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NON-COMPETE CLAUSE IN M&A TRANSACTIONS: AN INFRINGEMENT OF THE ARTICLE 101 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION?

Bachelor Thesis

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
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Table of Content

List of Abbreviations

EU	European Union
TFEU	Treaty on the Functioning of the European Union
M&A	Mergers and Acquisitions
ECJ	European Court of Justice
MS	Member State
PT	Portugal Telecom
Vivo	Vivo Participações

Introduction

"Competition law has played an important part in European Union law, but its precise role is contestable."[1] One can without a doubt state the fact that the objectives and priorities of the European Union (hereinafter EU) competition policy have not stayed the same across time. They have developed through decades and different phases that the EU has faced in its history, starting from the beginning. The primary objective is to enhance efficiency, which means the maximizing of the consumer's welfare and achieving the optimal allocation of resources.[2] This allows the competition to form not only efficient but workable as well.[3] The second objective would be, that it protects consumers and smaller firms from huge aggregations of economic power, for instance monopolies.[4] The third objective is to simply facilitate the creation of a single European market, and to prevent the single market being frustrated by private undertakings.[5]

The aim of the paper is to provide a reasoned answer for the research question in finding out **how the non-compete clause should be incorporated in the market-sharing agreement in a way that it does not infringe the article 101 of the Treaty on the functioning of the European Union** (hereinafter TFEU). The chosen hypothesis for the paper is following**: non-compete clause in Merger and Acquisition (hereinafter M&A) transactions can be permissible and is not an infringement of article 101 of TFEU when it is ancillary to the transfer of the relevant business.** The main reasoning behind the choice of the topic is the fact that these type of M&A transaction agreements, that contain a non-compete clause are very common, yet, they keep causing a lot of misunderstandings and struggle between the contracting parties. Even though in most of the cases the contracting parties have sought a guidance from competition counsels when wanting to create a specific non-compete clause to avoid such situations, unfortunately in most of the times problems arise, because of the different ways people interpret these non-compete clauses. Taking into consideration the research question and based on the used material, the author will provide answers that are compatible with the hypothesis mentioned above.

[1]Graig, P., De Búrca. G. EU LAW text, cases and materials. 6th Ed. Oxford, Oxford University Press 2015, p 1001.
[2]Ibid, p 1001.
[3]Ibid, p 1001.
[4]Ibid, p 1002.
[5]Ibid, p 1002.

This paper comprises of four chapters. After the introduction, Chapter 1 deals with the concept of the non-compete clause and gives the reader a proper definition of it. Although the concept is quite simple, the author has wanted to clarify from the first beginning, what is it that constitutes a non-compete clause and, exhausts its meaning especially in market-sharing agreements, which is dealt in the sub-chapter of the Chapter 1. Chapter 2 concentrates on opening the concept, wording and the history of the Article 101 of the TFEU. Chapter 3 discusses the Commission Notice on restrictions directly related and necessary to concentrations (2005/C 53/03), (hereinafter Ancillary Restraint Notice) with a sub-chapter about non-compete obligation being as an ancillary for the transfer. Chapter 4 concentrates on discussing the issue of the non-compete clause with the object of restricting competition in the internal market and thereby infringing the article 101 of TFEU. The author opens the article 101 of TFEU itself and uses as an example the case of *Telefónica v Commission* to explain the problem behind its' ninth clause that caused the issue to arise. Chapter 4 consists of two subchapters, where the author takes a closer look to the meaning of restricting competition "by object" and explains the case of *Telefónica*. The subchapter that focuses on the case of *Telefónica* consists of three detailed subchapters, where the author concentrates on defining the wording, alleged purpose and meaning of the ninth clause, on explaining the prior self-assessment, which is mentioned in connection with the nature of the clause and lastly explains about the response of the General Court regarding the case, as well as, provides reasoning of the General Court in its' latest judgements of the case. A conclusion with observances, commentaries and ideas for the future research in the field of non-compete clauses in M&A transactions finishes the paper.

The research methodology used in writing this paper has been based on comparative analysis and qualitative, primarily exploratory, analysis. Meaning that the author has been doing comparisons of academic articles and books regarding the issue of the research paper. The author has also scrutinized EU's, especially the TFEU and different Member State's (hereinafter MS), legislation. Relying on the used academic materials and case law as well, the author has compared for instance case law to academic literature. However, the research questions and the hypothesis will be answered by analysing mostly the article 101 of the TFEU, European case law, mainly the case *Telefónica v Commission,* and academic articles dealing with the problematic nature of the non-compete clause.

Explanation regarding the sources is following: Most of the sources that the author has used when putting together this research are, aforementioned, academic articles dealing with non-compete

clauses. The author has gone through some relevant European case law as well, but focusing on the case of *Telefónica v Commission* the most. The most relevant book source for the author has been the Richard Whish' and David Bailey's Competition law, which has been a guidebook for the author from the beginning of the project. The relevance for the chosen theme is determined by the fact that recently the last wave of mergers that have been finished can result and have already resulted an increase of the number of disputes and legal cases related to the transfer of businesses and especially related to non-compete clauses arisen from the transaction agreements.[6] The explanation why the subject is of interest for contemporary research is following: The fact how relative to their practical importance, it seems that M&A contracts are understudied and vastly more complex than they give to understand.[7] The non-compete clauses are an integral part of business transaction agreements and this makes them even more fascinating to examine, especially, because they change over time.[8] Also, the question of interpretation must be carried along the way when scrutinizing non-compete clauses.

[6]Bite, V. Non-competition Covenants in Case of a Business Transfer. Vilnus. Mykolar Romeris University, Faculty of Law 2011, p 178.
[7]Coates, J IV. M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice. Cambridge. Harvard John M. Olin Discussion Paper Series Paper No. 825, Apr 2015, p 1.
[8]Tripathi, S. Podded, P. Non-compete Clauses in M&A Transactions and Competition Law. West Bengal National University of Juridical Sciences Society of International Trade and Competition Law 2014, no page available.

1. The concept of non-compete clause in a M&A transaction

A non-compete clause usually refers to a clause in a business sale contract, which denies access to the seller from conducting a similar business in the specified area for a defined period.[9] One can find non-compete clauses from employment agreements as well, but the author concentrates in this paper on non-compete clauses in market-sharing agreements deriving from M&A transactions. The concept and the purpose of the non-compete clause may sound quite simple, but it is rather far from being simple.

M&A agreements consist of deliberate transfers of control and ownership of businesses organized in one or more corporations.[10] According to John C. Coates, they are shaped by regulation of M&A, by corporate law, finance, accounting and the business control and liquidity that influence patterns of ownership and as a result, M&A contracts fall into distinct types, with standard set of provisions, while varying substantially within type, by country, and over time.[11] They are said to be typically complex because the subject of M&A transaction is not only a collection of assets, but also, a control over a business.[12] What makes it complex as well, is the fact that a typical M&A process involves a lot of planning; meaning for instance investigation, negotiation, processing, "closing" and claims processing dispute resolution.[13] A merger usually involves two separate undertakings merging entirely into a new entity.[14] However the word "merger", which is used in competition policy includes much broader range of corporate transactions than full mergers of this kind.[15] For instance, the acquisition of assets can amount to an established joint venture company, meaning a business entity created by two or more parties who have a shared ownership of the company.[16] The EU gives guidance on the control of mergers and these rules are contained in the EU Merger Regulation 139/2004.[17]

[9] Dumych, TV., Razuvaiev, MS. Antitrust Implications of Non-Compete Terms in M&A Transactions. The Ukrainian Journal of Business Law 2016, p 3.
[10]Coates, J IV. M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice. Cambridge. Harvard John M. Olin Discussion Paper Series Paper No. 825, Apr 2015, p 2.
[11]Ibid, p 2.
[12]Ibid, p 3.
[13]Ibid, p 4.
[14] Whish, R., Bailey, D. Competition Law. 7th Ed. Oxford. Oxford University Press 2012, p.809.
[15]Ibid, p 809.
[16]Ibid, p 810.
[17]Ibid, p 828.

Like mentioned above, for these type of agreements, the contracting parties might want to add a clause that restricts the other party in conducting similar business (particularly the specified area of business of the parties) for a defined period.[18] In other words, the non-compete clause helps the purchaser and its investments against competition from the vendor.[19] There are various reasons for this, but the most common one must be that these agreements serve a set of goals where the buyer wants to make sure that the seller will not intervene the business that was just sold to the buyer.[20] To put it bluntly, a non-compete clause helps to make sure that the other party the buyer works with, does not wind up becoming the competition.[21] Thus, the author wants to exhaust that the agreement of the non-compete clause can be entered either at the end of a business relation or it can also be a pre-condition to a business relationship. The non-compete agreement is in a form of restrictive covenant, a clause that is added to the M&A transaction agreement.

