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„The clarification of the ECJ regarding vertical price-fixing agreements on the basis of recent case law“

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TABLE OF ABBREVIATIONS

AG	Advocate General
ART	Article
BGH	Federal Court of Justice in Germany
ECJ	European Court of Justice
EU	European Union
EEC Treaty	Treaty establishing the European Economic Community
E.G.	For example
NCA	National competition authority
NO	Number
OGH	The Austrian Supreme Court of Justice
PARA	Paragraph
R&D	Horizontal block exemption regulation for research and development agreements
RPM	Resale price maintenance
RRP	Recommended Retail Price
SBER	Horizontal block exemption regulation for specialisation agreements
TFEU	Treaty on the Functioning of the European Union
VBER	Vertical Block Exemption Regulation

CHAPTER I: INTRODUCTION

A. FOCUS AND PURPOSE OF THE MASTER'S THESIS

Agreements on price-fixing are explicitly prohibited under Article 101 (1) (a) TFEU if they have as their object or effect the restriction of competition.[1] This is primarily due to the fact that they are considered to be particularly harmful to competition.[2] Article 101 (1) TFEU, however, does not distinguish between horizontal or vertical agreements.[3] To determine whether an agreement violates Article 101 (1) TFEU, the ECJ has developed two approaches to assess the validity of any contentious agreements brought before it. They are the 'formal approach' and the 'more economic approach', which deals with the assessment of whether agreements are in fact object restrictions.[4] Even when the ECJ primarily followed the 'more economic approach' and placed this context-specific-inquiry approach before a 'formal approach', it was not always clear how rigorous and consistent it adhered to its previous precedent. Over time, the ECJ has positioned itself more clearly. However, the status on vertical price-fixing agreements, specifically, remained unclear until recently when the ECJ published the case C-211/22 *Super Bock*[5] at the end of June 2023.[6]

The aim of this Master's Thesis is to clarify how the European Court of Justice (ECJ) assessed the validity of vertical price-fixing agreements with regard to the most recent case law on the subject. The purpose is to illuminate what is meant by the clarification handed down by the ECJ concerning vertical price-fixing agreements and to highlight the inconsistent application in approaches employed in previous cases that resulted in confusion in this area of law. To underscore the ultimate holding in *Super Bock* and the reasoning of the ECJ, various judgments concerning vertical agreements as well as influential horizontal agreements will be discussed below to highlight the historical developments in this growing body of the ECJ case law.

[1] Art 101 (1) TFEU.
[2] Ben Bolderson, George Christodoulides, 'Formalism on the Chopping Bock – the ECJ's judgment in Super Bock' (2023) <https://www.bclplaw.com/en-US/events-insights-news/formalism-on-the-chopping-bock-the-ecjs-judgment-in-super-bock.html)> accessed 29 February 2024.
[3] cf Case C- 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] EU:C:1966:38, 240.
[4] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) <https://ssrn.com/abstract=4570358> accessed 04 October 2023.
[5] Case C-211/22 *Super Bock Bebidas SA* [2023] ECLI:EU:C:2023:529.
[6] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 4 <https://ssrn.com/abstract=4570358> accessed 04 October 2023.

Two equally important aspects of this Thesis concern the Guidelines[7] and Regulations[8] of the Commission on categories of vertical agreements, which reflect historical discrepancies in approaches taken by the ECJ and the Commission. Specifically, the discussion will center around the Commission's categorization of vertical agreements fixing minimum resale prices as 'hardcore restrictions', which are exempted from the Vertical Block Exemption Regulation.[9] These kinds of agreements were often criticized as 'per se' restrictions as the restraint on competition was based on formal criteria.[10] Nevertheless, *Super Bock* has brought to light more concrete guidance with respect to such agreements.

The following chapter provides an overview of the legal construct of vertical price-fixing agreements. Then, for a better understanding, the delimitations of vertical price-fixing agreements will be shown in order to better understand their legal classification. After discussion the legal frameworks for vertical price-fixing agreements, a historical outline of the rulings of the ECJ on these agreements and then, most importantly, the more recent case law, in particular *Super Bock*, which has brought clarity to the assessment of vertical price-fixing agreements, is presented. The final chapter before the conclusion deals with the two approaches and in particular with the different approaches that the ECJ and the Commission have taken in the past up to the current approximation.

[7] Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01.
[8] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L 134/4 (Vertical Block Exemption Regulation).
[9] Vertical Block Exemption Regulation, art. 4.
[10] cf Kokkoris Ioannis, 'Purchase Price Fixing: A per se Infringement?' (2007) <https://ssrn.com/abstract=2897172> accessed 02 February 2024.

CHAPTER II: VERTICAL PRICE-FIXING AGREEMENTS

Competition law recognizes various forms of cooperation by undertakings that can restrict competition.[11] One such form of cooperation is that of vertical agreements. Vertical agreements are agreements between companies that do not compete with each other and are therefore active at different market levels.[12] Vertical agreements must be clearly distinguished from horizontal agreements, which are agreements between competitors and are thus considered more critical under competition law.[13]

Vertical agreements are generally not considered problematic. Moreover, for this reason, there exists a general exemption for vertical agreements in the Vertical Block Exemption Regulation (VBER).[14,15] Vertical agreements are generally considered by the Commission to be pro-competitive because such agreements stimulate production and ultimately benefit the consumer.[16] Nevertheless, vertical agreements can be disfavored and even anti-competitive when they restrict competition. These kinds of vertical agreements are referred to as vertical restraints.[17] There are various types of vertical restraints, which, for example, refer to the distribution, production, supply, purchase and sale of goods.[18] Distribution agreements are considered problematic because they can directly lead to the foreclosure of goods from national markets.[19]
Particularly noteworthy are distribution agreements in which the supplier and distributor enter into a price-fixing agreement. A price-fixing agreement can be understood as an obligation of the distributor to resell or resale the product at a certain price.[20] By setting minimum prices, the product should be resold at a minimum fixed price, thus achieving a minimum level.[21] Due to their anti-competitive nature, price-fixing agreements are considered ‘hardcore restrictions’ within the

[11] Thomas Jaeger, *Materielles Europarecht* (3rd edn, Lexis Nexis, 2024) 341.
[12] ibid.
[13] European Commission, ‘Antitrust: Commission adopts revised competition rules for vertical agreements: frequently asked questions‘ (2010) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_10_138> accessed 04 October 2023.
[14] Vertical Block Exemption Regulation.
[15] Jaeger (n 11) 341.
[16] ibid.
[17] Sandra Marco Colino, 'Vertical restraints (or restrictions), Global Dictionary of Competition Law, Concurrences', Art. Nr. 85423 <https://www.concurrences.com/en/dictionary/vertical-restraints-or-restrictions> accessed 16 February 2024.
[18] ibid.
[19] Jaeger (n 11) 344.
[20] Wijckmans, Tuytschaever, Lorenz, Zellhofer, *Vertriebsverträge im Kartellrecht* (1st edn, Lexis Nexis, 2019) 237, para 4.42.
[21] ibid.

meaning of the Vertical Block Exemption Regulations in Article (Art.) 4 (a).[22] The Regulation defines 'hardcore restrictions' as restrictions that should not benefit from a block exemption under any circumstances.[23] In essence, price-fixing agreements fall outside of the scope of the VBER and can, therefore, generally not be exempted.[24] It should be emphasized, however, that only minimum and fixed prices are considered restrictive of competition such that they fall outside the VBER exemption.[25] The Regulation clearly emphasizes in Art. 4 (a) that maximum sale prices and recommended sale prices are not considered to be 'hardcore restrictions' and are thus deemed to be compatible with competition as long as they are advantageous for consumer.[26]

Notwithstanding the Commission's Guidance, the legal validity of vertical price-fixing agreements is not always clear, especially with regard to whether they are prohibited under Art. 101 (1) TFEU.[27]

This shows that price-fixing agreements are a sensitive issue as they can potentially lead to a distortion of competition.[28] The Commission's Regulation on Vertical Block Exemption is intended to help undertakings to better assess their behavior, which is why it is important that these rules are applied uniformly. This, in turn, assists undertakings to better draft and distinguish agreements as illegal price-fixing agreements or permitted price recommendations.

[22] Vertical Block Exemption Regulation, art. 4.
[23] ibid.
[24] ibid.
[25] ibid.
[26] ibid, para (15).
[27] See Chapter IV. B. Commission's Regulations, Guidelines and Papers.
[28] cf Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01, para (179).

CHAPTER III: DELIMITATIONS

In this chapter, the two most important delimitations regarding vertical price-fixing agreements will be outlined for a better understanding of where the differences between them lie. First, the distinction between recommended retail prices (RRP) and vertical price-fixing agreements will be explained in detail, followed by an excursus on horizontal agreements, which, together with vertical agreements, fall under the term 'agreement' in Art. 101 (1) TFEU. Understanding these delimitations is, therefore, critical to the discussion of this paper.

A. DELIMITATION OF RRPs

A supplier that includes resale prices to his buyer as a term of their agreement should do so only in the form of recommended retail prices (RRPs), because other types of price agreements, as mentioned above[29], such as price-fixing or minimum resale prices are anti-competitive.[30] This conclusion is based on the legal basis of Art 101 (1) TFEU, which states that price-fixing agreements constitute a ban on cartels.[31] Regarding RRPs, the VBER clearly states that maximum and recommended prices are allowed.[32] A RRP is understood as a unilateral, permitted declaration of intent by a manufacturer, who gives a recommendation to a distributor for the price at which the latter should sell the goods to the customers, so that he has an idea of it.[33]

The distinction between price-fixing or minimum resale prices, which can significantly affect competition, and recommended retail prices, which are commonplace in business, is important for legally distinguishing between anti-competitive and pro-competitive agreements as the delimitation can be easily overlooked.

[29] cf Chapter II: Vertical price-fixing agreements.
[30] BWB, 'Standpoint on Resale Price Maintenance' (July 2014) 9 <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Standpoint_on_Resale_Price_Maintenance_english.pdf> accessed 10 October 2023.
[31] Art 101 (1) TFEU.
[32] Vertical Block Exemption Regulation, art. 4.
[33] Bundeskartellamt, 'Hinweise zum Preisbindungsverbot im Bereich des stationären Lebensmitteleinzelhandels' (July 2017), 20, para 52 <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Hinweispapier%20Preisbindung%20im%20Lebensmitteleinzelhandel.pdf?__blob=publicationFile&v=8> accessed 10 October 2023.

Discussions about prices between two companies can be considered as RRPs as long as they do not carry advantages or disadvantages for one company or encourage a company to sell the products at a certain price.[34] Roughly defined, this means that if a company is threatened with disadvantages because it does not follow a recommended retail price it is considered to be an impermissible price agreement and, therefore, anti-competitive since it is no longer a recommendation.[35] Disadvantages that could threaten a company can take various forms. For example, if a company is threatened by having its purchasing conditions worsened if it does not comply with the RRP, this is considered a disadvantage and is thus deemed prohibited.[36] Simpler disadvantages include, among others, threats to cancel contracts or termination of cooperation.[37] Similarly, the same prohibition applies if benefits are offered to the distributor, provided that he follows the RRPs.[38] Recommended retail prices thus become anti-competitive if discounts or promotions are offered on the seller's side, provided that a distributor resells the goods at the recommended price.[39]

In principle, monitoring compliance of recommended retail prices is also considered a prohibited price-fixing agreement because pricing is no longer based on a one-sided recommendation and therefore unlawful.[40]

The interpretation of when a recommended retail price is based on a voluntary basis and when it is not has been discussed several times by national courts throughout Europe. The German Federal Cartel Office, for example, has clarified that the passing on of lists on which resale prices are listed are still recommended retail prices and is not price fixing.[41] Additionally, the Supreme Court in Austria, for example, has stated that the criterion of recommendation is only met if it is clear from the outset that it is non-binding on the retailer and does not suggest any must or should on their part.[42]

[34] Pautke in Schultze, 'Compliance-Handbuch Kartellrecht' (2021) Part E 2nd edn dfv Mediengruppe, para 3 <https://rdb.manz.at/document/1389_1_kartellrecht_kap_e> accessed 10 October 2023.
[35] ibid.
[36] ibid.
[37] ibid.
[38] ibid.
[39] Ibid.
[40] BWB, 'Standpoint on Resale Price Maintenance' (July 2014), 10 <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Standpoint_on_Resale_Price_Maintenance_english.pdf> accessed 10 October 2023.
[41] ibid.
[42] Case 9 Os 141/64 [1964] Austrian Supreme Court of Justice (OGH).

Overall, it can therefore be said that as long as a company does not gain any advantages or disadvantages due to price recommendations or the distributor is not forced in any way to sell the products at the recommended price, this constitutes permissible RRPs that are in the interest of consumers and, consequently, in line with competition law and beneficial to the economy.[43]

B. DELIMITATION OF HORIZONTAL AGREEMENTS

Horizontal agreements are particularly important to distinguish from vertical agreements because they themselves are much more anti-competitive due to the fact that they are agreements between market participants at the same level.[44] Additionally, they are regulated by both primary and secondary law.

