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Csongor István Nagy

THE CONCEPTUAL STRUCTURE OF EU COMPETITION LAW

Restrictive Agreements

NEW HORIZONS IN COMPETITION LAW AND ECONOMICS

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NEW HORIZONS IN COMPETITION LAW AND ECONOMICS

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Abbreviations

1999 VBER	Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. [1999] OJ L 336/21.
2000 Vertical Guidelines	Guidelines on vertical restraints. [2000] OJ C 291/1.
2001 *De Minimis* Notice	Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/13.
2001 Horizontal Guidelines	Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements. [2001] OJ C 3/2.
2002 MVBER	Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector. [2002] OJ L 203/30.
2004 Technology Transfer Guidelines	Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements. [2004] OJ C 101/2.
2004 TTBER	Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements. [2004] OJ L 123/11.
2010 MVBER	Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector. [2010] OJ L 129/52.
2010 RDBER	Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements. [2010] OJ L 335/36.
2010 SBER	Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements. [2010] OJ L 335/43.
2010 Supplementary Motor Vehicle Guidelines	Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles. [2010] OJ C 138/16.

2010 VBER	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. [2010] OJ L 102/1.
2010 Vertical Guidelines	Guidelines on vertical restraints. [2010] OJ C 130/1.
2011 Horizontal Guidelines	Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. [2011] OJ C 11/1.
2014 *De Minimis* Notice	Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice). [2014] OJ C 291/1.
2014 Technology Transfer Guidelines	Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements. [2014] OJ C 89/3.
2014 TTBER	Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements. [2014] OJ L 93/17.
2022 VBER	Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. [2022] OJ L 134/4.
2022 Vertical Guidelines	Guidelines on vertical restraints. [2022] OJ C 248/1.
2023 Horizontal Guidelines	Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. C/2023/4752, [2023] OJ C 259/1.
2023 RDBER	Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements. [2023] OJ L 143/9.
2023 SBER	Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements. [2023] OJ L 143/20.
AG	Advocate General
Article 101	Article 101 of the Treaty on the Functioning of the European Union
Article 102	Article 102 of the Treaty on the Functioning of the European Union
Article 81	Article 81 of the Treaty Establishing the European Community (equivalent of Article 101 until 30 November 2009)

Article 85	Article 85 of the Treaty establishing the European Community (equivalent of Article 101 until 30 April 1999)
BER	block exemption regulation
CJEU	General Court and European Court of Justice
Commission	European Commission
De Minimis Notice	See 2014 *De Minimis* Notice
DoJ	US Department of Justice
ECJ	Court of Justice of the European Union (before 1 December 2009: Court of Justice of the European Communities)
ECN	European Competition Network
ECN Communication	Commission Communication on cooperation within the network of competition authorities. [2016] OJ C 374/10.
FTC	Federal Trade Commission
FTC Collaborations Guidelines	Federal Trade Commission (FTC) and Antitrust Division of the U.S. Department of Justice (DOJ) Guidelines for Collaborations Among Competitors, April 2000
GC	General Court (before 1 December 2009: Court of First Instance)
Guidance on Restrictions by Object	Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the *De Minimis* Notice. SWD(2014) 198 final.
Guidelines on Article 101(3)	Guidelines on the application of Article 81(3) of the Treaty. [2004] OJ C 101/97.
Guidelines on Effect on Trade	Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty. [2004] OJ C 101/81.
Horizontal Guidelines	See 2023 Horizontal Guidelines.
Hungarian Competition Act	Act LVII of 1996 on Unfair Market Conduct and Restriction of Competition (in Hungarian: *A tisztességtelen piaci magatartás és versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény (Tpvt.)*).
Merger Control Jurisdictional Notice	Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. [2008] OJ C 95/1.
(old) Merger Control Regulation	Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. [1989] OJ L 395/1.
Merger Control Regulation	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). [2004] OJ L 24/1.
Notice on Ancillary Restraints	Commission Notice on restrictions directly related and necessary to concentrations. [2005] OJ C 56/24.

Notice on Cooperation	Commission Notice on cooperation within the Network of Competition Authorities. [2004] OJ C 101/43.
Notice on Relevant Market	Notice on the definition of relevant market for the purposes of Community competition law. [1997] OJ C 372/5.
Private Enforcement Directive	Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. [2014] OJ L 349/1.
RDBER	See 2023 RDBER.
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. [2003] OJ L 1/1.
RPF	resale price fixing
RPM	resale price maintenance
SBER	See 2023 SBER.
Section 1	Section 1 of the Sherman Act.
Section 2	Section 2 of the Sherman Act.
Technology Transfer Guidelines	See 2014 Technology Transfer Guidelines.
TEU	Treaty on the European Union.
TFEU	Treaty on the Functioning of the European Union.
TTBER	See 2014 TTBER.
Unfair Commercial Practices Directive	Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22.
US Supreme Court	Supreme Court of the United States
VBER	See 2022 VBER.
Vertical Guidelines	See 2022 Vertical Guidelines.

1. Introduction: the structural issues of competition analysis

During its six-decade-long history, EU competition law has failed to work out a consistent and clear conceptual framework to analyse the totality of competition problems caused by restrictive agreements. This is in sharp contrast with competition law's utmost social significance and the fact that it has otherwise developed a very extensive case law. The lack of a coherent conceptual framework entails anomalies and dysfunctions, the most important of which are the social costs of false positives and false negatives[1] and increased compliance costs.

What is the final purpose of EU competition law? Which agreements are condemned automatically as anticompetitive by object and which ones merit an effects-analysis? Is anticompetitive object a formal rule or can it be established on a case-by-case basis? What is the difference between the object-inquiry and the effects-analysis? Is there room for substantive competition analysis under Article 101(1)? What is the structure of the effects-analysis (if it has a generally applicable structure at all)? Does the effects-analysis include presumptions and suspect classes of agreements? What is measured under Article 101(1) and what is the difference between the focuses of Article 101(1) and Article 101(3)? Can a restriction be exempted under Article 101(3) for furthering the general good? The case law has given varying and, at times, contradictory, answers to these questions, and competition practice has put up with the amorphous and nebulous conceptual answers the CJEU has given. The last few decades have seen significant changes in the law of restrictive agreements, which exacerbated the half-century-long debate about the optimal analytical framework. The concept of anticompetitive object has been remoulded and new categories of condemnable agreements emerged. In the field of restrictive agreements, the 'more economic approach' failed to bring so much economic analysis as one may have expected. The low rate of effect cases raises issues concerning the methodology of the effects-analysis. Competition law is facing

[1] For a definition of false positives and false negatives, *see* Richard Whish & David Bailey, *Competition Law* 203 (8th ed, 2015).

new challenges in digital markets and has to respond to the criticism that it is indifferent to general societal values.[2]

In the last three decades, doctrinal analysis has been sidelined in EU competition law.[3] The 'more economic approach' heralded an era with more substantive analysis. In fact, however, in the field of restrictive agreements, this era saw the proliferation of anticompetitive object; the number of cases where effects-analysis was carried out remained low and economics played no substantial role in day-to-day competition enforcement. Of course, the guiding force of competition law is inevitably economics. However, the targets of the 'more economic approach' were probably exaggerated. Courts cannot apply economics; they can apply law. And undertakings cannot comply with economics; they can comply with law. The economic considerations need to be converted into judiciable standards that work effectively in legal procedures and provide guidance, even under incomplete market information.

This book provides a systematic and critical presentation of the key conceptual issues of restrictive agreements by means of doctrinal analysis and comparative law. It engages in both positivist (doctrinal) and evaluative (normative) analysis. The purpose of the positivist-doctrinal analysis is to conceptualize the case law as it is, including its paradigmatic changes and apparent contradictions. This strand of the analysis offers a doctrinal account and a positivist conceptualization and goes into the intricacies of the various questions of interpretation, such as the categories of anticompetitive object, the delimitation of object and non-object agreements, borderline and recently emerged or emerging categories (information exchange, patent settlements, etc), the analytical framework of effects-analysis, and the consideration of general societal values. The evaluative part is the critical strand of the work, which involves an assessment of the system and proposals as to how it may optimally contribute to competition law's function and goals.

Article 101, termed in this book as the 'rule on restrictive agreements', embeds a laconic legal test. It is made up of a general prohibition of restrictive agreements, enshrined in Article 101(1), which an undertaking or asso-

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[2] *See e.g.* Dina I. Waked, *Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice*, 65(1) The Antitrust Bulletin 87 (2020).

[3] For notable exceptions, *see* Okeoghene Odudu, *The Boundaries of EC Competition Law* (2006); Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* (2018); Pablo Ibáñez Colomo, *The New EU Competition Law* (2023).

ciation of undertakings may breach by the agreement's object or effect, and an exemption, enshrined in Article 101(3):

> Article 101
> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>   (b) limit or control production, markets, technical development, or investment;
>   (c) share markets or sources of supply;
>   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>   - any agreement or category of agreements between undertakings,
>   - any decision or category of decisions by associations of undertakings,
>   - any concerted practice or category of concerted practices,
>
>   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The above architecture rests on three cryptic terms: anticompetitive object, anticompetitive effect, and exemption. These constitute the book's key questions of inquiry and are analysed in the following structure.

Chapter 2 explores the elusive purpose of competition law and the relationship and interaction between competition law's teleology and structure of analysis. It addresses the apparent oxymoron that competition law protects the free market by interfering with it, and how this impacts (or should impact) the interpretation of competition rules. It explores the two major ways to grasp the economic purpose of competition law (as an end and as a means), the question whether and to what extent competition law may accommodate non-competition goals, and market integration as the unique normative purpose of EU competition law.

The book's inquiry heavily relies on issue-specific comparative analysis based on US antitrust. To avoid repetitions and to define how the different concepts and notions of US antitrust are understood, Chapter 3 provides a comparative framing. It presents US antitrust law doctrines like *per se*, 'quick look', abbreviated rule of reason, full rule of reason and sliding scale, which serve as points of reference, benchmarks and comparative patterns throughout the analysis of EU competition law. This chapter presents the *per se* rule's selection test, rationale and *modus operandi*, the intermediate modes of analysis and the rules of reason. As to the intermediate modes of analysis, it introduces a distinction between 'quick look' and 'abbreviated rule of reason'. This distinction is unknown to the scholarship, which usually treats them as a single category. However, this chapter demonstrates that this categorization provides both a better reconstruction and a better reconceptualization of the case law.

Chapter 4 explores the notion of anticompetitive object. It provides a doctrinal and normative analysis and presents how the fluctuating judicial practice remoulded this concept and its individual categories. Section 4.1 examines what makes an agreement anticompetitive by object and what the essential difference between agreements anticompetitive by object and anticompetitive by effect is. It explores the considerations and rationale that should determine the definition and operation of anticompetitive object and identifies its shaping criteria. These include the textual and syllogistic interpretation of Article 101(1) and the identification of the criteria justified by decision efficiency and practicality. Section 4.2 identifies and distinguishes the three modes of analysis of restrictive agreements and demonstrates that textual and contextual analysis are part of the object-inquiry, while effects-analysis pertains solely to effect agreements. It provides an overview of the CJEU's quest for a reasonable and balanced notion of contextual analysis and demonstrates that the case law has failed to develop a consistent notion and has confused contextual analysis with effects-analysis. It uses the subsumption and classification analysis carried out in the context of US antitrust law's *per se* rule as a comparative reference point and proposes a consistent notion for contextual analysis. Section 4.3 demonstrates that anticompetitive object is made up of specified (established) categories of agreements and, as a relatively recent development, an unspecified category, which operates through a case-by-case analysis embracing the totality of the circumstances. This section provides an overview and assessment of the case law on the unspecified category, inquires if it has counterparts in US antitrust law, and demonstrates that it is a flawed concept of EU competition law, which should be discarded. Section 4.4 provides a detailed analysis of the specified categories of anticompetitive object, such as cartels (horizontal price fixing, output limitation and market sharing), horizontal information exchange agreements, horizontal group boycott, vertical resale price fixing, vertical absolute territorial and customer protection and selective distribution. The individual categories are explored through the case law, the block exemption regulations, and their comparative aspects.

Chapter 5 deals with agreements anticompetitive by effect, the structure of the effects-analysis and how the risk of false positives and negatives can be minimized by means of presumptions, the allocation of the burden of proof and the use of a sliding-scale approach. It explores the meaning of restriction by effect and presents the elements of substantive analysis, such as context, counterfactual and procompetitive effects. It also inspects the argument that there is no rule of reason in EU competition law and demonstrates that this is more a terminological than a substantive question. This chapter identifies competition law's two partial methodologies (appreciability and ancillarity), which have no general application but provide useful rules of thumb to specific subsets of agreements. It also explores whether restrictions can be justified under Article 101(1) with reference to the public interest and conceptualizes the pertinent case law. This chapter provides a comparative contextualization and proposes a sliding-scale approach for the analysis of effect agreements and an abbreviated effects-analysis for restrictions that, though not anticompetitive by object, have a high anticompetitive potential.

Chapter 6 explores the concept of exemption, including the yardstick of Article 101(3) and how it differs from that of Article 101(1). It demonstrates that block exemption regulations, although they formally implement Article 101(3) and identify agreements that are presumed to be exemptible, in fact, implement Article 101(1) in the sense of identifying agreements that do not breach Article 101(1) for lack of anticompetitive effects. This chapter also inquires if and to what extent object restrictions may benefit from an exemption and whether Article 101(3) may accommodate non-economic societal values.

Chapter 7 contains a short summary and some closing thoughts.

2. The purpose of competition law and the structure of competition analysis

Competition may be conceived as either an end (outcome) or a means (process) to achieve an end. In the context of EU competition law, the process-based approach is generally labelled as ordoliberalism, and focuses on rivalry and competitive market structure. The outcome-based approach conceives the purpose of competition law as the maximization of social (or consumer) surplus and views rivalry and competitive structure merely as a means to achieve this outcome. As an accessory to the 'single market' project, EU competition law also serves the purpose of furthering market integration or, at least, shielding the single market from practices that go against market integration. This is a normative purpose that affects the way EU law conceives competition. Competition law, at times, is seen to also pursue other non-competition goals, which may be either economic (e.g. industrial policy) or non-economic (e.g. environmental protection, sustainability).

This chapter addresses these teleological questions[1] from a structural perspective: what is the purpose of competition law and how does this teleology connect with the structure of competition analysis? Section 2.1 presents and resolves an apparent contradiction: competition law, on the one hand, idealizes the free market and, on the other, interferes with it. Section 2.2 presents and confronts the process- and outcome-based approaches and identifies those cases where they may lead to diverging outcomes. Section 2.3 examines whether EU competition law pursues and ought to pursue non-competition goals. Section 2.4 showcases the purpose of market integration and its impact on EU competition law. Section 2.5 presents how the *telos* of competition law connects with and informs the structure of competition analysis.

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[1] For a general overview and analysis, *see* Daniel A. Crane, *Rationales for Antitrust: Economics and Other Bases*, *in* Volume 1, The Oxford Handbook of International Antitrust Economics 3 (Roger D. Blair & Daniel Sokol ed., 2015).

2.1 PROTECTING THE FREE MARKET BY INTERFERING WITH IT?

The starting point of competition law is that free competition in the market yields the best results for the society. It ensures optimal prices, quantity, quality and product diversity. This statement may suggest that competition law goes against its very purpose: if free competition made up of freely made choices is the best of all possible worlds, why is competition law needed at all? Is competition law not interfering with its own rationale by setting out rules of conduct and interfering with the freedom of contract?

This contradiction is, however, apparent. Competition law intervenes only in cases where competition fails. This proposition not only resolves the above contradiction, but also suggests that competition law should not replace choices made under competition with its own views about optimal outcome and should have no role to play in cases featuring workable competition.

Economic theory promises that perfect competition is the most efficient way to use the society's scarce resources, but it also warns that perfect competition works only if several preconditions are met.[2] First, there need to be numerous buyers and sellers in the market, otherwise the market may feature a monopoly, monopsony or oligopoly and produce a suboptimal output. Second, the products need to be homogenous (that is, perfectly interchangeable in the eyes of the buyers). Third, product differentiation, brand loyalty, monopolistic competition, though not eliminating competition in the market, do change its nature and outcome. Fourth, perfect competition presupposes perfect information and lack of information asymmetry. Competition works properly only if sellers and buyers make rational choices, and (perfectly) rational choices can be made only if there is (perfect) information. The lack of informed decisions undermines this process. Fifth, perfect competition presupposes the lack of transaction costs, that is, costs that emerge irrespective of whether the transaction works out (such as search and information costs). Sixth, perfect competition presupposes no entry barriers: new undertakings can freely and easily enter the market without incurring any unrecoverable (sunk) costs.

It is easy to see that the above preconditions are rarely met in real life. If one or more preconditions are missing, the market fails to operate perfectly. This is referred to as 'market failure'. The perception of market failures is contemporaneous with the very idea of free competition. According to the metaphor of 'invisible hand', coined by the famous Scottish economist Adam Smith, the unseen and uncontrolled forces of the free market spontaneously generate optimal outcomes, because they help supply and demand reach equilibrium

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[2] Stephen Munday, *Markets and Market Failure* 29–47 (2000).

and maximize social surplus. Nonetheless, Adam Smith also emphasized that there are cases where the free market fails to work in the public interest. Employees (in the parlance of the age: servants) and tenants are vulnerable and usually do not have the power to contract on an arm's length basis.[3] Adam Smith also pointed out that collusion among market operators (today referred to as 'cartels') undermines the optimal operation of the free market.[4]

The law intervenes in various ways to rectify market failures and creates 'artificial limbs' in the form of regulatory surrogates for the missing precondition(s) of perfect competition. Unfair commercial practices are prohibited to rebalance information asymmetry.[5] Weaker parties (employees, consumers, tenants, etc) are protected even against their own decisions by means of mandatory rules.

The targets of competition law are market failures created by undertakings. The most important of these is market power, which is the lack of numerous, independently acting sellers and buyers. If market operators have some market power, they may be able to enforce terms and prices they could not under workable competition. This market power may be created by coordinated behaviour (restrictive agreements), where independent enterprises collude and engage in parallel behaviour on account of a common understanding or may be disposed of by a single undertaking. This implies that the power to influence the market (termed as market power) should be a general prerequisite of competition law intervention. This does not exclude rules that are applicable irrespective of market power but limits their purview. Competition law does prohibit certain agreements irrespective of the parties' market power (referred to as anticompetitive by object in the EU and *per se* illegal in the US). The reason why this regulatory conception is reconcilable with the justification competition law offers for its own intervention is that these agreements are either harmful or neutral but never beneficial to competition.[6] If the parties have some market power, these agreements cause harm. If the parties have no

3 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 68 (1776).

4 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 130 (1776).

5 Recitals 6, 8, 14 and 18 of the Unfair Commercial Practices Directive.

6 *Cf.* Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* 203 (2000) ("[F]or an offense like price fixing there is little if any social cost to balance against this enhanced deterrence. As a generalization, price-fixing does not become socially beneficial when power is lacking; it simply becomes ineffective. (…) [E]ven if this leads to overenforcement (…), the 'overenforcement' would not inhibit any socially valuable conduct; it merely inhibits ineffective attempts to do something both harmful and unlawful.")

market power, their collusion remains a failed attempt, which causes no harm but generates no benefit either. The regulatory choice behind the automatic condemnation is based on the calculation that the outright prohibition has no substantial collateral damage (false positives), while it simplifies the law and, hence, makes it more effective.

2.2 THE ECONOMIC PURPOSE OF COMPETITION LAW: COMPETITION AS AN END AND AS A MEANS

The competitive process is at the heart of competition law, but it might not be a goal in itself. Competition law's teleology may be conceived as either protecting the competitive process or as using it as a means to maximize social surplus.

The process-based approach (generally associated with EU competition law)[7] conceives competition as the process of rivalry and the obviation of market power, which may be the result of either collusion or concentration, as an aim in and of itself. This conception may manifest itself through notions like economic freedom,[8] the protection of competitors,[9] competitive structure and

[7] *See* Roger Van den Bergh, Peter Camesasca & Andrea Giannaccari, *Comparative Competition Law and Economics* 107–109 (2017); Oles Andriychuk, *The Normative Foundations of European Competition Law* (2017). For an overview of the goals of EU competition law, see Claus Dieter Ehlermann & Laraine L. Laudati (eds.), *European Competition Law Annual 1997: The Objectives of Competition Policy* (1998).

[8] For an overview of the scholarship on the right-based conception of competition, *see* Peter Camesasca & Andrea Giannaccari, *Comparative Competition Law and Economics* 55–56 & 100–101 (2017).

[9] *See* Joined cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P. *GlaxoSmithKline*, EU:C:2009:610, para 63 (Article 101 "aims to protect not only the interests of *competitors* or of *consumers*, but also the *structure* of the market and, in so doing, competition as such.") (emphasis added); Joined Cases 6-7/73 *ICI & Commercial Solvents*, EU:C:1974:18 ("When a dominant undertaking abuses its position in such a way that a *competitor* (…) is likely to be *eliminated*, once it has been established that this elimination will have *repercussions on the competitive structure* within the common market.") (emphasis added). *Cf. United States v Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897) ("small dealers and worthy men").

competitive process,[10] and fairness.[11] For instance, in *T-Mobile Netherlands*,[12] the CJEU ruled that antitrust law protects 'not only the direct interests of competitors or consumers, but also the structure of the market and thus competition itself'.[13] The CJEU repeated this in *HSBC Holdings*.[14] In *GlaxoSmithKline*,[15] it pointed out that 'there is nothing in [Article 101] (…) to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object'.[16] In this thinking, competition is conceived as a market mechanism, and it is this process that is protected. Although workable competition normally maximizes social surplus, competition law focuses on the process and not the outcome.

The outcome-based approach conceives the purpose of competition law as the maximization of social (or consumer) surplus and views rivalry in and the competitive structure of the market merely as a means. This conception may manifest itself through notions like efficiency,[17] social or consumer surplus or welfare,[18] and is generally associated with the current approach of US antitrust law.[19] In this conception, the aim of competition law is not the protection of the competitive process, but the obviation of outcomes that raise prices, reduce output, product choice and innovation. Competition is merely an instrument to

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[10] *Ibid*.

[11] *See* the reference of Article 101(3) to the "fair share" of consumers from the benefits resulting from the cooperation and the designation of Article 102(a) of "unfair purchase or selling prices or other unfair trading conditions" as abusive. *See also* Case 26-75 *General Motors*, EU:C:1975:150, para 12 (Excessive prices are abusive because they lead "to unfair trade."); European Commission, *Report on Competition Policy 2016*. COM(2017) 285 final, 2.

[12] Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343, paras 38–39. *See* AG Kokott's Opinion in Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:110.

[13] Paras 38–39.

[14] Case 883/19 P. *HSBC Holdings*, EU:C:2023:11.

[15] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P *GlaxoSmithKline*, EU:C:2009:610.

[16] Para 63.

[17] *Verizon v Trinko*, 540 US 398, 407 (2004) (Innovation and economic growth may take precedence over monopoly profits (i.e. consumer surplus)).

[18] Peter Camesasca & Andrea Giannaccari, *Comparative Competition Law and Economics* 95–98 (2017).

[19] Peter Camesasca & Andrea Giannaccari, *Comparative Competition Law and Economics* 101–105 (2017). For a nuanced account of the convergences and divergences between EU and US competition law, *see* Clifford A. Jones, *Foundations of Competition Policy in the EU and USA: Conflict, Convergence and Beyond*, *in* The Evolution of European Competition Law 17 (Hanns Ullrich ed., 2006).

achieve the best outcome, it is not a value in and of itself and is not the only way to achieve the best outcome.

It has to be mentioned that the above distinction is the result of theoretical modelling, and the two approaches are merely illustrative pictograms.

First, in most cases the two diverging theories result in converging expectations. The competitive process generally secures the biggest surplus, so protecting the process and striving for the optimal outcome may result in the very same substantive principles, especially in the field of restrictive agreements. Given that in most cases it is the competitive process that secures the best outcome, the two approaches may lead to the same rules. Given this congruence, it is an academic question if the justification for a rule is that it protects the competitive process or that it secures the best output.

Second, in those cases where the two sets do not overlap, the comparatively higher efficiency of cooperation turns on empirical issues and usually involves a regulatory choice under uncertainty. Due to the lack of compelling evidence, decision-makers rely on probabilities, and their choice, at the end of the day, turns on the level of proof required to rebut the presumption that the competitive process yields the best possible outcome. By way of example, both EU competition and US antitrust law target the maximization of social surplus and none of them sticks to the competitive process when cooperation is proven to beat competition in terms of surplus. The reason for their divergent rules and principles is not that EU competition law insists on protecting the competitive process even in cases where it is clear that this process impairs social surplus, but that in the EU it is not considered to be sufficiently corroborated that these arrangements, which hamper the competitive process, do produce a bigger social surplus. When the CJEU refers to the protection of the competitive structure of the market, it does not suggest that this is to be protected at the cost of social surplus. Quite the contrary, it usually links the competitive structure of the market to higher surplus, although admitting that the link is indirect.[20] Against this background, the relevant question is not whether cooperation may beat competition, but what level of probability is needed to corroborate this. As a corollary, the differences between the two approaches manifest themselves in the instincts, presumptions and suspicions of competition policy.

Third, the importance of the distinction also decreased in terms of comparative modelling. The process-based approach is considered to be characteristic to the EU, while the outcome-based approach to the US. In reality, however,

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[20] Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343, paras 38–39; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P *GlaxoSmithKline*, EU:C:2009:610, para 63; Case 883/19 P. *HSBC Holdings*, EU:C:2023:11, para 121.

both systems have featured a unique blend of the two approaches, though with different accents.

The idea of protecting the competitive structure of the market is not alien to US antitrust. In fact, this had been the original notion[21] and remained the prevalent notion until the mid-1960s,[22] referred to as the idea of 'atomistic competition',[23] and it still has an important role to play.[24] The notion of 'atom-

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[21] Senator Sherman explained the need for the act, subsequently named after him, with ordoliberal terms:

> If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and fix the price of any commodity.

