Streamline of the applicable tests between Art. 101 and 102 TFEU on restrictions by effect

Analysis of CJEU Judgment C-606/23 "KIA autos"

On December 5, 2024, the Court of Justice of the European Union (CJEU), sitting in its Tenth Chamber, delivered a judgment concerning the interpretation of Art. 101 of the Treaty on the Functioning of the European Union (TFEU). The case arose from a preliminary reference submitted by two Latvian companies challenging a Latvian Competition Authority decision.[1]

This decision is significant because it clarifies the principles for assessing restrictions "by effect" under Art. 101 TFEU, drawing on jurisprudence established under Art. 102 TFEU. The judgment affirms that a competition infringement can be established based on sufficiently appreciable potential restrictive effects without the need to demonstrate concrete effects on competition.

Facts of the Case

The facts are straightforward. One party, Kia Auto, an Estonian company, is the sole authorized importer of Kia vehicles in Latvia (para. 4). Kia Auto selects authorized dealers and repairers to act on its behalf. The agreements issued by Kia Autos included provisions related to vehicle warranties that restricted consumer freedoms (para. 7). Specifically, car owners were required to (para. 6):

1. Not conduct routine maintenance and repairs elsewhere than with authorized representatives during the warranty period.
2. Use original spare parts from the manufacturer, excluding third-party alternatives.

The Latvian Competition Authority (*Konkurences padome*) identified these provisions as vertical restraints violating Art. 11(1) of the Latvian Law on Competition, which transposes Art. 101 TFEU. The authority concluded that the clauses created anti-competitive effects "by effect" rather than "by object". Notably, the authority deemed it unnecessary to prove actual restrictive effects, as the existence of such clauses in itself restricts competition (para. 8).

Procedural Background (para. 9-14)

The case involved a preliminary reference under Art. 267 TFEU. The Latvian Competition Council imposed fines on Kia Auto and its parent company, Tallinna Kaubamaja Grupp. Kia Auto challenged this decision. In the first instance, the case was dismissed by the Regional

[1] CJEU, '*Tallinna Kaubamaja Grupp' AS & 'KIA Auto' AS v Konkurences padome* (Case C-606/23), Judgment of the Court, 5 December 2024.

Administrative Court. On appeal, the Supreme Court of Latvia (Senate) referred the case back to a lower court. That lower court, confused by the arguments raised by the parties and the Supreme Court's opinion on the interpretation it had to give on EU law and its standards of proof[2], posed the following questions to the CJEU:

1. Does Art. 101(1) TFEU require competition authorities to demonstrate actual restrictive effects on competition when assessing warranty-related agreements mandating the use of authorized representatives and original spare parts?
2. Alternatively, is it sufficient for competition authorities to demonstrate only the existence of potential restrictive effects?

Key Findings of the Judgment

Jurisdiction of the CJEU (para. 15–21)

The Latvian Competition Law at hand, Art. 11(1), closely mirrors Art. 101 TFEU. The referring courts rightly considers that therefore national courts must interpret these provisions consistently with the practice of the corresponding EU law, art. 101 TFEU (para. 15).

As it is a referred case, the CJEU has to examine its own jurisdiction to hear the case (para. 17). Following established case law[3], the CJEU is competent to rule on questions of EU law even where the facts fall within the scope of national law, provided that the law applicable to those facts reflects EU law (para. 18). This CJEU's competence into these internal matters is justified by the need for a uniform interpretation of provisions of EU law in the Member States in order to avoid legal discrepancies in future cases (para. 19).

The CJEU founds its jurisdiction (para. 21) on the facts that Art. 11(1) of the Latvian Law on Competition adopts indeed an interpretation identical to Art. 101(1) TFEU (para. 20) and on the fact that previously the Court based its jurisdiction on the interpretation between Art. 11 of Latvian Law on Competition and Art. 101 TFEU (para. 20, *in fine*).[4]

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[2] General Court, *Google and Alphabet v Commission* (Case T-612/17), Judgment of 10 November 2021.
[3] CJEU, *Visma Enterprise v Konkurences padome* (Case C-306/20), Judgment of the Court, 18 November 2021.
[4] CJEU, *Visma Enterprise v Konkurences padome* (Case C-306/20), Judgment of the Court, 18 November 2021, para. 47.

