NULLITY UNDER ART. 101(2) TFEU

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Abstract

The paper discusses the characteristics of the Article 101(2) TFEU nullity compared to the concepts of nullity in civil law in Belgium, the Netherlands, France and Germany as well as to the concept of non-bindingness in EU consumer law.

Keywords: EU competition law, European private law, nullity, non-bindingness, EU consumer law
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I Introduction

Article 101(2) is the only provision of the TFEU dealing with the private law consequences of conduct by individuals. Article 101(2) TFEU provides that agreements and decisions infringing Article 101(1) and not being exempted under Article 101(3) TFEU are automatically void. Article 101(1) 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”. The nullity referred to in Article 101(2) is an autonomous concept of EU law. However, the TFEU does not give any further information on the characteristics or the consequences of the automatic voidness under Article 101(2) TFEU.

The present contribution aims to analyse the case law of the Court of Justice in order to learn more about the nature, the scope of application, the characteristics and the consequences of the Article 101(2) nullity and its impact on the national law of the member states. Attention will also be paid to the application of the Article 101(2) nullity by national courts and to the analysis of the said article in legal scholarship as well as to the similarities and differences with national concepts of nullity and the concept of non-bindingness that is used in the Unfair Contract Terms Directive (UCTD)\(^2\). No attention will be paid to the so-called theory of provisional validity which applied before the entry into force of Regulation 1/2003\(^3\), when Article 101(3) was not

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1 See infra, II.
directly applicable by national courts.\(^4\) Equally, the issue of the impact of the nullity of an agreement or clause for infringement of Article 101(1) TFEU on related contracts will not be addressed.\(^5\)

Firstly, the character of the Article 101(2) nullity as an EU private law sanction will be highlighted. Subsequently, the scope of application of the Article 101(2) nullity will be investigated. Then the typical characteristics of the Article 101(2) nullity will be further examined: its automatic and absolute character and its retroactive effect. After this, attention will be paid to the impact of the nullity of a clause of an agreement or decision on the remainder of that legal act and to the possibility of national courts to modify void agreements in order to render them valid. The conclusion will sum up the results of the research.

For the purposes of this contribution the concepts nullity and voidness, null and void are used as synonyms. Unless otherwise indicated, the phrase “anticompetitive agreements or decisions” refers to agreements or decisions infringing Article 101(1) TFEU or its predecessors. In order to improve the readability of this contribution, case law or scholarly statements relating to the predecessors of Article 101 TFEU (Arts. 85 and 81 EC) will be described as relating to Article 101 TFEU and the concept European Union (EU) will be used even when referring to times where it was strictly speaking the European Community or even the European Economic Community.

II Article 101(2) nullity: a truly EU private law sanction

Already in *La Société Technique Minière* the Court of Justice pointed at the autonomous meaning of the Article 101(2) nullity, stating that

\(^4\) On this theory, see e.g. S. Mail-Fouilleul, *Les sanctions de la violation du droit communautaire de la concurrence* in Bibliothèque de droit international et communautaire, Paris, L.G.D.J., 2002, n° 140 et seq., p. 142 et seq.

“This provision, which is intended to ensure compliance with the Treaty, can only be interpreted with reference to its purpose in Community law and it must be limited to this context”.  

The nullity of agreements between undertakings or of decisions by associations of undertakings which infringe Article 101(1) TFEU is therefore a matter of EU law itself. Where Article 101(2) applies, there is no need or room to apply national rules, such as Article 3:40 Dutch Civil Code, holding contracts or legal acts contrary to law or good morals void or voidable. Given the priority of EU law over national law, Article 101(2) TFEU prevails over national rules.

In Automec, the Court of Justice describes the Article 101(2) nullity as one of the civil law consequences of an infringement of Article 101(1). In his Artijus decision, the president of the Court of Justice described the Article 101(2) nullity as a “civil-law sanction”. In order to prevent confusion with the distinction between civil-law and common law, the concept of a “private law sanction” is to be preferred. Nevertheless, the underlying idea is correct. The nullity of Article 101(2) determines the private law consequences of anticompetitive agreements or decisions. It does not affect the powers of the European Commission (EC) or the National Competition Authorities (NCAs) to impose positive or negative injunctions ordering undertakings or associations of

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9 Case T-24/90, Automec Srl v Commission, ECLI:EU:T:1992:97, ECR 1992, II-02223, para 50: “Among the consequences which an infringement of that prohibition may have in civil law, only one is expressly provided for in Article 85(2), namely the nullity of the agreement.” See also Immenga/Mestmäcker: EU-Wettbewerbsrecht, AEUV Art. 101 Abs. 2 [Kartellverbot], n° 6. Beck Online, 2012. “Die in Art. 101 Abs. 2 angeordnete Nichtigkeit wird als eine spezifisch gemeinschaftsprivatrechtliche Rechtsfolge bezeichnet.”

undertakings to cease an infringement of the competition rules or to modify anticompetitive agreements or decisions.\textsuperscript{11}

Although EU law contained a concept of nullity in Article 101 TFEU, the EU did not use this concept to indicate one of the sanctions for the use of unfair terms in the UCTD. In this Directive it used the novel concept “non-bindingness”. Although Article 6(1) UCTD requiring Member States to lay down that unfair terms shall not be binding on the consumer, referred to national law (unfair terms (…) shall, as provided for under their national law, not be binding on the consumer), the Court of Justice has in the meantime clarified so many characteristics of this non-bindingness that the content of this sanction is mainly determined at the EU level. However, contrary to Article 101(2) Article 6(1) UCTD is not directly applicable. The direct source of the non-bindingness in B2C relationships remains thus to be found in national law, although the content of this concept is mainly determined on the EU level by means of instructions which national courts and legislators need to take into account. The Article 101(2) TFEU nullity and the Article 6(1) non-bindingness therefore have a different legal status.

\section*{III \hspace{1em} Scope of application of Article 101 (2) nullity}

Article 101(2) TFEU only mentions nullity as a sanction for anticompetitive agreements and decisions. It does not mention concerted practices. In November 2013, in \textit{Artisjus}, the President of the CJEU made clear that Article 101(2) TFEU does not apply to prohibited concerted practices.\textsuperscript{12} The case concerned a request from a Hungarian association for the collective management of copyright (Artisjus) to suspend the operation of the Commission’s CISAC Decision\textsuperscript{13}. CISAC is the International Confederation of Societies of Authors and Composers. The Commission’s decision was addressed at 24 collecting societies which are members of CISAC and established in the EEA and which manage the rights held by the authors (lyricists and composers) in the musical works created by them. In the said decision the Commission had \textit{inter alia} found that the EU collecting societies had infringed Article 101 TFEU by imposing

identical territorial limitations in each of the representation agreements they had concluded between themselves and by which they entrusted each other, on a reciprocal basis, with the management of their repertoire in their respective operating territories. The Commission had ordered the infringement to be brought to an end. Artisjus claimed *inter alia* the suspension of this part of the decision arguing that it was unclear whether it should extend the mandates it had granted to the other collecting societies or whether the territorial clauses in its reciprocal representation agreements were void under Article 101(2) TFEU.

The President held that

“it suffices to note that Article [101(2) TFEU] makes void only ‘agreements between undertakings’ or decisions [by associations of undertakings] prohibited under Article [101(1) TFEU], whereas that civil-law sanction does not apply to prohibited ‘concerted practices’. (...) the Commission limits itself to stating that the collecting societies mentioned have infringed Article [101 TFEU] ‘by coordinating the territorial delineations’ (...). The unlawfulness of the concerted practice referred to in the contested decision cannot therefore make void the alleged result of that practice, namely the reciprocal representation agreements’”\(^{14}\).

In order to understand the exclusion of concerted practices from Article 101(2) TFEU it is important to recall the definition of a concerted practice. The Court of Justice consistently defines the concept of a concerted practice as

“a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition”\(^{15}\).

\(^{14}\) Ibidem, n° 46-47.

Since the act of coordination which gives rise to a concerted practice does not amount to an actual agreement, it is not a binding legal contract or act in civil law terms. Consequently, there is no need to declare it void.\textsuperscript{16} This is in line with the Court’s statement in \textit{HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co.} that Article 101(2) TFEU “is (only) intended for cases where a legal obligation is actually in issue”.\textsuperscript{17}

Long standing case law of the CJEU holds that the contracts concluded with third parties following-on to an actual anticompetitive agreement between undertakings are not automatically void as a matter of EU law.\textsuperscript{18} It is consistent with this case law to not automatically hold agreements with or decisions affecting third parties based on concerted behavior void as a matter of EU law. However, it must be admitted that, given the absence of an actual agreement between the concerting parties, the distinction between (a) the act of concertation itself and (b) the agreements concluded with, or the decisions directed towards, third parties, is less clear.\textsuperscript{19}

It is to be noted that, in so far as a concerted practice or a cartel agreement would lead to the inclusion of unfair terms in consumer contracts, these terms can be held non-binding or an injunction to prevent the further use of such terms can be given under the national rules implementing the UCTD (Article 6 and 7 UCTD).

\textsuperscript{16} MünchKommEUWettbR/Säcker/Jaecks, Art. 81 EG, 2007, n° 773, p. 715. See also Casebook, chapter 2.
\textsuperscript{19} See also Casebook, chapter 2.
IV \hspace{1em} \textbf{Characteristics of EU Competition Law Nullity}

The CJEU nicely summed up the most important characteristics of the Article 101(2) nullity in its \textit{Courage} judgment:

“\textbf{That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article [101](1) are met [...]. Since the nullity referred to in Article [101](2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties [...]}. Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned [...].”\textsuperscript{20}

In the following paragraphs each of these characteristics will be subjected to closer analysis.