As it has been mentioned, the antitrust involvement of non-compete clauses are not fully straightforward and due to this fact, they need focused attention. The enforcement of non-competition agreements has always been a controversial topic.[22] The broad meaning of the non-compete clause has been defined until now, but when it comes to the narrow meaning of it and finding the purpose for its words is the difficult part. The European Court of Justice (hereinafter ECJ) has been giving various judgements about the non-compete clause over the years. The ECJ has clarified the scope of the clause many times, yet the author has concluded that one cannot expect to find only one way for the issue of the clause, because it does depend on the context of the agreement and because of the different ways of interpretation, the meaning of the clause is not always so self-evident as it may seem. Before discussing the clause itself, one must always discuss the M&A contract in question to review the basic purposes of the contract generally.[23]

The history of the non-compete clause dates to Middle ages in England. The first non-competes appeared as traditional common law "restraints of trade" in England more than five hundred years ago.[24] Undoubtedly the most important case, which remains from that era is the case of *Mitchel v. Reynolds* that recognized that partial restraints on trade under certain circumstances might be

[18]*Supra* nota 9, p 3.
[19]Ibid, p 3.
[20]Ibid, p 3.
[21] https://www.rocketlawyer.com/form/noncompete-agreement.rl#/ (20.2.2017).
[22]Gallo, AJ. A Uniform Rule for Enforcement of Non-Competition Contracts Considered in Relation to "Termination Cases". Pennsylvania. University of Pennsylvania Journal of Labor & Employment Law 1998, p 1.
[23]*Supra* nota 10, p 2.
[24]Shangguan, H. A Comparative Study of Non-Compete Agreements for Trade Secret Protection in the United States and China. Washington. Washington Journal of Law, Technology and Arts 2016, p 409.

enforceable.[25] According to Mr. Shangguan, although *Mitchel v. Reynolds* related to the concept of a non-compete to the sale of business, rather than to employment, it deeply influenced nineteenth-century courts' approach to employment-restraints.[26] The popularity of the non-compete clauses grew in large part to the rise of the Industrial Revolution and the necessity of for instance trade secret protection.[27] Since the non-compete clause is so debatable, there has not been any clear-cut answers how to decrease the risk of misunderstandings when incorporating the clause into an agreement. When clearing out the meaning of the non-compete clause in a market-sharing agreement, the author expects to find out some alternatives in making the non-compete clause to become more clear for its users. The following sub-chapter will discuss the meaning mentioned above and its' purpose is to lead the way to the main issue of this particular research.

1.1 Non-compete clause in a market-sharing agreement

It is widely recognized that one of the main determinants of business profitability is market share.[28] Competition may be eliminated between independent undertakings in other ways than through direct and indirect price fixing.[29] It is part for the human nature that one wants to beat their competitors and therefore the pursuit of competitor-oriented objectives is consisted with the long-held belief that business is like warfare. [30] For instance, both European and American economic policy have always praised the freedom of competition. Even the US Supreme court has acknowledged that "the heart of our national economic policy has been faith in the value of competition".[31] Competition advocacy is thriving internationally and the passed 20 years witnessed more countries with antitrust laws and of course the birth and growth of the International Competition Network.[32]

The author wants to point out that there are three different effects of market sharing in order to clarify the diversity of market sharing. The three effects are following: horizontal, vertical and

[25]*Supra* nota 24, p. 409.
[26]Ibid, p. 409.
[27]Ibid, p. 409.
[28]Buzzell, RD., Gale, BT., Sultan, RGM. Market Share – A Key to Profitability. Cambridge. Harvard Business Review 1975, p 1.
[29]*Supra* nota 14, p 530.
[30]Armstrong, JS., Green, KC. Competitor-oriented Objectives: The Myth of Market Share. Wellington. International Journal of Business 2007, p 116.
[31]Stucke, ME. Is Competition Always Good? Oxford. Journal of Antitrust Enforcement 2013, p 2.
[32]Ibid, p 2.

conglomerate.[33] The first one occurs where a merger takes place between actual or potential competitors in the same product and geographic markets and at the same level of the production or distribution cycle.[34] As a general, the horizontal effect proposes much greater danger to competition than the two latter effects.[35] The second effect occurs between firms that operate at different levels of the market but for the same final product.[36] In the other hand this proposes a risk of the market becoming foreclosed to third parties because it might lead to a collusion between the merged entity and third parties.[37] The latter effect occurs in a situation where merger between two companies is neither horizontal or vertical, but this may however enable the merged entity to use its market power in two different but related fields resulting markets to foreclose competitors.[38] When talking about non-compete clauses, which are incorporated into market-sharing agreements, in the EU context are viewed particularly seriously because, apart from the obviously anti-competitive effects already, they serve to perpetuate the isolation of geographical markets and to retard the process of single market integration, which happens to be the prime aim of the EU.[39]

The author states that it seems that exceptions in competition law are strictly applied and usually if the non-compete clause is understood wrong, it may become quite costly in the field of market-sharing for the one who misinterpreted it. When incorporating a non-compete clause into a market-sharing agreement, the parties must, therefore take into account which of these three effects the agreement amounts to. It is crucial from the buyer to note that if, for instance, competing in the same product and geographic markets, the market-sharing agreement causes a great danger for the buyer and therefore by composing a wisely worded non-compete clause, it will protect the buyer from the seller in the best possible way. To be able to avoid infringing the article 101 of TFEU at the same time, it must be remembered to make sure that the wording emphasizes the fact that object or effect of the agreement is not to prevent competition within the internal market, but to protect the buyer from the competition of the seller for a certain period of time in order to get the chance to establish their position in the particular market. According to the author, it is not only about the wording of the clause, but also about the fact that the non-compete clause and its' formation has been made according to the laws and with respecting the article 101 of TFEU. It must be noted, that in case a competition authorities would want to investigate the non-compete

[33] *Supra* nota 14, p 810.
[34] *Supra* nota 14, p 810.
[35] *Supra* nota 14, p 810.
[36] *Supra* nota 14, p 810.
[37] *Supra* nota 14, p 810.
[38] *Supra* nota 14, p 810.
[39] *Supra* nota 14, p 531.

clause and its' purposes, they have the right to do so and for the sake of transparency the author exhausts the meaning of making the non-compete clause as transparent as possible so that it does not leave any room for speculation whether it could be infringing the article 101 of the TFEU. A noteworthy idea for the future practice of non-compete clauses could be that, it might be good to legislate a requirement that forces the parties to form the clause in a way that it would be easy for an authority to see whether the clause is incorporated to a market-sharing agreement in a way that it has not infringed article 101 TFEU and is ancillary to the transfer of that particular transfer.

2. The article 101 of Treaty on the Functioning of the European Union

The full text of Article 101 is following:

"Article 101 TFEU

1. The following shall be prohibited as incompatible with the internal 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 internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make 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.

2. Any agreements or decisions 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 the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

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

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

The main aim and objective of the article 101 of TFEU is the market integration, resulting agreements aimed at partitioning national markets, are in principle restrictive of competition by object.[40] Therefore Article 101 requires the existence of an agreement, decision or concerted practice.[41] The article 101(1) prohibits agreements that have their object or effect the prevention, restriction or distortion of competition.[42] According to 101(2) agreements that contravene Article 101(1) are null and void.[43] The Article 101(3) on the other hand provides that the prohibition contained in 101(1) may be declared inapplicable only in case when an agreement between undertakings restricts competition within the meaning of the Article 101(1) TFEU, meaning block exemptions[44] In this particular research, the author focuses on the guidelines set in the article 101 for the agreements between undertakings, decisions of associations of undertakings and concerted practices pertaining to horizontal co-operations.[45] The nature of the agreement is horizontal when if an agreement is entered between actual or potential competitors.[46] The article also covers horizontal co-operation agreements between non-competitors meaning that the two companies are active in the similar product markets but active in different geographical markets without being potential competitors. [47] The author states that many times when the parties are about to conclude a horizontal market sharing agreement, the adding of the non-compete clause becomes relevant in order for the buying party to cover their own competitiveness in the markets.

It is quite essential when talking about the article 101 of TFEU, to exhaust the importance of the terminology regarding the words "undertaking" and "association of undertakings". There is no legal definition for the word "undertaking" and therefore it has been stated that it can

[40]Ibanés Colomo, P. Article 101 TFEU and Market Integration. London. Journal of Competition Law and Economics 2016, p 1.
[41]*Supra* nota 1, p 1004.
[42]Commission decision of 16 July 2008, on appeal to the General Court Cases T-398/08 etc, no page available.
[43]*Supra* nota 14, p 115.
[44]Communication from the Commission - Guidelines on the Application of Article 81(3) of the Treaty [Official Journal No C 101 of 24.4.2004.], no page available.
[45]Communication from the Commission – Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Brussels SEC 528/2 2010, p 5.
[46]Ibid, p 5.
[47]Ibid, p 5.

be any natural or legal person engaged in economic or commercial activities.[48] This statement derives from the case *Höfner and Elser v Macroton GmbH* where the ECJ held that the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.[49] Hence, the jurisprudence indicates that the definition has a wide meaning, however, it must at the minimum be a unit, which carries on an economic activity.[50] This has been held to include: corporations, partnerships, individuals, trade associations, the liberal professions, state-owned corporations, and cooperatives.[51] When talking about the term "association of undertakings", the ECJ has on the other hand, stated in its judgement in the case *SAT Fluggesellschaft v. Eurocontrol,* that the critical factors for determining whether entities fall outside the scope of Article 101(1) are the nature of the activities they perform, their object, and the rules to which they are subject.[52] Situations where an undertakings enter into an agreement with each other, but also when undertakings act in concert through the intermediary of an association, falls under the Article 101 of TFEU.[53] With the term "undertaking", the term "association" is to be to be interpreted broadly.[54] The concept of "association of undertakings" is quite loose but in its all meaning it is stated to consist of undertakings of the same industry and is responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general.[55] It is not prohibited by law to bring together undertakings under an associative form in itself, however, when, through decisions adopted by the association of undertakings, the same restricts competition, this type of behaviour falls under the rules of competition and is definitely prohibited.[56] In order to have this object or effect when talking about association of undertakings, the said decision should contain the power to impose certain behaviours to the association members in their economic activity in the market for instance.[57] The concept

