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What Is ‘Competition Law’? – Measuring EU Member States’  
Leeway to Regulate Platform-to-Business Agreements

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# What Is ‘Competition Law’? – Measuring EU Member States’ Leeway to Regulate Platform-to-Business Agreements

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## ABSTRACT

If both national competition law and article 101 TFEU apply to an agreement, the former must not set rules that are stricter than the latter. Member States remain free, though, to impose stricter rules if they are not classified as ‘competition law’. We analyse relevant jurisprudence by the English and French courts that have dealt with potential conflicts between, on the one hand, EU competition law and, on the other hand, the common law restraint of trade doctrine and the *pratiques restrictives de concurrence* under French commercial law. We develop criteria that allow (national) ‘competition law’ to be distinguished from similar regulatory interventions into agreements that pursue purposes distinct from article 101 TFEU and which, therefore, must not be regarded as ‘competition law’. This paper illustrates and elaborates on the challenges for the implementation of our approach by focusing on the ban on the use of parity clauses by hotel booking platforms in France, Austria, Italy and Belgium. We map a possible way forward to prevent further regulatory fragmentation in the internal market with regard to the regulation of platform-to-business agreements.

*Keywords:* competition law; regulation; article 3(2) of Regulation 1/2003; objective pursued by article 101 TFEU; restraint of trade doctrine; *pratiques restrictives de concurrence*; platform-to-business agreements; price-parity clauses; Regulation 2019/1150

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## I. Introduction

Where competition law cannot stimulate competition, it may be crucial to regulate. The growing need to do so is seen in relation to platform markets, which tend to converge towards monopolies because of network effects and which are, for this reason, dominated by entrenched digital and technological platforms. While the Commission recently launched an initiative that may pave the way for extended ex ante regulation at the EU level,<sup>1</sup> the Member States have in some cases already moved ahead.<sup>2</sup> However, where domestic market regulation is intended to complement competition enforcement, it is essential to know how far Union law prevents Member States from regulating firms more strictly than EU competition law.

This article focuses on the Member States' leeway to regulate agreements between the platforms and businesses to which article 101 TFEU also applies. The present interest in this matter has been sparked by the legislative interventions of various Member States restricting the use of parity clauses in contracts between online booking platforms and hotel businesses. These interventions have occurred in response to a level of competition enforcement that has been regarded as being too low or too uncertain. Most famously, the so-called 'Loi Macron' prohibited the use of all forms of price-parity clauses by online booking platforms in France; this was introduced shortly after the French competition authority handed down a commitment decision that effectively accepted the use of 'narrow' price-parity clauses.

If we assume that the presumptions underlying the French competition authority's decision were correct and the use of narrow price-parity clauses was not to be considered an infringement of article 101 TFEU,<sup>3</sup> was it within the competence of the French legislature to prohibit such contract terms? The question arises because, whenever national competition law and article 101 TFEU apply in parallel, the rule set by the former as to which agreements constitute a restriction of competition and which agreements may be exempted must not be stricter than those established by the latter.<sup>4</sup> Pursuant to article 3(3) of Regulation 1/2003, the Member States remain free, however, to impose stricter rules through provisions that predominantly pursue an objective that is different from EU competition law. Therefore, to measure Member

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<sup>1</sup> See the Commission's initiatives of 2 June 2020 for a 'Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers' <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-digital-services-act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers>> and for a 'New Competition Tool' <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-new-competition-tool>>.

<sup>2</sup> See, for example, the recent enactment of Section 58a of the German Payment Services Supervisory Act that provides a right for payment service providers and e-money issuers to access technical infrastructure that contributes to mobile and internet-based payment services. The provision has been dubbed 'Lex Apple Pay' as it was saliently motivated by the objective to give payment service providers the right of direct access to the NFC interfaces of Apple's mobile devices. See Jens-Uwe Franck and Dimitrios Linardatos, *Germany's 'Lex Apple Pay': Payment Services Regulation Overtakes Competition Enforcement* (Discussion Paper Series – CRC TR 224 June 2020), forthcoming *Journal of European Competition Law and Practice*.

<sup>3</sup> See below Section V.A(i).

<sup>4</sup> Regulation 1/2003, art 3(2). Previously, the interrelationship between EU competition law and national competition laws had been dealt with by the ECJ in several cases of which *Walt Wilhelm* (C-14/68, EU:C:1969:4) constituted the landmark ruling. However, the Court had not made an explicit statement as to whether or under what circumstances national competition law could prohibit an agreement to which article 101 TFEU was applicable, but which was not prohibited by article 101 TFEU. See Rein Wesseling, 'The Commission White Paper on Modernization of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options' [1999] *European Competition Law Review* 426, 427.

States' leeway to regulate agreements beyond EU competition law, we need to establish which parts of domestic law must be regarded as 'national competition law' within the meaning of article 3(2) of Regulation 1/2003 and which parts should not be since they predominantly pursue a different objective.

The struggle for an appropriate regulatory response to the use of parity clauses by online travel platforms has turned into an open-ended saga, with an impressive number of episodes involving various national legislatures and courts.<sup>5</sup> A judgment by the Paris Commercial Court on Amazon's business terms for sellers on its marketplace shows that this dispute is certainly not an isolated issue.<sup>6</sup> For the time being, however, the overall number of domestic legislative measures specifically dedicated to harmful platform-to-business trading practices<sup>7</sup> and of cases dealing with fairness in platform-to-business contracts<sup>8</sup> is still limited. Yet legislatures and courts in the Member States have identified the market power – or, more generally, the economic power – on the part of the large online platforms and the resulting imbalances in bargaining power as one of the pressing regulatory challenges of our time, one that cannot be met by competition enforcement alone.<sup>9</sup> In fact, the various bans on parity clauses in the hotel sector stand *pars pro toto* for a significant number of regulatory interventions that is to be expected for the near future. Therefore, clarifying the extent to which the Member States' regulatory leeway is restricted by article 3(2) of Regulation 1/2003 appears to be a pressing issue in the context of platform-to-business regulation.

In this respect, it is, first of all, important to see that from the mere fact that a domestic provision can be classified as 'ex ante regulation' – as it is designed as a *rule* according to the dichotomy between *rules* and *standards*<sup>10</sup> – it cannot be concluded that it is not 'competition law' within the meaning of article 3(2) of Regulation 1/2003. This follows from article 3(3) of Regulation 1/2003, which clarifies that it is the regulatory objective, not its regulatory design, that is decisive for the definition of 'competition law'. This focus on substantive criteria is certainly reasonable in this context: within its scope of application, article 3(2) of Regulation 1/2003 aims to level competition law for the sake of internal market integration. While a typical provision of competition law (such as articles 101 and 102 TFEU and the corresponding provisions under national competition law) can be characterized as a *standard* because its precise meaning with

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<sup>5</sup> See below Section V.A(i).

<sup>6</sup> T.com. Paris, 02 septembre 2019, n° 2017050625.

<sup>7</sup> See Commission Staff Working Document, Impact Assessment, Annexes, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (26 April 2018), SWD(2018) 138 final, Part 2/2, sub 8.5, 92–94.

<sup>8</sup> See European Commission, Study on Contractual Relationships between Online Platforms and Their Professional Users, FWC JUST/2015/PR/01/0003/Lot1-02 (23 April 2018) ('Ernst & Young Study'), sub 2.1.7, 21–23.

<sup>9</sup> This is also true with regard to the EU legislature, as can be seen in particular from the adoption of Regulation 2019/150. See below Section VI. See also European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data (19 February 2020) 66 final 8, 14 ('The accumulation of vast amounts of data by Big Tech companies, the role of data in creating or reinforcing imbalances in bargaining power and the way these companies use and share the data across sectors is being analysed by the Observatory of the Online Platforms Economy. The issue will not be addressed as part of the Data Act, but under the broader fact-finding around the high degree of market power of certain platforms and also in the context of the Commission's work on the Digital Services Act package. On the basis of this fact-finding, the Commission will consider how best to address more systemic issues related to platforms and data, including by *ex ante* regulation if appropriate, to ensure that markets stay open and fair').

<sup>10</sup> See Louis Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42 *Duke Law Journal* 557.

regard to a particular case cannot be deduced from the provision itself, the judiciary has naturally created a large body of competition *rules* over the years. Article 3(2) of Regulation 1/2003 can therefore only meet its objective if it applies to all *rules* of ‘competition law’, regardless of whether they are judge-made or set by a legislature as *ex ante* regulation. In other words, the practical effectiveness of article 3(2) of Regulation 1/2003 as a legal barrier to national law would be drastically undermined if stricter national laws on agreements were permitted simply because they are designed as *ex ante* regulation. Hence, to clarify the meaning of ‘competition law’ with regard to article 3(2) of Regulation 1/2003, it is indispensable to identify robust substantive criteria.

To this end, in Section II of this paper we analyse case law by the High Court of Justice in London and the Paris Court of Appeal that have already had to demarcate the borderline between article 101 TFEU and regulatory interventions into agreements under domestic law. Most notably, in two judgments the High Court of Justice regarded the application of the common law’s restraint of trade doctrine as barred by article 101 TFEU. Our focus will be on the arguments put forward by the courts in order to identify and distinguish the objectives pursued by EU competition law and by the restraint of trade doctrine under English common law and the *pratiques restrictives de concurrence* under French commercial law. We will show that the reasoning of the courts at this point is insufficient.

Subsequently, in Section III, we will argue that, for the purpose of defining ‘competition law’ within the meaning of article 3(2) of Regulation 1/2003, it is not relevant whether or not a certain rule of national law that addresses unilateral conduct – such as the imposition of a certain contractual term – pursues an objective different from article 102 TFEU. This is because, as specified in the second sentence of article 3(2) of Regulation 1/2003, the application of such a provision of national law is in any event not blocked by EU competition law. Therefore, in the context of article 3(2) of Regulation 1/2003, it is only relevant to distinguish the objective of the national rule in question from the objective pursued by article 101 TFEU.

In Section IV, we will engage in a positive analysis of the EU courts’ and the Commission’s practice to carve out two features that allow us to distinguish the objective pursued by article 101 TFEU from national<sup>11</sup> interventions into agreements between businesses that pursue similar regulatory purposes. First, it is a fundamental characteristic of article 101 TFEU that it aims to *protect competition from distortion* brought about by market operators. Second, and more specifically, article 101 TFEU protects competition from distortion that results from the *use of market power*, where ‘use of market power’ must not be understood only as a legitimizing *topos* for intervening into agreements but also as being enshrined in the *modus operandi* of EU competition law. In other words, a rule can only be characterized as ‘competition law’ within the meaning of article 101 TFEU if it requires a certain degree of monopoly power and its anti-competitive use to be established in each individual case.

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<sup>11</sup> To be sure, it is also a characteristic feature of EU competition law that it serves the functioning of the internal market. However, as the Union has the exclusive competence in this regard (art 3(1)(b) TFEU), this objective cannot be a meaningful criterion to distinguish ‘national competition law’ as required pursuant to article 3(2) of Regulation 1/2003.

A two-stage test to assess whether domestic law that regulates agreements has to be regarded as ‘national competition law’ can be derived from this. First, one needs to establish whether the respective provision of national law is predominantly aimed at protecting undistorted competition as envisaged by article 101 TFEU. As we shall demonstrate, this requires that the rule can be understood as being predominantly aimed at protecting the interest of market operators *not* party to the (regulated) agreement, namely (potential) competitors and consumers.<sup>12</sup> If this can be answered in the negative, the domestic rule is not ‘national competition law’ and the regulatory barrier foreseen in article 3(2) of Regulation 1/2003 does not apply. At this first stage of the test, therefore, two main types of regulation can be distinguished that are *not* to be regarded as ‘competition law’ within the meaning of article 3(2) of Regulation 1/2003:<sup>13</sup>

- Rules that prohibit certain contractual terms viewed as the result of an imbalance of economic or bargaining power between the contracting parties and, therefore, as unfair.
- Rules that prohibit contractual restrictions in order to protect a party’s individual and commercial freedom as a value for its own sake.

If the first question is answered in the positive, one has to fall back on the second distinctive criterion and ask whether the provision in question, in its actual application, is tied up with the exercise of market power. If this is the case, the provision must be characterized as being national ‘competition law’. Consequently, at this second stage of the test, the application of article 3(2) of Regulation 1/2003 can be ruled out for three further types of regulatory interventions into agreements:<sup>14</sup>

- Rules that are intended to enhance competition through the lowering of entry barriers, in particular by granting rights to access data or infrastructure, but which are not related to the exercise of market power in its application.
- Rules that prevent information deficits in markets and which, thus, address a type of market failure other than market power.
- Rules that provide for sector-specific price regulation that is not only meant as a response to an imbalance of power between market operators (in which case the first criterion would already not be fulfilled) but also to remedy potential exclusionary effects of excessive pricing, though only where the application of the rule does not require the possession or exercise of market power.

In Section V, we will illustrate the implementation of the two-stage test, using the various national bans on the use of parity clauses by hotel booking platforms. We provide an overview of national competition enforcement with regard to those clauses. We argue that, in any event, their total prohibition goes beyond the level of regulation as required under article 101 TFEU. Therefore, insofar as article 101 TFEU is applicable, a general prohibition of these parity clauses under national law is only fully applicable if it is not ‘competition law’ within the meaning

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<sup>12</sup> See below Section IV.A.

<sup>13</sup> For pertinent examples see below Section IV.A(iii).

<sup>14</sup> For pertinent examples see below Section IV.B(ii).

of article 3(2) of Regulation 1/2003. We provide a summary of the material that may be consulted to identify the objective pursued through the prohibition of these clauses under the law of four Member States, and we show which arguments can be derived from this.

Finally, given the limited harmonizing effect of article 3(2) of Regulation 1/2002, in Section VI we consider the EU's options for reaching a level playing field with regard to the regulatory standards on platform-to-business agreements. In Section VII we conclude by summarizing the main results of this study.

## II. Measuring the Leeway for Domestic Regulation: the Perspective of the Courts in England and France

The ECJ has so far had no opportunity to elaborate on the criteria that decide which parts of national law should be considered 'competition law' within the meaning of article 3(2) of Regulation 1/2003.<sup>15</sup> There is, however, jurisprudence by the English and French courts that have had to deal with the scope of this regulatory barrier on national (competition) law. In this section, we will analyse this case law with a focus on *how* the courts established the regulatory objectives pursued by the relevant provisions of national law, and on how they distinguished those from the objectives pursued by EU competition law.

### A. Restraint of Trade Doctrine under English Common Law

The High Court of Justice in England and Wales has handed down judgment in two noteworthy cases on the question of whether common law<sup>16</sup> could impose stricter rules on agreements than provided under article 101 TFEU. As the United Kingdom will no longer be bound by EU competition law as a result of its withdrawal from the Union,<sup>17</sup> this case law no longer has any significance for the application of the English common law. Nevertheless, it is remarkable as the only instance we are aware of where a court has explicitly invoked article 3(2) of Regulation 1/2003 to consider a doctrine of national law inapplicable.<sup>18</sup>

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<sup>15</sup> The Court was concerned with the provision in *Expedia* where it clarified that provisions of national law that prohibit cartels must only be applied to an agreement that is covered by art 101(1) TFEU if the agreement perceptibly restricts competition within the common market. *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, para 20. The Court emphasized that this may also be the case where the thresholds specified by the Commission in its *de minimis* notice are not reached, as, for example, if an agreement has an anti-competitive object. *Ibid.*, paras 37–38.

<sup>16</sup> It goes without saying that common law doctrines might be regarded as 'national competition law' within the meaning of Regulation 1/2003, art 3(2), despite the fact that Regulation 1/2003, recital 9, refers to 'national legislation'. Mary Catherine Lucey, 'Unforeseen Consequences of Article 3 of EU Regulation 1/2003' (2006) 27(10) *European Competition Law Review* 558, 562.

<sup>17</sup> One could think, nonetheless, of these decisions as being of persuasive authority for Irish courts. See Raymond Byrne and others, Paul McCutcheon, Claire Bruton and Gerard Coffey, *Byrne and McCutcheon on the Irish Legal System* (6th edn, Bloomsbury Professional 2014), para 12.08.

<sup>18</sup> Another remarkable instance is a Paris Court of Appeal's judgment where the court, albeit without referring to Regulation 1/2003, stated that art L. 442-6, I, 5°, of the French Commercial Code had to be interpreted and applied having regard to EU competition law, which had been said to prevail over the general and special rules of French law. See CA Paris, 11 mai 2011, n° 10/03073.



The common law restraint of trade doctrine<sup>19</sup> aims at ‘agreements that purport to restrain a person from exercising his or her trade and profession of business’.<sup>20</sup> Such agreements are invalidated unless it can be shown that the restraint is reasonable in the interests of the parties and the public.<sup>21</sup> It is said that courts use the doctrine to reconcile the freedom to trade, on the one hand, with the freedom to contract, on the other.<sup>22</sup> Terms that may fall within the ambit of the doctrine can most typically be found in employment or sale of business contracts, but also in many other agreements.<sup>23</sup> The *Esso Petroleum* ruling was a landmark judgment on the applicability of the doctrine to exclusive dealing agreements;<sup>24</sup> it opened up a wide field of possible parallel applications besides article 101 TFEU.

The first case where the relevance of article 3(2) of Regulation 1/2003 with regard to the applicability of the restraint of trade doctrine was considered was *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd*.<sup>25</sup> Pihsiang was a Taiwanese manufacturer of electric scooters and Days Medical Aids (DMA) its exclusive distributor throughout the UK and mainland Europe. DMA claimed that Pihsiang had wrongfully repudiated the exclusive distribution agreement and, thus, sought substantial damages from the defendant. While the agreement was concluded for an initial period of five years, DMA retained the right to renew the contract for another five years, as many times as permitted by law, if certain sales goals were met. Pihsiang tried to justify the repudiation by relying on the restraint of trade doctrine. DMA submitted that the agreement was lawful under EU competition law, which in turn would have rendered contradictory or incompatible national (competition) law inapplicable.

Given the potentially infinite duration of the contract, Langley J suspected an unreasonable restraint of trade, but expressed his doubt that such a decision would be compatible with EU law. The agreement was considered to affect trade between Member States but not to restrict competition within the meaning of article 101(1) TFEU.<sup>26</sup> Against the background of this preliminary conclusion, the court addressed whether it was precluded from applying the restraint of trade doctrine as a matter of EU law. While at the time of the judgment Regulation 1/2003 had come into force but did not apply, the court nevertheless paid attention to its article 3

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<sup>19</sup> According to PS Atiyah and Stephen A Smith, *Atiyah's Introduction to the Law of Contract* (6th edn, Oxford University Press 2006) 219, the modern and arguably wider term for the doctrine would be ‘restrictive practices’. Such phrasing may to some degree indicate a functional equivalence between the common law doctrine and the ‘*pratiques restrictives*’ under French law, which are to be further discussed below under Section II.B.

<sup>20</sup> David Cabrelli and Louise Floyd, ‘New Light through Old Windows: Restraint of Trade in English, Scottish, and Australian Employment Laws: Emerging and Enduring Issues’ (2010) 26(2) *International Journal of Comparative Labour Law and Industrial Relations* 167, 168.

<sup>21</sup> See, with references to some of the case law: Neil Andrews, *Contract Law* (2nd edn, Cambridge University Press 2015) 577–79, paras 20.20–20.21; Ewan McKendrick, *Contract Law* (13th edn, Red Globe Press 2019) 305–07, para 15.12.

<sup>22</sup> Andrew Scott, ‘The Evolution of Competition Law and Policy in the United Kingdom’ (2009) LSE Law, Society and Economy Working Papers <[http://eprints.lse.ac.uk/24564/1/WPS2009-09\\_Scott.pdf](http://eprints.lse.ac.uk/24564/1/WPS2009-09_Scott.pdf)> 4.

<sup>23</sup> An overview of contracts that are likely to be caught by both the restraint of trade doctrine and art 101 TFEU is provided by Mary Catherine Lucey, ‘Safeguarding the Restraint of Trade Doctrine from EU Competition Law: Identifying the Threat and Proposing Solutions’ (2014)(52) *Irish Jurist* 115, 117, namely: exclusive purchasing agreements, joint venture agreements, transfer of patents agreements, licensee agreements, franchises, management and promotion contracts, independent contractor agreements, agency agreements and consultancy agreements.

<sup>24</sup> *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269.

<sup>25</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44 (Comm), [2004] WL 62122.

<sup>26</sup> For the hypothetical opposite conclusion that competition was restricted, both block and individual exemptions were discarded, again for reason of the contract's duration.

because it assumed that the provisions of the Regulation ‘as subordinate legislation [...] were required to reflect general Community law derived from the Treaty’.<sup>27</sup>

The defendant asserted that the regulatory objectives of the restraint of trade doctrine had to be distinguished from those pursued by EU competition law: while the common law doctrine pursued the public policy goal of ensuring personal freedom to trade, EU law ‘was concerned with competition and so recognised that agreements whilst restrictive on personal freedom may nonetheless promote competition and so benefit consumers’.<sup>28</sup> Addressing this aspect, Langley J draw a distinction between the restraint of trade doctrine and EU competition law, insofar as the former is concerned with the reasonableness of an agreement at the time it is made, whereas the latter examines not only an agreement’s object but also its practical effects.<sup>29</sup> Ultimately, however, he did not share the defendant’s view with regard to the underlying objectives but succinctly explained:<sup>30</sup>

The qualification in paragraph 3 of Article 3 [of Regulation 1/2003] was [...] aimed at consumer protection laws relating to unfair contract terms and the like. Whatever characterisation may be given to the common law doctrine of restraint of trade [...] I do not think it can be said predominantly to pursue an objective different from Articles [101] and [102 TFEU].

The court considered the restraint of trade doctrine to be ‘no more than earlier language for the restraint on competition at which Article [101 TFEU] is aimed’.<sup>31</sup> In the same vein, one author called it the ‘common law forbear of statutory competition law’.<sup>32</sup> As a result, the court saw itself as precluded from applying the restraint of trade doctrine to invalidate a contract that was lawful under article 101 TFEU.<sup>33</sup>

Six years later, a similar issue arose in *Jones v Ricoh UK Ltd*.<sup>34</sup> CMP provided assistance to companies in the acquisition and management of photocopying equipment and related requirements by negotiating on behalf of its clients with manufacturers of such equipment. Ricoh was a manufacturer whose devices had become predominantly recommended by CMP to its clients. Owing to their enhanced business relations, the two companies entered, first, into a trading agreement to govern the relations between them and, second, into a confidentiality agreement to protect CMP’s confidential information that had been disclosed to Ricoh in the course of their business relationship. Under clause 7 of the confidentiality agreement, Ricoh undertook to refrain from having contact with CMP’s employees, clients, suppliers or prospective partners

<sup>27</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* (n 25) at [265].

