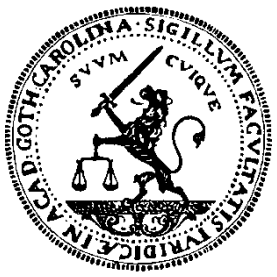

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Is The Safe Harbour Open For Restrictions Of Competition By Object?

- An Examination Of The Condition "To An Appreciable Extent" In Light Of EU Competition Law

JURM02 Graduate Thesis

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Contents

Summary

The general goal of the Treaty on the functioning of the European Union is to create a social market economy, where free competition is crucial. The Competition rules, governing the actions of the parties on the Swedish and EU market, aim to prevent conduct that may restrict effective competition. From an economic point of view it is necessary to have the ability to influence the market in order to restrict effective competition. The condition, that a restriction of competition must have an appreciable effect is therefore at the centre of the question of market power. In this paper I discuss the necessary depth and sophistication of the market definition required to satisfy the appreciability requirement in relation to agreements that restrict competition by object. I also discuss what the relevant factors and thresholds are in the assessment such agreements.

The definition of the relevant market has been considered a necessary precondition in order to establish whether an agreement appreciably restrict competition. Although, the EU courts have stated that the market must only be defined, where it would be impossible without such a definition to find that the prohibition has been infringed. The reasoning follows from case law stating that it is not necessary to analyse agreements in their economic and legal context once it has been established that they obviously restrict competition. The obviousness of the restriction may be inferred primarily from the nature of the agreement and from a summary assessment of the circumstances relevant in the case. Perhaps, guidance as to the obviousness of the restriction comes from asking whether it is clear that the market shares, without being precisely determined, far exceed 5 %. In addition to defining the market in order to satisfy the conditions in 2 ch. 1 § SCA and Art. 101(1) TFEU, it is necessary to define the market in sufficient detail to satisfy the essential requirement of legal certainty.

The application of the appreciability requirement in cases where the agreement restrict competition by object is debated within the EU. However, it seems as though both Swedish and EU courts have settled that it is necessary to apply the condition in object as well as effect cases. The assessment of the appreciability condition is divided into a quantitative and a qualitative aspect. The quantitative analysis generally considers the position and importance of the parties and the structure on the market. There is no clear guidance as to the level of the market share threshold from either the EU guidelines or the Swedish and EU courts, in relation to object restrictions. The uncertainty regarding the appreciable effects of an agreement may, however, start to become evident where the market share of the undertakings moves below 5 %. The qualitative aspect considers whether the restriction in itself is insignificant. This analysis takes into account the nature of the agreement and whether an established restriction is limited by objectively ascertainable factors, such as national legislation.

Sammanfattning

Den övergripande målsättningen med Fördraget om Europeiska Unionens Funktionssätt är att skapa en social marknadsekonomi där fri konkurrens spelar en avgörande roll. Konkurrensreglerna som styr företagens handlande på marknaden i Sverige och inom EU strävar efter att förhindra handlande som kan begränsa effektiv konkurrens. Ur ekonomisk synvinkel är det nödvändigt att möjligheten finns att marknaden kan påverkas för att begränsa effektiv konkurrens. Kravet på att en konkurrensbegränsning ska ha märkbara effekter ligger därför nära kärnan av frågan om marknadsinflytande. Jag diskuterar i denna uppsats hur djupgående och sofistikerad en marknadsdefinition måste vara för att kravet på märkbar effekt ska anses uppfyllt i förhållande till syftesöverträdelser. Jag diskuterar även vilka faktorer och tröskelvärden som är relevanta för bedömningen av syftesöverträdelser.

Definitionen av den relevanta marknaden har ansetts vara en nödvändig förutsättning för att fastställa att ett avtal märkbart begränsar konkurrensen. EU domstolarna har dock konstaterat att det enbart är nödvändigt att definiera marknaden om det utan en sådan definition skulle vara omöjligt att fastställa att en överträdelse har skett av förbudet. Resonemanget följer av tidigare rättspraxis som konstaterat att det inte är nödvändigt att se till den ekonomiska och juridiska kontexten när det har fastställts att det rör sig om en uppenbar konkurrensbegränsning. Uppenbarheten i begränsningen kan först och främst härledas från avtalets art och en summarisk bedömning av omständigheterna relevanta för avtalet. Vägledning i relation till om begränsningen är uppenbar kan eventuellt hämtas från svaret på frågan om det, utan en exakt definition marknaden, är möjligt att fastställa att företagens marknadsandel vida överstiger 5 %. Utöver att definiera marknaden för att uppfylla rekvisiten i 2 kap. 1 § KL och Art. 101(1) FEUF krävs det att marknaden definieras tillräckligt precist för att uppfylla det grundläggande kravet på rättssäkerhet. Att tillämpa märkbarhetskravet i mål som rör syftesöverträdelser har varit omdebatterat inom EU. Det verkar dock som om domstolarna i både Sverige och EU har slagit fast att det är nödvändigt att tillämpa rekvisitet i förhållande till såväl syftes- som effektöverträdelser. Märkbarhetsbedömningen är uppdelad i kvantitativ och en kvalitativ del. Den kvantitativa aspekten tar hänsyn till parternas position och betydelse på marknaden, samt marknadsstrukturen. Det finns ingen klar vägledning i riktlinjerna från EU eller praxis från domstolarna i Sverige och EU i förhållande till vilka marknadsandelar som krävs för att ett avtal inte ska anses märkbart vid syftesöverträdelser. De märkbara effekterna av ett avtal bör dock kunna börja ifrågasättas när marknadsandelarna rör sig under 5 %. I förhållande till den kvalitativa aspekten görs en bedömning om begränsningen i sig är tillräckligt är märkbar. Analysen tar hänsyn till avtalets natur och om det finns några objektivt konstaterbara inskränkningar på konkurrensbegränsningen.

Preface

I would like to thank my supervisor Katarina Olsson for all the help during the writing of this paper. By being available to answer questions and by giving constructive feedback she helped me improve my writing and the material discussed in this paper.

I would also like to thank the people who helped me with proofreading the text. Thank you Anna Bryngelsson, Kendra Bannister, Sara-Emelie Savert and Caroline Persson. Lastly I would like to thank my friends and my family for allowing me to fully focus on my writing.

Abbreviations

AG	Advocate General
Art.	Article
CA	the Swedish Competition Authority (Konkurrensverket)
CJEU	the Court of Justice of the European Union
DC	the Swedish District Court (Tingsrätten)
EU	the European Union
FEUF	Fördraget om Europeiska Unionens funktionssätt
KL	Konkurrenslag SFS 2008:579
GC	the General Court
MC	the Market Court (Marknadsdomstolen)
SCA	the Swedish Competition Act (Konkurrenslag SFS 2008:579)
TFEU	the Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

Ch. 2, 1 § of the Swedish Competition Act[1] (2 ch. 1 § SCA) prohibits agreements between undertakings, which have as their object or effect, the prevention, restriction or distortion of competition in the market to an appreciable extent. The purpose of the prohibition is to hinder conduct, which may be considered contrary to effective competition, and is based on the assumption that free competition provides benefits for society and consumers. The prohibition makes a distinction between agreements, which have as their object or effect the restriction of competition. The distinction is based on the fact that certain types of agreements are considered to be inherently harmful and therefore presumed to negatively influence the market. Hence, once it has been established that an agreement has a restrictive object, it is not necessary to prove any actual effects. This provides an investigatory relief for the party alleging a restriction of competition. However, it is still necessary to determine whether the agreement may appreciably effect competition. The fact that an agreements may escape the prohibition in 2 ch. 1 § SCA, and Art. 101(1) Treaty on the Functioning of the European Union[2] (TFEU), if the effects are not appreciable, has been referred to as the de minimis principle.[3]

The necessity to consider the appreciable extent of restrictions by object can be viewed either in a more legalistic or formalistic manner, drawing a line between allowed and prohibited agreements based on the legal assessment of their nature. A more economics approach, however, put more emphasize on the ability of the agreement to influence the market, and the appreciable effect as a minimum requirement of influence. Requiring the determination of appreciable effects in cases of object restrictions may be considered counter-intuitive as the object category is based on the inherent harm of the agreements therein. Similarly, it may seem contradictory to presume effects of an object restriction, thereby providing an investigatory relief, but at the same time require appreciable effects to be proven, providing an obligation to determine the ability to effect the market. These issues are discussed throughout the paper with the ambition to provide clarity in the assessment of the concept "to an appreciable extent".

[1] Konkurrenslag SFS 2008:579 [KonkL] Competition Act 2:1 (Swed.).
[2] Consolidated version of the Treaty on the Functioning of the European Union OJ C 115, 9.5.2008, p. 47–388. What is now the Treaty on the Functioning of the European Union has throughout history been amended. With the amendments the article number has been changed from Article 85, to Article 81 and now Article 101.Throughout this paper I will refer to the prohibition by using the current numbering, with the exception of quotes or names of EU documents, such as Regulations or Guidelines.
[3] The metaphor of a safe harbour has been used to describe the scope of the de minimis principle.

1.2 Purpose And Research Questions

The general purpose of this paper is to examine the interpretation and application of the requirement that an agreement, which has as its object the restriction of competition, must have an appreciable effect on the market in order to be prohibited by the Swedish competition rules. The purpose may be divided into two parts. First, I attempt to determine to what extent it is necessary to define the relevant market, once it has been established that an agreement restricts competition by object, in order to satisfy the appreciability condition. This part of the paper address the issues of whether it is necessary to define the relevant market at all in these cases, and if so, examine how rigorous the market analysis should be. Second, I attempt to determine whether there exists a safe harbour for agreements with a restrictive object. This part address whether any quantitative or qualitative thresholds may be deduced from the preparatory work of the SCA or from the European Union (EU) and Swedish case law. Moreover, I seek to determine what quantitative and qualitative factors to consider in the assessment of the appreciability condition.
Consequently, this paper answers the following three related research questions:

1) At what depth and sophistication must a market analysis be conducted in order to establish an appreciable effect, when an agreement restricts competition by object?

2) *Is there a quantitative and qualitative safe harbour for agreements, which have as their object the restriction of competition?*

3) *What quantitative and qualitative factors are relevant in the assessment of appreciability?*

1.3 Delimitations

This paper has as its primary focus competition as it stands today in Sweden. However, I initially describe the legal history of the European and Swedish competition rules as well as its recent changes, in order to place the current legislation into perspective. I also present some of the economic theory underlying the competition rules as a means to provide a general understanding of what consequences competition, or a lack thereof, may have on the market. These sections are necessarily brief, and the description limited in scope and depth. Due to the focus of the paper, the majority of the arguments and reasoning is put forward to determine the current interpretation and application of the prohibition (de lege lata), and will not be prospective, relating to how the prohibition should be interpreted or applied (de lege ferenda). However, certain sections will provide suggestions regarding the interpretation of 2 ch. 1 § SCA and Art. 101(1) TFEU.

2 ch. 1 § SCA may generally be divided into three conditions. First, there must be an agreement between at least two undertakings (the agreement condition). Second, the agreement must restrict competition either by object or effect (the restriction of competition condition). Third, the agreement has to restrict competition to an appreciable extent (the appreciability condition). This paper focuses on the appreciable effects of an agreement, which has as its object the restriction of competition. The restriction of competition condition will only be discussed in order to get a general understanding of what constitutes a restriction by object. The agreement condition or appreciability condition in relation to trade between Member States is not considered in detail and is only referred to when necessary for general understanding of the paper. Lastly, I do not consider the exception that administrative fines may not be imposed on undertakings in minor cases according to 3 ch. 7(3) § SCA. Further minor delimitations are used throughout to limit the scope of the paper.

1.4 Method And Material

The method used in this paper is a traditional legal method. Essentially, this means that I examine the research questions above systematically according to legislation, preparatory works, case law and doctrine. The basis for the examination is 2 ch. 1 § SCA, prohibiting agreements that to an appreciable extent restrict competition. The preparatory works, the case law and doctrine are used, in that order of relevance, to analyse how the concept "to an appreciable extent" has been interpreted and applied in Swedish competition law. Much of the focus is on case law where the boundaries of the relevant concepts, such as restrictions by object and "to an appreciable extent", have been drawn. The aim is primarily be to determine the law as it stands today, i.e. determining de lege lata. The material in chapter 2 - 6 is, therefore, mainly descriptive. The last chapter consists of the main analysis, answering the researched questions.

EU Treaty law, secondary law, such as Council and Commission Regulations, case law and other instruments, such as Commission guidelines, notices and communications are used throughout the paper in order to interpret the Swedish Competition law. As is further addressed in section 2.4, the EU competition law plays an important role in the understanding and application of the SCA. Therefore, the paper is heavily influenced by EU competition law, and case law from the EU courts will be used interpreting the Swedish competition rules, The reliance on case law from the EU courts is particularly prominent in parts where the Swedish case law is scarce. Because of the influence by EU competition law, and considering that the Swedish competition rules forms part of the EU competition network, the language of this paper is English.

The selection of materials used in this paper varies based on the issue being examined. As an example, case law is the primary focus in sections concerning the boundaries of concepts such as “to an appreciable extent” and “market definition”, as the scope of these concepts generally has been defined through case law. On the other hand, the chapter addressing economic theory is to a large extent based on economic literature, as these theories have been formed through economic doctrine.

1.5 Outline

The paper consists of six chapters relating to the substance of the research questions (Chapter 2 - 7).

The second chapter briefly examines the legal and economic background of the prohibition in 2 ch. 1 § SCA and Art. 101(1) TFEU. It addresses the relationship between legal and economic theory and discuss the necessity to apply economic reasoning in application of competition law. It also discusses the relationship between Swedish and EU competition law.

The third chapter describes some of the economic theory underlying competition law. The theory of perfect competition is used to illustrate the consequences market power may have on the market.

Chapter four considers what constitutes a restriction of competition by object. The reasoning behind using a presumption-based rule in relation to object restrictions is addressed. Lastly, some agreements are examined that, although *prima facie* could be considered to restrict competition, may fall outside the scope of the prohibition.

The fifth chapter provides a thorough analysis of the depth and sophistication needed, once a restrictive object has been established, to establish that an agreement may restrict competition to an appreciable extent. In addition, the concept of market power is defined.

The sixth chapter considers the concept of “to an appreciable extent” and what quantitative and qualitative factors are relevant for the assessment of the appreciability concept.

The seventh chapter concludes with an analysis of the material presented throughout the paper and provides some clarity regarding the proposed researched questions.

2 Background

2.1 Introduction

In the interpretation and application of the Swedish competition rules it is often necessary to consider the underlying goals and purposes providing their legal and economic history. Considering the important role European competition law and case law from the EU courts have on the interpretation and application of Swedish competition rules, it is valuable to briefly examine the goals and purposes of the Treaty on the functioning of the European Union. The application of the appreciability condition may be viewed at in two different ways. First, it may be viewed at with a legalistic or formalistic perspective, dividing agreements into allowed of prohibited, based on a legal assessment of their nature. Second, the application of the condition may be viewed at with a more economic perspective focusing on the effects on the market and in particular the consumer interest. This chapter initially addresses the foundation of EU competition law and the move towards a more economically oriented approach. It further discusses the relationship between law and economics in the field of competition law. Thereafter, the foundation of Swedish competition law and the relationship between EU and Swedish competition law is examined.

2.2 The Foundation Of European Competition Law

2.2.1 Background

European competition policy is based on the concept of a "social market economy", which is ingrained in the EU. Article 2(3) TFEU states that

> "[…] It [the EU] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment."[4].

This general aim of the treaty is based on the assumption that the market mechanism is the best way to encourage innovation and productivity. Furthermore, it seeks to achieve the full potential of undertakings in terms of efficiency, which in turn will provide social and consumer welfare.[5] The recognition of these benefits as a result of competitive markets is largely shared throughout the world.

[4] Article 3(2) TFEU.
[5] Hildebrand, page 2, See also Whish, page 3f.

There are currently more than 120 systems of competition law in the world governing the interactions on the various markets.[6]

Even though there is a great reliance in the market mechanism to provide the above-mentioned benefits, this is not to say that the European approach towards competition is characterized as a fully deregulated and liberal market. According to *Hildebrand*, the European school of thought and the "social market economy" was based on ordoliberalism and the Freiburg school of thought. It emphasizes a liberal market process, but within a legal institutional framework with a constitutional basis. Competition law creates this necessary structure, which allows the competitive process to provide benefits for society.[7] The ordoliberal system enables the market to, as far as possible within the legal framework, regulate itself, with state intervention only where the market is unable to provide sufficient competitive pressure.[8]

2.2.2 A Variety Of Goals

As noted, competition law may be seen as a means to achieve a social market economy. The utility of competition, and competition rules, rests on a foundation built on a variety of goals. *Geradin and others* note that, although consumer welfare is particularly prevalent in the latest application of the competition rules, the prohibition of undistorted competition is a multifaceted concept that may include a variety of goals such as fairness, freedom, efficiency and consumer welfare.[9] In *Anic*[10] the Court of Justice of the European Union (CJEU) stated that inherent in the provisions of the TFEU is the concept that every economic operator must determine the policy which he intends to adopt on the market independently. Hence, an agreement restricts competition when it limits the freedom of one or more undertakings to determine their policy and where the object or effect of the contact between the undertakings is to "create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products and services offered, the size and number of the undertakings and the volume of the said market."[11]. This statement may be viewed as an expression of the underlying goal of freedom, where restrictions of the actions of undertakings should be prevented. The specific purpose of the prohibition in Art. 101(1) TFEU is, in addition to the economic goal of preventing restrictions of competition, to prevent restrictions on trade between Member States in order to promote integration across the borders.[12]

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[6] Whish, page 3.
[7] Hildebrand, page 159ff.
[8] Ibid, page 1ff.
[9] Geradin and others, page 23, paragraph 1.70-1.72, The book is published 2012 and the latest development should be viewed as the time recently predating the publishing of the book.
[10] Case C-49/92 P *Commission of the European Communities v Anic Partecipazioni SpA* [1999] E.C.R. I-04125.
[11] Anic [1999] paragraph 117.
[12] Bishop & Walker, page 4ff. paragraph 1-004 – 1-006.

The goal to protect the interest of consumers is apparent in the *guidelines on Article 81(3)* where the Commission states, "the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."[13]. In this connection, *Eklöf* argues that it would be politically troublesome not to have the consumer aim.[14]

2.2.3 The Relationship Between Competition Law And Economics

Competition law is intrinsically linked with economic theory and economic analysis. Competition law may be viewed as the vehicle used to translate the economic models into reality on the markets.[15] The link between competition law and economics is further evidenced by the way economic concepts, such as efficiency, market power but also appreciability, are used in the discussion and application of competition law.[16] Consequently, these concepts should not be assessed in isolation from economic theory, but demand an accompanying economic analysis.

Competition law and economic theory have been recognized as being unpredictable and hard to evaluate because of its reliance on assumptions.[17] *Crandall & Winston* argued that, within the American context, little empirical evidence supported that past intervention had provided consumer benefits or significantly deterred anticompetitive behaviour.[18] They therefore argued that competition authorities would be well advised to prosecute only the most egregious violations of competition until hard evidence can be adduced that identifies what enforcement actions improve consumer welfare.[19] This view was criticised by *Baker* who stated that although there is not enough evidence to determine the robustness of competition law,

> "[…] The presumption should be in favor of antitrust enforcement as it is conducted today, with substantial input from economists at the antitrust agencies and in the courts both in resolving individual cases and in the development of antitrust rules."[20].

[13] Guidelines on Article 81(3), paragraph 13.
[14] Eklöf, Konkurrensbegreppet och konsumentvälfärden, 18f.
[15] Hildebrand, page 164.
[16] Peeperkorn, Luc and Verouden, Vincent, "The Economics of Competition", In: Faull & Nikpay, page 4, paragraph 1.01.
[17] See Neven, page 1ff.
[18] Crandall & Winston, page 4.
[19] Ibid, page 4.
[20] Baker, page 32.