Quoted in Stephen Martin, *Industrial Economics. Economic Analysis and Public Policy* 49 (Macmillan Publishing, 2nd ed, 1994). For an overview of what lead to the enactment of the 1890 Sherman Act and the 1914 Clayton Act, *see* Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* 37–40 (2003).

[22] As for the case law, *see Standard Oil v US*, 337 U.S. 293, 314 (1949). *US v Richfield Oil*, 99 F. Supp. 280, 293 (1951), affirmed 343 U.S. 922 (1952); *Kiefer-Stewart v Seagram*, 340 U.S. 211, 213 (1951); *Times-Picayune v US*, 345 U.S. 594, 605 (1953); *Dictograph Products v FTC*, 217 F.2d 821, 828 (1954); *N. Pac. Ry. Co. v US*, 356 U.S. 1, 4 (1958); *Brown Shoe v US*, 370 US 294, 344 (1962) ("Of course, some of the results of large integrated or chain operations are beneficial to consumers (…) But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favour of decentralization."); *FTC v Brown Shoe*, 384 U.S. 316, 21 (1966). *Albrecht v Herald*, 390 U.S. 145, 152 (1968); *US v Topco, Inc.*, 405 U.S. 596, 610–611 (1972). As for agency practice, *see also* Report of the Attorney General's National Committee to Study the Antitrust Laws 1 & 3 (1955) ("The general objective of the antitrust laws is promotion of competition in open markets." Antitrust law established a "policy 'against undue limitations on competitive conditions.'"). As for the scholarship, *see* Thurman Arnold, *The Economic Purpose of Antitrust Laws*, 26 Mississippi Law Journal 207 (1955); Milton Handler, *Antitrust in perspective* 3 (1957); Carl Kaysen & Donald F. Turner, *Antitrust policy: an economic and legal analysis* 18–19 (1959); Donald Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 Vanderbilt Law Review 413, 414 (1964).

[23] Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Michigan Law Review 1696 (1986).

[24] *See* Barak Orbach, *How Antitrust Lost Its Goal*, 81 Fordham Law Review 2253 (2013). *See also* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective*

istic competition', which left its mark on the judicial practice, has a strong 'liberty' background[25] and very much resembles the paradigm of ordoliberalism.[26] Furthermore, the structure–conduct–performance paradigm of Harvard economics, which is a process and structure-based paradigm, dominated the field in the 1950s, 1960s and 1970s.[27] The outcome-based approach gained ground primarily as a result of the emergence of Chicago economics, which dethroned Harvard economics in competition scholarship and case law after the mid-1970s.[28]

At the same time, the European movement for a 'more economic approach' introduced several outcome-based elements, though it did not wipe out ordoliberalism. Furthermore, the outcome-based provision embedded in Article 101(3), which allows cooperation to replace competition, if it produces more benefits, plainly falsifies that ordoliberalism is purported to be the exclusive approach in EU competition law.[29]

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and Prospective: Where are We Coming from? Where are We Going?, 62 New York University Law Review 936, 942–944 (1987); Oliver Black, *Per Se Rules and Rules of Reason: What Are They?*, 18(3) European Competition Law Review 145, 146 (1997); Alan J. Meese, *Price Theory, Competition and the Rule of Reason*, 2003 University of Illinois Law Review 77, 86 (2003).

[25] *See Kiefer-Stewart v Seagram & Sons*, 340 U.S. 211, 213 (1951); N. *Pac. Ry. Co. v US*, 356 U.S. 1, 4 (1958); *US v Topco*, 405 U.S. 596, 610–611 (1972). *See also* Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 Antitrust Law Journal 461, 467 (2000).

[26] *See* Daniel A. Crane, *Rationales for Antitrust*, *in* The Oxford Handbook of International Antitrust Economics, Volume 1, 13 (2015).

[27] Peter Camesasca & Andrea Giannaccari, *Comparative Competition Law and Economics* 101–105 (2017).

[28] Peter Camesasca & Andrea Giannaccari, *Comparative Competition Law and Economics* 51 (2017); Deborah Healey, *The ambit of competition law: comments on its goals*, *in* Research Handbook on Methods and Models of Competition Law 12, 19–21 (Deborah Healey, Michael Jacobs & Rhonda L. Smith eds., 2020).

[29] For an overview of EU competition law's plurality of goals, *see* Deborah Healey, *The ambit of competition law: comments on its goals*, *in* Research Handbook on Methods and Models of Competition Law 12, 24–26 (Deborah Healey, Michael Jacobs & Rhonda L. Smith eds., 2020). For an empirical account, *see* Konstantinos Stylianou & Marios Iacovides, *The goals of EU competition law: a comprehensive empirical investigation*, 42 Legal Studies 620 (2022). For an overview of the interaction between competition law and sustainability in EU competition law, *see* Jurgita Malinauskaite, *Competition Law and Sustainability: EU and National Perspectives*, 13(5) Journal of European Competition Law & Practice 336 (2022).

2.3 NON-COMPETITION GOALS IN COMPETITION LAW

Although an oxymoron, competition law may arguably accommodate non-competition goals, which may be either economic (e.g. industrial policy) or non-economic (e.g. environmental protection, sustainability).[30] The importance of non-competition considerations in competition law is, however, very limited, if they have a legitimate role at all.

First, the perception of non-competition goals may be a delusion. What is viewed as the manifestation of a non-competition goal may simply be the fancy re-labelling of a competition-driven or dual-function consideration. As a matter of practice, in most cases competition and non-competition goals do not come into conflict with each other.[31] Most instances viewed as featuring a non-competition goal may easily be translated to the language of competition. These are multipurpose arrangements which also have an arguably procompetitive aspect. Cartels blocking technological development and thwarting the introduction of new, more environment-friendly technology go against both competition policy and environmental protection.[32] A chamber's rules of conduct on advertising may be viewed both as the emanation of professional ethics and the protection of informed consumer choices in a market featuring information asymmetry.[33] In the same vein, professional independence protects the clients. They are ethical requirements and, at the same time, have a discernible economic meaning.[34] Furthermore, the perception of non-competition goals may often emerge from the divergent views on competition and competition goals. For instance, competition policy may accommodate industrial policy considerations in the sense of protecting SMEs. If conceiving competition law's purpose as the maximization of social or consumer surplus, the protection of SMEs qualifies as a non-competition goal. If, however, competition law's purpose is conceived as preserving the process

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30 *See* Hans Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?* (2003); Wolf Sauter, *Coherence in EU Competition Law* 69–72 (2016); Or Brook, *Non-Competition Interests in EU Antitrust Law* (Cambridge University Press, 2022).

31 Bundeskartellamt, *Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice*, Virtual Meeting of the Working Group on Competition Law (October 1, 2020), p. 43.

32 *See* European Commission's decision of July 8, 2021 in AT.40178 – *Car Emissions*.

33 *See California Dental Association v FTC*, 526 U.S. 756 (1999).

34 *See* Case C-309/99 *Wouters*, EU:C:2002:98.

of rivalry and the competitive structure of the market, the protection of SMEs may be easily viewed as a competition goal.

Second, it has to be noted that the wide grasp of aims is peculiar to competition authorities and less prevalent in judicial practice. Accordingly, it is questionable whether the manifestation of non-competition goals can be conceived as being part of the law or part of the administrative practice (including the setting of enforcement priorities). The public prosecutor may refuse to spend public resources on pursuing violations that attract no social disapproval or have a trivial impact on the society. Nonetheless, a 'blind eye' policy does not change the law. Administrative practice may change over time and different administrative attitudes may fare well within the same legal framework. Furthermore, administrative indulgence does not affect private parties' right to pursue the case in a civil action.

The litmus test of non-competition goals are cases where they thwart competition. A pro-competitive agreement that enhances environmental protection or sustainability may be applauded as such, but it presents no dilemma as it is pro-competitive in the first place. But can an arrangement be sanctioned if it clearly reduces social surplus or restricts the competitive process without any plausible procompetitive benefit?

Allowing market operators to suppress competition with reference to general societal values raises constitutional issues. Can self-interested market operators be trusted with the furtherance of general societal values. Are competition authorities and courts well equipped to supervise these arrangements and make choices between incommensurable social interests that are otherwise left to the democratic process? Do the reduction of unemployment, protection of SMEs, enhancement of environmental protection, protection of human and labour rights, and the furtherance of gender equality weigh more than social surplus, and how much social surplus can be sacrificed to pursue these goals? Can market operators patronize consumers and force them to purchase more expensive but environment-friendly products? The answer requires a value choice, which is typically for the democratic process to make.[35]

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[35] Bundeskartellamt, *Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice*, Virtual Meeting of the Working Group on Competition Law (October 1, 2020), p. 43 ("Where the goals of protecting competition and pursuing public interests come into conflict, it is primarily the task of the democratically elected lawmaker to strike a balance between the opposing interests.").

2.4 THE NORMATIVE PURPOSE OF EU COMPETITION LAW: THE SINGLE MARKET

It is a unique trait of EU competition law that, besides economic teleology, it also serves the purpose of market integration. The law of the single market applies to Member State acts, while competition law applies to undertakings. EU competition law is instrumental in creating and reinforcing the single market by prohibiting market operators from rebuilding those hurdles to trade that Member States were required to dismantle.[36] Partitioning the EU internal market along national borders goes against the very idea of the single market and, hence, needs to be prohibited, even if it were not anticompetitive in an economic sense.

Market integration is a predominantly political (or normative) purpose, though it may be conceived in economic terms. The single market is an economic project that aims to enhance economic efficiency; hence, by strengthening the single market, EU competition law strives to serve a more general economic aim. This conceptualization overlooks, however, an important aspect. While the single market has, indeed, an economic meaning, the case law developed by the CJEU under this label treats the single market as a dogmatic imperative and, at times, goes against sound economic theory.[37] It admittedly sacrifices efficiency in the individual case to further the general cause of the single market.

In most cases, the purpose of market integration and the traditional teleology of competition law overlap. Conducts that restrict competition should, by themselves, also restrict trade within the internal market. Arrangements that restrict market entry hold off both in-state and out-of-state firms. Hence, they restrict not only competition but also trade. Competition law focuses on market entry in general, while single market law focuses on the entry of out-of-state market operators. Put another way, the single market addresses the inter-state aspects of competition, while competition law embraces both inter-state and intra-state aspects. If a market is, however, contestable, it is both procompetitive and in line with the expectations of the single market.

This raises the question: what real function can market integration serve in EU competition law besides supplying a reinforcing justification for the rules that are entailed by general economic theory anyway? If competitors divide the market along national borders, the cartel will amount to a hardcore restriction under general economic theory. Market integration serves a deco-

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36 Giorgio Monti, *EC Competition Law* 39–41 (2007).

37 *See*, for instance, the analysis of the treatment of absolute territorial exclusivity in Section 4.4.6.7.

rative function here: the cartel not only stifled competition, but also infringed the imperative of market integration. Nonetheless, in a good number of cases, either visibly or invisibly, the purpose of market integration determines outcomes, and, at times, these outcomes go against sound economic theory.[38] Furthermore, this purpose-setting also impacts the Commission's enforcement priorities. EU competition law is applied more intensively to violations that defy the single market.

Vertical territorial protection (territorial exclusivity) is a poster child of how the purpose of market integration shapes EU competition law and limits the purview of sound economic theory.

On the one hand, it is generally accepted in mainstream economic theory that although vertical territorial protection limits intra-brand competition, it has outweighing merits in enhancing inter-brand competition and is, overall, procompetitive.[39] Vertical territorial protection is efficient, among others, because it handles the free-rider problem.[40] Penetrating a market involves considerable risks, while it requires substantial investment in terms of marketing efforts and promotion. A farmer may be reluctant to put the seeds into the soil, if it is not guaranteed that they will be the one who harvests the crop. Likewise, a distributor may be reluctant to invest in promoting a certain brand, if it has no exclusive right to recover the investment. Intuition may suggest that it is not in the producer's interest to create a privileged status for a distributor (instead of generating downstream competition). The free-rider theory explains why producers are, still, inclined to confer such a privileged status on distributors and how it intensifies competition by making them interested in competing vigorously with other brands.

On the other hand, the rule that a distributor has exclusivity over the territory of one or more Member States goes against the very idea of the single market. The purpose of market integration has three strands. First, the single market requires Member States to eliminate all hindrances to inter-state commerce, and undertakings are not allowed to covertly reproduce these. In this narrative the parallel trader is not a 'parasite' dealer free-riding on the exclusive distributor's investment, but a 'hero because his sales foster the free movement of the brand within the common market and thus contribute to market

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38 *See*, for instance, the analysis of the treatment of absolute territorial exclusivity in Section 4.4.6.

39 *See* George A. Hay, *The Free Rider Rationale and Vertical Restraints Analysis Reconsidered*, 56(1) Antitrust Law Journal 27–35 (1987).

40 Roger J. Van den Berg & Peter D. Camesasca, *European Competition Law and Economics* 226–228 (2001).

integration'.[41] The intra-Union flow of goods is considered to be a value in itself. Second, parallel trade equalizes prices in the different Member States through arbitrage.[42] Third, the single market is considered to imply consumers' fundamental and inalienable right to purchase wherever they want.[43] This right is normative and not susceptible to economic considerations.

EU competition law's treatment of vertical territorial restrictions features a formal compromise between the free-rider rationale and the single market's imperative.[44] The watertight isolation of national markets, even within a par-

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41 Luc Gyselen, *Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale under EEC Competition Law*, 21 Common Market Law Review 647, 648–649 (1984). *See also* Leon J. de Keyser, *Territorial Restrictions and Export Prohibitions under the United States and the Common Market Antitrust Laws*, 2 Common Market Law Review 271, 294 (1964); Vivien Rose and Peter Roth, *Article 81(1)*, *in* Bellamy & Child's European Community Law of Competition 2.068 (Peter Roth and Vivien Rose eds., 2008); Doris Hildebrand, *The role of economic analysis in the EC competition rules* 279 (1998); Joanna Goyder, *EU Distribution Law* 73 (4th ed., 2005); Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 62 (2002).

42 *See* Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.09 (Jonathan Faull and Ali Nikpay eds., 2007); Thomas Hays, *Parallel Importation under European Union law* 130 (2004); Doris Hildebrand, *The role of economic analysis in the EC competition rules* 278 (1998); Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 263 (2002).

43 *See* 2001/146/EC *Opel* [2001] OJ L 59/1, 129–130 paras ("[T]he basic rights of the European consumer include the right to be able to purchase a motor vehicle within the common market in the Member State where it is offered at the most favourable price. (…) This right is protected, in practice, by the Community competition rules on parallel trade. In the light of these rules, market partitioning through arrangements concerning restricted supply of motor vehicles to dealers in the distribution network cannot be accepted.") *See also* Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.09 (Jonathan Faull and Ali Nikpay eds., 2007) ("The possibility of passive sales was also seen as necessary to protect what was seen as the fundamental right of consumers or their agents to purchase wherever they want. This right is the symbol of the internal market. Such was the strength of feeling with respect to the right to make parallel trade and passive sales, that any attempt in a distribution system to frustrate these rights was almost treated as a *per se* infringement of Article 81.")

44 Vivien Rose and Peter Roth, *Article 81(1)*, *in* Bellamy & Child's European Community Law of Competition § 2.068 (Peter Roth and Vivien Rose eds., 2008); Claus-Dieter Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 Common Market Law Review 257, 262 (1992); Derek Ridyard

ticular brand, is beyond the single market's red line. Likewise, without some territorial protection, distributors would be reluctant to penetrate new markets (which, perversely, would go against the very idea of the single market). The two considerations are reconciled by way of a compromise, where absolute territorial protection is *per se* illegal, while relative territorial protection, which enables passive sales, is lawful, unless it has anticompetitive effects. This is, however, only a formal reconciliation. Passive sales enable customers and parallel traders to circumvent the territorial protection,[45] and this may be a profitable strategy, depending on the value of the goods and the costs of information. Consumers pay two types of costs: the price, which is an out-of-pocket cost, and search costs, which may encompass out-of-pocket costs and time. If the search costs are low in comparison with the price, consumers may be inclined to make efforts to find the cheapest source. Relative territorial protection rules out active sales, which prohibits other authorized dealers from mitigating the customers' search costs. Nonetheless, search costs may be low and unauthorized dealers remain free to mitigate them by doing what authorized dealers are prohibited from. The shielding effects of search costs are diminishing in the digital age,[46] especially as the Commission, though acknowledging its 'extraterritorial' effects, does not consider the internet *per se* to be a form of active selling.[47]

The purpose of market integrations has also affected several other rules of EU competition law. The automatic condemnation of RPF is a controversial issue of competition economics. There is a mounting economic scholarship suggesting that it is not always anticompetitive and, hence, would merit

& Simon Bishop, *E.C. Vertical Restraints Guidelines: Effects Based or Per Se Policy*, 23(1) European Competition Law Review 35, 35–36 (2002) (Referring to market-partitioning as the Commission's schizophrenia.).

[45] *See* Paul M. Taylor, *The Vertical Agreements Regulation*, 3 The Cambridge Yearbook of European Legal Studies 525, 539 (2000) (Stressing "the ease with which a ban on passive sales can be eclipsed merely by the customer requesting the supply, as it is quite likely to do in response to web-site advertising.") *Contra* Giorgio Monti, *Article 81 EC and Public Policy*, 39 Common Market Law Review 1057, 1067 (2002) (Submitting that "the distinction between active and passive sales makes economic sense." The most effective way of free-riding is active sales. "Conversely, if a distributor exploits the territorial protection he has received by behaving anticompetitively, buyers will have an incentive to invest resources in finding alternative suppliers outside the territory.").

[46] Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 62 (2002).

[47] *2010 Vertical Guidelines*, para 52–53; *2022 Vertical Guidelines*, para 206(a); Article 4(e) VBER.

a full-blown analysis. In 2007, the US Supreme Court abolished the *per se* illegality of this restriction and held that it should be assessed under the rule of reason.[48] EU competition law declined to follow suit. Though the *2010 Vertical Guidelines* invited undertakings to test their RPF arrangements under Article 101(3), it preserved the automatic condemnation under Article 101(1).[49] This approach was maintained by the *2022 Vertical Guidelines*. Arguably, EU law's approach has been influenced not only by antitrust traditionalism, but also by the idea of the single market.[50] RPF can be used to maintain more or less uniform prices in the different Member States, thus impeding the inter-state flow of goods. It can also be used to reinforce a system of territorial protection.[51]

The single market also affects the way the definition of vertical agreement, at times, covers apparently unilateral conduct.[52] The CJEU has often applied Article 101 to cases where, at least in a colloquial sense, there were no mutual subjective elements (consensus) between the parties and, hence, the existence of an agreement was dubious.[53] In these cases, non-dominant undertakings tried to partition the common market along national borders, eliminate parallel trade or maintain different prices in different Member States. The CJEU treated these practices as vertical agreements, so it could suppress the threats to the single market.[54] Arguably, the Court construed the 'agreement' in a wider sense than it would otherwise.[55]

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[48] *Leegin v PSKS*, 551 US 877 (2007).

[49] *2010 Vertical Guidelines*, paras 223–229. For an analysis, *see* Csongor István Nagy, *Resale Price Fixing after the Revision of the EU Vertical Regime – A Comparative Perspective*, 54(4) Acta Juridica Hungarica / Hungarian Journal of Legal Studies 349 (2013).

[50] *See* Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 105 (2002); Lennart Ritter & W. David Braun, *European Competition Law: a Practitioner's Guide* 269–270 (3d ed., 2005); Femi Alese, *Unmasking the Masquerade of Vertical Price Fixing*, 28(9) European Competition Law Review 514, 525 (2007).

[51] *See* 77/66/EEC *GERO-fabriek* [1977] OJ L 16/8, para II(3)(c); 2002/190/EC *JCB* [2002] OJ L 69/1, paras 168–172.

[52] Joanna Goyder, *EU Distribution Law* 21 (4th ed., 2005).

[53] *See* Joanna Goyder, *EU Distribution Law* 20 (4th ed., 2005).

[54] Morten Broberg & Peter Stig Jakobsen, *The Concept of Agreement in Article 81 E.C.: on the Manufacturers' Right to Prevent Parallel Trade within the European Community*, 23(3) European Competition Law Review 128 (2002).

[55] Ioannis Lianos, *Collusion in Vertical Relations under Article 81 EC*, 45 Common Market Law Review 1027, 1037 (2008).

2.5 THE PURPOSE OF EU COMPETITION LAW AND THE STRUCTURE OF COMPETITION ANALYSIS

As noted in Section 2.2, although the conception of competition as a process and as a surplus-maximizing output are uncongenial, the rivalry between the two has produced relatively modest divergences on the level of general substantive rules. EU competition law is no exception to this. Article 101 features a blend of the two approaches. The purpose of competition law is not a question of choice but a question of accents.[56] Although regarded as the home of ordoliberalism, EU competition law does not protect the competitive process at the cost of social surplus. Article 101(3) specifically and clearly provides that, in case cooperation produces more benefits than competition, it should be given priority. Article 101 mandates the selection of the surplus-maximizing regulatory option, but, at the same time, creates a presumption in favour of the competitive process. Article 101 is based on the following narrative. The protection of the competitive process ensures lower prices, higher output, better product choice and innovation. There are, however, cases where inter-firm cooperation, while restricting commercial autonomy and market freedom, has a positive effect on prices, output, product variety and innovation. The choice between competition and cooperation is usually made under some degree of uncertainty and turns on economic predictions. Nonetheless, a process-based mindset is wary of the surplus-enhancing capacity of arrangements that limit rivalry and may apply a more-demanding standard of proof. One can hardly find any CJEU judgment where the Court sacrificed the enhancement of social surplus to protect the competitive process. There are, however, cases where the Court did not find cooperation's promise of a higher surplus convincing enough to sacrifice the competitive process. The question is not if a surplus-maximizing option should prevail, but how to shape the analytical structure and allocate the burden of proof, how to conceive the presumption for the competitive process, what standard of proof to use, and how to minimize false negatives and false positives.

Economics measures the performance of the market by means of social surplus, which is, in general, the result of two kinds of efficiency. Allocative efficiency ensures that buyers get optimal quality for optimal price. It implies that social surplus is maximized through allocating the society's resources to the production of the most valued goods and services. This is achieved when market price, which reflects the value buyers attach to the product or service,

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[56] For an account of the changing relationship among the aims, Giorgio Monti, *EC Competition Law* 48–52 (2007).

equals the marginal cost of production. Productive efficiency refers to the production of the goods at the lowest possible costs.

The optimal structure of the market is the one that secures the highest social surplus, which is made up of consumer surplus and producer surplus. Put simply, when a consumer pays a price that is lower than the highest price they are ready to pay (reservation price), they save money. By way of example, if you buy an ice cream for €3 (market price) but are willing to pay €5 for it (reservation price), you save (earn) €2 and this amounts to a surplus. The sum of individual savings makes up the consumer surplus generated by the market. Producer surplus is calculated similarly. If the producer is inclined to sell the product for at least €1 but can sell it for €3, they make €2, which is the difference between the sale price and the reservation price. This represents the producer's surplus. Social surplus is the sum of consumer and producer surplus.

The above analytical structure may also be used to measure the performance of the market. Social surplus is maximized through allocative efficiency if market price and quantity are determined by supply and demand. Market power results in higher prices (in case of buying power: lower prices), which results in suboptimal quantity. It is a fundamental law of economics that, apart from some narrow exceptions, in principle, higher prices entail lower quantity, while lower prices entail higher quantity. A supplier's market power affects social surplus in two ways.

First, by charging higher prices, sellers capture a part of the consumer surplus. This value is, however, not lost but transferred. Using the above example, if the buyer pays €4 for the product, consumer surplus decreases from €2 to €1, while the producer's surplus increases from €2 to €3. Notwithstanding its impact on social justice, this causes no inefficiency, as wealth is transferred but not lost; hence, the sum of social surplus remains unchanged.

Second, market power also causes deadweight loss, which, however, reduces social surplus. Contrary to the above example, where a part of the consumer surplus was transferred to the producer but the transaction worked out, deadweight loss is made up of transactions that do not work out, because the consumer is not willing to pay the higher price. Put another way, the higher prices exceed the consumer's reservation price. The consumer would be happy to pay the competitive price (the price prevailing in case of workable competition in the market) or, put differently, a reasonable price, but refuses to pay the inflated price. Different consumers have different reservation prices, which are determined by their income and preferences (the product's utility to them). While, in the above example, the reservation price was €5 and the buyer was ready to pay the inflated price of €4, other consumers' reservation prices may be lower and, hence, they may not be willing to buy the product for €4. These transactions are a pure loss to society, as both the buyer and the producer could have made some surplus through them.[57]

Competition also ensures productive efficiency, given that the ineffective use of resources generates extra costs and, hence, a competitive disadvantage. The lack of competitive pressure may result in X-inefficiency: production costs may be higher than they would be under competitive pressure.[58] On the contrary, in a competitive environment, undertakings need to meet the productive efficiency of their competitors (or the market average) to be able to operate profitably under the market price. Lower costs result in a lower market price and, as such, increase social surplus.

Allocative and productive efficiencies are static in the sense that they have a short-term horizon. They maximize surplus in the frame of the existing competition but do not embrace prospective game-changers that remould competition by introducing new products, innovations and market patterns and conditions (dynamic efficiency).[59] Allocative and productive efficiencies are short-term effects within the box, which maximize social surplus with the use of existing products, technology, knowledge and patterns. Dynamic efficiency is a mid- or long-term out-of-the-box process which improves allocative and productive efficiency over time. Occasionally, static and dynamic efficiencies may conflict with each other. For instance, cooperation in the field of research and development may result in cost savings in the short run by excluding parallel expenses in the research process, but it may chill rivalry in terms of innovation and reduce dynamic efficiency by reducing the incentive to find alternative avenues to satisfy technological needs. This implies that a cooperation that appears to be a justifiable restriction of competition on account of increasing social surplus in the short run may, on account of reducing dynamic efficiency, reduce social surplus in the long run.