[48]Odudu, O., Bailey, D. The Single Economic Entity Doctrine in EU Competition Law. UK. Common Market Law Review 51 Kluwer Law International 2014, p 1723.
[49]*Supra* nota 14, p 84.
[50]Raybould, D.M., Firth, A. Law of Monopolies Competition Law and Practice in the USA, EEC, Germany and the UK. London. Graham & Trotman Limited 1991, p 211.
[51]*Supra* nota 1, p 1003.
[52]ECJ 19.01.1994, C-364/92 *SAT Fluggesellschaft mbH v. Eurocontrol*, para 30.
[53]Van Bael, I. Competition Law of the European Community. 4th Ed. London. Kluwer Law International 2004, p 49.
[54]Ibid, p 49.
[55]Morgan de Rivery, E. 10th Annual Conference GCLC: Effectiveness in Antitrust Enforcement Concept of "undertaking" and parental liability; implementation of solidarity; fines for associations of undertakings and related issues. Paris. Jones Day Paris 2014, p 7.
[56]Cucu, C. "Agreements", "Decisions" and "Concerted Practices": Key Concepts in the Analysis of Anticompetitive Agreements. Bucharest. University of Bucharest Faculty of Law 2013, p 219.
[57]Ibid, p 220.

of "trade between Member States" (hereinafter MS) must not be forgotten either since in order for the Article 101(1) to apply to an anticompetitive agreement, the agreement must affect the trade between MS.[58]

When examining article 101 of TFEU, it clearly forbids any agreements that have as their object or effect the restriction of competition that may affect trade between MSs within the internal market. In the case of non-compete clauses, it is obvious that the buyer wants to protect itself from the seller in the market, but by incorporating a clause into an agreement that clearly states that the object is to prevent the competition made in bad faith, constitutes an infringement of the article 101 of TFEU[59]. At EU level, there has been many cases where the non-compete clause has been considered as an ancillary to the transfer and therefore it has been noted that those types of clauses do not infringe the article 101. The author claims, that the position of the non-compete clause in a market-sharing agreement is crucial since it must be carefully examined before included part of an agreement. Even if there would be a separate agreement concerning the non-compete clause, there is no way around that it could be acceptable before it satisfies all the conditions laid out in the article 101 of TFEU.[60] The concept of ancillarity will be discussed in the following chapter, where the author explains how the Commission's Notice on restrictions directly related and necessary to concentrations 2005/ C 56/ 03 (hereinafter the Ancillary Restraint Notice) is connected to the presented research question and hypothesis.

[58]*Supra* nota 14, p 83.
[59]Tóth, A. The Most Recent EU Competition Law Developments in the Telecommunication Market. European Networks Law and Requlation Quarterly, Lexxion, 2013: pp. 65-79, p 70.
[60]Ibid, p 70.

3. The Ancillary Restraint Notice

In the practice of EU Competition Law, EU legislation contains the concept of ancillarity.[61] According to the Ancillary Restraint Notice; "concentration consists of contractual agreements and agreements establishing control within the meaning of Article 3(2) of the Merger Regulation". In the light of this particular research it is important to exhaust the fact that when talking about ancillarity, the author refers to a commercial ancillarity in M&A transactions. Considering whether an agreement has the effect of restricting competition, it is possible to argue successfully that restrictions that are necessary to enable the parties that have entered into agreement, to an agreement to achieve legitimate commercial purpose fall outside Article 101(1).[62] Thus, the compatibility of the restraints with the common market will depend largely upon the particular facts of the agreement, and the presentation of the need for and reasonableness of such restriction, will always require careful attention.[63] Pursuant to this concept, the Ancillarity Restraint Notice states that all agreements that have the main object of the concentration, such as agreements relating to the sale of shares or assents of an undertaking, are integral parts of the concentration.[64] If and when these types of agreements mentioned above contain ancillary restraints, they are automatically covered by the decision that clears the concentration, meaning the merger clearance approval.[65]

With respect to the EU Competition Law, there are mainly two schools of thought regarding ancillary restraints.[66] According to the first school, the term refers to any clause or restriction in an agreement that is appreciable and is considered to fall outside of Article 101(1).[67] The second school, however, argues that the term ancillary restraints should be used in a more limited set of circumstances, meaning that agreements that do not fall within the Article 101(1) could be sub-divided into several different categories.[68] To put it bluntly these two

[61] *Supra* nota 18, p 3.
[62] *Supra* nota 14, p 128.
[63] Downes, T.A., Ellison, J. The Legal Control of Mergers in the European Communities. London. Blackstone Press Limited 1991, p 49
[64] *Supra* nota 18, p 3.
[65] Ibid, p. 3.
[66] González Diáz, F.E. The Notion of Ancillary Restraints under EC Competition Law. Fordham. Fordham International Law Journal 1995, p 954.
[67] Korah, V. An Introductory Guide to EC Competition Law and Practice. 9th Ed. Oxford and Portland, Oregon. Hart Publishing 2004, p 148.
[68] Whish, R. Competition Law. 4th Ed. London. Butterworths 2001, p 210.

schools suggest that ancillary restraints are simply one category of such agreements or restrictions and on the other hand the other category would be those relating to commercial risk and to selective distribution systems.[69] Some scholars who follow the stricter definition of ancillary restraints regard them as merely an *ad hoc* collection of terms considered so-called "objectively necessary" for the performance of certain contracts.[70] More eminently, the ancillary restraint Notice is just essential to justify restrictions that are necessary for the full preservation or transfer of value in certain types of contracts.[71]

There is a theory that ancillary restraints are restrictions necessary to preserve or transfer value in a particular transaction, which is supported by the example of know-how licencing agreement where the licensor will need to ensure the secrecy of the know-how.[72] The agreement provides for an exchange of information relating to, for instance, a process of manufacture, meaning that the term "exchange of information" refers that both parties must exchange information.[73] This will of course require the addition of provisions that impose obligations on the licensee to obtain the know-how secret, which leads to the obvious conclusion that this is almost certainly necessary for the seller to covenant not to compete with the buyer for a certain period that depending on its nature will be considered as an ancillary restraint if having the meaning to control the business of the seller and is made in bad faith.[74] On the other hand, such clause is essential for transferring and preserving the value in the transaction.[75]

When talking about the ancillary restraints, The Ancillary Restraint Notice pays specific and careful attention to non-compete clauses.[76] The Ancillary Restraint Notice establishes that non-competition obligations that are imposed on the vendor in the context of the transfer of an undertaking, or part of it, can be directly related and necessary for implementation of the concentration.[77] One of the main aims of the Ancillary Restraint Notice is to clarify that non-

[69]*Supra* nota 53, p 49.
[70]*Supra* nota 53, p 49.
[71]*Supra* nota 65, p 955.
[72]Ibid, p 955.
[73]Hermann, A.H., Jones, C. Fair Trading in Europe. Brentford. Kluwer-Harrap Handbooks 1977, p 280-281.
[74]Ibid, p 955.
[75]Ibid, p 955.
[76]*Supra* nota 18, p 3.
[77]*Supra* nota 53, p 3.

compete clauses protecting the buyer against competition against the vendor is essential since without such non-compete clause there would be reasonable grounds to expect that the transaction made or part of it could fail.[78] In the following sub-chapter, the author's attempt is to steer the focus on the non-compete clause obligation itself as ancillary for the transfer.

3.1 Non-compete clause obligation as ancillary for the transfer

A non-compete obligation which is imposed on the seller in the context of a M&A transaction can be permissible when it is ancillary to the transfer of the relevant business, that is, when it is directly related and necessary to the implementation of the deal.[79] In order to obtain the full value of the assets being transferred, the purchaser must be able to benefit for some protection against competition from the seller in order to for instance assimilate and exploit the know-how, meaning that such non-competition clauses guarantee the full value of the transfer for the purchaser.[80] The transfer of technical know-how in connection with the sale of an undertaking, for instance, does not automatically preclude any further action on the part of the seller based on such know-how, it is mainly just ancillary for the transfer.[81] There is always a risk after the transaction that, for instance, the seller may cause considerable harm to the possibilities of the buyer to successfully develop the acquired business and push out the buyer from the market, especially if the buyer is a newcomer in the market.[82] It is very clear that non-compete clauses are not legally necessary for the conclusion of the contract, but their existence is supported by economic considerations, meaning for instance, the legitimate buyer's wish.[83] Therefore the author points out that for the buyer to be able to really enjoy the purchase of the transferred business to the fullest, there is no question whether the buyer should be able to benefit from some protection against competition from the seller for a transitional period of time. However, the responsibility over the clause is shared between both, the buyer and the seller, since it is also in interest of the seller to form a lawful non-compete clause in order to avoid misunderstandings.

[78] *Supra* nota 53, p 3.
[79] Thomas, C., De Stefano, G. Non-compete clauses in M&A transactions: the EU Telefónica/Portugal Telecom judgements and some best practices. Wolters Kluwer Law &Business. Kluwer Competition Law Blog 2016, page not available.
[80] Svechkar, I. Non-compete in M&A: Not Ancillary Restraints? Kiev. Asters Law 2012, p 29.
[81] *Supra* nota 65, p 961.
[82] *Supra* nota 6, p 179.
[83] Ibid, p 179.