At the primary level, Art. 101 TFEU, in particular, ensures that horizontal agreements between undertakings at the same level of the market do not have the effect of restricting, preventing or distorting competition because they significantly harm consumers.[45] To the extent that horizontal agreements are aimed at eliminating competition and there are no longer any risks, this clearly falls under the prohibition of cartels under Article 101 TFEU.[46]

Coordination in horizontal cooperation takes the form of either an 'agreement, a decision by an association of undertakings or a concerted practice'.[47] In the former, the undertakings make a concurring declaration of intent by agreeing to cooperate together, whereas in the latter the parties do not agree on the cooperation but set a practical cooperation to control competition.[48] The parties to horizontal agreements are either actual or potential competitors, meaning that actual competitors are active on the same product and geographic market and potential competitors would not only theoretically but realistically invest or incur costs within a short period of time in order to be able to enter the same relevant market as the other undertaking.[49] The newly released Guidelines on Horizontal Agreements list various characteristics that indicate whether an undertaking can be

[43] Pautke in Schultze, 'Compliance-Handbuch Kartellrecht' (2021) Part E 2nd edn dfv Mediengruppe, para 3 <https://rdb.manz.at/document/1389_1_kartellrecht_kap_e> accessed 10 October 2023 and Standpoint on Resale Price Maintenance' (July 2014), 6 <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Standpoint_on_Resale_Price_Maintenance_english.pdf> accessed 10 October 2023.
[44] Thomas Jaeger, *Materielles Europarecht* (3rd edn, Lexis Nexis, 2024) 341.
[45] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C 259/01 (Guidelines on Horizontal Agreements), para 9.
[46] cf Jaeger, (n 44) 339.
[47] Guidelines on Horizontal Agreements, para 14.
[48] ibid.
[49] ibid, para 16.

considered a potential competitor of the other undertaking.[50] In particular, this is the case when an undertaking intends to or can enter the market within a short period of time without facing any insurmountable barriers[51] or when market participants at the same level enter into an agreement with some undertakings that are not active on the market in question.[52,53] Provided that an agreement violates Art. 101 (1) TFEU and, therefore, substantially restricts competition, an agreement may nevertheless fall under the exception provision of Art. 101 (3) TFEU. Art. 101 (3) TFEU is applicable to a limited extent when hardcore restrictions are involved. The agreement can then only be exempted in individual cases under Art. 101 (3) TFEU, for example, when entrepreneurs conclude production agreements as 'non-competitors' or if such agreements facilitate the possibility for undertakings to develop and bring certain products to the market.[54] Cooperation agreements in the field of research and development between competitors are also considered positive.[55]

As far as secondary legislation is concerned, horizontal agreements, unlike vertical agreements, do not have a general block exemption regulation,[56] but rather individual regulations that allow certain categories of agreements to enter into horizontal agreements.[57] These regulations determine in secondary law how the legal exception in Art 101(3) TFEU is to be applied.[58] The two most important individual block exemption regulations on horizontal agreements are the Regulation for Research and Development Agreements and the Specialisation Block Exemption Regulation.

One very common block exemption regulation on horizontal agreements is the newly revised Regulation for Research and Development Agreements (R&D).[59] It provides that certain categories of research and development agreements (R&D) fall within the exception of Art. 101 (3) TFEU and can therefore be exempted and, thus, would not restrict competition.[60] The addressees of the Regulation are companies that research and develop products jointly or in return for payment and the

[50] ibid.
[51] Case C-591/16 P *Lundbeck v Commission* [2021] ECLI:EU:C:2021:243, para 58-59.
[52] Case C-307/18 *Generics (UK) Ltd and others v Competition and Markets Authority* [2020] EU:C:2020:52, para 36-58.
[53] Guidelines on Horizontal Agreements, para 16.
[54] Jaeger, (n 44) 343.
[55] ibid, para 342.
[56] cf Vertical Block Exemption Regulation.
[57] Jaeger, (n 44) 341.
[58] ibid, 340.
[59] Commission Regulation (EU) 2023/1066 of 1 June 2023 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 [2023] OJ L 143/9 (Block Exemption Regulation for Research and Development Agreements).
[60] ibid, para (3) and (5).

exploitation of the results thereof.[61] The Regulation should primarily provide legal certainty for companies so that they know whether their actions are consistent with competition law.[62] The goal is to find a balance between permitted agreements which support innovative technologies and the protection of competition for the benefit of consumers.[63] The Regulation clarifies that only those agreements that do not lead to the elimination of competition are to be covered by the exemption.[64] Consequently, agreements in the field of research and development should not benefit from the exemption if they exceed a certain threshold.[65] With respect to the threshold, the combined market shares of the companies on the relevant product and technology market cannot exceed 25%.[66,67] However, if the agreement is made between companies that are not in competition with one another and, for example, develop new products that did not previously exist, then such agreements are exempted by the Regulation even if the undertakings reach a certain market share threshold.[68] Separate provisions apply to the exploitation of the outcome of the researched or developed product because the Regulation is only applicable in the initial phase if a certain threshold is reached.[69] It is important to underscore that even if the Regulation is not applicable, this does not foreclose the possibility that an individual exemption on the basis of Art. 101 (3) TFEU is not applicable.[70]

Another important block exemption regulation on horizontal agreements is the Specialisation Block Exemption Regulation (SBER) which exempts certain categories of specialisation agreements from being anti-competitive as long as the market share of the involved parties does not

[61] Lara Skotki, 'New Block Exemption Regulation for Research and Development Agreements' (August 2023) <https://www.taylorwessing.com/en/insights-and-events/insights/2023/08/new-block-exemption-regulation-for-research-and-development-agreements#:~:text=Block%20exemption%20regulations%20exempt%20the,for%20the%20cooperation%20between%20companies> accessed 03 November 2023.
[62] Block Exemption Regulation for Research and Development Agreements, para (4).
[63] ibid, para (8).
[64] ibid, para (15).
[65] ibid.
[66] cf Block Exemption Regulation for Research and Development Agreements, art. 6.
[67] Lara Skotki, 'New Block Exemption Regulation for Research and Development Agreements' (August 2023) <https://www.taylorwessing.com/en/insights-and-events/insights/2023/08/new-block-exemption-regulation-for-research-and-development-agreements#:~:text=Block%20exemption%20regulations%20exempt%20the,for%20the%20cooperation%20between%20companies> accessed 03 November 2023.
[68] Block Exemption Regulation for Research and Development Agreements, para (16).
[69] ibid, para (18).
[70] Lara Skotki, 'New Block Exemption Regulation for Research and Development Agreements' (August 2023) <https://www.taylorwessing.com/en/insights-and-events/insights/2023/08/new-block-exemption-regulation-for-research-and-development-agreements#:~:text=Block%20exemption%20regulations%20exempt%20the,for%20the%20cooperation%20between%20companies> accessed 3 November 2023.

exceed 20% on the specialisation product market.[71] The aim of this Regulation is to give companies the opportunity to focus on the production of certain products in order to work on them more intensively and sell them at a lower price.[72] This Regulation applies to three different agreements concerning production.[73] First, it exempts unilateral specialisation agreements, which are agreements between two or more undertakings who are active on the same relevant market where one party agrees to stop their production volume partially in order to buy it from the other company who has promised to produce it.[74] Second, reciprocal specialisation agreements are exempted from being anti-competitive.[75] These are agreements where at least two undertakings reciprocally stop the production of a specific but different product and they commit to buy it from the party who agreed to produce it.[76] Third, it exempts agreements where undertakings agree to produce a product together but none of the parties stop their production.[77]

In sum, it can be clearly stated that horizontal agreements are much more anti-competitive than vertical agreements, which can be seen in particular from the fact that there are several individual regulations for horizontal agreements that regulate when horizontal agreements fall under Art. 101 (3) TFEU, rather than one general legal act.[78] Furthermore, it can be seen that the individual regulations of horizontal agreements have a positive effect on the economy because agreements are concluded between companies at the same market level in order to contribute to technological progress more efficiently and at a reasonable price.[79] However, these regulations provide explicit detailed criterion, which exemplifies the legislative intent to avoid the risk of any market foreclosures that may result from anti-competitive horizontal agreements entered into by competitors.[80]

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[71] Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2023] OJ 143/20 (Specialisation Block Exemption Regulation), art. 3 (1).
[72] Vogel – Vogel, 'Specialization [*sic*] Agreements – EU' <https://www.vogel-vogel.com/faq-items/specialization-agreements-eu/?lang=en> accessed 03 November 2023.
[73] Lara Skotki, 'New Block Exemption Regulation on Specialisation Agreements' (July 2023) <https://www.taylor-wessing.com/en/insights-and-events/insights/2023/07/new-block-exemption-regulation> accessed 03 November 2023.
[74] ibid.
[75] ibid.
[76] ibid.
[77] ibid.
[78] cf Block Exemption Regulation for Research and Development Agreements and Specialisation Block Exemption Regulation.
[79] cf Block Exemption Regulation for Research and Development Agreements, para (7-8) and Specialisation Block Exemption Regulation, para (7).
[80] cf Block Exemption Regulation for Research and Development Agreements, para (20).

CHAPTER IV: LEGAL FRAMEWORK ON VERTICAL PRICE-FIXING AGREEMENTS

A. ARTICLE 101 TFEU

As far as this chapter is concerned, Art. 101 TFEU will be explained more generally to garner a broad understanding of its legal basis in antitrust law with partial references to vertical price-fixing agreements. The next chapter will then deal more specifically and detailed with its application on vertical price-fixing agreements, in particular, in connection with the changes brought about by current case law.

In general, Article 101(1) TFEU prohibits 'all agreements between undertakings, decisions by associations and concerted practices which may affect trade between Member States and which have as their object or effect the preventing, restricting, or distorting of competition within the internal market'. [81] The aim of this provision is to ensure fair competition, which is the key to a functional fair playing field in the EU.[82] Art. 101 TFEU is directly applicable to private individuals as a provision of antitrust law.[83] Due to its direct applicability, private individuals can rely on Art. 101 TFEU directly before national courts in the European Union.[84] The norm consists of four conditions, which are essential for the assessment of vertical price-fixing agreements, which are explicitly mentioned in Art. 101 (1) (a) TFEU, with regard to the violation of antitrust law in primary law.[85] The norm is also the legal basis of the newest judgement *Super Bock*[86], which regulates how vertical price-fixing agreements are examined for their violation of antitrust law and thus the subsumption under Art. 101 (1) TFEU.

i. Anti-competitive behavior

Anti-competitive behavior arises from the knowing and intentional cooperation of undertakings.[87] The cooperation can either take the form of 'agreements between undertakings, decisions by associations of undertakings and concerted practices'.[88] Generally, there is no clear distinction between

[81] Art. 101 (1) TFEU.
[82] cf Wollmann in Jaeger/Stoeger, 'EUV/AEUV Art 101 AEUV' (2019) Manz, para 3-4 <https://rdb.manz.at/document/1118_11_euv-aeuv_aeuv_art-0101> accessed 07 March 2024.
[83] ibid, para 10.
[84] Thomas Jaeger, *Materielles Europarecht* (3rd edn, Lexis Nexis, 2024) 299.
[85] cf Art 101 (1) TFEU.
[86] Case C-211/22 *Super Bock Bebidas SA* [2023] ECLI:EU:C:2023:529.
[87] Wollmann in Jaeger/Stoeger (n 82), para 47.
[88] ibid.

these three forms of cooperation, but a certain approach has been developed through case law to distinguish them.[89] First, a certain market behavior of two undertakings already constitutes an agreement through tacit behavior, provided that they both agree to it.[90,91] It is irrelevant whether the agreed behavior is actually implemented or not, in what form this agreement was made or how the parties reached a consensus.[92] Second, a concerted practice, on the other hand, requires actual implementation.[93] This is the key difference between an agreement and a concerted practice, because, with respect to a concerted practice, the mere agreement is not sufficient, since it must actually be implemented.[94] This was also ruled at the national level with reference to Art. 101 TFEU from the Federal Court of Justice of Germany in *Bierkartell*.[95] In *Bierkartell* the court stated that the facts of a concerted practice within the meaning of Art. 101 TFEU are twofold, which means that the mere coordination of conduct is not sufficient since the conduct must also be implemented.[96] However, implementation is presumed[97] until proof to the contrary is provided.[98] In general, the concept of concerted practices is very broad and any form of cooperation (*e.g.*, exchange of information) between undertakings falls under this term, provided that competition is prevented by actual implementation and not merely by their cooperation since an exchange of information must actually influence the parties' market behavior.[99]

The last cartel formation is the decisions by associations of undertakings. This is intended to prevent circumvention at company law level by making agreements or concerted practices in decisions which are based on statutes or rules of procedure.[100] The same rules as for agreements and concerted practices apply here.[101]

[89] ibid.
[90] Case C-2/01 P and C-3/01 P *Bayer* [2004] ECLI:EU:C:2004:2.
[91] Jaeger (n 84) 318.
[92] ibid.
[93] Wollmann in Jaeger/Stoeger (n 82), para 48.
[94] ibid.
[95] Case *Bierkartell* [2020] Federal Court of Justice in Germany (BGH) ECLI:DE:BGH:2020:130720BKRB99.19.0.
[96] Deutscher Fachverlag, 'BGH 13.7.2020, KRB 99/19' (2020) WRP 2020, 1584 <https://rdb.manz.at/document/rdb.tso.ENwrp2020120313?execution=e1s3&highlight=UVP+preisabsprachen> accessed 05 October 2023.
[97] Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECLI:EU:C:1999:356, para 121.
[98] Jaeger (n 84) 321.
[99] ibid.
[100] Jaeger (n 84) 324.
[101] cf ibid.