Article 101 proceeds from the assumption that the competitive process is generally the best pattern to maximize social surplus. Competitive pressure ensures allocative and productive efficiency, as well as dynamism. Article 101(1) refers to the restriction of competition, which may be easily equated with the competitive process. At the same time, Article 101(3) rec-

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[57] This demonstration is based on sellers' market power. However, buyers' market power (such as monopsony, which is the inverse of monopoly) generates the same effects.

[58] *See* George Stigler, *The Xistence of X-Efficiency*, 66(1) American Economic Review 213 (1976); Harvey Leibenstein, *On the basic proposition of x-efficiency theory*, 68(2) American Economic Review 328 (1978).

[59] Roger Van den Bergh, Peter Camesasca & Andrea Giannaccari, *Comparative Competition Law and Economics* 91–95 (2017).

ognizes that cooperation may at times beat competition in maximizing social surplus.

A very plastic example for how cooperation may outstrip competition in terms of productive efficiency is the treasure island parable.[60] Assume that there are five treasure-hunter teams that are searching for a treasure that is worth €5,000. The search costs each team €500. It is also assumed that they have equal chances to find the treasure. Since only one can succeed and the expenditures of those who fail are wasted, it is more efficient not to compete but to cooperate, and both the entrepreneurs and society would be better off if the treasure hunters cooperated. The parties could split the costs, while the benefit of the adventure to society would remain the same. If the entrepreneurs are searching for the treasure on a competitive basis, the costs of finding it would amount to €2,500 altogether (5 × €500). If they cooperate, they can share the costs and the income. This makes it reasonable for them to combine: the cooperation not only eliminates the risk of failure, but, due to cost saving, it also improves the balance between the costs and the expected value. In case of competition, the expected value of the independent adventure is €1,000 (the value of the treasure is €5,000 and there are five teams having equal chances: €5,000 ÷ 5), while the costs are €500. Accordingly, the balance is €500. If the parties cooperate, the expected value is €1,000 per member, which will be earned with 100% certainty. The costs are, however, not the same: the expenditure of €500 would be split by the parties, resulting in a cost of €100 per entrepreneur. This makes the individual balance of the common adventure €900. Accordingly, the net profit of the common adventure is €400 higher than the balance of independent treasure-hunting, and society also saves €2,000 (the wasted costs of the unsuccessful treasure hunters). There remains no more but to substitute the treasure, for instance, with a new patentable technology to show why cooperation in R&D is efficient, notwithstanding its obvious anticompetitive nature.

The distinction between the two prongs of Article 101 cannot be fully described by the distinction between allocative and productive efficiency.[61] The competitive process enhances not only allocative efficiency, by forcing undertakings to content themselves with a reasonable margin, but also productive efficiency, by forcing them to keep costs as low as possible to keep up with their competitors. At the same time, cooperation may enhance not only productive but also allocative efficiency. An industry-wide platform or standardization may facilitate consumers to cheaply (that is, conveniently) acquire

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[60] *Cf.* William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 300–302 (2003).

[61] *Cf.* Okeoghene Odudu, *The Boundaries of EC Competition Law* (2006).

information on offers in the market and to compare them.[62] This intensifies the competitive process and enhances allocative efficiency.

Given the above background, the relevant teleological question of Article 101 is not if it aims to protect competition as a process or competition as an outcome. The ultimate purpose of Article 101 is clearly social surplus. However, Article 101 embeds a strong presumption that it is the competitive process that maximizes social surplus. The central questions of Article 101 are structural, such as how to array the different considerations and aspects of the competition analysis, how to distinguish the purview of Article 101(1) from that of Article 101(3), and how strong the presumption in favour of the competitive process should be.

62 *2023 Horizontal Guidelines*, para 475.

3. Comparative framing: *per se*, 'quick look', 'abbreviated' and 'full' rule of reason in US antitrust law

The purpose of this chapter is to provide a framing for the comparative references in the subsequent chapters. This book uses comparative law to identify, highlight and contextualize issues of EU competition law and to point out alternative patterns of reaction. For this purpose, this chapter provides an overview of the relevant principles of US antitrust law and clarifies the conceptualization used in the comparative references.

Section 1 of the Sherman Act contains neither a bifurcation similar to Articles 101(1) and 101(3), nor a distinction between object and effect. Nonetheless, the judicial practice read a nuanced scheme of inquiry into the Sherman Act's laconic language.

The doctrine of *per se* applies to inherently anticompetitive agreements with no prospect of redeeming virtue. *Per se* treatment is made up of two elements:

1. the 'automatic condemnation' rule, which implies the conclusive presumption of anticompetitive effects; and
2. the 'no defence' rule, which, as a matter of law, rules out the consideration of any rebuttal of anticompetitive effects and any affirmative defence of procompetitive justifications.

The intermediate categories of antitrust analysis are defined in this book as 'quick look' and 'abbreviated rule of reason' (although these two are generally treated as the same doctrine, this chapter demonstrates that they are not):

- Under the 'quick look', anticompetitive effects are presumed but justifications are considered, and if they appear to be facially plausible, they are considered in detail. 'Quick look' is an exception to *per se*. It preserves the 'automatic condemnation' but discards the 'no defence' rule.
- The 'abbreviated rule of reason' does not presume anticompetitive effects but sets up a lower threshold of proof, while leaves the floor open to procompetitive justifications.

Under the 'rule of reason', anticompetitive effects are not presumed but need to be proved, and if they are proved, the justifications offered by the defendant have to be considered to the full extent. Nonetheless, rule-of-reason analysis involves a sliding scale, where the required quality of proof and elaboration of analysis depend on the restriction's anticompetitive potential, and where not all arrangements benefit from a plenary analysis.

It has to be stressed that these categories were made to facilitate antitrust analysis and not the other way around. The idea behind having analytical tools is to use economic probabilities to ensure optimal decisions and to obviate redundant examinations. Rigid bans may result in the prohibition of justifiable agreements (false positives), while requiring economic analysis in cases where the impact on competition is obvious entails unnecessary costs and reduces the level of enforcement and, hence, may lead to practical outcomes similar to false negatives.

The analysis under Section 1 combines the considerations set out in Articles 101(1) and 101(3). It is, however, an important structural difference that in EU competition law automatic condemnation entailed by anticompetitive object is limited to Article 101(1) and any agreement may, at least theoretically, benefit from an exemption under Article 101(3).[1] On the contrary, *per se* illegal agreements cannot be justified, unless the rule-of-reason analysis is opened as a result of a 'quick look'.[2]

This chapter provides a comparative framing for the subsequent analysis of Article 101. Section 3.1 explores the *per se* and rule of reason dichotomy and provides an overview of the doctrine of *per se*. Section 3.2 presents the intermediate modes of antitrust analysis and argues that what is viewed as a single doctrine is, in fact, made up of two different notions: the 'quick look' and the 'abbreviated rule of reason'. Section 3.3 presents the structure and dynamics of the rule-of-reason analysis. Section 3.4 provides a comparative overview of Article 101 and Section 1.

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[1] Case T-17/93 *Matra Hachette*, EU:T:1994:89, para 85; Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, paras 21 & 39; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 *GlaxoSmithKline*, EU:C:2009:610; C-439/09 *Pierre Fabre*, EU:C:2011:649, paras 49 & 59. *See Guidelines on Article 101(3)*, para 46; Richard Whish & David Bailey, *Competition Law* 127–29 (8th ed, 2015).

[2] For a comparison of *per se* and anticompetitive object, see Kelvin Hiu Fai Kwok, *Re-Conceptualizing Object Analysis under Article 101 TFEU: Theoretical and Comparative Perspectives*, 14(3) Journal of Competition Law and Economics 467 (2018).

3.1 THE '*PER SE*' DOCTRINE

Section 1 of the Sherman Act makes no reference to any classification of agreements and simply prohibits all restraints of trade. 'One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says.'[3] If interpreted literally, it would prohibit every commitment, including ordinary contracts, given that all of them restrict the parties' conduct in the market. Nonetheless, the Supreme Court established very early that only 'unreasonable' restrictions are prohibited, and some restrictions are conclusively presumed to be unreasonable, while others can be judged only in light of their effects. Agreements that embrace the very evils of antitrust are *per se* illegal. There is no possibility to plead the arrangement's effects and context. The defendant's only chance is to argue that the agreement at stake cannot be brought under the alleged *per se* category.[4] If the agreement is not *per se* illegal, its effects on competition need to be inspected.[5] This dualist approach was supplemented with intermediate modes of analysis, which are presented in Section 3.2. Nonetheless, the cornerstones of Section 1 have remained the *per se* rule and the rule of reason.

After a short prelude in *Trans-Missouri Freight Association*[6] and *Joint-Traffic Association*,[7] the Supreme Court established in *Standard Oil*[8] that

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[3] *National Society of Professional Engineers v US*, 435 U.S. 679, 687 (1978).

[4] *Cf*. Donald L. Beschle, *What, Never? Well, Hardly Ever': Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 Hastings Law Journal 471, 472–473 & 477 (1987).

[5] In the early days of antitrust, the *per se* and rule of reason dichotomy had a very significant competitor. The dichotomy of naked and ancillary restraints was also a strong candidate for being the law of the land. *See US v Addyston Pipe*, 85 F. 271 (1898). Finally, in *Standard Oil*, the Supreme Court adopted the rule of reason standard. Nevertheless, the conceptual distinction between naked and ancillary restraints still has a considerable role in antitrust analysis, the two theories being to some extent parallel anyway.

[6] In *US v Trans-Missouri Freight Association*, 166 U.S. 290 (1897), the Court seems to have held that all naked agreements are anticompetitive. The Court also established that the term "restraint of trade or commerce" embraces all agreements that operate to restrain trade or commerce, whether legal or illegal under common law, and irrespective of whether the restraint is reasonable or unreasonable. According to the Supreme Court, the language of the statute is plain. *Ibid*, 327–341.

[7] *U.S. v Joint-Traffic Association*, 171 U.S. 505 (1898).

[8] *Standard Oil v US*, 221 U.S. 1 (1911).

the term 'restraint' means 'undue or unreasonable restraints'[9] and, as a general principle, a rule of reason applies.[10] Nevertheless, the judgment also ushered the doctrine of *per se* illegality[11] when holding that the 'nature and character' of the agreement may create a 'conclusive presumption' of illegality.[12] The two concepts are congenial, as both of them target unreasonable restraints of trade.[13]

3.1.1 Selection Test

There are certain arrangements that always or almost always entail anticompetitive results[14] without any redeeming virtue. Procedural convenience[15] and legal certainty justify the automatic condemnation of these.[16] Nevertheless, the principle is rule-of-reason analysis,[17] and *per se* illegality is the exception,

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9 *Ibid*, 63.

10 *Ibid*, 60. *See Northern Pac. R. Co. v US*, 356 U.S. 1, 5 (1958) ("Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition.")

11 *See US v Trenton Potteries*, 273 U.S. 392, 399 (1927) ("That the opinions in the *Standard Oil* and *Tobacco* Cases were not intended to affect this view of the illegality of price-fixing agreements affirmatively appears from the opinion in the *Standard Oil* Case".) The term "*per se*" was first used in 1940 in *US v Socony-Vacuum*, 310 U.S. 150 (1940). *See* Donald L. Beschle, *What, Never? Well, Hardly Ever': Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 Hastings Law Journal 471, 477 (1987).

12 *Standard Oil v US*, 221 U.S. 1, 65 (1911).

13 *See* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 University of Illinois Law Review 77, 93 (2003). *See also NCAA v Board of Regents*, 468 U.S. 85, 103–104 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition.").

14 *See Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1, 19–20 (1979).

15 *U.S. v Topco*, 405 U.S. 596, 609–610 (1972); *Arizona v Maricopa County Medical Society*, 457 U.S. 332, 343–344 (1982); *Northwest Wholesale Stationers v Pacific Stationery and Printing*, 472 U.S. 284 (1985).

16 Oliver Black, *Per Se Rules and Rules of Reason: What Are They?*, 18(3) European Competition Law Review 145, 151–152 (1997).

17 In *Sylvania*, the Supreme Court, with reference to *Standard Oil*, held that "since the early years of this century a judicial gloss on this statutory language has

which applies exclusively to arrangements that were specifically classified as such.[18] Furthermore, the *per se* rule only covers agreements whose anti-competitive nature is obvious. '*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.'[19] In the *per se* 'category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality – they are "illegal *per se*."'[20]

Since the early days of the Sherman Act, the Supreme Court has treated certain types of agreements (such as horizontal price fixing,[21] division of markets,[22] including bid rigging,[23] output restrictions,[24] certain forms of group boycott[25])[26] not only facially anticompetitive but also refused to hear any justification raised in favour of them. The rationale of the *per se* approach had, however, not been clarified for a long time. Perhaps one of the first comprehensive explanations is the Supreme Court's reasoning in *Northern Pacific*:[27]

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the

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established the 'rule of reason' as the prevailing standard of analysis." *Continental v Sylvania*, 433 U.S. 36, 49 (1977).

[18] *Northwest Wholesale Stationers v Pacific Stationery and Printing*, 472 U.S. 284, 289 (1985).

[19] *Continental v Sylvania*, 433 U.S. 36, 49–50 (1977).

[20] *National Society of Professional Engineers v US*, 435 U.S. 679, 692 (1978).

[21] *U.S. v Trenton Potteries*, 273 U.S. 392, 400 (1927), *US v Socony-Vacuum*, 310 U.S. 150 (1940).

[22] *U.S. v Addyston Pipe*, 175 U.S. 211 (1899).

[23] Douglas Broder, *US Antitrust Law and Enforcement* 47–48 (OUP, 2010).

[24] *NCAA v Board of Regents*, 468 U.S. 85, 103 (1984).

[25] *Fashion Originators' Guild of America v FTC*, 312 U.S. 457 (1941); *Associated Press v US*, 326 U.S. 1 (1945); *Klor's v Broadway-Hale Stores*, 359 U.S. 207 (1959); *Northwest Wholesale Stationers v Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985); *NYNEX Corp. v Discon, Inc.*, 525 U.S. 128 (1998).

[26] The Supreme Court also pronounced tying arrangements to be *per se* illegal but on the precondition of market power. *See International Salt v US*, 332 U.S. 392 (1947); *Northern Pac. Ry. v US*, 356 U.S. 1 (1958); *Jefferson Parish Hosp. Dist. No. 2 v Hyde* 466 U.S. 2 (1984); *Eastman Kodak Co. v Image Technical Servs*, 504 U.S. 451 (1992). Nonetheless, because of the requirement of market power, this legal test appears not to establish a real *per se* category but an abbreviated strait-jacketed rule-of-reason test.

[27] *Northern Pac. R. Co. v U.S.*, 356 U.S. 1 (1958).

> Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken.[28]

The *per se* approach is exceptional[29] and 'there is a presumption in favour of a rule-of-reason standard'.[30]

Per se treatment's exceptionality implies the precondition of a long-standing judicial experience. Courts should not make quick judgements regarding particular types of restraints but carry out a detailed analysis without begrudging judicial resources. Nevertheless, if the multitude of benevolent antitrust analyses of a particular type of arrangement coherently leads to condemnation, this experience may justify the judicial reflex of outright prohibition. 'Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.'[31] Accordingly, the Supreme Court is 'slow (…) to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious'.[32]

3.1.2 Rationale

While clear-cut rules have their inherent merits (e.g. legal certainty, judicial convenience, deterrence),[33] these obvious benefits generally do not justify the risk of false positives inherent in the extensive use of the *per se* approach. The rationale of *per se* illegality is that there are certain agreements that are either harmful or neutral but never beneficial. These agreements cause competitive harm in case the parties have some market power and are ineffective if they

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[28] *Ibid*, 5. *See Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1, 19–20 (1979); *NCAA v Board of Regents*, 468 U.S. 85, 103–104 (1984).

[29] *See Northwest Wholesale Stationers v Pacific Stationery and Printing*, 472 U.S. 284, 289–291 (1985); *Business Electronics v Sharp Electronics*, 485 U.S. 717, 723–724 (1988); *FTC v Indiana Federation of Dentists*, 476 U.S. 447, 458–459 (1986); *NCAA v Board of Regents*, 468 U.S. 85, 103–104 (1984); *National Society of Professional Engineers v US*, 435 U.S. 679, 692 (1978).

[30] *Business Electronics v Sharp Electronics*, 485 U.S. 717, 726 (1988).

[31] *Arizona v Maricopa County Medical Society*, 457 U.S. 332, 344 fn 14 (1982).

[32] *FTC v Indiana Federation of Dentists*, 476 U.S. 447, 458–459 (1986).

[33] *See* Oliver Black, *Conceptual Foundations of Antitrust* 74–75 (2005).

do not. In neither case have they any positive effect, hence, there is no point in countenancing these intended mischiefs simply because they prove to be failed attempts to restrict competition or even 'impossible crimes'. If properly construed, anticompetitive object generates no false positives and merely entails 'false neutrals' at most. Whereas a naked price-fixing arrangement covering a small portion of the market is not susceptible to raising prices, these agreements are treated as having no virtue at all. Hence, there is no point in complicating the application of the law with countenancing these 'impossible crimes', as the automatic condemnation entails no collateral damage.[34]

As a corollary, *per se* illegality is not a question of trade-off between the judicial costs of elaborate analysis and the probability of a false positive. *Per se* agreements have manifest anticompetitive effects with no or negligible chance of a procompetitive benefit.[35] What is required here is not that these arrangements are anticompetitive on balance, but that they are anticompetitive in absolute terms. This was made clear by the Supreme Court, *inter alia*, in *Sylvania*.[36]

> *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials (…) but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of

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34 *Cf*. Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 203 (2000) ("[F]or an offense like price fixing there is little if any social cost to balance against this enhanced deterrence. As a generalization, price-fixing does not become socially beneficial when power is lacking; it simply becomes ineffective. (…) [E]ven if this leads to overenforcement (…), the 'overenforcement' would not inhibit any socially valuable conduct; it merely inhibits ineffective attempts to do something both harmful and unlawful.").

35 *Cf*. Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* 203 (2000) ("[F]or an offense like price fixing there is little if any social cost to balance against this enhanced deterrence. As a generalization, price-fixing does not become socially beneficial when power is lacking; it simply becomes ineffective. (…) [E]ven if this leads to overenforcement (…), the 'overenforcement' would not inhibit any socially valuable conduct; it merely inhibits ineffective attempts to do something both harmful and unlawful.")

36 *Continental v Sylvania*, 433 U.S. 36, 50 fn 16 (1977).

antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law.[37]

3.1.3 *Modus Operandi*

The *modus operandi* of the *per se* rule is category-building: the case law has established various types (categories) of agreements that are afforded a *per se* treatment. Contrary to EU competition law, where – at least theoretically – ‘object’ agreements might benefit from an exemption under Article 101(3), *per se* treatment is final and conclusive. *Per se* illegality is reserved for agreements that are always or almost always anticompetitive, without the prospect of any redeeming virtue. Nonetheless, the court does not make a comprehensive assessment as to whether the agreement at stake has such characteristics (that is, whether it is always or almost always anticompetitive), but inquires whether the arrangement at stake comes under one of the pre-established *per se* categories. In other words, the focus of the inquiry is not on whether the restraint has an anticompetitive character and whether it is of the genus that is always or almost always anticompetitive without the prospect of any redeeming virtue, but on whether it falls into one of the *per se* pigeonholes.[38] The principle that restrictions that are always or almost always anticompetitive without the prospect of any redeeming virtue should be *per se* illegal is not applied directly but used to build categories of *per se* agreements, and it is these categories that are actually applied to real-life cases.

The whole point of *per se* is to save economic analysis, which implies that requiring economic analysis to move a specific case into a *per se* category would be a contradiction. All the plaintiff is expected to do in a specific case is pigeonhole the conduct into one of the *per se* categories. Although the *per se* rule makes economic analysis superfluous, it involves a different time of analysis required by the categorization exercise. The relevant question is not

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[37] 433 U.S. 36, 50 fn 16 (1977). *See also Arizona v Maricopa County Medical Society*, 457 U.S. 332, 344 (1982) (“Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.”); *Leegin Creative Leather Products, Inc. v PSKS, Inc.*, 127 S.Ct. 2705, 2718 (2007) (Emphasizing that administrative convenience is, in itself, not sufficient to justify the creation of a *per se* rule.).

[38] *See* Herbert J. Hovenkamp, *The Rule of Reason*, 70 Florida Law Review 81, 137 (2018).

if the conduct at issue is 'inherently suspect' in general, but 'whether the specific act in question belongs to the illegal class'.[39] Defendants may not justify the restriction but may argue that it is not of a kind that comes under a *per se* category, and in the process of classification they may raise arguments (such as ancillarity to a legitimate purpose or cooperation) that could also be raised as justification.[40]

Of course, *per se* categories may change over the time. Although the Court issues no general theoretic opinions and can change a category in connection with a specific case where plaintiffs and defendants play a central role, the creation of new categories and the abolition of old ones is the result of the development of economic thinking and experience. These decisions are guided by economic analysis. This is, however, not a micro-level analysis, which is excluded by the *per se* rule, but a more general analysis of the agreement's belonging to the pigeonhole. The relevant question is not whether the specific agreement at issue is anticompetitive, but whether the category the agreement at issue is part of is anticompetitive.[41]

It has to be noted that the Supreme Court's case law on *per se* agreements is not devoid of its flaws and contradictions. The list of *per se* agreements, which rules out economic analysis, embraces two categories whose application presupposes economic analysis. Tying agreements are *per se* illegal if there

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[39] Donald L. Beschle, *What, Never? Well, Hardly Ever': Strict Antitrust Scrutiny as an Alternative to Per se Antitrust Illegality*, 38 Hastings Law Journal 471, 472–473 (1987)

[40] *See* Donald L. Beschle, *What, Never? Well, Hardly Ever': Strict Antitrust Scrutiny as an Alternative to Per se Antitrust Illegality*, 38 Hastings Law Journal 471, 472–473 (1987) ("[The *per se*] rule condemning all acts belonging to a certain class does not eliminate the need for analysis. It merely shifts the crucial point in the analysis to the decision whether the specific act in question belongs to the illegal class."); *id*. at 477 ("The proposition that horizontal price fixing is *per se* illegal remains the law. But our understanding of that statement has undergone serious change in the last decade. It is now more clear than ever that the process of categorizing conduct as price fixing may allow defendants to raise arguments which cannot be raised to justify a practice already characterized as price fixing.").

[41] *See e.g. State Oil v Khan*, 522 U.S. 3 (1997); *Leegin v PSKS*, 551 US 877 (2007).

is market power.[42] The case law on group boycotts is more nebulous;[43] it also requires the establishment of market power for the *per se* condemnation to apply. It appears that there are some group boycotts that are subject to a genuine *per se* rule (illegal irrespective of market power and market effects) and there are other instances of group boycott which are illegal only on condition of market power.[44] These categories require an economic analysis that is specifically excluded by the *per se* rule and look like requiring a scrutiny that is described in Section 3.2 as an intermediate mode of inquiry, more specifically as an 'abbreviated rule of reason'. These categories had emerged before the appearance of the notion of intermediate modes of analysis and were not relabelled afterwards.

3.2 INTERMEDIATE MODES OF ANALYSIS: 'QUICK LOOK' AND 'ABBREVIATED' RULE OF REASON

The sharp distinction between *per se* and rule of reason determined antitrust analysis until the 1980s, when the Supreme Court set intermediate modes of analysis on the path. This involved the idea that certain apparently *per se* agreements are afforded a limited substantive analysis but also that certain non-*per se* agreements may be presumed to have anticompetitive effects and immediately call for justification. This process is generally considered to have

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[42] *See International Salt v US*, 332 U.S. 392 (1947); *Northern Pac. Ry. v US*, 356 U.S. 1 (1958); *Jefferson Parish Hosp. Dist. No. 2 v Hyde* 466 U.S. 2 (1984); *Eastman Kodak Co. v Image Technical Servs*, 504 U.S. 451 (1992). For an overview and analysis, *see* Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, *in* Antitrust Law and Economics 183 (Keith N. Hylton ed., 2010).

[43] *See* C. Paul Rogers, *Consumer Welfare and Group Boycott Law*, 62 Southern Methodist University Law Review 665 (2009); Jeffrey L. Harrison, *The Law of Group Boycotts and Related Economic Considerations*, in Antitrust Law and Economics 46 (Keith N. Hylton ed., 2010).

[44] *Fashion Originators' Guild of America v FTC*, 312 U.S. 457 (1941); *Associated Press v US*, 326 U.S. 1 (1945); *Klor's v Broadway-Hale Stores*, 359 U.S. 207 (1959); *Northwest Wholesale Stationers v Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985); *NYNEX Corp. v Discon, Inc.*, 525 U.S. 128 (1998). In *FTC v Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986), the Supreme Court noted "the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor."

been started out in *NCAA v Board of Regents*,[45] traceable to *Broadcast Music v Columbia Broadcasting*[46] and baptized as 'quick look' in *California Dental Association*.[47]

Interestingly, although they have been part of antitrust law for four decades, the intermediate modes of analysis have not ossified in the way *per se* and rule of reason did. As a symptom of this, they have also given rise to haphazard terminology where 'quick look', 'abbreviated rule of reason' and 'truncated rule of reason' are used interchangeably. The analysis they require is relatively clear. Just as the *per se* rule, there is a presumption of, or low evidentiary threshold for, anticompetitive effects and, contrary to *per se*, neither rebuttal nor affirmative defence is excluded, although these are afforded less elaborate consideration than the rule of reason. Nonetheless, there is a disagreement as to when these modes of analysis apply. Three lines of interpretation emerged. The first line of interpretation is that they apply to some *per se* agreements but leave smoke-filled hotel room cartels under the outright prohibition.[48] The second line of interpretation is that they single out 'inherently suspect'[49] restrictions to limit the set of arrangements benefitting from a full-blown rule of reason. These are agreements that would otherwise benefit from a substantive analysis but are presumed to be anticompetitive under the doctrine, so the inquiry immediately shifts to the question of justification. As a third version,

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45 *NCAA v Board of Regents*, 468 U.S. 85 (1984). The idea that the dualism of antitrust should be supplemented with a third pattern of analysis had not been unprecedented. In *US v Realty Multi-List*, 629 F.2d 1351, 1369–1387 (1980), the Court of Appeals for the Fifth Circuit relied on the concept of "facial unreasonableness". Accordingly, once the plaintiff proves a significant restriction and market power, the burden of proof shifts to the defendant. *See NaBanco v VISA*, 596 F.Supp. 1231, 1250–1251 (1984).