A non-compete obligation imposed on the seller that helps fully implementing the planned outcome of the transaction must be limited in its (i) duration, (ii) geographical scope, (iii) subject matter and the persons subject to them in order to be deemed as directly related to and necessary for the implementation of the concentration.[84] According to the Ancillary Restraint Notice, geographical field of the application should not exceed what the implementation of the concentration reasonably requires.[85] What comes to the duration, non-competition clauses are justified for periods up to three years when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how.[86] When only goodwill is included they are justified for periods of up to two years.[87] The geographical scope of the non-compete clause refers to the fact that the clause must be limited to the area in which the vendor has offered the relevant products or services before the transfer.[88] This leads to the fact, which was decided by the Commission in the case *Vodafone Group PLC v ERICELL*, that the non-compete clauses must remain limited to products and services forming the economic activity of the transferred business.[89] This may include products and services at an advanced stage of development at the time of the transaction, or products, which are fully developed but not yet marketed.[90] Protection against competition of the vendor in product or service markets in which the transferred undertaking was not active before the transfer is not considered necessary.[91] The vendor may as well, bind himself/herself, his/her subsidiaries and commercial agents, however, an obligation to impose similar restrictions on others would not be regarded as directly related and necessary to the implementation of the concentration, meaning that this applies particularly to clauses, which would restrict the freedom of resellers or users to import or export.[92]

The conditions of the admissibility of non-compete clauses were firstly addressed by ECJ in *Remia BV and others v Commission of the European Communities* case in 1985.[93] The ECJ saw the difference in two conditions.[94] First of all the necessity for an appropriate transfer of the enterprise and secondly the proportionality, meaning strict limitation of their duration and scope to that

[84]Commission Notice on restrictions directly related and necessary to concentrations 05.03.2005 (2005/C 53/03), para 14.
[85] Ibid, para 14.
[86]*Supra* nota 52, para 20.
[87]*Supra* nota 52, para 20.
[88]*Supra* nota 52, para 22.
[89]The European Commission Decision 02.03.2001, COMP/M.2305 *Vodafone Group PLC v EIRCELL*, para 17.
[90]*Supra note* 76, para 23.
[91]The European Commission Decision 02.03.2001, COMP/M.2305 *Vodafone Group PLC v EIRCELL*, para 22.
[92]*Supra* nota 76, para 24.
[93]*Supra* nota 81, p 181.
[94] Ibid, p 181.

purpose.[95] Since the decision of this aforementioned case, the position given was taken over by both the European Commission and the ECJ in its prospective cases.[96]

Based on the abovementioned case law, the author has concluded that according to the Commission, it has been concluded many times that non-compete clauses have been, indeed, ancillary to the transfer and in those cases, for the conclusion of the agreement, the non-compete clause has been ancillary to the transfer of the relevant business.[97] Hence, it must always be examined individually what is ancillary to the particular business transfer in question and thus form and incorporate the non-compete clause into a market-sharing agreement in a way that it shows the ancillary nature of the case. It is always contestable that what can be considered as necessary for the implementation of a market-sharing agreement, but when it comes to non-compete clauses, the author has concluded that for the future reference, there should be more specific regulation for the businesses to know exactly, depending of the context, what is considered as ancillary for the transfer in different markets. Hence, it would be easier to form the wording of the non-compete clause and therefore to be sure that it will not infringe article 101 of TFEU.

[95] *Supra* nota 81, p 181.
[96] *Supra* nota 81, p 181.
[97] *Supra* nota 59, p 69.

4. Non-compete clause with the object of restricting competition in the internal market and thereby infringing article 101 of TFEU

"The concept of restriction of competition is an economic one, and as a general proposition economic analysis is needed to determine whether an agreement could have an anti-competitive effect."[98]

In order for the Article 101(1) to apply, the agreement must have an effect on trade between MSs.[99] It has been stated that the Article 101(1) of TFEU and its aspect on the concept of agreements whose "object" is to restrict competition is one of its most neglected standpoints.[100] Although it is stated in the Article 101(3) of TFEU that an agreement restricting competition by object could be exempted under this particular Article, it has always been seen as highly unlikely to happen.[101] Notably particular restrictions that fall under the questionable category are therefore automatically seen as having the effect of restricting competition by object under Article 101(1) of TFEU.[102] Hence as such, they usually involve an obvious infringement of the Article 101(1) of TFEU.[103] According to the Article 101(1), the restrictions by object do not require anti-competitive effects to be proven and therefore they fall imminently under the Article 101(1) of TFEU.[104]

4.1 Restricting competition "by object or effect"

As aforementioned, Article 101(1) prohibits agreements, which have as their "object" or "effect" the prevention, restriction or distortion of competition.[105] In the light of this research particularly, it is important to understand the significance of the words "object" and "effect", especially the word "object" in Article 101(1) of TFEU.[106]

[98] *Supra* nota 14, p 120.
[99] *Supra* nota 1, p 1025.
[100] King, S. Agreements that restrict competition by object under article 101(1) TFEU: past, present and future. London. London School of Economics Doctoral Thesis 2015, p 9.
[101] Ibid, p 9.
[102] Ibid, p 9.
[103] Ibid, p 9.
[104] Ibid, p 9.
[105] *Supra* nota 14, p 117.
[106] *Supra* nota 14, p 117.

According to Whish, when thinking about competition law infringements, there are the object box and the effect box.[107] The object box refers to agreements that have as their object the restriction of competition and the effect box on the other hand refers to agreements that have as their effect the restriction of competition.[108] It is stated that the Article 101(1) targets particularly injurious types of agreement that are likely to cause harm to consumer's welfare of the object box.[109] According to Whish, certain agreements are so clearly inimical to the objectives of the EU that they can be permitted only where they satisfy the requirements of the Article 101(3) of TFEU.[110] Hence, all the other cases, to its anti-competitive effects, require wide-angle analysis of the market.[111]

The case *GlaxoSmithKline Services Unlimited v Commission* established that there are some types of agreement of anti-competitiveness of which can be determined simply from their object.[112] In addition, the ECJ stated in the case *T-Mobile Netherlands* that in result of an anti-competitive object to be a concerted practice, it is sufficient that the practice has the potential to have a negative impact on competition.[113] Hence it can be concluded that the ECJ's aim was to state that Article 101 is designed to protect the structure of the market and competition as such.[114] In order to find a restriction by object, according to ECJ's decision in *T-Mobile Netherlands*, it is indicated that the objective's meaning and purpose of the agreement should be considered in the economic context in which it is to be applied.[115] This had resulted to the fact that there was a debate formed regarding the Commission's "effect-based approach" in determining the restrictions of competition and it was concluded after number of important judgements that as it was seen quite complex, the competition authorities would rather resort to applying the object criterion since it carries the burden of proof, which is easier to satisfy than the effect-based analysis because it is far more demanding to carry out.[116]

When talking a look from the competition authority's point of view, in opinion of the Advocate General Kokott of the *T-Mobile Netherlands*, she emphasized the fact that the classification of

[107] *Supra* nota 83, para 24.
[108] *Supra* nota 14, p 120.
[109] Ibid, p 120.
[110] Ibid, p 120.
[111] Ibid, p 120.
[112] Ibid, p 118.
[113] Ibid, p 118.
[114] Ibid, p 118.
[115] Ibid, p 118.
[116] *Supra* nota 100, p 11.

certain types of agreement as restrictive by object sensibly conserves resources of competition authorities and the justice system.[117] The Advocate General Kokott also pointed out that the existence of object restrictions "creates legal certainty and allows all market participants to adapt their conduct accordingly adding that, although the concept of restriction by object should not be given an unduly broad interpretation, nor should it be interpreted narrowly as to deprive it of its practical effectiveness."[118] One of the points that Whish exhausts is that that, here the parties to an agreement that is restrictive by object wish to assert that it could produce efficiency-enhancing effects, they could do so only by proving that it satisfies the criteria of Article 101(3) of TFEU, the burden of proof being on them to prove that this is so.[119] The last point of Whish regarding this issue is that there is a rule that any restriction of competition must always be appreciable since even a restriction of competition by object might fall outside the Article 101(1) if its likely impact on the market is minimal.[120]

The debate whether the concepts of "object" and "effect" should be distinguished from each other has been a question while the European Courts have continued to repeat the basic principle of the Article 101(1) of TFEU, which states that an agreement falls within the Article when it has as its "object or "effect" the prevention, restriction or distortion of competition.[121] However, according to Joined Cases *Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Ltd* and *Société Technique Minière v Maschinenbau Ulm* stated that whether an agreement restricts competition under Article 101(1) TFEU can be result of either its object or its effect and due to this either of the elements need to be proven and therefore they are not cumulative concepts that should be applied together.[122] They are seen as rather partitive concepts.[123]

Based on the facts mentioned above, the author claims that it is practical way to implement the concept of "object" and "effect" in a mentioned way so that the entirety of the case would be always taken into consideration rather than examine the concept separately, when it is obvious that in a way or another they are in way linked to each other. When it comes to a non-compete clause

[117]*Supra* nota 14, p 119.
[118]Ibid, p 119.
[119]Ibid, p 119.
[120]Ibid, p 119.
[121]*Supra* nota 100, p 114.
[122]ECJ 04.10.2011, Joined cases C-403/08 *Football Association Premier League Ltd v QC Leisure* and C-429/08 *Karen Murphy v Media Protection Services Ltd* and *Société Technique Minière v Maschinenbau Ulm*, para 249.
[123]The General Court 17.07.1997, C-219/95P *Ferrière Nord v Commission*, para 6.

and its formation, the author claims that object of the clause it is the most essential factor and therefore based on the previous case law and Whish's suggestion about the object box and effect box, before incorporating the non-compete clause into agreement, it should be decided under which box the clause falls. Hence, it might be easier then to examine whether there is something in the clause that could amount a restricting of the competition in that particular case.

4.2 The *Telefónica* case

The author has decided to use the case of *Telefónica* as an example to demonstrate the issue of non-compete clauses that are incorporated into a market-sharing agreement in a way that it amounts conflicts when it comes to the interpretation of the clause. Firstly, the author will introduce the parties of the case and after that, the chain of events will be laid out. The explanation of the wording, purpose and meaning of the non-compete clause and the General Court's response will be given in its own sub-chapters that focusses on the wording of the non-compete clause that was incorporated into a market-sharing agreement that was concluded between the parties in 2010. Lastly the author will clarify the latest judgements in the case of *Telefónica*, which are very current since they were given by the General Court on June 2016.