It is crucial to note that there are important exceptions to anti-competitive behavior that do not violate the ban on cartels. For example, price changes made on a company's own initiative due to economic circumstances are not prohibited.[102] In *Bayer*, it was ruled that undertakings do not violate Art. 101 (1) TFEU even if pharmaceutical companies unilaterally restrict the supply to their customers in order to prevent parallel exports.[103]

ii. Addressee

The addressees of the provisions of antitrust law, in general, are primarily undertakings.[104] The term 'undertakings' in this context does not have a legal definition, rather it must be interpreted from the jurisprudence of the courts.[105] It follows from established case law that the term 'undertaking' 'covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed'[106]. This 'economic entity' does not necessarily have to be one single unit and can also consist of several natural and legal persons.[107] Furthermore, it is clear from consistent case law that any offering of goods or services on a specific market constitutes an economic activity with the exception of activities from public authorities[108] and must be of a certain duration.[109] It is important whether a market for the goods exists, which requires there to be supply and demand of goods.[110] Demand alone is not sufficient.[111] Remarkably, whether an undertaking returns a profit is not required.[112] Consequently, non-profit organizations are also addressees of the provision.[113]

Associations of undertakings are another addressee of Art. 101 TFEU.[114] Associations of undertakings are associations of at least two companies.[115] An association of undertakings is a broad

[102] Wollmann in Jaeger/Stoeger (n 82), para 53.
[103] ibid, para 54.
[104] Jaeger (n 84) 299.
[105] LMRKM/Grave/Nyberg, 'Kartellrecht AEUV Art. 101 Abs. 1' (2020) 4th edn C.H.Beck, para 2 <https://beck-online-beck-de.uaccess.univie.ac.at/Dokument?vpath=bibdata%2Fkomm%2Floemeeriekartrko_4%2Fa-euv%2Fcont%2Floemeeriekartrko.aeuv.a101.x1.htm&pos=1&hlwords=on> accessed 07 March 2024.
[106] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161, para 21 and Case C-231/11 P *Commission v Siemens AG Österreich et al.* [2014] ECLI:EU:C:2014:256, para 43.
[107] ibid.
[108] Case C-327/12 *SOA Nazionale Costruttori* [2013] ECLI:EU:C:2013:827, para 27.
[109] LMRKM/Grave/Nyberg (n 105).
[110] Jaeger (n 84) 304-305.
[111] Ibid, 306.
[112] Wollmann in Jaeger/Stoeger (n 82), para 34.
[113] ibid.
[114] ibid, para 33 and 46.
[115] LMRKM/Grave/Nyberg (n 105), para 185.

term, which differs from the concept of an undertaking in the fact that the association is not economically active itself.[116] Two undertakings need only to pursue a common interest and take decisions regardless of their legal structure.[117] In practice, the distinction only plays a subordinate role as the association of undertakings is only the addressee of Art. 101 TFEU in order to ensure that anti-competitive behavior of associations is not overlooked, thereby circumventing the meaningfulness of the norm.[118]

As it pertains to vertical price-fixing agreements, this means that Art. 101 TFEU must be applied to agreements on fixed prices between at least two undertakings or price related decisions by associations of undertakings that are each active at a different level in the production or distribution chain.[119] The addressees are either 'undertakings' which are economically active on different levels themself and have a legal structure, or they are associations which work on different market levels and are constructed much simpler since they mainly pursue a common interest and have a decision-making structure.[120]

iii. Restriction of competition

In general, the restriction of competition is the most important aspect of Art. 101 (1) TFEU since this norm aims to prohibit the prevention, restriction or distortion of competition by object or effect within the EU.[121] The exact distinction between prevention, restriction, or distortion of competition is immaterial, as they are all seen as restriction of competition.[122] On the other hand, the distinction between the restrictions by object or effect has become essential. Since the *Cartes Bancaires* judgement, the ECJ has ruled that the restrictions by object must be interpreted narrowly.[123] The main difference between object or effect restrictions is that there is no need to prove the actual effects in the case of a restriction of competition by object, whereas this is decisive for

[116] ibid.
[117] ibid.
[118] ibid, para 184.
[119] cf Chapter II: Vertical price-fixing agreements.
[120] cf *Klaus Höfner and Fritz Elser v Macrotron GmbH*, para 21 and *Commission v Siemens AG Österreich et al.*, para 43 and LMRKM/Grave/Nyberg (n 105), para 185.
[121] Wollmann in Jaeger/Stoeger (n 82), para 60.
[122] Lorenz Moritz, 'Key concepts of Article 101 TFEU. In: An Introduction to EU Competition Law' (2013) Cambridge University Press, 91 <https://www.cambridge.org/core/books/an-introduction-to-eu-competition-law/key-concepts-of-article-101-tfeu/5A0F82CEF360A8827DDA4C46E12CE0DE> accessed 07 March 2024.
[123] Case C-67/13P *Cartes Bancaires* [2014] ECLI:EU:C:2014:2204, para 58 and cf *Super Bock Bebidas* (n 86), para 32.

the restriction by effect.[124] On the ground that the effect on the market is decisive for the restriction by effect, the assessment of the prohibition of agreements is much more complex than by object.[125] This is also reflected in the fact that cases of restrictions by effect have recently become less important and restrictions by object are now predominantly examined.[126]

In general, the burden of proof in the case of restriction by effect is much more demanding than by object because the actual impact on the market must be proven, whereas in the case of restriction by object, only an objective assessment of criteria is required.[127] However, the simplified assessment of restriction by object has changed over time due to the inclusion of a case-by-case assessment.[128] It is important that the by effect and by object restrictions assessments are strictly held separate, even if the examination of the restriction by object, nowadays, requires a substantive case-by-case analysis, it is still distinct from the by effect analysis.

The assessment of the restriction of competition by object is of particular importance for the underlying judgment in *Super Bock*.[129] In that case, the ECJ held that vertical agreements fixing minimum prices are not automatically restrictions of competition by object under Art. 101 (1) TFEU.[130] This decision focuses on the assessment of the restriction by object.[131]

Restrictions by object are generally agreements that objectively intend to hinder competition without actually having to affect the market.[132] Price-fixing agreements are a traditional example of restrictions by object. Recently, however, the *Super Bock* decision decively clarified that agreements to fix minimum prices for resale are not necessarily restrictions of competition by object.[133] Therefore, a case-by-case assessment needs to be made in order to qualify the agreement as a

[124] Michael Mayr, 'Vertikale Vereinbarungen von Mindestpreisen sind nicht zwangsläufig "bezweckte" Wettbewerbsbeschränkungen iSv Art 101 AEUV' [2024] 1/2024 ecolex 2024/44 <https://rdb.manz.at/document/rdb.tso.ENecolex20240144> accessed 07 March 2024.
[125] Pablo Ibáñez Colomo, 'Restrictions of Competition under Article 101(1) TFEU. In: The Shaping of EU Competition Law' (2018) Cambridge University Press, 141 <https://www.cambridge.org/core/books/shaping-of-eu-competition-law/restrictions-of-competition-under-article-1011-tfeu/8AD582930BC59963DAACCD0B17031E4B> accessed 07 March 2024.
[126] Ibid.
[127] Michael Mayr (n 124).
[128] which is explained in more detail in the next chapter (Chapter V. Position of the ECJ).
[129] *Super Bock* (n 86).
[130] ibid, para 43.
[131] cf ibid, para 27.
[132] Jaeger (n 84) 334.
[133] cf *Super Bock* (n 86), para 43.

restriction by object, notwithstanding the actual effect on competition.[134] The judgement stated that a vertical price-fixing agreement restricts competition by object if the content of its provisions and the objectives it pursues, as well as the economic and legal context in which it stands, leads to that assumption.[135] This ruling is significant. According to *Super Bock*, object restrictions are no longer considered to be forbidden 'per se'.[136] Consequently, restrictions by object must first be examined on a case-by-case basis to determine whether they are in fact prohibited.[137]

The examination of the restrictions by object is facilitated by secondary legislation.[138,139] To provide a general overview, these Block Exemption Regulations exclude enumerated 'hardcore restrictions' from exemptions due to their distortion of competition.[140] It should be noted that restrictions by object and 'hardcore restrictions' are, however, distinct, although the distinction may at times be unclear because 'hardcore restrictions' are likely to be restrictions by object.[141,142]

Finally, for the sake of completeness, it should be mentioned that there are some restrictions that do not violate antitrust law despite their market distortion because these restrictions are in areas that only play a subordinate role on the relevant market.[143] This is not particularly relevant for the *Super Bock* decision and the vertical price-fixing agreements, which is why it will not be discussed in detail.

iv. Ability to affect trade between Member States to an appreciable extent

This condition of Art. 101 (1) TFEU is based on intra-Community trade, which widens the scope of application of European Union antitrust law.[144] This means that anti-competitive behavior is

[134] Michael Mayr (n 124).
[135] *Super Bock* (n 86), para 35.
[136] cf Kokkoris Ioannis, 'Purchase Price Fixing: A per se Infringement?' (2007) <https://ssrn.com/abstract=2897172> accessed 02 February 2024.
[137] Michael Mayr (n 124).
[138] cf Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L 134/4 (Vertical Block Exemption Regulation).
[139] This is already mentioned in chapter II: Vertical price-fixing agreement and will be explained in more detail under B. Commission's Regulations, Guidelines and Papers.
[140] cf Vertical Block Exemption Regulation, art. 4.
[141] cf Michael Mayr (n 124).
[142] cf Lorenz Moritz (n 122) 95.
[143] Jaeger (n 84) 325-326.
[144] Mercedes Pedraz Calvo, 'Effect on trade between Member States, Global Dictionary of Competition Law, Concurrences', Art. Nr. 86019 <https://www.concurrences.com/en/dictionary/effect-on-trade-between-member-states> accessed 06 February 2024.

only prohibited under this antitrust norm if it is able to affect trade between Member States.[145] The fact that the anti-competitive behavior must have an effect on trade between Member States means that if this criterion is not met, national antitrust law applies.[146] The condition must be separated into (i) the ability to affect trade between Member States and (ii) to an 'appreciable extent'.[147]

The key facts on how to determine (i) the ability of agreements to affect intra-Community trade was established by various judgements of the ECJ. It is consistent jurisprudence that the condition that an agreement is able to affect the inter-Community trade is given if it 'is possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States. Moreover, the effect must not be insignificant'.[148] This generous interpretation of this condition states that it is sufficient that the agreement is suitable to affect the market between Member States, even if this is not actually the case.[149] In *Miller* it was further ruled that due to the difficulty of proof, it is not necessary for the clauses to actually appreciably affect trade, rather the mere capability of such an agreement to affect trade is sufficient.[150] In *Windsurfing International*, the ECJ made clear, with respect to intra-Community trade, it is not necessary that all single clauses of an agreement affect trade between Member states, rather, what is dispositive is whether the contract as a whole does so.[151]

It is important to note that the ability to affect trade between Member States does not always require the involvement of at least two Member States.[152] For example, the participation of a subsidiary of a company domiciled in a third country in an agreement with a company from the same Member State as the subsidiary may also have an impact on the market.[153] Furthermore, the ECJ has also stated that vertical price-fixing agreements that do not even refer to the whole territory of a state can affect intra-Community trade.[154]

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[145] Wollmann in Jaeger/Stoeger (n 82), para 98.
[146] Mercedes Pedraz Calvo (n 144).
[147] cf Wollmann in Jaeger/Stoeger (n 82), para 77.
[148] *Super Bock* (n 86), para 60 and Case C-439/11 *P Ziegler v Commission* [2013] EU:C:2013:513, para 92 and also cf Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECLI:EU:C:2006:440, para 34.
[149] Jaeger (n 84) 336.
[150] Case C-19/77 *Miller International Schallplatten GmbH v Commission of the European Communities* [1978] ECLI:EU:C:1978:19, para 15 and Case C-215/96 and C-216/96 *Bagnasco* [1999] ECLI:EU:C:1999:12, para 48.
[151] Case C-193/83 *Windsurfing International Inc. v Commission of the European* Communities [1983] ECLI:EU:C:1986:75, para 96.
[152] Jaeger (n 84) 338.
[153] Case C-215/96 and C-216/96 *Bagnasco* [1999] ECLI:EU:C:1999:12, para 49.
[154] *Super Bock* (n 86), para 65.

The effect on intra-Community trade as well as the restriction of competition must be (ii) 'appreciable'.[155] This criterion is not part of the written conditions of Art. 101 (1) TFEU, as it is a result of case law.[156] Whether an agreement affects trade to an 'appreciable extent' is examined from an economic and legal perspective.[157] The determination of the 'appreciable extent' regarding the effect on trade is regulated in a Commission Notice[158] on the basis of quantitative criteria.[159]

That the restriction of competition must also be effected to an 'appreciable extent' relates back to the decision of the ECJ *Voelk v Vervaecke*, which states that the effect on trade must reach an 'appreciable extent' in order to be prohibited.[160] The 'appreciable extent' in this case is also regulated by a separate Notice of the Commission which is called the *De Minimis Regulation*.[161] This Regulation examines the 'appreciable extent' on quantitative criteria as well.[162] An important aspect of this Regulation is that it is not applicable for restrictions by object, as it only concerns restrictions by effect.[163] This is based on the *Expedia* judgment, where the ECJ ruled that the 'appreciable extent' does not need to be examined if an agreement has the object to restrict competition and intra-Community trade may be affected.[164,165]

In summary, it is important to note, that the ability to affect trade between Member States is one of the conditions under Art. 101 (1) TFEU for an agreement to be subsumed under this prohibition.[166] The condition 'appreciable extent' on the other hand is an unwritten criterion, which defines that the restriction of competition as well as the effect on intra-Community trade must be affected to an 'appreciable extent',[167] which are mainly based on quantitative criteria regulated in

[155] Jaeger (n 84) 336-337.
[156] Marcus W.A. Sonnberger, *Die Spürbarkeit im europäischen Kartellrecht* (Juristische Schriftenreihe Band 262, Verlag Österreich, 2017) 1.
[157] Case C-125/07 P *Erste Group Bank and Others v Commission* [2009] ECLI:EU:C:2009:576, para 37 and Case C-439/11 *P Ziegler v Commission* [2013] EU:C:2013:513, para 93.
[158] Commission Notice Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty [2004] OJ C 101/07, para 46.
[159] which will be further explained under B. Commission's Regulations, Guidelines and Papers.
[160] Case C-5/69 *Voelk v Vervaecke* [1969] ECLI:EU:C:1969:35, 300.
[161] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/1.
[162] ibid, para 8.
[163] Ibid, para (2) and (13).
[164] Case C-226/11 *Expedia* [2012] ECLI:EU:C:2012:795, para 37 and cf Raoul Hoffer, 'Mindestspürbarkeit als Untergrenze von Empfehlungskartellen' (2013) Manz ÖBl 2013/55, 228 <https://www.bindergroesswang.at/fileadmin/user_upload/Media_Library/Publications/Fachpublikationen/PDF_Publications/OEBl_2013-05__226_Raoul_Hoffer.pdf>accessed 11 March 2024.
[165] Reference to this Regulation is made under B. Commission's Regulations, Guidelines and Papers.
[166] Jaeger (n 84) 336.
[167] ibid, 326 and 336.

the Commission's secondary legislation.[168] The restriction by object is assumed to affect trade to an 'appreciable extent' if the other conditions of Art. 101 (1) TFEU are given, which is why this criterion is only of relevance for the restriction of competition by effect.[169] This is a logical step, because a restriction by object is considered a significant competitive restraint anyway.

v. Article 101 (3) TFEU

Article 101 (3) TFEU is the paragraph of the antitrust norm that defines the conditions under which circumstances Art 101 (1) TFEU does not apply.[170] It has been clarified that the exemption provision already applies by law, provided that the criteria are met, which means that compatibility with antitrust law does not have to be established beforehand.[171] In total, four cumulative conditions must be met, of which two are formulated in a positive way and the other two in a negative[172]. First, an agreement needs to 'contribute to improving the production or distribution of goods or to promoting technical or economic progress,' while secondly, '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.'[173].