46 *Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1 (1979).

47 *California Dental Association v FTC*, 526 U.S. 756 (1999).

48 Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* 220 (2000) ("The balanced solution is to continue to recognize the *per se* rules, as the Court is doing, but to concede the possibility that in some limited instances it may be possible to see even on a quick look that the purpose and the likely effect of the challenged conduct is not the cartel-like competition harm at which the *per se* rule is aimed.")

49 The term was first used by the Supreme Court in *White Motor v US*, 372 U.S. 253, 265 (1963), but subsequently used in a slightly wider sense, to refer to agreements that are "close neighbor" to the *per se* rule. Tiffany Lee, *Anticompetitive Exclusion and the "Inherently Suspect" Framework: The Viability of the Federal Trade Commission's Analysis in Realcomp II*, 11 UC Davis Business Law Journal 375, 390 (2011).

some argue that 'quick look' absorbed *per se* illegality altogether,[50] ended the category-based analytical system,[51] and replaced it with a pervasive sliding scale where, in theory, every agreement can be justified and, in theory, every agreement can be presumed to be anticompetitive in the first place.[52]

3.2.1 The Distinction Between Quick Look and Abbreviated Rule of Reason

It is submitted that the root cause of the confusion is that the case law labelled as 'quick look', contrary to the mainstream conceptualization,[53] features two different sets of problems and notions. This distinction is key to conceptual-

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[50] *See* William E. Cohen, *Per Se Illegality and Truncated Rule of Reason: the Search for a Foreshortened Antitrust Analysis* III. 3. (1997), http://www.ftc.gov/opp/jointvent/persepap.shtm (Arguing that basically all *per se* illegal arrangements are candidates for a "quick look"; therewith, arguing that not only *per se* agreements are covered by the truncated rule of reason, but also arrangements having been on the edge of the rule of reason.); Terry Calvani, *Some Thoughts on the Application of the Rule of Reason and the Per Se Rule* SH064 ALI-ABA 27, 44. (2003). (Arguing that theoretically all *per se* agreements are candidates for a quick look.); Thomas A. Piraino, *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 Indiana Law Journal 345, 366–371 (2007).

[51] *California Dental Association*, 121 F.T.C. 190, 199 (1996) (This approach was adopted also by the FTC; nevertheless, the FTC returned to the traditional characterization and abandoned the above approach, contending that "although there have been some oblique suggestions in Supreme Court cases that perhaps the categories had merged, the Court later returned to distinguishing between *per se* and rule of reason categories.").

[52] *See* Jennifer E. Gladieux, *Towarcds a Single Standard for Antitrust: The Federal Trade Commission's Evolving Rule of Reason*, 5 George Mason Law Review 471, 471 (1997); Timothy J. Muris, *The New Rule of Reason*, 57 Antitrust Law Journal 859, 859 (1988); 7 Phillip Areeda, *Antitrust Law* ¶ 1507c, at 399-403 (1986). Interestingly, this approach was supported also by the FTC for a while. *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 603–604 (1988). Nevertheless, the FTC, finally, abandoned the notion that the *per se* category was utterly replaced by the "quick look". *California Dental Association v FTC*, 526 U.S. 756 (1999). *See* James A. Keyte, *What It Is and How It Is Being Applied: the 'Quick Look' Rule of Reason*, 11-SUM Antitrust 21, 21 (1997); Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 61 Southern Methodist University Law Review 691, 712 (2009).

[53] *See e.g.* Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 61 Southern Methodist University Law Review 691, 707–711 (2009).

ization. Any attempt to conflate them as a unitary doctrine inevitably leads to contradiction and confusion. This section explores this distinction and conceptualizes the case law accordingly. The first notion, referred to as '*quick look*' in this book, applies solely to *per se* agreements and their penumbra and gives a limited chance to consider the proffered justifications.[54] This is not a prohibitive but a saving test. It is not directed at quick condemnation, but rather at the exoneration of certain *per se* agreements. The second notion, referred to as '*abbreviated*' or '*truncated*' *rule of reason* in this book, applies solely to agreements that are likely anticompetitive but come under no *per se* category. These are rule-of-reason agreements whose anticompetitive effects can be ascertained without a full-blown analysis. This notion contributes to the legal test with a prohibitive element. It introduces no saving element, as rule-of-reason agreements can be justified anyway.[55]

A look at the case law through these two lenses illuminates important structural aspects of the case law and showcases that it is less nebulous than it may appear at first sight. The Supreme Court did apply intermediate modes of analysis before *California Dental Association*,[56] where 'quick look' made its debut in the Court's vocabulary, but, in terms of language, it stuck to the traditional dualist terminology and oscillated between the labels of *per se* and rule of reason. This – and the fact that in complex cases the edges of *per se* and rule of reason may overlap – exacerbated the perception of ambiguity. In *NCAA v Board of Regents*,[57] the Court used the *per se* label but still considered the proffered justifications. In *National Society of Professional Engineers*,[58] to be able to consider the proffered justifications, the Court classified an arguably *per se* agreement as rule of reason but, instead of affording full-blown substantive analysis, it established its anticompetitive effects almost immediately and

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54 *See American Ad Management v GTE*, 92 F.3d 7101, 789–790 (1996) (Contending that only agreements belonging to one of the *per se* categories may be covered by "quick look" analysis, while agreements coming traditionally under the rule of reason remain in this pigeonhole.).

55 For a comparable distinction, *see* Tiffany Lee, *Anticompetitive Exclusion and the "Inherently Suspect" Framework: The Viability of the Federal Trade Commission's Analysis in Realcomp II*, 11 UC Davis Business Law Journal 375, 375 (2011) ("[T]he 'inherently suspect' framework presumes anticompetitive effects without a showing of market power", "the 'quick look' analysis requires proof of either market power or anticompetitive effects.").

56 *California Dental Association v FTC*, 526 U.S. 756 (1999).

57 *NCAA v Board of Regents*, 468 U.S. 85 (1984).

58 *National Society of Professional Engineers v US*, 435 U.S. 679 (1978).

only took a 'quick look' at the defendant's affirmative defence.[59] This created the wrong impression that the Court applied the presumption of anticompetitiveness to a rule-of-reason agreement, while in reality is moved a *per se* agreement under the rule of reason so as to consider its allegedly procompetitive aspects. After *California Dental Association*, these cases can be referred to as applying a 'quick look' and not an abbreviated rule of reason.

Accordingly, the above case law resulted in a four-part structure made up of *per se*, 'quick look', abbreviated rule of reason and full-blown rule of reason. *Per se* and 'quick look' are part of the same genus. The cluster of *per se* agreements features 'automatic condemnation' and the principle of 'no defence'. 'Quick look' agreements are subject to 'automatic condemnation' but are not subject to the 'no defence' principle. Agreements coming under the rule of reason do not necessarily benefit from a full-blown substantive inquiry, as common sense and economic theory may simplify the identification of anticompetitive effects in certain cases and there are arrangements that have a higher anticompetitive potential than others. Although this notion of rule of reason refines and itemizes antitrust categorization and, as such, creates a sliding-scale approach, it applies solely to rule-of-reason agreements and certainly does not replace antitrust analysis with a pervasive sliding scale.

3.2.2 Trajectory of the Case Law

Broadcast Music v Columbia Broadcasting[60] might be viewed as an antecedent of 'quick look'. In reality, however, the case involved a classic question of dualist categorization in the context of ancillary restraints. The parties created a collective management scheme for their intellectual property rights and issued 'blanket licences' (individual licences could be purchased from the members directly). The Court conceived the scheme as a 'joint venture' and the determination of the licence fee as ancillary and applied a full-blown rule of reason.[61] The Court held that only naked price fixing is *per se* illegal; ancillary price fixing comes under the rule of reason.[62] It noted that price fixing 'in the literal sense' is not necessarily price fixing in an antitrust sense.[63]

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59 *National Society of Professional Engineers v US*, 435 U.S. 679 (1978); *FTC v Indiana Federation of Dentists*, 476 U.S. 447 (1986).

60 *Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1 (1979).

61 *Ibid*, 21.

62 The Supreme Court stressed that "[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints." *Ibid*, 23.

63 *Ibid*, 8–9.

The reason why *Broadcast Music v Columbia Broadcasting*[64] figures in the strand of quick-look cases is that the language of the judgment is far more sweeping than the actual decision and could be read to open up almost any price-fixing agreement to a full rule-of-reason inquiry. However, the Supreme Court's judgment in *Arizona v Maricopa County Medical Society*,[65] handed down a few years later, may essentially be read as indicating that *Broadcast Music v Columbia Broadcasting* should not be overread.[66]

NCAA v Board of Regents[67] is generally considered to be the first 'quick look' case. Although the Court did not use this term, it adopted a saliently novel approach that did not fit antitrust law's dualism prevailing at that time. The Court viewed the restraint as *per se* but still showed willingness to investigate the proffered justifications. However, it carried out no rule-of-reason analysis: it took anticompetitive effects as granted and afforded no full consideration to the justifications but discarded them after a cursory look.

The NCAA, the professional organization of amateur collegiate sport, heavily regulated the selling of the telecast rights for football games.[68] This involved price recommendations and the limitation of telecasts per member institution. The NCAA argued that these restrictions promoted game attendance and preserved the championship's amateur character. The measures were adopted in the context of a legitimate cooperation, but the Court did not consider them to be ancillary but viewed them as naked. Although this called for *per se* treatment,[69] the Court 'decided that it would be inappropriate to apply a *per se* rule to this case'.[70] At the same time, it also refused to apply the rule of reason. Instead, it presumed the anticompetitive effects, as if the *per se* rule

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64 *Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1 (1979).

65 *Arizona v Maricopa County Medical Society*, 457 U.S. 332 (1982).

66 *Ibid*, 355–356.

67 *NCAA v Board of Regents*, 468 U.S. 85 (1984).

68 *NCAA v Board of Regents,* 468 U.S. 85, 88–89 (1984).

69 The Court rejected the NCAA's reference to the lack of market power by explaining that "as a matter of law, the absence of proof of market power does not justify a naked restriction on price or output". *NCAA v Board of Regents,* 468 U.S. 85, 86 & 109–110 (1984). *Cf.* William E. Cohen, *Per Se Illegality and Truncated Rule of Reason: the Search for a Foreshortened Antitrust Analysis* III. 2. (1997), http://www.ftc.gov/opp/jointvent/persepap.shtm; Eric D. Daniels, *Did the Supreme Court Fumble?: the Supreme Court's Failure to Endorse a Market Power Threshold to the Application of the Rule of Reason for Cases under Section 1 of the Sherman Act in NCAA v Board or Regent*, 27 Boston College Law Review 579, 601–602 (1986); Stephen Calkins, *California Dental Association: Not a Quick Look but not the Full Monty*, 67 Antitrust Law Journal 495, 543 (2000).

70 *Ibid*, 100.

applied, and then took a quick look at the proffered justifications to ascertain whether they were facially plausible. It was inclined to give them full consideration, but they did not pass this screening test.

It was clear that *NCAA v Board of Regents* neither created a new prohibitive rule, nor extended the purview of presumed anticompetitive effects, but carved a very limited exception into the rigid *per se* rule. The automatic condemnation principle remained intact, as the anticompetitive effects were conclusively presumed. However, the 'no defence' principle was discarded, although the offered justifications were afforded only a cursory look before deciding whether they deserved a full consideration.

Although the Court adumbrated the substance of analysis 'quick look' called for, it was less clear about its purview. It was clear that the holding concerned *per se* agreements,[71] where the rule of reason is 'applied in the twinkling of an eye'.[72] The judgment suggests that the inquiry pivots on the 'nature' of the agreement, and not its effects. The fact that market power analysis was altogether excluded by the Court implies that 'quick look' applies to agreements that are inherently suspect irrespective of market power.[73] This is, however, essentially the test governing *per se* illegality, which embraces agreements that either harm competition or end up as failed attempts to do so. Furthermore, it can also be gathered that the reason why the Court was reluctant to apply the *per se* rule was that this case occured in the context of a league where some decisions must be taken jointly for the product to exist. The very reason the service existed was that the members cooperated:

> This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.[74]
>
> Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore

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71 Susan J. Bevan, *Antitrust per se or Rule of Reason: The Right of Engineers to Formulate Bidding Policies as a Learned Profession – National Society of Professional Engineers v United States*, 28 DePaul Law Review 1141, 1148 (1979).

72 *NCAA v Board of Regents*, 468 U.S. 85, fn 39 (1984).

73 *NCAA v Board of Regents,* 468 U.S. 85, 109 (1984).

74 *Ibid*, 100–101.

> procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.[75]

Given the above circumstances, the Court could have viewed the impugned restrictions as ancillary,[76] although there was a difference between ancillarity and the way the NCAA attempted to link its justifications to the organization of amateur collegiate sport. The NCAA did not argue that the restrictions were reasonably connected to a joint venture but argued that competition in terms of price and quality would be ruinous. In other words, the thrust of the argument was not that there was no price fixing and output limitation in the antitrust sense, but that price fixing and output limitation was reasonable given the peculiarities of the market. This went, however, against the futility of 'ruinous competition'. It seems this link was too week to justify the rule of reason but too strong to allow genuine *per se* treatment.

It is interesting to compare *NCAA v Board of Regents*[77] to *NCAA v Alston*,[78] where, nearly four decades later, the Supreme Court examined the NCAA's rules on student-athletes' education-related benefits and treated them as ancillary and applied the rule of reason.[79] This might arguably suggest that the Supreme Court could have assessed the measures in *NCAA v Board of Regents* under the rule of reason,[80] although it can also be argued that *NCAA*

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[75] *NCAA v Board of Regents,* 468 U.S. 85, 117 (1984).

[76] *See* Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 Antitrust Law Journal 461 (2000). Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* 211 (2000).

[77] *NCAA v Board of Regents*, 468 U.S. 85 (1984).

[78] *NCAA v Alston*, 594 U.S. 2147 (2021).

[79] Although the Supreme Court did not use the term "ancillary" in *NCAA v Alston*, it noted that the scheme may be regarded as a joint venture ("even assuming (without deciding) that the NCAA is a joint venture") and acknowledged "[t]hat *some* restraints are necessary to create or maintain a league sport, although not "*all* 'aspects of elaborate interleague cooperation are.'" *National Collegiate Athletic Association. v Alston*, 594 U.S. 2147, 2162 (2021).

[80] *See* Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 Antitrust Law Journal 461 (2000) ("The restraints did not stand alone, however, but were instead ancillary to a joint venture that produced college football.") Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 211 (2000) ("The Court's refusal to apply a *per se* rule to joint pricing was anything but revolutionary. The record showed no con-

v Board of Regents dealt with an output restriction agreement unrelated to the core purpose of college athletics, while *NCAA v Alston* dealt with a price cap that could be viewed as fundamental to the definition of amateurism. Be that as it may, the comparison of the two judgments showcases that this uncertain characterization may have shaped the Court's grasp of the matter.

In *National Society of Professional Engineers*,[81] the Supreme Court encountered a *per se* restriction adopted by a professional organization, which it examined under the rule of reason. Given that the restriction came under one of the *per se* categories, the Court was quick to establish its anticompetitive effects and shifted the inquiry to the assessment of justifications, which, then, it rejected. The National Society of Professional Engineers (NSPE) pronounced it unethical for engineers to 'discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer'.[82] Although this was not price fixing in a literal sense, the Court acknowledged that it 'operate[d] as an absolute ban on competitive bidding'[83] and found it to have an 'anticompetitive character' without any substantive analysis.[84] The Court was similarly quick in rejecting the NSPE's justification, as it purposed to demonstrate that price competition was unreasonable and ruinous.[85] It is fair to assume that the Court would have had no problem with condemning the restriction as *per se* illegal price fixing or market sharing if it had not been the self-regulation of a learned profession. In fact, the judgment may also be characterized as a standard *per se* case, where the Court ended its analysis once it characterized the agreement as price fixing and the statements concerning the proffered justification were merely *dicta* aimed to indicate that, even if applying the rule of reason, the justification that competition is not in the public interest would not be admissible anyway.

If *NCAA v Board of Regents* was the first appearance of 'quick look', *FTC v Indiana Federation of Dentists*[86] was the genesis of what this book terms the 'abbreviated rule of reason'. Interestingly, this was, at the same time, the last case where the Supreme Court established the anticompetitive effects of an agreement by means of an intermediate mode of antitrust analysis.

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ventional price fixing agreement; the NCAA is no conventional cartel. Some integration had taken place – integration of a fairly complex kind.")

[81] *National Society of Professional Engineers v US*, 435 U.S. 679 (1978).
[82] 435 U.S. 679, 692 (1978).
[83] 435 U.S. 679, 692 (1978).
[84] 435 U.S. 679, 692 (1978).
[85] 435 U.S. 679, 696 (1978).
[86] *FTC v Indiana Federation of Dentists*, 476 U.S. 447 (1986).

The Indiana Federation of Dentists (IFD) required its members to ignore dental insurers' requests for the x-rays of patients to prevent insurers from second-guessing the dentists' diagnostic and treatment decisions, which they viewed as a threat to 'their professional independence and economic well-being'.[87] The Court noted that although the restriction was reminiscent of a *per se* illegal group boycott, it was not.[88] *Per se* collective boycott targets a competitor and aims to drive it out of the market, while here the IFD, indirectly, boycotted customers. This shifted the case to rule of reason,[89] which, however, was supposed to require a full-blown analysis, including the definition of the market and the establishment of market power or the corroboration that the restriction resulted in higher dental costs to patients and insurers, which the FTC failed to carry out. Under a rule of reason, this should have settled the matter for failure to state a *prima facie* case and, indeed, the Court of Appeals for the Seventh Circuit vacated the order for lack of substantial evidence. Nonetheless, the Supreme Court reversed. In consideration of the anticompetitive potential to 'disrupt the proper functioning of the price-setting mechanism of the market'[90] and the lack of any credible procompetitive benefit, it contended with less detailed evidence about anticompetitive effects.[91] It was reasonable to assume that, absent the restriction, the dentists would have cooperated with the insurers' requests[92] and there was evidence that in the areas where the IFD's membership was most significant, insurers were forced to resort to other, more costly, means of reviewing diagnoses.[93]

Although the judgment refers to *NCAA v Board of Regents*,[94] it also distinguishes the two cases. In *NCAA v Board of Regents*, the Court described the restriction at stake as 'naked' and '*per se*', while in *FTC v Indiana Federation of Dentists*, it clearly labelled it as not *per se*.

The Supreme Court explicitly recognized 'quick look' and the abbreviated rule of reason in *California Dental Association*.[95] Interestingly, while the judgment gives hints as to these conceptions, which it treats as a single doctrine, and endorses their labelling as 'quick look' and abbreviated rule of reason, using the two terms interchangeably, none of these applied to the restriction at stake. Although the Court envisaged a less than full rule-of-reason inquiry, it

87 476 US 447, 459 (1986).
88 476 US 447, 458 (1986).
89 476 US 447, 458 (1986).
90 476 US 447, 461–462 (1986).
91 476 US 447, 460 (1986).
92 476 US 447, 456 & 458 (1986).
93 476 US 447, 457 & 460 (1986).
94 476 US. 447, 458 & 462 (1986).
95 *California Dental Association v FTC*, 526 U.S. 756 (1999).

made it clear that the restriction was not *per-se*-like and called for more than a truncated rule-of-reason analysis.[96]

The California Dental Association (CDA) prohibited false and misleading advertising and, as a corollary, restricted commercial communication. It prohibited across-the-board discount advertisements on account that these did not fully disclose all the variables and factors that determine the final price and, hence, may be misleading. Furthermore, it also prohibited advertising involving quality claims on account that these were not susceptible to measurement or verification and, hence, misleading. The FTC considered these measures to be *per se* illegal or at least not deserving more than a quick look. The Court of Appeals for the Ninth Circuit affirmed. Nonetheless, the Supreme Court remanded the case for a rule-of-reason analysis. The text of the Code of Ethics prohibited only deceptive practices and the Court found that it was the FTC's burden to show that the effect was to prohibit more than just deceptive advertising. Although the judgment applied no intermediate mode of analysis,[97] it clarified them.

First, it explicitly recognized and coined 'quick look' and 'abbreviated rule of reason' and conflated them as a single doctrine.

Second, it took stock of the preceding case law and identified three cases which 'formed the basis for what has come to be called abbreviated or 'quick-look' analysis under the rule of reason' (*NCAA v Board of Regents*,[98] *National Society of Professional Engineers*,[99] *FTC v Indiana Federation of Dentists*[100]).

Third, the Court adumbrated when the intermediate mode of analysis applies. The common element the legal tests applied in the foregoing cases was that 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets'.[101] The Court held that 'quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained'.[102]

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[96] *See* Stephen Calkins, *California Dental Association: Not a Quick Look but not the Full Monty*, 67 Antitrust Law Journal 495, 543 (2000).
[97] *California Dental Association v FTC*, 526 U.S. 756, 771 (1999).
[98] *NCAA v Board of Regents*, 468 U.S. 85 (1984).
[99] *National Soc. of Professional Engineers v US*, 435 U.S. 679 (1978).
[100] *California Dental Association v FTC*, 526 U.S. 756, 769–770 (1999).
[101] *Ibid*.
[102] *Ibid*.

Fourth, it established that the general rule-of-reason analysis features a sliding scale and the advertising restrictions at stake called for more than a truncated but less than a full-blown inquiry.[103]

Fifth, the Court also underscored that antitrust categories are not rigid but functional. They are guided by economic probabilities and geared to ensure decisions meet economic reality, while obviating redundant examinations. It is antitrust rationality that determines the application of these categories and not the other way around.

> The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear. We have recognized, for example, that 'there is often no bright line separating *per se* from Rule of Reason analysis,' since 'considerable inquiry into market conditions' may be required before the application of any so-called '*per se*' condemnation is justified.

California Dental Association was the last instance where the Supreme Court engaged in detail with the intermediate modes of analysis. The issue emerged, however, in a number of subsequent cases.

In *Texaco v Dagher*,[104] the Supreme Court found a horizontal joint pricing scheme ancillary to a joint venture approved by the FTC and adjudicated it under the rule of reason. But for the joint venture, this may well have been *per se* illegal price fixing. The pricing was by the joint venture; hence, it was ambiguous whether there were two parties to the agreement. The Court stressed that 'quick look' applies 'to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability'.[105]

In *FTC v Actavis*,[106] the controversy emerged from a patent settlement agreement involving reverse payment. The FTC opined that these agreements should be judged under the 'quick look', while the district court and the Court of Appeals for the Eleventh Circuit applied a very deferential rule-of-reason analysis and found them essentially unreviewable. The Supreme Court reversed. It held that patent settlement agreements involving reverse payment

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103 *California Dental Association v FTC*, 526 U.S. 756, 770 & 781 (1999).
104 *Texaco v Dagher*, 547 U.S. 1 (2006).
105 *Ibid*, fn 3.
106 *FTC v Actavis*, 570 U.S. 136 (2013).

are subject to a less than full rule-of-reason analysis, but they are not covered by 'quick look':

> We do not believe that reverse payment settlements, in the context we here discuss, meet this criterion.
>
> That is because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the FTC must prove its case as in other rule-of-reason cases.
>
> To say this is not to require the courts to insist, contrary to what we have said, that the Commission need litigate the patent's validity, empirically demonstrate the virtues or vices of the patent system, present every possible supporting fact or refute every possible pro-defense theory.[107]

The Supreme Court also addressed intermediate modes of analysis in *NCAA v Alston*.[108] The restraints at stake were not covered by a presumption of anti-competitiveness. The Court used the metaphor of 'quick look' in the contrary sense, to create a presumption of legality for agreements on the opposite extreme of the antitrust law spectrum:

> [F]or restraints at opposite ends of the competitive spectrum (…) – rather than restraints in the great in-between – a quick look is sufficient for approval or condemnation. At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. (…) At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look.

3.2.3 Summary and Conclusions

All in all, the Supreme Court developed two intermediate modes of antitrust analysis ('quick look' and 'abbreviated rule of reason') to judge agreements with clear anticompetitive repercussions. These represent a transition between *per se* and rule of reason and apply a simplified prohibitive and saving test. Under the 'quick look', the Court glimpses at justifications offered for arrangements that are otherwise viewed as *per se* illegal and considers them in a cursory manner to ascertain whether an elaborate inquiry is needed. Under the 'abbreviated rule of reason', it conclusively presumes the anticompetitive

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[107] *FTC v Actavis*, 570 U.S. 136, 155 (2013).
[108] *NCAA v Alston*, 594 U.S. (2021).

effects of certain non-*per se* agreements after a cursory analysis and shifts the burden on the defendant to prove procompetitive justifications.

The intermediate modes of analysis have left the traditional categories of antitrust, such as *per se* and rule of reason, intact and interfere much less with antitrust law's traditional dichotomy than often portrayed.[109] Although *NCAA v Board of Regents*[110] could have given rise to the thought that the 'no defence' principle has been abolished as to all *per se* agreements, subsequent Supreme Court judgments confirmed that the judgment did not affect the traditional *per se* rule.[111]

Likewise, the Supreme Court has applied the abbreviated rule of law exceptionally, so the justified fear that the intermediate modes of analysis would enable too 'aggressive' antitrust enforcement and lead to false positives proved to be vain.[112] These fears were partially attributable to the conflation of 'quick look' and the abbreviated rule of reason, which created the perception that courts may arbitrarily label restrictions as 'inherently suspect' without any prior experience. In reality, however, the Supreme Court applied 'quick look' only to agreements coming under one of the pre-established *per se* categories. In the same vein, under the abbreviated rule of reason, the Court has never presumed anticompetitive effects out of hand. Although the inquiry was simplified, it was substantial. It is worthy of note that the Supreme Court has not applied the prohibitive side of the intermediate modes of analysis since 1986, in *FTC v Indiana Federation of Dentists*.[113]

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109 *See* Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 University of Miami Business Law Review 39, 67 (2017) (Lower courts have been reluctant to apply intermediate modes of analysis, which, "outside a narrow range of FTC cases, has largely become a dormant doctrine.").