The record from the EU case law shows that effective cartels can create substantial harm and that leniency programs may help prosecuting cartels that otherwise would remain secret.[21] In light of the relatively recent changes in European competition law and policy, the use of economic reasoning and the explicit use of economic arguments have increased.[22] Empirical evidence has been used to support economic theories and remove some of the uncertainties due to their underlying assumptions.[23] *Peeperkorn and Verouden* note that while economic theories and models may not always give clear and definitive answers, they provide a coherent framework of analysis and help to tell the most plausible story.[24]

2.3 A More Economic Approach

The necessity and importance of economic analysis, as noted in the previous section, have been more and more accepted within the EU context. Since the late 1990s the Commission has moved from a more forms-based approach to what has been known as the "economics-based approach"[25]. Between 1962 and 2004 agreements could be exempted from the prohibition in Art. 101(1) TFEU either by EU block exemption regulations or by receiving an individual exemption. The exemption system was based on notifications to the Commission where *Regulation no 17* gave the Commission exclusive competence to grant individual exemptions under Art. 101(3) TFEU. This approach led to notifications in excess of 30,000 in the early 1960s.[26] Due to lack of resources the Commission was therefore forced to take a categorical approach in determining which agreements should benefit from the exemption. This resulted in an approach that did not consider the different effects of similar agreements and threatened to deter pro-competitive agreements.[27] Hence, in the 1970s and 80s the European institutions tended to apply economic principles in an imprecise ad hoc manner.[28] The administrative burden led the Commission to adopted regulations providing block exemptions and a de minimis notice.[29]

In the *Green Paper on vertical restraints* presented in 1996 the Commission recognized the necessity, and pro-competitive effects, of many vertical agreements.[30] The Commission noted that consensus was emerging amongst economists that vertical agreements could neither be seen as *per se* suspicious, nor *per se* pro-competitive.[31]

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[21] Neven, page 2f.
[22] Ibid, page 1ff.
[23] Bishop & Walker, page 3f.
[24] Peeperkorn, Luc and Verouden, Vincent, "The Economics of Competition", In: Faull & Nikpay, page 4, paragraph 1.03-1.04.
[25] Geradin and others, page 19, paragraph 1.60.
[26] Green Paper on vertical restraints, Exec summary page Iv, paragraph 15.
[27] Alison, page 787ff.
[28] Bishop & Walker, page 3f.
[29] Ehlermann, paragraph 9.
[30] Green Paper on vertical restraints, Exec. Summary page I, paragraph 2.
[31] Ibid, Exec. Summary page I, paragraph 10.

According to the Commission, the market structure stood out as being generally important in the assessment of these agreements. Anti-competitive effects were considered more likely where inter-brand competition was weak and where there were entry barriers.[32] The Commission reached, *inter alia*, the conclusion that,

> "Analysis should concentrate on the impact on the market rather than the form of the agreement. For example, whether entry is foreclosed by a network of agreements or whether the vertical agreement coupled with market power permit producers or distributors to practice price discrimination between Member States."[33]

However, the Commission further stated that economic theory is only one source of policy and that an individual assessment of every case "would be too costly in resource terms and may lead to legal insecurity"[34]. Focusing on impact, and necessarily economic analysis of effects, could also result in the additional cost of reduced legal certainty.[35]

Even though the Commission took steps towards a more economic approach, absolute territorial protection and resale price maintenance were still considered to fall *per se* within Art. 101(1) TFEU and unlikely to be exempted.[36] The *Green Paper on vertical restraints* has been considered to mark the change towards a more economic based approach.[37] With *Regulation 1/2003* the Commission relinquished its exclusive power to provide individual exemptions and abolished the notification system. Furthermore, *the guidelines on Article 81(3)* were introduced in 2004, which has considered to bring a more coherent economic framework in the analysis of Art. 101(1) and Art. 101(3) TFEU and put more emphasize on consumer welfare as the objective of Art. 101(1) TFEU.[38]

In its *White paper on modernisation* the Commission stated that it had to "[…] refocus its activities on combating the most serious restrictions of competition […]"[39]*Ehlerman* noted, in a comment to the Commission *White paper on modernisation*, that it was generally considered that the Commission had interpreted "restriction of competition" too broadly in the past but that it had indicated that it would take a less formalistic approach in favour of an approach giving more weight to the economic reality.[40]

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[32] Ibid, Exec. Summary page iii, paragraph 10.
[33] Ibid, Exec. Summary page iii-iv.
[34] Ibid, Exec. Summary page iv.
[35] Geradin and others, page 19, paragraph 23.
[36] Green Paper on vertical restraints, Exec. Summary page x.
[37] Alison, page 789, Peeperkorn, Luc and Verouden, Vincent, "The Economics of Competition", In: Faull & Nikpay, page 220, paragraph 3.136.
[38] Alison, page 790.
[39] White Paper on Modernisation, paragraph 42.
[40] Ehlermann, page 16.

In conclusion, it seems as though the Commission has 1) moved towards an approach characterized by reliance in economic theory and market analysis, in order to determine the impact an agreement may ultimately have on the consumer, and 2) narrowed its scope of interpretation in relation to the concept "restriction of competition" and refocused its resources on the agreements that represents the greatest harm to the market and the consumer.

Even though the Commission has taken steps towards a more economics-based approach, it may take time before this change is reflected in the European and national courts.[41] In *GlaxoSmithKleine*[42] the General Court (GC) used consumer welfare as a benchmark standard in the assessment of Art. 101(1) TFEU arguing that the objective of Art. 101(1) TFEU was to prevent the undertakings from reducing the welfare of final consumers.[43] *Nikpay and others* noted that this development was welcome and, arguably, long overdue.[44] However, the judgement of the GC was overturned by CJEU stating that neither the wording of Art. 101(1) TFEU nor the case law supports a view that the object category depends on whether an agreement may be presumed to deprive final consumers of the advantages of effective competition. Instead the court stated that Art. 101 TFEU aims to protect the market structure and competition as such, as well as consumers and competitors. It was therefore not considered necessary that final consumers were deprived of the advantage of effective competition.[45] The CJEU judgement indicates that the court has not followed in the footsteps of the Commission adopting the more effects-based approach with the consumer welfare focus in mind. Although, it may also confirm the complexity and plurality of the goals of EU competition policy.[46]

2.4 The Swedish Approach

The history of Swedish competition rules dates back to 1925 when the first legislation regarding the investigation of monopolies was introduced.[47] During the 1990s Sweden moved closer to the collaboration in Europe and in connection with the Swedish accession to the EU, a new Competition Act entered into force in 1993.[48] When the act was introduced the Government deemed competition in many important parts of the economy to be inadequate and stated that it was necessary to create more suitable conditions in order to promote competition.[49] With the introduction of the

[41] Peeperkorn, Luc and Verouden, Vincent, "The Economics of Competition", In: Faull & Nikpay, page 222, paragraph 3.143.
[42] Case T-168/01 *GlaxoSmithKleine Services Unlimited v Commission of the European Communities* [2006] E.C.R. II-02969
[43] GlaxoSmithKline v Commission [2006] paragraph 118.
[44] Nikpay and others, "Article 81", in: Faull & Nikpay, page 220, paragraph 3.138.
[45] GlaxoSmithKline v Commission [2009], paragraph 62-63.
[46] Alison, page 792.
[47] Gustafsson, page 17.
[48] Ibid, page 18.
[49] Prop. 1992/93:56, page 4f.

SCA it was stated that a natural starting point, when proposing the new SCA, was the convergence to EU competition rules. The Government pointed out that Swedish companies conducting business on the EU market was already affected by the EU competition rules. It stated that the SCA should be modelled after, and conformed to, Art. 101(1) and 102 TFEU.[50] The aim was to as far as possible achieve substantive conformity with the EU competition rules, with the obvious exception of the condition "may affect trade". The SCA therefore rest on much of the same purposes as the TFEU with the exception of the integration goal. In the interpretation of the SCA the Government held that the EU case law, and case law from other countries applying a prohibition principle, could provide guidance in the application of the substantive rules.[51] The Government argued that the utility of competition was that it stimulates markets in order to better utilize the resources of society. By putting pressure on prices and broadening the range of supplies competition was considered to bring consumer benefits.[52]

With the modernization of the competition rules within EU and especially the introduction of *Regulation 1/2003*, the Government appointed an inquiry to examine the application of the Competition Act. The inquiry resulted in a new Competition Act that entered into force 2008 and is currently applicable.[53] *Regulation 1/2003* brought the application of TFEU and SCA even closer as it enabled the Member States Authorities to apply Art. 101(1) and 101(3) TFEU in their entirety.[54] It further obligated the Member States Authorities to apply TFEU and SCA in parallel once an agreement affect trade between Member States.[55] Similar to the goals of EU competition law, the general aim of the SCA is to strengthen competition in order to improve social and consumer welfare.[56] Effective competition is the adequate benchmark in the test to determi ne whether or not certain conduct restricts competition to an appreciable extent.[57] 1 ch. 1 § SCA states, "The purpose of this Act is to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products."[58].

[50] Prop. 1992/93:56, page 19.
[51] Prop. 1992/93:56, page 21.
[52] Prop. 1992/93:56, page 4.
[53] Gustafsson, page 18f.
[54] Regulation 1/2003, recital 4, Article 6.
[55] Regulation 1/2003, Article.
[56] Prop. 2007/2008:135, page 67.
[57] Prop. 2007/2008:135, page 66.
[58] 1 ch. 1 § SCA (English translation).

3 Competition Economics

3.1 Introduction

As noted, economics has become more important in the EU competition law and there has been an increase in focus and reliance on economic analysis. As the application moves towards a more effects based and consumer oriented approach the economic theory becomes increasingly important, as the foundation for the economic reasoning. The concept of "restriction of competition" is fundamentally an economic concept that which generally requires an economic evaluation.[59] Similarly, the determination of the appreciable effects of an agreement also has its basis in economic theory. Throughout the 20th century many different schools of thought and economic models were used analysing competition law.[60] However, in order to illustrate the negative impact restrictions of competition may have on the market, this paper applies the neoclassical model, where perfect competition and monopoly exist as the two opposite poles of the market.[61] The model provides a static illustration of the inefficiencies that may arise when a market moves from perfect competition towards a market characterized by monopoly. There are two main criticisms of this market rendition; it is a static model and does not take into account dynamic efficiencies of innovation and technological progress[62], it is also based on unrealistic assumptions rarely, if ever, present in the real markets.[63]

With this criticism in mind it should be pointed out that the model is not used in the application of competition law, but is instead used to illustrate the economic consequences of market power. The perfect competition model has been regarded as helpful in illustrating the economic consequences that may arise with market power. *Bishop and Walker* notes,

> "While neither of these models [perfect competition and monopoly] provides a good description of the competitive process in most industries, they can be used to illustrate some of the basic economic concepts that enable one to judge whether intervention by competition law authorities is likely to improve consumer welfare"[64].

[59] Whish, page 117.
[60] See inter alia the Harvard school of thought, the Chicago school of thought and the theory of contestable market. Hildebrand, page 95ff.
[61] Geradin and others, page 62, paragraph 2.10-2.11, See also Hildebrand, page 104ff., Peeperkorn and Verouden, "The Economics of Competition", in Faull & Nikpay, page 18, paragraph 1.54.
[62] Bishop & Walker, page 45, paragraph 2-036.
[63] Hildebrand, page 22, paragraph 2-009.
[64] Bishop & Walker, page 21f, paragraph 2-009, See also Peeperkorn and Verouden, "The Economics of Competition", in Faull & Nikpay, page 18, paragraph 1.54.

The following section, describing perfect competition and monopoly, provides an overview that will offer an economic basis for the reasoning throughout the paper, but is, however, not the main focus of this paper. It will therefore necessarily be brief. The text is mainly based on *Bishop and Walker*, *"The Economics of EC competition law"*[65] and *Geradin and others*, *"EU Competition Law and Economics"*[66]. Although, most of the basic reasoning can be found with many authors on the same subject.[67]

3.2 Perfect Competition

Perfect competition may be described as a state where the market mechanism of supply and demand works perfectly. *Geradin and others* argues that there are five criteria necessary for perfect competition in a given market. These are:

1. Large number of sellers and buyers
2. Homogenous products
3. Perfect information
4. Free entry (no entry barriers), and
5. No transportation costs[68]

Due to the competitive pressure on the market, prices are driven down to the marginal cost of the firm, including a sufficient profit for the producer to have had incentives to invest capital in the industry in the first place.[69] Under these conditions a buyer would turn to a competitor if a firm decided to increase the price above marginal cost. Would the firm instead decide to lower the price below marginal cost it would not be able to achieve sustainable profitability and be forced to exit the market.[70] A market with perfect competition would therefore, based on the model, maximize allocative efficiency, productive efficiency and increase consumer welfare, which is further explained in the next section on monopoly.[71] A more controversial and debated question is whether perfect competition induces dynamic efficiencies.[72] The static model of perfect competition used in this paper does not consider dynamic issues such as innovation or the change in products or processes.[73] Neither is it the purpose of this paper to analyse efficiencies on the market. Hence, the question of dynamic efficiency is not further analysed in this paper.

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[65] Bishop & Walker.
[66] Geradin and others.
[67] See Faull & Nikpay, page 18-23, paragraph. 1.54 - 1.74, Whish, page 3-9.
[68] Geradin and others, page 64, paragraph 2.16.
[69] Bishop & Walker, page 22, paragraph 2-009, in particular footnote 21, See also Whish, page 5.
[70] See Geradin and others, page 64f., paragraph 2.17 – 2.18.
[71] Bishop & Walker, page 24ff.
[72] Geradin and others, page 67f., paragraph 2.25-2.27, See also Whish, page 5f, Faull & Nikpay, page 36ff. paragraph 1.117ff., Eklöf, Konkurrensbegreppet och konsumentvälfärden, page 20.
[73] Bishop & Walker, page 45, paragraph 2-036.

3.3 Monopoly

A monopoly market is characterized by another set of assumptions. Instead of multiple sellers there is only one firm producing the total quantity traded on the market. Furthermore, there are entry barriers limiting other firms to establish their business on the market.[74] Under these conditions the monopoly firm has the ability, due to market power, to affect the market in a way that would not be possible under perfect competition conditions. Assuming that the firm is profit maximizing, it will, according to economic theory, set its prices where the marginal cost intersects the marginal revenue. The firm may limit production or raise the prices in order to achieve maximal profits.[75] A cartel may in this connection be seen as a "[…] monopoly comprised of several undertakings working in concert organized by means of an agreement to restrict production and keep prices high […]"[76], which creates analogous effects to a monopoly by an individual undertaking.[77]

The behaviour of monopoly firms result in several market inefficiencies and welfare losses; effects which are the fundamental aim of competition law to prevent.[78] The first consequence is that the restricted production creates allocation inefficiencies and therefore a total, or social, welfare loss. With the restricted output resulting in higher prices there will be consumers on the market valuing the product at a level above its marginal cost but under the monopoly price. The outcome is a surplus of demand that, while not currently satisfied, could be satisfied with a better allocation of resources, commonly referred to as a dead weight loss.[79] The second consequence relates to the increase in price for consumers as a result of firms being able to maximize profits. The increase in price leads to a redistribution of the consumer surplus that is created by the disparity between the valuation of a certain product and its marginal cost. As an effect of the monopoly, consumer surplus will decrease and the producer surplus increase. This is in itself not a social welfare loss but a redistribution of welfare, which results in consumer welfare loss.[80] A third consequence is that the monopolist may, when free from competitive pressure, acquire production costs higher than the marginal cost on a highly competitive market. In other words, the market power allows the firm to maintain a less effective production, known as productive inefficiency.

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[74] Peeperkorn and Verouden, "The Economics of Competition", in Faull & Nikpay, page 20, paragraph 1.62, See also Bishop & Walker, page 26, paragraph 2-013.
[75] Bishop & Walker, page 26, paragraph 2-014.
[76] Geradin and others, page 66, paragraph 2.22.
[77] Ibid, page 66, paragraph 2.22.
[78] Ibid, page 66ff., paragraph 2.23-2.27.
[79] Ibid, page 66, paragraph 2.23, Eklöf, Konkurrensbegreppet och konsumentvälfärden, page 19.
[80] Eklöf, Konkurrensbegreppet och konsumentvälfärden, page 19.

The production costs would then consume the redistributed consumer surplus, instead of resulting in producer profits, and ultimately lead to a social welfare loss.[81]

In conclusion, the neoclassical model shows that negative effects on the market may arise as a result of a maintained or strengthened ability to influence the market. As is further discussed in section 5.5, market power is commonly defined as the ability to raise prices above levels that would predominate under competitive conditions. Consequently, the condition that an agreement must appreciably effect competition is strongly connected with the economic theory concerning the ability to exert an influence on the market. The condition provides a minimum threshold necessary for undertakings to be theoretically able to negatively effect competition on a properly defined market.

[81] Geradin and others, page 66f., paragraph 2.24, See also Bishop & Walker, page 25, pp. 2-012, Compare Eklöf, Konkurrensbegreppet och konsumentvälfärden, page 28.

4 Restriction Of Competition

4.1 Introduction

The purpose of this paper is to determine how the condition of appreciable effect is interpreted and applied in relation to restrictions by object. Hence, it is necessary to determine what constitutes an object restriction, why there is a division between effect and object restrictions and how object restrictions are established.

The condition, that a restriction of competition must be appreciable, is stated directly in the SCA. 2 ch. 1 § SCA states,

> "Agreements between undertakings shall be prohibited if they have as their object or effect, the prevention, restriction or distortion of competition in the market to an appreciable extent, if not otherwise regulated in this act."[82]

2 ch. 1 § SCA may be divided into three conditions that must be satisfied in order to apply the prohibition. First, there must be an agreement between at least two undertakings, a decision by an association of undertakings or concerted practices (the agreement condition). Second, the conduct must have a restrictive object or effects (the restriction of competition condition). Third, competition must be restricted to an appreciable extent (the appreciability condition).[83] However, although it may be useful to divide the second and third condition into different assessments, it is important to keep in mind that the parts are highly connected and inter-dependent. Art. 101(1) TFEU was in early case law described as an "indivisible whole"[84] and it was stated that the two concepts object and effect "seek to identify the same consequence of collusion: restriction of competition"[85]. The aim of the analysis in 2 ch. 1 § SCA should therefore, regardless of the theoretical framework of analysis used, ultimately determine whether or not competition has been restricted on a given market.

[82] 2 ch. 1 § SCA (English translation).
[83] See Prop. 1992/93:56, page 20.
[84] Geus [1962] page 6.
[85] Kolstad, page 3.

4.2 Object Restriction

4.2.1 Introduction

2 ch. 1 § SCA prohibits agreements that have as their object or effect the restriction of competition. The conditions "object or effect" are alternative and not cumulative. It is therefore not necessary to show the effects of an agreement on the market once a restrictive object has been established.[86] In other words, once it has been established that an agreement has as its object the restriction of competition the effects on the market will be presumed.[87] The presumption is based on the inherently harmful nature of certain agreements, "as being injurious to the proper functioning of normal competition"[88], and provides an investigatory relief for the party alleging an infringement of the prohibition.[89] Similar reasoning is provided in *the guidelines on Article 81(3)*, where the Commission states that the presumption is based on "the serious nature of the restriction and on experience showing that restrictions of competition by object […]"[90].

The reference to experience indicates that past effects of similar agreements are relevant factors when determining if an agreement has as its object the restriction of competition. Many commentators agree that experience may indicate that certain agreements have anti-competitive effects.[91] *Bailey* argues, however, that the combination of economic analysis, empirical research, experiences from other jurisdictions and policy judgements forms the basis for infringements by object.[92] Even though the object category provides an investigatory relief through the presumption of effects, *Zenger and Walker* points out that the agreements should not be categorized as object restrictions in order to avoid the requirement to specify the theory of harm.[93] Instead, a theory of harm should be provided also in cases of object restrictions because of the benefits it brings; it focus on harm to competitors instead of competition do not survive; it concentrate on conduct where the involved firms have incentive and ability to act anti-competitively; it emphasize empirical evidence that is required to underpin potential competition concern.[94]

[86] Prop. 1992/93:56, page 72, Prop. 2007/2008:135, page 71, Norsk Hydro [2005], page 20, See also BIDS [2008], paragraph 15.
[87] Kolstad, page 4ff.
[88] BIDS [2008] paragraph 17.
[89] Ibid, paragraph 17.
[90] Guidelines on Article 81(3), paragraph 21.
[91] Bennett and others, page 3f.
[92] Bailey, page 4.
[93] Zenger and Walker, page 29.
[94] Ibid, page 29.

The number of agreement types that are regarded to be injurious by their very nature is limited.[95] However, even though the number of agreements may be limited, cases framed in "object terms" are overrepresented in the decisional practice of the Commission. In a review of the Commission decisions between January 2000 and January 2011 it was pointed out that 17 out of 18 infringement decisions made by the Commission were framed in "object" terms.[96] Hence, the assessment of the appreciable effect of an agreement with a restrictive object is highly relevant.