The parties of the case are Portugal Telecom (hereinafter PT), Telefónica and the European Commission (hereinafter the Commission). Both PT and Telefónica are dominant operators in the area of electronic communications.[124] The market layout of the companies is following: PT is a primary telecommunications operator in Portugal and has a strategic presence, in particular, in Brazil and Telefónica is for its part, a primary telecommunications operator in Spain and has an international presence in several EU countries, in Latin America and Africa.[125] Vivo Participações (hereinafter Vivo), which is one of the biggest telecommunications operators in Brazil, is jointly controlled by PT and Telefónica through Brasilcel NV, an investment vehicle company incorporated in the Netherlands.[126]

[124]Judgements in Cases T-208/13, *Portugal Telecom SGPS, SA v Commission* and T-216/13, *Telefónica SA v Commission*. Press Release No 68/16. Luxemburg 2016, para 1.
[125]Ibid, para 1.
[126]Ibid, para 1.

In the case of *Telefónica*[127] the applicants sought to annul an order[128] of the General Court, by which it dismissed their action for annulment concerning a Commission Decision, which declared that a certain Spanish tax scheme amounting to state aid was incompatible with EU Competition Law policy. It was said that the contested decision required implementation by Spain, as it was required to recover the incompatible aid from the beneficiaries, which did not satisfy certain condition.[129] The chain of events started in 2010 when PT and Telefónica together with Vivo, concluded a share-purchase agreement where the context of the agreement was to gain the exclusive control over Vivo by Telefónica.[130] The parties decided to add a non-compete clause to the agreement (hereinafter "the ninth clause") under which both of the parties committed to, which stated that: "to the extent permitted by law, to refrain from participating or investing, directly or indirectly through any affiliate, in any project falling within the telecommunications sector (including fixed telephone and mobile telephone services, internet access services and television services, with the exception of any investment or any activity in progress on the day on which the present agreement is signed) which is liable to be in competition with the other company on the Iberian market for a period starting on [27 September 2010] the date of closing until December 31, 2011."[131] In January 2011, the chain of events escalated to the extent that the Spanish competition authority was notified about the clause and the European Commission initiated a procedure against PT and Telefónica, following the initiation of the procedure, on February 2011, PT and Telefónica signed an agreement where they agreed to remove the aforementioned ninth clause.[132] In accordance with the preliminary conclusion of the Statement of Objections in 2011, the Commission concluded in its decision in 2013 that the ninth clause amounted to a market-sharing agreement with the object of restricting competition in the internal market.[133] Hence, it accordingly imposed on Telefónica fines amounting to €66 894 000 and on PT fines amounting to €12 290 000.[134] The Commission concluded that with the referral to the "Iberian market", PT and Telefónica were to strengthen their already strong position in the market and by protecting their home markets, they were to prevent the entrance of other operators onto those markets.[135] Subsequently, PT and Telefónica requested the General Court to annul the Commission decision

[127]The General Court 23.01.2013, C-274/12 P *Telefonica SA v. European Commission*, para 1.
[128]The General Court 21.03.2012, T-228/10 *Telefonica SA v. European Commission*, para 3.
[129]Commission Decision 2011/5/EC of 28 October 2009 on the tax amortization of financial goodwill for foreign shareholding acquisitions C 45/07 implemented by Spain, art 4-5.
[130]*Supra* nota 124, para 2.
[131]The European Commission Decision 23.01.2013, T-208/13 *Portugal Telecom SGPS, SA v Commission* and T-216/13 *Telefónica SA v Commission*, para 29.
[132]*Supra* nota 124, para 3.
[133]*Supra* nota 131, para 434.
[134]*Supra* nota 124, para 3.
[135]*Supra* nota 124, para 3.

and requested to reduce the amount of the fine that were imposed.[136] PT and Telefónica argue and dispute the fact that, in particular, the finding that the clause constitutes a restriction of competition by object because the Commission did not at any point demonstrate that they were potential competitors and that the ninth clause was therefore restricting competition and infringing the Article 101 TFEU.[137] Furthermore, PT and Telefónica claimed that it should be necessary to exclude from the calculation of the fines the volume of the sales achieved on the markets, which did not come with the scope of the clause.[138]

In other words, the parties had concluded a market-share agreement where the formation of the clause had not been considered thoroughly and therefore it was said to amount an infringement of the article 101. The aim of the author is to find out what was it in the "ninth clause" that triggered the Commission to claim that the clause caused the infringement. Thus, by finding out what caused the infringement, will also tell what was the wrongful act that the parties were said to have committed when incorporating this particular into the market-sharing agreement, causing an infringement of the article 101 of TFEU. András Tóth has argued in his article The Most Recent EU Competition Law Developments in the Telecommunication Market that: "The *Telefónica* case was the first article 101 TFEU case in the telecommunication at EU level where the Commission considered a non-compete clause as not ancillary to a transaction".[139] The author suggests that the reason for this might be the fact that the wording of the clause did not really describe clearly its ancillary meaning to the main transaction and therefore it could be claimed that the clause was incorporated into the market-sharing agreement in a way that it infringed the article 101 of TFEU.

4.2.1. The wording, alleged purpose and meaning of "the ninth clause"

The full text of the final "the ninth clause" is following:

> "Ninth - Non-compete
>
> To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding

[136] *Supra* nota 124, para 4.
[137] *Supra* nota 124, para 4.
[138] *Supra* nota 124, para 4.
[139] *Supra* nota 59, p 69.

any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market for a period starting on [27 September 2010] the date of Closing until December 31, 2011."[140]

When going through this particular non-compete clause, to fully understand it, it is vital to understand the factual background of the negotiations when creating it.[141] Telefónica underlined that since from its first offer regarding the acquisition of Vivo, had an important strategic value for Telefónica and PT from its part pointed that Telefónica tried to merge Vivo with Telefónica's telephone subsidiary in Brazil, Telesp, but could not reach an agreement over it with PT and therefore tried to require a sole control of Brasilcel instead .[142] When Telefónica tried to suggest a hostile takeover for the 50% share owned by PT in Brasilcel, PT's Board of Directors rejected the first offer of €5 700 million because of the importance of Vivo and of the Brazilian mobile telephone market in PT's market strategy.[143] One of the main points of the discussion about the legality of the formation of the ninth clause is following. First of all, Telefónica stated that in the fifth clause (iii)[144] of its first offer, Telefónica expressly provided that "Telefónica would not require any non-compete or non-solicitation commitment from Portugal Telecom.", meaning that Telefónica agreed not to require PT to comply with the non-compete commitment covering Brazil and that Telefónica did not intend to include a non-compete commitment covering the Iberian market in the context of Vivo transaction.[145] Referring to the aforementioned, the author concludes that the intentions of the parties were not compatible from the first beginning and as mentioned before, the interpretation of the parties over the non-compete clause differed. In the second offer on June 2010, Telefónica suggested an amendment to the ninth clause in order to exclude the fact that the parties were engaged to activities in each other's national markets and hence, the proposed amended clause was added to the second offer, in particular, according to Telefónica, the aim of the amendment was to limit the scope of the clause as much as possible without significantly changing its' wording.[146] Since this was not opposed by PT, the amended clause was integrated in the second offer.[147] However there was a third version of the offer drafted due to several different events on June 29 2010 with the suggested offer of €7 150 million and therefore it was subject to

[140]*Supra* nota 131, para 29.
[141]*Supra* nota 131, para 30.
[142]*Supra* nota 131, para 34.
[143]*Supra* nota 131, para 35.
[144]Clause 5(iii) of the Binding Offer dated 6 May 2010, Document ID 0027, p. 2. Reply of Telefónica to the Statement of Objections, Document ID 076, paras 43-45.
[145]*Supra* nota 131, para 36.
[146]*Supra* nota 131, para 40.
[147]*Supra* nota 131, para 40.

terms and conditions of the second offer, except for the price.[148] On June 30 2010, in PT's general shareholders meeting the general assembly voted for the third offer presented by Telefónica.[149] Regardless of this, the Portuguese government used its "golden share" in PT to block the transaction, which later on led to the Telefónica's claim that such intervention led Telefónica to reasonably believe that, in the absence of the clause, the Vivo transaction would be blocked by the Portuguese, via exercise of its special rights under the so-called "golden share" that it had over PT.[150] The third offer reached its expiration date since in spite of PT's request from Telefónica to prolong the offer, Telefónica did not give its consent to it.[151] The parties decided to meet in the end of July 2010 and two following final amends were made to the ninth clause.[152] The first one was to add the wording "To the extent permitted by law" at the beginning of the clause in order to modify the nature of the clause, which later became a ground-breaking fact for the final decision, since it was introduced only at the end of the negotiations.[153] According to Telefónica, this aforementioned amendment, was made to indeed modify the nature of the clause, meaning that it would pass establishing a non-compete obligation to establishing the obligation to perform a self-assessment in order to determine the lawfulness and the scope of the non-compete commitment, which would be ancillary to the wanted transaction.[154] The second amendment was to set the duration of the clause from the date of closing until 31 December 2011.[155] The final date for the closing of the agreement was on 28 July 2010, which therefore gave the sole control over Vivo to Telefónica, by purchasing the 50% of the share capital of Brasilcel owned by PT for € 7 500 million.[156] Contrary to the second offer, the final version no longer included the call option in favour of PT to buy back the PT shares owned by Telefonica and in addition, the agreement included a number of clauses, to mention one, which was about the resignation of the members of PT's Board of Directors designated especially by Telefónica.[157]

When examining the alleged purpose, and meaning of the clause, one must take a look what did the parties submit about the circumstances regarding the creation of the non-compete clause. Both of the parties exhausted the fact that the circumstances of the negotiations and amendments should