110 *NCAA v Board of Regents*, 468 U.S. 85 (1984).

111 *FTC v Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990); *Palmer v BRG of Georgia, Inc.*, 498 U.S. 46 (1990). *See* James A. Keyte, *What It Is and How It Is Being Applied: the 'Quick Look' Rule of Reason*, 11-SUM Antitrust 21, 22 (1997); Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* 219 (2000); Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* 220 (2000).

112 Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 Antitrust Law Journal 613, 615 (1996).

113 *FTC v Indiana Federation of Dentists*, 476 U.S. 447 (1986).

3.3 THE RULE OF REASON: STRUCTURE AND BALANCER

The *per se* rule proceeds from a conclusive – while quick look from a strong but inconclusive – presumption of anticompetitive effects. The truncated rule of reason does not presume anticompetitive effects but treats the agreement as suspect. The basic presumption of rule of reason is the lack of anticompetitive effects. This does not question the common sense that different agreements may feature a varying level of suspiciousness in terms of impact on competition and, hence, the amount and quality of evidence to prove anticompetitive effects may vary. Nonetheless, this does imply that all agreements subject to the rule of reason are presumed to be lawful and the defendant has the benefit of the doubt so that antitrust law obviates the 'mistaken condemnations of legitimate business arrangements'.[114]

The rule-of-reason analysis is a rather speculative[115] balancing of the anticompetitive effects and the reasonable justifications where 'everything goes into the blender'[116] and where 'everything is relevant, nothing is dispositive'.[117] 'Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'[118]

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[114] *NCAA v Alston*, 594 U.S. ___ (2021).

[115] *See* Thomas C. Arthur, *A Workable Rule of Reason: a Less Ambitious Antitrust Role for the Federal Courts*, 68 Antitrust Law Journal 337, 338 (2000) ("This uncertainty is not likely to go away. Clarity in antitrust law is not possible under the current conception of the Sherman Act as a standardless delegation to the federal courts to engage in microeconomic regulation".); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 California Law Review 263 (1986); Thomas C. Arthur, *Workable Antitrust Law: the Statutory Approach to Antitrust*, 62 Tulane Law Review 1163 (1988).

[116] Terry Calvani, *Some Thoughts on the Rule of Reason*, 22(6) European Competition Law Review 201, 201 (2001).

[117] Frank H. Easterbrook, *The Limits of Antitrust*, 63 Texas Law Review 1, 12 (1984). *See* Thomas C. Arthur, *A Workable Rule of Reason: a Less Ambitious Antitrust Role for the Federal Courts*, 68 Antitrust Law Journal 337, 346–347 (2000).

[118] *Continental T. V., Inc. v GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

The Supreme Court's judgment in *Board of Trade of City of Chicago*[119] provides a classic definition of this all-embracing and omnipercipient analysis:[120]

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[121]

The rule-of-reason analysis consists of four steps: proof of anticompetitive effects by the plaintiff (showing a *prima facie* case), proof of procompetitive justifications by the defendant, proof of less restrictive alternatives to achieve the same procompetitive benefits by the plaintiff, and balancing by the court. First, it is to be inquired whether the agreement at stake has substantial anticompetitive consequences – an issue in relation to which the burden of proof rests on the shoulders of the plaintiff. If such effects are proved, in the second step, the defendant has the burden of proof to come up with objective justifications, arguing that the agreement produces procompetitive effects or is efficient. If substantial procompetitive effects are proved by the defendant, who bears the burden in this regard, the plaintiff may prove that these could be achieved through means that are less restrictive of competition. In the fourth and final step, the case calls for a balancing, which is an exercise to be carry out by the court.

Accordingly, in the first step, the plaintiff has to present a *prima facie* case. Showing market power is a customary way of meeting the plaintiff's burden of proof, albeit in *FTC v Indiana Federation of Dentists*,[122] the Supreme

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[119] *Board of Trade of City of Chicago v U.S.*, 246 U.S. 231 (1918).

[120] *See* Thomas A. Piraino, *Reconciling the Per Se and Rule of Reason Approached to Antitrust Analysis*, 64 Southern California Law Review 685, 689 (1991).

[121] *Board of Trade of City of Chicago v U.S.*, 246 U.S. 231, 238–239 (1918).

[122] The roots of this proposition may be found in *National Collegiate Athletic Ass'n v Board of Regents of the University of Oklahoma*, 468 U.S. 85, 109 (1984); nevertheless, this case concerned a naked restraint, and it was highly questionable whether the proposition could have a more general application. ("As a matter

Court held that market power is not a necessary prerequisite of establishing anticompetitive effects.[123] Instead, the real test is actual anticompetitive effect ('competitive harm') demonstrated empirically, and the market power test can only serve as a surrogate for this[124] – a very useful one though, 'due to the difficulty of isolating the market effects of challenged conduct',[125] which is, in practice, 'an integral part of showing anti-competitiveness in traditional rule of reason cases'.[126] Accordingly, the market power filter is not necessary but it is sufficient for establishing a *prima facie* case for the plaintiff.

While the defendant is completely free to proffer evidence refuting anticompetitive effects, if the plaintiff meets their burden of proof, it is up to the defendant to come up with procompetitive arguments, i.e. they can (and should) argue that despite its restrictive effects on inter-firm rivalry, the agreement is featured by procompetitive justifications, mainly in the form of efficiency benefits.[127] These justifications are to be proved. If the defendant

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of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'")

[123] It could be argued that the fact pattern concerned a horizontal agreement and, hence, the above proposition is not applicable to vertical cases; however, the judgment's language suggests the contrary. *See* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 University of Illinois Law Review 77, 103–104 (2003).

[124] *FTC v Indiana Federation of Dentists*, 476 U.S. 447 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.''). *But see* Mark R. Patterson, *The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History*, 37 San Diego Law Review 1, 8 (2000).

[125] *US v Brown University*, 5 F.3d 658, 668 (1993) ("Such proof is often impossible to make, however, due to the difficulty of isolating the market effects of challenged conduct. (…) Accordingly, courts typically allow proof of the defendant's 'market power' instead.")

[126] Marina Lao, *Comment: the Rule of Reason and Horizontal Restraints Involving Professionals*, 68 Antitrust Law Journal 499, 504 (2000).

[127] *FTC & DOJ Guidelines for Collaborations Among Competitors*, April 2000. 23 (Introducing procompetitive benefits as follows: "Competition usually spurs firms to achieve efficiencies internally. Nevertheless, as explained above, competitor collaborations have the potential to generate significant efficiencies that benefit consumers in a variety of ways. For example, a competitor collaboration may

proves that such procompetitive benefits materialized, the plaintiff can prove that the arrangement at stake is not the least restrictive alternative, i.e. the same procompetitive benefits could have been achieved with means that are substantially less restrictive to competition and that are still reasonably capable of achieving the same legitimate end. Nonetheless, courts tend to show deference to the sound business decisions of the market, when inquiring whether 'reasonable alternatives' exist:[128]

> [A]ntitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess 'degrees of reasonable necessity' so that 'the lawfulness of conduct turn[s] upon judgments of degrees of efficiency.'[129]

If the defendant does not meet their burden of proof, a decision is made for the plaintiff; if they do, the case reaches the third analytical phase: the court has to balance the anti- and procompetitive effects in order to ascertain the net effects. Nevertheless, '[w]hen courts are truly troubled by a restraint, but they see that it has both pro- and anticompetitive incidents that are non-trivial, they tend to find for the defendant. In other words, presence of a significant benefit is often determinative.'[130] One of the reasons may be that 90% of antitrust cases in the US are brought to court by private plaintiffs and are tried in civil

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enable firms to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would otherwise be possible. Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. (…) Indeed, the primary benefit of competitor collaborations to the economy is their potential to generate such efficiencies.")

[128] Phillip Areeda, *The Rule of Reason – a Catechism on Competition*, 55 Antitrust Law Journal 571, 582 (1986); *FTC & DOJ Guidelines for Collaborations Among Competitors*, April 2000. 24 ("The Agencies consider only those efficiencies for which the relevant agreement is reasonably necessary. An agreement may be 'reasonably necessary' without being essential. However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement. *In making this assessment, the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities*.") (emphasis added).

[129] *NCAA v Alston*, 594 U.S. 2147 (2021).

[130] Phillip Areeda, *The Rule of Reason – A Catechism on Competition*, 55 Antitrust Law Journal 571, 582 (1986).

procedure,[131] where the usual standard of proof is preponderance of evidence (balance of probabilities). Accordingly, a circumstance is proved if it is more likely than not (or it is 'more probable than not'[132]) that it is true.

The proof of anticompetitive and procompetitive effects, as well as their balancing, is carried out along a sliding scale. Some restrictions may have a higher anticompetitive potential and, hence, their anticompetitive effects may be more easily proved. The general rule-of-reason analysis is not a uniform, one-size-fits-all analysis but features a sliding scale. The Supreme Court explained this clearly in *California Dental Association*,[133] where it held that the advertising restrictions at stake called for more than a truncated but less than a full-blown inquiry. The court not only established the intermediate modes of antitrust analysis, but also made it clear that the rule of reason requires:

> an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. (…) For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions.[134]

The Court refused to treat advertising restrictions as either *per se* illegal, or subject merely to an intermediary mode of inquiry and prescribed the completion of a rule-of-reason inquiry. At the same time, it also stressed that, due to the anticompetitive potential of the restrictions in the case, there was no need to carry out a plenary market examination:

> Saying here that the Court of Appeals' conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. Although we have said that a chal-

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[131] *See* Clifford A. Jones, *Private enforcement of antitrust law in the EU, UK and USA* 16 (1999); Jonathan Sinclair, *Damages in private antitrust actions in Europe*, 14 Loyola Consumer Law Review 547 (2002); Katherine Holmes, *Public enforcement or private enforcement? Enforcement of competition law in the EC and UK*, 25(1) European Competition Law Review 25, 31 (2004).

[132] *See* Lord Denning's famous definition in *Miller v Minister of Pensions* [1947] 2 All ER 372. ("It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not.")

[133] *California Dental Association v FTC*, 526 U.S. 756 (1999).

[134] *California Dental Association v FTC*, 526 U.S. 756, 781 (1999).

> lenge to a 'naked restraint on price and output' need not be supported by 'a detailed market analysis' in order to 'requir[e] some competitive justification,' (…) it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination.[135]

This approach features the Supreme Court's judgment in *FTC v Actavis*.[136] The Court held that patent settlement agreements involving reverse payment are subject to a less than full rule-of-reason analysis[137] and set out the aspects of this more than abbreviated but less than full-blown analysis.

The rule of reason's balancer is closely connected to the ultimate purpose of antitrust law.[138] The legislative history of the Sherman Act features concurring policy goals, without any indication on how to rank them.[139]

For a long time, the purpose of the Sherman Act had been determined by the idea of 'atomistic competition'[140] and the concomitant unrestrained freedom

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[135] *California Dental Association v FTC*, 526 U.S. 756, 770 (1999).

[136] *FTC v Actavis*, 570 U.S. 136 (2013).

[137] *FTC v Actavis*, 570 U.S. 136, 155 (2013).

[138] *See* Phillip Areeda, *The Rule of Reason – A Catechism on Competition*, 55 Antitrust Law Journal 571, 572 (1986).

[139] *See* Jennifer E. Gladieux, *Towards a Single Standard for Antitrust: the Federal Trade Commission's Evolving Rule of Reason*, 5 George Mason Law Review 471, 475–476 (1997). ("Congress passed the Sherman Act in 1890. The 51st Congress believed that the Sherman Act furthered competition by protecting consumers from monopolies and cartels, and by protecting competitors from predatory conduct. However, an examination of the legislative history reveals testimonial support from the drafters for almost any policy goal, from the promotion of 'small dealers and worthy men' to an overriding emphasis on the maximization of efficiency and consumer welfare."); Rudolph J. R. Peritz, *Competition Policy in America 1888–1992* (1996); Sandra Marco Colino, *Vertical Agreements and Competition Law* 47–50 (2010).

[140] Alan J. Meese, *Price Theory, Competition and the Rule of Reason*, 2003 University of Illinois Law Review 77, 86 (2003) ("Such an analysis did not involve implementation of any abstract, technical conception of competition. Unlike modern economists, who view competition as a technical term of art, functionally linked to the efficient allocation of resources, the Standard Oil Court, like classical economists, equated competition with rivalry, the struggle between several firms to realize economic opportunities."). *See* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Michigan Law Review 1696, 1696 (1986). *See also* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where are We Coming from? Where are We Going?*, 62 New York University Law Review 936, 942–944 (1987).

of action.[141] In *Standard Oil*,[142] the Supreme Court condemned an exclusive dealing arrangement that bound only 6.7% of the dealers in the given region. It held that the exclusive dealing arrangement 'create[d] (…) a potential clog on competition' that went against the purpose of antitrust law.[143] In *FTC v Brown Shoe*,[144] the Supreme Court held, in the context of an exclusive dealing arrangement covering a trivial part of the market, that it 'obviously conflicts with the central policy of [antitrust law] (…) against contracts which take away freedom of purchasers to buy in an open market'.[145] In its since then overruled judgment in *Albrecht v Herald Co.*,[146] the Supreme Court justified the *per se* illegality of vertical maximum price fixing with the fact that it eliminated the dealers' unrestrained freedom of action.[147] In *Times-Picayune Pub*,[148] the Supreme Court held, in the context of tying, that antitrust policy is that 'competition rule the marts of trade' and 'a free economy best promotes the public weal'.[149] In *National Society of Professional Engineers*,[150] the Supreme Court held that 'the purpose of the [rule-of-reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favouring competition is in the public interest, or in the interest of the members of an industry (…)[,] that policy decision has been made by the Congress'.[151]

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[141] *See* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Michigan Law Review 1696, 1696–1697 (1986).

[142] *Standard Oil of Cal. v US*, 337 U.S. 293 (1949).

[143] *Standard Oil of Cal. v US*, 337 U.S. 293, 314 (1949).

[144] *FTC v Brown Shoe Co.*, 384 U.S. 316 (1966).

[145] *FTC v Brown Shoe Co.*, 384 U.S. 316, 321 (1966).

[146] *Albrecht v Herald Co.*, 390 U.S. 145, (1968).

[147] *Albrecht v Herald Co.*, 390 U.S. 145, 152 (1968). The *per se* illegality of maximum resale price fixing was overruled in *State Oil Co. v Khan*, 522 U.S. 3 (1997).

[148] *Times-Picayune Pub. Co. v U.S.*, 345 U.S. 594 (1953).

[149] *Times-Picayune Pub. Co. v U.S.*, 345 U.S. 594, 605 (1953).

[150] *National Soc. of Professional Engineers v US*, 435 U.S. 679 (1978).

[151] *National Soc. of Professional Engineers v US*, 435 U.S. 679, 692 (1978). *See U.S. v National Lead Co.*, 63 F.Supp. 513, 525 (1945) ("Indeed, the major premise of the Sherman Act is that the suppression of competition (…) is in and of itself a public injury; or at any rate, that such suppression is a greater price than we want to pay for the benefits it sometimes secures. (…) Anyone is free to speculate whether, in the absence of the arrangement, the stimulus of competition might not have produced far greater strides in these beneficial directions. The economic theory underlying the Sherman Act is that, in the long run, competition is a more effective prod to production and a more trustworthy regulator of prices than even an enlightened combination.") *Contra* Phillip Areeda, *The Rule of Reason*

The idea of atomistic competition had a strong liberty background.[152] In *Kiefer-Stewart v Joseph Seagram*,[153] the Supreme Court condemned vertical maximum price fixing, because it 'cripple[s] the freedom of traders and thereby restrain[s] their ability to sell in accordance with their own judgment'.[154] In *N. Pac. Ry. v US*,[155] the Supreme Court referred to the Sherman Act as 'a comprehensive charter of economic liberty aimed at preserving free and unfettered competition', which 'rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions'.[156] A similarly liberty-centred language was used in *US v Topco*,[157] where antitrust law was referred to as 'the Magna Carta of free enterprise' and 'as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms'.[158]

Welfare and surplus-enhancing cooperation did not really fit the idea of atomistic competition, which remained the dominant notion until the mid-1970s, when the case law gradually replaced it with the efficiency[159] and

– *A Catechism on Competition*, 55 Antitrust Law Journal 571, 579–580 (1986). ("In *Professional Engineers* (…) [t]he Supreme Court characterized this defense as a generalized appeal to the public interest and rejected it. The Court seemed to say that only competition counted and that it would listen only to the argument that a restraint, which superficially restrains competition, doesn't really do so when closely examined. I doubt that *Professional Engineers* will be applied so absolutely. In some cases, 'public interest' justifications will be considered where they are powerful and the restraint is minor.")

152 Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 Antitrust Law Journal 461, 467 (2000).

153 *Kiefer-Stewart Co. v Joseph Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

154 *Kiefer-Stewart Co. v Joseph Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951).

155 *N. Pac. Ry. Co. v US*, 356 U.S. 1 (1958).

156 *N. Pac. Ry. Co. v US*, 356 U.S. 1, 4 (1958).

157 *US v Topco*, 405 US 596 (1972).

158 *U.S. v Topco Associates, Inc.*, 405 U.S. 596, 610–611 (1972).

159 *See e.g.* Timothy J. Muris, *The New Rule of Reason*, 57 Antitrust Law Journal 859, 861–862 (1988); Thomas C. Arthur, *A Workable Rule of Reason: a Less Ambitious Antitrust Role for the Federal Courts*, 68 Antitrust Law Journal 337, 363 (2000).

welfare-centred[160] paradigm of Chicago economics.[161] In *Reiter v Sonotone*,[162] the Supreme Court, quoting Robert Bork, held that 'Congress designed the Sherman Act as a "consumer welfare prescription"'.[163] By now, the ultimate purpose of antitrust law is generally considered to be efficiency, surplus and welfare.[164] In *Broadcast Music. v Columbia Broadcasting*, the Supreme Court held that efficiency may justify a restriction of competition.[165] In *Continental v Sylvania*, it held that when 'atomistic competition' and commercial autonomy conflict with efficiency, the latter should prevail.[166]

When it comes to professional services, the rule-of-reason analysis, at least in theory, may also accommodate public interest considerations. In *Goldfarb v Virginia State Bar*,[167] although condemning the conduct as *per se* illegal

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[160] Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 University of Illinois Law Review 77, 78–79, 97 (2003).

[161] Peter Camesasca & Andrea Giannaccari, *Comparative Competition Law and Economics* 51 (2017). *See* Robert H. Bork, *The Antitrust Paradox* 107–115, 405–407 (1978); David A. Ettinger & Gerard Mantese, *The Rule of Reason*, 64 Michigan Bar Journal 36, 40 (1985); Phillip Areeda, *The Rule of Reason – A Catechism on Competition*, 55 Antitrust Law Journal 571, 572 (1986); Richard A. Posner, *Antitrust Law. An economic perspective* 4 (1976) (Stressing antitrust's goal of efficiency.); Russell Pitman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, 3(2) Competition Policy International 205 (2007).

[162] *Reiter v Sonotone*, 442 US 330 (1979).

[163] *Reiter v Sonotone*, 442 US 330, 343 (1979), quoting Robert. Bork, *The Antitrust Paradox* 66 (1978). The Supreme Court endorsed this statement shortly afterwards in *NCAA v Board of Regents*, 468 U.S. 85, 107 (1984).

[164] For the stance that antitrust law's ultimate purpose is consumer surplus or welfare, *see* David A. Ettinger & Gerard Mantese, *The Rule of Reason*, 64 Michigan Bar Journal 36, 40 (1985); Phillip Areeda, *The Rule of Reason – A Catechism on Competition*, 55 Antitrust Law Journal 571, 572 (1986); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Michigan Law Review 1696, 1698 (1986); Stephen F. Ross, *Principles of Antitrust Law* 9–11 (1993); Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* 12–13 (2000). For the stance that it is social surplus, *see* Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 University of Pennsylvania Law Review 699, 703–713 (1977); Robert H. Bork, *The Antitrust Paradox* 107–12 (1978); Wesley J. Liebeler, *Intrabrand "Cartels" under GTE Sylvania*, 30 University of California at Los Angeles Law Review 1, 13.–16 (1982).

[165] *Broadcast Music v Columbia Broadcasting*, 441 U.S. 1, 19–20 (1979).

[166] *Continental T.V., Inc. v GTE Sylvania Inc.*, 433 U.S. 36, 54–55 (1977).

[167] 421 U.S. 773 (1975).

without hesitation, the Supreme Court noted that professional services may justify a more relaxed treatment:

> It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.[168]

Although this hint was dropped in a footnote, later on it evolved into 'main text' case law. Although *per se* rules do apply to professions,[169] the Supreme Court is 'slow to condemn rules adopted by professional associations as unreasonable *per se*'[170] and, as a general principle, '[e]thical norms may serve to regulate and promote (…) competition, and thus fall within the Rule of Reason',[171] where courts are less wary of them.[172] Still, notwithstanding the lip service paid to the peculiarities of learned professions, the practical impact of the notion has been limited and it is unclear how and to what extent the rule of reason differs when applied to professional services.[173]

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[168] *Id*. at 787–788, fn 17. This *dictum* may arguably be traced back to *Klor's v Broadway-Hale Stores*, where the Supreme Court, referring to *Apex Hosiery*, 310 U.S. 469 (1940), indicated in footnote 7 "that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." 359 U.S. 207, 214 (1959).

[169] *Arizona v Maricopa County Medical Soc.*, 457 U.S. 332 (1982).

[170] *FTC v Indiana Federation of Dentists*, 476 U.S. 447, 458–459 (1986).

[171] *National Society of Professional Engineers v US*, 435 U.S. 679, 696 (1978).

[172] *See American Medical Association*, 455 U.S. 676 (1982); *California Dental Association v FTC*, 526 U.S. 756, 772–773 (1999). *See also* David A. Clanton, *The FTC and the Professions*, 52 Antitrust Law Journal 209 (1983); Kenneth G. Starling, *Antitrust Defenses in Physician Peer Review Cases*, 63 Antitrust Law Journal 399 (1995); John E. Kwoka, *The Federal Trade Commission and the Professions: A Quarter Century of Accomplishment and Some New Challenges*, 72 Antitrust Law Journal 997 (2005).

[173] *See National Society of Professional Engineers v US*, 435 U.S. 679, 696 (1978) ("[T]he cautionary footnote in *Goldfarb* (…) cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions."); Marina Lao, *The Rule of Reason and Horizontal Restraints Involving Professionals*, 68 Antitrust Law Journal 499, 512 & 520 (2000) (The Supreme Court "had never, in reality, accorded preferential treatment to professionals until (…) [*California Dental Association* in 1999] at least not in horizontal restraint cases involving self-interested professionals.") ("[T]he Supreme Court has never relied on *Goldfarb's* public service distinction to justify treating horizontal restraints among

3.4 SUMMARY

The purpose of Section 1 is to screen out unreasonable restrictions of trade; however, it requires an analysis of varying intensity as to whether a restriction is unreasonable.[174] The case law distinguishes between four modes of analysis: *per se* illegality, 'quick look', 'abbreviated rule of reason' and rule of reason.

The *per se* rule applies to agreements that are always or almost always anticompetitive without a redeeming virtue. It sets out categories of agreements that are outright prohibited. The *per se* rule is made up of two elements: the 'automatic condemnation' rule, which implies the conclusive presumption of anticompetitive effects, and the 'no defence' rule, which, as a matter of law, rules out the consideration of any rebuttal of anticompetitive effects and any affirmative defence of procompetitive justifications.

The rule of reason implies a full-blown analysis of the restriction and proceeds from the presumption of legality; hence, the plaintiff is required to state a *prima facie* case in the first place to rebut this presumption and to shift the burden to the defendant. Once the plaintiff proved the restriction's anticompetitive effects according to the requisite standard, the defendant may either engage in rebuttal, falsifying the plaintiff's allegation, or in affirmative defence, proving that the anticompetitive effects are counterbalanced by the agreement's procompetitive merits. If both anticompetitive and procompetitive effects are proved, it is the court's task to balance them.

The rule-of-reason analysis involves a sliding scale, where the required quality of proof and elaboration depend on the restriction's anticompetitive potential. 'What is required (…) is an enquiry meet for the case',[175] and the Supreme Court envisages a varying intensity of analysis in function of the restriction's anticompetitive potential.[176]

The case law features two intermediate categories of antitrust analysis. 'Quick look' is similar to *per se* by embracing the principle of automatic condemnation. The plaintiff is not required to prove anticompetitive effects, as

members of a profession differently than similar restraints among non-professionals, as it should not.").

[174] *Cf.* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 University of Illinois Law Review 77, 93 (2003) ("While courts refer to this second step as a Rule of Reason analysis, both steps of the process attempt to answer the question put by Standard Oil, viz., is a restraint 'unreasonably restrictive of competitive conditions.'").

[175] *California Dental Association v FTC*, 526 U.S. 756, 781 (1999).

[176] *See* Herbert J. Hovenkamp, *The Rule of Reason*, 70 Florida Law Review 81, 121–135 (2018).

these are presumed. Nonetheless, contrary to *per se*, the ‘no defence’ principle does not apply, even though an elaborate inquiry is expected only if the proffered justifications are facially plausible. The ‘abbreviated rule of reason’ does not presume anticompetitive effects but significantly lowers the threshold of proof. If this low threshold is met, the burden shifts to the defendant to prove procompetitive justifications.

