Ontwikkelingen basisbeginselen mededingingsrecht

20/02/2024

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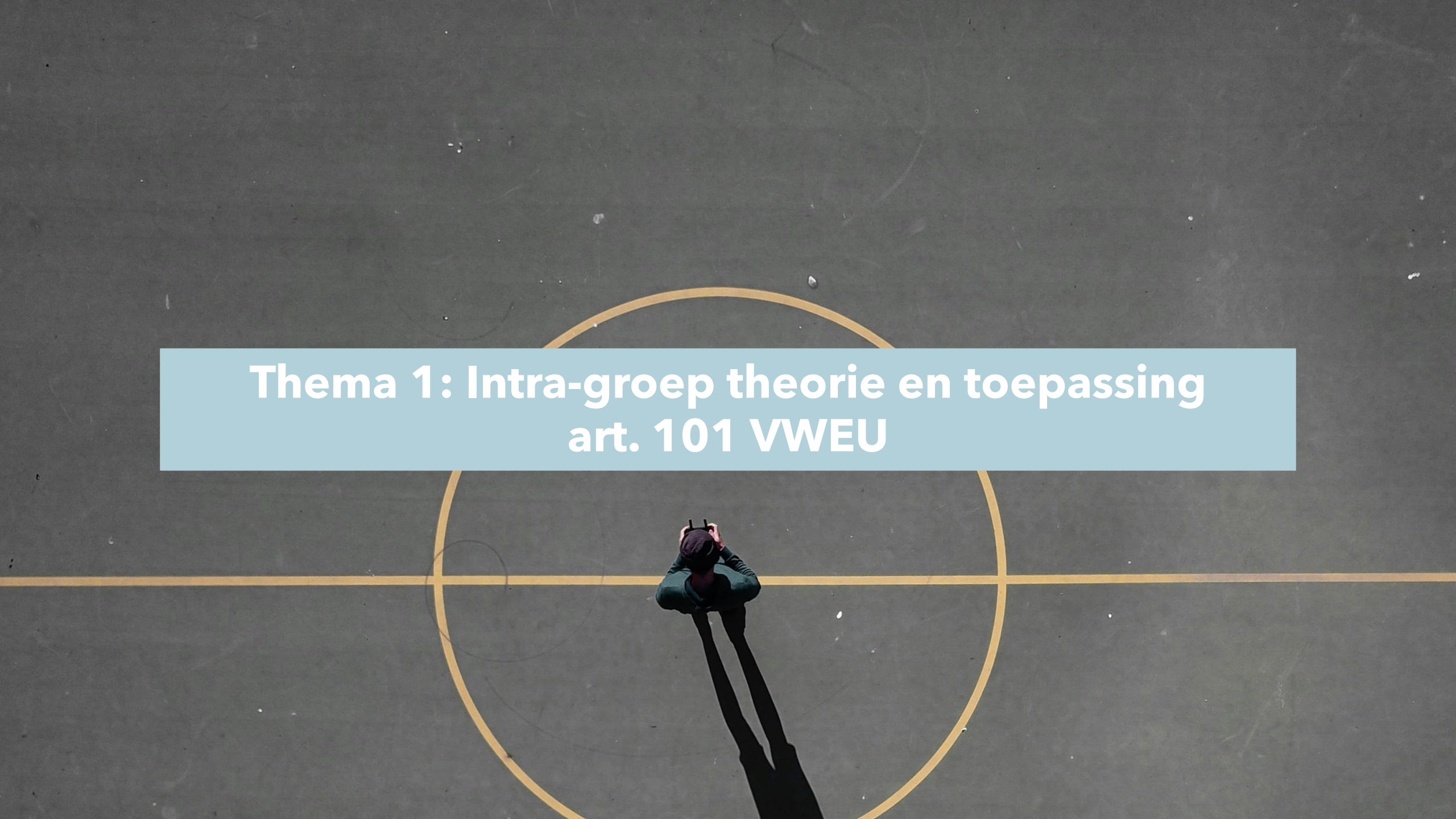
I.
Ondernemingsbegrip



Thema 1: Intra-groep theorie en toepassing art. 101 VWEU

Thema 1: Intra-groep theorie en toepassing art. 101 VWEU

- **Viho Europe/Commissie** (C-73/95 P)
- **Horizontale richtsnoeren** (§11)
- **Groepsvrijstellingen** (art. 1.2)

Viho Europe/Commissie (C-73/95 P)

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It should be noted, first of all, that it is established that Parker holds **100% of the shares** of its subsidiaries in Germany, Belgium, Spain, France and the Netherlands and that the **sales and marketing activities** of its subsidiaries are **directed** by an area team appointed by the parent company and which controls, in particular, sales tar gets, gross margins, sales costs, cash flow and stocks. The area team also lays down the range of products to be sold, monitors advertising and issues directives concerning prices and discounts.

