIVE EFFICIENCY GAINS

The European Commission cites as examples of situations where cost savings can be achieved the development of new production techniques and processes, synergies from the pooling of assets, economies of scale and scope, improvements in production planning, the reduction of expensive inventories, the improvement of capacity utilization or the overall rationalization of production.

The European Commission considers the possible qualitative efficiencies to be equivalent to efficiencies in the form of cost savings. Thus, according to the European Commission, qualitative efficiencies may arise in the sense that improvements in goods and services would either not have been achieved at all (i), would have been achieved later (ii) or would have been achieved only at higher cost (iii) in the absence of an agreement.

Agreements that may give rise to efficiencies include research and development agreements. Guidelines on the application of Article 81(3) of the Treaty states, that "An example would be A and B creating a joint venture for the development and, if successful, joint production of a cell-based tyre. The puncture of one cell does not affect other cells, which means that there is no risk of collapse of the tyre in the event of a puncture. The tyre is thus safer than traditional tyres. It also means that there is no immediate need to change the tyre and thus to carry a spare. Both types of efficiencies constitute objective benefits within the meaning of the first condition of Article 81(3)".

The European Commission believes that the combination of complementary technologies has the potential not only to reduce costs but also to create synergies. Examples cited by the European Commission are the pooling of production facilities that can be used to manufacture new or improved products, or the dissemination of a new or improved technology through licensing agreements. In addition, the Commission sees the possibility of qualitative efficiency gains in distribution agreements along the lines of "Higher, faster, further!". Efficiency gains are said to occur when a product (service) is better tailored to the needs of the consumer. In the case of qualitative efficiency gains, the question is generally raised as to how the question of efficiency gains in this area is to be delimited.

According to the conventional approach of the European Commission in its guidelines, the requirement of appropriate consumer participation is usually not applicable in the case of qualitative efficiency gains, since consumer participation is a mandatory consequence of the affirmation of the efficiency gain.

The statements made by the European Commission in the guidelines on Article 101 (3) TFEU are to be criticized in two respects for reasons of consistency and stringency (Ibáñez, 2016). On the one hand, the content of the statements on the efficiency gains is not consistent with the logic of the guidelines themselves. The European Commission defines two types of efficiencies – cost savings on the one hand and qualitative efficiencies on the other. However, the European Commission attributes qualitative efficiencies to cost savings using its own definitions of the two types of efficiencies. On the other hand, the European Commission contradicts itself by citing commercial improvements by the parties as examples of cost savings where there are no real qualitative efficiencies under the „wrong" heading of cost savings. Elsewhere, however, the European Commission explicitly excludes such commercial improvements as merely "subjective" benefits from the scope of the first condition for exemption and describes them as improvements that do not deserve to be taken into account and do not qualify for individual exemption.

2.3. Fair participation of consumers in the profits made

Before discussing the Guidelines' view on the interpretation of the second exemption requirement of adequate consumer participation, it is first necessary to clarify the systematic relationship between the first two exemption requirements. There is no advantage in prioritizing the question of indispensability before considering adequate consumer participation. Bringing forward the test of whether the restriction is indispensable to achieve efficiencies obscures the view of the relationship between efficiencies and consumer participation[12]. The difficulty of the systematic interpretation of the first two conditions for exemption can be explained by the fact that, on the one hand, one can succumb to the attempt to consider the conditions of Article 101 (3) TFEU in isolation. However, an isolated

12 Gunnar Niels, Helen Ralston, „ Two-Sided Market Definition: Some Common Misunderstandings" *European Competition Journal*, 17:1. (2021): 118–133.

consideration of efficiency gains and consumer participation hardly leads to the goal. The isolated consideration can too easily lead to the assessment that either one or the other condition is actually superfluous because its function is already covered by the other. If, for example, too much attention is paid to the concept of "efficiency gain", the term „gain" unintentionally becomes synonymous with appropriate consumer participation.

In its guidelines on the interpretation of Article 101 (3) TFEU, the European Commission takes a position that purely subjective improvements by the parties to the agreement are not suitable for consideration as efficiency gains. In doing so, the European Commission[13] fails to recognize from the outset that, for example, the case group of rationalization agreements can only be explained as a sub-case of efficiency gains by subsuming purely subjective (i.e. commercial) gains of the parties to the agreement under the first condition for exemption. The attempt to exclude the purely commercial gains of the parties to the agreement by means of the first condition for exemption is misguided from the outset. It is precisely the economic – purely subjective – benefits that can be captured by the term „efficiency gains". Attempts to include only economic benefits under the first exception are unsuccessful.