4.2.2 Establishing A Restrictive Object

In *KIA*[97] the MC stated that in order to determine whether or not an agreement restricts competition it is necessary to conduct an objective assessment of the agreement, taking into account the actual and economic context as well as the actions of the parties.[98] Similarly, in *GlaxoSmithKline*[99] the CJEU held that the provisions of the agreement, the objectives it seeks to attain and the economic and legal context must be taken into account.[100]

The necessity to consider the context, and not only the nature, of an object restriction was clearly stated *Football Association Premier League*[101], where the CJEU stated in a grand chamber judgement that the agreement was deemed to have a restrictive object "[…] unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition."[102] The statement is clear in that certain contextual circumstances may justify that even a restriction by object escapes the prohibition in Art. 101(1) TFEU.

[95] Whish, page 117, Bailey, page 1.
[96] Gerard.
[97] Marknadsdomstolen [MD] Market Court 2012:13 (Swed.) *Sveriges Bildelsgrossisters förening v KIA Motors Sweden AB.*
[98] KIA [2012] page 26, See also Assistancekåren [2007] page 4, where the MC, referring to EG case law, stated that the actual context must be considered, taking into account the legal and economic context when assessing an alleged restriction of competition., See also Bil-Bengtsson and others [2008] page 13 – 16, where the MC conducted a thorough analysis of the applicants argument relating to whether of not the agreement had as its object the restriction of competition.
[99] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2009] E.C.R. I-09291
[100] GlaxoSmithKline [2009] paragraph 58, Similarly, the CJEU has stated that in order to determine the anti-competitive nature of an agreement it is necessary to assess the objective meaning and purpose of the agreement in the economic context in which it is to be applied, See Compagnie Royale [1984] paragraph 26.
[101] Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* [2011] E.C.R. Page 00000.
[102] *Football Association Premier League* [2011] paragraph 140.

In this connection it is worth pointing out that the object of the agreement does not relate to the subjective intent of the parties. The subjective intent Is not considered a relevant factor in the application of 2 ch. 1 § SCA.[103] However, in the application of Art. 101(1) TFEU, the subjective intent of the parties is considered "a relevant factor but not a necessary condition"[104]. It has, however, generally been used to condemn behaviour as a restriction of competition by object, and not in order to rebut the presumption of harm.[105] The relevance of the subjective intention of the parties is based on the idea that conduct is more likely to result in a restriction of competition if the parties intentionally are working toward this end.[106]

In addition to an objective analysis of the agreement in its context, an agreement may be classified as an object restriction by reference to the list of particularly harmful agreements in Art. 101(1) TFEU and 2 ch. 1 § SCA, to the "hardcore restrictions" in the block exemption Regulations or to decided cases. These sources may be viewed as non-exhaustive guidance as to the classification of agreements as object restrictions and a good starting point in determining the object of an agreement.[107]

4.2.3 Benefits And Criticism Of Using A Presumption

A presumption of effects provides a number of benefits. It has generally been stated that the distinction between object and effect is valuable due to the high risk of harm and the unlikelihood that agreements, which restrict competition by object, provides benefits. Furthermore, a case by case assessment of all agreements would place a high burden on firms as well as competition authorities and private plaintiffs to conduct economic and legal analyses.[108] This may lead to firms being less inclined to enter into beneficial agreements because of the risk the competition rules pose. It could also lead to insufficient deterrence of anti-competitive behaviour by the competition authorities because of lack of resources.[109] The object category therefore provides a relief from analysing the actual or potential effects of an agreement. Additionally, the object category provides legal certainty in that it more clearly points out the legal consequences of certain agreements.[110]

[103] See KIA [2012] paragraph 206, See also NCC and others [2009] page 48.
[104] Guidelines on Article 81(3), paragraph 22, See also General Motors [2006] paragraphs 77-78.
[105] Bailey, page 10.
[106] Odudu, page 121.
[107] Bailey, page 6ff.
[108] Bennett and others, page 7, See also Bailey, page 4f.
[109] Ibid, page 7.
[110] Bailey, page 4, Bennett and others, page 7ff.

Some of the criticism towards the object category is that the extended use of it goes beyond cases where agreements may be presumed, based on the inherently restrictive effect on competition, to be anti-competitive.[111] *Zenger and Walker* note that it might be tempting to characterize conduct as restrictions by object since it relieves the burden of providing a theory of harm. However, they state,

> "But this is not how the object category was intended to be utilised. As the 101(3) Guidelines explain, genuine restrictions by object are agreements where the theory of harm is obvious and where competitive harm is a foregone conclusion."[112]

Agreements, such as resale price maintenance agreements and restriction on parallel trade for the purpose of price discrimination, has been criticized for not justifying a presumption of harm.[113]

4.2.4 Limitations Falling Outside The Scope Of The Prohibition

Certain types of limitations on undertakings to adopt their policies on the market, such as ancillary restraints, have been considered to fall outside the scope of the prohibition laid down in Art. 101(1) TFEU.[114] The fact that certain agreements, that *prima facie* seem to restrict competition, have escaped the prohibition in Art. 101(1) TFEU has led many commentators to question whether the courts have adopted a rule of reason approach in its assessment, balancing the pro- and anti-competitive effects in the assessment of Art. 101(1) TFEU.[115] However, the EU courts have rejected this view.[116] These cases may be considered to fall outside the scope of Art. 101(1) TFEU either by stating that they do not restrict competition by object or effect, or by stating that the restriction is qualitatively insignificant. *Wahl* notes that the distinction of what does not constitute a restriction of competition at all and what does not constitute an appreciable restriction of competition is subtle but important. He further points out that it could be argued that the restriction of competition condition includes all restrictions of competition and that every exception should be considered a qualitative safe harbour. However, he states that this interpretation is too extensive.[117]

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[111] Zenger & Walker, page 14ff., The authors argue that the view that restrictions of parallel trade, resale price maintenance and payment card multi-lateral card interchange fees should be presumed harmful is erroneous.
[112] Ibid, page 19.
[113] Ibid, page 14ff., However see also generally Bennett and others, in particular page 3f., who argue that resale price maintenance should not be removed from the category presuming harm. The statement is conditioned on that the presumption is truly rebuttable and where the competition authority set up at least one theory of harm consistent with the facts of the case.
[114] See section 4.2.5.2.
[115] Westin & Linder, page 2ff.
[116] European Night Services [1998] paragraph 136, MasterCard [2012] paragraph 80.
[117] Wahl, page 17f.

In the following I distinguish between agreements that do not restrict competition at all and those that do not appreciably restrict competition due to their qualitative insignificance. The category of agreements which do not restrict competition at all will be based on three categories put forward by *Advocate General* (AG) Trestenjak in *BIDS*[118]. In her opinion in *BIDS*, AG *Trstenjak* considered three categories of restrictions in which "the assumption of a restriction of competition may be rejected or at least doubtful on the basis of the factual or legal context."[119]. These categories are:

1. Agreements limiting the freedom of undertakings, but which has no effect on competition,
2. Necessary restrictions in order to, *inter alia*, strengthen competition on a market, open up a market or allow a new competitor access to a market, and
3. Ancillary arrangements which are necessary in order to pursue a primary objective.[120]

In contrast to AG *Trestenjak*, I do not use category two and three above as two separate categories. This is because both categories cover exemptions where a restriction is considered necessary in order to achieve a desirable objective in competition terms. Therefore, I use the first and third category in the following sections in the examination of what agreements do fall outside the scope of the prohibition in Art. 101(1) TFEU. This distinction, between agreements that do not restrict competition and agreements that do not restrict competition appreciably, should not be over-emphasized, as it merely provides a theoretical framework for the assessment of the ultimate goal to determine whether an agreement restricts competition to an appreciable extent.[121]

4.2.4.1 Limitations With No Anti-Competitive Effects

The assessment whether or not an agreement restricts competition is done *ex ante*, or in other words, the assessment is based on competition as it was at the time when the agreement was signed.[122] In order for an agreement to restrict competition, it is therefore necessary that the parties to the agreement are actual or potential competitors on the relevant market or that the agreement may restrict third parties.[123] In *European Night Services,* the GC rejected the argument that potential competition between the undertakings was restricted.
The GC held that the hypothesis put forward by the Commission was "unsupported by any evidence or analysis of the structure of the relevant

[118] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] E.C.R. I-08637.
[119] Opinion BIDS [2008] paragraph 51.
[120] Ibid, paragraph 52 – 54.
[121] See Wetter and others, page 169.
[122] Wahl, page 27.
[123] European Night Services [1998] paragraph 137.

market from which it might be concluded that it represented a real, concrete possibility."[124]. The Court further found that the claim that third parties were restricted was unsubstantiated and held that the contested decision was vitiated by insufficiency of reasoning.[125]

In the preparatory work to the SCA the Government pointed out that it is not necessary that there is competition on the market when the agreement is concluded. Instead, it is sufficient that competition could occur but that the possibility for it to do so is restricted by the agreement.[126] In this connection, the MC has in several cases stated that the parties to the agreement would not have been competitors in a counter-factual scenario where the agreement was not concluded.[127]

In *Cementa*[128] the MC stated that undertakings are not prohibited from cooperating in tendering processes, when it is clear that they would not be able to submit tenders individually without the cooperation.[129] The Court held that the ability to submit individual tenders could not be assessed only by determining whether or not the undertakings had the capacity needed to supply the project. Instead, the assessment should take into account the consequences of an individual tender for the undertakings. Considering, *inter alia*, the ordinary customers already supplied by the undertakings, the MC held that the possibility to individually submit tenders was practically excluded. Hence, the agreement was not considered to restrict competition.[130] Wahl notes that this case may be viewed an example on situations where there is no restriction of competition at all.[131]

Furthermore, in *Swerock*[132] the MC considered whether two undertakings conducting quarry operations in a joint venture restricted competition to an appreciable extent. The Court noted that one of the parties did not have a quarry operation on its own and that it was highly unlikely that it would get the permits necessary. Hence, breaking up the joint venture would lead to fewer undertakings operating on the relevant market. The Court therefore found that the cooperation between the undertakings did not appreciably restrict competition.[133]

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[124] European Night Services [1998] paragraph 142.
[125] Ibid, paragraph 154 and 160.
[126] Prop. 1992/93:56, page 72f.
[127] Cementa [1997], Swerock [2001].
[128] Marknadsdomstolen [MD] Market Court 1997:15 (Swed.) *Competition Authority v Cementa AB and others.*
[129] Cementa [1997] page 7.
[130] Ibid, page 7.
[131] Wahl, page 18.
[132] Marknadsdomstolen [MD] Market Court 2001:11 (Swed.) *Swerock and others v Competition Authority.*
[133] Swerock [2001] page 15f.

In conclusion, it is necessary that there could be competition between the parties or third parties that may be restricted by the relevant agreement. The assessment should not only consider the ability, such as the capacity to supply certain products, in absolute terms. Instead, it is necessary to also consider the context and take into account the consequences of the individual undertakings. Hence, assuming that it has been determined that the parties to an agreement would not be able to compete in the absence of the agreement, or that it could affect third parties ability to compete, there is no restriction of competition. Therefore, the conduct should be considered to fall outside the scope of the prohibition for the reason that it does not negatively effect competition, not because the effects are insignificant in qualitative terms and therefore do not constitute an appreciable restriction.

4.2.4.2 Ancillary Restraints

In EU case law it has been stated that an agreement may not escape the prohibition in Art. 101(1) TFEU because it serves other purposes, in addition to the restrictive object, which may be legitimate.[134] However, there has evolved a doctrine of "ancillary restraints" in the EU case law, which state that restrictions that are necessary and proportionate in relation to a main operation with a desirable or legitimate object are not prohibited under Art. 101(1) TFEU.[135] In this context *Ortis* points out that an agreement may escape the prohibition in Art. 101(1) TFEU when it appears to restrict competition, but in fact does not. This has been referred to as the European rule of reason.[136] Although, as noted in section 4.2.5, a European rule of reason within Art. 101(1) TFEU has been rejected by the EU courts.

In the case *MasterCard*[137] the GC noted that the applicants' reference to the objective necessity of the agreement must be understood as meaning that it was an ancillary restriction to the main operation, or primary objective, of the applicant. The Court stated that a restriction must be objectively necessary and proportionate. The Court further rejected that the argument by the applicant that determining if the agreement was objectively necessary involved balancing of the pro- and anti-competitive effects of the agreement. On the contrary, the assessment was considered relatively abstract and was not aimed at analysing if the restriction was indispensible for commercial success but instead if it, in the context of the main operation, was necessary to implement the main operation.[138] AG *Trstenjak* stated in her opinion in the case *BIDS* that Art. 101(1) TFEU considers whether an agreement directly affects consumer welfare by restricting competition.

[134] BIDS [2008] paragraphs 22 – 25.
[135] MasterCard [2012] paragraph 80.
[136] Ortiz, page 41f.
[137] Case T-111/08 *MasterCard v European Commission* [2012] (Not yet officially published), available at: <https://www.competitionpolicyinternational.com/the-opinion-of-the-european-general-court-2/>.
[138] Ibid, paragraph 80.

Art. 101(3) TFEU on the other hand considers whether restrictive agreements may provide indirect benefits for consumer welfare, in particular through a reduction in production costs. Hence, factors such as efficiencies in production as a result of economies of scale may not be taken into account in the context of Art. 101(1) TFEU.[139] In the preliminary ruling *Pierre Fabre*[140] the CJEU stated that selective distribution agreements necessarily affect competition in the common market and that "such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'."[141] *Bailey* notes that

> "Perhaps the Court in Pierre Fabre was considering whether certain types of prima facie restrictive conduct fall outside Article 101(1), as opposed to whether a restriction by object can be saved by a legitimate objective under Article 101(1): a subtle, but important, difference."[142]

The distinction may be compared to the distinction made initially in the previous section, that certain agreements may be considered to fall outside the scope of the restriction of competition condition. Hence, there is no balancing of the different pro or anti-competitive objectives in the Art. 101(1) TFEU assessment.

Ortiz notes that restrictions have generally been considered ancillary when the objectives pursued by an agreement are recognised as desirable, either by a legitimate protectable objective or if it is economically advantageous, and the restriction is indispensible. Hence, the agreement escapes the prohibition if it is the least restrictive alternative in order to achieve a desirable objective.[143] A similar view has been expressed by *Wahl* who notes that ancillary restraints may be viewed as certain operations receiving a protection for their proper function.[144] There have been Swedish cases indicating that agreements, which serve a desirable objective, may escape the prohibition in 2 ch. 1 § SCA. In *Svenska Bilsportförbundet*[145] the MC stated that an agreement or decision by an association of undertakings, that restricts one or more of the undertakings freedom of action and thereby restricts competition, may escape the prohibition in 2 ch. 1 § SCA.[146]

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[139] Opinion BIDS [2008] paragraph 55 - 56 .
[140] Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] E.C.R. Page 00000.
[141] Ibid, paragraph 39.
[142] Bailey, page 11.
[143] Ortiz, page 41f., See also Bailey, page 11, who notes that the Court's use of "objective justification" in Pierre Fabre perhaps should be seen as considering whether certain prima facie restrictive conduct fall outside the scope of Article 101(1) TFEU, as opposed to a restriction by object being saved by a legitimate objective.
[144] Wahl, page 10.
[145] Marknadsdomstolen [MD] Market Court 2012:16 (Swed.) *Svenska Bilsportförbundet v Competition Authority*.
[146] Svenska Bilsportförbundet [2012] paragraph 140.

The Court stated, with a reference to the case *Meca-Medina and Mejcen v Commission*[147],

> "[…] An assessment must be conducted considering partly the overall context, in which the decision was made, and the purposes of the decision, partly whether the relevant restriction of competition is inherent in the pursuit of those purposes, and partly if the purposes may be attained through less far-reaching measures."[148]

The MC found that the contested provision restricted competition to an appreciable extent and could not be justified through the pleaded legitimate purposes.[149] The case above concerned conduct that was considered to have the effect, not the object, to restrict competition. However, in *Bil-Bengtsson and others*[150], concerning alleged price fixing and market sharing, the applicants argued, *inter alia*, that the cooperation had legitimate reasons to coordinate their conduct. They argued that the agreement was necessary in order to increase their negotiation power towards the common producer VPS, to reduce the free rider problem and consequently reduce consumer prices. The MC confirmed that there could be legitimate reasons for the undertakings to cooperate in relation to their common general agent VPS. However, the Court continued, the alleged restriction of competition concerned fixing prices and rebates in relation to end consumers. The applicants had failed to show that the agreement was necessary or harmless from a consumer perspective.[151]

In conclusion, it seems as though the MC has embraced the doctrine of ancillary restraints and that certain limitations do not restrict competition because the parties lack the ability to compete in absence of cooperation. These categories of agreements could be organized as escaping the prohibition in 2 ch. 1 § SCA or Art. 101(1) TFEU due to their qualitative insignificance. However, I find it more compelling to consider these agreements not satisfying the restriction of competition condition. From the case law it appears as though the MC does not consider the total capacity of the undertaking in the assessment of its ability to compete.

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[147] Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] I-06991, in particular paragraph 42.
[148] Svenska Bilsportförbundet [2012] paragraph 140 (author's translation).
[149] Ibid, paragraph 154.
[150] Marknadsdomstolen [MD] Market Court 2008:12 (Swed.) *Competition Authority* v *Bil-Bengtsson and others.*
[151] Bil-Bengtsson and others [2008] page 12f., See also NCC and others [2009] page 49, where the MC stated that the applicants agreements and concerted practices had as their object the restriction of competition. Furthermore, the Court stated that no objectively justifying reason had been shown as to why competing undertakings should be in contact with each other prior to the submission of tenders, . Similarly, in Västerbottens Taxi [2000] page 8, the MC stated that the cooperation could not be considered necessary in order to participate in tendering concerning hospital transports. Furthermore, the cooperation could not be considered to enhance competition as claimed by the applicants.

Instead, the Court considers the actual context of the agreement, and what the consequences would be for the undertakings if they would have competed individually. The case law of the MC in relation to ancillary restraints is limited and experiences from the EU courts may provide guidance. The analysis of ancillary restraints consist of three steps:

1. The Court make an abstract assessment of the purpose of the agreement in order to determine whether the main operation may be considered fundamentally beneficial or desirable for society and consumers. The assessment is based on direct effects on competition and is not concerned with indirect effect, such as might follow from a reduction of production costs.
2. If the main operation is considered desirable, the Court focus on the restriction and whether it may be considered necessary or inherent in the pursuit of the purposes.
3. Lastly, the Court consider whether the restriction is proportionate in relation to the purpose, or if the purpose may be achieved through less restrictive means.

5 Market Definition And Market Power

5.1 Introduction

In chapter 3 the brief overview of some of the economic reasoning underlying the prohibition of anti-competitive agreements showed that inefficiencies might arise when undertaking are capable of setting prices or output independently of its competitors, in other words when they enjoy market power. In order to determine whether an undertaking may act independently of its competitors it may be necessary to define the relevant market, and thereby identify which undertakings do constrain the actions of the undertakings.[152] *Carl Wetter and others* note that in order to apply the competition rules it is necessary that the undertakings may influence the market. Furthermore, they point out that an appropriate definition of the relevant market, providing a foundation for determining the market shares of the undertakings, is generally a prerequisite to determine the market influence.[153]

The Commission notes in this connection that an appropriately defined market could be seen as "a tool to identify and define the boundaries of competition between firms".[154] It seeks to identify the competitive constraints an undertaking faces from other undertakings on the market. Defining the market makes it possible to calculate market shares, which provides a very useful indication on market power.[155] The following sections will consider the rigorous case law that has evolved in EU case law concerning the scope of the obligation to conduct a market analysis. Subsequently, the Swedish approach taken in case law to define the scope of the same obligation will be examined in light of the EU case law.

[152] Notice on the relevant market, paragraph 2.
[153] Wetter and others, page 105.
[154] Notice on the relevant market, paragraph 2.
[155] Ibid, paragraph 2.