\textbf{A \hspace{1em} Automatic}

Article 101(2) TFEU provides that

“\textit{Any agreements or decisions prohibited pursuant to this Article shall be automatically}\textsuperscript{21} \textbf{void”}.

It follows from the Court of Justice’s decision in \textit{Haecht II} that this must be interpreted as meaning that the voidness takes effect as a consequence of the law itself (voidness


\textsuperscript{21} CC italicises.
No prior decision of the EC, an NCA or a Court is required. A decision whereby a national court finds an agreement to be null for infringement of Article 101 TFEU has a declaratory and not a constitutive character.

In this regard the European concept of nullity differs from for example the Belgian and French concept of nullity. In how far does the Article 101(2) nullity differ in this respect from the non-bindingness provided for by the UCTD? In her Opinion in Invitel Advocate-General Trstenjak voiced the opinion that the “non-binding nature of the term (...) exists ipso jure, and is not dependent on any judicial decision”. This statement finds support in the writings of certain French scholars who regard the sanction of unfair terms as a kind of inexistence and it may also be what Micklitz and Reich imply when they write that unfair terms are void ex lege. At first sight, this is, however, difficult to reconcile with the Court of Justice’s decisions in Pannon and Banif which allow the national court to apply the unfair term, if the consumer, after having been informed of its non-binding status, opposes its non-application.

It is uncertain whether this was the reason why the Court in Invitel did not underwrite the

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26 Opinion Advocate-General Trstenjak, Case C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt., ECLI:EU:C:2011:806, para 47.


just cited statement of its Advocate General. Nevertheless, the Court did agree with her that terms from a seller’s general business conditions which are declared to be unfair in an action for an injunction brought against that seller, are not binding on either the consumers who are parties to the action for an injunction or on those who have concluded with that seller a contract to which the same general business conditions apply.\(^{30}\) Here too, the non-bindingness exists before the consumer has had the possibility to object to the non-bindingness. It would seem, however, that non-bindingness does not necessarily mean inapplicable; it means inapplicable except when the consumer objects to the non-application.\(^{31}\) Even if this non-bindingness exists without a judicial decision, there is a major difference with the Article 101(2) nullity which applies without any possibility for any of the contracting parties to prevent it from having effect. As the CJEU stated in \textit{Courage}, national courts “are bound” by the principle of automatic nullity.\(^{32}\) This means that they have no discretion in the application of Article 101(2) TFEU;\(^{33}\) once the conditions for the application of the Article are fulfilled, the courts have no other option but to declare the (clause of the) agreement or decision in question void.

The statement that the courts “are bound” by the principle of automatic nullity“, once the conditions for the application of Article 101(1) are met, also gives rise to the question whether Courts are bound to apply the nullity \textit{ex officio} even when it is not invoked by the parties to the dispute.

In \textit{Van Schijndel} the Court of Justice held that national courts are under a duty to apply Article 101 TFEU (then Article 85 EC) \textit{ex officio} where domestic law allows such application.\(^{34}\) However, EU law

“does not require national courts to raise of their own motion an issue concerning the breach of provisions of [EU] law where examination of that issue would oblige them to abandon the passive role assigned to them by

\(^{30}\) Para 38, 44 and operative part 2.


\(^{32}\) \textit{Courage}, para 22.

\(^{33}\) S. Mail-Fouilleul, n° 132, p. 135.

going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim”. 35

In later cases (Courage,36 Manfredi,37 T-mobile38) the Court of Justice mentioned the duty of national courts to automatically apply Article 101 TFEU without referring to the limits set out in Van Schijndel. In certain language versions, such as the French, Dutch and the Italian one, the duty of courts to apply Article 101 TFEU automatically, is translated as a duty to apply Article 101 TFEU *ex officio* (*ambtshalve/d’office/d’ufficio*), of their own motion.

In Manfredi it was stated:

“Moreover, it should be recalled that Articles [101 TFEU] and [102 TFEU] are a matter of public policy which must be automatically applied by national courts (see, to that effect, Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraphs 39 and 40)”.39

In T-Mobile the CJEU held:

“It should be borne in mind at the outset that Article [101 TFEU], first, produces direct effects in relations between individuals, creating rights for the persons concerned which the national courts must safeguard and, second, is a matter of public policy, essential for the accomplishment of the tasks entrusted to the Community, which must be automatically applied by national courts (see, to that effect, Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraphs 36 and 39, and Joined Cases C-295/04 to C-298/04 Manfredi and Others [2006] ECR I-6619, paragraphs 31 and 39)”.40

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35 Ibid., para 22.
36 Cited above.
37 Joined cases C-295/04 to C-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA, ECLI:EU:C:2006:461, ECR 2006, I-6619.
39 Ibid., para 31.
40 Ibid., para 49.
These cases caused some turmoil amongst legal scholars. According to a first opinion Van Schijndel leaves no room for national courts to intervene of their own motion in the public interest. Paragraph 31 of the Manfredi judgment is only an *obiter dictum*. The consideration can be regarded as a slip of the pen. The reference to *Eco Swiss* is incorrect since that judgment only states that Article 101 TFEU is a matter of public policy within the meaning of the New York Enforcement Convention; it does not mean that Article 101 TFEU is of public policy in the context of the rules concerning the raising of points of law by courts of their own motion.

According to a second opinion, Manfredi is not a slip of the pen. However, Manfredi and Van Schijndel are not contradictory either. The rules contained in both decisions have a different scope of application. Van Schijndel potentially applies to a wide variety of cases. In Van Schijndel itself the original claim was based on the assumption that a legal provision was binding, but that it should not apply. In cassation it was argued that the Court should have raised *ex officio* the non-bindingness of that legal provision, because it was incompatible with Article 101 TFEU. This might have led to allowing Van Schijndel’s claim on a different legal basis, which was, however, prohibited by the rules of civil procedure. Manfredi and later T-Mobile on the other hand relate to the duty of national courts to *ex officio* raise the nullity of agreements or decisions in order to *reject* claims even if this means that the Court has to go beyond the ambit of the dispute as determined by the parties.

The scholarly dispute is very interesting, but what can really be derived from the cases *Van Schijndel, Manfredi* and *T-Mobile*? It seems to follow from Manfredi and T-mobile, 

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that the Court interprets “automatic” within the framework of Article 101 TFEU as *ex officio*. Therefore, given the wording of Article 101(2) TFEU, the nullity of agreements or decisions needs to invoked by the Courts *ex officio*. Moreover, *Van Schijndel* did not completely exclude a duty to *ex officio* apply Article 101 TFEU. It only stated that no such duty exists for national courts

“where examination of [the issue of breach of Art. 101] would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim”.

Strictly speaking, therefore, it only follows from *Van Schijndel* that the duty to *ex officio* apply Article 101 does not exist where two cumulative conditions are fulfilled: (1) the *ex officio* application of Article 101 would require the national court to go beyond the ambit of the dispute defined by the parties and (2) the *ex officio* application of Article 101 would require the national court to rely on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim. The expression “the ambit of the dispute” is a bit vague and can give rise to different interpretations. The second requirement, however, seems rather clear. There is no duty to apply Article 101 TFEU *ex officio* where this would require the court to rely on other facts and circumstances than those on which the party with an interest in the application of the Article relies. This is understandable, national civil courts (at least not all of them) are not equipped with sufficient powers of investigation to reveal all facts and circumstances required to assess the application of Article 101 TFEU where these are not submitted by the parties. Moreover, Article 2 Regulation 1/2003 contains clear rules on the burden of proof:

“In any national or Community proceedings for the application of Articles [101 and 102 TFEU], the burden of proving an infringement of Article [101(1) or of Article 102 TFEU] shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article [101(3) TFEU] shall bear the burden of proving that the conditions of that paragraph are fulfilled”.

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It is unlikely that the CJEU in *Manfredi* and *T-mobile* would have intended to set aside this rule.

When looking at national cases dealing with the *ex officio* application of Article 101 TFEU, it appears that the rules on the burden of proof are indeed used as limitations to the *ex officio* application of the said Article.

In a case decided on 15 May 2009, the Belgian Supreme Court refused to quash an appellate decision that had failed to *ex officio* invoke Article 101(3) in a case where it had on the basis of the facts presented to it decided that the requirements of Article 101(1) were satisfied, but had not investigated whether the requirements of Article 101(3) were satisfied.\(^{44}\) The Supreme Court pointed out that pursuant to Article 2 Regulation 1/2003 the party who seeks to rely on Article 101(3) bears the burden of proof. Yet, before the Court of Appeal the claimant had not invoked Article 101(3) and had not tried to prove that the requirements of Article 101(3) were fulfilled. The Supreme Court added that –given the passive role assigned to it (*principe de disposition*) the Court may not *ex officio* change the object of the claim either by extending it or by replacing it. The Court may *ex officio* add to the legal grounds asserted by the parties provided that it does not raise an issue the parties have excluded in their pleadings, that it only builds on the elements that have been brought before it regularly and that it does not modify either the object or the cause of the claim. The decision seems compatible with *Van Schijndel*. Nevertheless, it met with criticism from certain scholars. It was questioned whether the decision was to be interpreted as meaning that the judge would not be under a duty to *ex officio* raise Article 101(3) TFEU, while he would be under a duty to *ex officio* raise Article 101(1) TFEU and whether this did not create an artificial distinction between the two branches of Article 101 TFEU. Should Article 101 TFEU not be considered to be of public order in its entirety since the underlying reasons of all its branches equally affect the public economic order? The *ex officio* application of Article 101(3) TFEU would also be in line with the aim pursued by Regulation 1/2003.\(^{45}\) In my opinion, the decision by Belgian Supreme Court does


not exclude that Article 101(3) affects the public order. Even in cases where the public order is concerned national courts are bound by the rules on the burden of proof set out in Article 2 Regulation 1/2003 and do not always possess the investigatory powers to reveal all elements necessary to assess the application of Article 101(3) if these are not submitted by the parties.\footnote{See and compare MünchKommEUWettbR/Säcker/Jaecks, Art. 81 EG, 2007, n° 774, p. 715.}