The attempt to understand the concept of efficiency gains in the sense of welfare gains understood as economic added value cannot lead to a successful interpretation of Article 101(3) TFEU[14]. It is solely the task of the first condition for exemption to determine whether the parties to the agreement generate an economic benefit at all. If this is the case, it is the task of the second condition of reasonable consumer participation to examine whether it can be expected that the agreement will be passed on to consumers and thus increase consumer welfare. Therefore, the first condition of the exemption is primarily concerned with business benefits[15].

13 Bystrík Šramel, Libor Klimek, „The Prosecutorial Monopoly of the Slovak Public Prosecution Service: No Access to Justice for the Injured Party?" *Access to Justice in Eastern Europe*, 5 (2022): 22–45.

14 Ben Smulders, Eric Gippini-Fournier, *Some Critical Comments on the Report of the Global Competition Law Centre on the Directly Applicable Exception System and the Direct Applicability of Article 81 (3) EC: Positive Enforcement and Legal Certainty*. (2010): 1–12.

15 Zuzana Hajduova, Coronicova-Hurajova, Jana Bruothova, Michaela, „Determinants of innovativeness of Slovak SMEs" *Problems and Perspectives in Management*, vol. 19 issue 1, (2021): 198–208.

2.3.1. Interpretation given by the European Commission in the guidelines

In its guidelines, the European Commission follows the (at first glance very broad) concept of the consumer, which has been developed in its decision-making practice and has also been consistently confirmed by the ECJ (Joined cases 56 and 58–64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community). According to these guidelines, consumers within the meaning of Article 101 (3) TFEU may be all those „customers of the contracting parties" or „subsequent purchasers of the products", ranging from businesses to final consumers. The European Commission considers consumer participation to be „adequate" if the negative effects of the agreement are counterbalanced, i.e. the restriction of competition is „neutralized". The decisive factor here is that those consequences of the agreement which have a negative impact on consumers are compensated. In the European Commission's view, however, this statement should not apply in this absolute form. Accordingly, an exception should apply if two markets are linked[16] and „essentially the same group of consumers" is affected by the restriction and the efficiency gain.

Somewhat disturbing with regard to the consistent interpretation of the concept of consumer is the European Commission's statement that the society as a whole benefits if efficiency gains lead to fewer resources being required for production (i) or to higher quality products being produced, resulting in a more efficient allocation of resources (ii). Such statements of the European Commission on the one hand give reason to say that Article 101 (3) TFEU is hardly manageable, that there is legal uncertainty as to its interpretation[17]. We agree with the European Commission that consumers do not have to (appropriately) participate in every single efficiency gain. It is crucial that the negative effects of the agreement on consumers are neutralized in any case. A contrary interpretation would lead to the absurd result penalizing the parties to the agreement who

16 Václav Stehlík, Ondrej Hamuľák, Michal Petr, *Právo Evropské unie: ústavní základy a vnitřní trh* [*European Union law: constitutional foundations and the internal market*]. Praha: Leges. 2017.

17 Michal Ďuriš, Rastislav Funta, *Praktické prípady z práva Európskej únie právo*. Brno: MSD. 2021.

generate additional improvements through efficiency gains that offset the competitive disadvantages of the agreement[18], but which are only partially passed on. In the European Commission's view, when looking at how efficiency gains are passed on, an abstract standard should be applied. It is not important that it can be proven that certain individuals have benefited to an appropriate extent from an increase in efficiency. Accordingly, the focus should be on the relevant group of consumers as such. It is not a problem if there is a certain time lag before the improvements are passed on, i.e. there is a transitional period in which no compensation is paid. However, the European Commission requires the parties to the agreement to be even more efficient in order to compensate for the negative effects during the transitional period. The European Commission requires the discounting of the value of future profits to offset current losses.

In assessing whether efficiencies are passed on to consumers in the form of cost savings, the European Commission considers the characteristics and structure of the market (i), the nature and magnitude of the efficiencies (ii), the elasticity of demand (iii) and the extent of the restriction of competition (iv). In principle, all of these criteria should be taken into account. Thus, the European Commission is to be understood in the guidelines to the effect that the extent of the remaining competition is relevant for the assessment of whether efficiency gains in the form of cost savings can be expected to be passed on to the respective consumers[19] . On the cost side, the European Commission assumes in the guidelines that a reduction in variable costs (such as that made possible by a specialization agreement) is more likely to pass on efficiencies in the form of cost savings than a collaboration involving a reduction in fixed costs. In addition, the European Commission explains in the guidelines that the likelihood of cost savings being passed on increases with the elasticity of demand. At the same time, however, it rightly points out that the element of price discrimination must also be taken into account. Because a comparatively reliable prognosis about the passing on of cost savings can only be made where there is a market[20] with relatively elastic demand. In other words,

18 Elena Fifeková, Eduard Nežinský, Edita Nemcová, „Global Competitiveness of Europe: a Robustassessment" DANUBE*: Law, Economics and Social Issues Review*, 9(4), (2018): 245–260.