Viho Europe/Commissie (C-73/95 P)

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Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company con trolling them (Case 48/69 *ICI v Commission* [1972] ECR 619, paragraphs 133 and 134; Case 15/74 *Centrafarm v Sterling Drug* [1974] ECR 1147, paragraph 41; Case 16/74 [1974] ECR 1183, paragraph 32; Case 30/87 *Bodson v Pompes Funebères* [1*Centrafarm v Winthrop* 988] ECR 2479, paragraph 19; and Case 66/86 *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803, paragraph 35).

Viho Europe/Commissie (C-73/95 P)

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In those circumstances, the fact that Parker's policy of referral, which consists essentially in dividing various national markets between its subsidiaries, **might produce effects outside the ambit of the Parker group which are capable of affecting the competitive position of third parties** cannot make Article 85(1) applicable, even when it is read in conjunction with Article 2 and Article 3(c) and (g) of the Treaty. On the other hand, such unilateral conduct could fall under Article 86 of the Treaty if the conditions for its application, as laid down in that article, were fulfilled.

FARES

Horizontale richtsnoeren (§11)

11. When a company exercises decisive influence over another company, they form a single economic entity and, hence, are part of the same undertaking (8). Companies that form part of the same undertaking are not considered to be competitors for the purposes of these Guidelines, even if they are both active on the same relevant product and geographic market(s).

(8) See, for example, judgment of 24 October 1996, Viho, C-73/95 P, EU:C:1996:405, paragraph 51. The exercise of decisive influence by the parent company over the conduct of a subsidiary can be presumed in the case of wholly-owned subsidiaries, or where the parent holds all the voting rights associated with its subsidiaries' shares; see, for example, judgment of 10 September 2009, Akzo, C-97/08 P, EU:C:2009:536, paragraphs 60 and further, judgment of 27 January 2021, The Goldman Sachs Group Inc v Commission, C-595/18 P, EU:C:2021:73, paragraph 36.

FAROS

Groepsvrijstellingen (art. 1.2)

Art. 1.2 R&D BER

For the purposes of this Regulation, the terms 'undertaking' and 'party' shall include their respective connected undertakings. 'Connected undertakings' means:

(1) undertakings in which a party to the research and development agreement, directly or indirectly, has one or more of the following rights or powers:

(a) the power to exercise more than half the voting rights;

(b) the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking;

(c) the right to manage the undertaking's affairs; (…)

Groepsvrijstellingen (art. 1.2)

(2) undertakings which directly or indirectly have, over a party to the research and development agreement, one or more of the rights or powers listed in point (1);

(3) undertakings in which an undertaking referred to in point (2) has, directly or indirectly, one or more of the rights or powers listed in point (1);

(4) undertakings in which a party to the research and development agreement together with one or more of the undertakings referred to in points (1), (2) or (3), or in which two or more of the latter undertakings, jointly have one or more of the rights or powers listed in point (1);

(5) undertakings in which one or more of the rights or powers listed in point (1) are jointly held by:

(a) parties to the research and development agreement or their respective connected undertakings referred to in points (1) to (4); or

(b) one or more of the parties to the research and development agreement or one or more of their connected undertakings referred to in points (1) to (4) and one or more third parties.

Vraag bij Thema 1:

Vormt art. 1.2 GVO de juiste test voor
de intra-groep theorie of is er meer nodig?

Thema 2: Intra-groep theorie en joint ventures

Thema 2: Intra-groep theorie en joint ventures

- **E.I. du Pont de Nemours** (C-172/12 P)
- **LG Electronics** (C-588/15 P)
- **Horizontale richtsnoeren** (§ 12-13)

E.I. du Pont de Nemours (C-172/12 P)

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Where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is **only for the purposes of establishing liability** for participation in the infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies **did in fact exercise** decisive influence over the joint venture, that those **three entities** can be considered to form a single economic unit and therefore **form a single undertaking** for the purposes of Article 81 EC.

FAROS

LG Electronics (C-588/15 P)

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It cannot but be held that the appellants have misread and taken out of context paragraph 47 of the judgment of 26 September 2013, *EI du Pont de Nemours* v *Commission* (C-172/12 P, not published, EU:C:2013:601), in which the Court of Justice affirmed that it is solely for the purposes of establishing liability for participation in the infringement of competition law that the Commission may conclude, from the effective exercise by two parent companies of a decisive influence over a joint venture, that there exists a single and common unit.