5.2 Defining The Relevant Market In Art. 101(1) TFEU

5.2.1 Introduction

It should initially be point out that the burden of proof of proving an infringement of Art. 101(1) TFEU is on the competition authority or private party alleging the infringement. However, the party claiming the benefit of Art. 101(3) bear the burden of proof to show that the conditions of that paragraph are fulfilled.[156] Consequently the Commission must provide the proof necessary to satisfy the conditions when it brings an action in relation to Art. 101(1) TFEU. In order to satisfy the conditions it is often, as noted in the introduction, necessary to define the relevant market. The relevant market is established by the combination of the relevant product and geographic market. According to the Commission *notice on the relevant market*[157], the relevant product market comprises,

> "All those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use".[158]

The geographic market comprises, according to the same notice,

> "[…] the area which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area".[159]

The relevant market is defined in the application of Article 101(1), 101(3), 102 TFEU and the Merger Regulation. The Commission points out that the criteria for defining the relevant market should be applied generally but may lead to different results depending on, *inter alia*, whether the analysis is concerned with structural changes of supply (i.e. concentrations) or past behaviour (i.e. Article 101 and 102 behaviour).[160] In this connection Luis Blanco argues that there should not be any differences in the substantive content of the analysis, although it may vary in depth and sophistication.[161]

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[156] Regulation 1/2003, Article 2.
[157] Commission Notice on the definition of relevant market for the purposes of Community competition law OJ C 372, 9.12.1997, p. 5–13.
[158] Ibid, Paragraph 7.
[159] Ibid, Paragraph 8.
[160] Ibid, paragraph 10-12, See also Ortiz, page 4.
[161] Ortiz, page 4, See also Notice on the relevant market, paragraph 10-11.

5.2.2 Market Definition As A Necessary Precondition

It was stated early on in the case law of the EU courts that in order to analyse a potentially anti-competitive agreement it is first necessary to define the relevant market. In *Società Italiana Vetro*[162] the Court stated, rejecting the argument that a definition of the market would be superfluous because of the unambiguous and explicit evidence of the agreements, that "[…] the appropriate definition of the market in question is a necessary precondition of any judgement concerning allegedly anti-competitive behaviour".[163] The Court further held that the Commission, even though it is not required to reply to all arguments put forward by the applicants, should have examined the market structure in order to show that the applicants conclusions where groundless.[164] Similarly, the definition of the relevant market has been considered, in legal doctrine, as an indispensible prerequisite for determining whether an appreciable reduction in competition has occurred within the application of Art. 101(1) TFEU.[165]

In the 1990s and early 2000s the EU courts had to consider several arguments from various applicants relating to both the absence of a market definition and submissions that the market definition was incomplete or incorrect. In *SPO*[166] the applicants, relying on the judgement in *Società Italiana Vetro ,* stated that the Commission had failed to define the relevant market.[167] In an attempt to determine the scope of the Commission's obligation to define the relevant market, the GC stated that a proper definition of a relevant market is a necessary precondition in the application of Art. 102 TFEU. However, for the purpose of applying Art. 101 TFEU the market is defined in order to determine whether an agreement is liable to affect trade or restrict competition. It must therefore be seen in connection with these two conditions.[168] Considering, *inter alia*, that the Commission had followed the approach taken by the applicants when defining the market, the Court found that the Commission was right to adopt the Netherlands building market as the relevant market.[169] The judgement narrowed the scope of the Commission's obligation to define the relevant market, as it was previously stated in *Società Italiana Vetro ,* in relation to Art. 101 TFEU.

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[162] Joined cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG* Vernante *Pennitalia SpA v Commission of the European Communities* [1992] E.C.R. II-01403.
[163] Ibid, paragraph 159, See also SPO [1995] paragraph 74.
[164] Ibid, paragraph 159.
[165] Ortiz, page 2.
[166] Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and* others *v Commission of the European Communities* [1995] E.C.R. II-00289.
[167] Ibid, paragraph 66.
[168] Ibid, paragraph 73-75.
[169] Ibid, paragraph, 76-83.

5.2.3 Market definition in cases of Obvious Restrictions

In *European Night Services* the applicants argued in favour of a rule of reason in the application of Art. 101(1) TFEU. They held that if the pro-competitive effects outweigh the anti-competitive effects, and the latter were necessary, the agreement could not be considered an infringement of Art. 101(1) TFEU. The Commission challenged the rule of reason argument and that the competitive benefits and harms should be balanced in the assessment of Art. 101(1) TFEU.[170] The GC pointed out that,

> "[…] it must be borne in mind that in assessing an agreement under Article 85(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned […] unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Case T-148/89 Tréfilunion ν Commission [1995] ECR II-1063, paragraph 109). In the latter case, such restrictions may be weighed against their claimed pro- competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1)."[171]

The statement by the Court should be interpreted in the light of the discussion on the application of a rule of reason. The use of "obvious restrictions of competition" may follow from the referred case law *Tréfilunion*[172] where the CFI rejected a rule of reason in relation to "clear" infringements.[173] The statement in *European Night Services* was a response to an argument concerning the division of pro- and anti-competitive effects within Art. 101(1) TFEU, as noted in the last sentence of the quote. It should not be seen as rejecting the necessity of the appreciability condition, which does not consider pro-competitive effects but the magnitude of the actual, potential or presumed effects. In this connection, AG Trstenjak stated in *BIDS*,

> "In so far as the Court of First Instance held in that judgment [European Night Services] that in the case of obvious restrictions such as price-fixing, market-sharing or the control of outlets there is no need to examine the legal and economic

[170] European Night Services [1998] paragraph 130.
[171] Ibid, paragraph 136.
[172] Case T-148/89 *Tréfilunion SA v Commission of the European Communities* [1995] E.C.R. II-01063.
[173] Ibid, paragraph 109, See also Montedipe [1992] paragraph 265, The use of a rule of reason in the application of Article 101(1) TFEU has also been rejected by the Commission, White Paper on Modernisation, paragraphs 31-32.

> context, this merely shows that consideration of the legal and economic context may be summary."[174]

I find it reasonable to assume that an agreement should not be assessed in a total vacuum form the context even though the agreement has as its object the restriction of competition. The following two cases suggest that the approaches taken by the EU courts are not entirely consistent as to whether, and in which cases, the economic and legal context should be considered.

In the case *Mannesmannröhren-Werke*[175], the GC reaffirmed the statement in *European Night Services* and continued by stating that it was not necessary to define the relevant geographic market, if the object was to share markets, provided that the competition on the territories concerned was necessarily restricted.[176] Hence, the Court held that even assuming that the Commission defined the market insufficiently or incorrectly would not have an impact on the existence of the infringement. The use of "necessarily restricted" can be compared with the statement in *European Night Services* making reference to "obvious restriction of competition". It is possible that "necessarily restricted" imply a greater amount of certainty. The Court in *Mannesmannröhren-Werke* did not however exclude the definition of the geographic market, but states that it must not be defined with the same precision as would otherwise be necessary.

On the other hand, the CJEU stated in its preliminary ruling in *Lubricantes*[177] that even though the price fixing towards the public was explicitly prohibited by Article 101(1) TFEU, it still fell outside of the scope of the prohibition if it, *inter alia*, did not have appreciable effects on competition.[178] The Court held that it is for the national court to determine whether the conditions of the prohibition was satisfied taking into account, in particular, the economic and legal context.[179] The Court further reiterated in large parts the list of considerations that the Court in *European Night Services* found necessary to take into account in other cases than obvious restrictions of competition. The list included taking into account the nature of the goods and services provided, the operating conditions and structure of the market.

Both cases indicate that circumstances in an individual case may make it obvious that an agreement restrict competition appreciably, rendering a precise definition of the market superfluous. The judgement in *Lubricantes* shows that it is not sufficient to only refer to the nature of the agreement in order to establish that a restriction of competition is obvious.

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[174] Opinion BIDS [2008] paragraph 47.
[175] Case T-44/00 *Mannesmannröhren-Werke AG v Commission of the European Communities* [2004] E.C.R. II-02223.
[176] Ibid, paragraph 132.
[177] Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU* [2009] E.C.R I-00134.
[178] Ibid, paragraph 55.
[179] Ibid, paragraph 28 and 55.

This point was further stated in *Expedia* where the court put forward a similar list of considerations in order to establish that a restriction by object or effect perceptibly restrict competition.[180] The Court stated,

> "[…] the existence of such a restriction must be assessed by reference to the actual circumstances of such an agreement […]. Regard must be had, inter alia, to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part […]. It is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question […]."[181]

5.2.4 Market Definition As A Tool To Find Restrictions Of Competition

Prior to the judgements in *SPO* and *European Night Services*, the Commission had generally described the market in a general manner, not assessing the market power of the parties or their competitors. However, following these judgements the Commission took a more rigorous approach examining the market.[182] In *Volkswagen*[183] the GC reaffirmed the statement in *SPO* and added that there is, consequently, an obligation for the Commission to define the relevant market,

> "Where it is impossible, without such a definition, to determine whether the agreement […] has as its object or effect the prevention, restriction or distortion of competition within the common market."[184].

The Court noted that the Commission had considered that the object of the infringement was to restrict competition. Furthermore, it held that the applicants had partitioned the Italian market which could effect transactions between Italy and all other Member States. Consequently, the Court found that the application of Art. 101(1) TFEU did not require that the geographic market was defined.[185] However, the Commission had in its decision noted that Volkswagen had the highest market share of any motor vehicle manufacturer in the Community.[186]

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[180] Expedia [2012] paragraph 20 – 21.
[181] Ibid paragraph 21., See also Lubricantes [2009] paragraph 28, where a very similar statement was put forward by the CJEU in relation to agreements that fix prices or provide exclusive purchasing obligations on the parties.
[182] Ortiz, page 7.
[183] Case T-62/98 *Volkswagen AG v Commission of the European Communities* [2000] E.C.R. II-02707.
[184] Ibid, paragraph 230, See also Ziegler [2011] Paragraph 45 – 46.
[185] Ibid, paragraph 131.
[186] Ibid, paragraph 29.

The statement in Volkswagen was repeated in *CMA CGM*[187], where the GC further held that it was up to the Court to determine whether the Commission, without defining the relevant market, could find that the agreement had appreciably restricted competition and was liable to affect trade between Member States.[188] The Court noted that the horizontal price-fixing agreement was a clear infringement of competition law, that the relevant charges and surcharges could constitute as much as 60 % of the total tariff in question and that the applicants controlled approximately 86 % of all scheduled eastbound liner traffic between northern Europe and the Far East.[189] These circumstances allowed the Court to state that the Commission was entitled to find that the agreement had as its object an appreciable restriction of competition in relation to the related services as well.[190] The case shows that when the relevant market has not been defined, the Court determine whether the analysis of the market, considering the circumstances relevant for the case, is sufficient to allow the Court to find an appreciable restriction of competition. In *CMA CGM* the GC took into account the nature of the agreement as well as qualitative factors (the significance of the surcharges) and quantitative factors (the position and importance of the parties).

5.2.5 The Essential Requirement Of Legal Certainty

In the case *Adriatica*[191] the applicant argued, *inter alia*, that the market definition made by the Commission was incorrect and incomplete, ignoring the differences between the routes, operators and services provided. The Commission disputed the merits of the applicants claim.[192] The Court held that the Commission rightly concluded that the conditions in Art. 101(1) TFEU were satisfied and that the agreement in question had distorted competition. However, the Court continued by stating that

> "[…] the Commission ought to examine the relevant market or markets and identify them in the statement of reasons which it gives for any decision sanctioning an infringement of Article 85(1) of the Treaty, and it should do so with sufficient precision so as to be able to identify the operating conditions in the market in which competition has been distorted and to satisfy the essential requirements of legal certainty."[193]

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[187] Case T-213/00 *CMA CGM and Others v Commission of the European Communities* [2003] E.C.R. II-00913.
[188] Ibid, paragraph 208.
[189] Ibid, paragraph 209-212.
[190] Ibid, paragraph 213.
[191] Case T-61/99 *Adriatica di Navigazione SpA v Commission of the European Communities* [2003] E.C.R. II-05349.
[192] Ibid, paragraph 14 and 19.
[193] Ibid, paragraph 32.

The Court found that it was desirable that a decision by the Commission relating to a complex, collective and continuous infringement should take into account that personal liability is limited to the particular involvement of each undertaking.[194] The Court further restated the judgement in *Società Italiana Vetro* and referred to *Völk*[195], stating that a market analysis is not superfluous where the documentary evidence of a cartel is clear and explicit, but instead is a necessary precondition for any judgement as to allegedly anti-competitive behaviour.[196]

The judgement in *Adriatica* led the Commission, in its *Industrial bags decision*[197], to find that,

> "[…] defining the market in a cartel case does not call for a degree of precision equal to that which is required when assessing infringements of Article 82 of the Treaty or in certain merger cases. It is merely the case that the product concerned must be sufficiently well defined to enable each undertaking involved to be correctly allotted its share of responsibility for the Commission of the infringement, especially where the infringement is a collective, continuous one."[198]

However, in light of the case law described above it is not the author's view that this statement is true. Although the degree of precision is not equal to the assessment of infringements of Art. 102 TFEU, the market analysis must be sufficiently deep and sophisticated to find, 1) that the conditions for the application of Art. 101(1) TFEU has been satisfied, and 2) that the essential requirements of legal certainty, such as the principle of personal responsibility for collective infringements has been satisfied. It is necessary to satisfy both of the conditions mentioned above.

5.2.6 The Substance Of The Analysis

The above-mentioned case law has focused on the depth and sophistication of the market definition. The previous sections has, *inter alia*, found that a market analysis is necessary to the extent that it is possible to establish that the conditions in Art. 101(1) TFEU have been satisfied. Moreover, it shows that the market analysis must not be as precise when the case concerns obvious restrictions of competition. However, there is some uncertainty as to what constitutes an obvious restriction of competition. As noted in section 5.2.3, the assessment should not merely assess the nature of the agreement but also consider the circumstances in which it functions.

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[194] Ibid, paragraph 32.
[195] Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] E.C.R. 00295.
[196] Adriatica [2004] paragraph 33.
[197] Case COMP/38354 *Industrial Bags* C(2005)4634, 30.XI.2005, Available at: <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38354/38354_527_4.pdf> (referred to as "Industrial Bags Decision [2005]").
[198] Industrial Bags Decision [2005] paragraph 27.

This section suggests what a more summary market analysis of the economic and legal context should contain in order to establish that a restriction of competition is obvious.

Guidance as to the content of this more summary analysis, to find an obvious restriction of competition, may perhaps be inferred from the *guidelines on the effect on trade*[199] and case law concerning appreciable effect on trade[200]. Paragraph 53 of the guideline provides, *inter alia*, that agreements, which by their very nature are capable of affecting trade between Member States, often may be presumed to be appreciable when the market share of the parties exceeds 5 %. This presumption, based on the 5 % threshold, can be traced back to the case *Miller*.[201]

In *Gosselin Group*[202] the GC generally stated that Art. 101(1) TFEU is not applicable when the effect of an agreement on competition or trade is not appreciable.[203] In its respons to the alleged absence of appreciable effect on trade the Court held that the Commission had theoretically failed to provide a market analysis necessary to show that the 5 % market share was reached.[204] However, the Court continued by stating that the Commission had, "[…] in the circumstances of the case […] nevertheless, established to the requisite legal standard that the second alternative condition provided for in the presumption laid down in point 53 of the 2004 Guidelines was met"[205] In conclusion, the Court held that where the following conditions were met the Commission did not have to determine the relevant market and calculate the market shares of the parties:

> "Where the Commission provides a sufficiently detailed description of the sector concerned, including supply, demand and geographic scope, it identifies the relevant services and market precisely and such a description of the sector can be sufficient, in so far as it is sufficiently detailed, to enable the Court to verify the Commission's basic assertions and in so far as, on that basis, it is clear that the combined market share far exceeds the 5% threshold."[206]

The case *CMA CGM* could be used as an example on of a case where the GC were able to find that the agreement restricted competition to an appreciable extent without defining the market.

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[199] Guidelines on effect on trade.
[200] Gosselin Group [2011] paragraph 3.
[201] Faull & Nikpay, page 283, paragraph 3.371, See Miller [1978].
[202] Joined cases T-208/08 and T-209/08 Gosselin Group NV (T-208/08) and Stichting Administratiekantoor Portielje (T-209/08) v European Commission [2011] E.C.R II-03639.
[203] Ibid, paragraph 90.
[204] Ibid, paragraph 110.
[205] Ibid, paragraph 3 and 111.
[206] Ibid, paragraph 3.

The Court looked at the nature of the agreement, the scope of the restriction and the position of the parties in order to find that the conditions in Art. 101(1) TFEU had been satisfied.[207]

Consequently, where it is possible, based on the above-mentioned conditions, to establish that an agreement is an obvious restriction of competition, due to the circumstances in an individual case, it may not be necessary to conduct a deeper and more sophisticated analysis of the relevant market and the market share of the parties in order to establish an infringement of the prohibition in 2 ch. 1 § SCA and Art. 101(1) TFEU.

5.3 Defining The Relevant Market In 2 ch. 1 § SCA

5.3.1 Introduction

It is obvious from Swedish case law that the Competition Authority has the evidentiary burden to prove that 2 ch. 1 § SCA has been infringed. In *Asstistanskåren and others*[208] the Court stated that when the Competition Authority brings an action for administrative fines it must provide an investigation that clearly shows that the Competition Act has been infringed. The burden of proof was held to be on the Competition Authority and that the level of proof necessary, to prove the infringement, was relatively high.[209]

It was indicated already in the preparatory works of the SCA that the depth and sophistication of the appreciability analysis depends on the nature of the agreement. The Government stated that even though a restrictive object has been established, it is still necessary to assess if the influence on competition is appreciable. Although, the assessment may be done in a less in depth manner when a restrictive object has been established, leaving a more thorough analysis of the effects for the assessment of an exemption.[210] Similarly, the necessity to define the relevant market in cases of restrictions by object was pointed out in *VIVO*[211] where the MC found that it is necessary to define the relevant market even in cases of horizontal price fixing.[212] In order to get a better understanding on how the obligation to define the relevant market has evolved it is necessary to examine the case law as it has evolved in the Swedish courts.

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[207] CMA CGM [2003] paragraph 209-212.
[208] Marknadsdomstolen [MD] Market Court 2007:23 (Swed.) *Competition Authority v Assistancekåren Sweden AB and others*.
[209] Ibid, page 3f.
[210] Prop. 1992/93:56, page 72f.
[211] Marknadsdomstolen [MD] Market Court 1997:11 (Swed.) *VIVO v the Swedish Competition Authority*.
[212] Ibid, page 7.

5.3.2 Market Definition As A Tool To Find Restrictions Of Competition

In *NCC and others*[213], concerning alleged price fixing and market sharing, the MC stated that in order to find an infringement of the prohibition in 2 ch. 1 § SCA an agreement has to restrict competition to an appreciable extent. In order to find an appreciable restriction the parties' positions on the relevant market must be considered.[214] Hence, it may be inferred from the statement that an analysis of the market is necessary in order to consider the position of the parties.

In the recent case *Svenska Bilsportförbundet* the MC stated that the relevant market is defined in order to determine the market power of the undertaking. The Court further held, in line with the case law as evolved in the EU courts, "In a case concerning alleged restrictions of competition a market definition is done primarily in order to determine whether the restriction is appreciable"[215] The statement shows that the depth and sophistication of the market analysis depends on the circumstances in the case. Furthermore, the analysis does not have to go further than to allow the courts to establish that an agreement appreciably restrict competition. It seems reasonable therefore to argue that it is not necessary to provide a more precise definition of the market then to allow the court to find that the conditions in 2 ch. 1 § SCA are satisfied. Hence, in light of the EU case law, once it is obvious that an agreement appreciably restrict competition it is not necessary to further consider the context of the agreement. The veracity of this argument is further evidenced by the reasoning of the courts in case law as presented in the following sections.

5.3.3 An Appreciable Restriction Regardless Of A Precise Definition

The MC has in many cases held that it is possible to find an appreciable restriction of competition regardless of the exact definition of the relevant market. In several cases the Court has stated that the exact definition would be unnecessary, in particular due to the serious nature of the restriction.[216] In *Bil-Bengtsson and others* the parties disputed the definition of the relevant market. The Swedish Competition Authority (CA, Swed. *Konkurrensverket*) argued that the geographic market was the provinces of Skåne, Blekinge and Kronoberg.

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[213] Marknadsdomstolen [MD] Market Court 2009:11 (Swed.) *NCC and others v Competition Authority*.
[214] Ibid, page 49.
[215] Svenska bilsportförbundet [2012] page 17 (Author's translation).
[216] NCC and others [2009] page 50, Bil-Bengtsson and others [2008] page 16, Uponor [2003], page 4f., VVS-installatörerna [2005], page 11.