19 Rastislav Funta, „Social Networks and Potential Competition Issues" *Krytyka Prawa. Niezależne Studia Nad Prawem*, vol. 12, (2020): 106–118.

20 Alžběta Krausová, „Abuse of Market Power in ICT Sector" *The Lawyer Quarterly*, no. 1. (2018): 75–81.

the elasticity of demand as a criterion for assessing the second condition for exemption of cost savings is ambivalent due to the possibility of price discrimination. Unfortunately, the European Commission does not give any indication at this point as to how it intends to assess such a constellation of facts. The European Commission also points out that cost savings do not necessarily affect the entire cost structure of a company, e.g., a 6% reduction in production, with production costs accounting for 1/3 of the costs on which the price is based, results in only a 2% reduction in the product price – assuming full pass-through.

As with the question of appropriate consumer participation in cost savings, the question of passing on qualitative efficiency gains is treated separately by the European Commission. First, the European Commission confirms the author's view that the examination of the existence of an efficiency gain in the form of qualitative improvements – i.e., new, or improved products – already anticipates the examination of appropriate consumer participation, or that the result is the same in every case. The European Commission also considers it necessary to point out once again the obligation of the parties to the agreement to substantiate the claimed efficiency gains[21]. However, the second important statement on the passing on of qualitative efficiencies must be emphasized: The European Commission[22] is of the opinion that the appropriate participation of consumers in a qualitative efficiency gain can only be verified by means of an overall assessment in such a way that the participation of consumers (e.g. through an improved product) is compared with the disadvantages that the anti-competitive agreement entails for consumers. According to the European Commission's view expressed in the guidelines, it must be examined in particular whether the improved product represents genuine added value for consumers, taking into account in particular the relationship between the improvement and a price stabilization or increase.

21 Rastislav Funta, Kristína Králiková, „Obligation of the European Commission to Review National Civil Court Judgements?" *Juridical Tribune*, Volume 12. (2022): 215–226.

22 Bystrík Šramel, Peter Horvá, Ján Machyniak, „Peculiarities of Prosecution and Indictment of the President of the Slovak Republic: Is Current Legal Regulation Really Sufficient?" *Social Sciences*, 8 (2019): 1–20.

2. 4. The indispensability of restricting competition

According to the guidelines, the third exemption requirement is to be carried out within the framework of a two-stage reasonableness test. Accordingly, it must be examined firstly whether the agreement as such is „reasonably" necessary for the generation of the efficiencies and secondly whether each of the restrictions of competition is „reasonably" necessary for the attainment of the efficiencies[23]. In doing so, the European Commission emphasizes the function of the third exemption condition. According to the Commission, the test is not whether the agreement would have been entered into in the absence of the restrictions, but whether the agreement allows the relevant activities to be carried out more efficiently, i.e. whether the agreement creates more efficiencies than would have been the case without the agreement. The European Commission clarifies this statement to the effect that it is important to determine whether there is no less restrictive alternative to the agreement in question that could produce the same efficiencies. In doing so, however – as the European Commission also emphasizes – a standard must be applied that takes into account realistic market conditions[24]. In a second step, the European Commission requires the parties to the agreement to justify why the nature and extent of each restriction of competition is necessary to achieve the claimed efficiencies. A restriction should be indispensable to the attainment of the efficiencies if the efficiencies would not be achieved to the same extent without the restriction or if the probability of achieving the efficiencies would decrease without the restriction. With reference to the ECJ (T-86/95, Compagnie générale maritime and others v Commission of the European Communities), the European Commission is of the opinion that the severity of the third condition for exemption must be based on the severity of the restriction of competition.

23 Maria Patakyová, „Enhanced Digitalisation and Competition Law Enforcement in Slovakia" *TalTech Journal of European Studies*, Vol. 11. (2021): 83–101.