4. Agreements anticompetitive by object

Anticompetitive object is a shortcut to condemned agreements without proving effects and the spearhead of competition enforcement, which accounts for approximately 90% of Article 101 cases.[1] These are the most egregious violations,[2] which cause the highest social damage, and their pursuit has the best cost–benefit ratio. Object cases are the 'cheapest' (most effective) to prosecute, as they do not require the exploration of the effects in the market, while they generate the highest fine revenue due to the epic financial penalties they attract.

This chapter explores the theory and practice of anticompetitive object. Section 4.1 examines its definition and function. Section 4.2 presents the types of analysis envisaged by Article 101 and coins the concept of 'contextual analysis' to identify the substantive examination that, contrary to effects-analysis, is a legitimate part of the object-inquiry. Section 4.3 offers a conceptualization of the post-*Allianz*[3] case law. It demonstrates that anticompetitive object operates through specified and unspecified categories and presents the judicial

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1 *See* the preliminary results of the "Mapping Judicial Review of National Competition Authorities Competition Law Decisions" led by Or Brook & Barry Rodger, available at Mapping Judicial Review of National Competition Authorities Competition Law Decisions. The results of the research are being published in Or Brook & Barry Rodger (eds), *Beyond the ECN+ Directive: Mapping Judicial Review of National Competition Law Decisions* (Kluwer). *See also* Barry James Rodger & Or Brook, UK Report Beyond ECN Directive – Empirical Study Mapping Judicial review of national competition law decisions, p. 16. Available at SSRN: https://ssrn.com/abstract=4549672 (The paper is a preliminary publication of the results of the "Mapping Judicial Review of National Competition Authorities Competition Law Decisions." This was a comprehensive empirical project on judicial review in EU and national competition cases, based on the empirical study of 10,000 published appeals on the application of Articles 101 and 102 TFEU and their national equivalents by national competition authorities.); Anne C. Witt, *The Enforcement of Article 101 TFEU: What Has Happened to the Effects Analysis?*, 55 Common Market Law Review 417 (2018).

2 *See* Case C-331/21 *Autoridade da Concorrência v Ministério Público*, EU:C:2023:812, para 100 (Referring to object restrictions as "serious breaches of the competition rules").

3 Case C-32/11 *Allianz*, EU:C:2013:160.

practice on the unspecified category. It shows the inconsistency of the notion that anticompetitive object can be ascertained by means of a comprehensive case-by-case analysis and demonstrates that the object-inquiry should consist solely of specified categories. Section 4.4 analyses the specified categories of anticompetitive object and presents their unjustified proliferation in the last two decades.

4.1 WHAT MAKES AN AGREEMENT ANTICOMPETITIVE BY OBJECT?

Anticompetitive object is a cryptic term; hence, teleology and functional analysis serve a pivotal role in its interpretation. This section approaches anticompetitive object from three perspectives. Section 4.1.1 provides a traditional statutory construction of Article 101(1) based on textual interpretation and legal syllogism. Section 4.1.2 approaches anticompetitive object from the perspective of decision efficiency and identifies the considerations motivated by the desire to maximize correct decisions and minimize false decisions. Section 4.1.3 explores the practical function of anticompetitive object and sets out the ensuing considerations.

4.1.1 Textual and Syllogistic Interpretation of Article 101(1)

The fork in the road (object *or* effect) embedded in Article 101(1) implies that it is unnecessary to prove the effects if there is an anticompetitive object. In turn, the redundancy of effects-analysis implies that there is no need to consider the market context to identify and judge these agreements. Anticompetitive object prohibits the *conduct* (agreement) itself, while the prohibition embedded in anticompetitive effect is unleashed by the *impact* on competition in the market. The narrative accruing from this provision is that although Article 101(1) generally requires a full-blown effects-analysis, there are agreements that are considered to be always or almost always pernicious and, hence, outright prohibited. This also implies that the effects-analysis is the rule and automatic condemnation the exception and, hence, anticompetitive object should be interpreted narrowly and the benefit of the doubt works against 'by object' classification.[4]

The principle that neither the identification nor the judgement of these agreements requires the consideration of market context was set out by the

[4] *See* Case C-32/11 *Allianz*, EU:C:2013:160, para 34; Case C-345/14 *Maxima Latvija*, EU:C:2015:784, para 17; Case C-307/18 *Generics*, EU:C:2020:52, para 66.

CJEU in the very first case on anticompetitive object. In *Consten & Grundig*,[5] the CJEU held, first, that 'for the purpose of applying Article 101(1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition'.[6] This implies that agreements anticompetitive by object are those that can be judged without looking into the effects. Second, when carrying out the classification, the Court also noted that the 'restrictive nature' of the contractual clause in question was 'obvious'.[7]

The above principle has governed the case law in the last six decades. Although the judicial practice has been variable as to which specific agreements are anticompetitive by object, this two-element definition has been preserved.[8] For instance, in *Visma Enterprise*,[9] the CJEU held that 'certain types of coordination between undertakings reveal a sufficient degree of harm to competition to be regarded as being "restrictions by object", so that *there is no need to examine their effects*'.[10] The notion of anticompetitive object 'arises from the fact that certain forms of coordination between undertakings can be regarded, *by their very nature*, as being harmful to the proper functioning of competition'.[11] In *HSBC Holdings*,[12] the CJEU held that 'the essential legal criterion for ascertaining whether an agreement involves a restriction of competition "by object" is the finding that such an agreement *reveals in itself a sufficient degree of harm to competition* for it to be considered that it is not necessary to assess its effects'.[13]

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[5] Joined Cases 56/64 & 58/64 *Consten & Grundig*, EU:C:1966:41, p. 342. *Consten & Grundig* was not the first case tried under Article 101, it was preceded by Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, p. 249, which, however, involved an "effect" type agreement.

[6] p. 342.

[7] p. 343.

[8] *See e.g.* Case C-7/95 P *John Deere*, EU:C:1998:256, para 77; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P *GlaxoSmithKline*, EU:C:2009:610, para 55; Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, para 16; Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343, para 29.

[9] Case C-306/20 *Visma Enterprise*, EU:C:2021:935.

[10] Para 57 (emphasis added).

[11] Para 57 (emphasis added).

[12] Case C-883/19 *HSBC Holdings*, EU:C:2023:11.

[13] Para 106 (emphasis added).

The same conceptual elements feature the definition of the *Guidelines on Article 101(3)*:

> Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules.[14]

The same approach features the *2023 Guidelines on Horizontal Agreements*:

> Certain types of cooperation between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. In such cases, it is not necessary to examine the actual or potential effects of the behaviour on the market, once its anti-competitive object has been established.
>
> The concept of restrictions of competition 'by object' is to be interpreted strictly and can only be applied to certain agreements between undertakings which reveal, in themselves and having regard to the content of their provisions, their objectives and the economic and legal context of which they form part, a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects.[15]

As a corollary, those agreements are anticompetitive by object that can be identified and judged without looking into their effects,[16] because they are harmful for competition in themselves (by their very nature). This implies that there is no need to examine, for instance, the market position of the parties, the structure of the market and entry barriers, and a requirement to consider the market circumstances to identify anticompetitive object would go against the very distinction of Article 101(1). This notion is expressed in the metaphor that object agreements have an anticompetitive 'nature',[17] which signifies that the restriction of competition accrues directly from the agreement itself and not

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14 *Guidelines on Article 101(3)*, para 21.

15 *2023 Guidelines on Horizontal Agreements*, paras 22–23.

16 *See e.g.* Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, para 16.

17 *See e.g.* Case C-226/11 *Expedia*, EU:C:2012:795, para 36; Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343, paras 29; Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, para 17; Case C-32/11 *Allianz*, EU:C:2013:160, para 35; Case C-67/13 P *Groupement des cartes bancaires*, EU:C:2014:2204, paras 50. *See also 2011 Horizontal Guidelines*, para 24; *2023 Horizontal Guidelines*, para 22.

from the joint effect of the agreement and market circumstances. Although the extent of anticompetitive effects hinges on market circumstances, if an agreement is anticompetitive by nature, it will very likely trigger anticompetitive repercussions irrespective of the market it operates in. As a corollary, anticompetitive nature refers to agreements that have a 'high potential of negative effects on competition'[18] whatever the position of the parties or the structure of the market is.

4.1.2 Anticompetitive Object and Decision Efficiency

The idea that certain agreements may have perceivable negative effects on competition under all circumstances goes against the tenet that undertakings without market power can cause no harm to competition. The outright prohibition entailed by anticompetitive object is, however, not based on the fact that these agreements are always harmful, but on the fact that they are never beneficial. A cartel harms competition in case of market power and is a failed attempt to harm in the absence of market power, but it never has any virtue. Hence, a general ban comes with no collateral social damage, while it offers the benefits of a clear-cut rule, such as clarity and lower compliance and enforcement costs. If properly construed, anticompetitive object may bring about 'false neutrals' but no false positives.

Anticompetitive object is neither a question of procedural convenience, nor a trade-off between procedural costs and false positives but singles out those arrangements where the effects-analysis is redundant and not those where it is likely redundant. As a corollary, it applies to agreements that can be pronounced anticompetitive without any substantial risk of false positives.

Accordingly, anticompetitive object should be reserved for arrangements that are always or almost always anticompetitive without a redeeming virtue.[19] It calls for the careful selection of agreements to ensure that the automatic condemnation rule applies only where a detailed analysis is truly superfluous and, hence, there are no false positives.

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[18] *Guidelines on Article 101(3)*, para 21.
[19] *Cf. Northern Pac Ry Co v US*, 356 U.S. 1, 5 (1958).

In *T-Mobile Netherlands*,[20] AG Kokott used criminal law's concept of risk offences (*Gefährdungsdelikte*) to describe 'infringements of competition by object':

> [I]n most legal systems, a person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant.[21]

Risk offences are either harmful or neutral, but never beneficial; hence, there is no reason to condone for lack of actual harm. Drunk driving may or may not cause an accident; however, it never generates any social benefits. By prohibiting it, the law does not restrict any socially beneficial activity; it only bans acts that, at the end of the day, may turn out to be neutral. Hence, the prohibition comes with no collateral damage in terms of social cost.

The US Supreme Court's case law features a similar metaphor. In *FTC v Superior Court Trial Lawyers Association*,[22] Justice Stevens illustrated *per se* restrictions as follows:

> The *per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen. (…) Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.[23]

Translating this to 'object' restrictions, these are either anticompetitive or have a neutral effect; however, they have no procompetitive virtue. The outright prohibition of agreements that, depending on the circumstances, may have either anti- or procompetitive effects comes at social costs, as the suppression of the anticompetitive cases comes with the suppression of procompetitive cooperations. Nonetheless, banning agreements that are most of the time harmful and may exceptionally be neutral comes with no social costs, as it suppresses no procompetitive arrangements.

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20 Opinion of AG Kokott in Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:110.
21 Para 47.
22 *FTC v Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).
23 493 U.S. 433–434 (1990).

4.1.3 Practical Merits of Anticompetitive Object

Automatic condemnation by means of formal and, hence, clear-cut rules has several merits in terms of 'regulatory utility'. These are net benefits if they come without false positives. First, automatic condemnation is cheaper than proving effects and saves resources, which can be expended on agreements where a market analysis is really warranted.[24] Second, clear-cut rules send clear messages to undertakings.[25] Third, clear-cut rules are easy to comply with. Anticompetitive object helps legal counsels to ascertain whether the agreement at stake is prohibited or its legal fate depends on the market circumstances. This implies, on the one hand, that they have a list of agreements they should beware of. On the other hand, it is also a guarantee that if an agreement is not on the list, it can be condemned only after an effects-analysis.

Anticompetitive object fits in the line of competition law concepts that aim to give certainty to the system without questioning the basic tenet that in case of reasonable doubt a comprehensive effects-analysis needs to be carried out. Safe harbours (such as the wholesale immunization of agreements of minor importance and block exemptions) single out those arrangements that can be presumed to comply with competition law. In the same vein, anticompetitive object sets out the 'capital vices' of competition law: it makes clear which agreements are outright prohibited and likely entail hefty fines, and which are treated in a more relaxed manner. Once it is established that an arrangement has an anticompetitive object, it breached Article 101(1) *per se*.

Anticompetitive object can fulfil this practical function only if it is a formal rule. The agreement's 'legal and economic context'[26] is relevant, but contextual analysis must stop short of issues that pertain to effects-analysis. Contextual analysis serves as a corrective classificatory function and, as a matter of practice, the agreement's content normally determines the classification. As AG Bobek put in *Budapest Bank*, the first step of the analysis is based on the content of the agreement, the second step, which extends to

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[24] *See* David Bailey, *Restrictions of Competition by Object Under Article 101 TFEU*, 49 Common Market Law Review 559, 565–566 (2012).

[25] *See* David Bailey, *Restrictions of Competition by Object Under Article 101 TFEU*, 49 Common Market Law Review 559, 565–566 (2012).

[26] *See e.g.* Joined Cases 56/64 & 58/64 *Consten & Grundig*, EU:C:1966:41, p. 343; Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, p. 249; Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343, para 43; *Guidelines on Article 101(3)*, para 22.

context, 'amounts to a basic reality check'.[27] AG Bobek also demonstrated this with an illustrative metaphor:[28]

> Simplified to a metaphorical extreme, if it looks like a fish and it smells like a fish, one can assume that it is fish. Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such. If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question.[29]

The above practical considerations imply the following methodological principles.

First, the object-inquiry should be predominantly textual and usually (though not always) remain within the four corners of the contract. The extension of the inquiry beyond the text is justified only to the extent this is necessary to explore the agreement's economic logic and meaning or to classify it, for example, as horizontal or vertical, or as distribution or agency. Beyond this point, anticompetitive object would lose its formal character and encroach on anticompetitive effect.

Second, the redundancy of proving the effects also discards the examination of circumstances that may serve as surrogates of effects. The effects-analysis often relies on circumstances (such as market power and market structure) that are leads on and, thus, can prove effects. For instance, it may be difficult to prove that a non-compete clause effectively foreclosed new entrants, but the fact that the supplier has market power and concluded non-compete agreements with several dealers may corroborate this market foreclosure. A requirement to examine these market circumstances would go against the irrelevance of effects and suppress its merits. It would be inconsistent to require an inquiry into the effects to classify the agreement as object or effect, when this is the very inquiry that anticompetitive object is supposed to save. In the same vein, anticompetitive object rules out any market power conditionality. An agreement cannot be anticompetitive by nature if its assessment hinges on market power. If the assessment is a function of market power, it is, practically,

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[27] Opinion of AG Bobek in Case C-228/18 *Budapest Bank*, EU:C:2019:678, point 49. This was repeated by AG Rantos in Case C-298/22 *Banco BPN/BIC Português*, EU:C:2023:738, para 43 (Contextual analysis is "a 'basic reality check' in order to verify whether specific circumstances of the legal and economic context of the agreement concerned may cast doubt on the presumed harmful nature of that agreement.").

[28] Opinion of AG Bobek in Case C-228/18 *Budapest Bank*, EU:C:2019:678.

[29] Para 51.

a function of the effects and, hence, requires an effects-analysis. Agreements anti-competitive by object have negative effects on competition by definition. As the CJEU held in *Expedia*, an object agreement breaches Article 101(1) irrespective of market power, as it is irrebuttably presumed to have perceivable negative effects on competition.[30]

Third, the assessment of object agreements is, contrary to effects-analysis, a 'legalistic exercise'. A benefit of formal rules is that even a legal counsel with a rudimentary understanding of economics can apply them. Anticompetitive object ideally involves 'legal work' not encumbered by economics. Economic analysis may secure better decisions (by mitigating the risk of false positives), but, at the same time, impairs predictability. Effect agreements are, in essence, 'it depends' agreements, which hinge on economic issues that are both unpredictable and extremely costly to break down. This is the sacrifice competition law makes to avoid, or at least to minimize, false positives. The function of anticompetitive object is to single out those agreements where this sacrifice is superfluous.

4.1.4 Synthetization

Automatic condemnation is limited to agreements that have an anticompetitive 'nature'.[31] Conceptually, anticompetitive 'nature' refers to the notion that the serious anticompetitive potential of these agreements emerges from the agreement's characteristics and not from the joint effects of the agreement and extrinsic circumstances (such as market power, market structure, and entry barriers). Put another way, object agreements restrict competition no matter what the parties' market power and what the market's structure is,[32] because it is the agreement itself that is restrictive of competition and not the agreement as it operates in the given circumstances. This is reinforced by the notion that agreements anticompetitive by object have, by definition, negative effects on competition and are prohibited irrespective of the circumstances.[33] Furthermore, although collusions aligning no market power may not be sus-

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30 Case C-226/11 *Expedia*, EU:C:2012:795, para 37.

31 Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, para 17. *See* Okeoghene Odudu, *Restrictions of Competition by Object – What's the Beef*, 8 *Competition Law Journal* 11 (2009).

32 *See* Csongor István Nagy, *The Distinction between Anti-Competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?*, 36(4) *World Competition: Law and Economics Review* 541, 553 (2013).

33 *See* Case C-226/11 *Expedia*, EU:C:2012:795.

ceptible to harming competition, there is no point in tolerating these as failed attempts, since they have no virtue at all.[34]

Those agreements are anticompetitive by object that have either negative or neutral effects on competition but have no procompetitive virtue. The logic behind anticompetitive object is not that these agreements are always harmful, but that they are never beneficial (and usually harmful).[35] Having said that, classification as 'by object' rests on both a theory of harm and the lack of a theory of benefit. This implies that the lack of benefits is necessary but insufficient for this purpose.[36]

The notion that agreements that are perceived to produce no procompetitive benefits should be treated as anticompetitive by object, whether they are, in principle, susceptible to having a negative impact or not, would put the logic of competition law upside down and shift the burden of justification instead of requiring the demonstration of the anticompetitive repercussions in the first place. As explained in Chapter 2 (Section 2.1), competition law favours the 'judgment seat' of the market to that of a legal procedure. Hence, as a general principle, if there is no harm, there is neither need nor warrant for competition law to intervene. Unless there is a market failure, it should be left to the market to judge the arrangement's viability. Although it could be argued that the lack of a redeeming virtue stands for the lack of false positives, this is based on the infallibility of legal procedure as compared with the market. Furthermore, this notion would go against the compelling legal requirement that object classification is limited to agreements that have an anticompetitive nature, and no such nature can be established in the absence of a theory of harm.

Anticompetitive object prohibits a particular *conduct*, while anticompetitive effect prohibits a particular combination of *conduct and effect*.

The object-inquiry is predominantly textual and usually remains within the four corners of the contract. It extends neither to the effects in the market nor their surrogates (circumstances that prove these effects). The object-inquiry is

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34 Csongor István Nagy, *The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law*, 36(4) *European Competition Law Review* 154, p 155 (2015).

35 *Cf.* Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77(1) Georgetown Law Journal 165 (1988) ("*[P]er se* rules do not define antitrust violations, but instead govern the disposition of some defenses. (…) [C]ourts therefore should abandon the notion of *per se* violations and focus on categorizing certain defenses as *per se* inadmissible.").

36 *Contra* Luc Peeperkorn, *Defining Restrictions "by Object"*, September 2015, Concurrences No 3-2015, Art No 74812, p 49 (Those agreements are anti-competitive by object, which "are (highly) unlikely to be used to create efficiencies.").

a 'lawyer's job' that can be carried out even by a legal counsel with a rudimentary understanding of economics.

4.2 TEXTUAL, CONTEXTUAL AND EFFECTS ANALYSIS

Three types of inquiries may be distinguished in the application of Article 101, labelled in this book as 'textual', 'contextual' and 'effects-analysis'. 'Textual analysis' refers to the interpretation of the parties' agreement. The term 'textual' is used metaphorically, given that cartels and other object restrictions are rarely reduced to writing and need to be reconstructed by means of sporadic evidence. The textual analysis focuses on the concurrence of wills and the substance the parties agreed to. Effects-analysis solely applies to agreements that have no anticompetitive object. This is a market analysis that focuses on the agreement's impact on prices, quantity, product diversity and innovation. In between stands 'contextual analysis', which goes beyond the text but stops short of the effects. 'Contextual analysis' is part of the object-inquiry and extends neither to the effects nor the circumstantial evidence that is used to prove effects (such as market power and market structure).

While textual and effects-analysis have a relatively settled meaning, contextual analysis is a riddle of competition law. This section analyses the substance and boundaries of this notion and demonstrates that the CJEU inconsistently conflates it with effects-analysis. It also proposes a conception that is distinguishable from effects-analysis and is consistent with this concept's function. Section 4.2.1 presents the various functions of contextual analysis. Section 4.2.2 showcases the case law's failure to provide a consistent notion and its confusion of contextual and effects-analysis. Section 4.2.3 explores the comparative perspectives of the issue. Section 4.2.4 sets out a proposal for the definition of contextual analysis.

4.2.1 The Functions of Contextual Analysis

Contextual analysis has three, partially overlapping, roles in object-inquiry.

First, it has a pivotal role in the application of the unspecified category of anticompetitive object. In short, according to the CJEU's ruling in *Allianz*,[37] besides the specified categories of anticompetitive object (such as horizontal price fixing, market division, reduction of output, vertical resale price fixing and absolute territorial protection), an agreement may be pronounced restric-

[37] Case C-32/11 *Allianz*, EU:C:2013:160.

tive by object on the basis of a comprehensive case-by-case analysis extending to the totality of the circumstances.

Second, context also has an important role in the application of the specified categories of anticompetitive object. Object-inquiry has extended to context from the outset and the principle that there is a need to look into the economic and legal context even if the arrangement at stake comes under one of the traditional categories has recently been expressly confirmed by the CJEU in *Super Bock Bebidas*.[38]

Third, the economic and legal context serves a crucial role in distinguishing naked restrictions, which are automatically condemned, from ancillary restraints, which deserve an effects-analysis. For instance, joint commercialization, joint selling and joint buying may naturally involve elements, such as the fixing of prices, that, if separated from the context and viewed in themselves, are the hallmarks of a cartel. What distinguishes these modes of cooperation from restrictions by object is the context that they are ancillary to a wider joint project.

This third role significantly overlaps with the second one, and one may argue that the contextual analysis in these two points coincide. The case law, however, uses context in a wider sense than ancillarity, although it is not clear what functions it may have outside of ancillarity. It is very difficult to identify a ruling where a naked restriction coming under one of the traditional object categories was not regarded as restrictive by object because of its context, unless it was ancillary (or an agency contract not coming under Article 101). Furthermore, the reference to context may serve a function similar to US antitrust law's 'quick look', which permits the competition authority and courts to look behind the text of the agreement (extend the inquiry beyond textual analysis) in order to ascertain whether there is any legitimate reason to open the floor for an effects-analysis. Again, however, it is difficult to find any case where a 'quick look' saved a truly naked restriction.

The second and third aspects of contextual analysis are addressed below. This inquiry focuses on the role of contextual analysis in relation to the specified categories of anticompetitive object. The first aspect, that is, its role in relation to the unspecified category of anticompetitive object, where it is part of a comprehensive case-by-case analysis, is addressed in Section 4.3.

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[38] Case C-211/22 *Super Bock Bebidas*, EU:C:2023:529.

4.2.2 Contextual Analysis in the CJEU's Case Law

Context plays a significant but unclear role in the application of anticompetitive object.[39] The situation was further confused by the ruling in *Allianz*,[40] which could be interpreted as suggesting that the existence of anticompetitive object can be established only on a case-by-case basis. The CJEU held that those agreements are anticompetitive by object that reveal, after looking into the agreement and its context, a sufficiently high anticompetitive risk.[41] Subsequently, however, it turned out that the *Allianz* doctrine did not supersede but supplemented the traditional categories of anticompetitive object.[42] In other words, traditional categories of anticompetitive object, such as horizontal price fixing, market sharing, restriction of output, vertical resale price fixing and territorial protection, have remained intact, and were supplemented by the possibility to declare any other agreement as such. It has been, however, questionable what role contextual analysis has in the application of the traditional categories.

Context was made an integral part of the object-inquiry as early as *Société Technique Minière v Maschinenbau Ulm*.[43] The ruling referred to context as being potentially relevant but established that the characterization must be based on content, and if the agreement's content reveals no anticompetitive object, a full effects-analysis needs to be carried out:

> The fact that these are not cumulative but alternative requirements, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. *This interference* with competition referred to in Article 85(1) *must result from all or some of the clauses*

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[39] Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, p 249; Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, para 15; C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 *GlaxoSmithKline,* EU:C:2009:610, paras 55 & 58; Case C-307/18 *Generics*, EU:C:2020:52, para 80; Case C-591/16 P *Lundbeck*, EU:C:2021:243, para 131.

[40] Case C-32/11 *Allianz*, EU:C:2013:160.

[41] *See* Csongor István Nagy, *The Distinction between Anti-Competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?*, 36(4) World Competition: Law and Economics Review 154 (2013); Csongor István Nagy, *The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law*, 36(4) European Competition Law Review 154 (2015).

[42] Csongor István Nagy, *EU Competition Law Devours Its Children: The Proliferation of Anti-Competitive Object and the Problem of False Positives*, 23 Cambridge Yearbook of European Legal Studies 290, 296 (2021).

[43] Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, p. 249.

> *of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious*, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.[44]

At first glance, the reference to context may appear to be contradictory: if characterization is based solely on the agreement's content, why should context be relevant? This oscillation between 'content-analysis' and 'contextual analysis' has remained part of the ensuing practice. The CJEU's judgments confirming the doctrine laid down in *Société Technique Minière v Maschinenbau Ulm* rephrased this as a content-analysis (which is exclusive) but still consistently referred to the economic and legal context in regard to object-analysis.[45]

Very recently, the importance of contextual analysis was stressed in *Super Bock Bebidas*,[46] where the Court made it clear that however generally the anticompetitive nature of the given type of restriction is recognized and accepted, competition authorities and courts still have to look into the context and give account about what they discovered.[47] The CJEU held that even a traditional object restriction like vertical resale price fixing can be declared anticompetitive by object only if and when a contextual analysis is carried out:

> [T]he finding that a vertical agreement fixing minimum resale prices entails a 'restriction of competition by object' may only be made after having determined that that agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterise the economic and legal context of which it forms part.