LG Electronics (C-588/15 P)

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The Court made this affirmation in order to respond to a different argument from that in the instant cases, as summarised in paragraph 36 of that judgment, according to which the circumstance that two companies independent of one another both exercise a decisive influence over a joint venture does not imply that they constitute, within the meaning of competition law, a single undertaking. When read in its original context, it appears that that affirmation merely sought to highlight the fact that the establishment of the existence of a joint venture, such as the Commission may be led to make in this context, is valid only as regards competition law and the relevant market for the infringement.

LG Electronics (C-588/15 P)

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The fact that a joint venture and its parent companies are considered **to form part of the same undertaking** for the purposes of establishing an infringement **on a certain market** does not prevent the two parent companies from being independent, within the meaning of Article 2(4) of Regulation No 139/2004, on all other markets.

Horizontale richtsnoeren (§12-13)

12. For the purpose of establishing liability for infringements of Article 101, the Court of Justice has held that parent companies and their joint venture form a single economic unit and, therefore, a single undertaking as regards competition law and the relevant market(s), in so far as it is demonstrated that the parent companies exercise decisive influence over the joint venture (9). In light of this case-law, the Commission will, in general, not apply Article 101 to agreements or concerted practices between parent companies and their joint venture to the extent that they concern conduct that occurs in relevant market(s) where the joint venture is active and in periods during which the parent companies exercise decisive influence over the joint venture. (…)

(9) Judgment of 26 September 2013, EI du Pont de Nemours and Company, C-172/12 P, EU:C:2013:601, paragraph 47 and judgment of 14 September 2017, LG Electronics Inc. and Koninklijke Philips Electronics NV, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraphs 71 and 76.

FARES

Horizontale richtsnoeren (§12-13)

However, the Commission will generally apply Article 101 to the following categories of agreements:

(a) agreements between parent companies to create a joint venture;

(b) agreements between parent companies to modify the scope of their joint venture;

(c) agreements between parent companies and their joint venture concerning products or geographies in which the joint venture is not active; and

(d) agreements between parent companies not involving their joint venture, even if the agreement concerns products or geographies in which the joint venture is active.

FAROS

Horizontale richtsnoeren (§12-13)

13. The fact that a joint venture and its parent companies are considered to form part of the same undertaking on a particular market does not preclude the parent companies from being considered as independent on other markets (10).

(10) Judgment of 14 September 2017, LG Electronics Inc. and Koninklijke Philips Electronics NV, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraph 79.

Vraag bij Thema 2:

Hoever reikt intra-groep theorie op niveau parent companies?
[Bijv: Akkoord 1 parent company
om actief te blijven op JV market]

Thema 3: Toerekenbaarheid van inbreuken en verband met intra-groep theorie

Thema 3: Toerekenbaarheid van inbreuken en verband met intra-groep theorie

- **Akzo** (C-97/08 P)

- **Ook: Arkema** (C-520/09 P, § 38-40)

- **The Goldman Sachs Group** (C-595/18 P)

Akzo (C-97/08 P)

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In the specific case of **a parent company holding 100% of the capital of a subsidiary** which has committed an infringement, there is **a simple presumption that the parent company exercises decisive influence** over the conduct of its subsidiary (see, to that effect, Case 107/82 *AEG[-Telefunken]* v *Commission* [1983] ECR 3151, paragraph 50, and PVC II , paragraph 59 above, paragraphs 961 and 984), and that they therefore constitute a single undertaking within the meaning of Article 81 EC (Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission* …, paragraph 59). It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; see also, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925 ('Stora'), paragraph 29).

FAROS

The Goldman Sachs Group (C-595/18 P)

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It is apparent, however, from the case-law cited in paragraphs 31 to 33 above that it is not the mere holding of all or virtually all the capital of the subsidiary in itself that gives rise to the presumption of the actual exercise of decisive influence, but **the degree of control of the parent company** over its subsidiary that this holding implies. Consequently, the General Court was entitled, without erring in law, to consider, in essence, in paragraph 50 of the judgment under appeal, that a parent company which holds **all the voting rights** associated with its subsidiary's shares is, in that regard, in a similar situation to that of a company holding all or virtually all the capital of the subsidiary, so that the parent company is able to determine the subsidiary's economic and commercial strategy. A parent company which holds all the voting rights associated with its subsidiary's shares is able, like a parent company holding all or virtually all the capital of its subsidiary, to exercise decisive influence over the conduct of the subsidiary.

FAROS

Vraag bij Thema 3:

- Tot wanneer speelt vermoeden? Quid indirecte 100%? Quid minder dan 100%
- Decisive influence → waarover? [Commercieel beleid? Inbreukmakend gedrag?]