<sup>28</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* (n 25) at [255].

<sup>29</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* (n 25) at [237].

<sup>30</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* (n 25) at [265]. Following this statement, Langley J refers to *WWF v World Wrestling Foundation* [2002] WL 45478 and *Apple Corps Ltd v Apple Computer Inc* [1991] WL 839453. However, given the respective contexts, the incidental statements made in these judgments on the relationship between the restraint of trade doctrine and (now) article 101 TFEU are not of significance for the application of article 3(2) of article 1/2003. See below n 38.

<sup>31</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* (n 25) at [254].

<sup>32</sup> Scott (n 22) 5; see also Atiyah and Smith (n 19) 13, arguing that the ‘dramatic development of the formerly moribund common law doctrine of restraint of trade’ was a starting point for the prohibition of anti-competitive agreements.

<sup>33</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* (n 25) at [265]. See also Richard Whish and David Bailey, *Competition Law* (9th edn, Oxford University Press 2018) 79.

<sup>34</sup> *Jones v Ricoh UK Ltd* [2010] EWHC 1743 (Ch), [2010] WL 2731097.

unless it received prior written consent and for as long as it possessed or controlled any confidential information. Robert Jones, founder, owner and director of CMP, claimed that Ricoh had breached this and two other clauses when submitting on its own a jointly prepared tender for the planned acquisition of equipment by a common client.

Considering an infringement of article 101 TFEU, Roth J found that clause 7 went beyond protecting CMP's confidential information by constituting a restriction on over 150 companies of the Ricoh group dealing with or seeking to deal with one of CMP's clients. Thus, being too far-reaching in its range and scope, the clause was held to restrict competition by object and in any event by effect.<sup>35</sup> With reference to *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd*, Roth J ultimately explained:<sup>36</sup>

In the light of that, it is not necessary to consider separately the domestic law of restraint of trade. In any event, once EU competition law applies and either strikes down or permits the restriction involved, the court is not permitted to reach a different result as regards the application of a restriction to trade between EU Member States under the domestic law of restraint of trade.

Thus, the court confirmed the position that the restraint of trade doctrine had to be considered 'national competition law' and, therefore, its application, if it resulted in a stricter regulation of contracts than provided for by article 101 TFEU, was blocked by article 3(2) of Regulation 1/2003.<sup>37</sup>

Interestingly, these judgments are the only two that we know of where the applicability of the restraint of trade doctrine was discussed (and denied) in the light of article 3(2) of Regulation 1/2003 in conjunction with article 101 TFEU. In other words, there appears to be no case where a conflict with article 101 TFEU has been considered but where the doctrine of restraint of trade has nevertheless been applied.<sup>38</sup>

One reason why the courts may have (correctly) not addressed possible limits to the restraint of trade doctrine in other instances may be that article 101 TFEU was not applicable in the cases at hand. With regard to terms in employment contracts that restrict an employee's freedom to pursue economic activities during or after the contract period, courts may assume that

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<sup>35</sup> That was because its application would have precluded a large international corporation (the client) in its centralised procurement from receiving a competitive tender from one of the world's leading suppliers of the demanded products. Furthermore, clause 7 could not benefit from the block exemption for vertical agreements or from an individual exemption.

<sup>36</sup> *Jones v Ricoh UK Ltd* (n 34) at [49].

<sup>37</sup> For a critique of the two judgments and a plea for the parallel application of competition law and the restraint of trade doctrine, see Mary Catherine Lucey (n 23), who argues that their objectives are different.

<sup>38</sup> There are at least two judgments where the courts incidentally commented on the relationship between the restraint of trade doctrine and article 101 TFEU. See *Apple Corps Ltd v Apple Computer Inc* [1991] WL 839453 at [22]: 'for present purposes, the essence of [article 101 TFEU] is not substantially different from the common law principles concerning unreasonable restraints on trade'. *WWF v World Wrestling Foundation* [2002] WL 45478 para 66: 'We conclude that the Federation gains no assistance in this case from the doctrine of restraint of trade, whether in its common law or European form.' These statements cannot, however, be of any significance for the application of article 3 of Regulation 1/2003. This is not only because they were made before the Regulation entered into force, but above all because in none of these judgments did the court actually address whether the application of the restraint of trade doctrine could be constrained by the applicability of article 101 TFEU. See also Mary Catherine Lucey, 'Europeanisation and the Restraint of Trade Doctrine' (2012) 32(4) *Legal Studies* 623, 631–632, and n 30 above.

there is *no agreement between undertakings* as required under article 101 TFEU. This consideration can in any event not exclude the applicability of article 101 TFEU with regard to non-compete clauses that restrict (potential) self-employed or other independent economic activities, because, in this respect, an employee will be affected in his or her capacity as a potential undertaking.<sup>39</sup> Further, it is conceivable that individuals may be considered ‘undertakings’ when they make agreements that concern their (autonomous) offer of services on the labour market. Based on the recognized functional approach to the concept, this conclusion does seem reasonable. The question was not addressed in *Albany*, where the ECJ established an exception for collective bargaining.<sup>40</sup> In *Becu* the court held, however, that workers do not in themselves constitute ‘undertakings’ since during their employment relationship they are ‘incorporated into the undertakings concerned and thus form an economic unit with each of them’.<sup>41</sup> Although, strictly speaking, this reasoning does not preclude individuals from being regarded as ‘undertakings’ when they negotiate terms that relate to their activity as employees, it is widely read as a general statement to the effect that employees are not ‘undertakings’ for the purposes of EU competition law.<sup>42</sup>

Apart from these limits of the concept of ‘undertaking’, the *inter-State clause* certainly plays a significant role in the non-applicability of article 101 TFEU and thus, of article 3(2) of Regulation 1/2003. Where an individual employment contract restricts an employee’s liberty to pursue economic activities during or after the contract period, it can be presumed that an ensuing restriction of competition will typically not appreciably affect trade between Member States. The same certainly holds true for the majority of contracts on the sale of small and medium-sized businesses, which are subject to the restraint of trade doctrine but to which article 101 TFEU is not applicable as trade between Member States is not appreciably affected.

Finally, another reason why there have only been a few cases where the courts have discussed article 101 TFEU (and article 3(2) of Regulation 1/2003) parallel to the restraint of trade doctrine may be that the possible relevance of EU competition law was overlooked by the courts and the parties.

## **B. *Pratiques Restrictives de Concurrence* under French Commercial Law**

The Paris Court of Appeal has had several opportunities to consider whether certain provisions of the French law on restrictive practices had to be regarded as ‘competition law’ within the meaning of article 3(2) of Regulation 1/2003. French competition law (*droit de la concurrence*) distinguishes between anti-competitive practices (*pratiques anticoncurrentielles*),<sup>43</sup> which include the prohibition of cartels and of abuse of a dominant position) and restrictive practices (*pratiques restrictives de concurrence*).<sup>44</sup> The former rules are laid down in the Commercial

<sup>39</sup> See *Remia v Commission*, C-42/84, EU:C:1985:327, paras 17–18 (non-competition clause in an agreement for the sale of an undertaking).

<sup>40</sup> *Albany*, C-67/96, EU:C:1999:430, paras 59–64.

<sup>41</sup> *Becu*, C-22/98, EU:C:1999:419, para 26

<sup>42</sup> See Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law* (7th edn Oxford University Press 2019) 150.

<sup>43</sup> Occasionally also referred to as ‘antitrust law’ (*droit antitrust*).

<sup>44</sup> The law on unfair commercial practices (*règles de la concurrence déloyale*), albeit also forming part of what in France is called competition law (*droit de la concurrence*), is not discussed here any further, as it in any case pursues an objective distinct from ‘(national) competition law’ within the meaning of Regulation

Code's Book IV on freedom of pricing and competition under Title II, whereas the restrictive practices are contained under Title IV of that same book.<sup>45</sup> While it is evident that the French law on anti-competitive practices pursues predominantly the same objectives as articles 101 and 102 TFEU, the Court of Appeal has repeatedly had to judge whether the same is also true of the rules on restrictive practices.

Three of these judgments concerned the termination of automobile distribution contracts.<sup>46</sup> The car manufacturers each claimed that their respective distributor had failed to fulfil its contractual obligations.<sup>47</sup> As a consequence the manufacturers claimed the right to terminate the distribution agreement. The distributors thereupon brought legal action invoking, inter alia, the prohibition of the restrictive practice of a 'sudden termination of business relations' under former<sup>48</sup> article L. 442-6, I, 5°, of the French Commercial Code.<sup>49</sup>

The Court of Appeal held, first, that there was no violation of article 101 TFEU, as the notice periods for the termination of the contracts did not exceed the two years prescribed by the Motor Vehicle Block Exemption Regulation (MVBBER) as applicable at that time.<sup>50</sup> This raised the question, however, of whether the distributors could invoke longer mandatory periods of notice as prescribed by the former article L. 442-6, I, 5°, of the French Commercial Code, even

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1/2003. This follows from that Regulation's recital 9: 'Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice.'

<sup>45</sup> The provisions on restrictive practices can concurrently be regarded, on the one hand, as rules of competition law and, on the other hand, as rules of contract or tort law. Daniel Mainguy, Malo Depincé and Mathilde Cayot, *Droit de la concurrence* (3rd edn, LexisNexis 2019) 8; see also Muriel Chagny and Bruno Deffains, *Réparation des dommages concurrentiels* (Daloz 2015) 56–58, where it is argued that the rules on restrictive practices form part of the public economic order but nevertheless seek to ensure the protection of the weaker party and the rebalancing of contractual relations as well.

<sup>46</sup> CA Paris, 15 janvier 2014, n° 12/13845; CA Paris, 2 juillet 2014, n° 11/01468; CA Paris 11 mai 2016 n° 13/23968.

<sup>47</sup> Respectively, they failed to carry out the necessary investments and to meet the prescribed sales and performance targets.

<sup>48</sup> Through 'Ordonnance n° 2019-359 du 24 avril 2019 portant refonte du titre IV du livre IV du code de commerce relatif à la transparence, aux pratiques restrictives de concurrence et aux autres pratiques prohibées' the provision has now become art L. 442-1, II of the French Commercial Code.

<sup>49</sup> art L. 442-6:

I. – Any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused:

[...]

5° Abruptly breaking off an established business relationship, even partially, without prior written notice commensurate with the duration of the business relationship and consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices. Where the business relationship involves the supply of products bearing the distributor's brand, the minimum notice period shall be double that which would apply if the products were not supplied under the distributor's brand. In the absence of such agreements, the orders issued by the Minister for Economic Affairs may determine a minimum notice period for each product category, taking due account of commercial practices, and may lay down conditions for the severing of business relations, in particular based on their duration. The foregoing provisions do not affect the right to terminate without notice in the event of the failure by the other party to perform its obligations or in the event of force majeure. Where the business relationship is terminated as a result of competitive bidding via distance auction, the minimum notice period is double that of the period resulting from the application of the provisions of this paragraph if the duration of the initial notice period is less than six months, and at least one year in the other cases;

[...]

Translation by Martha Fillastre, Amma Kyeremeh and Miriam Watchorn, 'Commercial Code, as of 1st July 2013' (2014) <<https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>>.

<sup>50</sup> Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, art 3(5)(b).

though the existing notification periods were already in compliance with the less stringent requirements of the MVER. In all three judgments, reference was made to article 3(3) of Regulation 1/2003, and the court explained:<sup>51</sup>

whilst Article L. 442-6, I, 5, of the Commercial Code aims at ‘the protection of the functioning of the market and competition’ by means of protection of competitors, this objective is not identical to that pursued by the suppression of anti-competitive practices, which aims at the protection of the competitive functioning of the market as a whole.

In two instances, moreover, a full citation is given of recital 9 of Regulation 1/2003 and it is argued that the application of EU competition law does not exclude the application of rules prohibiting restrictive practices, such as former article L. 442-6 of the Commercial Code.<sup>52</sup> While the provision prohibiting a ‘sudden termination of business relations’ was consequently found applicable, the court found in each case that the notification periods were also in compliance with this stricter rule under French law.<sup>53</sup>

Similar issues were addressed in a case involving the online booking portal Expedia and its parity clauses.<sup>54</sup> At the time of the judgment, the price-parity clauses in question were already rendered null and void by article L. 311-5-1 of the Tourism Code, created by article 133 of the Loi Macron, according to which hotels retain the freedom to offer their clients any rebate or price advantage. Yet, Expedia’s parity clauses not only concerned prices and conditions but furthermore guaranteed the platform the provision of the last available room, a restriction that fell outside the scope of article L. 311-5-1 of the Tourism Code. This, together with the fact that the initial action was brought before the Loi Macron’s entry into force, led the court to assess the clauses against the rules on restrictive practices. Thus, the Court of Appeal applied former<sup>55</sup> article L. 442-6, II, d) of the Commercial Code, prohibiting clauses by which the advantages granted to competitors are automatically conferred upon one contracting party.<sup>56</sup> On a subsidiary basis, the court also examined a breach of former<sup>57</sup> article L. 442-6, I, 2°, of the Commercial Code, which prohibited the creation of a ‘significant imbalance in the rights and

<sup>51</sup> CA Paris, 15 janvier 2014, n° 12/13845; CA Paris, 2 juillet 2014, n° 11/01468; CA Paris 11 mai 2016 n° 13/23968. Translation by the authors.

<sup>52</sup> See CA Paris, 15 janvier 2014, n° 12/13845; CA Paris, 11 mai 2016 n° 13/23968.

<sup>53</sup> It is noteworthy that, only three years prior to the first of these three decisions, the Paris Court of Appeal had taken a different approach. Without any reference to Regulation 1/2003, the court had stated that art L. 442-6, I, 5°, had to be interpreted and applied having regard to EU competition law, which had been said to prevail over the general and special rules of French law. See CA Paris, 11 mai 2011, n° 10/03073.

<sup>54</sup> CA Paris, 21 juin 2017, n° 1518784. The Expedia group was anonymised in the public version of the judgment and is referred to as ‘groupe A’. The same legal issues have also been dealt with in a case involving Booking.com, though without addressing Regulation 1/2003; see T.com. Paris, 29 novembre 2016, n° 2014027403 and CA Paris, 15 septembre 2015, n° 1507435.

<sup>55</sup> Through ‘Ordonnance n° 2019-359 du 24 avril 2019 portant refonte du titre IV du livre IV du code de commerce relatif à la transparence, aux pratiques restrictives de concurrence et aux autres pratiques prohibées’ the provision has now become art L. 442-3(b) of the French Commercial Code.

<sup>56</sup> art L. 442-6, II:

Clauses or contracts that allow a producer, trader, manufacturer or a person listed in the trade register to commit the following acts are null and void:

d) Benefit automatically from more advantageous terms granted to competing undertakings by the co-contracting party.

Translation by Fillastre, Kyeremeh and Watchorn (n 49).

<sup>57</sup> Through ‘Ordonnance n° 2019-359 du 24 avril 2019 portant refonte du titre IV du livre IV du code de commerce relatif à la transparence, aux pratiques restrictives de concurrence et aux autres pratiques prohibées’ the provision has now become art L. 442-1, I, 2° of the French Commercial Code.

obligations of the parties'.<sup>58</sup> When assessing the significant imbalance, the court stressed the established duopoly of Booking.com and Expedia on the online booking market. This, it was argued, facilitated the imposition of structurally imbalanced conditions on hotels, with the object or effect of depriving them of their freedom to pursue an independent commercial and price policy. It is remarkable that market dominance was again used as an argument to establish a significant imbalance in a more recent judgment involving Amazon.<sup>59</sup> A record fine of €4 million was imposed on the platform for the use of clauses allowing it, inter alia, to modify or terminate contracts with sellers on its marketplace at any time, without prior notice or justification. While no attention was paid to Regulation 1/2003, the Paris Commercial Court defined an online sales market and referred to Amazon's powerful position on this market.<sup>60</sup>

In its *Expedia* judgment, the Court of Appeal explained, with a view to article 3(3) of Regulation 1/2003, that former article L. 442-6 of the Commercial Code had the objective of protecting competitors, regardless of any effect on the market at large. On this basis, the court argued that 'the exemption of clauses under European competition law should not de facto entail their exemption under contested restrictive practices',<sup>61</sup> thus indicating that it was prepared to impose stricter standards than those established by article 101 TFEU. The parity clauses were eventually found to infringe former article L. 442-6 of the Commercial Code. Whereas the Autorité de la Concurrence in its decision on Booking.com had prohibited only wide price-parity clauses while approving their narrow version,<sup>62</sup> the Court of Appeal in its *Expedia* judgment declared them null and void as a matter of principle.

### C. Reflections

Our interest in the case law analysed is essentially a methodological one: how did the High Court of Justice and the Paris Court of Appeal arrive at the conclusion that, where article 101 TFEU applies but does not prohibit certain behaviour, article 3(2) of Regulation 1/2003 could bar the application of the restraint of trade doctrine of English common law but not the application of the *pratiques restrictive de concurrence* under French commercial law?

#### (i) *On the Adjudication of the High Court of Justice in Days Medical Aids and Jones v Ricoh*

In *Days Medical Aids* and *Jones v Ricoh*, the High Court of Justice made it clear that it would only apply stricter limitations on contracts under the restraint of trade doctrine if the objectives pursued by the doctrine could be considered predominantly different from the objectives of

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<sup>58</sup> art L. 442-6, I:

Any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused:

2° Subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties.

Translation by Fillastre, Kyeremeh and Watchorn (n 49).

<sup>59</sup> T.com. Paris, 02 septembre 2019, n° 2017050625.

<sup>60</sup> See also Frédéric Buy, 'Big Is Not Beautiful ! (Amazon au crible du déséquilibre significatif)' (2019) 10 AJ Contrat 433, according to whom 'the judgment illustrates the porosity between antitrust law and restrictive practices'. The author furthermore points out the particularity of the court's reference to network effects, usually relevant in the context of barriers to market entry: 'It is odd that the court in the end shows itself much more determined on the question of Amazon's market position than the European competition authorities.'

<sup>61</sup> CA Paris, 21 juin 2017, n° 1518784.

<sup>62</sup> See below n 150 and accompanying text.

article 101 TFEU. It is remarkable, however, that the court made only sparse attempts to work out what the respective regulatory objectives in fact are. As a (potentially) distinctive feature of EU competition law as compared with the restraint of trade doctrine, the court identified that the former not only required examining the reasonableness of an agreement at the time it was concluded but ‘permits a more pragmatic approach to the effect of an agreement in practice’.<sup>63</sup>

In its sweeping generality, this statement appears to be dubious from the perspective of both sets of rules. There was, therefore, good reason for the court to immediately qualify this statement (at least with regard to article 101 TFEU) in the next sentence.<sup>64</sup> For, of course, article 101(1) TFEU prohibits not only agreements that have the ‘effect’ of restricting competition but also agreements that have the ‘object’ of restricting competition – or, to put it in the words of the ECJ, ‘where the anti-competitive object of an agreement is established, it is not necessary to examine its effects on competition’.<sup>65</sup> In order to bring an agreement into the category of ‘restrictions by object’, it is nevertheless not sufficient to consider its terms in the abstract. Instead, it is necessary to examine not only its content and its objectives but also the ‘economic and legal context of which it forms a part’, which may require, *inter alia*, ‘tak[ing] into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question’.<sup>66</sup> There is, however, no need to examine and ascertain its effects in the market. This rests upon the (normative) assumption that certain types of coordination ‘can be regarded, by their very nature, as being harmful to the proper functioning of competition’,<sup>67</sup> so that it can be presumed that, in a given legal and economic context, the agreement will in all probability have a negative impact on the competitiveness of a market.

With a view to the common law, one might take issue with the court’s statement that the restraint of trade doctrine does in fact neglect an agreement’s effect. The distinctive feature rather appears to be that ‘under the common law rules an agreement may be voided by reason of its adverse effect merely on the party restrained by it’.<sup>68</sup> As our analysis of the ECJ’s and the Commission’s practice below will reveal, this is indeed a crucial aspect. The adverse effects that an agreement has or may have on one of the contracting parties, in particular the restriction of their economic and commercial freedom, are as such not sufficient to substantiate a restriction of competition under article 101(1) TFEU.<sup>69</sup>

In contrast, while it is emphasized that the public interest plays a significant role in the application of the restraint of trade doctrine, it has been remarked that this refers not – or at least

<sup>63</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* (n 25) at [254].

<sup>64</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* (n 25) at [254] (‘There is, I think, an artificiality about the once and for all common law approach which *at least granted the agreement passes the object test* Community law avoids’ (emphasis added)).

<sup>65</sup> *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, C-228/18, EU:C:2020:265, para 34.

<sup>66</sup> *Groupement des cartes bancaires (CB) v European Commission*, C-67/13 P, EU:C:2014:2204, para 53.

<sup>67</sup> *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, C-228/18, EU:C:2020:265, para 35.

<sup>68</sup> Edwin Peel, *Treitel on The Law of Contracts* (14th edn, Sweet & Maxwell 2015) 596, para 11–107 (emphasis added). See also Mary Catherine Lucey (n 23) 121–22: ‘It is clear that the test under [restraint of trade doctrine] requires particular account to be taken of the restriction’s effect on the restrained person [...] The focus of art.101 TFEU is on the implications of a restriction for competitive conditions in the market.’

<sup>69</sup> See below Section IV.A.



not primarily<sup>70</sup> – to a general interest in the widest possible choice of competing suppliers but to an ‘interest of the public that a person should not be subjected to unreasonable restrictions on his freedom to work or trade’.<sup>71</sup> To put it in other words, under the restraint of trade doctrine it is regarded to be in the public interest that an individual’s freedom to work or trade should be guaranteed for its own sake.<sup>72</sup> This is inherently connected to the fact that under the common law, unlike competition law, contractual terms that are considered an unreasonable restraint are merely unenforceable rather than prohibited<sup>73</sup> and third parties typically have no effective remedy if they are adversely affected by an agreement in restraint of trade.<sup>74</sup>

In *Days Medical Aids* and *Jones v Ricoh*, the High Court of Justice did not elaborate further on whether the two sets of rules might pursue distinct protective purposes. Instead, it stated in a rather apodictic manner that it could in any event rule out the doctrine of restraint of trade predominantly pursuing an objective different from EU competition law.<sup>75</sup> To substantiate this assertion, the court essentially invoked a historical argument, maintaining that antitrust law had to be regarded as a statutory derivative of common law doctrines such as restraint of trade.<sup>76</sup>

Whether this historical connection is strong enough to substantiate parallel objectives of both sets of rules seems rather questionable. Thus, it has been remarked, with a view to the nexus between the common law rules on restrictions of trade and the establishment of antitrust law, that ‘by its traditional emphasis on individual liberty and economic independence’ the common law had a ‘general *tendency* [...] to encourage competitive force’.<sup>77</sup> But this ‘tendency’ did not amount to a ‘policy’ because the enhancement of competition does *not* appear to have been a consciously pursued *objective* by the common law.<sup>78</sup>

Moreover, it is true that there is a common law background in particular to the enactment of US antitrust law by the Sherman Act of 1890,<sup>79</sup> which later (at least in an indirect way) inspired the drafting of (now) articles 101 and 102 TFEU.<sup>80</sup> The Sherman Act makes use of language

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<sup>70</sup> Note that there are instances where non-compete clauses were considered contrary to the public interest precisely because they reduced the supply of a certain service on the market. *Wyatt v Kreglinger & Fernau* [1933] 1 K.B. 793. See Peel (n 68) at 577–578, para 11–080.

