Illegality of Contracts: A Critical Analysis of Agreements in Breach of Articles 101 and 102 of the Treaty on the Functioning of the European Union

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SUMMARY

This research paper is the result of an effort to critically evaluate the position of the European Union competition law on the legality of an agreement which contravenes Articles 101 and 102 of the Treaty for the Functioning of the European Union (TFEU). It is within the ambit of this article to analyse the elements of the provisions of Articles 101 and 102 of the TFEU and also to inquire whether agreements in breach of these provisions MUST, in accordance with Article 101(2) of the TFEU, be pronounced void and if not, whether there is other ancillary legal relief that can apply on the face of such infringing agreements. In this research paper, the litmus test of illegality is viewed from the common law perspective, though a more uniform outlook and balance will be achieved by drawing arguments and conclusions from European Union case law and legal literature.

1 INTRODUCTION

This research paper is a product of the interface between the concept of illegality of contracts and agreements under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (Formerly Articles 81 and 82 of the EC Competition Law). It is a matter of common knowledge that certain agreements, conducts and business initiatives of firms within a market place distort competition in the common and relevant markets to the detriment of consumers. These agreements are the reason for the enactment of Articles 101 and 102 of the TFEU. It has been held by K. J. Ceres[1] that consumer welfare standards have been widely discussed as the fundamental objective of competition law. Hence, the whole essence of this research will be to critically analyse the illegality status of agreements in breach of Articles 101 and 102 of the TFEU which are incompatible with workable competition in the common market and thereby affect consumer welfare.

The need to sanction illegal agreements started in the United State of America by the enactment of the Sherman Act of 1890.[2] This Act was a response to the vast agglomeration of a number of sectors of American industries.[3] Thus, large corporations used trusts to conceal the nature of their business arrangements. Large trusts became synonymous with large monopolies. The perceived corporations used all sorts of anti-competitive arrangements to divide up the markets; the advent of anti-trust legislation (Sherman Act 1890) was a device in order to tackle the anti-competitive activities of cheating trusts.

Section 1 of the Sherman Act 1890 provides that 'every contract combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared illegal'.[4]

However, it was not until the EC treaty of Rome in 1958 that European community competition law was born. It will be instructive to note that at the time of entry into force of the EC treaty in 1958, only one Member State, Germany, had a comprehensive competition law on their statute book.[5]

The European Community (now European Union) saw healthy competition as an essential element in the creation of a common market and achieving market integration. They also deemed it wise to sanction any illegal agreements or contracts that would distort competition, hinder free movement of goods, persons and services as being void and inapplicable.

This research, evaluates the status and effect of illegal agreements, their extents and limitations, and finally offering suggestions and raising questions on how to manage agreements that fall short of promoting healthy competition within the European common market. It will be germane to note that in this research 'contracts' and 'agreements' are used interchangeably.

2 DEFINITION OF CONCEPTS

The provisions of Articles 101 and 102 TFEU will be without proper ventilation if illegal/offending agreements cannot be decisively dealt with one way or the other within a uniform and lucid framework.[6] It is also desirable to decipher the

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[1] The Competition Law Review 3(2), 1 (Mar. 2007). It has also been put forward that the only legitimated goal of antitrust or competition law is the maximization of consumer welfare. *See* R. Bork, *The Antitrust Paradox* 51 (2d ed., Free Press, New York 1993).

[2] The Sherman Act of 1890 remains in force till today. The Act was passed in the context of major changes to the American economy in the late nineteenth century with the growth of large corporations, which began to have an important influence on significant parts of the American economy. *See* Cosmos Graham, *EU and UK Competition Law* 4 (Longman 2010).

[3] The activities of large corporations or trusts were politically highly controversial and pressure was placed on the US Congress to produce a Federal Law to regulate their activities. *See* Cosmos Graham, *supra* n. 2, at 5.

[4] Sherman Act.

[5] Competition law did not have a great start in Europe due to the fact that it is seen as an outshoot of economics. Competition lawyers now regularly work together in complex cases with economists who specialize in matters such as market definition, the determination of market power and the analysis of particular types of business behaviour. *See* Richard Whish, *Competition Law* 2 (5th ed., Butterworth 2005).

