

Territorial restrictions: why and when are they harmful?

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GCLC Annual Conference, 31 January 2020

Summary

- What is special about the market integration objective?
- The market integration objective in practice

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What is special about the market integration objective?

- The essential goal of the EEC Treaty was to integrate the economies of its Member States
- The creation of a system of undistorted competition was part of this overall goal
 - In this sense, Articles 101 and 102 TFEU are a means to an end
 - By the same token, Articles 101 and 102 TFEU are effective insofar as they are said to contribute to the integration of Member States' economies

What is special about the market integration objective?

- As a consequence of this background, the EU competition law system differs analytically and substantively from others
 - Practices that would be considered unproblematic, or pro-competitive, in other systems are prima facie prohibited under Articles 101 and 102 TFEU]
 - This point has been clear from the early days (*Consten-Grundig* and *Societe Technique Miniere* are clear on this point)
 - For the same reasons, it is often claimed that EU competition law is at odds with mainstream economics
 - EU competition law would deter efficiency-enhancing conduct
 - Because it departs from mainstream economic principles, it would go against the very objective of market integration

What is special about the market integration objective?

- Practices that are in principle prima facie prohibited insofar as being at odds with market integration include:
 - Distribution agreements providing for absolute territorial protection ('airtight exclusive franchise'): e.g. *Consten-Grundig*
 - Distribution agreements providing export prohibitions ('passive sales' restrictions): e.g. *Sandoz*
 - Dual pricing strategies having an equivalent effect to an export prohibition: e.g. *Glaxo Spain*
 - **Online sales bans: e.g. *Pierre Fabre***
 - Unilateral strategies aimed at restricting distributors' ability
 - More generally, discrimination based on nationality: e.g. *United Brands*

What is special about the market integration objective?

‘[A]n agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article [101(1) TFEU] is designed to pursue this aim [...]’.

Joined Cases 56 and 58/64, *Consten-Grundig*

What is special about the market integration objective?

- Practices aimed at restricting cross-border trade are ***not*** subject to a ***per se*** rule; they can escape Articles 101 and 102 TFEU
 - It is possible for the firms involved in a practice to show that it is not liable to restrict competition (*Murphy*):
 - For instance, the parties may be able to show that an agreement is objectively necessary to enter a new market and thus falls outside the scope of Article 101(1) TFEU (*STM*)
 - More generally, it may be possible to show that the practice does not restrict competition that would otherwise have existed (*Coditel II*)
 - Even if the practice is caught by Article 101(1) TFEU, or prima facie abusive, it is always possible to come up with a justification

What is special about the market integration objective?

‘143. Also, FAPL and others and MPS have not put forward any circumstance falling within the economic and legal context of such clauses that would justify the finding that, despite the considerations set out in the preceding paragraph, those clauses are not liable to impair competition and therefore do not have an anticompetitive object’.

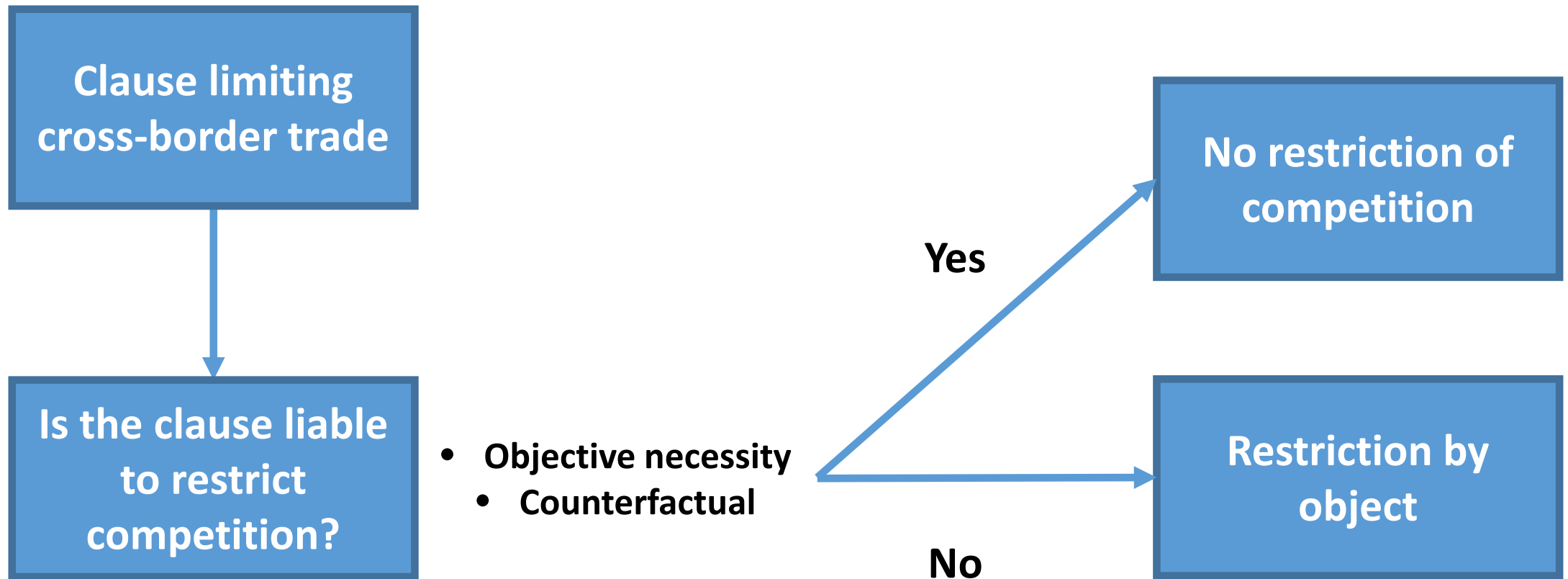
Joined Cases C-403/08 and C-429/08, *Murphy*