[148] *Supra* nota 131, paras 41-46.
[149] *Supra* nota 131, para 47.
[150] *Supra* nota 131, para 65.
[151] *Supra* nota 131, para 51.
[152] *Supra* nota 131, paras 52-53.
[153] Lamadrid, A. The General Court's Judgement in Case T-216/13, Telefónica (Counterfactual reasoning applied to fine calculation?). Chillin'Competition 2016, para 3.
[154] *Supra* nota 131, para 53.
[155] *Supra* nota 131, para 53.
[156] *Supra* nota 131, para 54.
[157] *Supra* nota 131, paras 56-57.

be taken into a serious consideration when examining the wording of the clause, in particular, of the wording "to the extent permitted by law".[158] Both PT and Telefónica claimed that when adding this part to the beginning of the clause, the clause would merely provide for an obligation to self-assess the legality of the clause and this would have been ancillary to carry out the Vivo transaction.[159] However, Telefónica submitted that it did not consider the clause lawful nor necessary to the transaction, the company stated that they understood that it was impossible to remove the clause once it was added and therefore tried to minimize the impact of the inclusion of the clause by reducing its scope and duration so that in a way it would lead to a clause potentially empty of its content, meaning that it had no plans to include this non-compete clause in the transaction agreement, which they claim to show that they had no purpose in denying the position of PT in the Brazilian and Iberian market.[160] In addition to claiming that the wording managed to change the nature of the clause, Telefónica also claimed that the parties agreed to self-assess the compatibility of the clause with competition law of an ancillary restraint to the transaction, which consisted of a non-compete commitment with a scope to be determined in the context of the self-assessment exercise.[161] Telefonica stated that PT considered the clause to be necessary and admissible for the transaction even though Telefónica expressed its concern about the fact that the clause might not be in accordance with the law.[162] Telefónica stated that, PT explicitly confirmed that the clause was an essential condition and a deal breaker for the transaction to be completed.[163] In spite of this, PT confirmed that the wording "to the extent permitted by law" was merely proposed by Telefónica and argues that they never really discussed its specific meaning together.[164] In addition, PT also argued that the wording should be interpreted in a way that it requires the parties to self-assess the legality of the non-compete commitment in the context of this very transaction in question.[165]

In respect of the stated by both of the parties, the Commission noted that, the ninth clause established a non-compete obligation on both Telefónica and PT, meaning that in spite of Telefónica's argument on that it was opposed to including the clause in the context of the transaction, it only tried to limit the scope of the clause as possible to not accord with the bilateralism of the clause, which also creates a non-compete obligation in the favour of

[158] *Supra* nota 131, para 76.
[159] *Supra* nota 131, para 76.
[160] *Supra* nota 131, para 77-78.
[161] *Supra* nota 131, para 87.
[162] *Supra* nota 131, para 83.
[163] *Supra* nota 131, para 84.
[164] *Supra* nota 131, para 94.
[165] *Supra* nota 131, para 94.

Telefónica.[166] The Commission stated that the justification provided by Telefónica for the bilateralism of the clause cannot be accepted since the non-compete obligation was to be interpreted as a self-assessment obligation, moreover to be substituted as a self-assessment clause, the bilateral nature of the clause still arguably showed an interest of Telefónica in benefiting from the clause from PT in connection with the Iberian market and therefore the initiative of the clause came from Telefónica.[167] To put it bluntly, according to both parties, the self-assessment exercise would have been carried out in October 2010 and it would have led to the conclusion that the non-compete commitment is not justified.[168] Hence, the commission concluded that regarding the self-assessment nature of the clause, the arguments and circumstances of the negotiations of the transaction, as well as the behaviour of the parties after the closing of the agreement amounted to confirm that the nature of the clause was rather non-compete than self-assessing.[169] Therefore the conclusion was that the clause provides for a non-compete obligation that amounts to a market-sharing agreement and by its nature, qualifies as a restriction by object to competition within the meaning of Article 101 of TFEU.[170]

When focusing on the wording, alleged meaning and purpose of the "ninth clause", the author wants to exhaust the fact how both of the parties claimed that the point of the clause was to merely provide for an obligation to self-assess the legality of the clause and this would have been ancillary to carry out the Vivo transaction and therefore it could be concluded that the communication about the wording of the clause was missing between the parties. Thus, if this was really the purpose of the clause, it should have been emphasized from the first beginning but this was not the case, which led to the case that explaining the scenario after words did not convince neither the Commission of the court. The author claims that by incorporating this particular non-compete clause to the market-sharing agreement, the parties cannot claim that their intention was to minimize the impact of the inclusion of the clause by reducing its scope and duration so that in a way it would lead to a clause potentially empty of its content. The author however states, that the misunderstanding could have been avoided by simply keeping the clause clear and stating that Telefónica has no what so ever meaning to deny the position of PT in the Brazilian and Ibearian market.

[166] *Supra* nota 131, para 80.
[167] *Supra* nota 131, paras 82-86.
[168] *Supra* nota 131, para 241.
[169] *Supra* nota 131, para 95.
[170] *Supra* nota 131, para 356.

4.2.2. The prior self-assessment

According to the EU Competition Law, the undertakings must conduct a self–assessment where it examines whether the agreement they are about to enter into infringes the criteria laid out in the Article 101(3) of TFEU.[171] Before this particular rule, derived from the Regulation 1/2003, there existed the Regulation 17 of 1962, which stated that the Commission had an exclusive power to grant individual exemptions to agreements on the basis of the criteria laid out in the Article 101(3) of TFEU (ex Article 81(3) EC), meaning that the Commission had the opportunity to develop its policy towards different types of agreements over the time, and in some cases to shape the policy of block exemption regulations.[172] However, this arrangement did not endure because of the drawbacks it faced, particularly, the lack of sufficient staff to deal with the enormous volume of agreements received.[173] The result was of course accordance with the issue and therefore severe delays were experienced.[174] The problem of the exclusive power of granting individual exemptions, led to the White Paper in Modernization of 1999, a proposal, for the abolition of this aforementioned process and the suggested was carried into effect by Regulation 1/2003.[175] Thus, the Regulation 1/2003 ended the policy of notification of individual exemption from 1st of May 2004 onwards.[176]

According to Richard Whish and David Bailey, since the undertakings and their lawyers can no longer notify the agreements to the Commission and wait for its approval confirming that the criteria of the Article 101(3) of TFEU is satisfied, therefore, they must be self-contained and conduct their own so-called "self-assessment" of the application of that provision.[177] This is simply for the undertaking to examine whether the agreement they have been preparing is lawful and ready to be signed by the parties.[178] After the Regulation 1/2003 entered into force, the Commission concluded that the lawyers and their clients were able to deal with the "self-assessment" in a correct way and published this fact in a Report on the functioning of Regulation 1/2003.[179] In addition, the Commission released a helpful report of Practical methods to assess efficiency gains

[171]Whish, R., Bailey, D. Competition Law. 8th Ed. Oxford. Oxford University Press 2015, p 378.
[172]*Supra* nota 14, p 176.
[173]*Supra* nota 14, p 176.
[174]*Supra* nota 14, p 176.
[175]*Supra* nota 14, p 176.
[176]Roth, P., MacNab, A., Rose, V. Bellamy and Child, European Community Law of Competition. 6th Ed. Oxford. Oxford University Press 2008, p 136-141.
[177]*Supra* nota 14, p 176.
[178]*Supra* nota 14, p 176.
[179]*Supra* nota 14, p 176.

in the context of Article 101(3) of the TFEU, which provided a structured framework on how to conclude the self-assessment of efficiency claims under Article 101(3) of TFEU.[180]

To demonstrate another point of view to the prior-self assessment, according to Frank Wijckmans and Filip Tuytschaever their intention is to emphasize the practical approach when it comes to the prior-self assessment. First of all, they recommend to examine whether the clause contains any direct or indirect restrains that could fail to meet the conditions that are laid out in the article 101 of TFEU.[181] If the agreement contains such restrictions they should not necessarily be removed but to bring them in line with the requirements of the article.[182] In other words, it should be examined if any of the restrains run a risk of infringing article 101(1) of TFEU.[183] The objective here is to determine these restrictions for further assessment.[184] They also suggest in finding whether there is any relevant case law at national or European level.[185]

In the case of *Telefónica*, the wording "to the extent permitted by law" became crucial in the context of examining the execution of the self-assessment.[186] Both PT and Telefónica claimed that the wording of the clause, in connection with all the other elements, such as, for instance, the circumstances of negotiations, was meant that the clause should be interpreted explicitly as not imposing any obligations until the prior self-assessment of the legality of the non-compete arrangement would have been examined.[187] To sum it up, the parties claimed that the wording of the clause should be interpreted requiring the parties to self-assess whether a non-compete commitment could be lawful in the context of the Vivo transaction, furthermore, PT submitted that the non-compete commitment would not enter into force until the parties assess the possibility and scope of the commitment.[188]

The author states based on the aforementioned, cautious and careful approach it should be taken at all times. To sum up, the meaning of the prior self-assessment is tremendous, especially when talking about non-compete clauses. The fact is clear, that the assessment should be done when

[180]*Supra* nota 14, p 176-177.
[181]Wijckmans, F., Tuytschaever, F. Vertical Agreements in EU Competition Law. 2nd Ed. Oxford. Oxford University Press 2011, p 277.
[182]Ibid, p 277.
[183]Ibid, p 277.
[184]Ibid, p 277.
[185]Ibid, p 277.
[186]Thomas, C., De Stefano, G. Non-compete clauses in M&A transactions: the EU Telefónica/Portugal Telecom judgements and some best practices. Wolters Kluwer Law &Business. Kluwer Competition Law Blog 2016, page not available.
[187]Ibid, page not available.
[188]*Supra* nota 131, paras 87 & 94.

evaluating the agreement as a whole, but special attention should be given to non-compete clauses. In the case of *Telefónica*, it was stated that the clause was meant to be interpreted explicitly as not imposing any obligations until the prior self-assessment of the legality of the non-compete arrangement would have been examined. When comparing the approaches of the academics mentioned above, requiring further assessment before adding a non-compete clause to an agreement is inevitable. The author concludes that it should be regulated that the prior-self assessment should always be conducted in advance.