This broad paragraph provides the authorities a wide range of interpretation to exclude an agreement that would be prohibited under Art. 101 (1) TFEU.[174] This is shown in particular by the fact that the application of this exception was not always uniform, as for example, the term 'benefit' in

[168] cf Commission Notice Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty [2004] OJ C 101/86 and De Minimis Notice.
[169] *Expedia* (n 164), para 37.
[170] Art. 101 (3) TFEU.
[171] cf Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 1/1 (Regulation 1/2003), art 1 (2).
[172] Frank Wijckmans, Filip Tuytschaever, *Vertical Agreements in EU Competition Law* (3nd edn, Oxford University Press, 2018) para 1.11.
[173] Art. 101 (3) TFEU.
[174] Or Brook, 'Article 101(3) TFEU: Individual Exemptions. In: Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU' (2022) Cambridge University Press, 93 <https://www.cambridge.org/core/books/abs/noncompetition-interests-in-eu-antitrust-law/article-1013-tfeu/1840EB1D58BB59FEA7B00F46BCF8CE4F> accessed 07 March 2024.

order to qualify the share for the consumer in the second case was interpreted differently by the authorities.[175]

In order to create uniformity, there are now several secondary legislations that give undertakings certainty whether their behavior is prohibited or excepted.[176] For example, the Vertical Block Exemption Regulation excepts categories of agreements and concerted practices by law.[177] The VBER also regulates 'hardcore restrictions', which can never benefit from the exception under Art. 101 (3) TFEU.[178] As already mentioned, agreements have been subsumed differently under this Regulation, which stood in the way of certainty for companies, but has been the focus of recent case law. This was an important step to create transparency, so that undertakings can now better assess their conduct.

B. COMMISSION'S REGULATION, GUIDELINES AND PAPERS

As previously discussed above antitrust law is extended by secondary legislation in various areas.[179] In principle, the Council is empowered under Art. 103 TFEU to adopt competition law implementing regulations and directives for Art. 101 and 102 TFEU.[180] For this purpose, the Council has issued the Regulation 1/2003, which was established to harmonize the application of these two articles.[181] More relevant for the underlying Thesis are the secondary acts, which were adopted by the European Commission, as the Commission is authorized to adopt block exemption regulations under Art 101 (3) TFEU based on Council framework regulations.[182,183]At this level, the Commission has issued regulations, guidelines and papers among others for vertical agreements. In turn, this gives undertakings certainty in economic life because they can legally classify their conduct, as primary law leaves many questions and interpretations open.[184] Reference has been made for the horizontal agreements in Chapter III. B. Delimitation of horizontal agreements.

[175] ibid.
[176] cf Vertical Block Exemption Regulation.
[177] ibid.
[178] ibid, art. 4.
[179] See Chapter IV: Legal framework on vertical price-fixing agreements A. Art. 101 TFEU.
[180] Art. 103 TFEU.
[181] cf Regulation 1/2003, para (1).
[182] Council Regulation 19/65/EEC of 2 March 1965 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices [1965] OJ 36/35 and cf Vertical Block Exemption Regulation, para (1).
[183] Wollmann in Jaeger/Stoeger, 'EUV/AEUV Art 103 AEUV' (2021) Manz, para 6 <https://rdb.manz.at/document/1118_15_euv-aeuv_aeuv_art-0103#rz2> accessed 07 March 2024.
[184] cf Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01, para (2).

The most important regulation by the Commission applying to vertical agreements is the Vertical Block Exemption Regulation.[185] This VBER was republished in 2022 together with the Guidelines on vertical restraints.[186,187] The Regulation from 2022 brought a significant change in the area of e-commerce.[188] The Commission recognized the online market's growing importance and that an amendment was necessary as the previous VBER was outdated in this respect.[189,190] In general, the VBER serves as a support for undertakings, because as soon as a vertical agreement is covered by this exemption Regulation, it does not have to be proven, as the exemption applies automatically.[191] This means that a vertical agreement, which falls under the VBER is assumed to fulfill the conditions of Art. 101 (3) TFEU and therefore Art. 101 (1) TFEU is not applicable.[192] This is the difference to the Guidelines, which only define a framework for companies for them to better assess their vertical agreements.[193] The general rule is that vertical agreements between undertakings that each do not have a market share of more than 30% on the relevant market are not considered to be anti-competitive and are therefore regarded to be exempt by the VBER, as fair competition is guaranteed in this case.[194] In order to determine the market share on the relevant market, this relevant market must first be determined. It consists of the geographic market and the product market, which is defined in detail in a separate Notice of the Commission.[195] The boundaries of the VBER are drawn where certain 'hardcore restrictions' are considered to be so harmful for

[185] Vertical Block Exemption Regulation.
[186] Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01.
[187] Simons + Simons, 'Update to the Vertical Block Exemption Regulation' (2022) <https://www.simmons-simmons.com/en/publications/cl1xd2e3a16ds0a08heu8h5rj/update-to-the-vertical-block-exemption-regulation> accessed 07 March 2024.
[188] Cuatrecasas, 'Implications of the New Vertical Block Exemption Regulation for e-commerce operators' (2023) <https://www.cuatrecasas.com/en/global/art/implications-of-the-new-vertical-block-exemption-regulation-for-e-commerce-operators#:~:text=Dual%20pricing%3A%20the%20New%20Guidelines,of%20investment%20and%20costs%20applicable> accessed 07 March 2024.
[189] cf Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1.
[190] cf Vertical Block Exemption Regulation, para (10).
[191] Or Brook, 'Block Exemption Regulations. In: Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU' (2022) Cambridge University Press, 186 <https://www.cambridge.org/core/books/non-competition-interests-in-eu-antitrust-law/block-exemption-regulations/66B4BF28C729BA47FA34DD8DD292973E> accessed 07 March 2024.
[192] ibid, 189.
[193] cf Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01, 1. Introduction 1.1. Purpose and structure of these Guidelines.
[194] Vertical Block Exemption Regulation, para (8).
[195] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, II. Definition of relevant market, para 7-8.

competition that they are never considered to be compatible with antitrust law and therefore excluded from the benefit of the Block Exemption Regulation.[196] This means that a fundamental distinction must be made between 'hardcore restrictions' (‘black clauses’), ‘excluded restrictions’ (‘grey clauses’) and other restrictions which contain neither of them, because the ‘hardcore restrictions’ are regarded as prohibited as a whole, irrespective of the market share threshold, whereas the latter falls within the scope of the Block Exemption Regulation as long as none of the parties involved exceed the market share threshold.[197] As regards the ‘excluded restrictions’, these are regulated in Art. 5 of the VBER.[198] Like ‘hardcore restrictions’, ‘excluded restrictions’ are exempted from the VBER, but only the separable parts of the clause, rather than the underlying agreement as a whole.[199] In this Thesis, however, the focus is on the ‘hardcore restrictions’, which are not automatically a restriction of competition by object under Art. 101 (1) TFEU, as this was recently decided in the *Super Bock* judgement which concerned vertical price-fixing agreements and thus ‘hardcore restrictions’ within the meaning of this Regulation.[200]

A similar approach is used to assess whether intra-Community trade may be affected to an ‘appreciable extent’.[201] The Commission adopted Guidelines in which it is stated that the appreciability is measured on quantitative criteria, which differ for horizontal and vertical agreements.[202] These Guidelines aim to facilitate subsumption since primary law does not provide sufficient rules in order to assess whether an agreement is capable of affecting intra-Community trade to an ‘appreciable extent’ or not.[203] These Guidelines define the conditions under which a vertical agreement does not appreciably affect trade negatively by regulating that the ‘aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %’ and, cumulatively, ‘the aggregate annual Community turnover of the supplier in the products

[196] Vertical Block Exemption Regulation, para (15) and art. 4.
[197] Commission Notice Guidelines on vertical restraints, para (7).
[198] Vertical Block Exemption Regulation, art. 5.
[199] Commission Notice Guidelines on vertical restraints, para (7) and Benedikt Rohrßen, 'Article 5 VBER: Excluded Restrictions - Grey Clauses. In: VBER 2022: EU Competition Law for Vertical Agreements' (2023) Springer, Abstract <https://link.springer.com/chapter/10.1007/978-3-031-35024-5_5> accessed 07 March 2024.
[200] Cf *Super Bock* (n 86), para 38 and 41.
[201] cf Chapter IV: Legal framework on vertical-price fixing agreements A. Art. 101 TFEU IV. Ability to affect trade between Member States to an appreciable extent.
[202] cf Commission Notice Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty [2004] OJ C 101/86, 2.4.2. Quantification of appreciability, para 52.
[203] cf Marcus W.A. Sonnberger, *Die Spürbarkeit im europäischen Kartellrecht* (Juristische Schriftenreihe Band 262, Verlag Österreich, 2017) 1.

covered by the agreement does not exceed 40 million euro'.[204] This is also the case, if the market share is not above 2 % and the threshold of a two-year turnover is not over 10 %.[205] These quantitative criteria are only Guidelines for undertakings for them to better assess their conduct, as the courts are not bound by the Guidelines.[206] As these Guidelines are part of the condition of the effect on intra-Community trade, they are also relevant for the by object restrictions, which means that they are applicable when dealing with vertical price-fixing agreements.[207]

The situation is different when dealing with the appreciability of the restriction of competition and the *De Minimis Notice* of the European Commission, as this Notice was issued to determine the appreciability on the basis of certain criteria, but it is not applicable for restrictions by object and hardcore restrictions,[208] which is why they are not of importance for vertical price-fixing agreements as they are classified as 'hardcore restrictions'.[209] Although, they are essential for vertical agreements in general, the rule is that if the market share of any party involved in the vertical agreement is less than 15% of any relevant market, there is no appreciable restriction of competition.[210] The relevant market consists again of the product and geographic market as defined in the Commission Notice as it generally applies to the enforcement of competition law.[211]

A thematically relevant Paper by the European Commission is the Green Paper on Vertical Restraints in EU Competition Policy,[212] which sought to encourage discussions on the analysis of vertical restraints.[213] This Paper was presented in 1997 and has contributed much to the by-then-widely-discussed effect-based approach.[214] Under the Green Paper, the economic effect of an

[204] Commission Notice Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty [2004] OJ C 101/86, 2.4.2. Quantification of appreciability, para 52 (b).
[205] ibid.
[206] ibid, para 3.
[207] Jaeger (n 84) 337.
[208] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/1, II. para 13.
[209] cf Vertical Block Exemption Regulation, art. 4.
[210] De Minimis Notice, II. para 8 (b).
[211] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 1.
[212] European Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' COM(96) 721 final, II. Economic analysis of vertical restraints and the single market.
[213] cf EUR-Lex, 'Green Paper' <https://eur-lex.europa.eu/EN/legal-content/glossary/green-paper.html#:~:text=Die%20von%20der%20Europäischen%20Kommission,Denkanstöße%20zu%20spezifischen%20Themen%20bieten> accessed 14 February 2024.
[214] Miguel Sousa Ferro and Miguel Gorjão-Henriques, 'The Latest Reform of EU Competition Law on Vertical Restraints' (1 December 2010) <https://ssrn.com/abstract=3077386> accessed 14 February 2024.

agreement must be assessed and not just the formal criteria for it.[215] Following this paper in 1997, the first Vertical Block Exemption Regulation was introduced in 1999,[216] which was seen as an improvement of the 'per se' restriction of vertical restraints in agreements.[217]

These legal acts of the European Commission show that the assessment of competition law is mainly determined by them, as primary law is over broad. Some regulations were adopted as early as 1999[218] and have been further developed through the ongoing amendments to the law.[219] This further development has taken place especially through case law in which the ECJ has ruled on the application of these legal acts.

[215] Damien MB Gerard, 'The effects-based approach under Article 101 TFUE and its paradoxes: modernisation at war with itself?' (2011) Collage of Europe <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjWq6qc3KqE-AxV4nf0HHbKdBE8QFnoECCUQAQ&url=https%3A%2F%2Fwww2.coleurope.eu%2Fcontent%2Fgclc%2Fdocuments%2F7th_conference%2F2.%2520D.%2520Gerard%2520-%2520The%2520effects-based%2520approach%2520under%2520Article%2520101%2520TFUE%2520and%2520its%2520paradoxes.pdf&usg=AOv-Vaw13Ep8Z_fnp9JBNKRsWOXBX&opi=89978449> accessed 14 February 2024.
[216] Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336/21.
[217] Miguel Sousa Ferro and Miguel Gorjão-Henriques (n 214).
[218] Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336/21.
[219] cf e.g. Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1 and Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L 134/4 (Vertical Block Exemption Regulation).

CHAPTER V: POSITION OF THE ECJ

The aim of this chapter is to show which position the ECJ has taken with regard to the restriction of competition as it pertains to vertical price-fixing agreements and to highlight changes that have been made to the ECJ's body of jurisprudence on the subject. It is important to recall that Art. 101 (1) TFEU, in short, prohibits all agreements restricting competition by object or effect.[220] There were varying approaches as to how the ECJ assessed whether such agreements restricted competition, especially by object since there is no need to further inquire into the actual effects on competition if an object restriction was present.[221] For that reason, vertical agreements and their restriction of competition by object is of relevance. In the case of vertical price-fixing agreements, the question arises as to how to assess whether they are prohibited under Art. 101 (1) (a) TFEU.

First, the historical position of the ECJ on the restriction of competition of vertical restraints in general will be outlined. The most important decisions in the past dealing with vertical price-fixing agreements, but also with vertical restraints in general, are discussed as these are essential for a better understanding of the subject matter, because vertical price-fixing agreements are only a part of the former. Second, the most recent clarifications and, above all, the consequences of that clarification are outlined. It can be said in advance that even if the ECJ does not like to use the term 'overruling', the stark shift in position in relation to the examination of vertical price-fixing agreements can be interpreted, at least in part, as such.