<sup>71</sup> Peel (n 68) at 582–583, para 11–090 and at 593–594, para 11–105.

<sup>72</sup> See *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308, at 1313 (‘The public interest requires in the interests both of the public and of the individual that everyone should be free so far as practicable to earn a livelihood and give to the public the fruits of his particular abilities’). See also Atiyah and Smith (n 19) 225: ‘The conclusion that a restraint is reasonable in the interests of the parties is generally treated as sufficient to show that the restraint is reasonable in the interest of the public. Indeed, the courts have almost never concluded that a restraint that is reasonable in the interests of the parties is contrary to the public interest.’

<sup>73</sup> Atiyah and Smith (n 19) 227–228.

<sup>74</sup> Peel (n 68) 578.

<sup>75</sup> See n 30 above.

<sup>76</sup> See n 31 above.

<sup>77</sup> Hans B Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Allen & Unwin 1954) 12 (emphasis added).

<sup>78</sup> *Id.*

<sup>79</sup> See for an overview Philip Areeda, Louis Kaplow and Aaron Edlin, *Antitrust Analysis* (7<sup>th</sup> edn, Wolters Kluwer 2013) 32–34. For a more detailed account, see Hans B Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Allen & Unwin 1954) 12–35; William L Letwin, ‘The English Common Law Concerning Monopolies’ (1954) 21(3) *University of Chicago Law Review* 355–385.

<sup>80</sup> The implementation of the (now) articles 101 and 102 TFEU into the Treaty of Rome reveals a remarkable path dependency in this regard. For the previous sector-specific integration through the European Coal and Steel Community (ECSC) had also contained competition rules in its articles 65 and 66, which – alongside the (then drafted) German Act against Restraints of Competition – became the model for the competition

familiar from various common law doctrines and Senator Sherman even claimed that the language of the Act ‘does not announce a new principle of law, but applied old and well-recognized principles of the common law’.<sup>81</sup> Yet, this rhetoric of continuation by the drafter of the bill should be understood as an attempt to buy legitimacy for a new federal jurisdiction. In fact, given the various – albeit not always consistent and clearly formulated – policy ambitions associated with the Sherman Act, it becomes evident that Congress did not merely intend to codify the common law. It has, therefore, been concluded that ‘the antitrust laws clearly constitute a departure from the substantive content of preexisting common law’.<sup>82</sup>

Irrespective of such considerations with regard to the legislative history of the antitrust laws, their contemporary application both in the US and in Europe has at any rate been freed from their origins. Therefore, in order to determine the objective of EU competition law, as is required pursuant to article 3(2) and (3) of Regulation 1/2003, only the current interpretation and practical application by the European courts and the Commission should be regarded as relevant. Thus, all in all, the High Court’s reference to the historical connection between the restraint of trade and other common law doctrines and the enactment of the antitrust laws does not provide any conclusive argument on how their relationship should be assessed under article 3(2) of Regulation 1/2003. It merely raises the question about the regulatory purposes pursued by the respective set of rules.

(ii) *On the Adjudication of the Cour d’Appel de Paris in the Car Dealer Cases and in Expedia*

The Paris Court of Appeal acknowledged in the three cases on car dealer agreements and in *Expedia* that the objective of the respective doctrine of the *pratiques restrictives* had to be distinguished from the objective pursued by competition law in order to apply stricter standards than foreseen under article 101 TFEU. Here, too, it is noticeable that the court did not in any case deal with the objectives of the respective legal provisions on the basis of their practical application by the courts and competition authorities.

In the judgments dealing with the termination of car dealer agreements, the court described the objectives of both legal institutions, using very similar wording, as protecting the functioning of the market and competition, but saw a decisive distinction in the fact that the applicable *pratique restrictive* would strive for this end *by means* of protecting competitors.<sup>83</sup> If one takes

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law provision in the Treaty of Rome (then articles 85 and 86). Articles 65 and 66 ECSC, in turn, were not only inspired by US antitrust ideas and experience, but their drafting was directly influenced by US antitrust jurists. See David J Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus* (Oxford University Press 1998/Reprinted 2003) 336–339 and 342–344. Furthermore, it is noteworthy that also the debates in Germany, which likewise inspired the drafting of (now) articles 101 and 102 TFEU, in particular the outright prohibition of cartels, were influenced by the US model of antitrust law: in Germany, Allied decartelization laws modelled after the US antitrust laws had come into effect in 1947 as occupation laws and remained in force as laws of the Federal Republic of Germany until their replacement by the Act against Restraints of Competition in 1958. For an overview of the impact of the allied decartelisation laws see Gerber, *op. cit.* 268–270; Stefan A. Riesenfeld, ‘The Protection of Competition’ in Eric Stein and Thomas L. Nicholson (eds), *American Enterprise in the European Common Market: A Legal Profile* (University of Michigan Law School 1960) 213–15.

<sup>81</sup> 21 Cong. Rec. 2456 (1890).

<sup>82</sup> Philip Areeda, Louis Kaplow and Aaron Edlin, *Antitrust Analysis* (7th edn, Wolters Kluwer 2013) 32–37.

<sup>83</sup> See n 51 above.

this literally, there would be no difference in the regulatory intention. And, indeed, it has been argued in the French academic literature that the provisions pursue exactly the same objective, namely avoiding the consequences of a sudden termination of the relation between two business partners. Consequently, the application of former article L. 442-6, I, 5°, of the Commercial Code has been criticized as unduly undermining the two-year notification period prescribed by the MVER.<sup>84</sup>

However, the subsequent statement in *Expedia*, according to which the *pratique restrictive* can be distinguished because its objective is to protect competitors, can also be understood as a clarification with regard to the above-mentioned judgments. In any case, this corresponds to the view expressed, with regard to the car dealer cases, by some authors who make a distinction between the goal pursued by competition law – to protect the functioning of the market – and the objective pursued by former article L. 442-6, I, 5° – to protect the operators on the market.<sup>85</sup> In the same vein, Mainguy et al concluded that ‘the rules sanctioning the “pratiques restrictives” have been established with the aim of protecting certain economic actors, as if the antitrust rules were incapable or too slow to achieve such a purpose, which may result from their application’. While they admit that many of the *pratiques restrictives de concurrence* are sometimes prone to have an effect on competition, they maintain that this should not be considered the objective of this regulation.<sup>86</sup>

With a view to the analysed judgments, it seems somewhat irritating that the court stated that the application of the *pratiques restrictives* was intended to protect a ‘competitor’, because in all four analysed judgments the court used this word to effectively refer to a party of the (regulated) contract (e.g. a car dealer) who is not (at least not necessarily) an actual competitor of the other party (e.g. the car manufacturer). Therefore, when it used the term ‘competitor’ the court arguably intended to refer to any market operator. This will in fact always be the other contracting party when applying doctrines such as the ‘sudden termination of business relations’ (as in the car dealer cases) or a ‘significant imbalance in the rights and obligations’ (as in *Expedia*). However, in view of the large number of different prohibitions as *pratiques restrictives*, including for example the prohibition of resale price maintenance (*prix imposé*), this cannot be generalized.

Moreover, it has been put forward that the rules on anti-competitive practices (i.e. essentially those rules that correspond to articles 101 and 102 TFEU) are distinct because they require an analysis of the effects on a market. An action based on the rules on restrictive practices, by contrast, does not require any market definition. The latter prohibitions are regarded as absolute in the sense that they apply irrespective of the finding of a certain degree of market power

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<sup>84</sup> Michel Ponsard, ‘Rupture du contrat de concession automobile : quel droit applicable?: Arrêt rendu par Cour d’appel de Paris’ (2014) 1 AJ Contrats d’affaires, Concurrence, Distribution 38.

<sup>85</sup> See Sébastien Regnault, ‘Rupture brutale de relations commerciales établies dans le secteur automobile’ (2016) 10 AJ Contrat 439, 440; Muriel Chagny, ‘Jurisprudence: La règle sur la rupture brutale entre droit spécial de la concurrence et droit commun de la responsabilité civile’ (2016) 4 Revue trimestrielle de droit commercial et de droit économique 719, 721.

<sup>86</sup> Mainguy, Depincé and Cayot (n 45) 211–212 (with reference to V.S. Retterer, *La restauration de l’équilibre dans les relations commerciales entre fournisseurs et distributeurs dans la grande distribution* : D. 2003, chron. P. 1210).

on part of the contracting party that imposes the restrictive clause.<sup>87</sup> With regard to the prohibition of ‘restrictions by object’ under article 101 TFEU,<sup>88</sup> this statement appears to be somewhat imprecise. In practice, for example, the enforcement of the prohibition of clauses black-listed in article 4 of the Vertical BER 330/2010<sup>89</sup> does not require a market analysis or a market definition. On a conceptual level, however, the argument is correct, because even those clauses considered hardcore restrictions are, technically speaking, not prohibited per se but might, if only under very narrow conditions, be exempted under article 101(3) TFEU, which would indeed require a detailed analysis of actual and potential effects in a defined market.

Furthermore, it has been remarked that, for competition law to be violated, a prevention, restriction or distortion of competition must actually be demonstrated. Restrictive practices, on the other hand, are per se prohibited, without it being necessary to prove a restriction of competition by object or effect.<sup>90</sup> But this statement, stressing that the doctrines of *pratiques restrictives* can be classified as ex ante regulation, in fact only raises the question of how the objectives pursued by the prohibition of restrictions of competition pursuant to article 101 TFEU and the prohibition of restrictive practices can be distinguished.

### (iii) Conclusion

All in all, it is striking that, in all the judgments analysed, although the courts had identified the (potential) relevance of the legal barrier enshrined in article 3(2) of Regulation 1/2003, their reasoning on the applicability of national law was rather sparse and imprecise. There is a lack of a detailed and nuanced elaboration on and comparison of the regulatory objectives pursued by EU competition law and the relevant doctrines under English and French law. The courts have not analysed relevant case law to clarify and compare the respective goals. In fact, the approach taken by the judges to identify ‘competition law’ comes close to US Supreme Court Justice Potter Stewart’s famous dictum ‘I know it when I see it’.<sup>91</sup>

On the one hand, this indicates that it is not a trivial exercise to set parameters for a robust and practicable test to distinguish (national) ‘competition law’ from similar regulatory interventions. On the other hand, it illustrates the difficulties caused by the lack of analytical effort on the part of the courts: if judges rely on their subjective position to determine what is and what is not competition law, the purpose of article 3(2) of Regulation 1/2003 to guarantee a certain level playing field in the internal market will systematically be undermined.

Despite our criticism of the judgments analysed above, we will certainly not make it our business to try lecture the English and French courts on the correct understanding of the objectives

<sup>87</sup> See Malka Marcinkowski, ‘Les récentes évolutions réglementaires et jurisprudentielles concernant la clause du client le plus favorisé ou clause de parité’ (2016) 8–9 *AJ Contrats d'affaires, Concurrence, Distribution* 378, 382.

<sup>88</sup> See n 67 above and accompanying text.

<sup>89</sup> Commission Regulation (EU) No 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.

<sup>90</sup> See Anne-Sophie Choné-Grimaldi, ‘Une nouvelle pratique anticoncurrentielle passée (presque) inaperçue’ (2017) 193(22) *Recueil Dalloz* 1255; see also Louis Vogel, *French Competition Law* (LawLex/Bruylant 2015) 93.

<sup>91</sup> 378 U.S. at 197 (Stewart, J., concurring).

pursued by the restraint of trade doctrine or the *pratiques restrictives*, respectively. In the remainder of this article, we will strive, instead, to clarify the benchmark for ‘competition law’ within the meaning of Regulation 1/2003. On this basis, we will identify the distinct features in the application of article 101 TFEU that reveal its regulatory objective and allow for a differentiation from similar regulatory interventions under national law. Subsequently, we will illustrate the implementation of the resulting criteria and address important challenges in this regard.

### III. Specifying the Benchmark for ‘Competition Law’ under Article 3(2) of Regulation 1/2003

As a matter of principle, EU competition law and domestic competition law apply in parallel. This is settled case law of the ECJ<sup>92</sup> and article 3(1) of Regulation 1/2003 even provides for an obligation on national competition authorities and courts to apply parallel enforcement in every case where both legal regimes are applicable.<sup>93</sup> Yet, for the sake of a certain levelling of the competition rules in the internal market,<sup>94</sup> article 3(2) of Regulation 1/2003 creates a barrier to the application of ‘national competition law’: it must not invalidate agreements that may affect trade between Member States and fall within the scope of,<sup>95</sup> but are not regarded as unlawful under, article 101 TFEU. The scope of this regulatory barrier<sup>96</sup> on the application of national law is, however, restricted in two ways:

- First, stricter rules may be imposed by national law that is *not* ‘competition law’ within the meaning of article 3(2), first sentence, of Regulation 1/2003.

<sup>92</sup> *Toshiba Corporation*, C-17/10, EU:C:2012:72, para 81; *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283, para 25.

<sup>93</sup> See on this provision and, in particular, the consequences of non-respect, Wouter PJ Wils, ‘The Obligation for the Competition Authorities of the EU Member States to apply EU antitrust law and the *Facebook* decision of the *Bundeskartellamt*’ (2019) N°3 *Concurrences* 58–66.

<sup>94</sup> See Regulation 1/2003, recital 8.

<sup>95</sup> This essentially requires that there be an agreement (or other form of coordination captured by article 101(1) TFEU) between undertakings that may affect trade between Member States. Note that whether this means that national competition law may apply a broader concept of ‘undertaking’ even in cases where the requirements of the inter-State clause are met has not yet been clarified in the case law and is disputed in the academic literature. See, for example, Marek Szydło ‘Leeway of Member States in Shaping the Notion of an “Undertaking” in Competition Law’ (2010) 33 *World Competition* 549, 555–561. This has practical relevance above all with regard to the ECJ’s restrictive approach adopted in *FENIN*, according to which purchasing activities must only be considered an economic activity (as required for an entity to be regarded as an ‘undertaking’) if ‘the subsequent use of the purchased good amounts to an economic activity’, which excludes, however, the pursue of exclusively social objectives based on the principle of solidarity. *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities*, C-205/03 P, EU:C:2006:453, paras 26–27. In contrast, the approach taken by domestic competition laws may be broader, considering any purchasing practice as an economic activity regardless of the way the purchased product is subsequently used. Thus, for instance the German Bundesgerichtshof has expressly left open whether or not it will adopt the restrictive concept of ‘undertaking’ as developed by the ECJ. See BGH 12 November 2002, KZR 11/01, *Ausrüstungsgegenstände für Feuerlöschzüge*, *Juris*, para 13; 6 November 2013, KZR 61/11, *VBL Gegenwertforderungen*, *Juris*, para 55. While orthogonal to the main point of our article, the issue concerns one element defining the scope of article 3(2) of Regulation 1/2003 and therefore, is also decisive for how relevant the distinction between ‘competition law’ and other regulatory intervention is at all.

<sup>96</sup> The European Commission prefers the term ‘convergence rule’, highlighting that the provision creates incentives for Member States to bring their competition law into line with the standards set by EU competition law. See European Commission, Communication from the Commission to the European Parliament and the Council, Report on the Functioning of Regulation 1/2003 (29 April 2009), COM(2009)206 final, para 21.

- Second, article 3(2), second sentence, allows Member States to adopt and apply stricter national rules that prohibit or sanction *unilateral conduct* not prohibited by article 102 TFEU.<sup>97</sup>

While our focus is on the scope of the first exemption ('not competition law'), to understand it properly it is crucial to consider, first of all, the scope of the latter exemption ('competition law prohibiting unilateral conduct'). This rule essentially means that domestic provisions that do not address agreements but market operators' unilateral conduct may invalidate certain contractual terms (as they are considered the result of abusive unilateral conduct), even though they may affect trade between the Member States *and* infringe neither article 101 nor article 102 TFEU. Thus, the fact that articles 101 and 102 TFEU<sup>98</sup> and the corresponding provisions of national competition law<sup>99</sup> overlap in their application to contracts effectively broadens the Member States' power to regulate contractual relationships.

It is a consequence of this regulatory scheme that the ambition to create a level playing field, which should allow the design of EU-wide business strategies without the need to consider all relevant national sets of competition law, is significantly thwarted. In fact, the third sentence of recital 8 of Regulation 1/2003 appears to provide for a different regulatory approach and, thus, for a different reading of article 3(2) of Regulation 1/2003:

To that effect [*viz.* to create a level playing field for agreements] it is necessary to provide that the application of national competition laws to agreements [...] may not lead to the prohibition of such agreements [...] if they are not prohibited under Community competition law.

Read in isolation, this would indeed seem to preclude Member States from applying rules of national competition law (including those that address mere unilateral conduct) that are stricter than article 102 TFEU to invalidate agreements that are prohibited neither by article 101 nor by article 102 TFEU.<sup>100</sup> But the fifth and sixth sentences of recital 8 of Regulation 1/2003 clarify that the EU legislature has settled for a compromise that significantly restricts the desired level playing field for agreements:

Member States should not [...] be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings.

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<sup>97</sup> Regulation 1/2003, art 3(2), second sentence.

<sup>98</sup> *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, para 116. The scopes of art 101 and 102 TFEU overlap in particular in cases involving exclusivity obligation. See Joanna Goyder and Albertina Albers-Llorens, *Goyder's EC Competition Law* (5th edn, Oxford University Press 2009) 373–74.

<sup>99</sup> The Bundeskartellamt, for instance, found that Booking.com's parity clauses infringed not only art 101 TFEU and s 1 of the German Competition Act but also s 20(1) of the German Competition Act, which extends the applicability of exclusionary abuses to firms with (only) relative market power. See Bundeskartellamt 22 December 2015, B9-121/13, *Booking.com*, paras 306–14. The authority left open whether Booking.com was market dominant and, therefore, subject to art 102 TFEU and s 19 of the German Competition Act (para 315).

<sup>100</sup> This seems indeed to be the position taken by Eddy de Smijter and Ailsa Sinclair, 'The Enforcement System under Regulation 1/2003' in Jonathan Faull and Ali Nikpay (eds), *The EU Law of Competition* (3rd edn, Oxford University Press 2014), paras 2.46, 2.47 and 2.49.

In the text of article 3(2) of Regulation 1/2003, this has found expression, as we have seen, in the second sentence, which, therefore, has to be understood as limiting the statement of the first sentence, but also in the fact that article 102 TFEU is not explicitly mentioned in the first sentence. Thus, because rules of national competition laws on unilateral conduct that are stricter than article 102 TFEU can effectively invalidate agreements that are not prohibited by article 101 TFEU, the distinction established in article 3(2) of Regulation 1/2003 is in fact a distinction between ‘agreement’ and ‘unilateral conduct’ *and* between article 101 and article 102 TFEU.<sup>101</sup>

This insight is of importance when considering the appropriate yardstick to define which parts of national law are not ‘competition law’ within the meaning of the first sentence of article 3(2) of Regulation 1/2003:<sup>102</sup> as the rule only relates to article 101 TFEU, to establish that there is leeway for stricter regulation under national law it is sufficient to demonstrate that the respective provision of national law predominantly pursues an objective different from that pursued by article 101 TFEU. It is, thus, not necessary to distinguish the objective pursued by the respective national provision from the objective pursued by article 102 TFEU. If the national provision (also) addressed mere unilateral conduct and were to pursue essentially the same objective as article 102 TFEU, article 3(2), second sentence (but not the first sentence), of Regulation 1/2003 would apply, allowing for stricter standards under national law compared with those foreseen by EU competition law. In other words, for the purpose of defining the scope of the regulatory barrier to national law under article 3(2) of Regulation 1/2003, it is not relevant whether or not a certain provision of national law that (also) addresses undertakings’ unilateral conduct – such as the imposition of a certain contractual term – pursues an objective different from article 102 TFEU. This qualification helps to define the limits of Member States’ regulatory power under article 3(2) of Regulation 1/2003.<sup>103</sup>

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<sup>101</sup> This is often assumed without further examination by courts and commentators, but it is not undisputed. See, on the one hand, Jones, Sufrin and Dunne (n 42) 1011 (‘The position differs depending upon whether Article 101 or Article 102 applies’) and Wouter P.J. Wils, ‘The Obligation for the Competition Authorities of the EU Member States to apply EU Antitrust Law and the *Facebook* Decision of the *Bundeskartellamt*’ (3-2019) Concurrences 58, 60 (‘This convergence rule [*viz.* the first sentence of Regulation 1/2003, art 3(2)] only relates to Article 101 TFEU’) and, on the other hand, de Smijter and Sinclair (n 100) para 2.46 (‘It follows that the relevant distinction within Article 3(2) is between agreement and unilateral conduct. It is not between Articles 101 and 102’). In line with the former position, the German Federal Court of Justice, for instance, invoked Regulation 1/2003, art 3(2), second sentence, and took it for granted that it had the competence to annul a contractual term based on s 19 of the German Competition Act without considering whether the clause could also have been invalidated based on art 102 TFEU. See BGH 6 November 2013, KZR 58/11, VBL-Gegenwert, Juris, para 76.

<sup>102</sup> Note that this argument does not apply with regard to the definition of ‘competition law’ within in the meaning of article 3(1) of Regulation 1/2003 or article 2(3) of Directive 2014/104/EU.