24 Stehlík, Hamuľák Petr, *Právo Evropské unie: ústavní základy a vnitřní trh*.

2.5. No elimination of competition: the fourth exemption requirement in the Guidelines

In the guidelines, the European Commission describes the function of the fourth condition for exemption as the protection of the institution of competition. Accordingly, the possibility of justifying agreements restricting competition finds its limit where, in the long term, only competition can lead to efficiency gains by market participants and thus deserves preference over short-term improvements in the context of anti-competitive agreements. The European Commission points out that the concept of „elimination of competition" is peculiar to EU law and therefore has no equivalent in other legal systems. However, its systematic position in relation to Article 102 TFEU must be taken into account. An agreement restricting competition cannot be exempted under Article 101 (3) TFEU if the agreement simultaneously constitutes an infringement of Article 102 TFEU, i.e. an abuse of a dominant position[25]. On the other hand, restrictive agreements by dominant companies are not always to be classified as a violation of Article 102 TFEU. This is the case, for example, when a dominant undertaking participates in a non-full-function joint venture (Šmejkal, 2020b), which is classified as restrictive of competition, but at the same time involves the pooling of significant assets.

First of all, it should be noted that it is not because of the fourth condition for exemption that conduct which is to be regarded as an abuse of a dominant position within the meaning of Article 102 TFEU is not to be exempted under Article 101(3) TFEU. It is simply not possible to derive from the fourth condition for exemption why Article 102 TFEU should oppose an individual exemption in this case. Rather, there are systematic aspects that arise from the context of the TFEU on the one hand and the nature of Article 102 TFEU on the other, which, in contrast to Article 101 TFEU, is aimed at unilateral behavior by companies that do not allow a conduct that violates Article 102 TFEU (Signoret, 2020). The reason for this lies in the nature of Article 101 TFEU, which deals with the antitrust assessment of bilateral conduct, whereas Article 102 TFEU deals with the antitrust

25 Heike Schweitzer, Justus Haucap, Wolfgang Kerber, Robert Welker, *Modernizing the Law on Abuse of Market Power*. Report for the Federal Ministry for Economic Affairs and Energy (Germany), September 17. 2018.

classification of unilateral conduct by a dominant player. Thus, a situation could arise where an agreement involving a dominant undertaking restricts competition but could in principle be exempted because the fourth condition for exemption is also fulfilled. Otherwise, however, the European Commission's interpretation of the fourth requirement for the individual exemption in the guidelines obscures the actual difference between Article 101 (3) TFEU and Article 102 TFEU. The European Commission's statements give the impression that market dominance and elimination of competition are synonymous. This is not the case, since the rest of the competition is also worthy of protection. According to the assessment of the restriction of competition under Article 101 (3) TFEU, the actual and potential effects of the agreement on competition must be examined in order to determine whether competition in the market is eliminated. According to the European Commission, this should be done by examining the interplay between the various sources of competition present in the market (i), the extent of the competitive constraint on the parties (ii) and the impact of the agreement on the extent of the competitive constraint (iii). The European Commission does not give the market share criterion any particular importance. Rather, detailed qualitative and quantitative studies should be carried out in order to be able to assess the real extent of the ability of the parties to the agreement to compete.

3 Conclusion

The interpretation of the conditions of Article 101(3) TFEU can therefore be summarized as follows: The first condition for an individual exemption is the existence of efficiencies. Two basic types of efficiencies can be distinguished: Cost efficiencies and qualitative efficiencies. Cost savings are those of the parties to the agreement. It is also decided that purely commercial improvements may well constitute efficiency gains. In the context of the first condition for exemption, it does not matter if the savings are of a purely commercial nature. This does not say anything about the final exemption possibility. Whether there are welfare gains can only be determined on the basis of the second exemption requirement. It is not necessary to exclude purely economic improvements from the scope of Article 101 (3) TFEU in order to avoid an individual exemption of hardcore restrictions.

The second exemption requirement has the task of determining whether the identified efficiencies also result in a welfare gain. Purely economic improvements generated by hardcore restrictions can be excluded from the scope of Article 101 (3) TFEU at this point of the analysis. The third exemption condition is used in the context of a competition law proportionality test to determine whether there is a less restrictive variant for generating the same efficiency gain. The fourth condition of the individual exemption forms the outer limit for an agreement. Where it has previously been found that an agreement restricts competition, but a review of the first three factual requirements revealed that the agreement produced efficiencies in which consumers receive a sufficient share and that there is no less restrictive alternative to achieve those welfare gains, it must not result in the elimination of competition. In other words, it is the view of the Union legislature that no efficiency gain can be so overwhelming as to justify shutting down competition completely. Generally speaking, if efficiency gains are in the form of cost savings, the assessment of market structure data will be the same for the second and fourth exemption requirements. Therefore, a positive verdict under the second exemption condition can hardly ever be overturned under the fourth individual exemption condition. This is different in the case of qualitative efficiency gains. The situation is different in the case of qualitative efficiencies. Here, market structure data play no role in the second exeption condition. The assessment of the respective market structure data under the fourth condition is therefore open.

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