[6] This research paper will be predicated on the issues of evaluation of the pros and cons of contracts which offend the provisions of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The research will also analyse properly the other connotations and issues that readily beg for critical articulation when applying the doctrine of illegality of contracts to agreements under the provisions of

meanings and connotations of common concepts that will be recurring in this research paper in order to aid proper understanding of the subject matter of the discussion. Some of the key concepts are as follows:

2.1 Competition

Competition is an act of rivalry between or among firms struggling for the soul of market power. Richard Whish[7] defined competition as:

> A struggle or contention of superiority and in the commercial world this means a striving for the custom and business of people in the market place.

The above definition, found voice in the ***Metro* case**[8] where the European Court held that:

> The requirement in articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition that is to say the degree of competition necessary to ensure the observance of the basic requirements and attainment of the objectives of the treaty … in particular the creation of a single market achieving conditions similar to those of a domestic market.

Competition law and competition policy are always used interchangeably,[9] competition policy describes the way in which governments or other supranational organizations take measures to promote competitive market structures and behaviour, thus competition policies normally encompass competition law.[10]

2.2 Illegality

Illegality, on the other hand, means doing an act which is in breach of the law. In the law of contract, the term 'illegal' is wide and imprecise. It embraces illegal contracts strictly so called, void contracts, contracts rendered illegal or void by statutes or common law etc.

K. Zweigert and Kotzwere are of the opinion that:

> The question what makes a contract immoral or illegal is one which receives different answers in the various systems. The emphasis differs since ethics differ from country and traditional value judgment still play an important role.[11]

For the purposes of this research, the definition will be restricted to the EU statutory perspective, with bias on how it affects Articles 101 and 102 of the TFEU. It has been held that the true test of legality is whether the restraint imposed is such to merely regulate and perhaps thereby promote competition or whether it is such as may suppress or even destroy competition.[12]

Where a statute, like Articles 101 and 102 prohibit the making or performance of an agreement, the breach of the statute makes any such agreement illegal.[13] This view was applied in the case of *Beguelin Import v. GL Import and Export*,[14] where it was held that agreements which have as their object or effect an impediment to competition contravened Article 81(1) (now 101(1)) of the TFEU and were thus illegal.

3 Article 101 TFEU and void agreements

Article 101 of the TFEU is one of the cornerstones of the EC competition law. It was formerly known and cited as Article 85 EC until the Amsterdam Treaty which entered into force in 1999 renumbered it as Article 81 EC Competition Law. It will be germane to note that this article underwent another metamorphosis in numbering again on 1 December 2009 when the Lisbon Treaty renumbered it as Article 101 of the Treaty on the Functioning of the European Union **(TFEU).** But the point remains that the article is still the same in the substance of its provision, nothing changes except the mere numerical numbering. Article 101 provides that[15]

> 1. The following shall be prohibited as incompatible with the common market; all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market and in particular those which:
>
> directly or indirectly fix, purchase or selling prices or any other trading conditions;
>
> limit or control production, markets, technical development or investment;
>
> share market or sources of supply;
>
> apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.
>
> 2. Any agreement or decision prohibited pursuant to this article shall be automatically void.
>
> 3. The provisions of paragraph 1 may however be declared inapplicable in the case of:
>
> – any agreement or category of agreements between undertakings;
>
> – any decision or category of decisions by associations of undertakings;
>
> – any concerted practice or category of concerted practices which contributes to improving production or distribution of goods or to promoting technical or economic

EC competition law. All these issues together are at the heart of the subject matter of this research.

[7] Richard Whish, *supra* n. 5, at 2.

[8] *Metro-SB-Gross Markte GMBH and co.kg v. Commission* (1977) ECR, I875.

[9] It has been argued that competition policy must therefore act on a number of fronts at the same time: firstly, it must enforce competition law whenever there is a harmful effect on Europe's citizens or businesses; but secondly, it must ensure that the regulatory environment fosters competitive markets. *See* P. Lowe, 'The Design of Competition Policy Institutions for the twenty-first Century – the Experience of the European Commission and DG Competition', Pol'y (2014) Newsl. 1, 6.