<sup>103</sup> Given that article 102 TFEU prohibits the imposition of ‘unfair purchase or selling prices or other unfair trading conditions’, the provision is also concerned with protecting the economic interests of contracting parties with inferior market power. In this respect, the objective of article 102 TFEU cannot be well described as protecting competition from distortion. Consequently, to distinguish regulatory interventions such as judicial control over standard business terms, the use of market power in order to impose such terms remains the distinctive feature of ‘competition law’: under article 102 TFEU, abuse by way of exploitative trading conditions requires that the stipulation of a business term is inherently connected with the position of market dominance. Thus, it must be demonstrated that the dominant firm could not have imposed the term in question but for its market-dominant position. See Thomas Eilmansberger, ‘How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses’ (2005) 42 *Common Market Law Review* 129, 143; Robert O’Donoghue and Atilano Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 264–65; Jens-Uwe Franck, ‘Eine Frage des Zusammenhangs: Marktbeherrschungsmisbrauch durch rechtswidrige Konditionen’ (2016) *Zeitschrift für Wettbewerbsrecht* 137, 151–53. As the various national bans on parity clauses

#### IV. Objective Pursued by Article 101 TFEU: Two Distinctive Elements

As stipulated in article 3(3) of Regulation 1/2003, whether or not a provision of national law has to be regarded as ‘competition law’ depends on whether it predominantly pursues the same objective as articles 101 and 102 TFEU. However, as explained in the previous section, for the application of article 3(2) of Regulation 1/2003 only the comparison with the objective of article 101 TFEU is relevant. Defining the objective of article 101 TFEU is a question of interpretation of EU competition law. Therefore, this reference must, first of all, be read as relating to the relevant case law of the ECJ and the Commission’s practice.<sup>104</sup> What is more, as the reference is an integral part of a legislative text, due regard must be given to the EU legislature’s view, expressed in the first sentence of recital 9 of Regulation 1/2003, according to which articles 101 and 102 TFEU ‘have as their objective the protection of competition on the market’. This must be read in conjunction with the statement that is (now<sup>105</sup>) contained in Protocol (No 27), ‘On the Internal Market and Competition’, that the internal market as defined in article 3 TEU includes a system that protects competition from distortion.

As has already been remarked in the introduction, in order for this criterion to be effective in defining ‘competition law’, further specification is needed: article 101 TFEU does not protect competition against *all* conduct by private market operators that may have a distortive effect; they aim specifically at preventing distortions that are brought about through the exercise of a certain degree of market power: article 101 TFEU addresses anti-competitive conduct that is based on various forms of coordination between firms (which allow them to exercise market

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as well as the analysed interventions into platform-to-business contracts by French courts based on the doctrines of *pratiques restrictives* are not inherently linked to the exercise of market power (see below Section V.C) these provisions and legal doctrines must also not be regarded as ‘competition law’ within the meaning of article 3(2) of Regulation 1/2003 if one were not to follow the aforementioned restrictive reading of this provision.

<sup>104</sup> Thus, the general (academic) discussion on the objectives EU competition law pursues or should pursue does not promise any sufficiently clear results for the interpretation of article 3(2) of Regulation 1/2003. This coincides with the assessment that ‘contrary to what is often advanced in competition law literature, determining the goals of EU competition law will not necessarily provide any information on the content and evolution of competition law’. Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law. Substantive Aspects* (Edward Elgar 2013) 3.

<sup>105</sup> Before the Lisbon Treaty (2007), the establishment of a system of undistorted competition was listed in EC, ex-art 3(1)(g). Transferring it to a protocol had no effect on its binding nature (see Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, C-52/09, EU:C:2011:83, para 20), but was in any event of significance at the political level, which would appear to date back to an initiative of Nicolas Sarkozy, the French president at the time. See Giorgio Monti, ‘EU Competition Law from Rome to Lisbon – Social Market Economy’ in Caroline Heide-Jorgensen, Christian Bergquist, Ulla Neergaard and Sune Troels Poulsen (eds), *Aims and Values in Competition Law* (DJØF 2013) 27, 31 n 29, and 44. In the academic literature, it has been submitted that the system of undistorted competition has always been listed as an activity and was never an objective or a value in any earlier version of the Treaty. It was only the rejected ‘Constitution for Europe’ (Rome 2004) that included among the EU’s objectives ‘an internal market where competition is free and undistorted’ (art I-3-2). See Giorgio Monti, *ibid* 31 and 38–44. Note, however, that the ECJ has ascertained that ‘Article 3(1)(g) EC [...] is limited to indicating [...] an *objective* which must, however, be specified more closely in other provisions of the Treaty, in particular those concerning competition rules’ (emphasis added, references omitted). *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-484/08, EU:C:2010:309, para 47. See also Opinion of Advocate General Kokott in *Kone*, C-557/12, EU:C:2014:45, point 66 (‘In a European Union based on the rule of law which has set itself the objective of achieving a highly competitive social market economy (Article 3(3) TEU), functioning markets characterised by undistorted competition are in themselves an asset beyond all cost-benefit considerations’). For a detailed discussion of the role attributed to arts 101 and 102 TFEU by the Treaties’ framework as amended through the Lisbon Treaty and possible implications for the interpretation of arts 101 and 102 TFEU, see Lianos (n 104) 47–66.



power). Thus, it is the fundamental purpose of article 101 TFEU to *protect competition from distortion* brought about by the *exercise of market power*.

#### **A. First Distinctive Element: Protection of ‘Competition on the Market’ as Protection of Market Operators *Not* Parties to the (Regulated) Agreement**

The regulatory aim of protecting undistorted competition is reflected in the text of article 101 TFEU, which prohibits agreements and other forms of coordination between undertakings ‘which have as their object or effect the prevention, restriction or distortion of competition’. An analysis of the relevant practice by the EU courts and the Commission reveals that, under article 101 TFEU, this objective of ‘protection of undistorted competition’ must be read as ‘protection of market players *not* party to the agreement or any other form of coordination captured by article 101 TFEU’. Such an understanding takes into account the insight that, depending on the economic and legal context, restrictions on the conduct and, thus, on the economic freedom of one contractual party may in fact be pro-competitive and, therefore, should not be considered a restriction of competition.

##### *(i) Vertical Agreements*

Past decisions of the Commission<sup>106</sup> and a few judgments of the ECJ<sup>107</sup> contain statements in which contractual restrictions on traders’ or licensees’ economic freedom have been equated with restrictions of competition. It is therefore right to note that ‘in the past’ for the Commission (and in some instances also for the court) the protection of the ‘freedom of action of the parties to the agreement [...] has been [...] an end in itself’.<sup>108</sup> However, at least in the wake of the reform of its policy vis-à-vis vertical restraints in the late 1990s, the Commission has abandoned this position. An explicit statement in this respect can be found in the Commission’s guidelines on the application of (now) article 101(3) TFEU:

<sup>106</sup> See, for example, *Video Cassette Recorders* Case IV/29.151 (1978) OJ L 47/42 para 23; *Breeders’ Rights – Maize Seed* Case IV/28.824 (1978) OJ L 286/23, at 31. It has been argued that the Commission at this point followed the court’s conception of a restriction of competition as laid down in *Consten and Grundig v Commission*, C-56 & 58/64, EU:C:1966:41, at 342, where the court stipulated that an agreement tending to restrict [the competition between distributors] should [not] escape the prohibition of [now] Article [101](1) merely because it might increase [competition between producers].’ Rein Wesseling, *The Modernisation of EC Antitrust Law* (Hart Publishing 2000) 89.

<sup>107</sup> See, for example, *Hasselblad v Commission*, C-86/82, EU:C:1984:65, para 46 (‘It should be observed that the agreement prohibits the sale of Hasselblad cameras to other dealers, including authorized dealers in the United Kingdom or elsewhere. As the Commission rightly points out, a prohibition of sales between authorized dealers constitutes a restriction of their economic freedom and, consequently, a restriction of competition’); *Société de vente de ciments v Kerpen & Kerpen*, C-319/82 EU:C:1983:374, para 6 (‘It is clear from previous judgments of the court that clauses in contracts of sale restricting the buyer’s freedom to use the goods supplied in accordance with his own economic interests are restrictions on competition within the meaning of [now] Article [101] of the Treaty. A contract which imposes upon the buyer an obligation to use the goods supplied for his own needs, not to resell the goods in a specified area and to consult the seller before soliciting business in another specified area has as its object the prevention of competition within the common market’).

<sup>108</sup> Jonathan Faull, Lars Kjølbye, Henning Leupold and Ali Nikpay, ‘Article 101’ in Jonathan Faull and Ali Nikpay (eds), *Faull and Nikpay: The EC Law of Competition* (3rd edn, Oxford University Press 2014) 229, para 3.163.

It is not sufficient in itself that the agreement restricts the freedom of action of one or more of the parties [...] This is in line with the fact that the object of [now article 101] is to protect *competition on the market* for the benefit of consumers.<sup>109</sup>

This statement clarifies that, in the light of the notion of protecting ‘competition on the market’, as referred to in recital 9 of Regulation 1/2003 to characterize the objective of articles 101 and 102 TFEU, a restriction of the commercial freedom of the contracting parties as such would not be sufficient to demonstrate a restriction of competition within the meaning of article 101 TFEU.

The ECJ did at no stage in its case law consistently take the position that contractual restrictions of the economic freedom of traders could as such be sufficient to establish a restriction of competition. Indeed, in its early jurisprudence, in *Société Technique Minière*, the court had already stipulated that restrictions on the freedom to operate in a market need not be regarded as a restriction of competition where they facilitate market access. In a contract dispute in which one of the parties maintained that the contract was invalid under (now) article 101 TFEU as it contained an agreement about an exclusive right of sale, the court stated:

The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking.<sup>110</sup>

The ECJ’s judgment in *Delimitis*,<sup>111</sup> concerning exclusive purchasing agreements for beer, can be seen as a crystallization point after a number of decisions relating to vertical agreements where the court committed itself to a position that a restriction of competition (whether by object or by effect) cannot be deduced from a restrictive contract clause read in isolation but only after examining the factual, economic and legal circumstances in which the contractual restriction is embedded.<sup>112</sup> Since then, the European courts have repeatedly taken up the view that exclusive purchasing agreements cannot be regarded as a restriction of competition

<sup>109</sup> Communication from the Commission, Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C 101/97, para 24 n 31 (emphasis added).

<sup>110</sup> *Société Technique Minière v Maschinenbau Ulm GmbH*, C-56/65, EU:C:1966:235 250.

<sup>111</sup> *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91, paras 10–27.

<sup>112</sup> The approach of the ECJ in *Delimitis* has been characterized as an ‘economic’ reading of article 101(1) TFEU. Wesseling (n 106) at 91. The judgment can be regarded as a harbinger of certain modifications in EU competition practice which subsequently have been described as the ‘more economic approach’. The emphasis on the effects an agreement may have on third parties for establishing a restriction of competition is related to statements by the Commission and the General Court that stress the enhancement of consumer welfare as the ultimate objective of competition policy (see Communication from the Commission, Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C 101/97, para 13; *GlaxoSmithKline Services Unlimited v Commission*, T-168/01, EU:T:2006:265, para 118). Note, however, that the emphasis on third-party effects, i.e. on effects on the (ultimate) consumers and on (potential) competitors, does not depend on any particular assumption about the role that a consumer welfare analysis should play in the context of article 101 TFEU. For the purposes of this paper, it is therefore not necessary to elaborate further on whether the application of article 101 TFEU is or should be determined more by notions of economic efficiency, in particular the enhancement of consumer welfare, or by notions other than economic welfare, such as, in particular, the goal of promoting and enhancing the economic freedom of market operators or the protection of the competitive process as a value for its own sake. A detailed analysis of this debate and its significance for the implementation of EU competition law is provided by Lianos (n 104) 1–85. For insightful overviews see Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007/Reprinted 2008) 20–51, and Okeoghene Odudu, *The Boundaries of EC Competition Law* (Oxford University Press 2006/Reprinted 2007) 9–22.

merely because they restrict the commercial freedom of the tied party. As was held, for example, in relation to agreements on the exclusive purchasing of ice cream<sup>113</sup> or of motor fuels,<sup>114</sup> their competitive assessment must essentially depend on whether and to what extent they restrict market access to the detriment of new competitors ('market-sealing effect').

Moreover, in its case law on selective distribution systems, the ECJ has argued that restrictions on the commercial freedom of traders are not to be considered a restriction of competition if they secure the availability of products via a particular distribution channel that is appreciated by the ultimate consumers.<sup>115</sup> This rationale can still be identified in the case law: in line with the *Metro* ruling, the ECJ held in *Coty Germany* that contractual restrictions on retailers' freedom to use certain online distribution channels, in particular a prohibition to sell via third-party platforms, are compatible with article 101(1) TFEU if they are necessary to preserve the luxury image of the goods for which the selective distribution system has been designed,<sup>116</sup> because the quality of luxury goods is not least the result of 'the allure and prestigious image which bestow on them an aura of luxury' that is appreciated by the final consumers.<sup>117</sup>

This case law reveals that it is not the restriction of the freedom of action of the contracting party but the third-party effects, namely effects on (potential) competitors and on the (ultimate) consumers, that determine whether or not there is a restriction of competition pursuant to article 101(1) TFEU.

## (ii) *Horizontal Agreements*

The notion that the restriction of the economic freedom of one of the parties to an agreement must not *as such* be considered a restriction on competition has also prevailed in the case law on horizontal coordination. In *M6*, a judgment that concerned an agreement by six major television and cable distribution companies on the common development and broadcasting of television programmes and services, the (then) Court of First Instance noted:

a broader trend in the case law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in [now] Article [101](1) of the Treaty. In assessing the applicability of Article [101](1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned.

That interpretation, while observing the substantive scheme of Article [101] of the Treaty [...] makes it possible to prevent the prohibition in Article [101](1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties.<sup>118</sup>

<sup>113</sup> *Langnese-Iglo v Commission*, T-7/93, EU:T:1995:98, paras 99 and 101; *Schöller v Commission*, T-9/93, EU:T:1995:99, paras 76 and 78.

<sup>114</sup> *Neste*, C-214/99, EU:C:2000:679, paras 25–33.

<sup>115</sup> *Metro v Commission*, C-26/76, EU:C:1977:167, para 21 ('For specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in [now art 101(1) TFEU] [...]').

<sup>116</sup> *Coty Germany*, C-230/16, EU:C:2017:941, paras 24–29.

<sup>117</sup> *Ibid* para 25.

<sup>118</sup> *M6 and Others v Commission*, T-112/99, EU:T:2001:215, paras 76–77.

In a subsequent case, *O2 (Germany)*, the court had to consider whether an agreement between operators of digital mobile telecommunication networks and services that concerned infrastructure sharing and national roaming for the third generation of GSM mobile telecommunications ('3G') had the effect of restricting competition. While it was undisputed that there was no restriction of competition by object, the Commission had assumed a restriction by effect, but considered the agreement – at least for a certain period of time – to be exempted pursuant to article 101(3) TFEU. The ECJ, however, contradicted that assessment. Referring, inter alia, to the aforementioned judgment in *Société Technique Minière*,<sup>119</sup> the court held that contractual restrictions in an agreement between competitors may fall outside the scope of article 101(1) TFEU if they were indeed necessary to enable one competitor to enter the market in the first place, and therefore, to actually foster competition on the market:

Moreover, in a case such as this [...] the effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking.<sup>120</sup>

Subsequently, the Court found that, in any event, it could not be ruled out that the roaming agreement had just enabled the smallest operator to compete with the major players<sup>121</sup> and consequently annulled the Commission's decision.

The necessity to distinguish between a restriction of the commercial freedom of one contracting party and a restriction of competition has also been made explicit by the ECJ on other occasions, for instance in *Wouters*, where the court had to assess whether a rule of the Dutch bar that prevented lawyers from entering into partnerships with non-lawyers, including accountants, fell within the ambit of article 101(1) TFEU:

[...] not every agreement between undertakings [...] which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in [now article 101(1)] of the Treaty. For the purposes of application of that provision [...] account must first of all be taken of the overall context [...] More particularly, account must be taken of its objectives [...] in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience.<sup>122</sup>

It is particularly noteworthy that the court denied that there was a restriction of competition if the agreed restrictions on the lawyers' freedom to exercise their profession had indeed to be considered necessary in the ultimate consumers' interest in obtaining high-quality legal advice. This is in line with the above considerations in *Metro* and *Coty Germany* on vertical restraints, according to which it is the (third-party) effects on consumers, not the restriction of the distributors' freedom of action, that determine whether or not there is a restriction of competition.

<sup>119</sup> See text accompanying n 110 above.

<sup>120</sup> *O2 (Germany) v Commission*, T-328/03, EU:T:2006:116, para 68.

<sup>121</sup> *Ibid* para 109.

<sup>122</sup> *Wouters and Others*, C-309/99, EU:C:2002:98, para 97. See also *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492, para 42.

(iii) *Conclusion*

The insight into the development of the Commission's view and the ECJ's case law reveals that it is the effects that a contract term will have on third parties, namely on (potential) competitors and on consumers, that are crucial in assessing whether an agreement restricts competition within the meaning of article 101(1) TFEU. In particular, the prohibition of anti-competitive agreements does not aim to protect parties from contractual obligations solely on the basis that they could be viewed as an undue restriction of their commercial freedom. Therefore, whenever it is the primary purpose of a rule of national law,

– first, to protect the interests of one contracting party against perceived risks of superior economic or bargaining power of the other party, or

– second, to protect the economic or commercial freedom of one contracting party as a value for its own sake,

this intervention deviates sufficiently from the regulatory objective pursued by article 101 TFEU. Consequently, Member States are not precluded under article 3(2) of Regulation 1/2003 from intervening more heavily than foreseen by article 101 TFEU into contractual relationships and prohibiting certain contractual terms, for the above reasons.

The *first category* of 'non-competition law' includes, in particular, rules that protect businesses from unfair contract terms. Such rules are provided by the majority of the EU Member States,<sup>123</sup> in particular by way of judicial review of general terms and conditions.<sup>124</sup> While this type of regulatory intervention into agreements may to a large extent be conceptualized as addressing a market failure,<sup>125</sup> as it steps in to compensate for the failure of competition on the quality of standard terms, it must not be considered 'competition law' as it is predominantly aimed at protecting the contracting party whose interests are unfairly affected by the contractual clause.

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<sup>123</sup> The Commission recently noted that only seven Member States do not explicitly forbid unfair terms in business-to-business. Commission Staff Working Document, Impact Assessment, Annexes, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (26 April 2018), SWD(2018) 138 final, Part 2/2, 91.

<sup>124</sup> See, for instance, s 307(1) of the German Civil Code (Bürgerliches Gesetzbuch), which also applies to b2b contracts and which stipulates that: 'Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user.' EU secondary legislation contains a prohibition of unfair terms not individually negotiated, which applies only to consumer contracts. See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. But note that under both the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) the judicial review of standard terms is also applicable to b2b contracts. See PECL, art 4:110, and DCFR, arts II.-9:405 and II.-9:408. At European level, one of the early advocates of this approach was Ole Lando, 'Unfair Contract Clauses and a European Uniform Commercial Code', in *New Perspectives for a Common Law of Europe* (1978) 267, 276–81.

<sup>125</sup> Akerlof's 'lemon market' model of adverse selection due to systematic information asymmetries that, in turn, are the result of prohibitive transaction costs (George A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) *Quarterly Journal of Economics* 488) is the standard justification for judicial control over standard contracts. See, e.g., Hans-Bernd Schäfer and Claus Ott, *The Economic Analysis of Civil Law* (Edward Elgar 2004) 370–73; Ole Lando, 'Is Codification Needed in Europe? Principles of European Contract Law and the Relationship to Dutch Law' (1993) 1 *European Review of Private Law* 157, 165.

The *second category* of ‘non-competition law’ that follows from our analysis includes, for example, prohibitions of non-compete clauses included in employment contracts or partnership and company agreements. Pursuant to certain doctrines of national law, such clauses have to be considered void because they unduly restrict an employee’s, partner’s or shareholder’s freedom to engage in an occupation or to conduct a business as protected by fundamental rights.<sup>126</sup> Depending on the circumstances of an individual case, such regulatory interventions may have precisely the same effect as the application of article 101 TFEU and corresponding provisions of national law on non-compete clauses. Nevertheless, they must not be considered part of (national) ‘competition law’ as they pursue a distinct objective that may in many cases result in rules different from the application of competition law.

## **B. Second Distinctive Element: Prevention of Competitive Risks Posed by the Creation and Exercise of Market Power**

### *(i) The Inhibition of Monopoly Power as the Conceptual Basis of Article 101 TFEU*

Article 101 TFEU aims to protect the competitiveness of markets; it does so, specifically, by preventing the establishment and use of market power through agreements and other forms of coordination between firms that are used to restrict competition. In other words, article 101 TFEU is aimed at protecting functioning competition by preventing or limiting market failure resulting from the exercise of monopoly power. Certainly, when applying article 101 TFEU, the implications of an agreement *or* its prohibition with regard to other sources of market failure such as systematic information deficits or externalities must also be taken into account. To name but two examples: an agreement between firms to exchange information, such as a credit information register established by (competing) banks in *Asnef-Equifax*, may not be regarded as a restriction of competition because it prevents market failure resulting from systematic information asymmetries.<sup>127</sup> The prevention of free-rider problems and, thus, of externalities, is one of the essential considerations in substantiating the pro-competitive effects of vertical coordination.<sup>128</sup> This, however, in no way changes the fact that it is a characteristic feature of article 101 TFEU that only those threats to competition are addressed that result from the use of (at least) a certain degree of market power and, therefore, that article 101 TFEU must basically be understood as a regulatory tool that addresses monopoly power as a form of market failure.

In this general way, this insight is not often explicitly recognized. The idea has been clearly articulated, though, by the Commission in its *Guidelines on the Application of Article [101](3) of the Treaty*, in the part on the ‘basic principles of assessing agreements under article [101(1) TFEU]’:

Negative effects on competition within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of market power and the agreement contributes to the creation,

<sup>126</sup> See, e.g., Bundesgerichtshof 30 November, II ZR 208/08, *Juris*, paras 12–17 (art 12(1) of the German Constitution (Grundgesetz) requires a restrictive interpretation of a non-compete clause in a company agreement that otherwise would have to be considered null and void).

<sup>127</sup> *Asnef-Equifax*, C-238/05, EU:C:2006:734, paras 47 and 55.

<sup>128</sup> European Commission, *Guidelines on Vertical Restraints*, [2010] OJ C 130/1, para 107(1); see also with regard to exclusive territorial protection in licensing agreements *Nungesser v Commission*, C-258/78, EU:C:1982:211, para 57.

maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time.<sup>129</sup>

What is more, the *de minimis* doctrine, according to which agreements that have no *appreciable* impact on competition do not fall within the ambit of article 101(1) TFEU, is based on the premise that the provision seeks to inhibit only those restrictions of competition that result from the exercise of (at least) a certain degree of market power. Thus, when it first established the doctrine in *Völk v Vervaecke*, the ECJ formulated:

an agreement falls outside the prohibition in Article [101 TFEU] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question.