The decision of the Belgian Supreme Court of 15 May 2009 can be compared with a case decided by the Austrian Court of Supreme Court on the duties of a first instance court in relation to Article 101(1) and (2) TFEU. The Austrian Supreme Court decided that the absolute nullity of Article 101(2) TFEU does not mean that the factual preconditions of Article 101(1) TFEU are to be investigated \textit{ex officio}. It only means that a formal assertion of nullity is not required. The factual preconditions, however, need to be asserted in first instance or at least they need to appear clearly from the case file. Since that was not the case, the Court did not need to apply the nullity.\footnote{Austrian Supreme Court (Oberste Gerichtshof) 11 December 2013, 7Ob210/13b, RdW 2014/370 S 336 - RdW 2014, 336.}

It is interesting to compare the CJEU’s decision relating to the \textit{ex officio} application of competition law with its case law on the same issue in relation to the UCTD,\footnote{Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 April 1993, 29.} since here the CJEU does require the national court to go beyond the facts readily available to it.\footnote{See fn 50.}

In \textit{Pannon}, the Court still held that

\begin{quote}
“The national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task”\textsuperscript{.50}
\end{quote}

This decision did not make clear whether the national court may or must also examine the unfairness of a contractual term of its own motion where it does not have available to it the legal and factual elements necessary for that task, in other words, whether it was also required to establish of its own motion the facts and the law necessary for that examination. The Court was asked to clarify this issue in Pénzügyi Lízing in relation to a jurisdiction clause in a consumer contract. The Court’s answer was that

“the national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair”.\(^{51}\)

The Court made clear that its decision in Pénzügyi Lízing was motivated by the fact that the UCTD aims to protect the consumer who is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. The Court added that the provision of the Directive holding unfair terms non-binding on the consumer

“is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (…)”

In order to guarantee the protection intended by the Directive, the Court has also stated that the imbalance which exists between the consumer and

\(^{51}\) Case C-137/08, VB Pénzügyi Lízing Zrt. v Ferenc Schneider, ECLI:EU:C:2010:659, ECR 2010 I-10847, para 56 and operative part 3. Confirmed in CJ 14 June 2012 Case C-618/10 Banco Español de Crédito SA v Joaquín Calderón Camino n.y.r. ECLI:EU:C:2012:349 para 44; CJ 21 February 2013 Case C-472/11 Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai n.y.r. ECLI:EU:C:2013:88, para 24; CJ 14 March 2013 C-415/11 Mohamed Aziz tegen Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) ECLI:EU:C:2013:164 para 47. It has to be noted however that in two later cases on the unfair terms directive, the Court no longer used the phrase from Pénzügyi referring to an investigation into the fact of whether a contract term had been individually negotiated, but limited itself to the wording used in or very similar to that used in Pannon: the Court’s duty to examine of its own motion the possible unfairness of a term exists “where it has available to it the legal and factual elements necessary for that task”, “as soon as it has available to it the legal or factual elements necessary for that task”, see Case C-488/11, Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV n.y.r., ECLI:EU:C:2013:341, para 41, Case C-397/11, Erika főös v Aegon Magyarország Hitel Zrt, ECLI:EU:C:2013:340, para 27.
the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (...).”

One could argue that competition law applies mostly between professional parties and that the financial value of the disputes is generally higher than in consumer cases, so that the parties are more likely to invest in sound legal advice. This might justify a different treatment of the national court’s obligation to carry out of its own motion an investigation into the facts of the dispute. However, particularly in vertical agreements between undertakings, there may also be significant differences in the economic and bargaining power as well as in legal expertise of the parties to the dispute. Yet, Article 2 Regulation 1/2003 does contain clear EU-wide rules on the burden of proof in competition law cases.

As mentioned above, Pannon and Banif reveal a limitation to the national Court’s duties to ex officio apply rules on unfair contract terms: the national court may apply an unfair and therefore non-binding term, if the consumer, after having been informed of the term’s non-binding status, opposes its non-application. This specification seems to be motivated by the consideration that the non-bindingness serves to protect the interests of the consumer. A similar specification is not appropriate in competition cases since here the nullity serves to protect the well-functioning of competitive markets, which is a matter of public policy.

Finally, it was implied in Pannon and made explicit in Banif Plus that

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52 Case C-137/08, VB Pénzügyi Lízing Zrt. v Ferenc Schneider, ECLI:EU:C:2010:659, ECR 2010 I-10847, para 47 and 48.
53 Case C-243/08, Pannon GSM Zrt. v Erzsébet Sustikné Győrfi, ECR 2009, I-04713, para 33 and operative part 2; Case C-472/11 Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai n.y.r., ECLI:EU:C:2013:88, para 27 and 35.
54 Case C-126/97, Eco Swiss China Time Ltd v Benetton International NV, ECR 1999, I-3055, paras 36 and 39-40; Manfredi, para 31; T-Mobile, para 49.
55 The concept “public policy” is to be carefully distinguished from that of “public interest” which is used in relation to the UCTD. On this distinction, see “Ex officio Application in case of Unenforceable Contracts or Contract Clauses. EU and National Laws confronted” in L. Gullifer and S. Vogenauer (eds.), English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale, Oxford, Hart, 2014, 479. See also A. Hartkamp, 2016, 115.
“the principle of audi alteram partem, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure”.  

This seems to apply in cases of private enforcement of competition law as well, even though in these cases the claimant cannot prevent the application of the nullity in the case that the conditions of Article 101(1) TFEU are fulfilled and the act is not exempted under Article 101(3).  

The automatic nature of the nullity also gives rise to the question whether the right to avail oneself of the nullity can be subject to prescription. Some scholars answer in the negative, arguing that the nullity is not the result of an “action for nullity”, so that there is no action that can be time barred. This view seems to be the most logical. Komninos, however, argues that this opinion would lead to an unacceptable level of legal uncertainty, which would be incompatible with EU law. He therefore argues that the national rules on prescription need to be applied, taking into account the principles  

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of effectiveness and equivalence. Given the public policy nature of the EU competition rules, the national rules on prescription that apply in cases of nullity for infringement of rules of public policy would need to be applied. Where such rules do not exist, the general national regime applicable to civil law actions would apply, subject to the principles of effectiveness and equivalence.\(^{58}\) In the *Cofidis* case in relation to the UCTD, the Commission, however, argued that to allow the Member States to introduce time-limits which might differ from each other for the court's power to find of its own motion that an unfair term is illegal and therefore not binding, would be contrary not only to the aims of the Directive, but also to the principle of the uniform application of Community law.\(^{59}\) The same could be argued in relation to the nullity of Article 101(2) TFEU: allowing the application of different national prescription rules would undermine the purpose of Article 101 TFEU and its uniform application. The Court of Justice also considered the application of a time limit on the court's power to set aside unfair terms (of its own motion or following a plea raised by the consumer) to be incompatible with the UCTD, albeit based on a more nuanced reasoning. In particular, the Court considered the application of a national rule containing such a time limit to be contrary to the effectiveness of the protection aimed at by the UCTD, but it took care to specify that not all limitation periods are incompatible with the protection of rights conferred on individuals by Community law and that it must in each individual case be analysed whether a national procedural provision renders the application of Community law impossible or excessively difficult by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.\(^{60}\) A party to an anticompetitive agreement or clause will be less likely to be unaware of the illegality or deterred from enforcing its rights than a consumer and waiting until the time limit has expired may be less effective for a party seeking to enforce an anticompetitive clause than for a trader seeking payment from a consumer, so that the reasons given for the incompatibility with the principle of effectiveness of a time-limit for the application of the sanction of

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\(^{58}\) Komninos, 154.


\(^{60}\) Case C-473/00, Cofidis SA v Jean-Louis Fredout, ECLI:EU:C:2002:705, 2002 I-10875, para 35-37.

Compare Case C-8/14, BBVA SA, formerly Unnim Banc SA v Pedro Peñalvo López et al., ECLI:EU:C:2015:731.
non-bindingness in unfair terms cases[^61] cannot as such be transposed to cases concerning Article 101(2) TFEU. Nevertheless, it follows from *Cofidis* that the Court of Justice is not *per se* opposed to a “non bindingness” or nullity that applies without being subject to a limitation period and the application of a time limit, in particular if this would run as of the moment of the conclusion of the agreement would undermine the effectiveness of Article 101 TFEU.