[10] Alison Jones & Brenda Sufrin, *EU Competition Law* 2 (4th ed., Oxford University Press 2008).

[11] An Introduction to Comparative Law (3d ed. 1998), at 382.

[12] *See Chicago Board of Trade v. United States* 246 US 231(1918).

[13] Trietel, The Law Of Contract (12th ed., Sweet & Maxwell 2007), at 472.

[14] 1971, ECR 949, I972 CMLR 81.

[15] EC Treaty of 1958, now Treaty for the Functioning of the European Union. Art. 101 has many grey aspects that need elaborate definitions and analysis. The meaning of undertaking and the terms agreements, decisions, and concerted practice tend to acquire *sui generis* meaning under EU competition law. *See* Richard Whish, *Competition Law* 80 (Butterworth 2007).

progress while allowing consumers a fair share of the resulting benefits and which does not:

(a) impose on the undertaking concerned restrictions which are not indispensable to the attainment of those objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101 provisions strike at cartels and operate to curtail the dangerous threat cartels can pose in the competitive market. They prohibit agreements between undertakings which may affect inter-state trade and which aim at disruption of healthy competition within the common market.[16]

The following are some of the key terms (words) used in the Article 101 provisions.

3.1 Agreement

Robert Lane[17] writes that:

> The term agreement requires, as with much of the community terminology its own autonomous meaning independent of national law and the proper law of a contract is irrelevant to the formation of an agreement for the purpose of Article 81.

Thus, in *ACF Chemifarima v. Commission*[18] it was held that an unsigned gentlemen's agreement fell within Article 101 prohibition. The concept of agreement in Article 101 is therefore *sui generis*, it is shaped to contain diverse complex economic/contractual arrangements that may defile the economic intentions of the European community.

In the *Polypropylene's* case,[19] the Commission was of the view that:

> an agreement that took the form of several oral, non-binding arrangements for which there were no enforceable sanctions formed a single agreement infringing Article 101.

Thus, the concept of agreement within the meaning of Article 101(1) of the TFEU, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.[20]

3.2 Undertaking

This concept is unique in European Union competition law. It falls outside the purview of the concept of legal personality in company and commercial law. Stephen Hurley and Adam Scott argued that 'the term undertaking should be considered as an economic concept rather than a legal one'.[21] It has been held in the case of *AOIP v. Beyrard*[22] that the concept of undertaking is not a legal concept that conforms to the strict compartmentalization of the national law; an individual, partnership, cooperatives and other forms of private sector organization can be categorized as an undertaking.

The concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way it is financed.[23]

The reason for this broad interpretation, according to A.-G. Warner, is not to 'divorce the law from reality.'[24]

3.3 Concerted Practice

Richard Whish, while discussing this phrase, said that:

> While it can readily be appreciated that loose, informal understandings to limit competition must be prevented as agreements, it is difficult both to define the type or degree of co-ordination within the mischief of the law and to apply that rule to the facts of any case.[25]

Concerted practice can take any form of uncoordinated or coordinated activities, as long as it distorts competition, it is sanctioned. In the case of ***ICI v. Commission***,[26] the court held that concerted practice means:

> A form of co-ordination between undertakings which without having reached the stage where an agreement properly so called has been concluded knowingly substitute's practical co-operation between them for the risk of competition.

3.4 Restriction of Competition

For a breach of competition to be within this phrase, the undertaking whose conduct is to be sanctioned must have a market power and a market share above the necessary threshold, and their activities must also appreciably affect or distort competition among Member States in the common market.[27] It has been held in *Volk v. Vervaecke*[28] that an agreement falls outside the prohibition in Article 101 TFEU when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question.[29]

4 Article 102 TFEU and Void Agreements

This article shares the same history with Article 101. Article 102 provides that:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may in particular consist in:
>
> directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> limiting production, markets or technical development to the prejudice of consumers;

[16] Agreements in breach of this prohibition are declared automatically void under Art. 101(2) of the TFEU, but the prohibition may be declared inapplicable under Art. 101(3) if certain conditions are met.