Thema 4: Aanrekenbaarheid van veroorzaakte schade en verband met intra-groep theorie

Thema 4: Aanrekenbaarheid van veroorzaakte schade en verband met intra-groep theorie

- **Sumal/Mercedes Benz Trucks España** (C-882/19)

Sumal/Mercedes Benz Trucks España (C-882/19)

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It follows that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, **cannot have a different scope** with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared to actions for damages for infringement of EU competition rules (judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 47).

Sumal/Mercedes Benz Trucks España (C-882/19)

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It is thus clear from the case-law that the conduct of a subsidiary may be attributed to the parent company in particular where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially to the economic, organisational and legal links between those two legal entities, with the result that, in such a situation, they form part of **the same economic unit** and, hence, form one and the same undertaking responsible for the conduct that constitutes an infringement (see, to that effect, judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraphs 58 and 59, and of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraphs 52 and 53 and the case-law cited). Where it is established that the parent company and its subsidiary are part of the same economic unit and thus form a single undertaking, within the meaning of Article 101 TFEU, **it is therefore the very existence of that economic unit which committed the infringement** that decisively determines the liability of one or other of the companies making up that undertaking for the anticompetitive conduct of the latter.

FAROS

Sumal/Mercedes Benz Trucks España (C-882/19)

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On that basis, the concept of an ‘undertaking’ and, through it, that of ‘economic unit’ automatically entail the application of joint and several liability amongst the entities of which the economic unit is made up at the time that the infringement was committed (see, to that effect, as regards joint and several liability for fines, the judgments of 26 January 2017, *Villeroy & Boch v Commission*, C-625/13 P, EU:C:2017:52, paragraph 150, and of 25 November 2020, *Commission v GEA Group*, C-823/18 P, EU:C:2020:955, paragraphs 61 and the case-law cited).

Sumal/Mercedes Benz Trucks España (C-882/19)

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However, it is also appropriate to observe that the organisation of groups of companies that may constitute an economic unit **may be very different from one group to another**. There are, in particular, some groups of companies that are 'conglomerates', which are active in several economic fields having no connection between them.

Sumal/Mercedes Benz Trucks España (C-882/19)

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Therefore, the possibility for the victim of an anticompetitive practice of invoking, in the context of an action for damages, the liability of a subsidiary company rather than that of the parent company **cannot automatically be available against every subsidiary of a parent company** targeted in a decision of the Commission punishing conduct that amounts to an infringement. As the Advocate General observes, in essence, in point 58 of his Opinion, the concept of an 'undertaking' used in Article 101 TFEU is a functional concept, in that the economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue (see, to that effect, judgments of 12 July 1984,, 170/83, EU:C:1984:271, paragraph 11, and of 26 September 2013, T*Hydrotherm Gerätebau*he *Dow Chemical Company v Commission*, C-179/12 P, EU:C:2013:605, paragraph 57).

Sumal/Mercedes Benz Trucks España (C-882/19)

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Therefore, **the same parent company may be part of several economic units** made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies. If that were not the case, a subsidiary within such a group could be held liable for infringements committed in the context of economic activities **entirely unconnected to its own activity** and in which they were in no way involved, even indirectly.

FAROS

Sumal/Mercedes Benz Trucks España (C-882/19)

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It follows from all the foregoing that, in the context of an action for damages based on an infringement of Article 101 TFEU found by the Commission in a decision, a legal entity which is not designated in that decision as having committed the infringement of competition law may nevertheless be held liable on that basis due to conduct amounting to an infringement committed by another legal entity, where those two entities both form part of the same economic unit and thus constitute an undertaking which is the perpetrator of the infringement within the meaning of that Article 101 TFEU (see, to that effect, the judgments of 10 April 2014, *Commission v Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others v Commission*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 45, and of 26 January 2017, *Villeroy & Boch v Commission*, C-625/13 P, EU:C:2017:52, paragraph 145).

Sumal/Mercedes Benz Trucks España (C-882/19)

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The Court has already held that the joint and several liability which applies to the members of an economic unit justifies, inter alia, upholding the aggravating factor of repeated infringement as regards a parent company, even though that company was not the subject of earlier proceedings giving rise to a statement of objections and a decision. In such a situation, what is seen to matter is the earlier finding of a first infringement resulting from the conduct of a subsidiary with which the parent company involved in the second infringement already formed, at the time of the first infringement, a single undertaking for the purposes of Article 101 TFEU (judgment of 5 March 2015, *Commission and Others v Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 91).

FAROS

Sumal/Mercedes Benz Trucks España (C-882/19)

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Therefore, there is nothing to prevent, in principle, a victim of an anticompetitive practice from bringing an action for damages against one of the legal entities which make up an economic unit and thus the undertaking which, by infringing Article 101(1) TFEU, caused the harm suffered by that victim.