4.2.3. Response of the General Court to the arguments of the parties regarding the "ninth clause"

The Article 101(1) of TFEU prohibits agreements whose object or effect is to restrict competition. It has been settled in case-law, for instance in the aforementioned case *Glaxo SmithKline Services Unlimited v Commission*, where the ECJ stated that "it is also apparent from the case-law that that it is not necessary to examine the effects of an agreement once its anti-competitive object has been established".[189] Similar issue had been dealt in the case *Consten SaRL and Grundig GmbH v Commission* where ECJ rejected the argument that allowing exclusive distributorship projected a distributor's legitimate interest, by hypothetically preventing competitors from free riding on the investment of advertising and marketing initiated by the distributor, and then undercutting prices.[190] Regarding to the facts stated by the parties, the General Court established that the ninth clause was entered into by two competitiors and therefore it is capable of amounting to anti-competitive effects.[191] Meaning that even if the wording would not be at stake, just the mere fact that the intention of the clause that was agreed upon these two parties, amounted anti-competitive effects when measuring the facts.

In this case, it was not necessary to show anti-competitive effects, but even though the clause was considered incapable of producing any effects, this fact would not impede its consideration as a restriction by object and therefore the claim of Telefónica and PT about the agreements' incapability to produce effects is irrelevant to this case.[192] Finally, a notice was given to Telefónica and PT that, as regards the possible implementation of the clause and apart from the fact that the parties claimed that it was never implemented and had no legal effects, the parties did not at any

[189] *Supra* nota 131, para 240.
[190] ECJ 13.07.1966, Joined cases 56 and 58-64 *Consten SaRL and Grundig GmbH v Commission, p 337.*
[191] *Supra* nota 131, para 363.
[192] *Supra* nota 131, paras 364-366.

point, provide evidence about the fact that they would have had any new activities in Spain or Portugal (each other's home markets).[193] One of the ground breaking factors was the fact that these both companies were the leading telecommunication operators in their countries so in other words they should have known the risks of not being able to show any evidence about the non-existence of new activities in their respective home countries. The Commission stated that, in spite of the fact, that it cannot be directly deduced from the lack of new competing activities that the clause was implemented, however, the mere observation that the parties did not submit any evidence of the new activities in their home markets, which would contradict the implementation of the clause should therefore be alleged as a non-conclusive sign that the clause may have been implemented.[194]

It is obvious, that the Court would also take into consideration the duration of the infringement. The clause was agreed and signed on 28th of July in 2010. According to the very wording, the clause was meant to contain obligations that binds the parties as from the date of Closing, 27th of September 2010, until 31st of December 2011.[195] On 4th of February 2011 the parties decided to amend the agreement by deleting the respective ninth clause.[196] As regards to the commencement of the infringement, according to Commission's Statement of Objections it took a preliminary view on the dates and therefore stated that the agreement was signed on 28th of July 2010 and the actual activities covered by the clause were determined by reference to the date of the agreement.[197] Telefónica rejected this argument, as this would have been the date which the clause would have entered into force according to its literal wording.[198] Telefónica explains this by stating that the parties could validly delay the possible non-compete obligation of the clause by subjecting its entry into force to a term or condition and thus, the only obligation provided for by the clause before Closing, was to carry out the self-assessment exercise itself.[199] PT's response for the Statement of Objections was that it was not possible, that a non-compete obligation could have entered into force before the conclusion of the self-assessment and thus, the duration of the clause cannot be validly discussed because it did not enter into force.[200] In spite of the statements of the parties, it can be argued that the effects of the obligation not to compete really started on the date of the signing of the agreement.[201]What comes to the end of the infringement, Telefónica states

[193]*Supra* nota 131, para 365.
[194]*Supra* nota 131, para 365.
[195]*Supra* nota 131, para 454.
[196]*Supra* nota 131, para 454.
[197]*Supra* nota 131, para 455.
[198]*Supra* nota 131, para 456.
[199]*Supra* nota 131, para 457.
[200]*Supra* nota 131, para 458.
[201]*Supra* nota 131, para 459.

that the clause exhausted its object to subsequent to the self-assessment exercise and it should be considered to be terminated on 29th of October at the latest, hence the termination agreement entered into force on 4th of February 2011 to delete the clause would be mere formalisation of such exhaustion.[202] As discussed above, the Court stated that there is no evidence that the conference calls in October 2010 were prompted by the alleged self-assessment obligation under the clause and would have resulted in an agreement by the parties that the clause was exhausted.[203]

Since it seems to be quite difficult to establish the requirement of conducting the prior-self assessment in advance, hence it was merely easy for the parties to rely on the statement that their intention was not to restrict competition in anyways. The author claims that due to all of the facts in the case the parties should have known that what they agreed upon would constitute a market-sharing agreement, which restricts competition and infringes the requirements laid in the article 101 of TFEU. Basically, the incorporation of the "ninth clause" to the agreement failed and the no matter of the intentions of the parties, they failed to demonstrate this in a clear way that could be expected from companies this large.

4.2.4. The latest judgement of the case 2016

In the judgements given on June 2016, the General Court dismisses, almost in their entirety, the actions brought by both PT and Telefónica.[204] The judgement itself was a major disappointment to the parties since they both, Telefónica and PT, had clearly hoped for the best when re-opening the case. However, due to the reasons explained a bit farther in the judgement, the Commission were ordered to determine once again the sales that are directly and indirectly linked to the said infringement, in order to, recalculate the amount of the fines imposed on the two companies.[205] The Court simply noted that, sales of the company corresponding to activities that are not capable of being in competition with the other company over the period of application of the clause must be excluded for the purposes of calculating the fine, because those activities were already excluded from the scope of the clause by its actual meaning and that, in order to recalculate the fines, the Commission decided to rely on the sales coming within the scope of the ninth clause.[206] Therefore, it was noted that, in order to determine the value of the companies' sales for the re-calculation of

[202] *Supra* nota 131, para 460.
[203] *Supra* nota 131, para 462.
[204] *Supra* nota 124, para 5.
[205] *Supra* nota 124, para 4.
[206] *Supra* nota 124, para 9.

the amount of the fines, the Commission had to go through all the arguments of the parties, both Telefónica and PT, seeking to establish that there was absolutely to chance of competition between the parties with regard to certain services.[207] It was stated by the General Court that, on the basis of such legal and factual analysis it would be possible to determine the value of the sales that are linked, directly or indirectly, to the infringement and thus, the Commission was ordered to make a new calculation of the amount of the fines.[208] For the purposes of the re-calculation of the amount of the fines, the decision of the General Court took into account the value of the sales made by the parties' in their respective home countries, Spain and Portugal, and decided to apply a 2% coefficient that resulted nearly 67 million euros for Telefónica and almost 12 million euros for PT.[209]

To put it bluntly, in its two judgements of June 2016, the General Court upheld the Commission's strict approach on the matter and stated that this ninth clause of the agreement indeed amounted to a market-sharing agreement and is therefore classified as a restriction of competition "by object".[210] Hence, the General Court decided to stick with the same point of view over the case than the Commission and gave its whole support for it when discussing the issues of the ninth clause. The General Court held that the nature of the ninth clause itself had the potential to restrict competition "by object", especially, when it was entered into by two potential competitiors in the same market.[211] The main issue was that the parties to the agreement, Telefónica and PT, were both the incumbent operators in the area of telecommunications and had strategic presences in their own respective home countries and even had international presence in several other countries.[212] The General Court dismissed Telefónica's arguments regarding the wording of "to the extent permitted by law" and dismissed the alleged ancillary nature of the clause.[213] The General Court also stated that, the non-compete clause was not at any moment ancillary to the transfer since the clause referred to the Iberian market, whereas the main transaction referred to Vivo, whose activity was limited to Brazil, hence the non-compete clause was not ancillary to the main transaction.[214]

[207] *Supra* nota 124, para 9.
[208] *Supra* nota 124, para 9.
[209] *Supra* nota 131, para 3.
[210] Thomas, C., De Stefano, G. Non-compete clauses in M&A transactions: the EU Telefónica/Portugal Telecom judgements and some best practices. Wolters Kluwer Law &Business. Kluwer Competition Law Blog 2016, para. 6.
[211] Ibid, para 6.
[212] *Supra* nota 131, para 1.
[213] *Supra* nota 131, para 3.
[214] *Supra* nota 131, para 7.

It was also noted that, the non-compete restriction was not ancillary to other clauses of the main agreement either, namely the provision referring to the call option and to the resignation of the members of the board, because the ancillary nature of the restriction should be determined by reference to the transaction itself as a whole rather than by reference to transaction or operation of independent provisions.[215] In addition to the statement by the General Court regarding the absence of actual anti-competitive effects, it was also noted that the arguments regarding the fact that the clause was in reality considered as ineffective by Telefónica and PT, following an *ex post* self-assessment to examine the legality of the clause, was dismissed.[216]

It has been noted, that the Commission's practice in recent years has demonstrated an increasing reliance on the analysis of "by object" when applying the article 101(1) of TFEU.[217] In respect of the latest judgements about the case, the author concludes that the "ninth clause" that was added to the agreement by the parties of the case did not demonstrate enough its ancillary nature and therefore the case was decided in the aforementioned way. Most of the facts regarding the formation of the clause gave the justification for the decision that the non-compete clause in question was not incorporated into the agreement by following the requirements of the article 101 of TFEU and therefore was found to have infringed it. Based on the materials used in this research, the author has concluded ways that might help the process of incorporating the non-compete clause into a market-sharing agreement so that it does not infringe the article 101 of TFEU.