[17] EC Competition Law (Pearson Education Ltd 2000), at 51.

[18] (1970) ECR 661.

[19] (1988) 4 CMLR, 347.

[20] T-41/96 *Bayer AG v. Commission* [2000] ECR 11–3383, para. 69.

[21] Competition L. J. 7(4), 2008, at 312. It can be gathered from the definition of undertaking that the legal status of the entity is not relevant. Thus individuals may be an undertaking.

[22] European Commission decision 76/29 [1976] 1 CMLR D14 (Opera Singers).

[23] *Hofner and Elsner v. Macroton Gmbh* (1999) ECR 1-1979.

[24] Commercial Solvent's Case (91974) ECR, 223.

[25] (5th ed., Oxford Press 2005), at 99.

[26] (1972) ECR, 619.

[27] Cosmos Graham, *supra* n. 2, at 60.

[28] Case5/69 *Volk v. Vervaecke* [1969] ECR 295.

[29] If agreements contain restraints such as price fixing, limiting output, etc, then there will be a conclusion that the said agreement will not escape Art. 101 of the TFEU. Cosmos Graham, *supra* n. 2, at 82.

applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a comparative disadvantage;

making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

This article is fashioned to curb the excesses of monopolies, oligopolies, mergers, takeovers, and other undertakings in a dominant position, which abuse such dominance.[30] Article 102 contains some elements/terms which cannot always be considered separately from one another, thus in considering whether or not an undertaking has committed an abuse of its dominant position, all the elements in the provision of Article 102 must be present and operative.[31] Some key terms in this article are the following:

4.1 Abuse of Dominance

It will be worthwhile to start with the definition of dominance. F. Dethmers and NinetteDodoo[32] are of the view that:

Dominance is potentially confusing as it encompasses firms with strong positions, whether stemming from superior performance or quality or due to structural absence of competition.

Dominance is often measured by the market share and power that the undertaking in issue possesses. It has been held in ***AKZO v. Commission*** that a market share above 40–50% in the relevant market indicates a dominant position.[33] It follows that an undertaking with an appreciable market share and power can abuse its dominant position, if it is in a position of economic strength, which enables it to prevent effective competition being maintained on the relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately consumers.[34]

In the celebrated *Microsoft* case[35] the court held that Microsoft had abused its dominant position. The reason for this is that:

Microsoft shielded itself from effective competition from vendors of potentially more efficient media players who could challenge its position, and thus reduces the talent and capital invested in the innovation of media players.

Microsoft was able to do this because of the large chunk of market power and share it commands in the relevant market.

The types of business arrangement envisaged under Article 102 TFEU are:

4.2 Monopoly/Oligopoly

Monopoly situations arise when an undertaking is in a position to affect the market price independently.[36] A monopolist is able to achieve this because the monopolist is responsible for all the output, and it is the aggregate output that determines price through the relationship of supply and demand. This situation always brings about inefficiency in the allocation of resources, since society's resources are not distributed in the most efficient way possible.[37] Monopoly can come about by simple absolute market dominance or by virtue of statutory privilege, but the fact remains that it enjoys a market strength/power which results in unilateral conduct that is not bound by the rules of competitive forces.

Article 102 though does not ban monopoly but outlaws as illegal abusive conducts/agreements that come with monopolistic dominance.