**B The Article 101(2) nullity is absolute**

1 **Absolute nullity as an autonomous concept of EU law vs national concepts**

It is standing case law of the Court of Justice that the nullity referred to in Article 101(2) TFEU is absolute.[^62] This concept may give rise to confusion since it has different meanings in different member states and its meaning is sometimes even disputed within a single member state.

a **Absolute nullity under national law**

In Belgium and France absolute nullity is opposed to relative nullity. Absolute nullity is intended to protect the general interest. Relative nullity is intended to protect the private interests of the other contracting party.[^63] In Belgium, rules protecting the general interest are considered to be rules of public order.[^64] The concept of public order is defined as the rules that affect the essential interests of the State or the collectivity or in private law those that establish the juridical foundations of the economic and moral

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[^62]: Béguelin, para 6; Kerpen and Kerpen, para 11; Courage, para 22.
order of the society.\textsuperscript{65} Rules that only serve to protect the private interests of the other party are called rules of mandatory law that does not affect the public order or rules of mandatory law \textit{sensu stricto}. Mandatory rules \textit{sensu lato} then cover both mandatory rules \textit{sensu stricto} and rules of public order.\textsuperscript{66} Rules of EU or national competition law are rules of public order.\textsuperscript{67} In France, generally two concepts of \textit{ordre public} are distinguished: 1) the \textit{ordre public de direction}, which is comparable with the Belgian public order and infringements of which lead to absolute nullity and 2) the \textit{ordre public de protection} which is comparable to the Belgian mandatory law \textit{sensu stricto} and infringements of which lead to relative nullity.\textsuperscript{68}

Absolute nullity can be relied on by everyone having a legitimate interest whether a party to the agreement or not and may be imposed by the court \textit{ex officio}.\textsuperscript{69} Relative nullity can only be invoked by the protected party to the agreement, who is free to invoke it or not to invoke it. The protected party can even confirm the relatively void contract at a moment that he no longer needs the protection, thereby renouncing from his right to bring to invoke the relative nullity of the contract at a later moment.\textsuperscript{70} The distinction between the two types of nullity is, however, fading. Both in France and in Belgium there is a tendency to allow courts to draw the attention of the parties to a


\textsuperscript{66} F. Peeraer, n° 6, p. 2710-2711.


\textsuperscript{69} Belgium: F. Peeraer, n° 40, p. 2744; W. Van Gerven and S. Covemaeker, 147; P. Wéry, n° 327, p. 318-319; France: under the old Civil code: J. Ghestin, G. Loiseau and Y.-M. Serinet, 2013, n° 2214 et seq., p. 925 et seq.; C. Larroumet, n° 552-554, p. 562-565; under the revised Civil code: Art. 1180 which also mentions the public prosecutor (le ministère public). As to the ability of the public prosecutor to invoke the nullity under the old civil code, see J. Ghestin, G. Loiseau and Y.-M. Serinet, 2013, n° 2261 et seq., p. 979 et seq.

relative nullity, without it allowing it, however, to leave a relatively null contract or clause without effect if the protected party indicates that it does not want to rely on the relative nullity. Furthermore, the Belgian Supreme Court held that even in a case of absolute nullity the courts may not declare the contract or clause null if this has not been claimed by the parties; they may only refuse the give effect to the absolutely null clause.

Both in cases of absolute and relative nullity, the nullity only becomes effective when it has been pronounced by a court (unless - under the revised French civil code - the parties reach a common agreement on the nullity). The judgment therefore has a constitutive and not a declaratory character. Once a contract or other legal act has been declared null, the nullity has retroactive effect: the legal act is deemed never to have existed.

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75 P. Wéry, n° 344, p. 338; C. Larroumet, n° 570, p. 582-583 and n° 571, p. 583. 

in relation to third parties. When only one or more specific third parties can act as if the contract or legal act does not exist, this is not regarded as a matter of nullity, but of opposability. In such a case the contract or legal act is valid, but it cannot be opposed against certain third parties.

In the Netherlands, a distinction comparable to that between absolute and relative nullity is made between nullity and avoidability. Nullity is similar to what is called absolute nullity in Belgium and France with that difference that it operates ex lege. A null act has no legal consequences. A judgment finding a legal act null only has a declaratory character. Avoidability is similar to the Belgian/French relative nullity. It can only be invoked by the protected party who can choose not to invoke it. The avoidable act can be rendered valid by confirmation. In the Netherlands, the term relative nullity is used to indicate what is called inopposability in Belgium and France. Only one or more particular persons may act as if the act is null, while in fact it remains valid between the parties and in relation to all other third parties. The opposite of relative nullity is absolute nullity. The situation is further complicated by the fact that a minority of (older) legal scholars, use the concept absolute nullity to refer to nullity and the concept opposability to refer to what the majority calls relative nullity.

The “new” Dutch approach to nullity resembles the German approach. German law distinguishes between Nichtigkeit and Anfechtbarkeit. A legal act that is nichtig, is null ex tunc, no action being required to achieve this result. When a legal act is only anfechtbar, it is valid until it has been annulled by the party whom the Anfechtbarkeit aims to protect. Once the Anfechtung has legally taken place, the result is the same as if the act had been nichtig from the beginning. The use of the concepts absolute Nichtigkeit and relative Nichtigkeit is not steady. According to the majority opinion

77 P. Wéry, n° 344, p. 338; C. Larroumet, n° 570, p. 583.
79 Asser/Hartkamp & Sieburgh 6-III 2014/607.
80 Asser/Hartkamp & Sieburgh 6-III 2014/607.
81 Asser/Hartkamp & Sieburgh 6-III 2014/608.
82 Asser/Hartkamp & Sieburgh 6-III 2014/620.
83 Asser/Hartkamp & Sieburgh 6-III 2014/625. Art. 3:55 Dutch civil code. The Dutch concept is “bevestiging”. Art. 3:58 Dutch civil in principle also recognizes “bekrachtiging” (ratification), a type of confirmation of void (as opposed to avoidable acts, by the later fulfillment of the missing validity requirement causing the voidness.
84 Asser/Hartkamp & Sieburgh 6-III 2014/612.
absolute Nichtigkeit refers to the fact that the Nichtigkeit may be invoked ex officio or that it may not only be invoked by the parties but by any interested party. The expression absolute Wirkung of the Anfechtung is also used to indicate that the Anfechtung is effective not only between the parties, but also in regard of third parties. Relative Nichtigkeit refers to either the fact that the nullity may not be invoked ex officio, to the fact that it may only be invoked by the parties the rule sanctioned with relative nullity aims to protect, or to the limitation of the consequences of nullity.

b Article 101(2) absolute nullity and national absolute nullity compared

Certain French case law and legal scholarship has derived from the use of the concept absolute nullity in Béguelin, that the nullity sanctions an infringement of the public order. This conclusion was a bit hasty. When the Court of Justice uses a certain concept that is also used in one or more national legal systems, this concept cannot without more be held to have the same meaning as in (one of) those national legal systems. Nevertheless, in its later judgment, Eco Swiss, the Court of Justice has indeed stated that infringements of Article 101(1) TFEU are to be dealt with in the same way as infringements of “national rules of public policy”. The Court justified this assimilation by the act that

“36 (...) according to [Protocol n° 27], Article [101 TFEU] constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article [101(2)], that any agreements or decisions prohibited pursuant to that article are to be automatically void”.

85 MüKoBGB/Armbrüster BGB § 134, n° 111.
86 BGH NJW-RR 1987, 1456; LM § 2080 Nr. 1; RG WarnR 1911, 401 (402); NK-BGB/Feuerborn Rn. 11; MüKoBGB/Busche BGB § 142, n° 14.
87 MüKoBGB/Armbrüster BGB § 134, n° 111.
90 The judgment mentions “Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC”.
As we have seen above, in Manfredi\(^{92}\) and T-mobile\(^{93}\) even went further and characterized the competition rules as rules of (EU) public policy. The Court of Justice did not, however, at least not explicitly, link the character of public policy and the extent to which the competition law nullity has to be applied *ex officio* to the *absolute* character of the nullity (as in Belgian and French law), but to the *automatic* character of the nullity.

Also, the fact that the Article 101(2) nullity operates without the need of a prior judicial decision, follows from the *automatic* character of the nullity. The Article 101(2) nullity resembles in this respect the Dutch/German nullity (*nietigheid* and *Nichtigkeit* as opposed to the *vernietigbaarheid/Anfechtbarkeit*).

However, according to the Court of Justice’s case law, the essential consequence of what it calls absolute nullity is that the provision which is null and void by virtue of Article 101(2) TFEU “has no effect between the contracting parties and cannot be set up against third parties”.\(^{94}\)

It follows that the EU absolute nullity resembles in this regard the modern Dutch distinction, which also finds support in German scholarship, between absolute and relative nullity in that it determines who is affected by the nullity: the contracting parties and all (interested) third parties, or only a specific group of third parties. The Article 101(2) nullity has effect *erga omnes*.\(^{95}\) In Franco-Belgian terms: the Article 101(2) nullity is an actual nullity, and not a case of inopposability.

It can, however, not be concluded that the Court actually “chose” to use the “modern” Dutch concept of absolute nullity.

The absolute character of the Article 101(2) nullity has an autonomous meaning. National legal systems that already have a national concept of absolute nullity are

\(^{92}\) Joined cases C-295/04 to C-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA, ECLI:EU:C:2006:461, ECR 2006, I-06619, para 31.

\(^{93}\) Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit, ECLI:EU:C:2009:343, ECR 2009, I-04529, para 49.


therefore confronted with a second type of absolute nullity with different characteristics.

In order to get a better understanding of the autonomous EU concept of absolute nullity a further analysis is required of what it means that the agreement or provision which is null “has no effect between the contracting parties and cannot be set up against third parties”.

2 Consequence of Article 101(2) Absolute Nullity: No effect between the contracting parties

The Court of Justice’s statement in Courage that an agreement which is null pursuant to Article 101(2) TFEU has no effect between the contracting parties means that none of the contracting parties can claim performance of the contract since such performance would be able to prevent, restrict or distort competition.

The nullity of an agreement or a clause for infringement of Article 101(1) TFEU does not, however, prevent either of the contracting parties to invoke the nullity of that clause. As mentioned before, such nullity even has to be invoked by the national court ex officio, albeit within certain limits (cf. supra, IV, A).