In its later case law the ECJ qualified the doctrine and held that ‘appreciability’ does not need to be assessed where an agreement could be regarded a restriction of competition ‘by object’.<sup>130</sup> Yet this does not call into question the basic idea underlying the *de minimis* doctrine.

That the application of article 101 TFEU is aimed at limiting the creation and exercise of market power is certainly most evident in relation to the prohibition of cartels and other forms of horizontal coordination, which enable firms to combine their individual market power, in turn allowing them to restrict competition and, consequently, to charge supra-competitive prices, to limit output or to harm consumers in any other way. The role of article 101 TFEU in addressing monopoly power may appear less obvious if applied to vertical agreements as they do not involve an aggregation of firms’ individual market power. Yet, the latter fact is precisely why anti-competitive effects are generally only assumed where at least one party with a considerable degree of market power is involved. Otherwise inter-brand competition will typically suffice to prevent appreciable anti-competitive effects. Thus, it is established case law of the ECJ that, to evaluate whether the terms of a vertical agreement will have a restrictive effect on competition, their economic context must be considered, which requires, *inter alia*, an assessment of the ‘conditions under which competitive forces operate on the relevant market’,<sup>131</sup> in particular of the market positions of the parties to the agreement and their competitors, as well as entry barriers.

This is also why article 2 of the Vertical BER 330/2010 generally exempts vertical agreements from article 101(1) TFEU only under the condition that the market shares held by the supplier and the buyer do not exceed 30 per cent of the relevant market.<sup>132</sup> Thus, this rule creates a ‘presumption of legality for vertical agreements depending on the market share of the supplier and the buyer’.<sup>133</sup> This is based on the assumption that, as long as there is no undertaking with a certain degree of market power involved, inter-brand competition is sufficiently effective to

<sup>129</sup> European Commission, Guidelines on the Application of Article 81(3) of the Treaty, [2004] OJ C 101/8, para 25.

<sup>130</sup> *Expedia*, C-226/11, EU:C:2012:795, para 37.

<sup>131</sup> *Maxima Latvija* C-345/14, EU:C:2015:784, para 28.

<sup>132</sup> Commission Regulation (EU) No 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, art 3.

<sup>133</sup> European Commission, Guidelines on Vertical Restraints, [2010] OJ C 130/1, para 23.

ensure that vertical agreements ‘improve production and distribution from which consumers will derive a fair share of the benefit’.<sup>134</sup>

However, certain vertical agreements are captured by article 101(1) TFEU irrespective of the contracting parties’ market position in an individual case because they are regarded as having the object of restricting competition.<sup>135</sup> This category includes in particular the imposition of fixed or minimum resale prices, the conferral of absolute territorial protection on a distributor, and other contractual terms blacklisted in article 4 of the Vertical BER 330/2010.<sup>136</sup> Here we are indeed on the borderline of measures that aim at protecting competition without their application being dependent on an actual identification of market power. Yet, even though the borderline may be thin, it remains intact: the finding that certain terms may be prohibited under article 101 TFEU owing to their presumed anti-competitive effects without an assessment of actual market power does not alter the fact that the prohibition is based on a concept that addresses an abuse of market power and presumes the exercise of a certain degree of market power in each individual case. This existing, albeit weak, distinctiveness is evident, because under exceptional circumstances even hardcore sales restrictions blacklisted in article 4 of the Vertical BER 330/2010 may be exempted pursuant to article 101(3) TFEU, which in any case requires a detailed market analysis.<sup>137</sup>

(ii) *Conclusion*

Article 101 TFEU addresses agreements and other forms of coordination between undertakings that have as their object or effect the restriction of competition. Thus, its application depends on demonstrating that undertakings create and use market power to restrict competition. This specification allows ‘competition law’, within the meaning of article 3(2) of Regulation 1/2003, to be distinguished from rules that are designed to promote competition – and therefore cannot be distinguished under the first distinctive element identified above – but are not tied up with the establishment or use of market power as they apply regardless of an undertaking’s coordination or the addressee’s market position. Therefore, whenever it is the primary purpose of a rule of national law

– first, to enhance competition through the lowering of entry barriers, in particular by granting rights to access infrastructure or data, but which, in its application, is not related to the exercise of market power,

– second, to prevent information deficits in markets and which, thus, addresses a type of market failure other than monopoly power, or

– third, to prevent the potential exclusionary effects of excessive pricing, but which in its practical application does not require the use of a certain level of market power,

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<sup>134</sup> See Vertical BER 330/2010, recital 8.

<sup>135</sup> See, e.g., *Maxima Latvija* C-345/14, EU:C:2015:784, para 18.

<sup>136</sup> European Commission, Guidelines on Vertical Restraints, [2010] OJ C 130/1, para 23. See Richard Whish and David Bailey, *Competition Law* (9th edn, Oxford University Press 2018) 129–31.

<sup>137</sup> European Commission, Guidelines on Vertical Restraints [2010] OJ C 130/1, paras 60–64.



the regulatory purpose of the intervention is predominantly different from the objective pursued by article 101 TFEU. Thus, the respective rules are not ‘competition law’ and Member States are not precluded under article 3(2) of Regulation 1/2003 from intervening more heavily than foreseen by article 101 TFEU into contractual relationships and prohibiting certain contractual terms for the above reasons.

To illustrate the *first category* of regulation that has to be distinguished, two examples are helpful:<sup>138</sup> first, car manufacturers have an obligation to grant independent operators access to the vehicle repair and maintenance information<sup>139</sup> required to carry out operations related to maintaining a car, including diagnosis of malfunctions, repair services and spare part identification. The purpose of this provision is to intensify competition on the markets for repair and maintenance services and for spare parts. Second, the Payment Service Directive provides that established payment service providers have to allow their customers the use of payment initiation services.<sup>140</sup> Thus, the former are prevented from formulating their terms and conditions so as to hinder innovative competitors from accessing the market.

A typical example included in the *second category* of ‘non-competition law’ as defined above is the prohibition of misleading commercial practices,<sup>141</sup> a rule that may be described as having the objective of inhibiting the distortion of competition (through informational deficits) but whose application is not related to the exercise of market power.

The *third category* of ‘non-competition law’ identified above can be exemplified by the capping of interchange fees for card-based payment transactions.<sup>142</sup> These fees are normally set by banks or the operators of payment card schemes. Yet, retailers, who have no opportunity to influence the level of the fees and who have no effective choice to refuse to accept commonly used cards, have to bear the costs through the fees charged by banks for processing card payments (though they may pass them on to consumers). The capping of interchange fees is intended not only to directly benefit retailers and consumers through lower prices but also to promote competition on the market for payment systems as it facilitates market entry and provides incentives for innovative and cheaper payment technologies to be introduced. Another relevant example of this third category of ‘non-competition law’ concerns telecommunication: price caps on wholesale roaming prices<sup>143</sup> accompany the complete abolition of retail roaming

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<sup>138</sup> While pursuant to art 3 Regulation 1/2003 the distinction between ‘competition law’ and other types of regulatory interventions is relevant with regard to national law, we chose below examples taken from EU legislation as these should be generally known.

<sup>139</sup> Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on Type Approval of Motor Vehicles with Respect to Emissions from Light Passenger and Commercial Vehicles (Euro 5 and Euro 6) and on Access to Vehicle Repair and Maintenance Information [2007] OJ L 171/1, art 6.

<sup>140</sup> See Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and Repealing Directive 2007/64/EC [2015] OJ L 337/35, art 64(2), second sentence, art 66 and recital 69.

<sup>141</sup> See, e.g., Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 Concerning Misleading and Comparative Advertising [2006] OJ L 376/21.

<sup>142</sup> Interchange fees for consumer debit cards are capped at 0.2 per cent and for consumer credit cards at 0.3 per cent of the value of the transaction. See Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions [2015] OJ L 123/1, arts 3 and 4.

<sup>143</sup> See Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on Roaming on Public Mobile Communications Networks within the Union (Recast) [2012] L 172/10, arts 3, 7, 9 and

charges in the EU, which, in turn, is intended to open markets by enhancing freedom of movement in the internal market.<sup>144</sup>

## V. Challenges in Implementation: Identifying and Distinguishing the Objective of National Regulation

According to the two distinctive criteria developed above, a regulatory intervention under national law can only be regarded as ‘competition law’ within the meaning of article 3(2) of Regulation 1/2003 if two conditions are met: *first*, the regulation’s objective must be to protect undistorted competition, which, if translated into individualized objects of protection, effectively means that it predominantly aims at protecting *not* one of the contracting parties but the interests of market operators *not* party to the regulated agreement, namely (potential) competitors and consumers. *Second*, and more specifically, the rule must aim at protecting undistorted competition against the risks of monopoly power so that its application depends on competition being threatened precisely by addressees establishing or using a certain degree of market power.

### A. Paradigmatic Example: National Regulation Prohibiting Hotel Booking Platforms’ Parity Clauses

In this section, we will consider implementation challenges under the two stages of the test outlined above: the evaluation of the protective purpose of the relevant national provision and its link to the use of market power. The legislative bans on parity clauses in contracts between booking platforms and hotels that various Member States have adopted in recent years serve as an illustration of this. They are useful as a paradigmatic illustration for three reasons in particular:

– First, in view of the growing sensitivity of policymakers to the risks associated with the special market position of large digital platforms, it can be expected that these bans will represent *pari pro toto* an increasing number of national regulatory interventions into platform-to-business agreements in the near future.

– Second, as will be explained in more detail below, various competition authorities and courts have already dealt with the assessment of those parity clauses under EU competition law. While no clear rules have yet emerged from this, it seems indisputable that parity clauses, at least as a general rule, do not amount to a restriction of competition by object under article 101(1) TFEU. Their general prohibition, independent of the market circumstances of the individual case, therefore constitutes stricter regulation than that provided for by article 101 TFEU. Insofar as, in a given case, the conditions for the application of article 101 TFEU are fulfilled

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12, as amended by Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 [2017] L 147/1.

<sup>144</sup> See Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on Roaming on Public Mobile Communications Networks within the Union (Recast) [2012] L 172/10, art 6a, as amended by Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 [2015] L 310/1.

but the parity clause does not infringe article 101 TFEU, those national rules may only invalidate the parity clause if they are not ‘competition law’ pursuant to article 3(2) of Regulation 1/2003.

– Third, as we can observe regulatory intervention into the same type of contractual term by the legislatures in four Member States, there is ample material to identify and compare various problems in the application of the criteria developed above.

(i) *Competition Enforcement in Europe: Drawing a Sketchy Picture*

To appreciate the implications of article 3(2) of Regulation 1/2003 with regard to the use of parity clauses by hotel booking platforms, it is, first, necessary to clarify whether and under which conditions the parity clauses in question infringe article 101 TFEU. In their most restrictive version, these terms require hotels to offer their rooms on an online booking platform at the lowest room price and on the best terms, including, for example, cancellation rules, breakfast and room availability relative to all other sales channels (‘wide parity clauses’). These clauses are considered potentially anti-competitive essentially because they prevent hotels from ‘rewarding’ platforms with relatively low commission rates by offering lower room prices. Thus, platforms have only limited incentive to compete on commission rates or other conditions they offer to hotels. Moreover, the lack of price competition may hinder the entry of new platforms or the expansion of small platforms.<sup>145</sup> The relevant consideration in defending the use of parity clauses is the fear of free-riding by hotels’ customers, because they can use the search services provided by the booking platforms without being charged directly. Without price parity, those customers, after a successful search, may be tempted to book the hotel room via an alternative sales channel at a cheaper price, effectively avoiding any commission charged by the platform.

The Commission left the field entirely to Member States’ competition authorities. This is remarkable, for the hotel platform cases involved market players whose conduct has significant impact throughout the internal market, and a decision rendered by the Commission could have contributed to a clarification of the competition law standard under article 101 TFEU, especially in the event of a subsequent action for annulment under article 263 TFEU. While we are not aware of any explicit statement of the Commission as to why it has not taken up at least one of those cases,<sup>146</sup> two considerations may have been crucial in this regard. First, the Commission’s enforcement priorities under article 101 TFEU lie with cartels. For some years now, the Commission has been leaving cases of vertical restrictions to the competition authorities of the Member States. Online platforms’ (price) parity clauses are not strictly ‘vertical’. Nevertheless, the Commission may have assumed that they were comparable to vertical restraints in terms of policy relevance. Second, the emergence of restrictive clauses in contracts between multi-

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<sup>145</sup> This ‘theory of harm’ has a solid basis in the economic literature. See Chengsi Wang and Julian Wright, ‘Search Platforms: Showrooming and Price Parity Clauses’, mimeo 2015/16; Jonathan B. Baker and Fiona Scott Morton, ‘Antitrust Enforcement against Platform MFNs’ (2018) 127 Yale Law Journal 2177, 2181–86. It has been taken up in several policy reports, including House of Lords, Select Committee on European Union, ‘Online Platforms and the Digital Single Market’, HL Paper 129, 2016, paras 108–10, and ‘Report on the Monitoring Exercise Carried Out in the Online Hotel Booking Sector by EU Competition Authorities in 2016’ 5.

<sup>146</sup> See article 11(6) of Regulation 1/2003.

sided platforms and their business users has been accompanied by a considerable uncertainty over how they should be viewed from a competition policy and competition law perspective. It stands to reason that the Commission, therefore, regarded the treatment of online travel platforms' (price) parity clauses by the Member States' competition authorities as a test case. It wanted to see how the decentralized enforcement of article 101 TFEU – which in fact amounted to a parallel experimentation with different ideas and approaches – and the cooperation and exchange of information via the European Competition Network (ECN) would work under such circumstances.

Thus, various competition authorities and courts across Europe have considered whether parity clauses imposed by hotel booking platforms have to be regarded as an infringement of article 101 TFEU. The German Bundeskartellamt was among the first to prohibit the use of parity clauses when it ruled against HRS, a major hotel platform on the German market, in December 2013.<sup>147</sup> On appeal, the Higher Regional Court in Düsseldorf confirmed an infringement of article 101 TFEU.<sup>148</sup> In April 2015, the Swedish,<sup>149</sup> French<sup>150</sup> and Italian<sup>151</sup> competition authorities accepted a commitment by Booking.com, a major international platform, to reduce its 'wide' parity clause to a 'narrow' parity clause. The use of this type of parity clause is less restrictive as it only prohibits hotels from offering better conditions via their own websites; it leaves them free to offer better conditions via offline channels, emails or other (competing) online platforms. When Booking.com eliminated its wide price-parity clauses across all European markets in August 2015, the Competition and Markets Authority (CMA), whose predecessor, the OFT, had initially presumed these clauses to be illegal,<sup>152</sup> closed its investigation into the use of parity clauses in the UK on the grounds of administrative priority.<sup>153</sup> In the same vein, the Greek<sup>154</sup> and the Polish<sup>155</sup> competition authorities have also decided to close their investigations against Expedia and Booking.com.<sup>156</sup>

<sup>147</sup> Bundeskartellamt 20 December 2013, B9-66/10, *HRS*.

<sup>148</sup> OLG Düsseldorf 9 January 2015, VI-Kart 1/14(V), *HRS*, *Juris*, paras 21–138.

<sup>149</sup> Konkursverket 15 April 2015, 596/2013, *Booking.com* <[http://www.konkurrensverket.se/globalassets/english/news/13\\_596\\_bookingdotcom\\_eng.pdf](http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf)>. Shortly afterwards, the authority rendered a follow-up decision concerning Expedia, Konkursverket 10 May 2015, 595/2015, *Expedia*.

<sup>150</sup> Autorité de la Concurrence 21 April 2015, Décision n° 15-D-06, *Booking.com* <<http://www.autoritedelaconcurrence.fr/pdf/avis/15d06.pdf>>. In 2017, the authority published its initial intermediary assessment of the commitments made by Booking.com, according to which 'more hoteliers are now varying their prices according to the online hotel booking platforms [...] though without any visible sign of increased competition among [online travel agencies]'. See Autorité de la Concurrence 9 February 2017, Press Release 'Hotel Booking Platforms' <<https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/9-february-2017-hotel-booking-platforms>>.

<sup>151</sup> L'Autorità Garante della Concorrenza e del Mercato 21 April 2015 <<https://www.agcm.it/media/comunicati-stampa/2015/4/alias-7623>>.

<sup>152</sup> See Office of Fair Trading 31 July 2012, Press Release 'OFT issues Statement of Objection against Booking.com, Expedia and International Hotels Group' <<https://webarchive.nationalarchives.gov.uk/20140402182533/http://www.of.gov.uk/news-and-updates/press/2012/65-12>>.

<sup>153</sup> Competition and Markets Authority 16 September 2015, Press Release 'CMA Closes Hotel Online Booking Investigation' <<https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation>>.

<sup>154</sup> See Hellenic Competition Authority, 'The Hellenic Competition Authority Decides to Not Launch Investigation in Hotel Market (Booking.com/Expedia)', 22 September 2015, e-Competitions September 2015, Art. N° 75832, <<https://www.concurrences.com/en/bulletin/news-issues/september-2015/The-Hellenic-Competition-Authority-75832>>.

<sup>155</sup> See Office of Competition and Consumer Protection 3 November 2015, Press Release 'Hotel Online Booking Case – Proceeding Concluded' <[https://www.uokik.gov.pl/news.php?news\\_id=11995](https://www.uokik.gov.pl/news.php?news_id=11995)>.

<sup>156</sup> See also Autorité de la Concurrence 10 December 2019, Décision n° 19-D-23, *Expedia, HRS* <[https://www.autoritedelaconcurrence.fr/sites/default/files/integral\\_texts/2019-12/19d23.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2019-12/19d23.pdf)> para 46.

In contrast, the settlement did not prevent the Bundeskartellamt from prohibiting Booking's use of the 'narrow' parity clause in December 2015.<sup>157</sup> The German competition authority emphasized that, with 'narrow' parity clauses in place, hotels that used Booking's platform but preferred to support competing booking platforms that charged relatively low commission rates by offering rooms at reduced prices on those platforms would forego the option to lure customers with price incentives to their own websites. This, the authority argued, should be considered the priority interest of an average hotel business.<sup>158</sup> Yet, on appeal in June 2019 the Higher Regional Court in Düsseldorf annulled this decision, essentially considering the 'narrow' parity clause a legitimate ancillary restraint and, therefore, denying an infringement of article 101(1) TFEU.<sup>159</sup> In a similar vein, the Swedish Patent and Market Court of Appeal had shortly beforehand, in May 2019, overturned a ruling of the first instance court, which had ordered Booking.com to remove 'narrow' parity clauses from its contract terms.<sup>160</sup> The appeal court found that the plaintiff, a tourist services industry association, had not sufficiently demonstrated an anti-competitive effect of those clauses on the hotel online booking market.<sup>161</sup>

What is more, in the course of civil litigation concerning Expedia's use of a parity clause, the Higher Regional Court in Düsseldorf left aside the question of an infringement of article 101(1) TFEU because it considered the clause to be exempted pursuant to article 2 of the Vertical Block Exemption Regulation 330/2010.<sup>162</sup> On this basis, the use of parity clauses (either 'wide' or 'narrow') by platforms with a market share below the 30 per cent threshold<sup>163</sup> can be considered legal as long as the exemption is not withdrawn by the Commission or a Member State's competition authority.<sup>164</sup>

A monitoring exercise on the effects of the various competition enforcement measures, carried out by ten national competition authorities and the Commission, concluded that the interventions against the use of parity clauses resulted in increased differentiation in room prices and availability on the platforms. Yet, no clear evidence of lower commission rates being charged by the platforms was found.<sup>165</sup> Consequently, the heads of the ECN agreed to leave it for the time being, to continue monitoring the online hotel booking sector, to reassess the competitive situation in due time and to coordinate future enforcement actions within the ECN.<sup>166</sup>

All in all, after almost ten years of competition enforcement, the assessment of parity clauses under article 101 TFEU remains unsettled. While there is on the one hand a tendency not to regard 'narrow' parity clauses as an infringement of article 101 TFEU, only the ECJ could provide ultimate guidance in this regard. But, even if the interpretation of article 101 TFEU

<sup>157</sup> Bundeskartellamt 22 December 2015, B9-121/13, *Booking.com*.

<sup>158</sup> Bundeskartellamt 22 December 2015, B9-121/13, *Booking.com*, paras 8 and 192 et seq.

<sup>159</sup> OLG Düsseldorf 4 June 2019, Kart 2/16(V), *Booking.com ('Enge Bestpreisklausel II')*. It is noteworthy that in the proceedings for interim relief the court still assumed that there had been an infringement of art 101 TFEU. See OLG Düsseldorf 4 May 2016, VI-Kart 1/16(V), *Booking.com ('Enge Bestpreisklausel I')*, *Juris*, paras 63–106.

<sup>160</sup> Stockholms Tingsrätt, Patent- och marknadsöverdomstolen 20 July 2018, PMT 13013-16, *Visita / Booking.com*.

<sup>161</sup> Svea hovrätt, Patent- och marknadsöverdomstolen 9 May 2019, PMT 7779-18, *Booking.com*.

<sup>162</sup> OLG Düsseldorf 4 December 2017, IV-U (Kart) 5/17, *Expedia*, *Juris*, paras 25–51.

<sup>163</sup> See Vertical Block Exemption Regulation 330/2010, art 3.

<sup>164</sup> See Regulation 1/2003, art 29.

<sup>165</sup> 'Report on the Monitoring Exercise Carried Out in the Online Hotel Booking Sector by EU Competition Authorities in 2016' (6 April 2017) 6–8.

<sup>166</sup> *Outcome of the Meeting of the ECN and DGs* (17 February 2017).

were to be clarified by the ECJ, to determine whether such a clause restricted competition by effect (article 101(1) TFEU)<sup>167</sup> or was exempted (article 101(3) TFEU) would in all likelihood still depend on the prevailing market conditions in each case. Finally, the question of whether platforms that use parity clauses may successfully invoke an exemption under article 2 of the Vertical Block Exemption Regulation cannot be regarded as clarified. One may expect that this last aspect will be settled in the course of the forthcoming revision of the Vertical Block Exemption Regulation.<sup>168</sup>

However, with regard to the application of article 3(2) of Regulation 1/2003 it is crucial to recognize that the use of parity clauses by hotel booking platforms can have both pro- and anti-competitive effects. Their general prohibition therefore in any case goes beyond the level of regulation resulting from article 101 TFEU. Thus, if article 101(1) TFEU is applicable, i.e. in particular if the inter-State clause is fulfilled, without the parity clause in an individual case actually infringing article 101 TFEU, the clause can only be invalidated by a provision of national law which can be regarded as not being ‘competition law’ within the meaning of article 3(2) of Regulation 1/2003.