The parties, on the other hand, argued that the geographic market was considerably larger. The MC found that the definition of the geographic market put forward by the Compeition Authority was reasonable. In the provinces of Skåne and Blekinge the market share of the parties was 23 and 19 %, in the two relevant product markets. The Court further noted that it was necessarily slightly lower adding the province of Kronoberg and eventually some other area.[217] Although, the Court held,

> "Regardless of the exact definition of the market, it is obvious that the market shares in relation to new as well as used cars far exceeds the threshold where it may be put into question whether horizontal price fixing and market sharing appreciably restricts competition."[218]

The Court indicated with its judgement that there is a threshold below which a deeper and more sophisticated analysis of the appreciability condition may be necessary. The facts of the case allowed the Court to find an appreciable restriction regardless of the precise definition of the relevant market.

In *Uponor*[219] the MC pointed out that the parties had differing opinions as to the aggregate market share of the parties cooperation in question (between 30 – 40 %). The Court stated, similar to the case in *Bil-Bengtsson and others*, "Regardless, it can be stated that the aggregate market share of the undertakings is sufficient for the agreement to be found to appreciably restrict competition on this basis alone"[220]

It seems as though the MC has taken a similar approach as the EU courts stating that it is necessary to consider the market power of the parties to an alleged restriction of competition. Furthermore, the analysis depth and sophistication vary depending on the circumstances of the case.

5.4 Conclusion

Defining the relevant market is often a necessary precondition in order to find an infringement of 2 ch. 1 § SCA and Art. 101(1) TFEU. However, the depth and sophistication of the analysis vary depending on the circumstances of the case. The analysis cannot be seen in isolation, but as a means to determine whether the conditions of 2 ch. 1 § SCA or Art. 101(1) TFEU have been satisfied.

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[217] Bil-Bengtsson and others [2008] page 16ff.
[218] Ibid, page 16 (author's translation).
[219] Marknadsdomstolen [MD] Market Court 2003:2 (Swed.) *Uponor v Competition Authority*.
[220] Ibid, page 4f., Compare with VVS-installatörerna [2005] page 11, where the court found that the cooperation, regardless of whether the definition submitted by the applicant or Competition Authority was used, effected a "not insignificant part of the market".

When it is possible to determine that an agreement is an obvious restriction of competition, without a closer examination of the market, it is not necessary to further define the relevant market. It could be argued that the statement by the Court in *Bil-Bengtsson and others*, as quoted above, should be viewed in light of the case law concerning obvious restrictions of competition. Consequently, when it is possible to establish that a threshold, not yet clarified by the Swedish courts, has been far exceeded an agreement obviously restricts competition, which renders a deeper analysis of the market superfluous. Guidance as to what the more summary analysis should contain and what the relevant threshold should be may possibly be inferred from the case law of the EU courts, which will be further addressed in the final analysis in chapter 7. Finally, even though the conditions in 2 ch. 1 § and Art. 101(1) TFEU have been satisfied it may still be necessary, depending on the circumstances of the case in question, to define the relevant market in order to satisfy the essential requirements of legal certainty.

5.5 Market Power

As pointed out in chapter 3, market power is of central importance for the ability to negatively influence the relevant market. Furthermore, the market definition as examined in the previous sections of this chapter seeks to determine the market power of undertakings. Hence, it is necessary to define what market power is and how it may be measured. Eklöf points out that the control of market power is one of competition law's real raisons d'être.[221] He further notes that market power is not an isolated condition in Art. 101(1) TFEU; it is enough to show appreciable effect. However, Eklöf argues that it is highly doubtful that an appreciable effect should be viewed as something other than restrictive effects on competition in relation to identified market power.[222] Bishop and Walker notes that one characteristic of markets with effective competition is the absence of market power.[223] The authors define market power as,

> "the ability of a firm or group of firms to raise price, through the restriction of output, above the level that would prevail under competitive conditions and thereby to enjoy increased profits from the action."[224]

In the *guidelines on Article 81(3)* the Commission provides guidance not only on the interpretation of Article 101(3), but also on the interpretation of the prohibition in Art. 101(1) TFEU. The guideline defines market power as,

[221] Ekelöf, moderniseringen, page 261.
[222] Ibid, page 270.
[223] Bishop & Walker, page 52, paragraph 2-002.
[224] Ibid, page 52, paragraph 2-002.

> "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."[225]

Anti-competitive effects are more likely to occur when the parties have or obtain market power and the agreement "contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power."[226] Market power is, however, a question of degree, since undertakings in most markets are able to fix their prices higher than their marginal cost. It is therefore necessary to determine what level of market power is needed to result in anti-competitive effects.[227] The preparatory works of the SCA, although not providing a clear definition of market power, notes that increased competition provides benefits for consumers through lower prices and increased output.[228]

There is no absolute instrument for determining whether or not undertakings have market power. *Bishop and Walker* states that, assuming that firms will be profit maximizing, the ability to independently raise prices or lower output depends on the price elasticity on the demand of the individual firm under conditions of effective competition. In other words, a firm enjoys market power where an increase in price would not lead to a decrease in demand rendering the change in price unprofitable.[229] Many factors may be considered in order to appreciate price elasticity and market power, such as the number of competing suppliers, concentration, barriers to entry and expansion, market shares and countervailing buyer power.[230] However, market shares may be considered to be the primary tool used in order to assess market power used by competition authorities.[231] This paper will not further analyse the assessment of market power or the measures used to conduct the assessment.

[225] Guidelines on Article 81(3), paragraph 25.
[226] Ibid, paragraph 25.
[227] Geradin and others, page 78f., paragraph 2.57 – 2.58.
[228] Prop. 1992/93:56, page 4.
[229] Bishop & Walker, page 53 - 56., paragraph 3-003-3.005 and page 62, paragraph 3-012.
[230] Ibid, page, 62 paragraph 3-012.
[231] Geradin and others, page 87, paragraph 2.84.

6 Appreciability

6.1 Introduction

As has been discussed in section 4, the restriction of competition condition is divided into object and effect restrictions. Agreements that restrict competition by object are presumed to be harmful and actual effects must therefore not be proven. This eases the investigatory or evidentiary burden of the party trying to prove an infringement of the prohibition laid down in Art. 101(1) TFEU and 2 ch. 1 § SCA. However, as shown in section 5.1 – 5.3 it is still necessary to conduct a market analysis to the extent that it may be established that the conditions of the prohibition are satisfied, in particular the appreciability condition. This chapter examines the existence and scope of a safe harbour for object restrictions that are deemed not to have appreciable effects.

The condition that a restriction of competition must be appreciable is not stated directly in Art.101 TFEU. However, the necessity to limit the scope of Art. 101 TFEU to agreements that restrict competition to an appreciable extent was recognised early in EU case law.[232] With the introduction of the SCA, modelled after the EU competition rules, the appreciability condition was stated directly in 2 ch. 1 §. The exception is based on the principles de minimis non curat lex, and that certain conduct is too insignificant to consider for the law.[233]

Different views have been expressed concerning whether or not the de minimis principle should be applied at all in relation to object restrictions. Section 6.1.1 will examine some of the arguments put forward where a more restrictive attitude has been held towards applying the de minimis principle in relation to object restrictions. The following section will consider the view that the de minimis should be applied in cases concerning restrictions by both effect and object.

[232] Völk [1969] paragraph 5 – 7.

[233] Opinion Miller [1978] page 4, See also Black's Law Dictionary, page 496 *"de minimis non curat lex* – The law does not concern itself with trifles", and The free dictionary by Farlex, available at: <http://www.thefreedictionary.com/de+minimis+non+curat+lex> "The law does not concern itself with trifles; - a principle of law, that even if a technical violation of a law appears to exist according to the letter of the law, if the effect is too small to be of consequence, the violation of the law will not be considered as a sufficient cause of action, whether in civil or criminal proceedings."

6.1.1 De Minimis As Applicable Only In Effects Cases

It has been argued, in relation to object restrictions, that the de minimis principle should not be applied at all due to the inherently harmful nature of this category of agreements. *Geradin and others* seem to argue that since *the Commission de minimis notice* expressly excludes certain hardcore restrictions, such as price fixing and market sharing, these agreements do not enjoy the benefit of the safe harbour the de minimis principle provides. The authors state that in practice the Commission has not pursued hardcore restrictions where the undertakings were of a small size and that "this probably explains the mistaken view that the de minimis doctrine also applies to restrictions by object"[234]. Moreover, in the recent case *Expedia*, AG *Kokott* expressed the view that agreements with anti-competitive object hardly can be regarded as de minimis infringements, considering their harmful nature. *Kokott* continued,

> "[…] it must be presumed that undertakings which enter into an agreement with an anti-competitive object always intend an appreciable effect on competition, irrespective of the size of their market shares and turnover."[235]

She argued that market share thresholds were intended to provide legal certainty and provide a safe harbour. However, this preferential treatment should not be afforded to agreements with anti-competitive object since it would practically invite undertakings to refrain from effective competition.[236]

A restrictive approach in the application of the de minimis principle in relation to certain agreements may also be inferred from EU case law. In *Mannesmannröhren-Werke* the GC held,

> "undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article 81(1) EC by claiming that their agreement should not have an appreciable effect on competition."[237]

The GC held that the sole reason of existence for the agreement was to restrict competition appreciably. The Court further held that it was not, in principle, necessary to define the relevant market precisely, "provided that actual or potential competition on the territories concerned was necessarily restricted […]".[238] However, the approach taken by the GC should be viewed in light of the facts of the case.

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[234] Geradin and others, page 141, paragraph 3.138.
[235] Opinion Expedia [2012] paragraph 50.
[236] Ibid, paragraph 52.
[237] Mannesmannröhren-Werke [2004] paragraph 130.
[238] Ibid, paragraph 132.

The applicants were parties to an agreement, which prohibited them from selling their products in the national markets of each other. Furthermore, the agreement covered products on four domestic markets, which amounted to about 15 % of the consumption on the internal market.[239] Consequently, the agreement led to absolute observance of the national markets, and could be considered to be a "naked cartel"[240], between parties with a very strong position on the market.

In the Swedish context it does not seem to be an as strong debate on whether the de minimis principle applies to object as well as effect restrictions. This might be because 2 ch. 1 § SCA expressly states that an agreement is prohibited if its object or effect is to appreciably restrict competition. Furthermore, the preparatory work explicitly states that even though it is not necessary to show that an agreement has a negative influence on the market once it has been established that it has a restrictive object, it is still necessary to analyse whether the agreement effects the market appreciably.[241] However, the view is often expressed that it is highly unlikely that certain types of agreements would be found not to be appreciable.[242] The MC stated in *Bil-Bengtsson and others* that even though there is no prohibition *per se* in the Swedish competition rules, there is a strong presumption that price fixing and market sharing agreements restrict competition.

6.1.2 De Minimis As Applicable In Both Object And Effects Cases

Initially, it should be pointed out that *the Commission de minimis notice* is neither binding on the EU courts nor the courts of the Member States. This follows, in relation to the EU courts, from the wording of paragraph 6 of the notice stating that it is without prejudice to the interpretation of Art. 101(1) TFEU by the EU courts.[243] Furthermore it follows, in relation to Member States, from the purpose of the notice, which is to make the application of Art. 101(1) TFEU by the Commission transparent. The Commission imposes a limitation on its discretion to interpret Art. 101(1) TFEU in accordance with the notice, since a departure would be inconsistent with the protection of legal certainty. Consequently, the notice is not binding in relation to Member States.[244]

[239] Seamless Steel Tubes Decision [1999] paragraph 101 – 106.
[240] Mario Monti defines naked cartels as follows, "*they serve to restrict competition without producing any objective counterveiling benefits",* See Policy Conference on Fighting Cartels, page 15.
[241] Prop. 1992/93:56, page 72.
[242] Wetter and others, page 1165f., in particular footnote 93, Wahl, page 8.
[243] De minimis notice 2001, paragraph 6.
[244] Expedia [2012] paragraph 28 – 29.

Therefore, it is not possible to conclude that agreements not considered insignificant in the Commission *de minimis notice*, due to the hardcore nature of the agreement, e contrario should be considered appreciable restrictions under Art. 101(1) TFEU.[245]

Since the case *Völk*, introducing the de minimis principle applicable to both object and effect restrictions, as will be further discussed in section 6.6.1 below, the CJEU has in several cases stated that it is necessary to determine whether an agreement has as its object or effect the appreciable restriction of competition.[246] It seems as though the statement by AG *Kokott*, as noted above in 6.1.1, could be considered a *de lege ferenda* argument, referring mainly to policy reasons. In the preliminary ruling following the opinion by AG *Kokott*, *Expedia,* the CJEU stated,

> "it is settled case-law that an agreement of undertakings falls outside the prohibition in that provision [Article 101(1) TFEU], however, if it has only an insignificant effect on the market."[247]

Furthermore, the Court stated that an agreement with a restrictive object or effect therefore must perceptibly restrict competition.[248] In this connection a policy argument may be put forward for the use of a reasonable scope of the requirement that an agreement must appreciably effect competition. A too narrow scope of the exception would likely lead to more cases being assessed in relation to the legal exemption in Art. 101(3) TFEU and 2:2 SCA. *Ehlerman* argues that,

> "the need for exemption decisions depends on the scope of Article 81(1). If this scope is broad, i.e. covering a large number of agreements, the need for exemption decisions is also great. If, on the contrary, this scope is narrow, the number of exemption decisions will decrease accordingly."[249]

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[245] Expedia [2012] paragraph 25.

[246] In *BMW* the CJEU held that it is necessary to assess whether an agreement restricting authorized BMW dealers to supply leasing companies, making the vehicles available to customers outside dealer's contract territory, restricts competition to an appreciable extent, see BMW [1995] paragraph 2 and 18. Similarly, in relation to exclusive dealership agreements the CJEU held in *Cabour and others* that an agreement will be caught by Article 101(1) TFEU only if its object or effectis perceptible to restrict competition within the common market, Cabour [1998] paragraph 48. In case *CEPSA* the CJEU held that where it was concluded that CEPSA had, in an exclusive dealings agreement, required Tobar to charge a fixed or minimum sale price, the agreement would only be caught by Article 101(1) TFEU only if its object of effect was to appreciably restrict competition, CEPSA [2008], paragraph 70 – 72. In this case law from the CJEU the Court uses two different expressions stating the necessity to show a not merely insignificant effect on the market. These are that the object or effects must be either "perceptible" or "appreciable". In *Cabour and Others* the court stated that the object or effects must be perceptible. However, in *CEPSA* the CJEU stated that the object or effect must be "appreciable", referring to the *Cabour and Others*. Hence, the two terms should likely be considered synonymous.

[247] Expedia [2012] paragraph 16.

[248] Ibid, paragraph 17.

[249] Ehlermann, page 16.

Similarly, Bernitz argues that the appreciability condition does not need to be stretched due to the possibility to apply the legal exemption.[250] Conversely, it could be argued that with limited possibilities for exemption decisions, the scope of 2 ch. 1 § SCA and Article 101(1) TFEU should be narrowed. In this connection it should be pointed out that agreements which have as their object the restriction of competition will generally not fulfil the conditions in 2:2 SCA or Article 101(3) TFEU.[251] In the *guidelines on Article 81(3)* the Commission states, "severe restrictions of competition are unlikely to fulfil the conditions of Article 81(3)"[252]. Furthermore, the Commission held in its *MasterCard decision*[253],

> "Any claim that a MIF creates efficiencies within the meaning of Article 81(3) of the Treaty must therefore be founded on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts"[254].

The GC later upheld the decision.[255]

However, commentators have questioned, in light of the reasoning by the Commission in the MasterCard case, how anyone through empirical evidence can objectively quantify efficiencies in relation to Article 101(3) TFEU. Furthermore, it was stated that if the Commission, but not the applicant, could rely on non-objectively quantifiable factors it would create an unevenness in the applicable standard of proof.[256] More generally it has been noted that it is hard to balance concrete efficiencies in Article 101(3) TFEU when there is no point of reference to balance the efficiencies against.[257] *Zenger and Walker* states, "There is an inherent difficulty in balancing concrete efficiencies against abstract harm if that harm is not even theoretically spelled out by the authority."[258]. Consequently, the limited scope of the de minimis principle, in cases concerning restrictions by object, would to a greater extent allocate a heavy burden on small and medium-sized undertakings to prove that the conditions of the legal exemption are satisfied.[259]

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[250] Bernitz, page 119.
[251] Bailey, page 17, See also Wetter and others, page 165f., in particular footnote 93, stating that the conditions where price fixing between competitors would be exempted are very limited.
[252] Guidelines on Article 81(3), paragraph 46.
[253] Case COMP/34.579 MasterCard, COMP/36.518 EuroCommerce and COMP/38.580 Commercial Cards, 19/XII/2007, Available at: <http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf>.
[254] MasterCard Decision [2007], paragraph 690 and 732, See also GlaxoSmithKline [2006] paragraph 235, where the GC stated *"Consequently, a person who relies on Article 81(3) EC must demonstrate that those conditions are satisfied, by means of convincing arguments and evidence"*.
[255] MasterCard [2012] paragraph 335.
[256] Lamadrid, page 3.
[257] Ekelöf, moderniseringen, page 261f., See also Zenger & Walker, page 19f.
[258] Zenger & Walker, page 19.
[259] See Wahl, page 32.

As noted in section 6.1.1, a common view in the Swedish context has been that it is unlikely that certain agreements would be exempted from the prohibition in 2 ch. 1 § SCA due to lack of effects. However, most commentators do not consider it impossible. *Wahl* notes that even object restrictions must realistically be able to influence competition.[260] *Wetter and others* consider it improbable, but possible, that a price fixing agreement would escape the prohibition in 2 ch. 1 § SCA.[261] In the case *Bil-Bengtsson and others* the MC stated that regardless of the precise definition of the relevant geographic market the market share of the parties far exceeded the level where it could be put into question whether horizontal price cooperation and market sharing appreciably restricted competition.[262] Consequently, it seems as though there is a threshold where the appreciable effects of an agreement could be put questioned even in cases where the agreement concern price fixing or market sharing. However, the scope of the de minimis principle in these cases is likely narrow.

6.2 The Dual Application Of Appreciability In EU Competition Law

It is necessary to point out that the concept of appreciability is used in relation to two conditions within the application of Art. 101(1) TFEU. Art. 101(1) TFEU states that agreements "which may affect trade between Member States" shall be prohibited and according to EU case law the influence must be appreciable.[263] It aims to prevent agreements which might harm the attainment of the objectives of a single market, in particular by partitioning the national markets or affecting the structure of competition within the common market.[264] The standard test to determine whether an agreement may affect trade between member states was put forward in *Société Technique Minière*[265]. The CJEU stated that

> "it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States."[266]

The term "pattern of trade" has been considered neutral, not requiring that competition is restricted or reduced. Art. 101(1) TFEU may therefore apply even to non-restrictive agreements.[267]

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[260] Wahl, page 8.
[261] Wetter and others, page 165f., See in particular footnote 93.
[262] Bil-Bengtsson and others [2008] page 16.
[263] Béguelin [1971] paragraph 16.
[264] Hugin [1979], paragraph 17, Ortiz, page 27.
[265] Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] E.C.R. English Special Edition Page 00235.
[266] *Société Technique Minière* [1966], page 249.
[267] Faull & Nikpay, page 279, paragraph 3.357.

However, *Faull & Nikpay* point out that the alleged restriction of competition may indicate the ability to affect trade.[268]

Art. 101(1) TFEU further prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their "object or effect the prevention, restriction or distortion of competition within the internal market […]"[269]. In EU case law it has been stated, as will be discussed throughout the following chapter, that the restriction of competition must be appreciable or constitute not merely an insignificant effect.[270]

In the decisional practice of the Commission and the EU case law the application of the appreciability condition in relation to effect on trade and restriction of competition has not always been clear and consistent.[271] *Bailey* notes that the intermingling of the two concepts has been a complicating factor settling the law concerning the de minimis doctrine.[272] In the case of *Völk* the CJEU stated that both conditions must be understood by reference to the actual circumstances of the case. Consequently, the Court held, an agreement with only an insignificant effect, taking into consideration the weak position of the parties, falls outside the prohibition of Art. 101(1) TFEU. This statement has been referenced in relation to effect on trade and restriction of competition.[273] In the following sections reference will be made to case law succeeding *Völk* but which relate to the appreciable effect on trade because the same considerations apply to the effect on competition condition.[274] However, in *Ziegler*[275] the CFI rejected the applicants objection regarding appreciability in relation to restriction of competition since the applicant had failed to distinguish between appreciability in relation to effect on trade and restriction of competition.[276]

6.3 Recent Developments

In *Expedia* the CJEU had to consider the relationship between Article 101(1) TFEU and Art. 3(1) and 3(2) *Regulation 1/2003*. Art. 3(1) *Regulation 1/2003* states that when an agreement may affect trade, a national authority shall apply Art. 101(1) TFEU as well as the national provisions.