Oligopoly is a market situation where a small number of producers or suppliers, none of them having a monopoly, but between or amongst them may exhibit some of the characteristics thereof. An oligopolistic market is anti-competitive, their agreements are illegal and it is generally an inefficient market.[38]

5 Categories of illegal agreements

Illegal agreements under Articles 101 and 102 of TFEU are enumerated into different categories in the duo provisions. Some of them are the following:

5.1 Price Fixing and Market Sharing

This problem has always been the Achilles heel of commercial practices. Adam Smith in his Book 'Wealth of Nations' observed that:

People of the same trade seldom meet together, even for merriment and diversion but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.[39]

Price fixing can be 'direct' by way of agreement over which prices to charge, or 'indirect' by way of exchange of information with the expectation that this will influence pricing policies so that there is no significant difference between undertakings.[40]

Pricing practices are relevant to every company including dominant companies; they need to have a pricing policy and to know what the constraints on that policy may be.[41]

Market sharing on the other hand is put in place in order for an anti-competitive cartel to work properly and this is done on a customer or geographical basis.[42]

In the case of *ICI v. Commission*,[43] the commission held that ten major producers of dye stuffs who held 80% of the market shares were in breach of Article 81(1) of the EC when

[30] Cosmos Graham writes that '… one of purposes of the Art. 102 TFEU was to try and ensure that dominant companies could not partition the common market along national lines'. Cosmos Graham, *supra* n. 2, at 118.

[31] T. Eilsmansberger, *Dominance – The lost Child? How the Effects-Based Rules Could and Should Change Dominance Analysis*, 2 Eur. L. J. 15 (2006).

[32] European Competition Law Review 2710), 537 (Sweet and Maxwell 2006).

[33] (1991) ECR 1-3359.

[34] *United Brand v. Commission*, 1978, ECR, 207.

[35] *Microsoft v. Commission* (2007) EUECJ, T-20/O4.

[36] Art. 102 is designed to deal with monopoly and market power. It focuses not on agreements between undertakings but on the unilateral behaviour of undertakings which hold a dominant position. Alison Jones & Brenda Sufrin, *supra* n. 10, at 259–260.

[37] Richard Whish, *supra* n. 5, at 5.

[38] It has been held while describing oligopoly in the *Irish Sugar Plc v. Commission* Case T-228/97, [1999] ECR 11-2969, that an individual undertaking could engage in conduct which constitutes an abuse of its dominant position held collectively with one or more undertakings.

[39] Adam Smith 1776.

[40] Cosmos Graham, *supra* n. 2, at 356.

[41] Robert O'Donoghue, *European Competition Law Annual* 371 (Hart Publishing 2003).

[42] And *see* OFT, 'Market sharing by Arriva plc and FirstGroup plc' (2002).

[43] *ICI v. Commission*, *supra* n. 25.

they announced price rises of about 10%. This agreement among them was rendered illegal, void and inapplicable.

Market sharing results when undertakings within the market eliminate competition between themselves, by apportioning markets between themselves. In the *Peroxygen Products Case*,[44] five producers which shared the market among them and operated a 'home market' agreement, which covered most of the European Union states and resulted in variations of prices for consumers in different geographical markets, were sanctioned for operating an illegal agreement.

5.2 Unfair Terms and Conditions and Imposition of Obligations

Any terms or conditions which limit competition in the terms and conditions offered to customers can have this effect. It has been held in the *Publishers Association Notebook Agreement* case that:

> An agreement to impose on resellers standard conditions of sale and measures taken to implement this were anti-competitive as it deprives the retailers of the ability to deviate from fixed retail prices.[45]

Imposition of obligations however is a form of illegal, anti-competitive practice that imposes an unfair obligation on a party, competitor, supplier, retailer or consumer as a condition for the conclusion of contracts.

5.3 Control of Productions

Most agreements or conduct that is fashioned to limit output is anti-competitive. This is because, when output is reduced, commodity becomes scarce and the price is raised**.** In *Associated Lead Manufacturers Ltd v. Commission*,[46] the Commission held that an agreement to limit production by apportioning quota among 'white lead' manufacturing companies is anti-competitive.

5.4 Predatory Pricing

This means the price is set lower than the average variable cost. David Howarth, while discussing predatory pricing, raised the query that:

> The analysis of predatory prices starts with the conundrum of why an undertaking with market power would sell at a loss and ends with invidious prospect of a remedy that requires prices to be raised.[47]

A predatory prices situation, arises when a dominant undertaking with the necessary resources at its disposal to cushion off losses sets prices lower than the production cost in order to unfairly compete with its rivals. Monopolists and cartels alike use it to create a barrier into market entry as well as to hurt vulnerable competitors.