(ii) *Prohibition of Hotel Booking Platforms’ Parity Clauses through Domestic Legislation*

Though the treatment of parity clauses in competition law may not be a Gordian knot, the legislatures in four Member States,<sup>169</sup> namely France, Austria, Italy and Belgium, have opted nevertheless for the sword: as they considered competition enforcement too uncertain and too hesitant, they issued sector-specific prohibitions of parity clauses that capture both their ‘wide’ and ‘narrow’ versions. Since in any event the application of article 101 TFEU does not result in such an unqualified prohibition, these legislative interventions can, in individual cases, be measured against article 3(2) of Regulation 1/2003.

For this reason, below we provide a brief summary of the material that can be consulted to identify the objective of the respective prohibition of parity clauses in the four Member States. The focus is in particular on whether the intervention was aimed at protecting undistorted competition, which market participants the legislature sought to protect and whether the possible or presumed market power of the addressed platforms was relevant for the regulatory intervention. Based on this, the implementation of the relevant criteria for the classification of a rule

<sup>167</sup> The Bundeskartellamt also considered it conceivable to regard the use of parity clauses by online booking platforms a restriction of competition by object, but did not take a final decision in this respect. See Bundeskartellamt 20 December 2013, B9-66/10, *HRS*, paras 1, 8 and 137.

<sup>168</sup> The Commission has published a consultation strategy document <[https://ec.europa.eu/competition/consultations/2018\\_vber/consultation\\_strategy.pdf](https://ec.europa.eu/competition/consultations/2018_vber/consultation_strategy.pdf)> and launched a public consultation <[https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981_en)>.

<sup>169</sup> Remarkably, the law in Switzerland has undergone a parallel development. In 2015, the country’s competition authority prohibited ‘wide’ price parity clauses. See Competition Commission 6 November 2015, Press Release ‘COMCO Prohibits Anticompetitive Contract Clauses by Hotel Booking Platforms’ <<https://www.news.admin.ch/newsd/message/attachments/41617.pdf>>. A year later, a legislative proposal was made with a view to also prohibit ‘narrow’ price parity clauses, which was adopted by both chambers of the parliament in 2017. See Bundesversammlung 30 September 2016, Motion ‘Verbot von Knebelverträgen der Online-Buchungsplattformen gegen die Hotellerie’ <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20163902>>. However, the law has even now not come into force, allegedly due to the stalling of the Swiss government. See Christophe Hans, ‘Lex Booking: Die Zeit drängt mehr denn je’ (28 May 2020) <<https://www.htr.ch/story/lex-booking-die-zeit-draengt-mehr-denn-je-27794.html>>.

of national law as ‘competition law’ within the meaning of article 3(2) of Regulation 1/2003 is discussed below.<sup>170</sup>

(iii) *France (2015)*

France was the first Member State to forbid the use of parity clauses. On the occasion of the so-called ‘Loi Macron’,<sup>171</sup> a comprehensive reform project, a provision was inserted into the Tourism Code that guaranteed hotels the freedom to grant their customers any rebate or price advantage, thus effectively prohibiting even the use of ‘narrow’ price-parity clauses by online travel platforms.<sup>172</sup>

The legislative procedure of the ‘Loi Macron’ provides no information on possible doubts over its compatibility with article 3(2) of Regulation 1/2003 and the relevant French literature seems to not have addressed this issue either.<sup>173</sup> The French government has merely voiced concerns regarding the constitutional protection of contractual freedom.<sup>174</sup> Nevertheless, the legislative procedure of the ‘Loi Macron’ still provides some insights into article L. 311-5’s objective. In view of the emergence of online booking platforms, and despite the corresponding benefits, hotel businesses were thought to have lost control over their pricing policies and to have been forced to pay those platforms ‘ever-increasing commissions’ (between 2008 and 2010 alone, an increase of 27.5 per cent was noted). Therefore, the vision was to ‘allow hoteliers to regain control over their prices and to reinstate a balance in the commercial relationship between reservation platforms and hoteliers’.<sup>175</sup>

During a discussion in the Senate, the rapporteur Estrosi Sassone spoke of a threat to the economic equilibrium between travel agents and hoteliers, which she attributed to the emer-

<sup>170</sup> See below Sections V.B and V.C.

<sup>171</sup> LOI n° 2015-990 du 6 août 2015 pour la croissance, l’activité et l’égalité des chances économiques, art. 133.

<sup>172</sup> Code du tourisme, art L. 311-5-1:

Le contrat entre un hôtelier et une personne physique ou morale exploitant une plateforme de réservation en ligne portant sur la location de chambres d’hôtel aux clients ne peut être conclu qu’au nom et pour le compte de l’hôtelier et dans le cadre écrit du contrat de mandat mentionné aux articles 1984 et suivants du code civil.

Nonobstant le premier alinéa du présent article, *l’hôtelier conserve la liberté de consentir au client tout rabais ou avantage tarifaire, de quelque nature que ce soit, toute clause contraire étant réputée non écrite* (emphasis added).

<sup>173</sup> See, for instance, Xavier Delpech, ‘Hébergement - Plateformes de réservation hôtelière : premier bilan d’étape’ (2017) 195 *Juris tourisme* 8; Christophe Lachièze, ‘Activités touristiques - Hébergement et restauration - Panorama d’actualité’ (2017) 198 *Juris tourisme* 49; Malka Marcinkowski, ‘Les récentes évolutions réglementaires et jurisprudentielles concernant la clause du client le plus favorisé ou clause de parité’ (2016) 8-9 *AJ Contrats d’affaires, Concurrence, Distribution* 378; Erwan Royer, ‘À la Une - Loi Macron - Le tourisme : levier de croissance pour la France’ (2015) 178 *Juris tourisme* 6.

<sup>174</sup> Direction de la séance, *Projet de loi Croissance, activité et égalité des chances économiques: Amendement N° 1519 du 2 avril 2015 présenté par Le Gouvernement* <[http://www.senat.fr/amendements/2014-2015/371/Amdt\\_1519.html](http://www.senat.fr/amendements/2014-2015/371/Amdt_1519.html)>.

<sup>175</sup> Commission spéciale sur le projet de loi pour la croissance, l’activité et l’égalité des chances économiques, *Projet de loi Croissance, activité et égalité des chances économiques : Amendement N° COM-231 du 12 mars 2015 présenté par M. Lenoir* <[http://www.senat.fr/amendements/commissions/2014-2015/300/Amdt\\_COM-231.html](http://www.senat.fr/amendements/commissions/2014-2015/300/Amdt_COM-231.html)>.

gence of the ‘large online booking platforms, in particular the American ones’, which had ‘conquered a formerly territorialized market’.<sup>176</sup> In this context, she also pointed out the high commission fees, of 25 to 30 per cent of the booking price, that hotels had to pay to those platforms. In her view, the objective of the law was therefore to rebalance the powers to the benefit of hotels.<sup>177</sup>

At the same time, several deputies rejected the idea of a need for a rebalancing, arguing that there was effective competition in the online booking sector and that a prohibition of parity clauses would harm consumers, especially foreign tourists, as the online booking platforms could no longer be presumed to offer the cheapest prices.<sup>178</sup>

In the initial intermediary assessment of the commitments made by Booking.com,<sup>179</sup> the Autorité de la Concurrence observed, but did not seem to denounce, the fact that the platform continued to use its ‘narrow’ price parity clauses (which were not prohibited under the commitment decision) even after the entry into force of the ‘Loi Macron’ vis-à-vis so-called ‘preferred establishments’. The latter were said to represent only a limited portion of Booking.com’s partner accommodations in France, yet to also contribute to a significant share of all reservations on, and hence the activity of, Booking.com.<sup>180</sup> Three years after the introduction of the legislative ban on price parity clauses, the French Senate published an ‘information report on tourist accommodation and digital issues’.<sup>181</sup> It reproduces the findings of several hotel associations and one independent organisation, according to which the proportion of direct bookings, as well as the percentage of hotels offering lower prices via their direct channels as compared to via Booking.com, had increased since the prohibition of price parity clauses. The authors of the report therefore submit that the interventions of both the competition authority and the legislature have ‘induced hotels to have better control over their commercial policy’, ‘probably contributed to a relative stabilisation of commission rates’ and ‘allowed hotels and platforms to

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<sup>176</sup> Sénat, Comptes Rendus de la CS Croissance, Activité et Égalité des Chances Économiques du 17 mars 2015: Examen du rapport et du texte de la commission spéciale <[http://www.senat.fr/compte-rendu-commissions/20150316/cs\\_croissance.html#toc2](http://www.senat.fr/compte-rendu-commissions/20150316/cs_croissance.html#toc2)> (‘Les grandes centrales de réservation en ligne, notamment américaines, sont venues conquérir un marché jusqu’alors assez territorialisé’). Senator Dominati therefore suspected the provision to ‘follow a protectionist logic’ (‘J’ai un peu de mal à comprendre l’équilibre économique de *cet amendement*, qui s’immisce dans des relations contractuelles et *obéit à une logique protectionniste*’), *ibid* (emphasis added).

<sup>177</sup> Sénat, Comptes Rendus de la CS Croissance, Activité et Égalité des Chances Économiques du 17 mars 2015: Examen du rapport et du texte de la commission spéciale (n 176) (‘Leur présence menace l’équilibre économique des opérateurs de voyage et des professionnels de l’hôtellerie. Nous partageons les objectifs de l’auteur de l’amendement. *Il faut rééquilibrer le rapport de force au profit des professionnels du secteur*’ (emphasis added)).

<sup>178</sup> Direction de la séance, Projet de loi Croissance, activité et égalité des chances économiques: Amendement N° 591 rect. du 7 avril 2015 présenté par Mme Lamure et M. Houel <[http://www.senat.fr/amendements/2014-2015/371/Amdt\\_591.html](http://www.senat.fr/amendements/2014-2015/371/Amdt_591.html)>; Direction de la séance, Projet de loi Croissance, activité et égalité des chances économiques: Amendement N° 194 rect. decies du 9 avril 2015 présenté par Mme Commeinhes et al <[http://www.senat.fr/amendements/2014-2015/371/Amdt\\_194.html](http://www.senat.fr/amendements/2014-2015/371/Amdt_194.html)>.

<sup>179</sup> See also (n 150) above.

<sup>180</sup> Autorité de la Concurrence 9 February 2017, ‘Bilan de l’efficacité des engagements pris par Booking.com devant l’Autorité de la concurrence’ <[https://www.autoritedelaconcurrence.fr/sites/default/files/bilan\\_engagements\\_booking\\_final\\_9fev17.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/bilan_engagements_booking_final_9fev17.pdf)> para 19.

<sup>181</sup> Sénat, Rapport d’information fait au nom de la commission des affaires économiques par le groupe de travail « Tourisme », sur l’hébergement touristique et le numérique, par Viviane Artigal et Patricia Mohret-Richard, sénatrices, du 20 juin 2018 <<http://www.senat.fr/rap/r17-587/r17-5871.pdf>>.



improve their relations'.<sup>182</sup> Despite these supposedly positive developments in France, the senators recommended, inter alia, an appropriate response to the issue of price parity clauses on the European level, with a view to 'rebalancing the relations' between intermediaries and business users and preferably by means of (what was then the proposal for) the Platform-to-Business Regulation (EU) 2019/1150.<sup>183</sup>

(iv) *Austria (2016)*

The Austrian legislature banned parity clauses with effect from 31 December 2016. Pursuant to section 1a(1) and (4) of the Federal Act Against Unfair Competition, in conjunction with No. 32 of the Annex,<sup>184</sup> it is regarded as an 'aggressive' and, consequently, 'unfair commercial practice' for a booking platform to require from a hotel business the inclusion of any kind of parity clause into the contract. Such contract terms are deemed 'absolutely' null and void, even if agreed upon before the amendment came into force.<sup>185</sup> In addition, the Austrian legislature amended section 7 of the Federal Act on Price Marking to the same effect, stipulating that hotels' and/or restaurants' freedom to set prices must not be restricted via price maintenance or price-parity clauses. Such clauses are 'absolutely' null and void.

The legislative materials show that the legislature was in any case concerned with protecting the interests of the hotel businesses. The leitmotif of the reform was 'to take account of the de facto economic imbalance between the operators of booking and comparison platforms and hotel businesses'.<sup>186</sup> The intervention was intended to serve the entrepreneurial freedom of hotel businesses.<sup>187</sup>

The notes on the bill gave several indications as to why the government assumed an economic imbalance in favour of platform operators, one of which was that hotels are forced by the markets to appear on platforms and, therefore, are dependent on them. It was argued that this was because hotel businesses were often small and medium-sized, while among the operators of booking platforms a certain process of concentration could be observed.<sup>188</sup> Much in this vein, a report by the Parliamentary Committee on Tourism stated that 'the strong concentration of power particularly of international platforms (e.g. Booking, HRS) has resulted in almost monopolistic structures'.<sup>189</sup> Thus, the prohibition of parity clauses was framed as an initiative to prevent an abuse of market power by online booking platforms. The fact that the Austrian hotels paid €200 million in commission annually to the online booking platforms<sup>190</sup> was apparently also regarded as a reflection of the abusive character of pricing restrictions imposed by the platforms.

<sup>182</sup> Ibid 28. See also Autorité de la Concurrence 10 December 2019, Décision n° 19-D-23, *Expedia, HRS* (n 156) paras 33–34.

<sup>183</sup> Ibid 31–32. See below section VI.C.

<sup>184</sup> For the legislative text in German, see <https://www.ris.bka.gv.at/Bundesrecht>.

<sup>185</sup> Federal Act Against Unfair Competition, s 44(10).

<sup>186</sup> Notes on the government bill: 214/ME XXV.GP – Ministerialentwurf – Erläuterungen, Allgemeiner Teil, Hauptgesichtspunkte des Entwurfs.

<sup>187</sup> Notes on the government bill: 214/ME XXV.GP – Ministerialentwurf – Erläuterungen, Zu Z 3 (Anhang Z 32).

<sup>188</sup> Notes on the government bill: 214/ME XXV.GP – Ministerialentwurf – Erläuterungen, Zu Z 3 (Anhang Z 32).

<sup>189</sup> Report of the committee for tourism ('Bericht des Tourismusausschusses'), 1305 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXV.GP.

<sup>190</sup> The figure was taken from a report published in 2015 and mentioned in a parliamentary resolution on the matter of 24 February 2016, See document 1572/A(E) XXV. GP – Selbständiger Entschließungsantrag 2.

In order to justify that it was appropriate to prohibit even ‘narrow’ parity clauses, the government referred without further explanation to the corresponding legal situation in France and the prohibition of these clauses by the German Bundeskartellamt in *HRS* and *Booking.com*.<sup>191</sup> As regards the necessity of setting a rule in addition to the standard established by competition law, the Austrian government referred to the need for legal certainty: a competition enforcement had only ex post effect, whereas hotel businesses expected a clear ex ante rule on the (in)effectiveness of parity clauses.<sup>192</sup>

In a decision rendered in September 2017, the Austrian Constitutional Court acknowledged that the prohibition of parity clauses interfered with the freedom to conduct business, which it regarded, however, as justified on grounds of public interest. The court assumed that the legislature aimed at ‘ensuring “fair” (“free”) competition conditions between booking platforms and hotel businesses’. Given the legislative leeway, the court considered the prohibition of parity clauses to be apt to promote competition because it provided hotels with the freedom to offer more favourable conditions for their own services through other distribution channels (including their own websites), which might ultimately serve consumers’ interests.<sup>193</sup>

(v) *Italy (2017)*

The Italian legislature inserted a prohibition of parity clauses into its Annual Competition Law of 2017.<sup>194</sup> Pursuant to this provision, not only price-related but also quality-related parity clauses were rendered null and void, in both their wide and narrow versions. Like the legislative initiatives observed in other Member States, the scope of application of the prohibition is limited to the tourist sector. It is noteworthy, however, that the provision applies to any agreement between a hotel and an intermediary, irrespective of whether the latter is an online platform or an offline travel agency.

The prohibition of parity clauses was inserted into the draft bill at a late stage of the legislative process, which is why the explanations given with regard to the initial proposal do not consider this rule. Following the amendment, in the parliamentary debate, the Chamber of Deputies merely specified that the objective of the law as a whole was to promote competition and thus strengthen the economy.<sup>195</sup> Given that the Annual Competition Law contains a large number of fairly disparate provisions of economic regulations, it seems futile to try to draw conclusions from this as to the actual policy aims pursued by the prohibition of parity clauses. At the very

<sup>191</sup> Notes on the government bill: 214/ME XXV.GP – Ministerialentwurf – Erläuterungen, Zu Z 3 (Anhang Z 32).

<sup>192</sup> Notes on the government bill: 214/ME XXV.GP – Ministerialentwurf – Erläuterungen, Zu Z 3 (Anhang Z 32).

<sup>193</sup> Verfassungsgerichtshof 29 September 2017, G44/2017.

<sup>194</sup> Legge 124/2017, art. 1, comma 166:

È nullo ogni patto con il quale l’impresa turistico-ricettiva si obbliga a non praticare alla clientela finale con qualsiasi modalità e qualsiasi strumento, prezzi, termini e ogni altra condizione che siano migliorativi rispetto a quelli praticati dalla stessa impresa per il tramite di soggetti terzi, indipendentemente dalla legge regolatrice del contratto.

For the full text of the law in Italian, see <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2017;124>>.

<sup>195</sup> See Gianluca Benamati, Dichiarazione di voto del 7 ottobre 2015, Legge annuale per il mercato e la concorrenza <<http://www.deputatipd.it/interventi/legge-annuale-il-mercato-e-la-concorrenza-6>>.

least, we can see from one statement that, even though the prohibition applies to any intermediary and not just in this specific platform context, the focus of the legislature was indeed on addressing the conditions established by large and significant online booking platforms.<sup>196</sup>

In a hearing before the Commission Senate regarding the legislative initiative, the president of the Italian competition authority, the *Autorità Garante della Concorrenza e del Mercato* ('Autorità'), explained that the new provision of the draft law pursued the same objective as the previous authority decision in the same matter, namely to eliminate contractual clauses that could constitute an obstacle to effective competition. At the same time, he expressed several concerns. First, he pointed out that the Autorità's prohibition of wide parity clauses was based on an assessment of the market positions of the two largest platforms, Booking.com and Expedia, whereas the absolute prohibition as foreseen by the law did not consider companies' market shares at all. Second, as it applied to both online and physical channels, the law was considered likely to integrate separate markets of intermediation. Third, there were doubts as to the provision's compatibility with EU law. No reference was made, however, to article 3 of Regulation 1/2003. Instead, the adoption of national rules was viewed critically because of the cross-border activities of platform operators and the potential artificial segmentation of this market. Finally, the absolute nature of the prohibition was criticized, as, unlike a case-by-case analysis as conducted under EU competition law, this prohibition would not allow the potential advantages of a vertical restraint to outweigh its anti-competitive effects.<sup>197</sup> In a Senate document summarizing the legislative procedure, the assessment by the Autorità's president was reproduced but no statement or opinion was given.<sup>198</sup>

In conclusion, while there are indications that the Italian competition authority considered the legal provision to go beyond the mere protection of competition on the market, the available documents do not sufficiently reveal the legislature's intention. More precisely, it does not become clear whether the law is meant to protect inter-platform competition or the interests of hotels, as nowhere is this explicitly mentioned.<sup>199</sup>

#### (vi) *Belgium (2018)*

In July 2018, the Belgian parliament unanimously adopted a statute on pricing freedom for tourist accommodation operators in contracts concluded with operators of online reservation

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<sup>196</sup> See *ibid*: 'Yesterday we all voted together on an important amendment in the tourism sector concerning the relationship between hotels and *large booking portals*' (emphasis added); Dossier n. 213 del 29 giugno 2017, 'ABC' della legge annuale per il mercato e la concorrenza <[http://www.deputatipd.it/files/documenti/213\\_AbcConcorrenza\\_2.pdf](http://www.deputatipd.it/files/documenti/213_AbcConcorrenza_2.pdf)> 15: 'Thanks to an amendment of the PD approved at first reading in the Chamber, the possibility has been introduced for tourist accommodation facilities to offer lower rates than those identified online by customers on the *main portals of the sector*' (emphasis added).

<sup>197</sup> Audizione del Presidente dell'Autorità Garante della Concorrenza e del Mercato. Prof. Giovanni Pitruzzella nell'ambito dell'istruttoria legislativa sul disegno di legge n. 2085 recante 'Legge annuale per il mercato e la concorrenza' del 28 ottobre 2015 <<https://www.agcm.it/dotcmsDOC/audizioni-parlamentari/Audizione-20151028.pdf>> 17–20.

<sup>198</sup> Legge annuale per il mercato e la concorrenza - A.C. 3012-B del 17 maggio 2017 <<https://documenti.camera.it/Leg17/Dossier/Pdf/AP0029F.Pdf>> 196–197.

<sup>199</sup> We assume that there may be other documents in both the Chamber of Deputies and the Senate explaining the regulatory objective of the rule. However, our inquiries to the institutions remained unanswered, so we were confined to evaluating the documents publicly available via the Internet.

platforms.<sup>200</sup> Article 5 of this Act guarantees providers of tourist accommodation not only the right to freely determine prices but also the freedom to grant discounts or price advantages of any kind, while article 6 renders any agreement to the contrary null and void. The rules apply to contracts concluded before and after the law's entry into force, where the accommodation operator is located in Belgium. When stating its grounds for the preliminary draft Act, the Federal Public Service Economy, as the responsible ministry, explained that the objective was twofold. On the one hand, the prohibition of parity clauses regarding both price and conditions was intended to 'encourage competition on the market for rental of tourist accommodations via online reservation platforms'. On the other hand, the measure was expected to 'end the imbalance between tourist accommodation operators and platform operators by ensuring greater freedom of action for tourist accommodation operators'.<sup>201</sup>

When invited to supply further information on the intention of the legislative initiative, the author of the draft noted that the use of parity clauses had a negative effect on competition between platform operators, since these clauses made it more difficult for new operators to enter the market. Prohibiting such clauses was considered important in view of the current market position of the platform operators. Furthermore, their stronger (bargaining) position in relation to accommodation providers was said to deprive the latter of their contractual freedom. In this regard, reference was made not only to the platforms' resources but also to their contracts with Google and their influence over search results, as well as possible retaliatory measures against those accommodation providers reluctant to apply parity clauses. Against this backdrop, the Council of State called into question the necessity of an absolute prohibition of parity clauses, as well as the proportionality of such a measure to the objective pursued, and requested that the author of the draft bill respond to these concerns.<sup>202</sup>

Interestingly, in its explanatory statement, the government no longer referred to inter-platform competition and market entry. Instead, after pointing towards the benefits of the platform economy, namely better search, comparison and reservation functions for consumers and increased visibility and sales for providers of tourist accommodation, all arguments were based on hotels' (alleged) economic dependence on platforms. This relationship was said to be the reason for the platforms' ability to impose parity clauses, which in turn were believed to reinforce the economic dependence of accommodation providers, a majority of which were small and medium-sized firms. The ministers argued further that this resulted in an unreasonable restriction of hotels' contractual and managerial freedom. In a direct response to the Council of State's remarks, they explained that both wide and narrow parity clauses had to be prohibited without distinction, as each type of such clause caused a restriction.<sup>203</sup>

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<sup>200</sup> For the legislative text in Dutch and French, see <[http://www.ejustice.just.fgov.be/mopdf/2018/08/10\\_1.pdf#Page64](http://www.ejustice.just.fgov.be/mopdf/2018/08/10_1.pdf#Page64)>.