[268] Faull & Nikpay, page 279, paragraph 3.357.
[269] Article 101(1) TFEU .
[270] Völk [1969] paragraph 5 - 7, De minimis notice 2001, parapraph 1.
[271] Ortiz, page 28 .
[272] Bailey, page 16.
[273] See for example Javico v YSLP [1998] paragraph 16, See also Miller [1978] paragraph 10.
[274] Bellamy & Child, page 170, paragraph 1.57.
[275] Case T-199/08 *Ziegler SA v European Commission* [2011] E.C.R. II-03507.
[276] Ibid, paragraph 47.

Art. 3(2) *Regulation 1/2003* states that when there is parallel application of the rules, the application of national rules may not prohibit agreements which do not restrict competition within the meaning of Art. 101(1) TFEU. Consequently, the CJEU found that when an agreement may affect trade a Competition Authority of a Member State may not prohibit the agreement if it does not perceptibly restrict competition within the internal market.[277] The CJEU further held that *"*[…] *an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition."*[278] Hence, the judgement connects the appreciability condition in relation to effect on trade with appreciability in relation to restriction of competition. In light of the case it must be viewed as sufficient to establish 1) that an agreement has as its object the restriction of trade and 2) that it may affect trade between Member States, in order to find an appreciable restriction of competition.

Consequently, "pattern of trade" may no longer be seen as neutral and disconnected from the restriction of competition condition in relation to restrictions by object. This is because a restriction by object that effect trade also necessarily restricts competition to an appreciable extent. According to EU case law an appreciable affect on trade has generally been found where the market shares of the parties have been approximately 5 %.[279] In light of the two cases *Expedia* and *Ziegler* the two concepts should be viewed as distinct but inter-connected. Throughout this paper appreciability will refer to restriction of competition if not indicated otherwise.

6.4 Determining "To An Appreciable Extent"

An agreement falls outside of the scope of the prohibition if it lacks effects of any significance. While the distinction between restrictions by object or effect considers the actual, potential or presumed effects, appreciability considers whether the magnitude of the eventual effects would be appreciable. Hence, the analysis of appreciability does not determine whether an agreement has had, is likely to result in, or may be presumed to result in anti-competitive effects.[280] In *Prym*[281] the GC explained that the Commission is not obliged to quantify the anti-competitive effects of the restriction of competition, but must provide sufficient reasoning to show that the agreement is capable to appreciably restrict competition.[282]

[277] Expedia [2012] paragraph 19.
[278] Ibid, paragraph 37.
[279] Opinion Expedia [2012] paragraph 56, in particular footnote 58.
[280] Faull & Nikpay, page 227f., paragraph 3.159.
[281] Case T-30/05 *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission of the European Communities* [2007] E.C.R. II-00107.
[282] Ibid, paragraph 103.

In this connection it should be pointed out that it is the agreement as a whole, and not the participation of an individual undertaking, that may be considered to provide only insignificant effects.[283] Hence, a submission that the involvement of one of the parties was insignificant, and that the prohibition therefore is not applicable, should be rejected.

The assessment of appreciability considers two aspects of the agreement, namely quantitative and qualitative factors. The former relates to an empirical assessment of the parties' market power and the latter to an abstract assessment of the agreement's content.[284] In this connection *Wahl* has noted that the requirement that an agreement must appreciably effect competition creates a quantitative as well as a qualitative safe harbour for restrictions of competition.[285] The following sections examine what falls inside the scope of the quantitative and qualitative parts of the assessment. The first section look at the guidelines put forward by the CA and the Commission. The following sections examine quantitative and then qualitative factors in relation to both EU and Swedish case law.

6.5 Guidelines

In light of the preparatory works and with guidance of EU competition rules the CA issued the *Swedish de minimis notice 1993*.[286] The notice, relying on a purely quantitative definition of appreciability, stated that an agreement do not restrict competition to an appreciable extent if the aggregate market share of the parties do not exceed 10 % and none of the parties annual turnover exceed 200 million Sek.[287]

Since then both the Commission and the CA has issued new notices on agreements of minor importance.[288] The current *Swedish de minimis notice*[289] mirrors the current *Commission de minimis notice* in all, for the purpose of this paper, relevant parts.[290] The three main differences, which has evolved through the amendments of the notices are that:

1. the quantitative threshold is an aggregate market share of the undertakings of 10 % in relation to horizontal agreements and 15 % in relation to vertical agreements,
2. the guidelines are not applicable in relation to hardcore restrictions as listed in paragraph 11 of the Commission notice on agreements of minor importance, and

[283] Bellamy & Child, page 169, paragraph 2.156.
[284] Ortiz, page 4.
[285] Wahl, page 13f.
[286] KKVFS 1993:2 de minimis notice, paragraph 1.3 – 1.4.
[287] Ibid, paragraph 2.1.
[288] De minimis notice 1997, paragraph 9 – 11, De minimis notice 2001, KKVFS 1999:1 de minimis notice, KKVFS 2009:1 de minimis notice.
[289] KKVFS 2009:1 de minimis notice.
[290] Ibid, paragraph 4 and 9.

3. small and medium-sized undertakings are not specifically referred to as rarely being capable of affecting competition.[291]

As hardcore restrictions generally may be presumed to restrict competition by object, it follows that in the absolute majority of these cases the thresholds set out in the Commission and Swedish de minimis notices may not be applied.[292] Consequently, they provide no direct guidance as to the threshold of appreciability in relation to object restrictions.

In *the Commission de minimis notice 1997* it was stated that agreements between small and medium-sized undertakings were rarely capable of significantly restrict trade between Member States and competition. Where these agreements would meet the conditions in Art. 101(1) TFEU they were still considered not to be of sufficient community interest and would therefore not result in proceedings instituted by the Commission. The exception did however exclude agreements where competition was significantly restricted in a substantial part of the relevant market, or where there were network effects.[293] This led the applicant in *Ventouris*[294] to argue that the agreement was of minor importance since the applicant came within the category of small and medium-sized enterprises[295] (SMEs). The GC stated that only agreements where all parties where SMEs were capable of falling outside the scope of the prohibition. In the case in question only two of the parties could be regarded as SMEs. Furthermore, the Court stated that the cartel restricted competition significantly in a substantial part of the market. Consequently, the plea was rejected.[296] Similarly, the MC considered that the relevant undertakings in *VIVO* were predominantly SMEs.[297] This consideration was not specifically analysed, but was instead part of the overall assessment conducted by the Court. It is therefore difficult to assess the relevance it had on the reasoning by the Court.

In the current de minimis notice the Commission only mention SMEs in relation to affect on trade and not competition.[298] However, as noted in section 6.1.2, the notice is without prejudice to the interpretation of the EU courts.[299] It is therefore unclear what relevance the amended de minimis notice has on the case law relating to SMEs as stated in *Ventouris*[300].

[291] De minimis notice 1997, paragraph 19, Compare with De minimis notice 2001, paragraph 3.
[292] Bailey, page 7.
[293] De minimis notice 1997, paragraph 19 – 20.
[294] Case T-59/99 *Ventouris Group Enterprises SA v Commission of the European* [2003] E.C.R. II-05257.
[295] There is no disparity between "undertaking" and "enterprise".
[296] Ventouris [2003] paragraphs 169 – 170.
[297] VIVO [1997] page 9.
[298] De minimis notice 2001, paragraph 3.
[299] Ibid, paragraph 6.
[300] Case T-59/99 *Ventouris Group Enterprises SA v Commission of the European* [2003] E.C.R. II-05257

Possibly, the term SME will not be used as an individual claim, but instead the circumstances relating to the size of the relevant undertakings will be considered as a quantitative factor in the appreciability assessment, which will be further discussed in the following sections.

6.6 The Quantitative Aspect In Article 101(1) TFEU

In EU the relevance of the position of the parties was recognized in an early case in the late 1960s, *Völk*, which has since then been widely referred to.[301] The quantitative aspect is empirical in nature and considers the position of the parties on the relevant market, i.e. the market power exercised by the parties. The market position of the parties is generally determined, as will be shown in the following sections, by analysing the size of the companies and their market shares on the relevant market.

In order to get a better understanding of how the quantitative aspect has been interpreted and applied in Swedish case law, it is necessary to look at the interpretation by the EU courts as well as the Swedish case law. However, the Swedish case law on the subject is limited. Therefore, the following sections commence with an examination of the EU case law. Thereafter, the Swedish case law is considered. The aim of these sections is to clarify the level of market power necessary to find that an object restriction does not restrict competition to an appreciable extent. Lastly, I examine what factors are relevant in order to find that an agreement restrict competition to an appreciable extent.

6.6.1 Position And Importance Of The Parties

In *Völk* the CJEU got the opportunity to clarify the relevance of "the position an importance of the parties", which was earlier pointed out in *STM* as a factor to consider when determining whether or not an agreement restrict competition to an appreciable extent.[302] The agreement in *Völk* was a vertical agreement with absolute territorial protection. Mr Völk's production represented 0.08 % of the total production on the common market, and 0.2 % in Germany. The contract bound Vervaecke to distribute products representing 0.6 % of the market in Belgium and Luxemburg. The Court stated that an agreement falls outside the scope of the prohibition in Art. 101(1) 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."[303]. This was a general statement and the Court noted that it applied even though the case at hand concerned

[301] See for example Miller [1978] paragraph 10 and Musique Diffusion française [1983] paragraph 84.
[302] Société Technique Minière [1966] page 250.
[303] Völk [1969] paragraph 7, See also Cadillon [1971] paragraph 7 – 9.

absolute territorial protection. These restrictions have generally been viewed as object restrictions.[304]

The general statement that object and effect restrictions must restrict competition to an appreciable extent has been reaffirmed in several other cases.[305] In AG *Gand's* opinion in *Völk* he argued that, depending on the positions of the parties, the Court could assess two contracts of the same type differently. He further noted that the changes in competition must not be only theoretical.[306] The case provides a general de minimis principle, which does not discriminate between restrictions by effect or object. However, considering the market share relevant in the case, less then 1 %, the scope of the de minimis principle is relatively narrow.

In a similar case *Miller*[307] the applicant Miller instituted a procedure against a Commission decision, in which it was stated that an exclusive dealing agreement constituted an infringement of Article 101(1) TFEU. The CJEU initially noted that a clause prohibiting export does, by its very nature, restrict competition.[308] In regard to the position on the market the Court noted that Miller had a total market share of approximately 5 %, but may have an appreciably larger market share in certain specialized categories of the market.[309] The Court found that it was not necessary to settle whether the relevant product market was the more general market of sound recordings or a more narrowly defined market because it was evident that Miller's sales constituted "a not inconsiderable proportion of the market"[310] and occupied an at least important position in the market of certain distinct categories of products.[311] Hence, in addition to the market share of the parties, the Court took into account the importance of the parties in certain segments of the market by distinguishing between a general and a more specialized market.

In the preliminary ruling *Expedia* the CJEU got an opportunity to clarify the interpretation and application of the appreciability condition. As noted in section 6.3 the CJEU examined the relationship between Article 101(1) TFEU and Article 3(2) *Regulation 1/2003*. Moreover, the Court held that an agreement must have the object or effect of perceptibly restrict competition.

[304] Ibid, paragraph 7, See also Article 4 Vertical block exemption Regulation and Javico [1998] paragraph 14.
[305] Javico [1998] paragraph 16, See also as referenced in note 246
[306] Opinion Völk [1969] page 305f.
[307] Case 19/77 *Miller International Schallplatten GmbH v Commission of the European Communities* [1978] E.C.R 00131.
[308] Ibid, paragraph 7.
[309] Ibid, paragraph 8-9.
[310] Ibid, paragraph 10.
[311] Ibid, paragraph 10.

The CJEU stated in this connection that the market share thresholds in the Commission de minimis notice may be considered a factor, but not a requirement, used in order to determine whether an agreement appreciably restrict competition.[312] The CJEU further held that an object restriction, which may affect trade between Member States, by its very nature restricts competition to an appreciable extent. Agreements have generally been presumed to affect trade when the aggregate market share of the parties has been around 5 %.[313]

These two statements above may indicate, by analogy, that agreements which have as their object the restriction of competition should be considered by their very nature to restrict competition to an appreciable extent in relation to 2 ch. 1 § SCA when the aggregate market share of the parties is at least around 5 %. This conclusion may be compared with Faull and Nikpay arguing, in light of *Völk* and *Miller*, that vertical agreements where the parties have a market share less than 1 % is insignificant. Furthermore, that an aggregate market share exceeding 5 % is appreciable, and that between 1 – 5 % there is a grey zone. The by the Court connects the case law on the concept of appreciable effect on trade with the concept of appreciable restriction of competition in such a way that once affect on trade has been established, for example when the scope of the relevant agreement is nation wide[314], an object restriction is necessarily appreciable. It may therefore be seen as providing a "shortcut" to establish an appreciable restriction of competition in object cases.

6.6.2 The Market Structure

In his opinion in *Miller*, AG Warner argued that it was not only the market share that was relevant, but also production and turnover in absolute terms. This reasoning was echoed in *Musique Diffusion Française*[315] where Musique Diffusion Française and other distributors of Pioneer, commenced proceedings against a Commission decision, which claimed that the applicants had been involved in concerted practices which had as its object the restriction of competition.[316] The applicants submitted, *inter alia*, that the Commission had erred in calculating the market shares of the distributors. They argued that the market share was just above 3 %, and not close to 10% as stated by the Commission.

The CJEU noted that a closer examination of the market shares would be unnecessary if the market shares indicated by the applicants could confirm an appreciable affect on trade.[317]

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[312] Expedia [2012] paragraph 31.
[313] Opinion Expedia [2012] paragraph 56, in particular footnote 58.
[314] KIA [2012] paragraph 226, Svenska Bilsportförbundet [2012] paragraph 135.
[315] Joined cases 100 to 103/80 *SA Musique Diffusion française and others v Commission of the European Communities.*
[316] Ibid, paragraph 2-3.
[317] Ibid, paragraph 81-83.

The Court referred to *Völk* but held that the position of the parties could not be considered weak. The relevant market was fragmented and the applicants' market share consequently exceeded most of their competitors. The Court considered the relative position of the applicants in relation to their competitors, but also pointed out the turnover in absolute numbers as a relevant factor. Consequently, the Court held that the conduct was capable of influencing the pattern of trade between Member States.[318]

The reasoning in the judgement mirrored, in most part, AG *Sir Gordon Slynn's* opinion, who also noted that smaller market shares are more likely to restrict competition where "the lion's share of the market is divided more or less evenly between a dozen or so enterprises […]"[319] since it indicates a strong position on the market. On the other hand, similar market shares may indicate a relatively weak position if the enterprise is "dwarfed by one or two major competitors."[320]

The above-mentioned case law has been recognized by the Commission in its decisional practice. In the *MasterCard decision* it stated, "The primary focus for analysing whether there is an appreciable effect on competition is the position and importance of the parties on the market taking into account the market structure."[321] Although it is generally the aggregate market share of the parties that is relevant, the Commission states in its *guidelines on horizontal co-operation agreements*[322],

> "If one of just two parties has only an insignificant market share and if it does not possess important resources, even a high combined market share normally cannot be seen as indicating a likely restrictive effect on competition in the market."[323]

Furthermore, the necessity to view an agreement in its economic and legal context taking into account the functioning and structure of the market was pointed out in *Expedia*[324].

One factor to take into consideration when analysing the market structure is whether there are parallel agreements which might create a network effect. In *Delimitis*[325] the CJEU had to determine whether a bundle of supply agreements containing an exclusive purchasing clause could collectively affect trade to an appreciable extent.[326]

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[318] Ibid, paragraph 84-86.
[319] Opinion *Musique Diffusion française* [1983] page 1943.
[320] Ibid, page 1943f.
[321] MasterCard Decision [2007] paragraph 105.
[322] Guidelines on horizontal co-operation agreements.
[323] Ibid, paragraph 44.
[324] Expedia [2012] paragraph 21.
[325] Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] E.C.R. I-00935.
[326] Ibid, paragraph 7.

The CJEU stated that the existence of a bundle of similar agreements was a factor to consider when determining whether an agreement, in light of its economic and legal context, restricted access to the relevant market.[327]

Where the agreement is part of a bundle of agreements, the individual agreement must, by the position of the parties and the duration of the agreement, provide an appreciable contribution to the foreclosure effect on the relevant market.[328] Hence, in *Neste Markkinointi Oy*[329] the CJEU found that an exclusive purchasing agreement with a one year termination notice did not make a significant contribution to the cumulative effect on the market. The Court considered the duration and that the agreement represented only a small proportion of similar agreements entered into by the supplier.[330]

The above noted case law points out the relevance of the structure of the market. The statement in *Musique Diffusion française,* where the fact that the market was fragmented was used to highlight the importance of the parties although they had relatively small market shares, could be compared to the approach taken by the Commission in the case *Villeroy & Boch*[331]. In that case the Commission found that it was out of the question that the co-operation between Villeroy and Boch and its network of retailers could facilitate collusion aimed at excluding competing firms. The reasons for this was that the market was fragmented, the number of producers too great and the circle of distribution too open and ill-defined.[332]

In relation to the importance of the market concentration and whether the market is fragmented, *Bellamy & Child* note, "where the market is concentrated, the likely effect on competition of restrictive provisions involving major competitors is enhanced"[333]. Furthermore, *Bishop and Walker* point out that, in general, the demand curve facing suppliers becomes more elastic when the number of firms increases. This is because the consumers, in the event of a price increase, have more suppliers to turn to.[334] However, the authors continue, one significant deficiency with using concentration ratios, such as the Herfindahl-Hirschman Index[335], is that it does not take into account the relative size of the competitors.

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[327] Ibid, paragraph 19 – 20.
[328] Ibid, paragraph 24.
[329] Case C-214/99 *Neste Markkinointi Oy v Yötuuli Ky and Others* [2000] E.C.R. I-11121
[330] Ibid, paragraph 35 – 36.
[331] Villeroy & Boch (Case IV/30.665) Commission Decision 85/616/EEC [1985] OJ L 376/15.
[332] Ibid, paragraph 31.
[333] Bellamy & Child, page 170 – 171, paragraph 2.160.
[334] Bishop & Walker, page 63, paragraph 3. 013.
[335] A concentration measure where the market shares on the relevant market are squared, which gives weight to larger firms, and indicates how concentrated the market is. See Niels [2011] page 128f.

Hence, the concentration ratio would not consider whether the market had a clear potential leader or the companies were struggling to become the largest firm, which could effect competition on the market.[336] Consequently, the market structure and concentration on the market may be used to indicate the ability to influence the market. However, other factors, such as the relative importance of the parties as stated in *Musique Diffusion française*, should also be considered a relevant factor.

6.6.3 Cases Where Other Factors May Be Relevant

In certain cases the aggregate market share of the parties may not be a good indicator on the ability to influence the market. On some markets, such as emerging markets, the parties may not yet hold any market shares or produce any turnover. This may be the case where the parties are entering a new market due to technological or medical advancement.[337] In these cases relevant factors to consider could instead be "the position of the parties on related product markets or their strength in technologies relating to the agreement."[338] Another example of markets where market shares may be poor indicators of market power is bidding markets. *Bishop and Walker* note that where tenders are large and infrequent, a relatively limited number of firms may be sufficient to provide fierce competition due to the consequences of failing to win the bid. However, they continue, most bidding markets do not have these characteristics. In these cases other methods of analysing the markets can be used, such as testing whether the undertakings are close competitors.[339] Consequently, while market shares may be viewed as the primary tool to assess the position of the parties on the market, it may not be a reliable indicator in all cases, depending on the market characteristics.