What is special about the market integration objective?

'61. [...] Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of Article 101(1) during the first two years that the distributor is selling the contract goods or services in that territory or to that customer group, even though such hardcore restrictions are in general presumed to fall within the scope of Article 101(1).'

Guidelines on vertical restraints

What is special about the market integration objective?



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The market integration objective in practice

How is a restriction by object established in market integration cases?

When does an agreement limiting parallel trade fall outside Article 101(1) TFEU?

The market integration objective in practice

- Even if uncontroversial in principle, the market integration objective can give rise to analytical difficulties in practice
- When market integration is at stake, the analysis of restrictions by object under Article 101(1) TFEU varies:
 - As a rule, the analysis focuses on the **object** of the practice (its objective aim or rationale)
 - When market integration is at stake, the analysis moves away from the object to focus on the **means** through which the object is achieved
 - Thus, even if the object of an agreement is pro-competitive, the agreement may be found to restrict competition by its very nature

The market integration objective in practice

- *Delimitis* is an example of the typical approach to the analysis of the object of an agreement:

‘11. [exclusive dealing] contracts entail for the supplier the advantage of guaranteed outlets, since [...] the reseller concentrates his sales efforts on the distribution of the contract goods [...]’

‘12. Beer supply agreements also have advantages for the reseller, [...] as they enable him to gain access under favourable conditions and with the guarantee of supplies [...]. The reseller's and supplier's shared interest in promoting sales of the contract goods likewise secures for the reseller the benefit of the supplier's assistance’

Case C-234/89, *Delimitis*

The market integration objective in practice

- *Asnef-Equifax* illustrates this approach well too:

'46. It is common ground that the essential object of credit information exchange systems, such as the register, is to make available to credit providers relevant information about existing or potential borrowers, in particular concerning the way in which they have previously honoured their debts. The nature of the information available may vary according to the type of system in use. [...].

47. Such registers [...] exist in numerous countries, increase the amount of information available to credit institutions on potential borrowers, reducing the disparity between creditor and debtor as regards the holding of information, thus making it easier for the lender to foresee the likelihood of repayment. In doing so, such registers are in principle capable of reducing the rate of borrower default and thus of improving the functioning of the supply of credit'.

Case C-238/05, *Asnef-Equifax*

The market integration objective in practice



The market integration objective in practice

- The fundamental question raised in *Ping* is whether the online sales ban amounted to a restriction by object
- This question gave rise to considerable confusion at the CMA and the Competition Appeal Tribunal (CAT) and Court of Appeal (CA) levels:
 - The CMA suggested that an agreement escapes the ‘by object’ qualification where it is objectively necessary to achieve its objectives
 - The CAT and the CA struggled with the identification of a rationale for the identification of ‘by object’ infringements
- The straightforward outcome of the case (online sales bans are at odds with the market integration objective) is never really discussed

The market integration objective in practice

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The market integration objective in practice

- The *Pay TV* case raises an issue that does not arise frequently in cross-border trade cases
 - The contested clauses in the case limited the ability to provide content outside the territory covered by the licence
 - The Commission argued that these clauses amounted to a restriction of competition by object
 - Unlike other cases, the passive sales that the agreement was said to restrict amounted to a copyright breach – they were unlawful
 - Is an unlawful transmission ‘competition’ for the purposes of competition law?
- In *Canal+* (Case T-873/16), the issue was never addressed...