Furthermore, as Courage v Crehan made clear, the nullity of a contract or clause for breach of Articles 101(1) does not prevent either of the contracting parties to claim damages for loss caused to him by the infringement of competition law consisting in the integration of an anticompetitive clause in a contract. Antitrust liability here takes the form of a precontractual liability or liability for culpa in contrahendo. It is important to note that the damages that can be claimed do not serve to compensate loss caused by non-performance of the anticompetitive agreement or clause. Since the agreement or clause is null, it does not bind the parties and non-performance of the agreement or

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96 Courage, para 22.
98 See Courage and Crehan, para 22: “That principle of automatic nullity can be relied on by anyone” and para 24: “It follows (…) that any individual can rely on a breach of Article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision”. See already, B. Hubeau, nº 73, p. 518.
clause does not give rise to a right to compensation. On the contrary, compensation is due to the party who to his detriment abided by the null clause.99

The CJEU stressed that there should not be “any absolute bar to [an action for damages] being brought by a party to a contract which would be held to violate the competition rules”. However, the CJEU does allow Member States to prevent unjust enrichment.100 Following the principle that “a litigant should not profit from his own unlawful conduct, where this is proven”, Member States may deny a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party, provided that the principles of equivalence and effectiveness are respected.101 The Court adds that

“32. In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract.

33 In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.

34 [Where a contract is contrary to Article 101(1) TFEU] for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition (…), the party contracting with the person controlling

99 Casebook, chapter 2.
100 Courage and Crehan, para 30.
101 Para 31.
the network cannot bear significant responsibility for the breach of Article [101], particularly where in practice the terms of the contract were imposed on him by the party controlling the network.”

Could similar considerations entail that a party to an anticompetitive agreement is exceptionally not entitled to rely on the nullity of an anticompetitive agreement or clause pursuant to Article 101(2) TFEU in order not to be compelled to perform the contract? The question is ultimately to be decided by the Court of Justice, but there is a good reason for a negative answer to this question. Since the anticompetitive agreement or clause prevents, restricts or distorts competition, it is beneficial to the general interest and in particular to the functioning of free competition on the market that the anticompetitive agreement or clause is not performed. This does not change by the fact that it is the “more guilty” party who draws the national court’s attention to the nullity of the contract. Potential loss to the more innocent contracting party can be compensated via an action for damages.

3 Consequence of Article 101(2) Absolute Nullity: No Effect against Third Parties

The Court of Justice has repeatedly stated that agreements which are null pursuant to Article 101(2) TFEU have no effect against third parties. However, the Court’s case law does not seem to provide an example of such a case.

The fact that anticompetitive agreements cannot have any effects against third parties does not mean that contracts concluded with third parties on cartelized terms (i.e. according to agreements made between the cartelists) are also null. As the Court of Justice stated in its seminal case Kerpen and Kerpen (Cement):

“the automatic nullity decreed by Article [101](2) of the Treaty applies only to those contractual provisions which are incompatible with Article [101](1). The consequences of such nullity (…) for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not
a matter for [EU] law. Those consequences are to be determined by the national court according to its own law.”

In *Allianz Hungaria*, however, the CJEU seems to have at least nuanced its views on the matter, ruling that

“One if there was a horizontal agreement or a concerted practice between those two companies designed to partition the market, such an agreement or practice would have to be treated as a restriction by object and would also result in the unlawfulness of the vertical agreements concluded in order to implement that agreement or practice”.

As mentioned in the introduction this contribution will not in go into detail regarding the impact on other contracts of a clauses or agreements that are void under Article 101(2).

A situation where a third party could invoke the nullity of an agreement between two other parties is that where the third party is sued for wrongful interference with an anticompetitive agreement. If the agreement is null, there can be no question of wrongful interference. An (unsuccessful) example can be found in a Belgian case where a company active in the gambling business brought an action to cease and desist against a competitor who would have wrongfully interfered with exclusive contracts concluded between the claimant and third parties. In defence, the defendant invoked the nullity of the contracts for breach of Article 101 TFEU. The case is only partially published and is far from clear. It appears that the defence failed because the Court found that Article 101 TFEU did not apply.

Where the nullity is not automatic, but needs to be brought about by a declaration or claim, a distinction is to be made between the subjects having the power to bring about the nullity and those affected by the effects of the nullity. In Belgium and France for example the relative nullity can only be claimed by the protected party, but once this

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103 Case C-32/11, Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal, ECLI:EU:C:2012:663, para 45.
party has successfully obtained the nullity, the null act is deemed never to have existed both in relation to the contracting parties and in relation to third parties.\(^{105}\) Since the Article 101(2) nullity is automatic, the issue of bringing about, declaring or claiming the nullity or of having the power thereto does not arise. Invoking the nullity here merely means relying on the fact that the (automatic) nullity is effective \textit{erga omnes}.

\section*{C The Article 101(2) Nullity has Retroactive Effect}

In \textit{Haecht II}, the Court of Justice stated that the Article 101(2) nullity

\begin{quote}
\text{“26 (...) is (...) capable of having a bearing on all the effects, either past of future, of the agreement or decision.}
\end{quote}

\begin{quote}
\text{27 Consequently, the nullity provided for in Article [101(2)] is of retroactive effect”.}\(^{106}\)
\end{quote}

In a later case, \textit{Hendrik Evert Dijkstra v Friesland}, the phrase that “Such nullity has retroactive effect” is found\(^{107}\), without being accompanied by the statement that the nullity is capable of having a bearing on all past or future effects of the agreement.

In more recent case law (\textit{Courage},\(^{108}\) \textit{Manfredi},\(^{109}\) \textit{Cepsa}\(^{110}\) the Court uses systematically the phrases

\begin{quote}
\text{“once the conditions for the application of Article [101(1)] are met and so long as the agreement concerned does not justify the grant of an exemption under Article [101(3) TFEU]”}
\end{quote}

\(^{105}\) \textit{Cf. supra}, IV, B, 1, a.
\(^{108}\) Para 22.
\(^{109}\) Joined cases C-295/04 to C-298/04, \textit{Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA} (C-295/04), \textit{Antonio Cannito v Fondiaria Sai SpA} (C-296/04) and \textit{Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA}, ECLI:EU:C:2006:461, ECR 2006, I-06619, para 57.
the nullity

“is capable of having a bearing on all the effects, either past or future, of the agreement (or decision) concerned”.

In legal scholarship the temporal effects of the Article 101(2) TFEU nullity are disputed.

According to a first view, an agreement or decision which is null, is considered to have been null from the moment it came into existence and for the future\(^{111}\), so that it is considered not to have produced any effects in the past and it cannot produce any effects in the future.\(^{112}\)

This interpretation is in conformity with the meaning of the retroactive effect of the nullity in contract law in Member States such as Belgium\(^{113}\), France\(^{114}\) and the Netherlands.\(^{115}\) The UCTD does not address the temporal effects of the non-bindingness. However, in its report on the implementation of the UCTD the Commission indicated that “any court judgment that finds a term to be unfair must provide that the judgment take effect from the time of conclusion of the contract (ex tunc)”.\(^{116}\) Advocate General Trstenjak expressed a similar opinion in Invitel.\(^{117}\)

The view that the Article 101(2) nullity would have effect ex tunc and for the entire future has been criticised by the proponents of the “theory of transient nullity”.


\(^{112}\) In this sense Zippo, 75-77.


\(^{115}\) Asser/Hartkamp & Sieburgh 6-III 2014/643. See also for “vernietiging”: Asser/Hartkamp & Sieburgh 6-III 2014/636.


\(^{117}\) Opinion Advocate-General Trstenjak, Case C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v Invitel Tőkézési Zrt., ECLI:EU:C:2011:806, para 47. See also F. Wilman, Private Enforcement of EU Law Before National Courts: The EU Legislative Framework, Elgar, Cheltenham, 2015, 164-165.
According to this theory the Article 101(2) nullity does not necessarily imply that the agreement or decision infringing Article 101(1) is void as from the moment when it came into effect and for the entire future. The theory of transient voidness takes into account that the question whether an agreement infringes Article 101(1) may depend on fluctuating circumstances, such as the market share of a company. When the contacting parties to a vertical agreement have market shares below 30% on the relevant markets and their agreement satisfies the other requirements provided by the Verticals Block Exemption Regulation\textsuperscript{118}, their agreement will be considered not to infringe Article 101(1). When the market share of one of the parties exceeds the 30% market share threshold for more than one year, the agreement will no longer benefit from the block exemption and may be considered null under Article 101(2). This does, however, not imply that it should also be considered void for the time during which it benefited from the block exemption. Similarly, when the market share of the parties drops again under the market share threshold provided by the Block Exemption Regulation, the agreement will cease to infringe Article 101(1) and should from that moment on, no longer be considered null.

The theory of transient nullity is supported by UK case law and legal scholarship,\textsuperscript{119} Belgian case law\textsuperscript{120} and German legal scholarship.\textsuperscript{121} According to the German Supreme Court, however, only a ratification (Bestätigung) within the meaning of §141 BGB by the parties after the situation causing the voidness of the agreement or clause may render the agreement valid for the future.\textsuperscript{122}

Kominos, who is very critical of the theory of transient voidness recognises that certain conduct might cease to fall under the prohibition of Article 101. But, in his opinion,


\textsuperscript{120} CA Brussels 23 June 2005, RCB 2006/2, 107.

\textsuperscript{121} Immenga/Mestmäcker, Art. 101(2), 2012, n° 16-17.

“the absolute and automatic character of the nullity sanction cannot be affected (by this).”\(^{123}\)

In his view

“Any other result would not be compatible with the *effet utile* of that provision and would not facilitate enforcement of aggrieved parties' rights under the doctrine of direct effect of Art. [101]. In all cases of “transient prohibition”, the contract, as initially concluded, will be void, although the conduct involved may no longer be prohibited.