6.6.4 Conclusion

It is settled case law that an agreement, which has as its object or effect the restriction of competition may escape the prohibition in Article 101(1) TFEU if the effects would not be appreciable. However, in relation to agreements with a restrictive object the scope of this quantitative safe harbour is relatively unclear. In terms of market shares exclusive dealing agreements with absolute territorial protection has been found by the CJEU not to restrict competition appreciably when the aggregate shares of the parties were less than 1 %. However, aggregate market shares exceeding 5 % has generally been held by the CJEU to constitute an appreciable restriction of competition. Where the combined market share has been around 2 – 3 % the CJEU has found, in combination with the relative

[336] Bishop & Walker, page 67, paragraph 3. 016.
[337] See Guidelines on effect on trade, paragraph 52.
[338] Ibid, paragraph 52.
[339] Bishop & Walker, page 576, paragraph 12-001 – 12.002.

importance of the parties and the turnover in absolute numbers, that the agreement restricted competition to an appreciable extent. Possibly, the approximate market share of 5 % may be viewed as a threshold where an object restriction may be put into question, or in other words where the harm is no longer obvious. It may then be necessary to consider other factors, such as the concentration on the market, the relative importance of the parties or the nature of the products, in order to establish whether or not an agreement appreciably restricts competition.

6.7 The Quantitative Aspect In 2 ch. 1 § SCA

In the preparatory work of the SCA the appreciability condition was primarily focused on the quantitative aspect, i.e. the position of the parties. The Government stated that cooperation between small and medium-sized undertakings with a small aggregate market share should normally lack significance for competition. Hence, the Government stated that the decisive factor when assessing the appreciable extent of a restriction of competition is the size and market share of the relevant undertakings.[340] However, the preparatory work left it for the judiciary to further determine when an agreement does not appreciably restrict competition. Furthermore, as noted in section 6.5, the application of *the Swedish de minimis notice* is generally precluded due to the exemption of hardcore restriction and provides no guidance in relation to object restrictions.

6.7.1 The Priority Policy

Swedish case law concerning the appreciability condition, in particular cases where the courts have conducted a closer examination of the quantitative aspect, is scarce. One reason for this may be the prioritization policy put forward by the CA. The policy aims to provide transparency in the prioritization of competition and procurement cases. The policy states that the CA must be selective in its choice of cases and focus on cases of public interest, which leads to clear results. When prioritizing, the CA considers, *inter alia*, the severity of the issue in question. The severity of the issue depends on what negative effects it may have on competition and consequently on the public and consumers. Furthermore, the severity may depend on whether the issue is widespread on the Swedish market and if the market is characterized by a small number of competitors and weak competition.[341] Consequently, it is possible that the reason why cases, where the parties have held a relatively insignificant position on the market, have not reached the MC is due to the fact that they have not been prioritized by the CA.

[340] Prop. 1992/93:56, page 73 (unofficial translation).
[341] Competition Authority Priority policy.

In many cases the market share of the parties has been sufficient for the MC to find that the agreement appreciably restrict competition regardless of the precise definition of the relevant market.[342] However, the following section will examine the existing case law and in particular focus on the case *Bil-Bengtsson and others*, which provide the best guidance as to the application of a quantitative threshold.

6.7.2 Position, Importance Of The Parties And The Market Structure

Like the preparatory works of the SCA, the MC has recognized the magnitude of an agreement as a relevant factor to consider when determining whether or not an agreement appreciably restricts competition. In the recent case *KIA* the MC stated that an assessment of the appreciable effects of an agreement should take into account the magnitude and the nature of the agreement. The Court held that the magnitude is based on the size and market share of the undertakings. Furthermore, the nature is based on whether the restriction negatively influenced competition to an appreciable extent. The MC held that the market share, which was considered very large, alone allowed the Court to find that the agreement appreciably restricted competition.

In contrast to the decision in *KIA* the MC found in *VIVO* that a horizontal price fixing agreement did not appreciably restrict competition. VIVO argued that the competition was so fierce, in particular in relation to ICA and KF, that the quantitative thresholds had to be placed significantly higher than in other industries.[343] The Court stated that the parties' market share was one of several factors to consider when determining the position of the parties. The MC also pointed out that other circumstances, important to the competition situation on the market, must be taken into account as well. The MC held that the applicants' submission stating that there was fierce competition on the market should be accepted and that the members of VIVO were predominantly SMEs. The Court further noted that the 10 % market share of the parties was relatively small. Consequently, the MC did not find that the cooperation could effect the prices on the market appreciably.[344]

In light of the development of EU case law, and with regard to the inherently harmful nature of horizontal price fixing agreements, it is the author's view that it is unlikely that the 10 % market share would be considered insignificant today, even in the context of fierce inter-brand competition.

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[342] VVS-installatörerna [2005] page 10f., where the applicants had an aggregate market share of around 70 %. See also NCC and others [2009], page 50 where the Court held that the influence exercised by the parties was significant, and Bil-Bengtsson and others [2008], page 16, where the parties were found to have an aggregate market share of around 20 %.
[343] VIVO [1997] page 9.
[344] Ibid, page 8f.

Perhaps, the MC accepted the argument put forward by the applicant that the fierce competition raised the quantitative threshold of appreciable effects. The Court may have considered, in contrast to the case *Musique Diffusion française*, that VIVO was dwarfed by its competitors ICA and KF. The statement regarding the market share of VIVO may also be viewed in light of the fact that the members of VIVO was predominantly SMEs, and that the preparatory work states that these agreements normally are insignificant for competition when the aggregate market share is around 10 %.[345]

In *IL Returpapper and others*[346] the MC took into account the structure of the market finding that the agreement did not restrict competition to an appreciable extent. In the case several undertakings cooperated in their purchase of recycled paper. The MC stated that the cooperating parties held a significant position on the market, with an aggregate market share of around 65 % according to the CA, but that there was a significant competitive pressure on the market. This was partly due to the fact that the European market was considered an alternative source for buyers and sellers. In light of these considerations, as well as other qualitative considerations that will be discussed in section 6.8, the MC found that the agreement did not appreciably restrict competition.[347] Another case where the MC took into account the structure of the market was *Svenska Petroliuminstitutet*[348] stating that the market was oligopolistic and highly concentrated.[349]

6.7.3 Bil-Bengtsson And Others v Competition Authority

The case *Bil-Bengtsson and others* concerned restrictive cooperation between eight distributors of Volvo and Renault cars in the provinces of Skåne and Blekinge. The CA claimed that the applicants had directly or indirectly fixed prices and rebates, but had also divided and shared the market.[350] The DC initially stated that the cooperation had as its object the restriction of competition. However, the Court held that the restriction still had to appreciably effect competition, taking into consideration the magnitude and nature of the agreement. The magnitude of the agreement was considered to relate to the size and market share of the parties. The nature of the agreement was considered to relate to whether the cooperation had appreciable negative influence on competition, in relation to the underlying considerations of the SCA.

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[345] Prop. 1992/93:56, page 73.
[346] Marknadsdomstolen [MD] Market Court 1999:11 (Swed.) *IL Returpapper and others v Competition Authority*.
[347] Ibid, page 24ff.
[348] Marknadsdomstolen [MD] Market Court 1999:20 (Swed.) *Svenska Petroliuminstitutet v Competition Authority*.
[349] Ibid, page 20.
[350] Bil-Bengtsson and others [2008] page 9.

The CA argued that the relevant geographic market was limited to Skåne and Blekinge. However, The DC stated, rejecting the market definition provided by the CA as insufficient, that the relevant market was considerably larger than Skåne and Blekinge. The Court found that the market share of the applicants in relation to new cars was approximately 20 % in Skåne and Blekinge and 3 % in Sweden. In relation to used cars the market share was 4 % in Skåne and Blekinge and 0.5 % in Sweden. The Court stated that it could not find that the market share was big enough to, by that fact alone, show that the cooperation appreciably restricted competition. The DC therefore went on to analyse the nature of the agreement. The Court found, *inter alia* due to the vertical control by the general agent of the distributors, already available price statistics and lack of effects on the market, that the cooperation did not appreciably effect competition.[351]

On appeal to the MC the CA used a slightly different market definition, adding one province to the definition originally stated in the DC. The MC initially held that even though 2 ch. 1 § SCA does not consider any conduct prohibited *per se*, there is a strong presumption that the type of conduct relevant in the case restrict competition. The MC found the market definition provided by the CA to be reasonable. The Court stated that, regardless of the precise definition of the market, the threshold where horizontal price fixing and market sharing agreements may be put into question was far exceeded.[352] The Court held that the influence of the undertakings on the relevant market had been significant which, in connection with the serious nature of the cooperation, restricted competition to an appreciable extent. [353]

The case is interesting due to the fact that the DC and the MC came to two opposite conclusions regarding the question of appreciability. The DC conducted a relatively thorough analysis of the appreciability condition and considered the magnitude as well as the nature of the conduct. Furthermore, the analysis by the DC may be viewed as dividing the assessment into two parts. The first part considers whether an agreement may be deemed to appreciably restricts competition to an appreciable extent, based solely on the size and market share of the parties. When the magnitude of the agreement alone does not provide conclusive proof that the agreement would have appreciable effects on competition, it is necessary to further analyse factors relating to the nature of the agreement. The reasoning may perhaps be compared with determining if the restriction, based on the market share of the parties, is obvious or need further analysis. It is interesting to note that the market share of the parties, according to the definition accepted by the DC, was within the grey area mentioned in section 6.6.1.

[351] Bil-Bengtsson and others [2006] page 66ff.
[352] Bil-Bengtsson and others [2008], page 16.
[353] Ibid, page 16.

It is hard to assess the relevance of the statements made by the DC since the MC did not comment on this reasoning in its judgement. The MC assessed the appreciability condition in a more summary manner noticing the position of the parties in connection with the serious nature of the conduct. However, due to the differing opinions on the definition of the relevant market the starting point of the assessment was different. Consequently, the MC did not have to conduct a deeper analysis in order to satisfy the appreciability condition. It is interesting that the MC explicitly made reference to a threshold below which it may be questioned whether object restrictions, such as involving price fixing and market sharing, appreciably effect competition.

6.8 The Qualitative Aspect

The qualitative aspect of an appreciable restriction of competition implicate, as noted in section 6.4 above, an abstract analysis of the content of an agreement. In Swedish case law it has been referred to as analysing the nature of the agreement to determine whether the negative effects it may have on competition are appreciable.[354] *Carl Wetter and others* note that the effect on competition should be evaluated in relation to the considerations underlying competition law.[355] It could be argued that the appreciability condition consists only of the quantitative aspect as the qualitative aspect of the restriction already has been considered when determining the object of the agreement. However, as the following sections will show, the qualitative aspect of the appreciability condition has been considered in both Swedish and EU case law.

Following the introduction of the SCA, several judgements by the MC clarified that other factors, in addition to quantitative, are relevant in the assessment of the condition "appreciable extent".[356] In the case *Taxi trafikförening*[357] the MC had to consider whether concerted taxi services, in particular a common order central, was infringing 2 ch. 1 § SCA. The MC held that the aggregate market share of the parties is only one of many factor to consider when determining the parties' position on the market. The Court took into account that the market was characterized by intense competition and that the parties' cooperation in fact had not prevented or restricted the competition.[358] In *VIVO*, the MC initially stated that the conduct of VIVO, which was an association of undertakings in the retail market, was in fact price collusion.[359]

[354] KIA [2012] paragraph 208 – 209.
[355] Wetter and others, page 175, in particular footnote 132, See also Case Bil-Bengtsson and others [2006] page 66.
[356] Taxi trafikförening [1996] page 7f., Sydsvensk Färskpotatis [1997] page 11, IL Returpapper [1999] page 25
[357] Marknadsdomstolen [MD] Market Court 1996:4 (Swed.) *Taxi trafikförening u.p.a v Små Taxiägares Intresse Organisation.*
[358] Ibid, page 7f.
[359] VIVO [1997] page 7.

The Court reaffirmed the judgement in *TFF* and added that whether cooperation restricts competition to an appreciable extent must be analysed having regard to the actual conditions under which it applies.[360]

It has been clearly stated in recent case law that both qualitative and quantitative factors should be considered in order to establish whether an agreement may restrict competition to an appreciable extent.[361] In *KIA* the MC stated that the nature of the agreement should be considered as well as the magnitude, and that this involved determining whether the negative effect on competition may be deemed appreciable.[362] *Carl Wetter and others* state that it is obvious that qualitative factors should be taken into account, considering the underlying socioeconomic function of the competition rules.[363] They further argue that every application of the prohibition against restrictions of competition should be preceded by a qualitative assessment. However, the need to conduct a qualitative analysis is naturally less apparent when it is obvious that an agreement has as its object the restriction of competition.[364]

Due to the abstract nature of the assessment, it is not possible to make an absolute demarcation as to what constitutes a qualitatively appreciable restriction of competition. Instead, cases could be organized in categories where the courts have relied on qualitative factors to find that an agreement was not appreciable. Such categories must, due to varied circumstances and the changing markets, be indicative and non-exhaustive.

The following sections examine some of the Swedish and EU case law, where agreements have been considered to be qualitatively insignificant, in two categories. It does not consider the categories mentioned in section 4.2.4 (limitations that do not restrict competition or ancillary restraints), due to the reasons provided in that section of the paper.

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[360] VIVO [1997] page 8f., See also Sydsvensk Färskpotatis [1997] page 11, where the MC had to determine whether information sharing concerning future output of cultivated potatoes appreciably restricted competition. The Court stated that it was common ground that the information could affect the output and actions of the parties. However, the Court stated that the effects was, due to certain industry specific factors, was only negligible, Cementa [1997], page 7 where the MC held that an agreement between the parties could not have an appreciable effect on the market considering that neither of the parties realistically could have submitted an offer in the procurement in question.

[361] See Bil-Bengtsson and others [2008] page 16, where the MC found that the influence of the parties on the market had been significant which, in connection with the severe nature of the agreement, constituted an appreciable restriction of competition. See also Svenska Bilsportförbundet [2012] page 136 – 139 (referring to the decision of the Competition Authority, see decision Svenska Bilsportförbundet [2009]*, paragraph 205 - 206*), where the MC stated that the absolute prohibition, in a decision by an association of undertakings, to partake in motor racing other than provided thoose organized by the association.

[362] KIA [2012] paragraph 208 – 209.

[363] Wetter and others, page 118.

[364] Ibid, page 176, in particular footnote 135.

6.8.1 The Restriction May In Itself Be Qualitatively Insignificant

Both in Swedish and EU case law the courts have considered whether or not a restriction of competition does amount to a qualitatively significant restriction. In the early case *Sydsvensk färskpotatis*[365] the MC had to determine whether information sharing concerning future output in the potato growing industry could be considered to appreciably restrict competition. The parties sharing information held on average a market share of around 27 % and during the harvest season around 70 %. The Court stated that it was common ground that the relevant type of information could affect output by the relevant undertakings. However, the MC found that due to the circumstances of the case the potato growers could not adapt their output in relation to the information received. Consequently, the information could not be considered to appreciably restrict competition.[366]

Similarly, the MC considered the undertakings' ability to adapt their commercial behaviour according to information provided by an agreement in *Svenska Petroliuminstitutet.* The MC noted that the information only included general monthly sales information and that the undertakings obtained the price information before they got the statistics relevant in the case. Furthermore the Court considered that the fact that the information was national, and that there were provincial differences in price, mitigated the risk for negative effects.[367] In the recent case *KIA* the MC rejected the argument concerning the qualitative factor that the agreement in question did not appreciably restrict competition since the agreement only covered a three year, and not the seven year, guarantee for service of cars.[368]

A similar approach was taken by the CJEU when assessing the qualitative aspect of the restriction in *Pavlov*[369]. The Court considered whether a supplementary pension scheme, for medical specialists and managed by a single fund, restricted competition to an appreciable extent. The Court found that the pension scheme standardised only one cost factor of specialist medical services. Furthermore, the Court found that the cost had only a marginal or indirect influence on the final cost of the services provided and was therefore not appreciable.[370]

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[365] Marknadsdomstolen [MD] Market Court 1997:5 (Swed.) *Sydsvensk Färskpotatis ekonomisk förening v the Swedish Competition Authority.*
[366] Ibid, page 9ff.
[367] Svenska Petroliuminstitutet [1999] page 19f.
[368] KIA [2012] paragraph 210, See also Uponor [2003] page 5.
[369] Joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] I-06451.
[370] Ibid, paragraph 93 – 97.

In *Bagnasco*[371] the CJEU held that collusion, which excluded the right for customers to adopt fixed interest rate, could not, due to objective factors such as changes in the money market, have an appreciable restrictive effect on competition.[372] Similarly, the Commission has in its decisional practice taken into account qualitative insignificance as a factor when assessing appreciability. In the Commission *UEFA decision*[373] the Commission found that a regulation, limiting national associations under certain circumstances to broadcast football, did not appreciably restrict competition. The Commission stated that the regulation did not have an anti-competitive object but that it may result in broadcasters being unable to broadcast football events live when they whish. However, considering, *inter alia*, the limited duration of the limitation and the restricted scope of the limitation the Commission held that the regulation did not appreciably restrict competition.[374]

In conclusion, the factors that may be considered assessing the significance of a restriction are diverse and contextual. However, it seems as though both Swedish and EU courts have generally considered objective factors limiting the ability to affect competition in order to find that an agreement does not qualitatively restrict competition to an appreciable extent. In cases concerning information sharing the assessment has been focused on whether or not the information actually could be used in an anti-competitive way or whether the ability to do so has been restricted by factors not relating to the parties. In other cases, primarily in EU case law, the duration and scope of the restriction have been considered.

6.8.2 National Legislation

One specific objective factor, considered in both Swedish and EU case law, is whether there is legislation that affects and direct the actions of the undertakings. In *IL Returpapper and others* the MC stated that the cooperation, concerning recycled paper, had to be assessed in light of legislation requiring producers to collect recycled paper, and authority regulations provided by the Environmental Protection Agency (Swed. *Naturvårdsverket*). The Court pointed out that the cooperation should be considered well motivated as it strived to reach the environmental goals prescribed. The MC found that, *inter alia* due to the considerations above and even though the parties had a large market share, that the cooperation could not be considered to appreciably restrict competition.[375]

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[371] Joined cases C-215/96 and C-216/96 *Carlo Bagnasco and Others v Banca Popolare di Novara soc. coop. arl. (BNP) (C-215/96) and Cassa di Risparmio di Genova e Imperia SpA (Carige) (C-216/96)* [1999] E.C.R. I-00135.
[372] Ibid, paragraph 35.
[373] UEFA's broadcasting regulations (Case 37.576) Commission Decision 2001/478/EC [2001] OJ L 171/12.
[374] Ibid, paragraph 50 – 52 and 57.
[375] IL Returpapper and others [1999] page 25.

Similarly, in *Suiker Unie*[376] the CJEU had to determine whether Italian regulations, and influence exerted by the Italian authorities had affected the applicants' conduct.[377] After conducting a thorough analysis of the circumstances of the case, the CJEU stated that,

> "All these considerations show that Italian regulations and the way in which they have been implemented had a determinative effect on some of the most important aspects of the course of conduct of the undertakings concerned which the Commission criticizes, so that it appears that, had it not been for these regulations and their implementation, the cooperation, which is the subject-matter of these proceedings, either would not have taken place or would have assumed a form different from that found to have existed by the Commission."[378]

The Court found that the Commission had not sufficiently considered the effects of the regulations and consequently held that the conduct could not appreciably restricted competition.[379]

In conclusion, the two cases above indicate that it is necessary, when analysing the context of an agreement, to determine whether there are any legislation that may influence the actions of the parties to an agreement. When such legislation exist it may be necessary to determine what effects, regardless of these factors, can be attributed to the actions of the parties. Lastly, it is necessary to determine whether or not the effects attributable to the parties amount to an appreciable restriction of competition.

6.9 Conclusion

As shown by the case *Völk* and *VIVO*, an agreement may escape the prohibition even though the nature of the agreement is inherently harmful to competition due to its quantitative insignificance. Similarly, as shown by the case of *Sydsvensk Färskpotatis,* an agreement where the parties have a significant market share may be considered qualitatively insignificant. Blanco argues that where the qualitative effect tends towards zero, the quantitative effects are irrelevant. Conversely, when the quantitative effect tends towards zero, the qualitative effect becomes irrelevant. Consequently Blanco states, it is necessary to establish a combined adequate level of both qualitative and quantitative levels of effect.[380]

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[376] Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] E.C.R 01663.
[377] See Ibid, paragraph 50 – 65.
[378] Ibid, paragraph 65.
[379] Ibid, paragraph 72.
[380] Ortiz, page 29.