The ruling makes it clear that competition authorities and courts should not cry anticompetitive object blindly, even if the arrangement formally comes under one of the established object categories, and no agreement can be declared

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44 Emphasis added.

45 Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, para 15; C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 *GlaxoSmithKline*, EU:C:2009:610, paras 55 & 58. As a recent example, in the *Lundbeck* cases, the CJEU reconfirmed that in the characterization as anticompetitive by object, only the specific characteristics of the agreement (and not its effects in the market) are relevant, and anticompetitive object can be inferred solely from these, even if the object-inquiry is carried out in view of the agreement's objectives and the economic and legal context. Case C-588/16 P *Generics*, EU:C:2021:242, paras 80; Case C-591/16 P *Lundbeck*, EU:C:2021:243, para 131.

46 Case C-211/22 *Super Bock Bebidas*, EU:C:2023:529.

47 Para 43.

anticompetitive by object without looking into its context. This raises the question: how can the need for a contextual analysis be reconciled with the redundancy of effects-analysis?

Unfortunately, the CJEU's case law is at fault for an answer. It provides no explanation about what the contextual analysis is and what needs to be and what must not be inspected in frame of this. Instead, it inconsistently conflates context with effects by envisaging an abridged effects-analysis. While the case law made contextual analysis pervasive, it did not define the purpose and ambit of this inquiry and blurred the line between context and effects. This gives rise to salient contradictions and goes against the very function of anticompetitive object, including the redundancy of effects. The Hungarian Supreme Court pointed this out very sharply in *Budapest Bank*,[48] where it noted that 'the need to take into account, in addition to the actual content of the agreement which allegedly restricts competition, the economic and legal context of that agreement makes it particularly unclear where examination of the agreement from the perspective of its object ends and where examination of the agreement from the perspective of its effects begins'.[49] Unfortunately, the CJEU preliminary ruling did little to clarify this distinction. In *Banco BPN/BIC Português*, AG Rantos even opined that contextual analysis is, in fact, an effects-analysis, just a less intensive (or abbreviated) version of it.[50] He claimed that the difference between object and effect restrictions 'lies in the intensity with which they are examined',[51] and the effects-analysis 'entails an additional burden of proof and a more detailed examination of the effects of the agreement'.[52]

The confusion is well illustrated by the *Horizontal Guidelines'* provisions on horizontal joint selling agreements. The *2011 Guidelines* provided that these 'are (…) likely to restrict competition by object'[53] but failed to specify why and when. The explanation that these agreements 'have the object of coordinating the pricing policy of competing manufacturers or service providers'[54]

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[48] C-228/18 *Budapest Bank*, EU:C:2020:265.

[49] C-228/18 *Budapest Bank*, EU:C:2020:265, para 22. For a similar conclusion, *see* Stefan Enchelmaier, *Restrictions "by object" after Generics, Lundbeck, and Budapest Bank: are we any wiser now?*, 11 Journal of Antitrust Enforcement i72 (2023).

[50] Opinion of AG Rantos in Case C-298/22 *Banco BPN/BIC Português*, EU:C:2023:738, para 43.

[51] Para 47.

[52] Para 45.

[53] *2011 Horizontal Guidelines*, para 234.

[54] *Ibid*, para 234.

is both inconsistent and useless. The *2023 Horizontal Guidelines* follow the same pattern:

> Agreements limited to joint selling and in general commercialisation agreements that include joint pricing generally lead to the coordination of the pricing policy of competing manufacturers or service providers. Such agreements may not only eliminate price competition between the parties in respect of substitute products but may also restrict the total volume of products to be delivered by the parties within the framework of a system for allocating orders. Such agreements are therefore likely to restrict competition by object.[55]

Contrary to the above, it is not the price-fixing element as such but the lack of ancillarity that may make these arrangements anticompetitive by object. Every arrangement involving joint productive activities may easily involve price limitations; hence, it is of little help to say that tampering with prices may make them anticompetitive by object. What may make these arrangements anticompetitive by object is not that they tamper with prices but that they are not ancillary, because they do not involve a genuine integration of economic activities.

Fortunately, the *Horizontal Guidelines* supplement the above with a provision that non-exclusive joint selling, where the parties remain free to sell individually outside the agreement, may not partake in the above harsh treatment, unless 'it can be concluded that the agreement will lead to a coordination of the prices charged by the parties to all or part of their customers'.[56]

The above conception of 'context' entails a contextual analysis that cannot fulfil its function. Contextual analysis should help distinguishing joint commercialization from price fixing, patent settlements from the division of markets and ancillary non-compete obligations assumed, for instance, in the context of transfer of business from market sharing, exchange of information in the context of an M&A transaction from an information cartel. According to the CJEU's conception of context, joint selling is anti-competitive by object if a quick look into the market suggests a high probability of negative effects. In the absence of this, an effects-analysis needs to be carried out.

The ensuing maze is very well exemplified by the EFTA Court's judgment in *Ski Taxi*,[57] where, surprisingly, it held that it depends on an undefined set of circumstances, if a consortium is anticompetitive by object, and the fact that the parties define a common price (which is inherent in a joint offer) tilts

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55 *2023 Horizontal Guidelines*, 329.

56 *2023 Horizontal Guidelines*, 330. The same provision is reproduced in *2011 Horizontal Guidelines*, para 235.

57 E-3/16 *Ski Taxi*, [2016] EFTA Ct Rep 1002.

the balance of probabilities towards anticompetitive object.[58] Consortia often enable firms to combine their assets, make use of synergies and benefit from economies of scale and scope. Quite often, these arrangements enable small companies to combine and make offers that are capable of competing with big companies. Of course, joint selling arrangements and consortia may also have detrimental effects on competition; however, this can be ascertained only if looking into the market. According to the EFTA Court, a consortium and a joint bid involving the integration of economic activities may be anticompetitive by object if it 'reveals a sufficient degree of harm' taking into account 'the substance of the cooperation, its objectives and the economic and legal context of which it forms part'.[59] Hence, anticompetitive object is a factual issue, which requires a detailed examination and a case-by-case assessment of the market.[60]

This means that even though they are traditional effect agreements, the competition law risks attached to joint selling and consortia skyrocketed, given that the borderline between consortia anticompetitive by object and consortia that deserve an effects-analysis got painfully blurred. While this uncertainty is inherent in effects-analysis, it is the very function of anticompetitive object to avoid it. Furthermore, in this conception, the choice between object and effect is made after a quick look into the circumstances that coincide with the ones that pertain to effects-analysis. With this, the inquiry conflates the two sides of competition analysis: the input side, which is about the choice between object and effects and the output side, which delivers the result of this analysis. If an effects-analysis needs to be carried out and this proves to be positive, this means that the agreement is anticompetitive by effect. It cannot reasonably mean that the effects-analysis should not have been carried out and the agreement should have been treated as anticompetitive by object in the first place.

Sadly, the judgment in *Ski Taxi* brings back two notorious 'Justizmords' of US antitrust law from half a century ago. In *US v Sealy*[61] and *US v Topco*,[62] SMEs engaged in joint productive activities and created collective trademarks, which they licensed to members on an exclusive basis. In the since-then overruled judgments, the US Supreme Court found that these arrangements amounted to *per se* illegal market sharing. Since then, it has become generally

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58 *See* Ignacio Herrera Anchustegui, *Joint Bidding and Object Restrictions of Competition: The EFTA Court's Take in the Taxi Case*, 1 European Competition and Regulatory Law Review 174 (2017).

59 E-3/16 *Ski Taxi*, [2016] EFTA Ct Rep 1002, para 101.

60 *Ibid*, para 95.

61 *US v Sealy*, 388 US 350 (1967).

62 *US v Topco*, 405 US 596 (1972).

accepted that these judgments stifled clearly procompetitive arrangements and suppressed competition in the name of competition.[63] The integration of economic activities, such as joint production and commercialization, cooperatives, and collective trademarks, may very naturally involve price limitations and territorial restrictions, but have nothing to do with 'naked' restraints. The examination of these schemes comes to a fork in the road at the early stage of the competition analysis, where it needs to be decided if they are automatically condemned. Here, the relevant question is whether they involve a genuine integration of economic activities. If they do, they qualify as effect agreements (even if some circumstances, for instance, the size of the undertakings, are claimed to foreshadow the outcome of this effects-analysis). The genuine integration of economic activities is certainly not always or almost always anticompetitive; hence, unless it is a sham, it cannot 'reveal a sufficient degree of harm'. Evidently, the fact that the effects-analysis corroborates anticompetitive effects does not imply that the agreement is *ab ovo* anticompetitive by object.

The very essence of anticompetitive object is the redundancy of market analysis. There are only a few clear rules in competition law: anticompetitive object is one of these. The requirement of a comprehensive case-by-case market analysis, even if it is a rudimentary one, takes away the very essence of this legal provision. Effects-analysis is a time-consuming, costly and, above all, uncertain intellectual exercise. Unfortunately, competition law cannot provide a clearer yardstick. At the same time, it attempts to separate straightforward cases from this quagmire. Some cases are straightforward because they are clearly anticompetitive (restrictions by object), others because they are clearly not (such as *de minimis* and block-exempted agreements).

The object-inquiry, although based primarily on textual analysis, must go beyond the text of the agreement, but it should not extend to the examination of effects. This implies that the contextual analysis required by the object-inquiry differs from the effects-analysis. But how do they differ? This question is answered below in two steps. First, Section 4.2.3 presents US antitrust law's subsumption and classification analysis carried out in the application of the *per se* rules. This provides a useful conceptual pattern for the conceptualization of contextual analysis in relation to the specified categories of anticompetitive object. This is followed by a proposal for a consistent notion presented in Section 4.2.4.

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[63] Richard H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 274–78 (1978).

4.2.3 Comparative Perspectives: Subsumption and Classification in the Application of the *Per Se* Rule

As enlarged in Chapter 3, in US antitrust law, *per se* agreements are subject to a subsumption and classification analysis and rule-of-reason agreements to an effects-analysis of varying intensity depending on character and context. Although the fork-in-the-road classification involves analysis, it involves no effects-analysis. Context is used to distinguish naked from non-naked restrictions; effects-analysis plays no role in this regard. Although 'quick' look opens the door to the consideration of justifications, the first part of this test involves the same pigeonholing as the *per se* rule. The abbreviated rule of reason involves a simplified effects-analysis; however, this is not a *per se* but a rule of reason standard with all the concomitant consequences.

As expanded in Section 3.1, the identification of naked restraints, which are governed either by the *per se* rule or the 'quick look', does involve analysis, but this focuses on the context and not on the effects or the leads on effects. The whole point of *per se* (and because it applies to *per se* agreements, also the point of 'quick look') is to save economic analysis. It would be an oxymoron to require economic analysis for the identification of *per se* agreements. The relevant question here is not whether the agreement is ultimately anticompetitive or not, but whether it comes under one of the *per se* pigeonholes. Distinguishing between naked and non-naked involves subsumption and classification, but this analysis centres around the general character and not the specific repercussions. The question to be answered here is 'whether the specific act in question belongs to the illegal class'.[64] Defendants may argue that the agreement is not of the genus that comes under a *per se* category, and this process of classification may raise substantive issues; however, these do not go back to the effects but to the context.[65]

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[64] Donald L. Beschle, *What, Never? Well, Hardly Ever': Strict Antitrust Scrutiny as an Alternative to Per se Antitrust Illegality,* 38 Hastings Law Journal 471, 472–473 (1987).

[65] *See* Donald L. Beschle, *What, Never? Well, Hardly Ever': Strict Antitrust Scrutiny as an Alternative to Per se Antitrust Illegality*, 38 Hastings Law Journal 471, 472–473 (1987) ("[The *per se*] rule condemning all acts belonging to a certain class does not eliminate the need for analysis. It merely shifts the crucial point in the analysis to the decision whether the specific act in question belongs to the illegal class."); *id.* at 477 ("The proposition that horizontal price fixing is *per se* illegal remains the law. But our understanding of that statement has undergone serious change in the last decade. It is now more clear than ever that the process of categorizing conduct as price fixing may allow defendants to raise arguments which cannot be raised to justify a practice already characterized as price fixing.").

The key issue of the substantive analysis is distinguishing price fixing (and market division, output limitation, etc) in the literal sense from price fixing in the antitrust sense. Market power and market effects play no role in this inquiry. *Broadcast Music v Columbia Broadcasting*[66] involved price fixing ancillary to joint blanked licensing, but the Supreme Court refused to treat it as a naked restriction. It looked into the cooperation's context but did not look into the market (carried out no market analysis). In the same vein, *Texaco v Dagher*[67] involved price fixing in the context of a joint venture. Again, the Court looked into the context and concluded that the price fixing was not naked but ancillary and, hence, deserved a full-blown consideration. The fork-in-the-road classification was, however, not based on market analysis but an inquiry into the context. The Supreme Court noted in both cases that a price determination 'may be price fixing in a literal sense', but may 'not [be] price fixing in the antitrust sense'.[68] *FTC v Actavis*[69] involved market sharing in a literal sense but not market sharing in the antirust sense. The FTC argued that the patent settlement involving reverse payment was *per se* illegal because it involved market division. The Supreme Court held, however, that the promise not to enter the market, if reasonably related to a genuine patent dispute and proportionate, may be market sharing in a literal sense but, due to its ancillarity, not in the antitrust sense.

The above framework also applies to 'quick look' analysis, given that it concerns a subset of *per se* agreements. It is noteworthy that in *NCAA v Board of Regents*,[70] the Supreme Court was quick to make clear that market power has no relevance in the inquiry about whether the agreement is naked or not.[71] This implies that the arrangement's context informs the classification, but its effects and economic repercussions do not.

As demonstrated in Section 3.2, contrary to *per se* and 'quick look', the other intermediate mode of analysis, the abbreviated rule of reason, naturally involves an effects-analysis. This is, however, a rule-of-reason standard. This legal test requires less quantitative-empirical data under the rule of reason in case there is qualitative-theoretical evidence that the agreement is likely restrictive. This is completely different from basing *per se* condemnation on no quantitative-empirical data because of some qualitative-theoretical concerns.

66 *Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1 (1979).
67 *Texaco v Dagher*, 547 U.S. 1 (2006).
68 *Texaco v Dagher*, 547 U.S. 1, 6 (2006), citing *Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1, 9 (1979).
69 *FTC v Actavis*, 570 U.S. 136 (2013).
70 *NCAA v Board of Regents*, 468 U.S. 85 (1984).
71 *NCAA v Board of Regents,* 468 U.S. 85, 109 (1984).

4.2.4 Proposal for a Consistent Notion

'Contextual analysis' and 'effects-analysis' refer to different ways of scrutiny and should not overlap. Looking into the 'legal and economic context' does not necessarily imply an effects-analysis, as market-effects are not the sole context of the agreement. Even if the inquiry is limited to the agreement's content, in quite a few cases the characterization cannot be carried out without looking into the context.

In *Budapest Bank*, AG Bobek conceived object-inquiry as a two-step analysis: a formal analysis based on content and 'a basic reality check'[72] based on context. This expression was taken over by AG Rantos in *Banco BPN/BIC Português*, where he defined contextual analysis as 'a "basic reality check" in order to verify whether specific circumstances of the legal and economic context of the agreement concerned may cast doubt on the presumed harmful nature of that agreement'.[73] He argued that '[t]he examination of the legal and economic context seeks to avoid the risk of "false positives" which may stem from a form-based analysis of an agreement, which is detached from the "economic reality" and the legal and legislative landscape in which it occurs.'[74] In *Toshiba*,[75] AG Wathelet distinguished between two types of agreements depending on the intensity of the contextual analysis. If the agreement that appears to have an anticompetitive nature 'forms part of a category expressly referred to in Article 101(1), the analysis of the economic and legal context may be a secondary consideration'.[76] If, however, it 'does not come within one of the situations referred to in Article 101(1) or has features that render [it] (…) atypical or complex, the analysis of the economic and legal context will have to be more thorough'.[77]

It is submitted that the most obvious aspect that defines and distinguishes contextual analysis is that, contrary to effects-analysis, it is essentially a 'lawyer's job'. Effects-analysis requires economic expertise and extends to the market context. On the other hand, contextual analysis extends to the factual context and can be carried out even with a rudimentary understanding of economics. Its purpose is to interpret the agreement, comprehend its economic

[72] Opinion of AG Bobek in Case C-228/18 *Budapest Bank*, EU:C:2019:678, point 49.

[73] Opinion of AG Rantos in Case C-298/22 *Banco BPN/BIC Português*, EU:C:2023:738, para 43.

[74] Opinion of AG Rantos in Case C-298/22 *Banco BPN/BIC Português*, EU:C:2023:738, para 44.

[75] Opinion of AG Wathelet in Case C-373/14 P *Toshiba*, EU:C:2015:427.

[76] Para 89.

[77] Para 90.

function and classify it. Contextual analysis can be carried out by means of traditional legal methodology.

By way of example, it could not be established if the agreement is horizontal or vertical, if not looking into the economic context. An agreement to exchange commercial data is not anticompetitive by object, if the data is historical.[78] The exchange of current commercial data is similarly not anticompetitive by object if it is aggregated statistical data.[79] An inquiry into the economic and legal context helps to understand whether the data is historical and whether it is aggregated (and not individual). Likewise, genuine agency agreements are exempt from most prohibitions applicable to vertical restraints; since this quality hinges on the risks borne by the agent,[80] the examination of the legal and economic context is inevitable for the agreement's classification.

Furthermore, 'contextual analysis' is also relevant in cases that hinge on ancillarity and where abusive references to legitimate cooperations need to be screened out. There are various effect agreements that feature the elements of collusion. If they appeared 'naked', these agreements would qualify as anticompetitive by object. It is only the 'legal and economic context' that enables the fact-finder to ascertain if these elements are ancillary to a legitimate cooperation and, hence, not naked. Without a 'contextual analysis', it is impossible to distinguish naked price fixing from joint production and commercialization. If the fixing of the price is the only and single element, the agreement is 'naked' and, as such, anticompetitive by object. If economic activities are integrated by combining assets and exploiting synergies, an effects-analysis is warranted. Fortunately, most naked cartels are concluded in 'smoke-filled hotel room' scenarios and, hence, they are 'naked' beyond doubt. Nonetheless, undertakings may form, for instance, a sham commercialization arrangement, which involves no integration of economic activities, to cover up a 'naked' cartel.[81] The effects-analysis is not at the pleasure of undertakings; however, without looking into the legal and economic context, the fact-finder would not be able to identify such abusive references. At the same time, automatically condemning all arrangements that involve some sort of price fixing would

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[78] *2023 Horizontal Guidelines*, para 393; *2011 Horizontal Guidelines*, para 90. *See also* Commission Decision 92/157/EC *UK Agricultural Tractor Registration Exchange* [1992] OJ L 68/19, para 16.

[79] *2023 Horizontal Guidelines*, para 391; *2011 Horizontal Guidelines*, para 89.

[80] *2022 Vertical Guidelines* paras 29–40; *2010 Vertical Guidelines*, paras 12–21.

[81] For an example from the US case law, *see Palmer v BRG of Georgia, Inc.*, 498 U.S. 46 (1990), where the parties covered up a horizontal market sharing with an exclusive license arrangement. The Supreme Court found the agreement to be a naked restriction.

throw the baby out with the bathwater. The distinction does not hinge on the effects in the market, but on whether there is a genuine integration of economic activities (ancillary restraint). The restraint may still be ancillary and call for an effects-analysis, even if the parties have market power, there are entry barriers and the market is concentrated.[82]

The CJEU's case law provides plentiful examples for 'contextual analysis'. The most straightforward examples are the status as an actual or potential competitor[83] and the distinction between horizontal and vertical agreements, which call for an inquiry into context. In *Generics*,[84] the Court held that a patent settlement, including reverse payments, calls for an effects-analysis if it is connected with a genuine patent dispute. This was confirmed in the *Lundbeck* cases,[85] which embraced six appeals emerging from the same competition matter. In this conceptualization, the pivot is ancillarity and not market context. Market structure, concentration, and power, as well as the impact on competition, are all irrelevant at this stage of the analysis. Patent settlements may feature market sharing, as one undertaking may promise not to enter another's market. If this is the agreement's only element (there is no legal dispute or there is one, but it was designed to cover up the restraint), it is a 'naked' restraint. If the market division is linked to a genuine patent dispute, it is ancillary and, hence, not anticompetitive by object. The same conceptual structure was used by the CJEU in *Pierre Fabre*[86] and *Coty*,[87] where, in the context of internet sales, it established that restrictions objectively justified by selective distribution (ancillary restraints) are not anticompetitive by object, while, absent such a link to selective distribution, they are automatically

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[82] *Cf.* Okeoghene Odudu, *The Object / Effect Distinction*, *in* Taking Competition Law Outside the Box: Liber Amicorum Richard Whish 101–119, 115–117 (Nicolas Charbit & Sonia Ahmad eds., Concurrences, 2020).

[83] Case C-331/21 *EDP v Autoridade da Concorrência*, EU:C:2023:812, paras 59–77.

[84] Case C-307/18 *Generics*, EU:C:2020:52. *See* Bernadette Zelger, *By Object or Effect Restrictions – Reverse Payment Settlement Agreements in light of* Lundbeck*,* Servier*, and* Generics, 12(4) Journal of European Competition Law and Practice 273 (2020).

[85] Case C-586/16 P *Sun Pharmaceutical & Ranbaxy*, EU:C:2021:241, paras 68–71; Case C-588/16 P *Generics*, EU:C:2021:242, paras 66–69; Case C-591/16 P *Lundbeck*, EU:C:2021:243, paras 1112–115; Case C-601/16 P *Arrow*, EU:C:2021:244, paras 71–75; Case C-611/16 P *Xellia & Alpharma*, EU:C:2021:245, paras 96–99; Case C614/16 P *Merck*, EU:C:2021:246, paras 84–88.

[86] Case C-439/09 *Pierre Fabre*, EU:C:2011:649.

[87] Case C-230/16 *Coty*, EU:C:2017:941.

condemned. These rulings suggest that selective distribution, if not objectively justifiable, is anticompetitive by object and this tenet applies to the individual restrictions too.[88] Although this legal test involves a substantive examination, this has nothing to do with effects-analysis.

The above cases reveal that even though contextual analysis and effects-analysis address substantive aspects, going beyond the four corners of the contract, they are completely different both in terms of focus and methodology. The former does not deal with market context but circumstances that can be examined through traditional legal means. Contextual analysis is a 'lawyer's job' and does not require more skills than cases where the law invalidates technically lawful contracts that aim to circumvent a legal prohibition or fall foul of good morals. Contextual analysis is very different from the economic analysis involved in the assessment of the market, the actual and potential consequences and their surrogates.

4.3 OBJECT-INQUIRY: THE UNSPECIFIED CATEGORY

A key issue of object-inquiry is whether it is carried out through specific categories or on a case-based basis. For decades, until the CJEU's ruling in *Allianz*,[89] anticompetitive object had been regarded in an unspoken manner as a category-building principle.[90] It had not been scrutinized in individual cases whether the given agreement had, by its very nature, 'such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market'.[91] This general definition of anticompetitive object had not been applied to 'flesh and blood' arrangements, but merely used to create specific categories of automatically condemned agreements.[92] It was not a judicial standard used for case-by-case assessment but the 'definition of definitions' and a principle of 'judicial rule-making' used to frame the development of the various categories (pigeonholes) of anticompetitive agreements (such as horizontal price

[88] Case C-439/09 *Pierre Fabre*, EU:C:2011:649, para 39; Case C-230/16, *Coty,* EU:C:2017:941, para 24.

[89] Case C-32/11 *Allianz*, EU:C:2013:160.

[90] Saskia King, *Agreements that restrict competition by object under Article 101(1) TFEU: past, present and future* 29–46 (Doctoral Dissertation, London School of Economics and Political Science, 2015), available at https://etheses.lse.ac.uk/3068/ (Referring to this as the "orthodox approach".).

[91] *Guidelines on Article 101(3)*, para 21.

[92] Cf Alison Jones, *Left Behind by Modernisation – Restrictions by Object under Article 101(1)*, 6 European Competition Journal 649, 656.57 (2010).

fixing,[93] market division,[94] restriction of output,[95] vertical resale price fixing[96] and absolute territorial protection[97]). Of course, these categories were not cast in stone and were subject to change. The general concept of anticompetitive object was used to put new categories on or remove old ones from the list, but not to subject real agreements to a comprehensive assessment. This resulted in a relatively clear list of restrictions that were pronounced outright prohibited (automatically condemned) and were offered no chance for justification under Article 101(1). The concept worked indirectly: it defined categories of automatically condemned restrictions and it was these categories that were, in fact, applied in competition matters. In this thinking, the relevant question was not if the arrangement was anticompetitive by object but if it came under one of the categories of anticompetitive object. This *modus operandi*, however, fundamentally changed with the CJEU's ruling in *Allianz*,[98] where the Court

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[93] *See e.g.* Case C-67/13 P *Groupement des cartes bancaires*, EU:C:2014:2204, para 51.

[94] *See e.g.* C-373/14 P *Toshiba v Commission*, EU:C:2016:26, para 28.

[95] *See e.g.* Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, para 40.

[96] Case 243/83 *SA Binon*, EU:C:1985:284, para 47.

[97] Case 56/64 & 58/64 *Consten & Grundig*, EU:C:1966:41.