Sumal/Mercedes Benz Trucks España (C-882/19)

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Consequently, in circumstances where the existence of an infringement of Article 101(1) TFEU has been established as regards the parent company, it is possible for the victim of that infringement to seek to invoke the civil liability of a subsidiary of that parent company rather than that of the parent company, in accordance with the case-law cited in paragraph 42 of this judgment. The **liability** of that subsidiary **cannot however be invoked unless victim proves** – whether by relying on a decision adopted earlier by the Commission under Article 101 TFEU or by any other means, in particular where the Commission has remained silent on the point in that decision or has not yet been called upon to adopt a decision – that, having regard, **first**, to the economic, organisational and legal links referred to in paragraphs 43 and 47 of the present judgment and, **second**, to the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible, that subsidiary, together with its parent company, constituted an economic unit.

Sumal/Mercedes Benz Trucks España (C-882/19)

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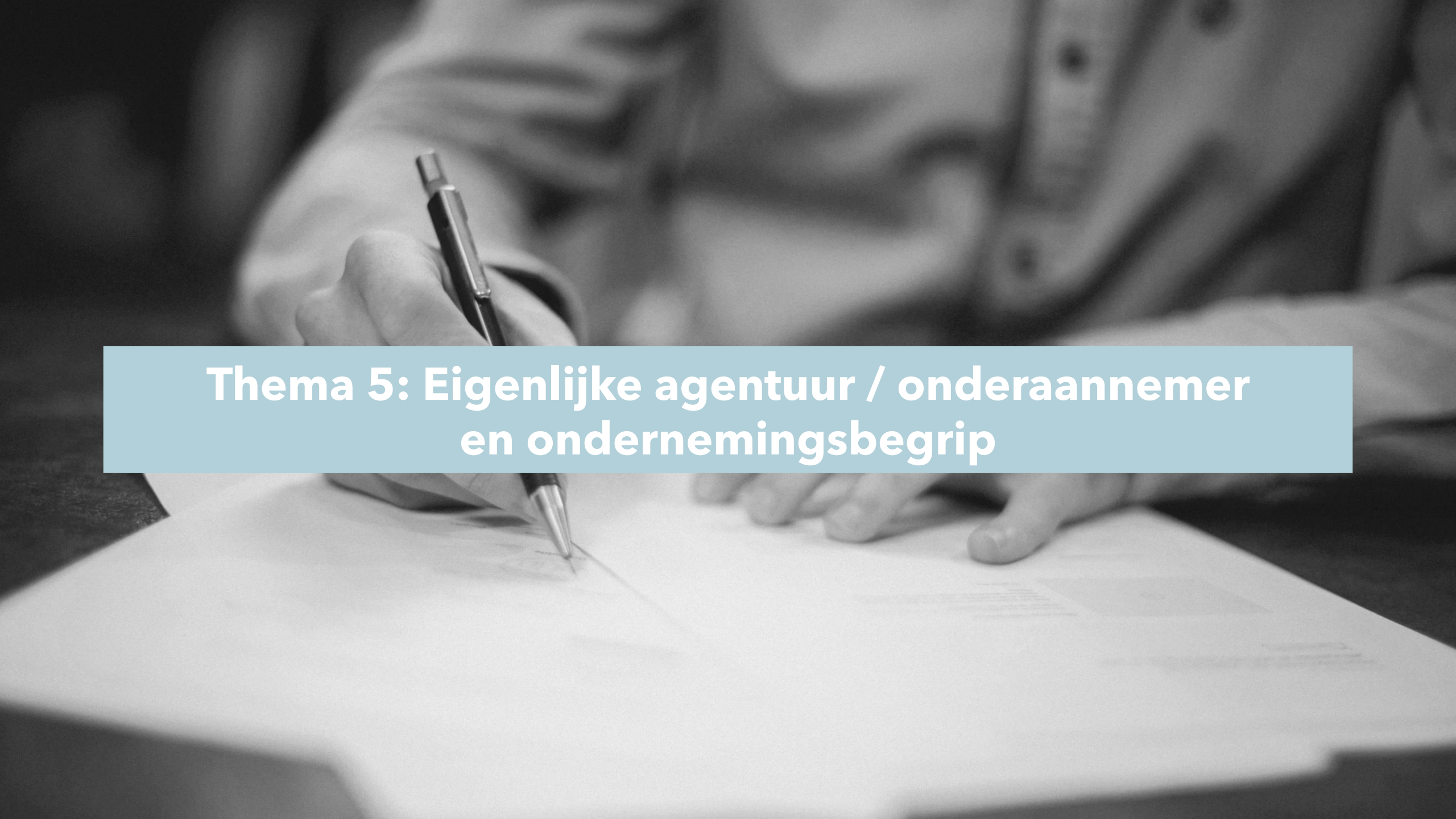
It follows from the foregoing considerations that such an action for damages brought against a subsidiary presupposes that the claimant must prove, in order for it to be found that the parent company and the subsidiary form an economic unit within the meaning of paragraphs 41 and 46 of this judgment, the links uniting those companies referred to in the preceding paragraph, as well as the specific link, referred to in the same paragraph, between the economic activity of that subsidiary company and the subject matter of the infringement for which the parent company has been held responsible. Thus, in circumstances such as those at issue in the main proceedings, the victim should in principle establish that **the anticompetitive agreement concluded by the parent company**, for which it has been punished, concerns the same products as those marketed by the subsidiary. In so doing, the victim shows that it is precisely the economic unit of which the subsidiary, together with its parent company, forms part that constitutes the undertaking which actually committed the infringement found earlier by the Commission pursuant to Article 101(1) TFEU, in accordance with the functional interpretation of the concept of 'undertaking' identified in paragraph 46 of this judgment.