A. HISTORICAL COURSE OF THE JURISPRUDENCE

The question as to whether a vertical agreement restricts competition by object is to be assessed based on its economic and legal context or based on formal criteria goes back to a decades-long debate.[222] It is unclear whether vertical restraints, which are vertical agreements that restrict competition, including vertical price-fixing agreements (also referred to as vertical agreements on minimum resale price maintenance (RPM)), always necessarily hinder competition.[223] This question

[220] Art. 101 (1) TFEU.
[221] cf Case C-373/14 P *Toshiba Corporation v Commission* [2016] EU:C:2016:26, para 25.
[222] cf Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 1 <https://ssrn.com/abstract=4570358> accessed 19 February 2024.
[223] Sandra Marco Colino, 'Vertical restraints (or restrictions), Global Dictionary of Competition Law, Concurrences', Art. Nr. 85423 <https://www.concurrences.com/en/dictionary/vertical-restraints-or-restrictions> accessed 16 February 20234.

dates back to the year 1966, when *Consten and Grundig*[224] was ruled upon. In that judgement, the ECJ ruled that Art. 101 (1) TFEU[225] is applicable to vertical restraints and that distribution agreements which grant a distributor absolute territorial protection constitute a restriction by object according to formal criteria.[226] The Court's refusal to examine the economic and legal context of the agreements has shaped the case law of the ECJ, in particular, because the ECJ's competition law jurisprudence was at its naissance of development at that time.[227] It is important to note that the ECJ relied heavily on formal arguments in this case relating to absolute territorial protection, which prohibits parallel trade.[228] However, the ECJ has not only followed the 'formal approach' in such an individual case as *Consten and Grundig*, but also decided on it in 1985 in a case more relevant for the underlying vertical price-fixing agreements - namely the *Binon* case.[229] In that judgement, the ECJ stated that vertical agreements on fixed-prices constitute a restriction of competition simply because agreements which 'directly or indirectly fix purchase or selling prices or any other trading conditions'[230] are expressly referred to as prohibited agreements in today's Art. 101 (1) (a) TFEU.[231] This result was based merely on the form of the restriction.[232] Another special feature of this case is that the ECJ stated in *Binon* that if a restriction by object has already occurred under Art. 101 (1) TFEU, positive effects of the vertical price-fixing agreement can be taken into account for an examination under Art. 101 (3) TFEU.[233] It should be noted that the EJC has not repeated this approach in any of its later decisions.[234]

[224] Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] EU:C:1966:4.
[225] Previously referred to as Art. 85 (1) EEC Treaty.
[226] *Consten and Grundig* (n 224), 343.
[227] Grigorios Bacharis, 'Consten and Grundig and the Inception of an EU Competition Law' Articles Using the Historical Archives of the EU to Study Cases of CJEU – First Part, 554 and 563 <https://cadmus.eui.eu/bitstream/handle/1814/71898/Bacharis_2021.pdf?sequence=1&isAllowed=y> accessed 19 February 2024.
[228] Justin Lindeboom, 'Formalism in Competition Law' (December 2022) Journal of Competition Law & Economics, Volume 18, Issue 4, 850 <https://doi.org/10.1093/joclec/nhac003> accessed 19 February 2024.
[229] Case C-243/83 *SA Binon & Cie v SA Agence et messageries de la presse* [1985] EU:C:1985:284.
[230] Art. 101 (1) (a) TFEU.
[231] *Binon*, para 44.
[232] Pablo Ibáñez Colomo, 'Chillin'Competition: Case C-211/22, Super Bock: the Binon (formalistic) era is over, and vertical price-fixing is no longer the odd one out' (2023) <https://chillingcompetition.com/2023/07/03/case-c-211-22-super-bock-the-binon-formalistic-era-is-over-and-vertical-price-fixing-is-no-longer-the-odd-one-out/> accessed 19 February 2024.
[233] *Binon*, para 46.
[234] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 20 <https://ssrn.com/abstract=4570358> accessed 19 February 2024.

These judgements have led to confusion as the ECJ has primarily followed and continues to follow the 'substance based approach' in order to constitute a restriction by object.[235] In the *Société Technique Minière* judgment, which was also ruled in 1966, the ECJ stated that an exclusive distribution agreement restricts competition if it has a negative impact on competition, which requires an evaluation of the economic context of the agreement.[236] The judgment underlines that the former Art. 85 ECC Treaty[237] does not distinguish between horizontal and vertical agreements[238], underscoring why this judgment is of relevance to vertical restraints in general. Some argue that the reason for the different treatment of the judgments from 1966 is that parallel trade was not prohibited in the *Société Technique Minière* judgement.[239]

The ECJ has since referred in various cases to the 'more economic approach' to vertical restraints, such as in the *Allianz Hungária Biztosító* case, in which the Court stated that in order to ascertain the purpose of an agreement between two companies on different market levels, a substantial analysis must be provided to assess whether it is a restriction by object, rather than relying solely on formal criteria.[240] Referring to the Court, this examination requires extensive detail.[241] Nevertheless, this broad analysis of agreements restricting competition by object was defined more narrowly in later judgments of the ECJ.[242]

In the year 2015 the *Maxima Latvija* case decided on how to assess whether vertical agreements restrict competition by object as the defendant had various leasing agreements with shopping centers, including anti-competitive clauses as their object.[243] The ECJ repeated that in order to examine whether an agreement restricts competition by object it is necessary to assess it in its economic context,[244] which requires a narrow interpretation.[245] These cases show that the EJC has increasingly relied on the 'more economic approach' because it bases the assessment of anti-competitive-

[235] See Chapter I: Introduction A. Focus and Purpose of the Master's Thesis.
[236] Case C- 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] EU:C:1966:38, 249.
[237] Today referred to as Art. 101 TFEU.
[238] ibid, 240.
[239] Grigorios Bacharis, 'Consten and Grundig and the Inception of an EU Competition Law' Articles Using the Historical Archives of the EU to Study Cases of CJEU – First Part, 556 <https://cadmus.eui.eu/bitstream/handle/1814/71898/Bacharis_2021.pdf?sequence=1&isAllowed=y> accessed 19 February 2024.
[240] Case C-32/11 *Allianz Hungária Biztosító and Others* [2013] ECLI:EU:C:2013:160, para 46.
[241] Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law - Is the Tide Turning' (2019) 64(2) Antitrust Bulletin, University of Leicester School of Law Research Paper No. 18-10, 51 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300114> accessed 19 February 2024.
[242] cf Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others* [2020] EU:C:2020:265, para 54.
[243] Case C-345/14 *Maxima Latvija* [2015] EU:C:2015:784, para 2.
[244] ibid, para 15.
[245] ibid, para 18.

ness on the economic and legal context of the agreements although it has applied the 'formal approach' in the past.[246] Furthermore, the examination of anti-competitive effects in order to examine the economic and legal context of vertical agreements and, therefore, their legality is not consistently applied as the decisions of the ECJ on preliminary rulings under Art. 267 TFEU impose the analysis of this 'more economic approach' on national competition authorities (NCA)[247], which consistently follow the 'formal approach' when determining the legality of agreements.[248] Consequently, the Court of Justice and the NCA recognize differing approaches, which has created uncertainty surrounding the uniform interpretation of EU law.[249]

Apart from the fundamental preference for the 'more economic approach' of the ECJ, a possible reason why the ECJ followed the 'formal approach', among others, in the *Binon* case rather than examining the legal and economic context of an agreement could be part of a long-held view that vertical restraints, in general, were either seen as pro-competitive or not without the need to analyze any facts.[250] After the *Binon* case, the view that all vertical restraints have either an anti-competitive effect or do not, irrespective of the requisite economic analysis, has changed in the sense that part of such agreements were seen as beneficial for market integration,[251] which is a goal of the Treaty[252] and could therefore be pro-competitive. This view was expressed when the Green Paper on vertical restraints was released in 1997 and stated that vertical restraints could be pro-competitive as they could stimulate competition within a certain sector or brand as long as competitive pricing exists.[253] Subsequently, in 1999, this 'more economic approach' was stated in

[246] cf *Binon*, para 44.
[247] cf for example *Allianz Hungária Biztosító and Others* (n 240), para 29.
[248] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 4 <https://ssrn.com/abstract=4570358> accessed 19 February 2024.
[249] ibid.
[250] cf European Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' COM(96) 721 final, Chapter II Economic analysis of vertical restraints and the internal market Exec. summary p. iii, para 10.
[251] European Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' COM(96) 721 final, I. Background and reasons for Green Paper, para 2.
[252] Pablo Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (March 15, 2016) Forthcoming in (2016) 12 Journal of Competition Law & Economics, LSE Legal Studies Working Paper No. 07/2016, 2 <https://ssrn.com/abstract=2747784 or http://dx.doi.org/10.2139/ssrn.2747784> accessed 19 February 2024.
[253] European Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' COM(96) 721 final, Chapter II Economic analysis of vertical restraints and the internal market Exec. summary p. iii, para 10 and Sandra Marco Colino, 'Vertical restraints (or restrictions), Global Dictionary of Competition Law, Concurrences', Art. Nr. 85423 <https://www.concurrences.com/en/dictionary/vertical-restraints-or-restrictions> accessed 20 February 20234.

the Guidelines on vertical restraints,[254] which were published together with the VBER[255]. These Guidelines state examples in which the pro-competitive effect of vertical restraints can occur as for instance in the so called 'free rider' situation, were distributors are willing to invest into the promotion of a product since the manufacturer, which is active on the other market level, restricted the market entrance of others in order to prevent 'free riders' from benefiting from the investments and promotions of the distributors.[256] This has the effect of leading distributors to willing invest and promote products of the manufacturer.[257] This pro-competitive view, which requires a more substantive examination of the applicable restraint, was only justified if it fostered inter-brand competition and was not harmful to consumers, which was accepted in exceptional situations but not for RPMs.[258] For this reason, within the meaning of these Guidelines and the Regulation, RPMs and thus vertical price-fixing agreements were considered to be restrictions of competition by object in fulfilling Art. 101 (1) TFEU without an applicable exemption requiring the need for further examination.[259] Thus these agreements were 'black-listed' as 'hardcore restrictions' and were, therefore, exempt from the Vertical Block Exemption Regulation due to the view that they imposed negative outcomes on fair competition.[260]

In sum, even if the ECJ stated in its early decisions and continues to do so that vertical agreements in general must be assessed in its legal and economic context in order to constitute a by object restriction[261], the *Binon* case shows that the ECJ has not strictly been against the application of the 'formal approach' as the prohibition of vertical price-fixing agreements in this case was examined

[254] Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01.
[255] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L 134/4 (Vertical Block Exemption Regulation).
[256] Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01, 2. Effects of vertical agreements 2.1. Positive effects (16) (b) and Dr.Dr.Doris Hildebrand, Managing Partner EE&MC 'Economic Analyses of Vertical Restraints – A Self-Assessment' <https://www.ee-mc.com/fileadmin/user_upload/Economic_Analysis_Vertical_Agreements_Part_1.pdf> accessed 20 February 2024.
[257] Ibid.
[258] Sandra Marco Colino, 'Vertical restraints (or restrictions), Global Dictionary of Competition Law, Concurrences', Art. Nr. 85423 <https://www.concurrences.com/en/dictionary/vertical-restraints-or-restrictions> accessed 20 February 2024.
[259] cf Vertical Block Exemption Regulation, art. 4 (a) and (b).
[260] Massimo Motta, Patrick Rey, Frank Verboven, Nikos Vettas, 'Hardcore restrictions under the Block Exemption Regulation on vertical agreements: An economic view' <https://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf> accessed 20 February 2024.
[261] Justin Lindeboom, 'Formalism in Competition Law' (December 2022) Journal of Competition Law & Economics, Volume 18, Issue 4, 848 <https://doi.org/10.1093/joclec/nhac003> accessed 20 February 2024.

on the basis of formal criteria.[262] As shown above, the legal situation concerning secondary legislation became increasingly clearer over time as the Commission categorized various forms of vertical agreements.[263] Nevertheless, the Commission's efforts could not account for the disparate application of the 'formal approach' and the 'more economic approach' employed by the ECJ. There is obviously a strong tendency for the ECJ to defer to the 'more economic approach' when deciding cases before the Court in recent times, but no position was taken on the earlier formal decisions and how far-reaching the analysis of the 'more economic approach' should be.[264] The various approaches of case law and the interaction of the developing secondary legislation and the 'formal approach' of the NCAs made a clear and uniform examination quite difficult.[265] Finally, this meant that there was a need for clarification here, which was long awaited and finally ruled in recent case law.

B. RECENT JURISPRUDENCE AND ITS EFFECTS

The different approaches have led to a long expectation that the ECJ would finally issue a decision to clarify the aforementioned uncertainty regarding the scope of Art. 101 (1) TFEU.[266] There was a general uncertainty as to how to determine the legal and economic context of agreements, in particular, vertical restraints and more specifically how to assess whether vertical price-fixing agreements constituted restrictions by object, as the case law on this had not yet been clarified. [267] The question as to the interactions of the various secondary acts of the Commission was also excepted, as the Court's 'more economic approach' came into conflict with the view held by some that 'hardcore restrictions' are 'per se' restrictions by object as they presumably infringe Art. 101 (1) TFEU.[268] Accordingly, the economic and legal context of such vertical agreements does not

[262] cf Pablo Ibáñez Colomo, 'Chillin'Competition: Case C-211/22, Super Bock: the Binon (formalistic) era is over, and vertical price-fixing is no longer the odd one out' (2023) <https://chillingcompetition.com/2023/07/03/case-c-211-22-super-bock-the-binon-formalistic-era-is-over-and-vertical-price-fixing-is-no-longer-the-odd-one-out/> accessed 20 February 2024.
[263] cf Vertical Block Exemption Regulation.
[264] cf Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 19-20 <https://ssrn.com/abstract=4570358> accessed 23 February 2024.
[265] cf ibid, 19-20 and 26.
[266] cf Pablo Ibáñez Colomo, 'Chillin'Competition: Case C-211/22, Super Bock: the Binon (formalistic) era is over, and vertical price-fixing is no longer the odd one out' (2023) <https://chillingcompetition.com/2023/07/03/case-c-211-22-super-bock-the-binon-formalistic-era-is-over-and-vertical-price-fixing-is-no-longer-the-odd-one-out/> accessed 20 February 2024.
[267] Pablo Ibáñez Colomo, 'Vertical Restraints after Generics and Budapest Bank' (August 31, 2020) Forthcoming in (2020) 17 Concurrences, 1 <https://ssrn.com/abstract=3683938 or http://dx.doi.org/10.2139/ssrn.3683938> accessed 23 February 2024.
[268] cf Kokkoris Ioannis, 'Purchase Price Fixing: A per se Infringement?' (2007) <https://ssrn.com/abstract=2897172> accessed 02 February 2024.

need to be assessed in order for them to be anti-competitive.[269] This is, however, countered by opposing views.[270] This uncertainty remained even though the Commission stated in its Guidelines that restrictions by object in general or even RPMs must be assessed individually due to the case law of the ECJ.[271] Notwithstanding the Commission's Guidelines, the Commission, itself, did not follow this approach consistently[272]. The reason why such a 'more economic approach' for 'hard-core restrictions' was not taken so strictly could lie in the fact that some argued that it may be hard to find pro-competitive effects in the economic and legal context of 'hardcore restraints.[273] Finally, case law had to bring these pieces of the puzzle together, which means that a unified approach from the ECJ itself as well as from the authorities was due.