[215] *Supra* nota 124, para 8.
[216] *Supra* nota 124, para 3.
[217] https://m.lw.com/thoughtLeadership/LW-European-Justice-Court-Groupement-Cartes-Bancaires (10.4.2017).

Conclusion

It is evident, taking into consideration the facts and the ruling of the *Telefónica* case that the non-compete clause as a concept is rather at the mercy of its interpretation than anything. The non-compete clauses in M&A transactions, that are in accordance with the law, are inevitably and clearly procompetitive, because an agreement for sale of a company, in its entirety or partial, often cannot be achieved if the seller competes with the transferred company immediately after the sale.[218] However, as mentioned before, the problematic nature of the non-compete clauses often tends to create problems and the wording of the clauses must be carefully examined to assure the legality of the clause. In this thesis, the author has sought to answer, how the non-compete clause should be incorporated in a market-sharing agreement in a way that it would not infringe the Article 101 of the TFEU.

First and foremost, it has been stated that in order for a non-compete clause to be permissible, they must be necessary and proportional to the implementation of the main deal.[219] Therefore, the author has concluded that, when examining how the non-compete clause should be incorporated into a market-sharing agreement, already at the beginning of negotiations over the non-compete clause in question, the parties should give careful consideration for the wording of the clause so that it does refer only to the object of the main deal. It has been proven that people often use the same words to mean different things.[220] Hence, the act of writing what has been agreed commonly leads the contracting parties to realize already at that point that they have spoken either incorrectly or incoherently, which on the other hand allows for more precision and finer distinctions.[221] Therefore, the drafting of the non-compete clause should be done with the highest degree of care and in keeping in mind the various factors mentioned above to prevent conflicts with competition law.[222] It is also always very highly recommended for the parties to seek specific guidance from a qualified competition counsel on the matter of the non-compete clause, especially, if the transaction is transnational, the jurisdictions over the non-compete clause may have different approaches regarding the duration, for instance.[223] As mentioned in the sub-chapter 3.1, the non-compete obligations are always assessed on the basis of their duration, geographical scope, subject

[218] *Supra* nota 124, para 11.
[219] *Supra* nota 124, para 12.
[220] *Supra* nota 10, p 3.
[221] *Supra* nota 10, p 3.
[222] *Supra* nota 8, no page available.
[223] *Supra* nota 124, para 13.

matter and participants so that it does not exceed what is reasonably necessary to achieve in the transaction in question. According to the Commission staff working document on guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice: "any arrangement by which competitiors allocate markets or customers is considered a restriction by object if it takes place in the context of a pure market sharing agreement between competitors."[224] It has been suggested that if the conduct of the parties to an agreement shows that their objective was to share the market, that objective may be taken into account in deciding whether the agreement is a restriction by object.[225] Hence, the author suggests that the parties to an agreement seeks to make sure that the wording of the planned non-compete clause is certainly accordance with the law and shows its clear meaning in not restricting the competition "by object" in any manners in order to avoid infringing the article 101 of TFEU.

The fact that the M&A transaction agreements are often public and subject to disclosure, it is easy for a third party to go ahead and examine the non-compete clause incorporated to the agreement and if wanted, to bring the issue found before the competition authorities.[226] When talking about M&A transactions where the parties are large companies, the competition authorities might initiate an investigation regarding the non-compete clause simply because they heard a rumour, read the latest news about the companies intentions or were alerted by other authorities, as occurred in the case of *Telefónica*.[227] In fact, the competition authorities can and do investigate non-compete provisions on their own initiative.[228] Since it is impossible to "hide" agreements of this scale, it is strongly recommended to consider when creating the non-compete clause, whether it might trigger a customer or a competition authority to initiate a private action.[229] The author acknowledges the fact that, especially in the cases where the parties are followed by the media, it is quite difficult to protect the content of an agreement. Therefore, the author suggests that for the sake of continued respect of the principle of transparency, the parties would consider in creating the non-compete clause as clear as possible and even publishing the clause before the closing in order to not leave any room for suspicion regarding the legality of the clause.

[224]Commission staff working paper, Guidance on Restrictions of Competition "by object" for the Purpose of Defining, which Agreements may benefit from the De Minimis Notice, Brussels. 25.6.2014, p.7.
[225]Ibid, p.7.
[226]*Supra* nota 124, para 15.
[227]Ibid, para 15.
[228]Ibid, para 15.
[229]Ibid, para 15.

In the case of *Telefónica*, the parties decided to rely solely on the fact that the ninth clause contained the wording "to the extent permitted by law". Thus, the court held that the wording as such would not protect the parties from the application of antitrust laws, even though both of the parties sought to argue that the qualification of the clause would certainly only be valid to the extent permitted by law.[230] What should be remembered in practicing non-compete clauses in corporate deals is that the companies should never rely solely on a caveat or qualification that the clause would only be valid "to the extent permitted by law" because the wording as such does not clarify the intention of the clause or make the intentions of the non-compete clause transparent enough.[231] Therefore a non-compete clause containing aforementioned wording should not be incorporated to a market-sharing agreement hence it will be considered to infringe the article 101 of TFEU. Even though the non-compete clause is concluded as a part of a legitimate M&A transaction agreement, it does not give automatically the validation of the particular clause under the antitrust laws.[232] The question of the liability may be strict, meaning that it might not be necessary for the competition authorities to really prove that the particular provision, the non-compete clause, actually prevented competition.[233] Hence, it the case of *Telefónica*, it was confirmed by the court that the ninth clause amounted to a market-sharing agreement and could be classified as a restriction of competition "by object" with no need to assess the concrete effects of the clause of the relevant markets.[234] In addition, the fact that both PT and Telefónica claimed that when adding this part to the beginning of the clause, the clause would merely provide for an obligation to self-assess the legality of the clause and this would have been ancillary to carry out the Vivo transaction, did not effect on the ruling that the clause was found unlawful under the article 101 of TFEU.[235]

Based on materials and case law, the litigation over the non-compete clauses are rising and therefore the author claims that the aforementioned ways to incorporate the non-complete clause into a M&A transaction agreement should be studied further. The author also claims that the companies entering such agreement should always carefully examine the position regarding the effect of the non-compete clause in order to avoid to end up in situations like the companies had in the case of *Telefónica*. In fact, pursuant to what has been discussed above, non-compete clauses

[230] *Supra* nota 124, para 16.
[231] Ibid, para 16.
[232] Ibid, para 3.
[233] Ibid, para 6.
[234] Ibid, para 6.
[235] *Supra* nota 131, para 76.

play a key role when it comes to M&A transactions and therefore they should be given more attention than ever. Hence, when a non-compete obligation is not regulated in such transactions, the investment that has been made becomes meaningless and no contribution is made to the economy, which means that the actual purpose of competition law would not be realized.[236]

In respect of the research question and the proposed hypothesis, the author has wanted to gather all the suggested ways to be more careful when it comes to incorporating the non-compete clause into a market-sharing agreement and therefore avoiding to infringe the article 101 of TFEU. The main fact to be remembered is that the article 101 of TFEU prohibits 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 internal market. Pursuant to this, in order to avoid the infringement of the article 101 of TFEU; the wording of the non-compete clause should be compiled into a shape where it refers only to the object of the main deal. Since the non-compete obligations are always assessed on the basis of their duration, geographical scope, subject matter and participants so that it does not exceed what is reasonably necessary to achieve in the transaction in question, these objects should be found clearly from a non-compete clause that has been formed accordance with the law. What comes to the transparency of the agreement itself and the non-compete clause in question, the author suggests that the non-compete clause should be incorporated into a market-sharing agreement in a way that the clause has been drafted as clear as possible and even published for a third party to examine it if wanted, before the closing, in order to not leave any room for suspicion regarding the legality of the clause. Lastly, the parties to a market-sharing agreement, should always consult specific guidance from a qualified competition counsel to lower the risk to even accidentally have a non-compete clause in their market-sharing agreement that could infringe the article 101 of TFEU in any ways.

To conclude this paper, the author claims that the clarification of the requirements of how to form a lawful, understandable and transparent enough non-compete clause in M&A transaction agreements, will not be achieved without great effort. Thus, the author suggests that, in order to define the requirements of how to incorporate a non-compete clause into a market-sharing agreement in a way that it does not infringe the article 101 of TFEU, the EU should give more

[236] Erdem, H.E. Non-Compete Agreements within Mergers and Acquisitions. TAGLaw A Worldwide Alliance of Independent Law Firms. 2013, no page available.

attention to this issue and for instance, assemble a specific committee to solve the problems arising from non-compete agreements in general. The article 101 of TFEU has left a wide margin when it comes to agreements that restrict competition within EU, due to the absence of specific definitions of key terms such as object or effect of the prevention, restriction or distortion of competition. It can be concluded that the non-compete clause in M&A transactions can be permissible and is not an infringement of article 101 of TFEU when it is ancillary to the transfer of the relevant business, however the position of the wording "ancillary to the transfer of the relevant business" should therefore be defined more distinctly as well and as a matter of fact, the author claims that the clarification of this particular sentence requires a specific attention for the future research in the field of non-compete clauses as well. Due to the possibility to interpret the article 101 of TFEU quite loosely, and as long as it stays open for the loose interpretation, the amount of non-compete clauses that infringe the article 101 of TFEU is inevitable.

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