FAROS

Vraag bij Thema 4:

Heeft deze zaak ruimere implicaties voor intra-groep theorie? Zijn er meerdere economic units binnen een groep?



Thema 5: Eigenlijke agentuur / onderaannemer en ondernemingsbegrip

Thema 5: Eigenlijke agentuur / onderaannemer en ondernemingsbegrip

- **Verticale richtsnoeren**

- **Bekendmaking 1978**

Vraag bij Thema 5:

Op welke basis wordt de niet-toepasselijkheid van verbod art. 101 VWEU gerechtvaardigd?

II.
Inbreuken naar strekking

Thema 6: ‘By object’ restrictions

Thema 6: ‘By object’ restrictions

- **Cartes Bancaires (C-67/13 P) + Opinion AG Wahl**
- **Budapest Bank (C-288/18) + Opinion AG Bobek**
- **Generics UK (C-307/18) + Opinion AG Kokott**
- **Super Bock (C-211/22)**
- **Superleague (C-333/21)**
- **Horizontale Richtsnoeren (§22-29)**

Horizontale richtsnoeren (§22-29)

22. Certain types of cooperation between undertakings can be regarded, by their very nature, as being harmful tothe proper functioning of normal competition (24). In such cases, it is not necessary to examine the actual orpotential effects of the behaviour on the market, once its anti-competitive object has been established (25).

(24) See, for example, judgment of 11 September 2014, CB v Commission, C-67/13 P, EU:C:2014:2204, paragraphs 49-50.

(25) See, for example, judgment of 6 October 2009, GlaxoSmithKline, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU: C:2009:610, paragraph 55; judgment of 20 November 2008, BIDS, C-209/07, EU:C:2008:643, paragraph 16; judgment of 4 June 2009, T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343, paragraph 29 and further; judgment of 28 May 1998, John Deere, C-7/95 P, EU:C:1998:256, paragraph 77.

FAROS

Horizontale richtsnoeren (§22-29)

23. The concept of restrictions of competition 'by object' is to be interpreted strictly and can only be applied to certain agreements between undertakings which reveal, in themselves and having regard to the content of their provisions, their objectives and the economic and legal context of which they form part, a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects (26).

(26) Judgment of 30 January 2020, Generics (UK) Ltd and Others, C-307/18, EU:C:2020:52, paragraph 67 and the case-law cited therein

FAROS

Horizontale richtsnoeren (§22-29)

24. According to the case-law, restrictions can be categorised as restrictions 'by object' on the basis of sufficiently reliable and robust experience for the view to be taken that the agreement in question is, by its very nature, harmful to the proper functioning of competition (27), or on the basis of the specific characteristics of the agreement, from which it is possible to infer its particular harmfulness for competition, where appropriate as a result of a detailed analysis of the agreement, its objectives and its economic and legal context (28).

(27) Judgment of 2 April 2020, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, C-228/18, EU:C:2020:265, paragraphs 76 and 79.

(28) See judgment of 25 March 2021, Lundbeck, C-591/16 P, EU:C:2021:243, paragraphs 130-131, and judgment of 25 March 2021, Sun v Commission, C-586/16 P, EU:C:2021:241, paragraph 86. The fact that the Commission has not previously considered that an agreement similar to the agreement in question was restrictive 'by object' does not, in itself, prevent it from doing so in the future.

FAROS

Horizontale richtsnoeren (§22-29)

25. To establish a restriction 'by object', there does not need to be a direct link between the agreement and consumer prices (29). Article 101 is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such (30).