Several judgments of the Court of Justice have been published on this issue in recent years. The most important judgements in this context are the judgements from 2020, which are the *Budapest Bank*[274] and *Generics*[275] judgments, as well as the *Visma Enterprise*[276] judgment from 2021. Additionally, the *opinion of the Advocate General (AG) Rantos* in the *AdC v EDP* case[277] was published in March 2023 shortly before the final *Super Bock*[278] decision, in which he sets out his opinion on the judgement *AdC v EDP*[279]. Generally, an opinion of an AG is published independently by the AG before the final ruling, which has an important influence on the judgement even though it is not binding for the ECJ when deciding on the case.[280] The *opinion of AG Rantos* and the final *AdC v EDP* judgment are relevant here because the *opinion of AG Rantos* was published before the *Super Bock* judgment and the judgment *AdC v EDP* shortly afterwards. It is

[269] Jochen Mohr, 'Bezweckte und bewirkte Wettbewerbsbeschränkungen gemäß Art. 101 Abs. 1 AEUV' (2015) ZWeR 1/2015, 16 <https://www-degruyter-com.uaccess.univie.ac.at/document/doi/10.15375/zwer-2015-0102/pdf?stream=true> accessed 23 February 2024.
[270] RA Mag. Dr. Harald Lettner, LL.M., 'Die vertikale Preisbindung als kartellrechtliche Kernbeschränkung und das Spürbarkeitskriterium – Eine Analyse dieses Spannungsfeldes im Lichte des BGH Urteils' (2018) Wirtschaftsrechtliche Blätter 32, 134 <https://elibrary.verlagoesterreich.at> accessed 23 February 2024.
[271] Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01, para (179), (195).
[272] cf Torsten Koerber, 'GlaxoSmithKline-Parallelhandel mit Medikamenten zwischen Binnenmarktziel, Konsumentenwohlfahrt und Innovationswettbewerb' (2007) ZWeR 4/2007, 518 and 519 <https://www.uni-goettingen.de/de/document/download/04bb69e5a71f03e0e26ec0ba5589376d.pdf/trade.or> accessed 23 February 2024 and Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 8 <https://ssrn.com/abstract=4570358> accessed 23 February 2024.
[273] cf Marcus W.A. Sonnberger, *Die Spürbarkeit im europäischen Kartellrecht* (Juristische Schriftenreihe Band 262, Verlag Österreich, 2017) 242-244.
[274] Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and others* [2020] EU:C:2020:265.
[275] Case C-307/18 *Generics (UK) Ltd and others v Competition and Markets Authority* [2020] EU:C:2020:52.
[276] Case C-306/20 *SIA Visma Enterprise v Konkurences padome* [2021] ECLI:EU:C:2021:935.
[277] Case C-331/21 *AdC v EDP* [2023] ECLI:EU:C:2023:812, Opinion of AG Rantos.
[278] Case C-211/22 *Super Bock Bebidas SA* [2023] ECLI:EU:C:2023:529.
[279] Case C-331/21 *AdC v EDP* [2023] ECLI:EU:C:2023:812.
[280] Eurofound, 'Advocate general of the CJEU' (2020) <https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/advocate-general-cjeu> accessed 23 February 2024.

therefore possible to analyze the extent to which the *Super Bock* decision influenced the decision-making process in *AdC v EDP*. The *Super Bock* judgement is seen as the decisive and final decision regarding the examination of the anti-competitive nature of vertical restraints and especially of vertical price-fixing agreements.

Therefore, the judgments to be discussed first relate to the application of Art. 101 (1) TFEU and in particular on the question of what had to be taken into account in the analysis of the context based approach, which is the 'more economic approach'.[281] In general, *Generics* was a preliminary ruling request on the basis of Art. 267 TFEU which pertains, *inter alia*, to the interpretation of Art. 101 (1) TFEU.[282] Regarding Art. 101 (1) TFEU, *Generics* involved a dominant company entering into an agreement with a 'potential competitor' to pay the latter not to enter the relevant market.[283] *Budapest Bank*, on the other hand, was also a preliminary ruling request concerning an agreement in which a 'uniform amount' was set 'for interchange fees'.[284] The importance of the *Budapest Bank* and *Generics* judgments from 2020 in relation to the issues in question is that they explicitly stated that the pro-competitive effects of the agreements that form part of the 'more economic approach' analysis must be addressed when assessing a restriction of competition by object[285] and that the objectives and the context of an agreement must be assessed in order for an agreement to harm competition to a sufficient degree.[286] However, it should be noted that these judgments concern horizontal agreements, which means that it can only be deduced that the approach also applies to vertical restraints, as a final decision on the application of this approach to vertical restraints was still awaited.[287] Nevertheless, the significance for vertical restraints arises from the fact that if pro-competitive effects are to be taken into account in horizontal agreements, this should apply *a fortiori* to vertical agreements, as they are less harmful to competition than the former.[288] Nowadays, it is generally recognized that parts of vertical agreements are considered beneficial for competition.[289] Furthermore, the two judgments relate to the interpretation of Art. 101 (1) TFEU,

[281] Pablo Ibáñez Colomo, 'Vertical Restraints after Generics and Budapest Bank' (August 31, 2020) Forthcoming in (2020) 17 Concurrences, 3 <https://ssrn.com/abstract=3683938 or http://dx.doi.org/10.2139/ssrn.3683938> accessed 23 February 2024.
[282] *Generics* (n 275), para 1.
[283] ibid, para 11, 19 and 21.
[284] *Budapest Bank* (n 274), para 6.
[285] *Generics* (n 275), para 103.
[286] *Budapest Bank* (n 274), para 86.
[287] Pablo Ibáñez Colomo, 'Vertical Restraints after Generics and Budapest Bank' (August 31, 2020) Forthcoming in (2020) 17 Concurrences, 2 <https://ssrn.com/abstract=3683938 or http://dx.doi.org/10.2139/ssrn.3683938> accessed 23 February 2024.
[288] ibid.
[289] See Chapter V: Position of the ECJ A. Historical course of the jurisprudence.

whereby the ECJ stated early on that Art. 101 (1) TFEU does not distinguish between horizontal or vertical agreements as the restriction of competition can take place on any level.[290] It can therefore be concluded that, the ECJ requires an analysis of the context of an agreement in order to be a restriction of competition by object.[291] Here, the ECJ has once again ruled that the 'formal approach' is long outdated, as an agreement does not restrict competition by its nature as the pro-competitive analysis overtakes this approach.[292] It is also noteworthy that the ECJ has clearly stated in *Generics* that the pro-competitive effects need to be taken into account when assessing an agreement under Art. 101 (1) TFEU[293] and not just under Art. 101 (3) TFEU, as, for example, previously decided in *Binon*.[294] Of course, all these arguments are no substitute for a clarifying decision on vertical restraints and whether its opinion on vertical price-fixing agreements is the same.

Following these judgements, *Visma Enterprise* was ruled in 2021.[295] *Visma Enterprise* assessed the distinction between restriction of competition by object and effect as vertical agreements were concluded, in which a disputed clause gave a 'distributor that was the first to register the potential transaction with an end user the priority in progressing the sale process'[296] for a certain amount of time.[297] This judgment is of particular importance as it refers to vertical agreements as the agreements were concluded between undertakings that are not competitors and its interpretation under Art. 101 (1) and (3) TFEU was questioned.[298] In this judgment the ECJ mainly repeated its statement made previously, emphasizing that here, too, in order for a vertical agreement to infringe Art. 101 (1) TFEU the 'content of its provisions, its objectives and the economic and legal context' must be assessed.[299] As to the detail of this context examination it also cross-referenced to the *Budapest Bank* judgement.[300] In this context, it is noticeable that there were still gaps on how to use the 'more economic approach' consistently as it is stated in the judgement that the national

[290] cf Case C- 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] EU:C:1966:38, 240.
[291] Pablo Ibáñez Colomo, 'Vertical Restraints after Generics and Budapest Bank' (August 31, 2020) Forthcoming in (2020) 17 Concurrences, 4 <https://ssrn.com/abstract=3683938 or http://dx.doi.org/10.2139/ssrn.3683938> accessed 23 February 2024.
[292] ibid.
[293] *Generics* (n 275), para 104.
[294] cf *Binon* (n 229), para 29.
[295] *Visma Enterprise* (n 276).
[296] *Visma Enterprise* (n 276), para 11.
[297] ibid.
[298] ibid, para 61.
[299] ibid, para 62.
[300] ibid and *Budapest Bank* (n 274), para 51.

administrative court did not apply the legal and economic context approach of the agreement correctly.[301]

However, it must be kept in mind that *Visma Enterprise* concerns an agreement between a supplier and a distributor that gives the latter a 'priority right' and must be distinguished from vertical price-fixing agreements that are based on the fixing of prices.[302] Nevertheless, this judgment is relevant regarding the interpretation of Art. 101 (1) TFEU in the context of vertical agreements. This judgment can be seen as influencing the legal position on vertical price-fixing agreements as it confirmed that, at least for vertical agreements, the context of the agreement must be closely examined in order to establish a restriction by object and vertical price-fixing agreements are, among others, a more specialized form of vertical agreements.[303]

Finally, the *opinion of AG Rantos* in the *AdC v EDP* case[304] is relevant for the final *Super Bock* decision regarding vertical restraints. *AdC v EDP* was a preliminary ruling request about a non-competition clause, even though the undertakings were active on other product markets ('potential competition[305]), and this clause was integrated into an association agreement between a supplier and a retailer as it gave consumers a discount of 10 % on their electricity usage when they participated in the loyalty scheme of the food retailer.[306] Part of the preliminary ruling was to determine whether the association agreement was vertical or not and under what circumstances a non-competition clause in an agreement can restrict competition by object.[307] With regard to the question of vertical agreements, the *opinion* points out that the Block Exemption Regulation contains a definition of vertical agreements.[308] According to the Regulation, AG Rantos explains that a vertical agreement can be described as such if 'for the purpose of the agreement, the parties operate at different levels of the distribution chain'[309]. Therefore, a vertical agreement is given if the parties are generally competitors but for the purpose of the agreement, they are active at different market levels.[310] He therefore concludes that the assessment of the agreement as vertical or not needs to

[301] *Visma Enterprise* (n 276), para 33.
[302] cf ibid, para 11 and *Super Bock* (n 278), para 15.
[303] cf *Visma Enterprise* (n 276), para 61-62.
[304] Case C-331/21 *AdC v EDP* [2023] ECLI:EU:C:2023:812, Opinion of AG Rantos.
[305] ibid, para 44-45.
[306] ibid, para 1, 6, 8 and 21.
[307] ibid, para 1, 20 and 86.
[308] ibid, para 97.
[309] ibid.
[310] ibid.

be analyzed separately from the potential competition.[311] On the fundamental question of whether the non-competition clause in the agreement, which AG Rantos considers to be a 'market sharing agreement',[312] provided that there is 'potential competition' between the parties and 'it is not a restriction ancillary to the association agreement', can be a restriction by object and is therefore prohibited under Art 101 (1) TFEU. AG Rantos compares such a market sharing agreement with price-fixing agreements, which he describes as 'obvious restrictions', meaning that the legal and economic context examination of such agreements contains only what is absolutely essential.[313] This seems like, AG Rantos considers these non-competition clauses in agreements as being restriction by object simply based on formal criteria. In this regard, he refers to the *Toshiba* judgment, which stated that market-sharing agreements are in themselves restrictions by object which cannot simply be justified by the economic and legal context analysis.[314] The well-known competition law specialist *Pablo Ibáñez Colomo* has commented on the topic and explains why the comeback of the formalistic approach should not be used to identify a restriction by object.[315] *Pablo Ibáñez Colomo* outlines several examples of why the 'formal approach' is not applicable in this case and why the 'more economic approach' is in line with established case law such as *Generics*, which he considers to be a similar case where the ECJ applied the 'more economic approach' in order to determine whether such clauses are by object restricted.[316] He thus concludes that this 'formal approach' of object restrictions, as proposed by AG Rantos in his *opinion*, is long outdated.[317] This opinion of *Pablo Ibáñez Colomo* shows again that a decision of the ECJ was needed regarding a more consistent approach to assessing the extent of the economic and legal context approach of agreements and their object to restrict competition. Even though the ECJ has repeatedly ruled in the past on the context-related analysis of those restrictions in which pro-competitive effects are to be taken into account, there still seem to be ambiguities that require a final resolution.

[311] ibid.
[312] More on 'market sharing' See: Paul Belleflamme and Francis Bloch, 'Market Sharing Agreements and Collusive Networks' (2001) Queen Mary University of London Working Paper No. 443, 2 <https://www.qmul.ac.uk/sef/media/econ/research/workingpapers/2001/items/wp443.pdf> accessed 28 February 2028.
[313] ibid, para 117.
[314] Case C-373/14 P *Toshiba Corporation v Commission* [2016] ECLI:EU:C:2016:26, para 28 and 29.
[315] Pablo Ibáñez Colomo, 'Chillin'Competition: AG Rantos in Case C-331/21, AdC v EDP: why formalism does not work as a tool to identify restrictions by object' (2023) <https://chillingcompetition.com/2023/06/28/ag-rantos-in-case-c%E2%80%91331-21-adc-v-edp-why-formalism-does-not-work-to-identify-restrictions-by-object/> accessed 28 February 2024.
[316] ibid.
[317] ibid.