<sup>201</sup> Communication from the Commission - TRIS/(2017) 03159, Notification Detail of the Preliminary draft Act on pricing freedom for tourist accommodation operators in contracts concluded with operators of online reservation platforms of 4 December 2017 <<https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaaction=search.detail&year=2017&num=570>>.

<sup>202</sup> Conseil d'État section de législation, avis 62.661/1 du 28 février 2018 <<http://www.raadvst-conseil.be/dbx/avis/62661.pdf>>, para 6.

<sup>203</sup> Chambre de représentants de Belgique, Document parlementaire 54K3164/001 du 19 juin 2018, Projet de loi relatif à la liberté tarifaire des exploitants d'hébergements touristiques dans les contrats conclus avec les opérateurs de plateformes de réservation en ligne <<https://www.la-chambre.be/FLWB/PDF/54/3164/54K3164001.pdf>> 4–5.

Subsequently, the authors of the explanatory statement further specified the goal of the law by stating that it aimed to ensure fair trading between the two parties. The government invoked article 6, § 1, VI, subparagraph 5, 4°, of the Special Act on Institutional Reform of 8 August 1980 as the relevant competence basis for federal legislative action for ‘trade practices law’.<sup>204</sup> No reference was made to ‘competition law’, which is mentioned in the same provision as another federal competence.<sup>205</sup> Finally, despite the focus on hotels’ economic dependence on platforms, the ministers also emphasized the advantages of the prohibition for customers, who are expected to benefit from better-quality services, as well as cheaper prices and increased buyer power.<sup>206</sup> In the regulatory impact analysis, in stark contrast to the aforementioned emphasis on contractual fairness, reference was once more made to the expected enhancement of competition between platforms, including better market entry, and between platforms and accommodation providers via their own distribution channels. This increase in competition was said to promote economic growth and lower consumer prices and to have a positive impact on the labour market, investments and small and medium-sized enterprises.<sup>207</sup>

A report on behalf of the Economic Commission set up by the Parliament expected the law to help tourist accommodation providers regain their freedom of action and achieve greater viability, while reference was made in this regard to the legislative interventions in France, Italy and Austria. The report further explained that the economic dependence on platforms resulting from their use of parity clauses could lead hotels, especially the smallest ones, to suffer from aggressive and unfair commercial practices and high commission fees of 10 to 20 per cent of the price of the stay.<sup>208</sup> Elsewhere, commission fees were said to be as high as 24 per cent.<sup>209</sup> As is moreover apparent from the report, the European Commission expressed its concern, albeit not in a reasoned opinion, that the law might fall within the scope of European competition law, while recalling that the compatibility of parity clauses with article 101 TFEU was still an open question.<sup>210</sup>

<sup>204</sup> Chambre de représentants de Belgique, Document parlementaire 54K3164/001 du 19 juin 2018 (n 203) 5.

<sup>205</sup> The original French provision reads:

L’(autorité fédérale) est, en outre, seule compétente pour :

4° le droit de la concurrence et le droit des pratiques du commerce, à l’exception de l’attribution des labels de qualité et des appellations d’origine, de caractère régional ou local;

As mentioned above, the government invokes only trade practices law (‘le droit des pratiques du commerce’) but not competition law (‘le droit de la concurrence’) as a legal ground for the prohibition of parity clauses; see, however, the legislative proposal by Winckel et al, where competition law is explicitly mentioned: Document parlementaire 54K2442/001, Proposition de loi modifiant la loi du 16 février 1994 régissant le contrat d’organisation de voyages et le contrat d’intermédiaire de voyages visant à interdire les clauses de parité tarifaire étroite entre les plateformes de réservation en ligne et les établissements d’hébergement touristique <<https://www.lachambre.be/FLWB/PDF/54/2442/54K2442001.pdf>> 8.

<sup>206</sup> Chambre de représentants de Belgique, Document parlementaire 54K3164/001 du 19 juin 2018 (n 203) 5.

<sup>207</sup> Chambre de représentants de Belgique, Document parlementaire 54K3164/001 du 19 juin 2018 (n 203) 13–14, 20–21; the advantages for consumers resulting from increased competition following the prohibition of parity clauses have also repeatedly been emphasized during the general discussion of the plenary session: Chambre de représentants de Belgique, Document parlementaire P0243, Compte rendu intégral <<https://www.lachambre.be/doc/PCRI/PDF/54/jp240.pdf>> 1–14.

<sup>208</sup> Chambre de représentants de Belgique, Document parlementaire 54K3164/003, Rapport fait au nom de la Commission de l’économie, de la politique scientifique, de l’éducation, des institutions scientifiques et culturelles nationales, des classes moyennes et de l’agriculture du 13 juillet 2018 <<https://www.lachambre.be/FLWB/PDF/54/3164/54K3164003.pdf>> 5.

<sup>209</sup> Chambre de représentants de Belgique, Document parlementaire P0243, Compte rendu intégral (n 207) 8.

<sup>210</sup> Chambre de représentants de Belgique, Document parlementaire 54K3164/003, Rapport fait au nom de la Commission de l’économie, de la politique scientifique, de l’éducation, des institutions scientifiques et culturelles nationales, des classes moyennes et de l’agriculture du 13 juillet 2018 (n 208) 10–11.

## B. Identifying the Protective Purpose

In order to decide whether a rule that regulates an agreement has to be considered ‘national competition law’, it must first be determined whether the rule’s objective is to protect undistorted competition as specified above. To implement that criterion, it is crucial to understand that ‘protection of undistorted competition’ through the regulation of agreements can be read as ‘protection of market players *not* party to the agreement’. The example of the various prohibitions on the use of parity clauses in platform-to-hotel business contracts shows that, despite this conceptual clarification, it may not be trivial to determine in individual cases whether or not the application of a national rule is barred by article 3(2) of Regulation 1/2003.

### (i) *Evidence to Specify the Protective Purpose from an Objective Perspective*

The first thing that stands out is that, whereas Italy established the prohibition of parity clauses through its Annual Competition Law,<sup>211</sup> in France the rule was included into the law code on tourism<sup>212</sup> and in Austria into the code on unfair commercial practices.<sup>213</sup> To take up the latter finding: can we infer from it that the rule is one that prohibits an ‘unfair trading practice’ (recital 9 of Regulation 1/2003) and, therefore, must *not* be considered ‘competition law’? Of course, it would not do justice to the aim of article 3(2) of Regulation 1/2003 if a national legislature could determine that it is not ‘competition law’ merely by including a provision in a certain code. Thus, neither the label of a statute nor the (predominant) regulatory purpose associated with it as a whole may be regarded as authoritative in determining the objective of an individual provision.<sup>214</sup> The systematic positioning of a rule within a Member State’s legal system may at most be taken as an indication of the protective purpose as intended by the legislature.

Moreover, an attempt to identify the beneficiary of a regulatory intervention on the basis of its actual (objective) effects will typically lead (only) to ambiguous results, because the prohibition of a certain contractual term such as (price) parity clauses in platform-to-hotel business contracts may, on the one hand, be considered a very plausible step to enhance the competitiveness of the market. For the invalidation of price-parity clauses, for instance, allows hotels to offer their rooms on cheaper platforms at lower room prices. Thus, newcomer platforms may well be the beneficiaries of such a rule.<sup>215</sup> On the other hand, however, the prohibition can easily be regarded as an instrument for the protection of the hotel businesses, because under such a regime they cannot be contractually ‘forced’ by the platforms to give up their freedom to set prices and other conditions. In particular, they remain free to offer rooms at cheaper prices on their own websites.

To overcome this ambiguity with regard to the identification of ‘competition law’ on the basis of the objective beneficiaries of a rule, one might be inclined to argue that a regulatory measure is not ‘competition law’ within the purpose of article 3(2) of Regulation 1/2003 if it goes beyond what is necessary to protect ‘undistorted competition’. There are, however, two crucial problems with such a conception. First, as the debate on the competition application to parity

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<sup>211</sup> See n 194 above.

<sup>212</sup> See n 172 above.

<sup>213</sup> See n 184 above.

<sup>214</sup> de Smijter and Sinclair (n 100) 109, para 2.60.

<sup>215</sup> See n 145 above and accompanying text.

clauses in platform-to-hotel business contracts shows, it is often quite contentious which measures should be considered necessary for the protection of competition on the market. Second, if, for the sake of simplicity, we consider the rules set by EU competition law to be the 'right' rules in that regard, this would automatically render article 3(2) of Regulation 1/2003 obsolete, because then, by definition, any national rule that is stricter than article 101 TFEU would have to be qualified as not being 'competition law' within the meaning of article 3(2) of Regulation 1/2003.

Furthermore, one might consider assuming a rule to be 'competition law' if the national legislature or a court manifestly enacted or established the provision in question in direct and explicit response to the fact that the level of competition law enforcement was deemed too low or too uncertain. This aspect seems, among other aspects, to have been a motivation for the Austrian legislature to ban the said parity clauses.<sup>216</sup> However, only limited conclusions can be drawn from such a finding. It is very possible that the rule-maker expected that increased competition law enforcement, as a positive side effect, would help to protect the particular interests of one party to the (regulated) agreements, for instance hotel businesses. Thus, when considering the level of competition enforcement too low or too uncertain in a given sector, it appears an at least plausible explanation that the legislature did not opt for stricter competition law rules but decided on regulation that specifically addresses the (perceived) need for protection of a certain party.

(ii) *Statements of Reason Issued during the Legislative Process*

The analysis in the previous section has revealed that, for the purposes of implementing article 3(2) of Regulation 1/2003, attempts to identify and distinguish a national rule's protective purpose from an objective point of view will typically face serious objections and will, in any event, hardly lead to conclusive results. Therefore, it is inevitable to consider the expressed (subjective) intentions of the rule-maker. Certainly, such an approach also has its weaknesses.

First and foremost, it means that the Member States' legislatures or courts can influence the scope of their regulatory competence vis-à-vis the European Union by the statements that are used to substantiate and justify the enactment or judicial creation of the rule in question. Indeed, there is some indication that the Belgian government, as it became aware of the possible regulatory barrier under article 3(2) of Regulation 1/2003, adjusted the 'official' regulatory purposes so that the ones officially announced had to be regarded as predominantly different from those pursued by EU competition law.<sup>217</sup> Yet, this kind of 'manipulation' or 'dishonesty' with regard to the legislative motives expressed can arguably be accepted from the perspective of EU law. Domestic rule-makers are democratically legitimate and accountable to the citizens not only for what they do but also for what they say they do. This insight also tells us which statements to consider when identifying the objective of a regulatory intervention, namely only statements of those bodies whose assent is necessary to legitimize the regulatory measure in question and which may be held accountable for it, as well as statements of other institutions

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<sup>216</sup> See n 192 above.

<sup>217</sup> See n 203 above and accompanying text.

and persons that have been explicitly or implicitly endorsed by the institutions that participate in the decision-making.<sup>218</sup>

Second, in some instances rule-makers will not articulate their intentions in such a differentiated manner as to be invoked to distinguish the rule's objective from those pursued by EU competition law. For example, in case of the enactment of the Italian ban on parity clauses, we were not able to identify legislative statements or other materials that would permit any viable and sufficiently specific conclusions to be drawn as to the purpose of the rule, as required under article 3(2) of Regulation 1/2003.<sup>219</sup>

Third, where such statements and materials on a rule's objective are available, they are, of course, not necessarily consistent but may reveal a rather mixed picture, in particular of the intended beneficiaries of a regulatory intervention. While this does not put into question that the policy purposes stated by the rule-maker can be taken into account, it does make it necessary to decide about the objective that is *predominantly* pursued.

The preceding analysis indicates that the legislatures in France, Austria and Belgium, first and foremost, sought to protect hotel businesses' interests. The rhetoric expressed in the analysed material demonstrates two different protective purposes. First, parity clauses are viewed as an undue restriction of the *hotels' freedom of commercial activity*,<sup>220</sup> in particular of their entrepreneurial freedom to set prices.<sup>221</sup> Second, the reference to the volume of commissions paid by the hotels to the platforms<sup>222</sup> and the 'ever-increasing commissions'<sup>223</sup> that have been complained about reveals the legislatures' concern about an *unfair distribution of economic rents between platforms and hotels*.

The need for a legislative intervention in favour of the hotel businesses is justified in all three jurisdictions by reference to an (alleged) economic imbalance between the platform operators and the hotels.<sup>224</sup> In some instances, reasons for the presumed imbalance of power are mentioned: hotel businesses are described as 'often small and medium-sized', while (international) platforms are viewed as enjoying significant market power due to concentration<sup>225</sup> and as having superior resources and contractual relationships to search engines at their disposal.<sup>226</sup>

In contrast, the idea that a prohibition of parity clauses would *enhance competition*, in particular because it would stimulate price competition between platforms and lower entry barriers to the platform market, is mentioned only rudimentarily (if at all). In Austria, this conceptualization

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<sup>218</sup> See (with a view to the historic interpretation of EU secondary law) Opinion of Advocate General Trstenjak in *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-484/08, EU:C:2009:682, point 83 with n 58; Karl Riesenhuber, 'Interpretation of EU Secondary Law' in Karl Riesenhuber (ed), *European Legal Methodology* (Intersentia 2017) 231, 246, paras 33–34.

<sup>219</sup> See above Section V.A(v). Thus, for the question whether or not the Italian ban on parity clauses should be regarded 'national competition law', it is decisive whether the prohibition is linked with the establishment or the use of market power; see below sub V.C.

<sup>220</sup> See n 187 above (Austria) and 201 and 203 above (Belgium).

<sup>221</sup> See n 175 above (France).

<sup>222</sup> See n 190 above (Austria) and 208 and 209 above (Belgium).

<sup>223</sup> See n 175 above (France).

<sup>224</sup> See n 175 and 177 above (France), 186 above (Austria), 201 and 203 above (Belgium).

<sup>225</sup> See n 188–189 above (Austria).

<sup>226</sup> See n 202 above (Belgium).



appears in a decision of the Constitutional Court,<sup>227</sup> while it is barely identifiable in the legislative materials. Most notably, in Belgium, while initially the drafters identified the promotion of platform competition as an objective that should be treated on an equal footing, ultimately the government legitimized the rule only as a mechanism to protect hotels, which were viewed as being economically dependent on platforms.<sup>228</sup>

### C. Identifying the Role of Market Power

The use of market power to restrict competition is a specifying feature of the object pursued by article 101 TFEU. As demonstrated above, this is reflected in the link between the coordination and distortion of competition, as stipulated not only by the text of article 101 TFEU, which captures ‘agreements’ ‘which have as their object or effect the prevention, restriction or distortion of competition’, but also through the development of the law through the EU courts and its practical application by the Commission.<sup>229</sup> Based on this, a national rule that is aimed at enhancing and safeguarding functioning competition has to be regarded as ‘competition law’ within the meaning of article 3(2) of Regulation 1/2003 if its application requires the coordination between undertakings or if it applies only to undertakings with significant market power. While this can easily be confirmed in case of provisions that explicitly provide for such a requirement, the question does arise as to whether and under which circumstances rules or doctrines without such an explicit link between the use of market power and the protection of competition can be considered ‘competition law’ in this sense.

#### (i) *Market Power as an Argument in the Legislative Materials*

First, one may ask: is it sufficient that the *legislative materials* suggest that the legitimizing reason is seen in the abuse of market power by one contracting party as, in our examples, by a large online platform? A rule would thus have to be considered ‘competition law’ if the legislature justifies the regulatory intervention as a reaction to the misuse of market power, even if this is not (explicitly) reflected in the text of a provision or its enforcement practice.<sup>230</sup> This is illustrated in our analysis of the various materials accompanying the legislative processes to the prohibitions of parity clauses in France, Austria and Belgium: in these instances the relevance of an exercise of market power cannot be inferred from the text of the respective provisions but is indicated (more or less clearly) in various reasons given for the regulatory intervention. This is most explicit in the case of Austria, where we have noted a reference to an alleged process of concentration among the operators of booking platforms<sup>231</sup> and a claim of

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<sup>227</sup> See n above 193.

<sup>228</sup> See n 203 above.

<sup>229</sup> See above Section IV.B.

<sup>230</sup> This seems to be the position taken by de Smijter and Sinclair (n 100) para 2.63: ‘the main distinguishing feature [...] is whether [...] the market context is taken into account either *in the elaboration* of the rule or its application’ (emphasis added). See also Susanne Augenhofer and Benedikt Schwarzkopf, ‘Bestpreisklauseln im Spannungsfeld europäischen Kartellrechts und mitgliedstaatlicher Lösungen’ (2017) *Neue Zeitschrift für Kartellrecht* 446, 451 (considering it relevant that a committee of the Austrian parliament justified the ban on parity clauses by a reference to the allegedly ‘almost monopolistic structures’ on the market for hotel booking platforms (see above n 189), yet without taking a definite position on whether the Austrian ban on parity clauses should be considered ‘national competition law’).

<sup>231</sup> See n 188 above and accompanying text.

'almost monopolistic structures' in this industry.<sup>232</sup> In France, the rapporteur to the Senate mentioned that the emergence of the 'large only booking platforms, in particular the American ones', had resulted in an economic disequilibrium at the expense of the hotel businesses.<sup>233</sup> Similarly, in Belgium it was stipulated, among other things, that the measure should be viewed as addressing an (economic) imbalance between platform operators and hotel businesses.<sup>234</sup>

We submit, however, that such considerations of an observed or feared abuse of market power or, less specifically, of economic power in the legislative process may not by themselves suffice to qualify a provision as 'competition law'. Article 101 TFEU is designed in such a way that its application in an individual case serves to effectively prevent the abuse of market power. The mentioning of the use of a merely alleged degree of market power or economic power as a motivation for a regulatory intervention falls far short of this requirement.

(ii) *Market Power as an Argument in the Court Practice*

Second, one may further ask: should it suffice if the *courts, in their practical application* of a rule that, as such, does not explicitly require the ascertaining of market power, invoke the market power of a contracting party to substantiate that its terms and conditions are considered invalid?<sup>235</sup> On the one hand, it would appear overly formalistic to require that the significance of market power be explicitly embodied in the text of a provision. The focus should instead be on the actual application by the courts. On the other hand, however, to preserve the distinctiveness of the 'market power' criterion this must not be interpreted too generously. Therefore, for it to be met it is necessary that the determination of a party's market power be an indispensable element of the legal doctrine as established and applied by the courts. It is not sufficient that the courts *may* take the actual market power or economic power into account, in particular as one element of an overall assessment of many factors to determine whether a contractual clause has to be regarded as 'unfair' or not. Furthermore, it must be necessary that causality be established between the possession of market power and the contractual terms that, according to the doctrine, are to be invalidated.

For the time being, this is not relevant with regard to the legislative bans of parity clauses analysed above. While we are not aware of any pertinent case law in Austria, Italy or Belgium, the Paris Court of Appeal has invoked article L. 311-5-1 of the Tourism Code to nullify the price parity clauses imposed by Expedia on its hotel customers. Since the French rule, according to its text, applies irrespective of the possession of market power on part of the booking platform, the court had no reason to comment on it.<sup>236</sup> It is worthwhile, however, to take another look at the practice of the High Court of Justice and the Paris Court of Appeal we analysed above.<sup>237</sup>

With regard to the applicability of the common law restraint of trade doctrine, it is remarkable that in *Days Medical Aids* and in *Jones v Ricoh* the High Court did not elaborate on the role of

<sup>232</sup> See n 189 above and accompanying text.

<sup>233</sup> See n 176 above and accompanying text.

<sup>234</sup> See n 201 above and accompanying text.

<sup>235</sup> See again de Smijter and Sinclair (n 100) para 2.63: 'the main distinguishing feature [...] is whether [...] the market context is taken into account either in the elaboration of the rule or its *application*' (emphasis added); cf. n 230 above.

<sup>236</sup> CA Paris, 21 juin 2017, n° 1518784. See n 54 above and the following remarks in Section II.B.

<sup>237</sup> See above Section II.

the use of market power as a potentially distinctive element. Moreover, an analysis of the case law confirms that, while differences in economic and bargaining power between the contracting parties may be an important factor in applying the restraint of trade doctrine,<sup>238</sup> the doctrine does not require that the market conditions and the market power of the party imposing a certain term be examined in each individual case.<sup>239</sup> Thus, for this reason, too, the grounds stated by the High Court in *Days Medical Aids* and in *Jones v Ricoh* to substantiate its decision to block the doctrine's application pursuant to article 3(2) of Regulation 1/2003 are not sufficient.

Remarkably, in two recent judgments on the *pratiques restrictives*, French courts have used the (alleged) market power of Expedia<sup>240</sup> and Amazon<sup>241</sup> as an indication that these platforms had imposed 'structurally imbalanced' terms and conditions. Yet, at a second glance it becomes apparent that the courts did not consider these findings to be an element strictly necessary for the doctrine to be applied.<sup>242</sup> This is particularly significant as it appears to be in stark contrast to the application of the doctrine of 'abuse of economic dependence' under article L. 420-2 of the French Commercial Code.<sup>243</sup> Contained in the exact same provision as the French equivalent of article 102 TFEU, this rule also prohibits the unilateral conduct of undertakings that do not possess a dominant market position but on which either suppliers or distributors are dependant.<sup>244</sup> Both the French courts and the competition authority have established the 'importance of the market share' on part of the (alleged) abuser as one of four constitutive requirements for the existence of a state of economic dependence.<sup>245</sup> In contrast, the *pratiques restrictives*, the implementation of which is not sufficiently linked to an exercise of 'market power', must not be regarded as 'national competition law' and, thus, are not affected by article 3(2) of Regulation 1/2003.

<sup>238</sup> See *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308, 1315–1316; *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 W.L.R. 61, 64–65; *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444 at [649].