26. In order to assess whether an agreement has an anti-competitive object (31), the following elements are taken into account:

(a) the content of the agreement,

(b) the objectives it seeks to attain, and

(c) the economic and legal context of which it forms part.

FAROS

Horizontale richtsnoeren (§22-29)

27. When assessing that legal and economic context, it is also necessary to take into consideration (32):

(a) the nature of the goods or services affected, and

(b) the real conditions of the functioning and structure of the market or markets in question (33)

Horizontale richtsnoeren (§22-29)

28. Where the parties raise the possible pro-competitive effects of an agreement, those effects must be duly taken into account as elements of context for the purposes of categorising the agreement as a restriction by object, in so far as they are capable of calling into question the overall assessment of whether the agreement is sufficiently harmful to competition (34). However, for these purposes, such pro-competitive effects should not only be demonstrated and relevant, but also specifically related to the agreement concerned and sufficiently significant (35).

29. The intention of the parties is not a necessary factor in determining whether an agreement has an anticompetitive object, but it may be taken into account (36).

FAROS

Vraag bij Thema 6:

- Wat is de ‘experience’ die vereist is?
[Zie Wahl, CB, § 79]
- Wat is de implicatie van vereiste tot strikte interpretatie?

Vraag bij Thema 6:

Hoe ver moet je in de context duiken?

Cartes Bancaires (C-67/13 P): Opinion AG Wahl

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To illustrate my remarks, I would refer to the example of an infringement which, in the light of experience, is presumed to cause one of the most serious restrictions of competition, namely a horizontal agreement concerning the price of certain goods. Whilst it is established that in general such a restrictive agreement is highly harmful for competition, that conclusion is not inevitable where, for example, the undertakings concerned hold only a tiny share of the market concerned.

Vraag bij Thema 6:

Wat is het verschil tussen nagestreefde doelstellingen en subjectieve intentie?

Vraag bij Thema 6:

Laten Superleague en ISU
de “mogelijke concurrentiebevorderende
gevolgen” uitweg open?

Superleague (C-333/21)

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Lastly, the taking into consideration of all of the aspects referred to in the three preceding paragraphs of the present judgment must, at any rate, show the precise reasons why the conduct in question reveals a sufficient degree of harm to competition such as to justify a finding that it has as its object the prevention, restriction or distortion of competition (see, to that effect, judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 69).

FAROS

Thema 7: Hardekernbeperkingen

Thema 7: Verband met hardekernbeperkingen

- **Super Bock (C-211/22)**

Super Bock (C-211/22)

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It follows from that case-law that, in order to determine whether a vertical agreement fixing minimum resale prices involves the 'restriction of competition by object', within the meaning of Article 101(1) TFEU, it is for the referring court to ascertain whether that agreement presents a **sufficient degree of harm for competition** in the light of the criteria recalled in paragraphs 35 and 36 of this judgment.

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When it makes that assessment, the referring court must also take into account the fact, which it has itself pointed to, that a vertical agreement fixing minimum resale prices may fall within the category of **'hardcore restrictions'** for the purposes of Article 4(a) of Regulations Nos 2790/1999 and 330/2010, **as an element of the legal context**.

Super Bock (C-211/22)

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However, if it does so, that does not exempt the referring court from carrying out the assessment referred to in paragraph 37 of this judgment.

Super Bock (C-211/22)

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The sole purpose of Article 4(a) of Regulation No 2790/1999 read in the light of recital 10 thereof, and Article 4(a) of Regulation No 330/2010, read in the light of recital 10 thereof, is to exclude certain vertical restrictions from the scope of a block exemption. That exemption, set out in Article 2 of each of those regulations, read in the light of their respective recital 5, benefits vertical agreements deemed not to be harmful to competition.

Super Bock (C-211/22)

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By contrast, those provisions of Regulations Nos 2790/1999 and 330/2010 do not contain an indication as to whether those restrictions must be categorised as a restriction 'by object' or 'by effect'. Furthermore, as the Commission observed in its written observations before the Court, the concepts of 'hardcore restrictions' and of 'restriction by object' are not conceptually interchangeable and do not necessary overlap. It is therefore necessary to examine restrictions falling outside that exemption, on a case by case basis, with regard to Article 101(1) TFEU.

Verticale Richtsnoeren (§180)

180. However, hardcore restrictions do not necessarily fall within the scope of Article 101(1) of the Treaty. If a hardcore restriction listed in Article 4 of Regulation (EU) 2022/720 is objectively necessary for the implementation of a particular vertical agreement, for instance, to ensure compliance with a public ban on selling dangerous substances to certain customers for reasons of safety or health, that agreement exceptionally falls outside the scope of Article 101(1) of the Treaty. It follows from the above that the Commission will apply the following principles when assessing a vertical agreement:

(a) where a hardcore restriction within the meaning of Article 4 of Regulation (EU) 2022/720 is included in a vertical agreement, that agreement is likely to fall within the scope of Article 101(1) of the Treaty.