In short, although there is indeed a possibility that a contract might be caught by the prohibition of Art. [101 TFEU] only for a specific period while thereafter changed circumstances may have taken the contract outside the ambit of illegality, the civil validity of that contract is a totally different issue. The automatic, retrospective and prospective nature of the Art. [101(2) TFEU] civil sanction of nullity makes it clear that such a contract will be null and void. It is quite another issue whether a *new* valid contract (possibly implied) can be considered to exist between the same parties, which will be operable ever since the prohibition of Art. [101 TFEU] has ceased to apply. However, in such a case the validity of the new contract will operate *ex nunc* and will affect neither the effects of the nullity of the initial contract, nor any possible claims for damages referring to the crucial period of the contract's nullity”.\(^{124}\)

Returning to the case law of the Court of Justice, it must be noted that only in *Hendrik Evert Dijkstra v Friesland* the Court speaks unconditionally of retroactive effect. In *Haecht II*, the Court uses the concept of retroactivity, but also indicates that the nullity is “capable of having a bearing on all the effects, either past of future, of the agreement or decision”, which seems to indicate that it does not necessarily have a bearing on all past and future effects of the agreement. Moreover, it must be borne in mind that the cited phrase from *Haecht II* was used by the Court in order to answer the question

\(^{123}\) Komninos, 204.

\(^{124}\) Komninos, 204-205.
whether the nullity took effect as from the moment of the Court’s judgement or from the moment the nullity was invoked by the parties. In its answer, the Court wanted to make clear that the nullity operated ex lege. This, however, does not necessarily imply that the agreement or decision is void as from the moment when it came into existence and that it remains void from then on. It may also imply that the agreement or act is null as of the moment when the conditions for the application of Article 101(1) are met and for so long as they are met. This is indeed what the Court seems to have made clear in its more recent judgments (Courage, Manfredi, Cepsa) dealing with the temporal aspects of the Article 101(2) nullity. From the wording “so long as” used by the Court of Justice in these cases, it seems to follow that the Court holds the opinion that an agreement which was prohibited and null during a certain period of time can later on qualify for an exemption. Once it is exempted, it will no longer be null until it loses the benefit of the exemption. The Court therefore seems to regard the nullity indeed as a temporal sanction that only applies so long as there is an infringement. This is a remarkable difference compared to the national law concepts of nullity, which generally have retroactive and prospective effect. While the retroactive effects are sometimes mitigated under national law (for example with regard to long term agreements that have been performed during a certain period of time), the idea that a nullity can cease to have effect without the intervention of (one of) the parties confirming the nullity is foreign to at least the Belgian and French national legal systems. This is due to the fact that nullity in these systems is a sanction for defects in the formation stage of the legal and therefore has to be judged at the moment of the formation of the legal act. Moreover, in Belgium and France confirmation is only possible in cases of relative nullity. As mentioned above, however, in Germany, it is recognized that when a ground for nullity no longer exists, parties may ratify the nullity and this can also occur through conduct. Similarly, in the Netherlands, a void

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125 See also J. Stuyck, 1986, n° 20, p. 728.
126 Except when the law changes and this follows from the rules of transitory law.
127 Belgium: C. Renard and E. Vieujean, 243; S. Stijns, n° 173, p. 126. France: C. Larroumet, n° 524, p. 533-534; M. Chagny, Droit de la concurrence et droit commun des obligations, Paris, Dalloz, 2004, n° 400, p. 400. See also M. Fabre-Magnan, 440 who notes, however, on p 439 that the nullity is no longer possible after a law regularising the situation has entered into force. See also in the Netherlands: Asser/Hartkamp & Sieburgh 6-III 2014/604 et seq. All the previously mentioned systems: F. Peeraer, n° 26, p. 2727.
128 Cf. supra IV, B, 1, a.
129 MüKoBGB/Busche BGB §141, n° 13.
act may at a later moment become valid by ratification: if a legal requirement, necessary for the validity of a juridical act, has been fulfilled only after the moment on which that act was performed, but all immediately interested persons who in the meantime could have appealed to this ground of invalidity have - within the period between the the moment the juridical act came into existence and the fulfilment of that necessary legal requirement - regarded this act as a valid juridical act, then this juridical act has been ratified with that.\textsuperscript{130}

At first sight, the transient nature of the nullity seems perfectly well suited to the nature of the Article 101(1) TFEU prohibition, the application of which - as mentioned - above may depend on fluctuating elements such as the market shares of the parties.\textsuperscript{131} This interpretation therefore seems to be in line with the effet utile of Article 101 TFEU. Moreover, by not extending the nullity beyond what is necessary for the protection of competition on the market, party autonomy is well-served. The agreement based on the common intention of the parties will have effect unless when this is incompatible with the requirement of free competition on the market. Practically, however, it would not be acceptable that one of the parties would at some point in time discover that an old agreement that was no longer performed because it had become void, is due to a change of the market circumstances no longer void and call on to its counterparty who has long forgotten about the old contract to perform that contract again. The German option which requires some type of an even implicit agreement between the parties to consider the contract valid again seems preferable. However, German law provides that if the confirmed legal act is a contract, and the intention of the parties with regard to the retroactive effect of their confirmation is not clear, the parties are entitled to what they would have had, had the contract been valid \textit{ex tunc} (§140 II BGB). This retroactivity is not a suitable consequence in cases where an agreement ceases to be

\textsuperscript{130} Art. 3:58 (1) Dutch Civil code.

\textsuperscript{131} See Case 23/67, SA Brasserie de Haeacht v Wilkin-Janssen (Haeacht I), ECLI:EU:C:1967:54, ECR 1967, 407; Case C-234/89, Delimitis v Henninger Bräu AG, ECLI:EU:C:1991:91, ECR 1991, I-935. Fluctuating elements may in any case play a role in deciding whether an agreement infringes Article 101(1) by effect. Where an agreement has an anticompetitive object this is less certain since the actual restrictive effects of the agreement are not required for it to be void. Since Expedia (Case C-226/11, Expedia Inc. v Autorité de la concurrence and Others, ECLI:EU:C:2012:795), paras 35-37) it became clear that restrictions by object cannot be considered not to appreciably restrict competition, and thus not to infringe Art. 101(1) because of for example the low market shares of the parties. See and compare, V. Rose and D. Bailey, “Litigating Infringements in the National Courts, 5 Declarations of Invalidity” in Bellamy and Child: European Union Law of Competition (7th Edition), n° 16-052.
incompatible with the competition rules: it should only become valid for the period after the incompatibility has ended. In the Netherlands, the civil code remains silent on the temporal effect of the ratification. The preparatory works of the civil code pointed towards an effect *ex tunc*. Certain legal scholars distinguish: when the ratification takes place by a legal act, it has effect *ex tunc*; when the ratification follow from a pure fact, it only has effect *ex nunc*. The fact that an agreement would no longer be incompatible with the competition rules due to market circumstances would be a pure fact.

V Impact of Nullity on the Non-infringing Parts of the Agreement

1 General rules

The CJEU’s case law on the impact of nullity of a specific clause for infringement of Article 101 TFEU on the remainder of the agreement dates back to *La Société Technique Minière* and *Consten and Grundig* both decided in 1966. In these cases, the Court stated in almost identical words that the automatic nullity of Article 101(2) TFEU only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if those parts are not severable from the agreement itself. Any other contractual provisions which are not affected by the prohibition fall outside Community law.

In *Béguelin* (1971) the Court used a less nuanced phrase:

“An agreement falling under Article [101 (1)] which has not been declared inapplicable under Article [101 (3)] as an agreement or a category of

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agreements becomes null and void in so far as its object or effect is incompatible with the prohibition in Article [101(1)]”. 136

In a number of later cases the Court stated that

“The automatic nullity decreed by Article [101(2)] of the Treaty applies only to those contractual provisions which are incompatible with Article [101(1)]. The consequences of such nullity for other parts of the agreement (…) are not a matter for Community law. Those consequences are to be determined by the national court according to its own law”. 137

This wording could be interpreted as implying that the automatic nullity of Article 101(2) TFEU applies only to the clauses actually infringing Article 101(1) TFEU, the consequences for the remainder of the agreement being left to the national law.

In Cepsa, however, the Court reverted to the wording used in LTM138 and Consten139 ruling that

“The automatic nullity provided for in Article [101(2) TFEU] affects a contract in its entirety only if the clauses which are incompatible with Article [101(1) TFEU] are not severable from the contract itself. Otherwise, the consequences of the nullity, in respect of all the other parts of the contract, are not a matter for Community law”. 140

The case law of the CJEU has not laid down a criterion for severability itself. In Cepsa the Court of Justice was asked whether the voidness of a clause fixing retail prices affected the contract as a whole. It had the opportunity to formulate a criterion for

severability. However, instead of determining whether such clause was severable from the remainder of the contract, the CJEU limited itself to the general statement referred to above.\textsuperscript{141} This could be read as a confirmation of the fact that the criterion for severability is to be determined by national law. Yet, this is difficult to reconcile with the Court’s statement that only where the anticompetitive clause \textit{is} severable from the remainder of the agreement, the consequences of its voidness for the remainder of the agreement are a matter of national law.

The way national legal systems deal with the issue of severability varies.