In the *Tetra Pak 11 Case*,[48] the Court of Justice held that 'predatory prices are abusive conduct, for it had no conceivable economic purpose other than to eliminate competitors.'

5.5 Contracts in Restraint of Trade

It is a long-established view of the common law that contracts which prevent or regulate business competition are void. This research paper is though restricted to those forms of agreements in restraint of trade as it affects Articles 101 and 102 of the TFEU.

It is the view of the common law that agreements between suppliers of goods or services restricting competition between them are against the restraint of trade doctrine. The major difference between the position (restraint of trade) and that in Articles 101 and 102 of the TFEU is that, under common law, such agreements are prima facie void, but if reasonable and not contrary to the public interest, can be adjudged valid.

Under European Union competition law, a different parameter is used. Such agreements are void if they are of appreciable effect to trade between Member States. Whether or not the agreements are reasonable is not of much concern to Articless 101 and 102 of TFEU.

Flowing from this, it has been held that exclusive dealing agreements between producers and dealers are in restraint of trade and thus anti-competitive[49] and illegal, as they contravene Articles 101 and 102 TFEU.

It has been settled also that a contract obliging a buyer of goods to secure supply is a contract in restraint of trade and hence distorting competition in the common market and freedom of market forces.[50]

6 Effects of illegality of agreements under articles 101 and 102 TFEU

Agreements that contravene Articles 101 and 102 of TFEU are discountenanced as being void if they do not fall under the exemption in Article 101(3). There are other effects, which may bear on such agreements, for instance, such agreements may attract injunctive interdict, or heavy fines. No legal right may be accorded to parties to such agreement (though some circumstances may operate to bring about legal rights to a victim party). Some of the various effects of illegality of agreements are:

6.1 Voidness of the Agreement and Severance

Article 101(2) of the TFEU provides that 'Any agreement or decision prohibited pursuant to this article shall be automatically void'. This provision also is in tandem with the fulfilment of the provision of Article 102. Ulf Bernitz was of the opinion that:

> Although the private law effects of the prohibited abuses are not treated in article 102, there is a general consensus that agreements and contract terms contravening article 102 are also void and unenforceable between the parties.[51]

[44] (1985) 1 CMLR 481.
[45] (1989) 4 CMLR 825.
[46] (1979) CMLR 825.
[47] EC Competition Law, *A Critical Assessment* 280 (Hart Publishing 2007).
[48] *Tetra Pak v. Commission* (1996) ECR1-5951.
[49] *Consten and Grundig v. Commission* (1966) ECR. 299.
[50] *Hilti v. Commission* (1991) ECR 11–1439.
[51] The rationale for this is that tacit collusion or coordination effects are likely to occur when undertakings have the incentive to avoid competing and the ability to do so, i.e. that it is feasible to do so. *See* R. O'Donoghue & J. Padilla, The Law and Economics of Art. 82 EC 139 (Hart Publishing Oxford 2006). *See also* (2003), http://www:juridicum.su.se/jureweb/utbildning/master/ec (accessed 4 July 2018).

Once an agreement, does not comply with the exemptions in Article 101(3), and also distorts competition, then Article 101 (2) holds it void. The rationale behind this provision is that the law of unfair competition tries to ensure fair play within the market, preventing competitors' strategies from turning into dishonest practices.[52] Furthermore, this research will suggest that the intention of Article 101(2) of the EC may actually be to render such a contract 'voidable' (upon failure to comply with Article 101(3)) and not automatically void as may be literally understood and interpreted.