(b) an agreement that includes a hardcore restriction within the meaning of Article 4 of Regulation (EU) 2022/720 is unlikely to fulfil the conditions of Article 101(3) of the Treaty.

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Vraag bij Thema 7:

Hoe moet verhouding hardekern/by object precies gezien worden?

Thema 8: Verticale prijsbinding

Thema 8: Toepassing op verticale prijsbinding

- **Verticale Richtsnoeren (§ 196)**

Verticale Richtsnoeren (§196)

196. RPM can restrict intra-brand and/or inter-brand competition in various ways:

(a) RPM may facilitate collusion between suppliers, by enhancing price transparency in the market, thereby making it easier to detect whether a supplier is deviating from the collusive equilibrium by cutting its price. This negative effect is more likely in markets prone to collusive outcomes, for example, where suppliers form a tight oligopoly and a significant share of the market is covered by RPM agreements;

(b) RPM may facilitate collusion between buyers at the distribution level, in particular where it is driven by the buyers. Strong or well organised buyers may be able to force or convince one or more of their suppliers to fix their resale price above the competitive level, thereby helping the buyers reach or stabilise a collusive equilibrium. RPM serves as a commitment device for retailers not to deviate from the collusive equilibrium through discounting prices;

(c) in some cases, RPM may also soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them; (…)

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Verticale Richtsnoeren (§196)

(d) RPM may reduce the pressure on the supplier's margin, in particular where a manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors. In that situation, the manufacturer may prefer to agree to RPM, to help it to commit not to lower the price for subsequent distributors, and to reduce the pressure on its own margin;

(e) by preventing price competition between distributors, RPM may prevent or hinder the entry and expansion of new or more efficient distribution formats, thus reducing innovation at the distribution level;

(f) RPM may be implemented by a supplier with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors may incentivise them to favour the supplier's brand over rival brands when advising customers, even where such advice is not in the customer's interest, or not to sell the rival brands at all;

(g) the direct effect of RPM is the elimination of intra-brand price competition, by preventing some or all distributors from lowering their sale price for the brand concerned, thus resulting in a price increase for that brand.

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Vraag bij Thema 8:

Laten deze theories of harm toe om te stellen dat een kwalificatie als verticale prijsbinding volstaat voor kwalificatie als ‘by object’?

III. Uitwijkingsmogelijkheden

Thema 9: Uitwijkingsmogelijkheden

- **Overheidsdwang**
- **Objectieve rechtvaardiging**
- **Nevenrestricties**

MasterCard (C-382/12 P)

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It is apparent from the case-law of the Court of Justice that if a given operation or activity is not covered by the prohibition rule laid down in Article 81(1) EC, owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other (see to that effect, in particular, judgments in *Remia and Others v Commission*, 42/84, EU:C:1985:327, paragraphs 19 and 20; *Pronuptia de Paris*, 161/84, EU:C:1986:41, paragraphs 15 to 17; *DLG*, C-250/92, EU:C:1994:413, paragraph 35, and *Oude Luttikhuis and Others*, C-399/93, EU:C:1995:434, paragraphs 12 to 15).

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MasterCard (C-382/12 P)

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Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article 81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 81(1) EC.

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Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in Article 81(1) EC because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 81(1) EC.

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However, that interpretation does not mean that there has been an amalgamation of, on the one hand, the conditions laid down by the case-law for the classification – for the purposes of the application of Article 81(1) EC – of a restriction as ancillary, and, on the other hand, the criterion of the indispensability required under Article 81(3) EC in order for a prohibited restriction to be exempted.

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In that regard, suffice it to note that those two provisions have different objectives and that the latter criterion relates to the issue whether coordination between undertakings that is liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of the goods or services, which is therefore covered by the prohibition rule laid down in Article 81(1) EC, can none the less, in the context of Article 81(3) EC, be considered indispensable to the improvement of production or distribution or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits. By contrast, as is apparent from paragraphs 89 and 90 of the present judgment, the objective necessity test referred to in those paragraphs concerns the question whether, in the absence of a given restriction of commercial autonomy, a main operation or activity which is not caught by the prohibition laid down in Article 81(1) EC and to which that restriction is secondary, is likely not to be implemented or not to proceed.

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Vraag bij Thema 9:

Wat is de hoofdtransactie? Houd je rekening met mededingingsbeperkende clausules of enkel de kerntransactie?

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