In Germany a two tier test is applied. The first step is regarded as a matter of EU law. In view of the purpose of Article 101(1) TFEU it is to be determined whether the voidness of a clause infringing Article 101(1) TFEU extends to the entire agreement or remains limited to the anticompetitive clause or part thereof. Furthermore, partial nullity requires of course that the remainder of the agreement remains objectively viable on its own. Only when the clause is severable under these criteria it is to be investigated whether the remainder of the contract is valid under German law.\textsuperscript{142} In this second stage of the analysis §139 BGB comes into play. In the first part of its two tier analysis, Germany clearly uses objective elements: the purpose of Article 101 TFEU and the objective viability of the remainder of the contract. The second part of the analysis, however, in principle brings in a subjective element. §139 BGB contains a presumption that the voidness of the particular clause extends to the entire contract. The party who wants to maintain the remainder of the contract needs to rebut this presumption, proving that the parties would have concluded the contract even without the void clause. However, this is to be judged taking into account common practice and good faith. This means that in fact a mixed subjective-objective criterion is applied. If the anticompetitive clause is a standard clause, however, the objective criterion of §306 BGB prevails over §139 BGB: the remainder of the contract as supplemented by default rules remains in effect unless it would result in unreasonable hardship for the other party.\textsuperscript{143}

\textsuperscript{141} Ibidem, paras 78-79.
\textsuperscript{142} Immenga/Mestmäcker, Schmidt, AEUV Art. 101 Rn. 22-23.
\textsuperscript{143} Insofar as the void clause is an unfair term in a B2C contract, supplementing the contract with default rules will not always be compatible with the case law of the Court of Justice, see infra
The new French Article 1184(1) Civil code (applicable as of 1 October 2016), resembles the German approach insofar as it takes as a starting point that there is a case where the nullity only affects one or more clauses of the agreement and provides what will in such cases happen to the remainder of the contract. The new Article provides indeed that when the cause of nullity only affects one or more contract clauses it only entails the nullity of the entire agreement when the clause(s) in question was/were decisive for one or both parties to enter into the agreement. The party invoking the decisive character of the clause bears the burden of proof thereof. The nullity will in any case be limited to the affected clause(s) when the law considers it (them) non-written (réputée(s) non-écrite(s)) or when the purpose of the rule requires the maintenance of the remainder of the contract (Article 1184(2) Civil code). It follows that a combined subjective-objective approach is taken when determining the impact of the nullity of a specific clause on the remainder of the agreement. The criterion used is in fact primarily subjective: the intention of one or both parties. However, the intention of the parties will not be taken into account when the legislator indicated by the terminology used (réputé non écrit) that he wants the nullity to be limited to a specific clause, or when this follows from the purpose of the infringed rule. Objective elements may thus supersede the intention of the parties, but, apparently, only to maintain the remainder of the agreement, not to extend it the nullity to the remainder of the agreement. The rule confirms (and clarifies) earlier case law.

According to the Austrian Supreme Court it is not the intention of the parties that is determinative for severability, but rather the function of the sanction of voidness and the restoration of the economic freedom of the bound parties (objective criteria). Although agreeing with this starting point, an Austrian scholar has argued that the purpose of Article 101(1) is often indifferent as to the further existence of the remainder of the contract. In that case the hypothetical intention of the parties would need to be

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146 Supreme Court (Oberste Gerichtshof) 22 February 2001, 6Ob322/00x, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20010222_OGH 0002_0060OB00322_00X0000_000.
used as a criterion to determine severability and when this hypothetical intention cannot be determined, the remainder of the contract needs to be held valid.\textsuperscript{147}

In the Netherlands Article 3:41 Civil code provides that the voidness of a particular clause does not affect the remainder of the agreement, unless it is indissolubly linked to that, which is to be determined by means of a mixed objective/subjective criterion. Indeed, according to the Dutch Supreme Court it is a matter of interpretation whether there is an indissoluble connection between the void clause and other parts of the contract\textsuperscript{148} and in that regard both subjective and objective elements can be taken into account. According to the seminal Dutch Supreme Court judgment regarding the interpretation of contracts, a contract is to be interpreted in accordance with the meaning each party in the circumstances of the case would reasonably attach to the clauses of the contract, having regard to what each party could reasonably expect from the other in that matter.\textsuperscript{149}

In Belgium, it follows from the case law of the Supreme Court that the intention of the parties is an element that may be taken into account when determining severability.\textsuperscript{150} Lower Belgian case law and legal scholarship is divided on the question whether the severability is to be determined based on subjective standards (the intention of the parties) and/or objective standards (the structure of the agreement, the purpose of the rule whose infringement is sanctioned by voidness, …).\textsuperscript{151}

The Spanish case law seems to hold anticompetitive clauses concerning minimum price fixing inseverable from the remainder of the agreement.\textsuperscript{152} The reason the

\textsuperscript{149} HR 13 March 1981, NJ 1981, 635.
\textsuperscript{150} Cass. 28 June 2012, www.cass.be.
\textsuperscript{152} Supreme Court 30 July 2009 Svenson, summarised and translated by J. Martí Miravalls, “Contract annulment due to minimum price-fixing: the bad application of private enforcement of competition law” in L.A. Velasco San Pedro et al. (eds.), Private enforcement of competition law, Valladolid, Lex Nova, 2011, 337. The author further notes that this decision is followed almost word for word in a number of lower court’s decisions, more particularly Court of Appeal Madrid 12 July 2004, Court of Appeal Firona 10 July 2004; First Instance Court Madrid 27 July 2009; Commercial Court Barcelona 27 October 2009; Commercial Court Madrid 29 July 2005; Commercial Court Madrid 15 April 2005.
Spanish Supreme court gives for extending the nullity to the entire contract is that clauses infringing the EU competition rules cannot be held to be of secondary importance to the entire contract.\textsuperscript{153} The elimination of such clauses would completely alter the economics of the contract.\textsuperscript{154} In addition, keeping the contract in place without the resale price maintenance clauses is considered incompatible with the parties’ intentions.\textsuperscript{155} This position is criticized by a part of legal scholarship.\textsuperscript{156} The opponents of the per se inseverability argue that severability is to be assessed by means of an objective, a normative criterion. This would entail that “the purpose and underlying principles of the imperative norm whose infringement is the reason for the nullity of the prohibited clause must be examined and assessed to decide whether the effects of the nullity are limited to the clause in question or whether the entire agreement is void”\textsuperscript{157}

When comparing the CJEU’s position on the impact of voidness on the remainder of the contract with Article 6(1) UCTD\textsuperscript{158} we see a certain similarity. Like the Article 101(2) nullity, the UCTD’s non-bindingness is in principle limited to the infringing part of the agreement. The reason for this rule however seems to be different. Under the UCTD, the reason for limiting the non-bindingness pursuant to Article 6(1) UCTD to the infringing clause is the idea of consumer protection: it usually is in the interest of the consumer that the contract remains in place without the unfair term. If the non-bindingness would affect the entire contract the consumer would be placed before the choice to being bound by the contract including the unfair term, or not having a
contract at all. With regard to the Article 101(2) nullity: the EU’s purpose of protecting competition is reached as soon as the terms that infringe the competition rules and the part of the agreement that is inseverably linked to them is void. For the purposes of the EU’s competition policy, it is irrelevant what happens to the remainder of the contract. This explains that the power to decide on this is left to the Member States.

Under Article 101(2) the nullity extends to the entire agreement, when the null clause cannot be severed from the remainder of the agreement, but EU law does not specify the criterion for severability. Under the UCTD the concept of severability is not used as such but one could say that immediately an objective criterion for severability is given: the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair terms (Article 6(1)). Moreover, as regards elements to be taken into account for assessing whether a contract can indeed continue to exist without the unfair terms, the Court of Justice held that both the wording of Article 6(1) UCTD and the requirements concerning the legal certainty of economic activities imply that the situation of one of the parties to the contract, cannot be regarded as the decisive criterion determining the fate of the contract so that the court hearing the case cannot base its decision solely on a possible advantage for the consumer of the annulment of the contract as a whole. It follows that “objective” is to be given a strict interpretation under the UCTD: it does not only mean that the intention of one of the parties is not decisive, but even that the (objective) situation of the parties is not decisive. Since the UCTD aims only at minimum harmonization, Member States may however provide that contracts concluded between a trader and a consumer which contain one or more unfair terms may be declared void as a whole where that will ensure better protection of the consumer.

161 Case C-453/10, Jana Pereničová, Vladislav Perenič v SOS financ spol. s r. o., paras 32-33 and 36 and operative, part 1.
162 Ibid., paras 34-3-36 and operative part 1.
Severance clauses

The parties to an anticompetitive agreement may include in their agreement a clause providing that the nullity of a particular clause will or will not affect the remainder of the agreement or a clause providing that a null clause will be replaced by a valid one that approaches the intended result as closely as possible. Such clauses are called severance clauses (in German *Salvatorische Klauseln*). Where the agreement provides in the replacement of a null clause by another clause also the concept of replacement clauses is used.

Severance clauses are only relevant to the extent that the intention of the parties is taken into account when determining severability. The Belgian Supreme Court held that a severance clause is an element that the Court may take into account when deciding on severability.

In Germany, a severance clause only shifts the burden of proof under §139 BGB; in the presence of a severance clause it is the party who wants to obtain the voidness of the entire contract who bears the burden of proving that without the anticompetitive clause the contract would no longer contain a sensible and balanced regulation of the respective interests of the parties and that according to the corresponding will of the parties it should not be held valid. It has been argued that if a contract contains a severance clause and a concrete replacement clause, the severance clause should only be tested under §139 BGB after replacement according to the replacement clause has taken place. If the severance clause forms part of standard terms, account is to be taken of §307 BGB: it will be ineffective if, contrary to the requirement of good faith, it unreasonably disadvantages the other party to the contract. If the standard clause is ineffective, the remainder of the contract as supplemented by default rules remains

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164 BGH 24 September 2002, KZR 10/01, BB 2003, 175 = NJW 2003, 347 = WuW/E DE-R 1031 „Tennishallenpacht“ reversing the older case law of the Competition Division of the German Supreme Court. An earlier judgment of the Competition Division of the German Supreme Court had inferred from the inclusion of a severance clause that the nullity of a certain clause for infringement of the EU competition rules did not affect the remainder of the contract, see BGH 8 February 1994, KZR 2/93, Pronuptia II, NJW 1994, 1651 = WuW/E BGH 2909, 2913.
into effect unless this would result in unreasonable hardship for the other party (§306 BGB).