However, the reasoning only considers agreements where either the qualitative or quantitative factor alone may render the effects of the agreement insignificant. Extending the argument, having regard to that the assessment is part of a contextual analysis of the agreement with the ultimate aim to determine whether the agreement appreciably restrict competition, the two thresholds should be considered interdependent. Hence, the quantitative threshold should depend on the severity of the agreement's nature, the scope and duration of the restriction and whether there are mitigating objectively established circumstances limiting the effects of the agreements, and vice versa. If a restriction in an agreement is qualitatively limited, e.g. when the restriction only effect one cost function of several or there are Regulations controlling the actions of the parties, the quantitative threshold could be set higher.

The analysis as put forward above would only be relevant where there is uncertainty regarding the satisfaction o the condition that an agreement appreciably restricts competition. Where a restrictive object has been established, a deeper and more sophisticated analysis could arguably be necessary below the level, in the words of the MC in *Bil-Bengtsson and others*, "where it may put into question whether horizontal price fixing and market sharing appreciably restrict competition"[381]. Hence, the investigatory burden, eased by the presumption of effects in relation to object restrictions, would not dramatically increase.

[381] Bil-Bengtsson and others [2008] page 16 (unofficial translation).

7 Concluding Remarks And Analysis

Section 7 is based on the research questions put forward initially in section 1.2. The first part addresses the first question regarding the definition of the relevant market. Thereafter, the second and third question are analysed considering the interpretation and application of the condition "to an appreciable extent" in Swedish competition law.

7.1 Research question one: Definition of the relevant market

2 ch. 1 § SCA prohibit agreements, which have as their object or effect the restriction of competition to an appreciable extent. A natural starting point when determining whether or not an agreement restrict competition to an appreciable extent is to define the relevant market where the undertakings, parties to the agreement, are competing. It is on this market the parties may influence the conditions of competition, or in other words, where the parties may exert market power. Hence, it is in relation to the defined relevant market that the effects should be assessed.

The question of whether or not, or to what extent, there is an obligation to define the relevant market relates to the necessity to apply the de minimis principle. The assessment of the object of an agreement is in large parts abstract, considering the provisions and purpose of the agreement. The determination may often be inferred from the non-exhaustive lists of particularly harmful conduct in 2 ch. 1 § SCA and 101(1) TFEU or the the block exemption Regulations. Once a restrictive object has been established, it is not necessary to show any negative effects on the market. A market definition is therefore not necessary in this regard to find a restriction of competition. However, even though a restrictive object has been established it is necessary to prove that it is capable of having appreciable effects. Considering that the effects are presumed, this assessment is based on whether or not the undertakings are able, and the agreement capable, to appreciably affect the market. The ability of the parties refers to their position on the market and the market power they may exert, while the capability of the agreement to effect competition is based on the provisions in the agreement. In order to determine the ability of the parties to influence the market it is necessary to define the relevant market. This may be why the MC stated in *Svenska Bilsportförbundet* that the market is defined to determine the market power of the parties and that the definition is done primarily to determine whether the restriction of competition is appreciable.

In Swedish competition law there has been little discussion as to whether it is necessary to show that an agreement, even though it has a restrictive object, may result in appreciable effects. This is likely due to the fact that the condition is explicitly stated in 2 ch. 1 § SCA and that a literal interpretation of the provision provides little ambiguity in that the condition covers object as well as effect restrictions. Similarly, the preparatory work clearly states that even though the object of the agreement is to restrict competition, it is still necessary to determine the appreciable extent of the restriction. Moreover, the MC has stated in several cases that it is necessary to determine that the appreciability condition is satisfied when the agreement restricts competition by object.

Consequently, it seems settled in Swedish competition law that a definition of the relevant market is necessary in order to satisfy the appreciability condition. In addition to satisfy the appreciability condition, the market analysis should, in light of the GC judgement in *Adriatica v Commission*, be conducted with sufficient precision to satisfy the essential requirement of legal certainty. The analysis should, in complex, collective and continuous infringements, consider that the personal liability is limited to the individual involvement of the undertakings.

What is not as clear is how rigorous the market analysis must be conducted to prove that an agreement with a restrictive object infringes the prohibition in 2 ch. 1 § SCA. A general proposition is that the market analysis has to be sufficiently deep and sophisticated to allow the courts to find that the appreciability condition is satisfied. This follows from the placement of the burden of proof, which lies on the party alleging an infringement of the prohibition. The preparatory work and case law from the Swedish courts do indicate that the analysis, necessary to satisfy the condition, varies in depth and sophistication depending on the nature of the agreement. The preparatory work points out that once a restrictive object is established, a more summary analysis of the market may be conducted in order to satisfy the appreciability condition. In this connection the MC and the EU courts has in several cases stated that it is not necessary to provide a precise definition of the relevant market once it is possible with certainty to find that the appreciability condition is satisfied. This has generally been the case where the alleged market share of both parties has been sufficient to be found appreciable.

In *Bil-Bengtsson and others* the MC stated that the market analysis did not have to precisely define the geographic scope of the market once it was obvious that the market shares far exceeded the threshold where the appreciable effects of the agreement could be questioned. The statement by the Court is interesting in several ways, as the language used by the Court resemble the language used in EU case law in relation to “obvious restrictions of competition” as well as case law concerning the analysis necessary to satisfy the presumption of affect on trade.

In EU case law the GC has further stated that the market definition is done to determine whether an agreement restrict competition appreciably. The Court held in *Volkswagen* that since the purpose of the market definition is, *inter alia*, to determine whether an agreement restrict competition, it is only necessary to define the relevant market, where it without such a definition would be impossible to make this determination. The statement indicate that there are circumstances where it would be possible to find that an agreement appreciably restrict competition without a definition of the market. In this section the GC referred to the judgement in *European Night Services*, stating that it is not necessary to take into account the actual conditions in which an agreement functions when it contains obvious restrictions of competition, such as price fixing, market sharing or control of outlets. The question then becomes what constitutes an obvious restriction of competition.

It is unclear what agreements, according to EU case law, constitute an obvious restriction of competition, and therefore do not require that the actual conditions, on the market in which it functions, are taken into account. What can be said with certainty is that the category includes agreements that have generally been considered particularly harmful to competition, such as price fixing, market sharing and control of outlet. Although, I do not find it convincing that the listed agreements should be considered obvious in the abstract, or in other words without considering the market in which they function at all, based purely on their nature. Instead, I do find the statement by AG *Trstenjak* compelling that these agreements require only a more summary consideration of the economic and legal context. The obviousness of the restriction of competition should be based on the nature of the agreement and the circumstances of the case, making the precise definition of the market and an extensive market analysis superfluous. This method would balance the benefits of the investigatory relief that the object category creates, with a reasonable allocation of the burden of proof between the CA and SMEs. Furthermore, it would focus attention and resources on agreements where the parties are able to effect competition.

The case *CMA CGM* may perhaps be viewed as an example of this method. In that case the GC found that it was sufficient to considered the nature of the agreement, the effects the restriction had on the total tariff in question and the strong position of the parties, without reference to the market share, in order to establish that an agreement appreciably restricted competition. The approach may, similarly to the reasoning by the DC in *ALIS v Mediearkivet*, be viewed as a gradual application of the obligation to investigate the circumstances of the case in relation to the alleged restriction of competition. The obviousness of the restriction of competition should therefore be based on the nature of the agreement with a summary analysis of the legal and economic context of the circumstances in the case. However, the question still remains what such an analysis should consider.

In *Gosselin Group* the GC held that even though the Commission had theoretically failed to show that the 5 % threshold was exceeded, it had based on the circumstances of the case established to the requisite legal standard that this was the case. The Court therefore stated that where certain conditions are met in regards to the market analysis, which show that the market share far exceeds the 5 % threshold, the Commission is not required to define the relevant market and calculate the market share.

The conditions considered necessary to satisfy in this more summary analysis, was that the Commission described the sector, including supply and demand of the market and identified the services, products and the market in sufficient detail to allow the court to find that the market threshold was far exceeded. In the *guidelines on Article 81(3)* the threshold that must be exceeded is 5 %. While the MC in *Bil-Bengtsson and others* indicated that there is a threshold where the appreciable effect of particularly harmful may be put into question, it did not indicate what this threshold was.

It should be clarified that the threshold in this connection is not applied to determine whether or not an agreement appreciably restricts competition. Instead, the purpose of the threshold is to provide a benchmark far above which a precise definition, and a deep and sophisticated market analysis, is not necessary. There are strong reasons based on EU case law, but also legal doctrine, suggesting that a 5 % threshold could be appropriate for this purpose.

The 5 % threshold, above which effect on trade is presumed, can be traced back to the case *Miller*. The 5 % market share of the parties in that case has been referred to also in relation to effect on restriction. *Faull & Nikpay* has in light of, *inter alia*, *Miller* suggested that the area between 1 and 5 %, in relation to vertical restrictions, is a grey area in the application of the prohibition. Extending this reasoning to include horizontal agreements it would seem as it is in cases falling into this grey area that a restriction by object may not be considered obvious, but instead require a deeper and more sophisticated analysis.

The recent statement by the CJEU in *Expedia* held that a restriction of competition is appreciable when 1) it has as its object the restriction of competition and 2) when it may affect trade. An agreement has, as noted above, and with reference to, *inter alia*, *Miller v Commission*, generally been found to affect trade where the market share of the parties has been around 5 % or more. Hence, the Court linked the appreciable effect of competition to the appreciable effect on trade in cases of restrictions by object. The case suggest that 5 % is generally sufficient to find that an agreement appreciably restrict competition by object where the market share of the parties are around 5 % or more. Consequently, a sufficient market analysis proving to the requisite legal standard that the market share of the parties far exceed 5 % would take into account the statement in *Expedia* and include a margin of error.

In conclusion, answering the first researched question, the market is defined in order to 1) determine whether the conditions, and in particular the appreciability condition, of the prohibition in 2 ch. 1 § SCA are satisfied and 2) to satisfy the essential requirements of legal certainty. Once a restrictive object has been established the market analysis does not have to be as rigorous. When it is obvious that an agreement restricts competition it is not necessary to further analyse the economic and legal context.

Perhaps, in relation to restrictions by object the market analysis may be more summary when it is possible by such an analysis to ascertain, based on the nature and circumstances of the case, that the market share of the parties far exceed 5 %. The summary analysis should provide a sufficiently detailed description of the sector and identify the product and services. When the market share of the parties are less then 5 % it may however be necessary to conduct a deeper and more sophisticated analysis of the market.

7.2 Research questions two and three: The appreciability assessment

The definition of the relevant market is, as mentioned above, necessary to determine the market power of the undertakings. Moreover, the market power of the undertakings is fundamental in the assessment of the prohibition in 2 ch. 1 § SCA, and in particular the condition that an agreement must restrict competition to an appreciable extent, as it indicates the ability of undertakings to influence the market. In this connection, the de minimis principle provides a minimum level of market power, below which undertakings escape the prohibition in 2 ch. 1 § SCA and enjoy the safe harbour it offers. Without collective market power of some significance, on a correctly defined market, an agreement may not, per definition, actually or potentially result in anti-competitive effects. This follows from the definition of market power as the ability of one or several undertakings to maintain prices above competitive levels for a significant period of time.

The distinction between agreements which have as their object or effect the restriction of competition is based on the inherently harmful nature of certain agreements. These agreements are considered harmful to the extent that they are considered to necessarily or inevitably restrict competition. However, the prohibition in 2 ch. 1 § SCA and the preparatory work to the Act clearly states that it is necessary to determine the appreciable effect of an agreement, even with a restrictive object. On a fundamental level the justification for applying the de minimis principle is obvious. Harm on competition and ultimately consumers could not be a foregone conclusion, necessary or inevitable, where the parties to the agreement or the restrictions of the agreement are not able to influence the market.

There are policy reasons for and against applying the de minimis principle on agreements with a restrictive object. As *AG Kokott* powerfully argued in *Expedia*, the preferential treatment of the safe harbour that the de minimis principle creates should not be afforded to agreements with an anticompetitive object. It seems to me that the reasoning is based partly on the inherent harmfulness of agreements which restrict competition by object, partly on that the conduct itself is reprehensible. The first part of this reasoning has been responded to above in the analysis. The second part I do find more compelling. The blameworthiness of an anti-competitive agreements should to a great extent be dependent on the intentions of the parties, even though it is of minor legal relevance when classifying the agreement.

An agreement with the sole object, stripped away from all alternative pro-competitive purposes or effects, to restrict competition to the detriment of consumers should reasonably be more blameworthy than an agreement where the restrictive object is incidental, or at least alternative, to other neutral or pro-competitive objectives. Considering that agreements, which are not able to appreciably restrict competition, lack the ability to influence the market, it seems unlikely that ultimately price increasing effects are intended by the parties to the agreement. In other words, it seems unlikely that undertakings would establish a price fixing cartel, which would be incapable of affecting the price. Instead, a narrowly defined de minimis principle would likely cover agreements where there are alternative reasons, other than harm to consumers, for cooperating. I find that this reasoning to some extent neutralize the argument that the application of the de minimis principle in when agreements restrict competition by object would be to invite undertakings to refrain from effective competition.

In light of the low market shares, where object restrictions have been found not appreciably restrictive in EU case law, the undertakings likely to be covered by the de minimis principle are SMEs. The benefits of SMEs as being dynamic, flexible and of little significance, or in certain cases providing pro-competitive effects, for competition law were considered in the preparatory works of the SCA. It has been noted that there is an inherent difficulty in satisfying the conditions of Art. 101(3) TFEU when a restrictive object has been established. This is partly due to the general attitude that object restrictions rarely will satisfy the conditions in Art. 101(3) TFEU, partly as it requires a rigorous analysis including empirical evidence to substantiate the pro-competitive effects of the agreement in order to balance the abstract harm as determined in the assessment of Art. 101(1) TFEU. There is no reason why the same argument would not be relevant in relation to the Swedish prohibition and legal exemption, since it is modelled on the prohibition and exemption in EU.

The narrowing of the scope of the de minimis principle reallocate the burden of proof on SMEs to proclaim the pro-competitive virtue of the agreement in question. With an unreasonably limited scope of the de minimis principle the burden of proof would be shifted to these undertakings where there is genuine uncertainty regarding the possible harm of the agreement. The SMEs are less likely to have legal representation, due to lack of resources, and will therefore not have the same ability to investigate and satisfy the conditions of 2 ch. 1 § SCA. Consequently, I do not find the policy arguments stating that the de minimis should not be applied at all convincing. Instead, these considerations are valuable when determining the scope of the safe harbour it creates. CJEU has stated in recent case law that both object and effect restrictions must be perceptible

The assessment of the appreciable effect of an agreement consists of a quantitative and a qualitative aspect. The quantitative threshold is based on the size and market share of the parties to an agreement and is therefore empirical and measurable. The qualitative aspect on the other hand is abstract and considers whether the restriction in question may appreciably restrict competition. While the quantitative aspect may be assessed in relation to a determined threshold, the qualitative aspect is highly contextual and depends on the circumstances of the case. Both Swedish and EU courts have recognized that effect and object restrictions must be appreciable. However, there is no clear authority establishing a quantitative threshold based on market shares. In EU case law the case law suggests that a market share below 1 % may be considered insignificant, a market share exceeding 5 % will generally be appreciable and the area in between constitutes a grey zone. Within this suggested grey zone there are cases where agreements have been considered to appreciably restrict competition although the undertakings have had a market share below 5 %.

An example of this is *Musique Diffusion française* where the parties had a 2 – 3 % market share. Although, in the case the CJEU took into account the leading position of the undertakings on the fragmented market and the turnover in absolute numbers. Hence, the case was not solely determined based on the market share of the parties, but the Court considered additional factors to condemn the agreement. This may indicate that the Court was reluctant to find that the market share alone constituted an appreciable restriction. Similarly, the DC held in Bil-Bengtsson and others that the aggregate market shares of around 0.5 and 4 % could not in itself justify a finding that the agreement appreciably restricted competition. Even though the case was overturned on appeal, the later judgement was not based on the same market shares, as the MC defined the relevant market more narrowly, resulting in a larger aggregate market share of the parties to the agreement. Hence, while the case does not indicate the attitude of the MC towards relatively small market shares in agreements with a restrictive object, it shows that the Swedish courts have considered the eventuality that agreements with an aggregate market share below 5 % may be found insignificant for competition.

The market share threshold can not, at the moment, be more concretely determined then to point out that below 5 % the uncertainty regarding the effects of an agreement with a restrictive object increases. As the market shares comes closer to 0 %, the greater the uncertainty becomes and the need to consider additional factors increases.

Admittedly, it is hard to reconcile the above reasoning with the judgement by the MC in *VIVO*. The Court put a lot of emphasize on the structure of the market, that there was fierce competition on the market. Furthermore, and more surprisingly, the Court stated that the 10 % market share, of the parties to the price fixing agreement, was relatively small. This statement seems to run contrary to the general tenor of the EU case law. Furthermore, the reference to the members of VIVO as being SMEs may have been a contributory factor for the Court finding that the market share of VIVO was relatively small. The relevance of categorizing undertakings as SMEs may also be inferred from the case *Ventouris*. However, since then the Commission *de minimis* notice has been amended and the reference to SMEs, as rarely capable of affecting competition, removed. The amendment is not binding on the EU or Swedish courts but may represent a change in attitude towards the application of the de minimis principle in relation to SMEs. Lastly, considering the judgement in *Expedia* I find it unlikely that a horizontal price fixing agreement would escape the prohibition where the aggregate market share of the parties are around 10 %.

As noted above, the structure of the market may be taken into account when determining the quantitative aspect of the appreciability condition. This may include considering the level of concentration on the market, whether the undertakings are market leaders and whether the agreement is part of a bundle of agreements. These factors generally complement the analysis of the market share. However, in certain cases the market share may not be suitable to indicate the market power undertakings may exert on the relevant market. In these cases alternative measures should be used depending on the characteristics of the market.

Agreements may be divided into agreements that do not restrict competition and agreements that do not restrict competition appreciably, because of their qualitative insignificance. The former category consists of 1) agreements where there were no actual or potential competition at the time when the agreement was concluded and 2) agreements where the restriction is an ancillary restraint necessary and proportional to achieve a desirable objective in terms of competition. In addition to the two categories above the qualitative aspect may be taken into account in two ways, in the assessment of the appreciable extent of a restriction. First, the nature of the agreement affects the assessment because it determines whether or not the threshold in the de minimis notice is applicable. Second, it is necessary to determine whether the restriction in itself provide merely insignificant effects. This assessment takes into account objective factors, which may limit or exclude the realization of the negative effects on the market and whether there are legislation affecting the actions of the undertakings.

In conclusion, the second and third research question should be answered as follows. The assessment determining whether or not an agreement, which has a restrictive object, appreciably restrict competition is based on the actual conditions in which it functions. While the market share of the parties provides a valuable indication of market power the quantitative aspect of the assessment also take into account the structure of the market, the concentration on the market, the importance of the parties and whether the agreement is part of a bundle of agreements. A quantitative threshold, while theoretically possible, may not be inferred from the case law of the Swedish or EU courts. Although, it is likely that the harmfulness of an object restriction can begin to be put in question where the aggregate market share of the parties is below 5 %. Consequently, there is a quantitative safe harbour for object restrictions, although the boundaries of its application are unclear.

It is clear from the case law from both the Swedish and the EU courts that there is a qualitative safe harbour as well. The boundaries of its application are likely not possible to define more precisely than to provide categories of agreements where the courts have found the restriction of competition to be qualitatively insignificant. Aside from the categories considered in this paper to fall outside the scope of the restriction of competition condition, the Swedish and EU courts have considered objectively ascertainable limitations on a restriction rendering its effects insignificant. Furthermore, the courts have considered whether there has been legislation controlling the behaviour of the undertakings.

The quantitative and qualitative safe harbours imply that when an agreement is quantitatively unappreciable, the qualitative nature of the agreement is irrelevant, and vice versa. Moreover, extending the reasoning de lege ferenda, the two aspects should be considered inter-dependent in such a way that a limited restriction, e.g. due to the fact that the restriction only affect one of several cost factors, would raise the quantitative threshold necessary to find an appreciable restriction of competition. Ultimately, the separate parts of the assessment forms part of an overall assessment with the purpose of preventing restrictions of competition for the benefit of society and consumers.

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