Article 101(3)

An Article 101 violation, as in *T-Mobile*, is one that satisfies the elements of Article 101(1). In fact, there are three subsections in Article 101. Article 101(2) declares that any agreement or decision prohibited by Art. 101(1) is void. Article 101(3) provides a basis to make Article 101(1) inapplicable to certain agreements, decisions, or concerted practices that would otherwise be deemed Article 101 violations.

Article 101(3) provides: [add all text or summarize with hyperlink?]

[Insert Chart if possible]

Undertakings can use Art. 101(3) either as a shield or as a sword. As a shield, undertakings can apply to the Commission for a block exemption to Art. 101(1) by showing that a proposed restrictive agreement between undertakings will satisfy the requirements of Art. 101(3). If the Commission decides to grant the block exemption, the agreement between the undertakings will be excepted from Art. 101(1) liability for as long as the Art. 101(3) requirements are met.[[1]](#footnote-1) As a sword, undertakings can use Art. 101(3) as an affirmative defense to a finding of an Art. 101(1) violation. Although a seemingly strong defense, the invocation of Art. 101(3) in this way is relatively rare for the reasons described herein.

The [Commission Guidelines](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(07):EN:NOT) make clear that any type of Art.101(1) violation is entitled to Art. 101(3) analysis. In theory, therefore, there are no categorical exclusions from exemption under Art. 101(3). In reality, however, a careful reading of the requirements to satisfy Art. 101(3) suggests otherwise. Specifically, in order to establish the elements of 101(3), a party must demonstrate the positive economic effects of the agreement, decision, or concerted practice at issue. Practically speaking, Article 101 acts rather like a lobster trap from the perspective of a party that has allegedly violated Art. 101 by object; i.e., it appears that if a party is caught under 101(1), it will have a chance to get out under 101(3). But if a party is culpable of violation by object, with no consideration of effects, that party will probably not be able to provide evidence of effects sufficient to establish the elements of 101(3). Thus, although 101(3) is available to any type of 101(1) violation *in theory*, 101(3) is essentially useless in a great number of violation by object cases.

The distinct nature of the relationship between 101(1) and 101(3) raises other concerns, as well. The Commission and the ECJ have both stated that pro-competitive effects are not taken into account when applying 101(1) and that they are only relevant to the application of Article 101(3). For this reason, EU decision-makers have explained that 101(3) performs the function of the “rule of reason” indispensible to U.S. antitrust jurisprudence.[[2]](#footnote-2) However, in cases that create the “lobster trap” paradox explained above, the ECJ is not likely to consider a 101(3) application. As a result, no form of reasonableness is taken into account in what are arguably the most attenuated violations of 101. On the one hand, two parties that enter into a written agreement to fix prices and create the effect of changing the price on the market have the ability to at least argue for a 101(3) exception. On the other hand, if one party unilaterally discloses confidential information to its competitors with no effect on the market and no evidence that the competitors used that information in any way, those parties can be deemed to have violated Art. 101(1) by object. A violation of this sort, supported mostly by application of legal presumptions, would seem to be at the outer limits of behavior that violates Art. 101. One would think that in a situation such as this, a consideration of reasonableness and pro-competitive effects would be most important. To the contrary, the ECJ would be least likely to consider the reasonableness of violating such ambiguous behavior. In sum, how helpful is this rule of reason replacement if it is not available in the most unclear of circumstances?

1. *See* Regulation 1/2003. [↑](#footnote-ref-1)
2. Marc S. Firestone, *A Quick Look at Two Areas of Doctrinal Difference between EU and U.S. Decision Makers*, 20 Tul. J. Int’l & Comp. L. 1, 25–27 (2011). [↑](#footnote-ref-2)