Ultimately, in June 2023, a decision clarifying these issues was adopted by way of the *Super Bock* judgement.[318] This decision, which relates to vertical price-fixing agreements, sets out the legal position for these agreements. Furthermore, it clarified that the Court's previous decisions on various forms of restraints were instrumental in the Court's holding with respect to analyzing restrictions of competition by object.[319] This preliminary ruling request pertained to the supplier, 'Super Bock', based in Portugal, which fixed the terms under which conditions its distributors were allowed to resell its beer and water.[320] The undertaking informed its distributors regularly on the minimum resale prices it deemed permissible.[321] In order to ensure compliance with the minimum resale prices 'Super Bock' established a system to control its distributors by ceasing discounts or failing to restock its distributors if they failed to comply with its required fixed minimum prices.[322] The goal of 'Super Bock' was to ensure fixed minimum resale prices for its beverages, especially beer and water, which is prohibited under Art. 101 (1) TFEU.[323] The appeal instance of the national court of Portugal saw a need for clarification regarding the interpretation of Art. 101 (1) TFEU and raised the questions: (i) under which circumstances a vertical price-fixing agreement on minimum resale prices is a restriction of competition by object, (ii) what is meant with respect to the concept of an 'agreement', and lastly, (iii) if the condition had an 'effect on trade between Member States' was given, although the agreement affected the territory of mainly one Member State, namely Portugal.[324] The main focus of the decision, as it pertains to this paper, will center around the first question. Concretely, this question deals with the interpretation of Art. 101 (1) TFEU with respect to whether a vertical price-fixing agreement can restrict competition by object and, consequently, what analysis should be employed to determine this aspect.[325] The Court stated that the ECJ can only relay on the interpretation of the Art. 101 (1) TFEU, which means that the national court then has to take the required considerations into account.[326] The ECJ repeated its previous ruling by stating that the effects do not have to be set out if the agreement has the object of restricting competition, which needs to be interpretated narrowly.[327] The Court continued by

[318] *Super Bock* (n 278).
[319] cf ibid, para 31-35.
[320] ibid, para 1, 10, 12 and 13.
[321] ibid, para 14.
[322] ibid.
[323] ibid, para 10, 13 and 15.
[324] ibid, para 18.
[325] Jacques Buhart, Stéphane Dionnet, Frédéric Pradelles 'Vertical agreements & restriction of competition by object: What's new in Europe?' (2023) <https://www.mwe.com/insights/vertical-agreements-restriction-of-competition-by-object-whats-new-in-europe/> accessed 28 February 2024.
[326] *Super Bock* (n 278), para 28.
[327] ibid, para 31 and 32.

repeating that in order for agreements to restrict competition by object, they have to harm competition to a 'sufficient degree'.[328] In making this determination, the ECJ made clear that this requires a detailed context examination of the agreement.[329] Thus, the economic and legal context, as well as the content of the provision and the objectives of the agreement should be analyzed.[330] The ECJ also ruled that the pro-competitive effects of the agreement in question must be taken into account in this context analysis, which is not the same as a 'restriction by effect' as the effects in this context approach refer to the object of the agreement and must therefore be distinguished.[331] This clearly shows that even though the ECJ followed the 'more economic approach' in previous case law, it has now definitively stated that the NCAs and national courts need to assess RPMs via this context-based approach when assessing whether a vertical price-fixing agreement restricts competition by object or not.[332] Accordingly, it appears that the ECJ has turned its back on the 'formal approach' once and for all. This conclusion can also be drawn, in part, because, although it has already pursued this context-based approach in past case law, it was not certain whether it would also follow this approach in the case of RPMs, as these are considered to be very harmful to competition.[333] As already pointed out in this Thesis, another important aspect of this part of the question to the ECJ was that the Court ruled on the interaction of vertical price-fixing agreements as 'hardcore restrictions' within the Vertical Block Exemption Regulation of the Commission and a restriction of competition by object within Art 101 (1) TFEU.[334] The Court made clear that even though vertical price-fixing agreements are seen as 'hardcore restrictions' under Art. 4 (a) of the Regulation[335] and thus assumed to infringe Art. 101 (1) TFEU, they need to be assessed individually and contextually in order to be a restriction by object, because 'hardcore restrictions' and 'by object restrictions under Art. 101 (1) TFEU' do not have to coincide.[336] Consequently, this means that the ECJ set an end to 'per se' restrictions.[337] Thus, an individual analysis of RPMs must always

[328] ibid, para 34.
[329] ibid, para 35.
[330] ibid.
[331] ibid, para 36 and Pablo Ibáñez Colomo, 'Chillin'Competition: Case C-211/22, Super Bock: the Binon (formalistic) era is over, and vertical price-fixing is no longer the odd one out' (2023) <https://chillingcompetition.com/2023/07/03/case-c-211-22-super-bock-the-binon-formalistic-era-is-over-and-vertical-price-fixing-is-no-longer-the-odd-one-out/> accessed 28 February 2024.
[332] Ben Bolderson, George Christodoulides, 'Formalism on the Chopping Bock – the ECJ's judgment in Super Bock' (2023) <https://www.bclplaw.com/en-US/events-insights-news/formalism-on-the-chopping-bock-the-ecjs-judgment-in-super-bock.html)> accessed 29 February 2024.
[333] ibid.
[334] *Super Bock* (n 278), para 38.
[335] Vertical Block Exemption Regulation, art. 4 (a).
[336] *Super Bock* (n 278), para 41.
[337] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 3 and 21 <https://ssrn.com/abstract=4570358> accessed 29 February 2024.

be made as it cannot be assumed that they are automatically restricted by object under Art. 101 (1) TFEU.[338] Because the ECJ has ended the 'per se' restriction of competition by object era of RPMs, the latest version of the Commission's Guidelines on vertical restraints[339] should be rewritten as they currently misstate that the ECJ is of the opinion that RPMs are object restrictions under Art. 101 (1) TFEU.[340,341]

For the sake of completeness, as far as the remaining questions of the decision are concerned, they can be summarized as follows. First, with respect to the demand that the distributors followed the prices given by the supplier, this was seen as an 'agreement' under Art. 101 (1) TFEU as it depends on the 'concurrence of wills', which must be examined on the contract, the conduct of the parties, the 'explicit or tacit acquiescence of the distributor to an invitation to comply with the prices' and not on the form.[342] This must then again be examined by the national court.[343] Second, the fact that the vertical price-fixing agreement covers only part of the territory of a Member State does foreclose the possibility that it could nevertheless affect trade between Member States, as the 'appreciable effect on trade between Member States' must be assessed in a legal and economic context.[344]

In sum, the *Super Bock* has enormous significance in competition law, especially for competition authorities as the ECJ made clear that vertical price-fixing agreements need a context specific assessment in order to be a restriction of competition by object under Art. 101 (1) TFEU.[345] Notwithstanding the fact that the 'more economic approach' had previously been adopted by the ECJ, it is finally clear that it is also applicable for vertical price-fixing agreements.[346] Accordingly, *Binon*[347] has effectively been 'overruled', although the ECJ has never stated that explicitly. Another consequence of the decision has clarified how the context-based examination interacts with secondary legislation by the Commission.[348] Thus, insofar as 'hardcore restrictions' are concerned,

[338] ibid.
[339] Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01.
[340] ibid, para 195.
[341] Jacques Buhart, Stéphane Dionnet, Frédéric Pradelles 'Vertical agreements & restriction of competition by object: What's new in Europe?' (2023) <https://www.mwe.com/insights/vertical-agreements-restriction-of-competition-by-object-whats-new-in-europe/> accessed 29 February 2024.
[342] *Super Bock* (n 278), para 49, 50 and 66.
[343] ibid, para 51.
[344] ibid, para 61 and 66.
[345] ibid, para 35.
[346] ibid, para 43.
[347] cf Case C-243/83 *SA Binon & Cie v SA Agence et messageries de la presse* [1985] EU:C:1985:284.
[348] *Super Bock* (n 278), para 40-42.

they are not automatically an infringement under Art. 101 (1) TFEU.[349] As such, the ECJ has communicated that the referring court and, if before the NCA, the latter, need to evaluate contentious vertical price-fixing agreements via the 'more economic approach'.[350] In my opinion, this judgment cohesively links the aforementioned judgements[351] that have already dealt with similar issues in this case, resulting in the ECJ taking a clear position on the assessment of vertical price-fixing agreements, which had remained in doubt until this point.[352]

To finalize this chapter, a brief overview of *AdC v EDP*[353] is at hand to illustrate the influence of the *Super Bock* ruling on this subsequent decision as it pertains, among other things, to the examination of restriction of competition by object.[354] In *AdC v EDP* the Court held that whether a non-competition clause in an association agreement in which one party was prohibited to enter the national product market of the other has as its object the restriction of competition needs to be assessed narrowly through a context-based analysis, irrespective of its effects on competition if it harms competition to a 'sufficient degree'.[355] It further states that the pro-competitive effects of the agreement play an important role when assessing this context, as it relates to the analysis of the by object infringement.[356] Furthermore, the ECJ makes clear, just like in the *opinion of AG Rantos*,[357] that, although there are certain agreements such as market sharing agreements or agreements as in the given case which have as their object the restriction of competition, these agreements must, nevertheless, undergo a context based analysis, but limited to what is necessary.[358] The ECJ emphasized that the pro-competitive effects of the agreement must be kept in mind even though they may not ultimately be dispositive.[359] Finally, that the economic and legal context of the clause in the agreement must be assessed in order to determine whether competition is harmed

[349] ibid.
[350] ibid, para 28.
[351] *Consten and Grundig* (n 224), *Binon* (n 229), *Société Technique Minière* (n 236), *Allianz Hungária Biztosító and Others* (n 240), *Maxima Latvija* (n 243), *Budapest Bank* (n 274), *Generics* (n 275), *Visma Enterprise* (n 276), *AdC v EDP* (n 279), *Toshiba* (n 314).
[352] cf *Super Bock* (n 278), para 27 and 43.
[353] *AdC v EDP* (n 279).
[354] cf ibid, para 97.
[355] ibid, para 98, 99, 106 and 107.
[356] ibid, para 103.
[357] cf *AdC v EDP*, Opinion of AG Rantos (n 277), para 117.
[358] *AdC v EDP* (n 279), para 100-102 and Anne Caroline Wegner, LL.M., 'European Court of Justice rules: an energy supplier and a food distributor can be 'potential competitors'' (2023) <https://www.luther-law-firm.com/en/newsroom/press-releases/detail/european-court-of-justice-rules-an-energy-supplier-and-a-food-distributor-can-be-potential-competitors> accessed 01 March 2024.
[359] *AdC v EDP* (n 279), para 103.

to a 'sufficient degree' such that the agreement can be viewed as a restriction on competition by object.[360]

This part of the judgment in *AdC v EDP* in which the ECJ ruled on how to examine whether the agreement in question is a restriction of competition by object reaffirms the importance of a context-based analysis of the agreement, even if certain agreements have in themselves the object to restrict competition.[361] Furthermore, this parallels what the ECJ has stated in *Super Bock* and can thus be regarded as establishing a consistent and current course of action in the application of ECJ jurisprudence.[362] *Super Bock* and *AdC v EDP*, taken together, demonstrate that agreements that are facially restrictive of competition in nature cannot be categorized as such based solely on formal criteria - underscoring an important clarification on the interpretation of Art. 101 (1) TFEU which decrees a final end to the formalistic period under jurisprudence.[363]

[360] ibid, para 106.
[361] cf ibid, para 100-106.
[362] *Super Bock* (n 278), para 35-36.
[363] cf Pablo Ibáñez Colomo, 'Chillin'Competition: Case C-211/22, Super Bock: the Binon (formalistic) era is over, and vertical price-fixing is no longer the odd one out' (2023) <https://chillingcompetition.com/2023/07/03/case-c-211-22-super-bock-the-binon-formalistic-era-is-over-and-vertical-price-fixing-is-no-longer-the-odd-one-out/> accessed 04 March 2024.

CHAPTER VI: SIGNIFICANCE AND IMPACT ON THE CLARIFICATION OF THE ECJ

This chapter deals with the importance of clarifying the legal position of vertical price-fixing agreements and what influence this has on future approaches for courts and authorities when examining such infringement under Art. 101 (1) TFEU. For this purpose, it is important to understand the exact distinction between the different approaches and how they interact between the ECJ and the Commission.

A. FORMAL VS. ECONOMIC APPROACH

As previously discussed, there are two different approaches, namely the 'formal approach' and the 'more economic approach', employed by the ECJ when examining whether an agreement restricts competition by object under Art. 101 (1) TFEU.[364] Although, these two approaches are primarily used in this specific instance and have been further developed through growing constellation of ECJ case law on the matter, these two approaches are generally applied to examine whether or not competition law has been infringed.[365] While there are differing understandings of formalism, the 'formal approach' in connection with the by object restrictions under Art. 101 (1) TFEU assesses infringements solely on formal criteria.[366] Accordingly, the 'formal approach' prohibits agreements that, by their very nature are considered to restrict competition, notwithstanding whether it affects competition.[367] In contrast, the 'more economic approach', also referred to as the 'effect-based approach' or 'substance-based approach', evaluates the pro- and anti-competitive effects of an agreement by considering its legal and economic context to determine whether it restricts competition by object. [368] The debate surrounding the applicability of either of these two approaches in any given antitrust case is one that debates back to the 1990s.[369] At that time, the 'formal approach' had been criticized for leading to an over- or under-enforcement of competition law when

[364] Justin Lindeboom, 'Formalism in Competition Law' (December 2022) Journal of Competition Law & Economics, Volume 18, Issue 4, 832 <https://doi.org/10.1093/joclec/nhac003> accessed 04 March 2024.
[365] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 1 and 5 <https://ssrn.com/abstract=4570358> accessed 04 March 2024.
[366] ibid, 10.
[367] ibid, 8-9.
[368] Max Albert, Dieter Schmidtchen, Stefan Voigt, *Conferences on New Political Economy: Vol. 24: The More Economic Approach to European Competition Law* (1st edn, Mohr Siebeck, 2007) 1-2.
[369] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 1 <https://ssrn.com/abstract=4570358> accessed 04 March 2024.

the effects of a conduct are not taken into account.[370] Arguably, this criticism seems justified because a formal examination overlooks the fact that certain agreements can nevertheless have a positive influence (e.g. free-rider).[371] Nevertheless, the 'formal approach' was often used by authorities when interpreting Art. 101 (1) TFEU because it lent itself to rendering quick decisions that could more easily be proven than when the legal and economic context of an agreement was taken into account.[372] However, a quicker decision by an authority does not necessarily lead to a just disposition of a case because it neglects essential positive or negative effects that, according to the ECJ, must be assessed when determining whether an agreement is an object restriction under Art. 101 (1) TFEU.[373] Moreover, the ECJ's rejection of the 'formal approach' is reflected in its rejection of the 'per se' prohibition rules in the VBER, which too are considered to be formalistic because they leave little room for arguments as to whether 'hardcore restrictions' are restrictions of competition by object.[374]

Nowadays, the distinction between these two approaches should play an increasingly subordinate role because the ECJ has repeatedly ruled that the 'more economic approach' is to be followed because it leads to a more effective decision as to whether competition law has been infringed or not, as over- or under-enforcement when applying the 'formal approach' is to be replaced by an individual case examination.[375]

B. ECJ VS. COMMISSION APPROACH

The ECJ and Commission, as previously mentioned[376], have not always applied the same approaches when assessing whether a certain practice infringes competition law.[377] This discussion requires further attention here because the interaction of the Commission's VBER regarding vertical price-fixing agreements with an infringement under Art. 101 (1) TFEU was clarified by the

[370] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 1-2 <https://ssrn.com/abstract=4570358> accessed 04 March 2024.
[371] cf Chapter V: Position of the ECJ A. Historical course of the jurisprudence.
[372] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 28 and 32 <https://ssrn.com/abstract=4570358> accessed 04 March 2024.
[373] cf ibid, 28.
[374] cf Justin Lindeboom, 'Formalism in Competition Law' (December 2022) Journal of Competition Law & Economics, Volume 18, Issue 4, 878 <https://doi.org/10.1093/joclec/nhac003> accessed 07 March 2024.
[375] cf Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 6 <https://ssrn.com/abstract=4570358> accessed 04 March 2024.
[376] Chapter V: Position of the ECJ A. Historical course of the jurisprudence.
[377] cf Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 7 and 16 <https://ssrn.com/abstract=4570358> accessed 04 March 2024.