<sup>239</sup> See Mary Catherine Lucey (n 38) 628: 'In *Meridian VAT Reclaim UK Ltd v Lowendal Group* [[2002] EWHC 1066] Gross J, in the absence of detailed economic evidence on the definition of markets, was reluctant to conclude that there was a serious competition law issue to be tried, but easily reached that conclusion under the [restraint of trade] doctrine by examining the terms of the contract.'

<sup>240</sup> CA Paris, 21 juin 2017, n° 1518784. See text accompanying n 58 above.

<sup>241</sup> T.com. Paris, 02 septembre 2019, n° 2017050625. See text accompanying note 59 above.

<sup>242</sup> For the particularity of the Amazon judgment, see n 60 above.

<sup>243</sup> art L. 420-2:

[...]

The abuse of the state of economic dependence of a client or supplier by an undertaking or group of undertakings is also prohibited, if it is likely to affect the functioning or structure of competition. This abuse may include a refusal to sell, tie-in sales or discriminatory practices mentioned in [arts L. 442-1 to L. 442-3] or in product range agreements.

Translation by Fillastre, Kyeremeh and Watchorn (n 49).

<sup>244</sup> In this, the rule is undoubtedly in compliance with art 3(2) of Regulation 1/2003.

<sup>245</sup> See for instance Cass. com., 9 avril 2002, pourvoi n° 00-13.921 and the references provided by Daniel Mainguy and Malo Depincé, *Droit de la concurrence* (2nd edn, LexisNexis 2015) 322 n 246. This is at least accepted in cases where a distributor is economically dependent on a supplier. In the opposite case, of suppliers' economic dependence on distributors, this is much less clear. In these cases, the 'importance of the market share' criterion is replaced by the 'importance of the distributor in marketing the products concerned'. See for instance the famous *Cora* decision: Cons. conc., Décision n° 93-D-21 du 8 juin 1993. See also Louis Vogel, *French Competition Law* (LawLex/Bruylant 2015) 307: 'Dependence is thus measured above all by reference to the distributor's relative position of strength over the supplier. This strength is evaluated not based on the distributor's market share, but by taking account of the quantitative (share of turnover) and qualitative (role in marketing) importance of the distributor for the supplier claiming dependence.'

## D. Summary

Depending on the circumstances of the individual case, the prohibition of parity clauses in contracts between booking platforms and hotel businesses in France, Austria, Italy and Belgium may impose more severe restrictions than foreseen by article 101 TFEU. However, their application is in any event not blocked by article 3(2) of Regulation 1/2003 as these rules must not be regarded as ‘national competition law’ within the meaning of this provision.

With regard to the French, Austrian and Belgian provisions, this already follows from the fact that the respective rules predominantly protect the interests of the hotel businesses, i.e. of one of the contracting parties. In the case of the Italian rule, it remains unclear whether it is intended rather to protect platform competition or the hotel businesses’ interests. However, the Italian prohibition of parity clauses must in any event also not be considered ‘national competition law’, for there is nothing to indicate that the (mis)use of market power constitutes an indispensable element of its application. The same applies, for that matter, to the corresponding rules in the three other Member States, which, therefore, for that reason too cannot be regarded as ‘national competition law’.

## VI. Outlook: Harmonizing the Law on Platform-to-Business Agreements – Levelling the Playing Field?

### A. Member States’ Wide Regulatory Discretion and the Case for a Harmonization of Platform-to-Business Regulation

The legal treatment of hotel booking platforms’ parity clauses is a striking example of the disparities of the Member States’ laws on platform-to-business agreements. On the one hand, it can be viewed as a valuable experiment that offers the chance to test and learn from different legal solutions. In fact, economists have used this window of opportunity to try to measure the effects of divergent regulatory approaches.<sup>246</sup> What is more, the regulatory differences across the Member States need not necessarily be seen as a shortcoming that results either from insufficient knowledge of the effects of these clauses or from the unfortunate lobbying of special interest groups. For one thing, differences in regulation can be reasonable as they do justice to divergent conditions such as differences in market structures. For another thing, it is not illegitimate per se for national lawmakers to try to influence the distribution of transaction rents to the benefit of their national industries. It is certainly not by coincidence that we find the rigorous bans on parity clauses in Member States where the hotel sector is considered to be of major economic importance and its prosperity, therefore, is viewed as essential for the general interest.

On the other hand, however, various observers, notably the House of Lords,<sup>247</sup> the French Senate<sup>248</sup> and the Italian competition authority,<sup>249</sup> have rightly pointed out that the regulatory

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<sup>246</sup> For an overview of empirical studies on the effects of parity clauses (including their own study) see Andrea Mantovani, Claudio Piga and Carlo Reggiani, ‘On the Economic Effects of Price Parity Clauses – What Do We Know Three Years Later?’ (2018) 9 *Journal of European Competition Law & Practice* 650, 651–53.

<sup>247</sup> House of Lords, Select Committee on European Union, *Online Platforms and the Digital Single Market*, HL Paper 129, 2016, para 125.

<sup>248</sup> See text accompanying n 183 above.

<sup>249</sup> See text accompanying n 197 above.

fragmentation entails risks for the integration of the internal market and that it would therefore be desirable to harmonize domestic legislation. First of all, diverging regulatory standards entail costs for the platforms, which have to inform themselves about the divergent standards and which have to adjust their product and marketing strategies. Moreover, the findings of one of the pioneering studies on the use of parity clauses by platforms indicates the risks of negative external effects of (a lack of) domestic regulation beyond the jurisdiction's boundaries. As was shown by Edelman and Wright, where wide parity clauses are enforceable, platforms will tend to over-invest in the quality of their services.<sup>250</sup> Such socially wasteful over-investments in the consumer experience may result in a competitive advantage if a platform that grew in such a regulatory environment enters a market where parity clauses are banned. A uniform regulatory level across the EU could prevent such distortions of (cross-border) competition.

The foregoing analysis has shown that article 3(2) of Regulation 1/2003 leaves ample leeway for Member States to set standards for platform-to-business agreements that are stricter than those foreseen by EU competition law. Based on the narrow reading of 'national competition law' as established above, to distinguish a national regulatory intervention it suffices to show that its predominant purpose is to protect the interests of one of the contracting parties.<sup>251</sup> If this criterion does not yet give rise to a distinction from the objective pursued by article 101 TFEU, it is also sufficient to show that the application of the relevant rule of national law does not depend on the finding of the use of market power in the individual case. This feature, too, will often mean that a regulatory intervention into agreements is not considered to be 'national competition law' and, thus, its application is not blocked by article 3(2) of Regulation 1/2003. This holds true, for instance, in the case of the national bans on parity clauses as analysed above<sup>252</sup> or the application of the French doctrine of *pratiques restrictives*.<sup>253</sup>

Therefore, the harmonizing effect of article 3(2) of Regulation 1/2003 on platform-to-business regulation is indeed rather small. But this should not really surprise us, given that it is the (sole) purpose of article 3(2) of Regulation 1/2003 to prevent the standards established by EU competition law for the functioning of the internal market being undermined by national legislation. The provision does not aim to ensure a level playing field in terms of regulatory interventions into agreements between businesses.

## **B. No Prospect of (Negative) Harmonization through the EU Fundamental Freedoms**

The level playing field for digital platforms should not be expected either through negative harmonization by way of the Union's fundamental freedoms. It is, first of all, doubtful whether and under which circumstances mandatory contract law rules that are indistinctly applicable can be regarded as a restriction of a fundamental freedom. Rules such as the prohibition of parity clauses can be viewed as a product standard for intermediation services offered by the platforms. They may involve significant costs for the platforms that have to adjust their business

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<sup>250</sup> Benjamin Edelman and Julian Wright, 'Price Coherence and Excessive Intermediation' (2015) 130 Quarterly Journal of Economics 1283–328.

<sup>251</sup> See above section IV.A.

<sup>252</sup> See above section V.C(i) and V.D.

<sup>253</sup> See above section V.C(ii).

model to different national legal frameworks and, therefore, may render the exercise of the free movement of services less attractive.<sup>254</sup>

However, as was repeatedly stressed by the ECJ, disparities in the level of regulation imposed on service providers may only be considered a restriction if they ‘affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade’.<sup>255</sup> National regulatory measures that were indistinctly applicable but were nonetheless regarded ‘restrictions’ have included, for instance, the setting of compulsory minimum fees (or at least giving national authorities control over the fees charged)<sup>256</sup> or advertising bans,<sup>257</sup> since such restrictions on the use of price as a marketing tool and of other marketing instruments affect newcomers more severely than incumbents. This requires a case-by-case assessment. But, since it is precisely the prohibition of parity clauses that may enhance competition on commission rates and thus facilitate the market entry of new platforms,<sup>258</sup> there are strong arguments against considering those rules a restriction pursuant to article 56(1) TFEU.

In any event, national regulation of agreements that amount to ‘restrictions’ can be justified on overriding grounds in the general interest, provided that the measure in question is suitable and necessary to attain the objective pursued,<sup>259</sup> leaving a margin of discretion to the Member States.<sup>260</sup> While the relevant case law is focused on measures protecting final consumers,<sup>261</sup> there is no doubt that legislative or judicial interventions into contractual relations to protect business parties with inferior bargaining positions, or third parties that may be negatively affected by a contractual term, can similarly be justified if consistent with the principle of proportionality.

### **C. Harmonization on the Basis of Article 114 TFEU: the Platform-to-Business Regulation (EU) 2019/1150 and the initiative for a ‘Digital Services Act Package’**

If the EU legislature wants to end the regulatory fragmentation in the internal market and to ensure a level playing field for internet platforms’ intermediation services, it must do so through positive regulation, for which article 114 TFEU provides the obvious basis. A first step in this direction has been taken by the adoption of Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services.<sup>262</sup> However, the regulation’s focus is on ensuring fairness *through* disclosure and transparency of platforms’ terms and conditions. The EU legislature almost<sup>263</sup> completely refrained from harmonizing content-related rules. In light of the legislative process, this reluctance is noteworthy for two reasons.

<sup>254</sup> See for the ECJ’s broad definition of ‘restriction’, e.g., *Commission v Italy*, C-518/06, EU:C:2009:270, para 62.

<sup>255</sup> *Ibid.* at para 64.

<sup>256</sup> *Commission v Italy*, C-465/05, EU:C:2007:781 para 125.

<sup>257</sup> *KO v GIP*, C-405/98, EU:C:2001:135 paras 18–25 (on Article 34 TFEU).

<sup>258</sup> See n 227 above and accompanying text.

<sup>259</sup> See, e.g., *Commission v Italy*, C-518/06, EU:C:2009:270, para 72.

<sup>260</sup> *Ibid.* at paras 84–85.

<sup>261</sup> See, e.g., *Commission v Germany*, C-404/05, EU:C:2007:723, para 50.

<sup>262</sup> [2019] OJ L 186/57.

<sup>263</sup> Note that art 8(1) of Regulation 2019/1150 prohibits retroactive changes to terms and conditions.

First, it is clear from the materials accompanying the proposal<sup>264</sup> that the Commission had on its radar the option of a substantive control of contracts on online intermediation services and the prohibition of specified unfair terms. In a workshop organized by the Commission, businesses active on internet platforms identified price-parity clauses of online travel agencies as one of the main problems that arise in platform-to-business relations and that should be addressed.<sup>265</sup> The participating businesses proposed a ban on price parity, which they argued should be accompanied by a transparency principle that should force the platforms to disclose the extent to which commissions paid by hotels influence the search/ranking results displayed by platforms and which would, therefore, reveal the potential for retaliating measures such as de-ranking<sup>266</sup> or ‘dimming’ in the event of a refusal to comply with a (non-enforceable) parity requirement.<sup>267</sup>

Second, the Parliament’s rapporteur proposed to include in article 3(1) a rule that ‘[p]roviders of online intermediation services shall ensure that their terms and conditions [...] include only fair and proportionate clauses’.<sup>268</sup> Such a provision would have provided a basis for a comprehensive judicial review of the terms and conditions of online intermediation contracts.<sup>269</sup> Its implementation would have resulted in a harmonized protection of businesses against unfair contract terms by online platforms – a step that the EU legislature was not (yet) prepared to take. The suggested amendment was not included in the position adopted by the Parliament at first reading.<sup>270</sup>

However, the Regulation contains the seed of further measures, which may well include a substantive control of contract terms.<sup>271</sup> Article 1(1) of Regulation 2019/1150 defines its objective as contributing ‘to the proper functioning of the internal market by laying down rules to

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<sup>264</sup> Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (26 April 2018), COM(2018) 238 final.

<sup>265</sup> Commission Staff Working Document, Impact Assessment, Annexes, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (26 April 2018), SWD(2018) 138 final, Part 2/2 34.

<sup>266</sup> On 11 June 2019, Nustay, a Danish online booking agency, filed a formal complaint with the European Commission against Expedia and Booking.com, alleging an infringement of the EU competition law rules. Nustay submitted that Expedia and Booking.com penalize hotels that show cheaper offers on Nustay. The alleged penalties include downgrading a hotel’s ranking. ‘Nustay Files EU Complaint against Expedia and Booking.com’ 11 June 2019 <<https://news.cision.com/nustay/r/nustay-files-eu-complaint-against-expedia-and-booking-com,c2838250>>. See Inge Graef, ‘Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence’ (2019) Yearbook of European Law 1, 12–13 and 23.

<sup>267</sup> Commission Staff Working Document (n 265) 35.

<sup>268</sup> European Parliament, Report on the Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (COM(2018)0238 – C8 0165/2018 – 2018/0112(COD)) (7 December 2018), A8-0444/2018 50, Amendment 67 and page 85.

<sup>269</sup> See also *ibid.* 18, Amendment 18 (‘Terms and conditions would not be considered to be fair and proportionate where, for example, those terms and conditions grossly deviate from good commercial conduct in the particular economic activity in which the online intermediation service operates, or go against the principles of good faith and fair dealing. In assessing these general requirements, the nature and purpose of the contract, the circumstances of the case and the usages and practices of the commercial activity should also be taken into account by the relevant enforcement authorities’).

<sup>270</sup> European Parliament, European Parliament Legislative Resolution of 17 April 2019 on the Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (COM(2018)0238 – C8-0165/2018 – 2018/0112(COD)) P8\_TA-PROV(2019)0398.

<sup>271</sup> See Regulation 2019/1150, recital 49.

ensure that business users of online intermediation services [...] are granted appropriate transparency, fairness and effective redress possibilities'. Article 16 of the Regulation provides that the Commission must closely monitor the impact of the Regulation and article 18 requires that it draw up an evaluation report by 13 January 2022. The various national prohibitions of parity clauses in the hotel sector and similar regulatory interventions at the national level make it clear, however, that the Regulation's objectives of preventing regulatory fragmentation and ensuring fairness of platform-to-business contracts cannot be reached (only) by way of a transparency-focused approach. In this light, an extension of the regulatory approach will seem inevitable. Commissioner Margrethe Vestager, who acts as executive vice-president for A Europe Fit for the Digital Age, clearly indicated at her hearing before the European Parliament in October 2019 that she kept in mind the option to extend the Regulation with a substantive protection from unfair contract terms.<sup>272</sup> Consequently, in its recent initiative for a 'Digital Services Act Package' the Commission mentioned, as the first among various policy options, a revision of Regulation 2019/1150 by which:

further horizontal rules could be established for all online intermediation services [...] This could cover prescriptive rules on different specific practices that are currently addressed by transparency obligations in the Platform-to-Business Regulation as well as on new, emerging practices (e.g. certain forms of 'self-preferencing', data access policies and unfair contractual provisions).<sup>273</sup>

One should be aware, however, that, even if the EU legislature were to harmonize the protection against unfair terms in platform-to-business contracts, this could not completely ensure a level playing field for online platforms. Certainly, if the legislature agreed on a catalogue of forbidden contract clauses, this could effectively address the issues that are most urgent in terms of regulatory fragmentation. But, eventually, comprehensive harmonization could not be achieved without a general clause, such as the one proposed by the Parliament's rapporteur.<sup>274</sup> Its application, however, could not easily guarantee a common standard across Member States. What is more, the harmonizing effect would be restricted to the regulatory purpose of the Regulation to prevent unfair contract terms that are harmful to the legitimate interests of the platform's business users.<sup>275</sup> Naturally, this does not exclude stricter rules under competition law, which is, as we have seen, only partially harmonized in the internal market.<sup>276</sup> Indeed, there are signs that national competition authorities are becoming more active in tackling al-

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<sup>272</sup> 'Hearing of Margrethe Vestager, Executive Vice President-Designate of the European Commission (Europe Fit for the Digital Age)', 8 October 2019, Verbatim Report 21 ('When it comes to the gatekeeping as such, the platform-to-business legislation is going to be coming into effect quite shortly, I think by summer next year, and that will allow you as a business depending on a platform, to have transparency as to how am I ranked, and if I'm not to be found anymore, why is that? [...] That was made in a very prudent way, not to overshoot the regulation. At the same time an observatory was created, so that if need be we can increase these obligations, because the gatekeepers, when you own the market, if they don't apply privately set rules of fair competition, then obviously we have an issue').

<sup>273</sup> Inception Impact Assessment - Ares(2020)2836174 3 <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-digital-services-act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers>>.

<sup>274</sup> See n 268 above.

<sup>275</sup> Regulation 2019/1150, recital 2.

<sup>276</sup> See above Section III.



legedly exploitative conduct by online platforms towards business users. For instance, competition proceedings by the Austrian and German competition authorities led Amazon to make significant changes to its business terms.<sup>277</sup>

## VII. Concluding Remarks

If one looks from the outside at the numerous provisions that regulate the behaviour of market players, one could be inclined to label all those rules ‘competition law’, which may contribute to ensure the functioning of competition. Yet, article 3(2) of Regulation 1/2003 calls for a more restrictive and, indeed, ‘legalistic’ concept of (national) ‘competition law’. To measure the Member States’ regulatory leeway in relation to article 101 TFEU, it is essential to identify the objectives that are (predominantly) pursued by EU competition law. As the regulatory barrier to national competition law does not apply in any case to rules on unilateral conduct not prohibited by article 102 TFEU, to establish that a regulatory intervention is *not* competition law within the meaning of article 3(2) of Regulation 1/2003 it is sufficient to demonstrate that the respective provision does predominantly pursue an objective different from that pursued by article 101 TFEU.

As our positive assessment of the law and practice of article 101 TFEU has demonstrated, its objective can be characterized by two distinctive features: article 101 TFEU *protects competition from distortion* resulting from market operators’ *use of market power* that they obtain through a coordination of their conduct. By addressing an agreement’s anti-competitive object or effect, the application of article 101 TFEU does not aim at protecting the interests of the parties to this agreement; rather, to identify whether competition may be distorted through an agreement, one must assess the effects that a term will have on third parties, namely on (potential) competitors and on consumers. This approach does not conflict with the statement that ‘EU competition rules are primarily intended to protect the competitive process as such’.<sup>278</sup> Rather, it takes account of the insight that, under article 101 TFEU, the protection of competition as such and the protection of competitors and consumers from agreements that make market entry more difficult and restrict freedom and range of choice are always two sides of the same coin. This does not apply, however, to the protection of the parties to an agreement: restrictions on their economic freedom may in fact be pro-competitive.

Therefore, in particular, whenever it is the predominant purpose of a regulatory intervention to protect the interests of one contracting party against the perceived risks of the superior economic or bargaining power of the other party to the contract (‘protection of contractual fairness’) or to protect the commercial freedom of one party for its own sake, this intervention deviates from the objective pursued by article 101 TFEU and must not be regarded as ‘competition law’ within the meaning of article 3(2) of Regulation 1/2003. For this reason alone, the great majority of national regulatory interventions into platform-to-business contracts, such as the bans on the use of parity clauses by online booking platforms and the analysed interventions by French courts based on the commercial law doctrines of *pratiques restrictives*, are not barred pursuant

<sup>277</sup> Bundeswettbewerbsbehörde, Fallbericht Amazon.de Marktplatz (17 July 2019) and Bundeskartellamt, Case Summary, B2 – 88/18 (17 July 2019). See Martin Gassler, ‘The Austro-German Proceedings against Amazon and Its Online Marketplace’ (2019) 10 *Journal of European Competition Law & Practice* 563–71.

<sup>278</sup> CK Telecoms UK Investments v Commission, T-399/16, EU:T:2020:217, para 362.

to article 3(2) of Regulation 1/2003, even if article 101 TFEU applies concurrently and does not prohibit the contractual term in question. Moreover, the application of these rules is not sufficiently linked to the exercise of market power, so that the second distinctive element of the objective pursued by EU competition law is also missing.

Consequently, article 3(2) of Regulation 1/2003 leaves ample leeway for national regulation of platform-to-business agreements. It is particularly notable that, depending on the framing of its objective, the very same regulatory measure must or must not be regarded as 'national competition law'. However, it would be a mischaracterization to see this as an unwanted leeway for a national rule-maker to expand its regulatory competence by misleading the public about its true regulatory objectives. After all, rule-makers are democratically accountable not only for what they do but also for what they say they do. In any case, given the political realities, it seems rather far-fetched to assume that a national legislature would disguise a rule such as the prohibition of price-parity clauses by the 'Loi Macron' as a rule to protect the weaker contracting party, in this example (presumably) the hotels in their contractual relationship with (large) online booking platforms, even though the 'true' objective of the measure was to enhance competition between the platforms. Rather, the example reveals that, from a political point of view, the indirect protective effects of competition enforcement in favour of individual market participants regarded as 'weak' appeal to the public more than the rather abstract idea of protecting undistorted competition. It is therefore conclusive that it is precisely those legislative interventions initiated because competition enforcement was considered not effective enough in protecting the 'weaker' contracting parties (which is the desired side effect) that are not to be regarded as 'national competition law' within the meaning of Article 3(2) of Regulation 1/2003.

Divergent national regulation of platform-to-business contracts across the European Union is as such not necessarily reprehensible. Decentralized rule-making may have various advantages but, at the same time, it entails risks for the integration of the internal market. Thus, the EU legislature would do well to contemplate creating a level playing field for internet platforms' intermediation services by way of positive harmonization based on article 114 TFEU. While a first step in this direction has been taken by the adoption of Regulation 2019/1150, the transparency-focused approach of the measure stops short of effectively addressing the drawbacks of regulatory fragmentation. While the Regulation contains the seed for an extension of its scope, it remains to be seen whether that seed will bear fruit and whether those in the European Parliament who pleaded during the legislative process for a substantive fairness control to be included will prevail in the foreseeable revision of the Regulation. The current initiative for a 'Digital Services Act Package' shows that the Commission is ready to go down this road and take the lead.