Considerations of the questions referred (para. 22-37)

In addressing the questions referred and summarized by the court in para. 22, the Court clarified the distinction between restrictions "by object" and "by effect" in its case law related to Art. 101 TFEU[5] (para. 23-28).

In deciding whether an agreement between undertakings is contrary to EU law, the Court examines whether the agreement has as its “object” or “effect” the restriction of competition.

Restrictions "by object" are inherently anticompetitive and do not require an analysis of their effects (para. 25). By contrast, restrictions "by effect" necessitate a thorough examination of how the agreement or practice impacts competition (para. 28). The Latvian Competition Council considered that there were no “by object” restrictions. The Court emphasized the need for a counterfactual analysis (para. 29)— i.e. how the competitive landscape would have reacted in the absence of the disputed agreement. This analysis involves defining relevant markets and determining whether the agreement’s effects, whether actual or potential, significantly distort competition. Potential effects, if sufficiently substantiated, are deemed adequate to establish a restriction "by effect".

The judgment drew parallels with established jurisprudence under Art. 102 TFEU (para. 35), which governs abuses of dominant positions. Similar to cases under Art. 102 TFEU, findings of abuse under Art. 101 can now rely on potential anticompetitive effects, provided these are significant and substantiated. To quote the Court, “*Thus, the interpretation of Art. 101 TFEU, according to which it is sufficient to demonstrate the existence of potential anticompetitive effects (...) corresponds to that of Art. 102 TFEU*”(para. 36).

The CJEU concluded that Art. 101(1) TFEU does not require competition authorities to demonstrate concrete restrictive effects on competition to classify an agreement as restrictive "by effect". Instead, sufficiently appreciable potential restrictive effects are sufficient (para. 38).

Analysis and Evaluation

This case deals with vertical relationships, where parties at different levels of the distribution chain set terms for buying, selling, or reselling goods or services. The Court consolidates its philosophy on “by object” and “by effect” restriction, a principle first established in *Société Technique Minière v Maschinenbau Ulm* (1966)[6]. If the Court did not, *in specie*, expand on the

[5] CJEU, *International Skating Union v Commission* (Case C-124/21 P), Judgment of the Court, 21 December 2023, para. 98.
[6] CJEU, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.), Judgment of the Court, Case 56-65, 30 June 1966.

definition of "by object" restrictions in Art. 101 TFEU (which it recently did in the case law *Generics*[7]*; Servier*[8] and *Banco BPN*[9]); it consolidated its requirement for a counterfactual scenario and the presence of concrete or potential restriction to competition in "by effect" restrictions. This line of thought was already well existent within Art. 102 TFEU with its "effects-based approach" (see *Post-Denmark II*[10], paras. 65-66).

This ruling solidifies the effects-test from 102 TFEU into 101 TFEU, especially for vertical relationships, and may impact how authorities approach restrictive practices under both norms in the future. It is also a testament that the Court is currently pushing for consistency in the methodologies of the norms. Indeed, as the CJEU puts it in *Superleague:* "[*Art. 101 & 102 TFEU] must (..) be interpreted and applied consistently, although in compliance with the specific characteristics of each of them*".[11]

Conclusion

The "Kia Autos" judgment clarifies the principles for assessing "by effect" restrictions under Art. 101 TFEU, aligning the applicable tests with those of Art. 102 TFEU. This convergence underscores the importance of demonstrating sufficiently significant potential restrictive effects through a robust counterfactual analysis. The ruling enhances the consistency in practice between Art. 101 and 102 TFEU and provides clearer guidance to national authorities and courts in examining restrictive practices.

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[7] CJEU, *Generics (UK) Ltd, GlaxoSmithKline plc, Xellia Pharmaceuticals ApS, Alpharma LLC, Actavis UK Ltd, Merck KGaA v Competition and Markets Authority* (Case C-307/18),Judgement of the Court, 30 January 2020.

[8] CJEU, *European Commission v KRKA, tovarna zdravil* (Case C-151/19 P), Judgment of the Court, 27 June 2024.

[9] CJEU, *Banco BPN/BIC Português, SA and Others v Autoridade da Concorrência* (Case C-298/22), Judgment of the Court, 29 July 2024.

[10] CJEU, *Post Danmark A/S v Konkurrencerådet* (Case C-23/14), Judgment of the Court, 6 October 2015.

[11] CJEU, *European Superleague Company, SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* (Case C-333/21), Judgment of the Court, 21 December 2023, para. 119.