EJC in the *Super Bock* judgment with the 'more economic approach'.[378] Furthermore, the Commission's approach is now aligned with that of the EJC, which was not always the case in the past.[379]

The Commission followed the 'formal approach' until the end of 1990.[380] Evidence for this lies in the fact that the Commission assumed that the enumerated categories in the Block Exemption Regulation fulfilled the requirements set forth in Article 101 (3) TFEU merely by adherence to formal criteria, without regard to any context analysis, which were therefore automatically exempted.[381] Similarly, the same applied to vertical agreements that were 'per se' prohibited.[382] However, the ECJ on the other hand, had begun to distance itself from the strict and formulaic 'formal approach' when it ruled, in 1966, in the *Société Technique Minière* judgment that in order for an agreement to restrict competition, its impact on competition must be assessed.[383] This then novel 'context approach' was not without its doubts, as the Court failed to elucidate how exactly this effect analysis should be conducted.[384] Nevertheless, *Société Technique Minière* was one of the first instance where a discordance between the ECJ and Commission arose with respect to the assessment of infringements under competition law.[385] Whereas the Commission continued to strictly adhere to the 'formal approach,' the ECJ set a course towards a complete integration of the 'more economic approach'.[386]

Nevertheless, the strict adherence to the 'formal approach' by the Commission, too, began to change when it adopted the VBER in 1999, explicitly mentioning in its Guidelines that the 'more

[378] Case C-211/22 *Super Bock Bebidas SA* [2023] ECLI:EU:C:2023:529, para 41.
[379] cf Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 7 <https://ssrn.com/abstract=4570358> accessed 04 March 2024.
[380] ibid.
[381] Or Brook, 'Block Exemption Regulations. In: Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU' (2022) Cambridge University Press, 189 <https://www.cambridge.org/core/books/non-competition-interests-in-eu-antitrust-law/block-exemption-regulations/66B4BF28C729BA47FA34DD8DD292973E> accessed 07 March 2024.
[382] cf European Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' COM(96) 721 final, Chapter II Economic analysis of vertical restraints and the internal market Exec. summary p. iii, para 10.
[383] Case C- 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] EU:C:1966:38, 249.
[384] Damien Geradin and Ianis Girgenson, 'The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach' (December 11, 2011) 9 <https://ssrn.com/abstract=1970917> accessed 7 March 2024.
[385] This can be concluded in particular from the fact that the Commission followed the 'formal approach' until 1990 and the EJC followed the 'more economic approach' in this case law.
[386] cf Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 7 and 16-17 <https://ssrn.com/abstract=4570358> accessed 04 March 2024.

economic approach' must be applied when analyzing vertical agreements and introducing the market share threshold of 30 % for the first time.[387] This version of the VBER was issued after the Green Paper on Vertical Restraints was published in 1997, in which the Commission's 'per se' prohibition regarding vertical restraints was heavily criticized due to its excessive enforcement of competition law which disregarded any account of an agreement's effects on competition.[388] This criticism was leveled against the Commission, in part, due to the fact that if the Commission followed the 'formal approach' in its Regulation, practices which would have a pro-competitive effect on competition would be prohibited and some practices having anti-competitive effects would be allowed.[389] Ultimately, this would hinder the goal of fair competition. The Commission points out in its Guidelines from 2000 that vertical agreements must be assessed based on the 'more economic approach' which includes an effect examination on the market, whereas the actual effects of 'hardcore restrictions' in Art. 4 of the Regulation do not need to be examined.[390]

The Court on the other hand has repeatedly favored the 'more economic approach', even if it has not completely rejected the 'formal approach'. [391] This, in turn, put pressure on the Commission to revise the VBER.[392] As recent case law has shown, the ECJ has predominantly applied the 'more economic approach', especially when assessing restrictions by object, without resorting to the 'formal approach'.[393] With regard to vertical price-fixing agreements, which are regarded as 'hardcore restrictions' under the VBER, the ECJ has even gone so far as to say that these do not automatically constitute a restriction of competition by object under Art. 101 (1) TFEU, because the pro-competitive effects within the economic and legal context analysis must be taken into account, which means that it has also rejected the 'formal approach' to RMPs.[394] It is remarkable that the Commis-

[387] Commission Notice Guidelines on vertical restraints [2000] OJ C 291/01, para (7) and (21) and Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 7 <https://ssrn.com/abstract=4570358> accessed 07 March 2024.
[388] European Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' COM(96) 721 final, Chapter II Economic analysis of vertical restraints and the internal market Exec. summary p. iii, para 10 and Pablo Ibáñez Colomo,'Form and Substance in EU Competition Law' (September 13, 2023) 1 and 6 <https://ssrn.com/abstract=4570358> accessed 07 March 2024.
[389] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 6 <https://ssrn.com/abstract=4570358> accessed 07 March 2024.
[390] Commission Notice Guidelines on vertical restraints [2000] OJ C 291/01, para (7).
[391] Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (September 13, 2023) 16 <https://ssrn.com/abstract=4570358> accessed 08 March 2024.
[392] cf ibid, 7.
[393] ibid, 16 and 17.
[394] cf *Super Bock* (n 378), para 40-42.

sion's Guidelines from 2022 do in fact also regulate RPMs and their infringements under competition law via the ‘more economic approach’.[395] The fact that the Commission has incorporated the 'more economic approach' into the VBER and the Guidelines over the years and that the ECJ has adopted a clearer position on the 'economic approach' means that these two institutions and approaches are moving closer together on the issue.

For the uniform application of EU law and a better assessment by undertakings as to whether or not their conduct is harmful to competition, it is important that the Commission and the ECJ align their approach when assessing infringements under competition law. This means that undertakings can measure their conduct by the VBER or the Guidelines and without the need to expend valuable time and resources litigating the matter before the ECJ.

C. APPROACH IN THE FUTURE

Whether the Commission and the ECJ will continue to apply the 'more economic approach' as uniformly as they did in recent time is unclear, but currently the 'formal approach' appears to be slowly losing relevance. *Pablo Ibáñez Colomo* shows in his paper that the ‘formal approach’ does not work when it comes to restrictions of competition by object, because it overlooks the effects of agreement on competition, which are vastly more important than formal criteria that can lead to over- or under-enforcement of competition law.[396] His recommendation is, therefore, that the Court and the NCAs should continue to follow the ‘more economic approach’.[397] On the other hand, *Justin Lindeboom* views the strict separation between these two approaches as outdated and imprecise as he states that, in his opinion, ‘anticompetitive effects are highly formalistic and actual empirical ‘effects’ are seldomly of dispositive value’.[398] Thus, *Justin Lindeboom* is not as averse to the ‘formal approach’ as *Pablo Ibáñez Colomo* because, according to his estimations, the ‘formal approach’ appears to be unassailable.[399]

[395] Commission Notice Guidelines on vertical restraints [2022] OJ C 248/01, para (195), (179) and (181).
[396] Pablo Ibáñez Colomo, ‘Form and Substance in EU Competition Law’ (September 13, 2023) 35 <https://ssrn.com/abstract=4570358> accessed 08 March 2024.
[397] ibid, 32-34.
[398] Justin Lindeboom, 'Formalism in Competition Law' (December 2022) Journal of Competition Law & Economics, Volume 18, Issue 4, 878 and 880 <https://doi.org/10.1093/joclec/nhac003> accessed 08 March 2024.
[399] ibid, 880.

In my opinion, the recommendations of *Pablo Ibáñez Colomo* should be followed, because the 'more economic approach' is a more effective and equitable means of ensuring fair competition. Furthermore, conduct that merely appears to be anti-competitive at first glance based on strict formal criterion can, nevertheless, be pro-competitive if its effects demonstrate that to be the case. For this reason, I side with the holding in *Super Bock* and contend that it has definitively put an end to the 'formal approach' when assessing whether agreements are in line with Art. 101 (1) TFEU. Moreover, the prevailing norm moving forward should be to fully adopt the application of the ‘more economic approach’ with respect to vertical price-fixing agreements, which are considered especially harmful to competition, as well as ‘hardcore restrictions’ under the VBER and their infringements by object under Art. 101 (1) TFEU. *Super Bock* has set a precedent that authorities such as NCAs as well as the Commission must adhere to the ‘more economic approach’ in the future in order to ensure a uniform interpretation of EU law, whereby the existing uncertainties on the matter have clearly been resolved. Accordingly, the approach of the ECJ and the Commission should be consistent moving forward and the 'formal approach' should remain a relic of the past.

CHAPTER VII: CONCLUSION

The validity of vertical price-fixing agreements has long been a contested issue. This is understandable, of course, because they lead to considerable distortions of competition and, thus, hinder the Union's goal of market integration. However, recent case law has shown that the ECJ, nevertheless, requires these agreements to be carefully examined before they are deemed to constitute a restriction of competition. This precise examination is particularly evident in the fact that the ECJ has previously insisted on the 'more economic approach' in various decisions and has now also applied this approach to vertical price-fixing agreements in *Super Bock*. Today there are hardly any constellations imaginable in which agreements should not be examined in their context even though they contain elements previously thought to be anti-competitive ‘per se’. It is particularly noteworthy that the ECJ has ultimately ‘overruled’ its prior opinion in *Binon*, where it declined to apply this 'more economic approach' to vertical price-fixing agreements. Even if, as is well known, the ECJ does not tend to explicitly mention an ‘overruling’, in this case I would dare to speak of one.

In any case, the ECJ was justified in departing from the ‘formal approach’, as the subject matter of this paper makes clear, that the 'formal approach' leads to an excessive regulation of competition law, which is counter to the purpose of this body of law, which ultimately should concern itself primarily with the individual context of such agreements to determine whether they are harmful to competition and should not impede pro-competitive agreements simply based on fixed classifications. If agreements do not have a harmful tendency, they should not have to be prohibited under Art. 101 (1) TFEU when there arises no harm to either consumers or competitors. It seems that this ‘more economic approach’ has by now also reached the European Commission, which has clearly incorporated this contextual approach into its legal acts. Due to a number of uncertainties in the past, it is now important that *Super Bock* has also addressed the relationship between 'hardcore restrictions', which constitute vertical price-fixing agreements under the VBER, and by object infringements under Art. 101 (1) TFEU. The Commission's VBER has often been criticized for considering these 'hardcore restrictions' as 'per se' prohibitions, even though this content analysis is set out in their Regulation and Guidelines. The ECJ's clarification that 'hardcore restrictions' and by object infringements under Art. 101 (1) TFEU are two separate concepts, which also require a detailed examination in order to fall under Art. 101 (1) TFEU at all, means that the ECJ has clearly rejected these automatic prohibitions of RPMs. This context-based analysis of the EJC shows that

its primary goal is to foster a fair playing field. To that end, there should be no place for a ‘formal approach’ divorced from the economic and legal realities in which the pro-competitive effects of agreements are excluded. It is also noteworthy that with this decision, the ECJ is again encouraging NCAs and the national courts to assess decisions according to the 'more economic approach' so that a uniform assessment can be rendered on all administrative levels of enforcement. In the future, it is important that the ECJ continues to maintain a uniform approach and that the Commission strengthens this even further in its Regulation by deleting inconsistencies therefrom. In this regard, it is very important to bring the legal approaches of these two legal instruments closer together.

Therefore, the newest decision *Super Bock* is a prime example of the further development of the law and the importance of the uniform application of EU law. This is the way to go in the future.

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ABSTRACT

This Master's Thesis deals with the essential question of how vertical price-fixing agreements are to be assessed according to recent case law. Such agreements are prohibited under Article 101 (1) (a) TFEU if they constitute a restriction of competition by object or effect and appreciably affect trade between Member States. However, the examination of how such agreements are to be subsumed under this norm is not as clear as it seems at first glance. In the past, the ECJ has generally used either an 'economic' or 'formal approach' when examining whether an agreement infringes antitrust law. These two approaches differ in particular in that the 'more economic approach' requires an examination of the content of the agreement, whereas the 'formal approach' is based on purely formal criteria of an agreement without examining the content of the agreement in more detail. Historical case law will be discussed to show how the ECJ has dealt in the past with vertical agreements and their infringement of antitrust law in general, which has influenced the most recent case law on vertical price-fixing agreements. This case law is of particular importance because vertical price-fixing agreements are regarded as a significant restriction of competition, but the ECJ nevertheless emphasizes that they must also be subject to a substantive examination.

Another important aspect of this work is the interplay between the approach of the European Commission and that of the ECJ. In its Vertical Block Exemption Regulation, the Commission has classified agreements on vertical price-fixing as so-called 'hardcore restrictions', which can never benefit from this exemption. For a long time, it was assumed that these 'hardcore restrictions' automatically infringed EU antitrust law without the need for an individual examination of these agreements. The ECJ has thus recently dealt intensively with vertical price-fixing agreements, so that nothing stands in the way of their uniform examination in the future.