VI Modification of a void agreement or clause?

Referring to LTM\textsuperscript{166} and Société de vente de ciments et bétons\textsuperscript{167}, the Court of Justice confirmed in VAG France that the consequences of the fact that contractual provisions which are incompatible with Article 101(1) TFEU are automatically void for all other parts of the agreement or for other obligations flowing from it are not a matter for EU law, but for national law. It specified that it is therefore up to the national law to determine whether the parties may amend their contract in order to prevent it from being void, for example by replacing the void clause by one that is exempted under a block exemption regulation.\textsuperscript{168}

In the same vein the CJEU held in Cepsa that

“It is for the referring court to ascertain whether, under national law, the contractual clause relating to [fixed resale prices] can be amended by unilateral authorisation of the supplier (...), and whether a contract which is automatically void may become valid following an amendment of that contractual clause which has the effect of bringing that clause into line with Article [101](1)”\textsuperscript{169}

Following the line of reasoning behind the Court’s judgments,\textsuperscript{170} it would also seem to be up to the national law to determine whether the national court has the power to replace the void clause by one that is valid. The extent to which national legal systems allow courts to replace void terms by valid ones (conversion) or to reduce a clause in


\textsuperscript{169} Cepsa, point 76.

\textsuperscript{170} But see Hartkamp, 2016: “It is likely, in view of the purport of the treaty provisions under consideration, that the ECJ considers the element of prevention so important that it will not readily find modification or mitigation of the nullity permissible”.
order to bring it within legal boundaries (reduction) and whether they distinguish between these two judiciary powers varies between European legal systems. Moreover, even if these techniques are known in general contract law, this does not automatically mean that their use is permitted in cases of infringement of the EU or national competition rules.

Although the CJEU does not seem to be opposed against the judicial modification of anticompetitive clauses in order to bring them within the limits of what is permissible by EU competition law, the Dutch Supreme court excluded judicial modification (conversion) of anticompetitive clauses.\textsuperscript{171} For a long time Belgian case law and part of legal scholarship was also opposed to judicial modification of anticompetitive and other void clauses.\textsuperscript{172} The civil code does not contain any rules on judicial modification of void clauses and judicial conversion was generally considered irreconcilable with the all or nothing character of civil law nullity and the principle of party autonomy.\textsuperscript{173} In a recent judgment, not dealing with clauses infringing competition law, the Belgian Supreme court however accepted judicial modification in the form of reduction of clauses infringing rules of public order subject to certain conditions.\textsuperscript{174}

In Germany the majority opinion does not accept the power of courts to reduce the ambit of anticompetitive clauses in order to bring them within legal limits.


\textsuperscript{173} See I. Claeys, n° 82, p. 326-327; L. Cornelis, n° 573, p. 725-726.

Reduktion\(^{175}\), which is generally regarded as an application of §139 BGB dealing with partial nullity.\(^{176}\) An authoritative commentary however pleads for reduction.\(^{177}\) The application of replacement clauses is generally accepted. Moreover, in the absence of a replacement clause, the disappearance of an anticompetitive clause from a contract may lead to obligations for the parties to renegotiate a contract based on “Wirtschaftsklauseln”, interpretation (ergänzender Vertragsauslegung) or frustration.\(^{178}\)

The Nordic countries have a general civil law rule on judicial modification of void clauses,\(^{179}\) but no applications thereof in relation to anticompetitive clauses have been found.

The aversion to the judicial modification of anticompetitive clauses (in the Netherlands) and reduction (in Germany) is motivated by the aim and purpose of Article 101 TFEU. Allowing judicial modification of such clauses would undermine the preventive aim of Article 101 TFEU.\(^{180}\)

This is also the reason why the Court of Justice considers national rules allowing judicial modification of unfair terms incompatible with the UCTD.\(^{181}\) In Kásler it mitigated this view however holding that if a contract concluded between a seller or supplier and a consumer cannot remain in existence after an unfair term has been deleted and the total annulment of the contract might expose the consumer to particularly unfavourable consequences\(^{182}\), the UCTD does not preclude a rule of

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\(^{176}\) Although sometimes this is seen as an application of §140 BGB. See Immenga/Mestmäcker, n° 29 with further references.

\(^{177}\) Immenga/Mestmäcker, n° 29.

\(^{178}\) Immenga/Mestmäcker, n° 31.

\(^{179}\) Article 36 Nordic contracts act.


\(^{181}\) Case C-618/10, Banco Español de Crédito SA v Joaquín Calderón Camino, ECLI:EU:C:2012:349, paragraph 69 et seq. and operative part; Case C-26/13, Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt., ECLI:EU:C:2014:85, paras 77-79.

\(^{182}\) In casu, the contract was a loan and the consequence of an annulment thereof is “that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer’s financial capacities and, as a result, tends to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts”, Case C-26/13, Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt., ECLI:EU:C:2014:85, para 84.
national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law.\textsuperscript{183} In \textit{Unicaja Banco and Caixabank} it again addressed the power of national judges to modify contractual terms in accordance with national legislation. The case concerned a Spanish national provision under which the national court hearing mortgage enforcement proceedings was required to adjust the amounts due under a term in a mortgage-loan contract providing for default interest at a rate more than three times greater than the statutory rate in order that the amount of that interest may not exceed that threshold. The CJEU held that the UCTD does not preclude such a provision, provided that

“the application of that national provision:

- is without prejudice to the assessment by that national court of the unfairness of such a term and

- does not prevent that court removing that term if it were to find the latter to be ‘unfair’, within the meaning of Article 3(1) of that directive”\textsuperscript{184}

The judgment seems to confirm the Court’s earlier case law that once a national court has identified a term in a consumer contract as unfair it has to declare it inapplicable instead of modifying it, except where the conditions of \textit{Kásler} are satisfied. Outside the application of \textit{Kásler}, national courts may only apply national legislation requiring modification of contractual clauses insofar as these terms are not unfair within the meaning of the UCTD.

\section*{VII Conclusion}

The Article 101(2) TFEU nullity is an autonomous EU private law sanction. It applies to agreements and decisions infringing Article 101(1) TFEU and not satisfying the requirements of Article 101(3) TFEU. In the case of concerted practices, the act of concertation is not a legal act so there is no need to declare it void. The validity of any

\textsuperscript{183} \textit{Kásler}, para 85 and operative part.

legal acts concluded between one of the concerting undertakings and one or more third parties is not a matter of EU law, but of national law.

The nullity is automatic; this means that it applies *ex lege*, no prior court decision being required. The extent to which the Article 101(2) nullity may be invoked by national courts *ex officio* is disputed in legal scholarship. It seems to follow from the case law of the Court of Justice that such an obligation does exist, except where examination of the issue of breach of Article 101 would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in the application of those provisions bases his claim. In particular, the duty of national courts to apply Article 101(2) *ex officio* does not seem to interfere with the rules of Article 2 Regulation 1/2003 regarding the burden of proof.

The absolute character of the nullity means that the null agreement or decision has no effects between the parties or regarding third parties.

Under EU law as opposed to Belgian and French law, the duty to apply Article 101(2) *ex officio* is rather related to the automatic character of the nullity than to the absolute character of the nullity.

The CJEU has recognized that the Article 101(2) nullity may have retroactive effects. This does not mean however that nullity always implies that the act is deemed never to have existed. The act only becomes null and void as of the moment it infringes Article 101(1) TFEU and does not satisfy the requirements of Article 101(3) TFEU. The question whether an act that at one point was null for this reason can revive later on, when it no longer infringes Article 101(1) TFEU or satisfies the requirements of Article 101(3) TFEU, is disputed.

It is standing case law of the CJEU that the automatic nullity provided for in Article 101(2) TFEU affects a contract in its entirety only if the clauses which are incompatible with Article 101(1) TFEU are not severable from the contract itself. Otherwise, the consequences of the nullity, in respect of all the other parts of the contract, are not a matter for Community law. The CJEU has not laid down a criterion for severability itself. In case law and legal scholarship the dominant opinion seems to consider that
severability is to be determined according to national rules. German scholars however regard the issue of severability as an issue of EU law. Only when the anticompetitive clause is severable from the remainder of the agreement they use §139 to determine whether the nullity is to be extended to the remainder of the contract. National legal systems generally accept the validity of severance clauses, although in Germany they only lead to a reversion of the burden of proof under §139 BGB.

According to the Court of Justice it is up to the national law to determine whether the parties may amend their contract in order to prevent it from being void, for example by replacing the void clause by one that is exempted under a block exemption regulation. The Court of Justice did not make an explicit statement about the power of national courts to amend an anticompetitive agreement. In my opinion, chances are significant that the Court would also leave this up to the national legal systems. Currently, Dutch law prohibits such judicial intervention. In Belgium, judicial conversion has long been prohibited, but recently the Belgian Supreme court accepted it, albeit not in a competition law related case. German case law and legal scholarship is divided about judicial conversion, but accepts the application of concrete modification clauses.

Although there are certain similarities between the nullity under Article 101(2) TFEU and the concept of non-bindingness under the UCTD, the Article 101(2) nullity and the UCTD’s non-bindingness are two distinct concepts which derive their characteristics from their own distinct purposes: the protection of free competition in the case of Article 101(2) and consumer protection in the case of the UCTD.