The legal implications of an agreement being automatically void under Article 101(2) can be distinguished from the common law concept of void. Under common law, when a contract is void by the provisions of a statute, there are no qualifying conditions or exemptions that can apply, anything founded upon it amounts to nothing and cannot be remedied.[53]

An English court, while applying Article 101 TFEU, appeared to follow the common law reasoning by holding that a French company copyright owner of a 'Falk Veritas' product cannot use an injunction to stop the defendant English company from stocking the product, this is because, the court reasoned, that the exclusive dealing agreement between the French company and another English company was against Article 101 TFEU and therefore void and unenforceable.[54] The defence employed by the defendant is known as Euro-defence. The legal interpretations appear different in the context of EU competition law. Such agreements that contravene Articles 101 and 102 may not be totally void, the illegal part can be severed from the other untainted part, and the valid part can still be applied. In the case of *Passmore v. Morland plc*[55] the English Court of Appeal, while interpreting Article 101(2) TFEU, held that an agreement could move from invalidity to validity and back again according to the effect it might be having on the market.

Also in the *STM* case[56] the European court of justice held that the sanction of nullity only applied to the prohibition. If it is possible to sever the offending parts, the rest of the agreement may stand.

The recent position of the community law – as regards the effect of illegal agreements/contracts under Articles 101 and 102 TFEU is that even a party to the illegal agreements can claim damages under it, if inequality of bargaining power can be established, or if the party is not in *pari delicto* in the formation of the agreement. The reason behind this view was espoused in the case of *Courage Ltd v. Crehan*,[57] where it was held that:

> The full effectiveness of Article 101 TFEU would be put to risk if it were not open to any individual to claim damages for loss caused by a contract or conduct liable to restrict or distort competition.

6.2 *Fines*

The Commission uses a fine also as a tool to chastise undertakings that engage in illegal agreements to the detriment of competition. Now, the Commission's new fining guidelines prescribed a basic amount according to the gravity of the offence.[58]

For instance, cartel fines or contraventions of Articles 101 and 102 TFEU start at 30% of the company sales in the relevant sector, possibly with an increase of 15 to 25% of such sales.

7 Conclusion

This research paper critically analyses the position of the most important part of the European Union competition law provisions. That is the part that deals with the fate of agreements that contravene Articles 101 and 102 of the TFEU.[59]

This research suggests that the sweeping provisions of Article 101(2) TFEU may not represent the intentions of the European community to automatically void offending agreements. This research therefore shall recommend an amendment of Article 101(2) TFEU to follow the development in the *Passmore v. Morland plc*[60] case, *STM* case, and *Courage v. Crehen* case[61] where there is now a paradigm shift from automatically voiding agreements in breach of Articles 101 and 102 TFEU to inquiring whether part of the contract is valid and severable. In addition, an abused individual or an undertaking can claim damages or reparation from an abusive undertaking instead of wanton losses that could be incurred by categorization of the entire agreement/contract as a nullity *ab initio*.

Finally, the *sui generis* nature of Competition law concepts, the meaning given to some terms/concepts in the definitions of Articles 101 and 102 are not in tandem with its normal or ordinary contract, commercial, and company law usages. Terms, like agreement, undertaking, competition, etc are in a class of their own when it comes to application of competition law therefore further appendix or glossary or interpretation sections can be enacted as an addendum to the TFEU in order to conclusively define these concepts in accordance with the case law development and academic exposition of these concepts.

[52] http://wwwfp7.org.tr/tubitak-contentfiles/267/IPR/ (accessed 4 July 2018).

[53] Re Mohamoud and Ispahanion.

[54] Application *des Gaz v. FalksVeritas* (1974) 1, Ch. 381.

[55] (1998) 4 All ER, 468.

[56] *Societe La Technique Miniere v. M aschinenbau Ulm Gmbh* (1966) ECR.

[57] (2001) 5 CMLR 1058.

[58] The European Commission's power to impose fines for a substantive breach of competition law has its starting point from Art. 23(2) of Regulation 1/2003, which provides that the Commission may impose fines where undertakings either intentionally or negligently infringe Art. 101 or Art. 102 TFEU.

[59] Whether or not competition is being eliminated will depend on the degree of competition that existed prior to the agreement being brought about. This requires a realistic examination of the sources of competition in the market and looking at the actual market conduct of the parties concerned. *See* Cosmos Graham, *supra* n. 106.

[60] *Passmore v. Morland* plc, *supra* n.55.

[61] *Courage v. Crehen*, *supra* n. 57.