[98] It has to be noted that, due to the lack of a formal system of precedents, the CJEU's citation practice is somewhat haphazard. Apart from a few classic milestone cases, such as, for example, *Cassis de Dijon*, Case C-120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42, and *Keck et Mithouard*, Joined Cases C-267/91 & C-268/91, ECLI:EU:C:1993:905, in internal market law, and *Société Technique Minière v Maschinenbau Ulm*, Case 56/65, EU:C:1966:38, and *Consten & Grunding*, Case 56/64 & 58/64, EU:C:1966:41, in competition law, the CJEU rarely cites old rulings; instead, it cites its recent rulings that reproduce them. *Allianz* has been consistently cited in a long line of judgments, as, for example, Case C-67/13 *Groupement des cartes bancaires*, EU:C:2014:2204, paras 49–54, Case C-228/18 *Budapest Bank*, EU:C:2020:265, paras 80, Case C-382/12 *MasterCard*, EU:C:2014:2201, paras 184–185, Case C-345/14 *Maxima Latvija*, EU:C:2015:784, paras 16–17 & 21, Case C-306/20 *Visma Enterprise*, EU:C:2021:935, paras 51, 58 & 61, until it gradually dropped out and gave its place to its more recent offsprings, which, however, both cite and incorporate *Allianz*, see e.g. Case 883/19 P. *HSBC Holdings*, EU:C:2023:11, paras 106–107, Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010, para 86, Case C-333/21 *European Superleague*, EU:C:2023:1011, para 159, Case C-141/21 P *International Skating Union*, EU:C:2023:1012, para 99. In *Hoffmann-La Roche & Novartis*, the CJEU did not refer to *Allianz*, it just followed its way of thinking and remoulding of the earlier case law *Allianz* also referred to. *See* C-179/16 *Hoffmann-La Roche & Novartis*, EU:C:2018:25, para 80.

carried out a comprehensive case-by-case analysis extending to the totality of the circumstances to identify anticompetitive object.

This section demonstrates that although anticompetitive object predominantly works through categories, it may also be inquired on a case-by-case basis if an agreement, considering the totality of the circumstances, comes under the general definition of anticompetitive object. Accordingly, anticompetitive object is made up of a set of specified categories, such as horizontal price fixing, market division, restriction of output, vertical resale price fixing and absolute territorial protection, and an unspecified category of agreements, where characterization is carried out on the basis of the general definition of anticompetitive object and the comprehensive assessment of the totality of circumstances. Section 4.3.1 presents the genesis of the unspecified category in *Allianz*.[99] Section 4.3.2 presents the trajectory of the ensuing case law. Section 4.3.3 identifies the current state of the doctrine. Section 4.3.4 presents the relationship between *Allianz* and the specified categories of anticompetitive object. Section 4.3.5 compares *Allianz* with US antitrust law's *per se* rule and intermediate modes of analysis. Section 4.3.6 provides a critical assessment of the *Allianz* doctrine. It demonstrates why it should be abolished and the case law should return to the conception that anticompetitive object is a category-building principle, which may be used to create new or to remove old categories but which may not be used on a case-by-case basis.

4.3.1 The Advent of the Unspecified Category: The CJEU's Ruling in *Allianz*

Allianz[100] was the first matter where the CJEU pronounced an agreement that came under none of the established categories restrictive by object on the basis of a case-by-case analysis. The Court, instead of creating a new object category or referring the case to effects-analysis, pronounced it anticompetitive by object on the basis of a case-by-case analysis. The matter emerged from a serious regulatory failure in the Hungarian insurance market, and competition law was used to rectify an error outside its comfort zone. This probably contributed to the ruling's oddity.

This was a vertical case dealing with the commission payment practice of two major Hungarian insurance companies. There was no evidence suggesting

[99] Case C-32/11 *Allianz*, EU:C:2013:160.

[100] For a detailed note on the Hungarian procedure *see* Katalin J. Cseres & Pál Szilágyi, *The Hungarian Car Insurance Cartel Saga*, *in* Landmark Cases in Competition Law – Around the World in Fourteen Stories 145–166 (Barry Rodger ed., 2013).

a horizontal collusion. The insurance companies set selling targets for insurance brokers in the form of a percentage of the overall sales. A good part of these insurance brokers were repair shops, which had a dual role: they both provided repair services (covered by insurance) and sold insurance products. As a financial incentive, the insurance companies offered higher hourly rates for reparations if the repair shop met the sales targets. Under Hungarian law, contrary to insurance agents, who are employed by the insurance company, brokers are neutral advisers, who are expected to serve the interests of the clients. Although they receive commission from insurance companies, they are not employed by them. The sales targets created financial incentives that interfered with this role of the brokers. After the sectoral regulator had failed to intervene, the Hungarian Competition Office (HCO) opened an investigation, pronounced these arrangements anticompetitive by object, and imposed astronomical fines. The case was referred to the CJEU in respect of hourly reparation rates (but not in respect of the rest of the target fees).[101]

The case involved two aspects, which were legally irrelevant but may still have influenced the Court. First, it was difficult to sympathize with the practice which created illicit financial incentives to abuse the clients' confidence. Second, the outcome of the case hinged on classification, as the HCO carried out no effects-analysis (not even a truncated one), so the lack of anticompetitive object would have set the procedure – which had been pending for eight years by then – back to square one.

The CJEU confirmed the HCO's automatic condemnation and, by that, re-moulded anticompetitive object. In short, it held that any agreement may be regarded as anticompetitive by object if, after an abridged effects-analysis,[102] the individual examination 'reveal[s] a sufficient degree of harm to competition'[103] and confirms that it is 'sufficiently injurious to competition'.[104] This amounted to a paradigm shift: anticompetitive object no longer operated

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[101] Although the case was tried solely on the basis of Hungarian competition law, the Hungarian Supreme Court considered Section 11 of the Hungarian Competition Act to be the equivalent of Article 101(1) TFEU and the legislative intent to follow the rules and principles of EU competition law could be established. The CJEU found that the preliminary question was admissible.

[102] Saskia King, *Agreements that restrict competition by object under Article 101(1) TFEU: past, present and future* 178–179 (Doctoral Dissertation, London School of Economics and Political Science, 2015), available at https://etheses.lse.ac.uk/3068/ (*Allianz* made it clear that "the effects-based approach is not the preserve of the effect criterion. It is utilised also under the object criterion".).

[103] Case C-32/11 *Allianz*, EU:C:2013:160, para 34.

[104] *Ibid*, para 46.

through the intermediation of categories but became viable in itself and, hence, provided for individual, case-by-case examination.

In the ruling, the CJEU reiterated the well-established formula, holding that 'infringements by object' accrue from the experience that 'certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'.[105] It is noteworthy that the text referred to 'certain forms of collusion', that is, categories and not individual agreements. However, when enumerating the pertinent factors, the Court went beyond the usual language of the case law and listed a set of factors (such as nature of the goods, real conditions of the functioning of the market, structure of that market, existence and importance of alternative distribution channels, market power[106]) that had been completely unknown in the pre-*Allianz* era and germane to effects-analysis:

> In order to determine whether an agreement involves a restriction of competition 'by object', regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part (…). *When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see Expedia, paragraph 21 and the case law cited)*.[107]
>
> [The] court should in particular take into consideration the *structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned*.[108]

The Court's reference to the content, objectives and context of the agreement was the usual mantra of the case law.[109] Nonetheless, the rest of the analytical aspects – in particular, market structure, market power, alternative distribution channels – went further and added factors that, as surrogates or indices of effects, belonged to the effects-analysis.

This was a novel approach, although the CJEU purported that it was an established conception of 'context' by referring to paragraph 21 of the ruling in *Expedia*.[110] This, however, did not address restrictions by object specifically but restrictions of competition at large. Paragraph 21 of *Expedia* has to be

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105 Para 35.

106 *Ibid*, paras 36 & 48.

107 Para 36 (emphasis added).

108 Para 48 (emphasis added).

109 *See e.g.* C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 *GlaxoSmithKline*, EU:C:2009:610, para 58; Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, para 17.

110 Case C-226/11 *Expedia*, EU:C:2012:795.

interpreted in conjunction with paragraph 20, which, in turn, refers to 'agreement[s] [that] perceptibly restrict (…) competition within the common market'. In fact, paragraph 21 refers back to 'agreements perceptibly restricting competition' and the ruling provides in this context that '[t]he Court has held that *the existence of such a restriction* must be assessed by reference to the actual circumstances of such an agreement'.[111] The further sentences of paragraph 21 have to be interpreted in this context, including the last sentence, which provides that '[i]t is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question'. Accordingly, the foregoing circumstances have to be scrutinized when determining whether the restriction of competition is perceivable or not – that is, whether a perceivable restriction exists or not. It is noteworthy that the last sentence of paragraph 21 of *Expedia* (as indicated in the ruling) was taken from paragraph 49 of the CJEU's judgment in *Asnef-Equifax*,[112] which, however, deals solely with 'the appraisal of the effects of agreements' and does not address anticompetitive object.[113]

The CJEU's reference to paragraph 21 of *Expedia* is irreconcilable not only with the language of the ruling but also with the propositions laid down in this judgment. In *Expedia*, the CJEU held that a restriction of competition by object falls foul of Article 101(1) irrespective of market structure and market power and of whatever effects the agreement may have.[114] It would be self-contradictory to contend that the existence of an anticompetitive object depends on market structure and market power, while object agreements are prohibited irrespective of market structure and market power.

All in all, *Allianz* implies that an abridged effects-analysis needs to be carried out to ascertain whether the agreement has an anticompetitive object. This examination has nearly all the makings of a real effects-analysis except that it is methodologically simplified and empirically superficial. As noted above, the proof of actual effects is usually costly and complicated (at times even unfeasible); hence, quite often, instead of direct proof, circumstantial evidence, such as anticompetitive potential and market power, is used as a surrogate.[115] The CJEU's subsequent case law confirmed and added to the above conception, making it a full-blown doctrine.

[111] Emphasis added.
[112] Case C-238/05 *Asnef-Equifax*, EU:C:2006:734.
[113] Para 49.
[114] Para 37.
[115] Csongor István Nagy, *The Distinction between Anti-Competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?*, 36(4) World Competition: Law and Economics Review 541, 559 (2013).

4.3.2 The Trajectory of the Post-*Allianz* Case Law

Allianz was followed by a series of rulings (*Cartes bancaires*,[116] *MasterCard*,[117] *Budapest Bank*,[118] *Maxima Latvija*[119]) which confirmed the doctrine but disapproved the designation as anticompetitive by object in the given case. *Maxima Latvija* particularly highlighted the inconsistency of *Allianz*, as it involved a vertical non-compete clause and, hence, should have never been referred to the CJEU for interpretation. These cases might have even created the false pretence that the doctrine is so exceptional and its purview so limited that it may be of little relevance for day-to-day practice. At this point, it could be hoped that *Allianz* would remain an isolated ruling triggered by an odd fact pattern and a salient regulatory error. Nonetheless, in *Hoffmann-La Roche & Novartis*,[120] the doctrine reappeared, untarnished. Although the arrangement was an atypical market-sharing agreement and could be condemned by means of this object category, the Court chose the amorphous *Allianz* doctrine to establish anticompetitive object. The two cases that followed *Hoffmann-La Roche & Novartis* are an epitome of the futility of the *Allianz* doctrine. *Visma Enterprise*[121] involved a matter that, similarly to *Maxima Latvija*,[122] should have never been referred to the CJEU in the form it was. *HSBC Holdings*[123] involved a matter that was condemnable under one of the traditional categories of anticompetitive object. The chronology of the *Allianz* case law is closed by three rulings adopted on the very same day (21 December 2023). In *Royal Antwerp Football Club*,[124] the CJEU encountered an input-side market-sharing arrangement, but, similarly to *Hoffmann-La Roche & Novartis* and *HSBC Holdings*, as if this object category did not exist, condemned it under the elusive *Allianz* doctrine. *European Superleague*[125] and *International Skating Union*,[126] however, brought new developments. These involved constructive vertical non-compete clauses used by dominant sporting organizations. Vertical non-compete restrictions had been traditionally considered effect restrictions. However, the CJEU found the non-compete restrictions in these

[116] Case C-67/13 P *Groupement des cartes bancaires*, EU:C:2014:2204.
[117] Case C-382/12 *MasterCard*, EU:C:2014:2201.
[118] Case C-228/18 *Budapest Bank*, EU:C:2020:265.
[119] Case C-345/14 *Maxima Latvija*, EU:C:2015:784.
[120] Case C-179/16 *Hoffmann-La Roche & Novartis*, EU:C:2018:25.
[121] Case C-306/20 *Visma Enterprise*, EU:C:2021:935.
[122] Case C-345/14 *Maxima Latvija*, EU:C:2015:784.
[123] Case 883/19 P. *HSBC Holdings*, EU:C:2023:11.
[124] Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010.
[125] Case C-333/21 *European Superleague*, EU:C:2023:1011.
[126] Case C-141/21 P *International Skating Union*, EU:C:2023:1012.

cases anticompetitive by object, because it found them clearly anticompetitive by effect.

The trajectory of the *Allianz* case law is presented with the use of the following taxonomy. Section 4.3.2.1 presents those cases where the CJEU engaged with the doctrine in detail but the test yielded a negative result. What makes these cases congenial is that all but *Maxima Latvija*, which should have never been referred to the CJEU, were located in the penumbra of an object category; still, the Court refused to conceive the issue as delimitating the pertinent object category and assessed them under the *Allianz* doctrine. Section 4.3.2.2 presents those cases where the test yielded a positive result, but the application of the *Allianz* doctrine was superfluous, as the restriction came under one of the established object categories. Section 4.3.2.3 presents those cases where, again, the test yielded a positive result, but the application of the doctrine had no added value, as the restriction's anticompetitive effects were salient.

The feasibility of this taxonomy showcases that, besides confusing the case law, the notion of unspecified object category has been of little use. *Allianz* was the last case where *Allianz* made a difference. Since then, all the restrictions condemned under this doctrine could have been condemned either under one of the established object categories or, after an abbreviated analysis, as clearly anticompetitive by effect. In the same vein, all the cases where the doctrine was applied but found inapplicable (yielded a negative result) could have been analysed as a delimitation issue of the pertinent object category.

4.3.2.1 Applied but found inapplicable

The first three cases (*Cartes bancaires*,[127] *MasterCard*[128] and *Budapest Bank*[129]) the CJEU encountered after *Allianz* arose from restrictions in bank card systems and could be conceived, along the naked-ancillary continuum, as delimitation questions of different horizontal object categories, most notably price fixing, but were assessed under the *Allianz* doctrine. These were followed by *Maxima Latvija*,[130] which clearly involved a textbook effect restriction and, hence, should have never been referred to the CJEU with a view to ascertaining whether it is anticompetitive by object. The last case in this cluster is *Visma Enterprise*,[131] which, again, featured a question of delimitation of an object category but was assessed by means of the doctrine. Although at the end of the

[127] Case C-67/13 P *Groupement des cartes bancaires*, EU:C:2014:2204.
[128] Case C-382/12 *MasterCard*, EU:C:2014:2201.
[129] Case C-228/18 *Budapest Bank*, EU:C:2020:265.
[130] Case C-345/14 *Maxima Latvija*, EU:C:2015:784.
[131] Case C-306/20 *Visma Enterprise*, EU:C:2021:935.

day no anticompetitive object was identified in any of these cases, these rulings provided important interpretive guidance.

In *Cartes bancaires*,[132] French banks established an economic interest grouping in order to ensure the interoperability of the members' card systems and to maintain the scheme's balance. The grouping introduced various measures to stimulate engagement in acquiring activities. One of these was a financial contribution paid by banks less active in acquisition activities. The CJEU stressed that anticompetitive object has to be conceived narrowly, as it is the exception and not the rule, and it extends only to the most serious competition mischiefs that are, 'by their very nature', 'harmful to the proper functioning of normal competition'[133] and 'reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects'.[134]

In *MasterCard*,[135] the CJEU found that the multilateral interchange fee (MIF)[136] used in the bank card system (paid by the acquiring bank, which operates the payment terminal, to the issuing bank, which issued the bank card) is not anticompetitive by object. It held that in this context, 'mere suppositions or assertions that the anti-competitive effects (…) are "obvious" cannot (…) be relied upon'.[137] Although the question of object was not a pivotal issue, given that the MIF was assessed according to its effects and found restrictive,[138] the judgment makes it clear that automatic condemnation should be restricted to arrangements whose restrictive effects are unequivocal.

Budapest Bank[139] also dealt with the competition law characterization of the MIF. The HCO condemned Hungarian banks for fixing the domestic MIF and for treating the two payment card companies (Visa and Mastercard) alike, as anticompetitive both by object and effect.[140] The CJEU found that the MIF is presumed not to be anticompetitive by object. While concluding that this is a fact-intensive issue and, hence, the final decision is up to the national court,[141] the Court also established a presumption against automatic condemnation. The

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[132] Case C-67/13 P *Groupement des cartes bancaires*, EU:C:2014:2204.

[133] *Ibid*, para 50.

[134] *Ibid*, para 58; *see also* para 49.

[135] Case C-382/12 *MasterCard*, EU:C:2014:2201.

[136] For a general overview of the payment card industry and interchange fees, *see* Jean-Charles Rochet, *Interchange fees in payment card systems: price remedies in a two-sided market*, *in* Cases in European Competition Policy: The Economic Analysis 179 (Bruce Lyons ed., CUP, 2009).

[137] *Ibid*, para 187.

[138] *Ibid*, para 186.

[139] Case C-228/18 *Budapest Bank*, EU:C:2020:265.

[140] Case Vj-18/2008 *MIF*.

[141] Case C-228/18 *Budapest Bank*, EU:C:2020:265, para 59.

wording of the preliminary decision makes this clear: it provides that the MIF is not anticompetitive by object, *unless* the national court finds that the arrangement's purpose and background suggests the opposite conclusion.[142] It seems that the CJEU found that the preliminary question fell within the scope of the ruling in *Cartes bancaires*, where the Court took the same position with respect to another two-sided payment card system.

The Court stressed that anticompetitive object is the exception and not the rule and, hence, competition authorities and courts should make use of this only when there is sufficiently solid and reliable experience ('une expérience suffisamment solide et fiable') that bears out this conclusion.[143] It may be assumed that such experience may derive from earlier case law or empirical analysis.[144] The Court concluded that the experience with the MIF did not live up to this expectation.[145]

According to the CJEU, the following raised doubts as to the anticompetitive nature of the MIF. First, while acknowledging that indirect price fixing is also price fixing,[146] the Court pointed out that banks did not fix the price but merely a cost element.[147] Second, it also underlined that complex two-sided markets are normally not amenable to the automatic condemnation inherent to a finding that an agreement is anticompetitive by object.[148] Third, the MIF appears to have been serving the purpose of creating balance in the system, which may be a legitimate consideration and may make the multilateral cooperation ancillary, and call for an effects-analysis.[149] Fourth, the MIF was determined not by the sellers (issuing banks) unilaterally, but was based on a bipartite agreement between sellers and buyers (issuing and acquiring banks). Although the bipartite nature of the agreement does not rule out the existence of an anticompetitive object, it does raise doubts in this regard.[150]

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[142] *Ibid*, para 86.

[143] *Ibid*, para 76.

[144] As later confirmed by the CJEU in the *Lundbeck* cases, the lack of prior judicial or competition authority condemnation does not rule out the characterization of the agreement as anticompetitive by object, since this is not the only source of experience. Case C-586/16 P *Sun Pharmaceutical & Ranbaxy*, EU:C:2021:241, paras 85–86; Case C-588/16 P *Generics*, EU:C:2021:242, paras 78–79; Case C-591/16 P *Lundbeck*, EU:C:2021:243, paras 130–31; Case C-611/16 P *Xellia & Alpharma*, EU:C:2021:245, paras 118–21; Case C-614/16 P *Merck*, EU:C:2021:246, paras 97–100.

[145] Case C-228/18 *Budapest Bank*, EU:C:2020:265, paras 65, 77 & 79.

[146] *Ibid*, para 62.

[147] *Ibid*, para 61.

[148] *Ibid*, para 68.

[149] *Ibid*, paras 71, 73.

[150] *Ibid*, paras 84–85.

In *Maxima Latvija*,[151] the CJEU encountered a question that, given the obvious answer, would have raised eyebrows in the pre-*Allianz* era. The Court was asked if a vertical non-compete clause is anticompetitive by object. Maxima Latvija rented commercial spaces in large malls and shopping centres and, as an 'anchor tenant', it was granted the right to approve 'the lessor['s] letting to third parties commercial premises not let to Maxima Latvija'.[152] As in the post-*Allianz* era virtually any agreement may be considered anticompetitive by object, the question was referred to the CJEU, which, not surprisingly, confirmed the obvious: vertical non-compete agreements are not anticompetitive by object but call for an effects-analysis.[153]

Most interestingly, the Court based its ruling on a textbook summary of the pre-*Allianz* conception of anticompetitive object, which called into question the cogency of the very doctrine established in *Allianz*. First, it underlined that the characterization of the agreement as anticompetitive by object should be based on its 'content' (put otherwise, the analysis should, in principle, remain within the four corners of the contract).[154] Second, automatic condemnation is confined to cases where the agreement 'reveals *in itself* a sufficient degree of harm to competition'.[155] Even if demonstrated that the agreement 'could potentially have the effect of restricting' competition, this cannot imply that it always has such effects 'by [its] very nature', that is, irrespective of the market context.[156] This implies that the agreement's anticompetitiveness does not depend, among others, on the structure of the market and the parties' market shares. Third, the categories of anticompetitive object ('certain collusive behaviour') have to be defined on the basis of experience and not theoretical argumentation.[157]

The first and the second points, arguably, imply that market context does not have the relevance *Allianz* prescribes to it. The third point suggests that if neither the judicial practice nor the literature has accumulated sufficient (empirical) experience about the arrangement at stake, it cannot be automatically condemned (cannot be pronounced anticompetitive by object), but an

[151] Case C-345/14 *Maxima Latvija*, EU:C:2015:784.
[152] *Ibid*, para 5.
[153] *Ibid*, paras 21, 23–24.
[154] *Ibid*, para 17 ('*Where, however, an analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered* and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent'.) (emphasis added).
[155] *Ibid*, para 20 (emphasis added).
[156] *Ibid*, para 22.
[157] *Ibid*, para 19.

effects-analysis needs to be carried out. These contradictions make it difficult to reconcile the rulings in *Maxima Latvija* and *Allianz*.

In *Visma Enterprise*,[158] the CJEU was invited to carry out the object-analysis of a soft customer exclusivity clause. The agreements between a software producer and its distributors provided for a six-month priority period for the dealer the customer approached first. The priority was triggered by the registration of the customer by the dealer and the customer had the right to object to this.[159] The case involved a textbook example of free riding. The negotiation and the individualization of the software presumably involved significant investments (sunk costs) on the side of the dealer and the producer envisaged stimulating its dealers' marketing efforts by protecting their investments. Although it secured no exclusivity, the restriction created a six-month waiting time subject to the customer's consent and, hence, it was akin to customer exclusivity.

The CJEU's ruling provided a neat summary of the legal test of anticompetitive object and concluded that the priority clause did not meet this. The communication of the final conclusion was not that blunt as, for example, in *Maxima Latvija*, but this may arguably be explained with the fact that the case involved some undecided factual issues whose clarification was left to the national court.

The Court reiterated the distinction between object and effect agreements.[160] Anticompetitive object makes the investigation of the effects unnecessary[161] and '[t]he essential legal criterion for ascertaining whether an agreement involves a restriction of competition "by object" is (…) the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects'.[162] The classification of these agreements emerges from 'their very nature'[163] and has to be based on prior experience that 'shows that such agreements lead to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers'.[164] Furthermore, there is a presumption against anticompetitive object in the sense that this concept 'must be interpreted restrictively'.[165] Finally, the Court reiterated that the case-by-case object-inquiry has to be comprehensive and extend to the totality of the circumstances, such as

158 C-306/20 *Visma Enterprise*, EU:C:2021:935.
159 Para 11.
160 Paras 54–56.
161 Paras 57–58.
162 Para 59.
163 Para 57.
164 Para 58.
165 Para 60.

'the content of its provisions, its objectives and the economic and legal context of which it forms a part' and, as part of the context, 'the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question'.[166]

The ruling combines two weaknesses of the *Allianz* case law. On the one hand, the case could have been addressed under a traditional object category and could have given an occasion to clarify the boundaries of this. On the other hand, the case was relatively straightforward and the reason why it could not be called *acte claire* was the elusive *Allianz* doctrine.

The priority clause did not come under any of the vertical categories that the case law considers anticompetitive by object. Although it could have been dwelled upon whether, in effect, it amounted to an exclusivity clause, it provided for customer and not territorial protection; hence, the purpose of market integration had no role in the assessment. As the CJEU noted in the ruling, it is a general principle that in case there is workable inter-brand competition, intra-brand restrictions may cause no harm to competition[167] (with the exception of the categories that are considered *per se* anticompetitive, such as resale price fixing and absolute territorial protection). In this case there were clear free-rider problems, and it was plausible to assume that the priority time window was created to prevent one dealer from free riding on the marketing efforts and investments of another. In the absence of this, a dealer may be less inclined to make marketing efforts, and this disinclination may chill competition. The question of the case should have been if the existing category of territorial and customer exclusivity should be extended to the case. The CJEU's answer was negative, however; instead of making clear that a vertical customer priority clause (the same as a vertical customer exclusivity clause) is not restrictive by object, the CJEU concluded that the arrangement was presumably not a restriction by object, but the national court may still find it restrictive by object, if it finds circumstances that speak against this presumption.

4.3.2.2 Applied to agreements covered by an established object category anyway

In *Hoffmann-La Roche & Novartis*,[168] *HSBC Holdings*[169] and *Royal Antwerp Football Club*,[170] the CJEU condemned restrictions that arguably came under established object categories. However, instead of using these complex cases

[166] Para 62.
[167] Para 78.
[168] C-179/16 *Hoffmann-La Roche & Novartis*, EU:C:2018:25.
[169] Case 883/19 P. *HSBC Holdings*, EU:C:2023:11.
[170] Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010.

of price fixing and market sharing to clarify these object categories, it did not bother with interpretive work; it went back to Adam and Eve and condemned them after an amorphous analysis.

In *Hoffmann-La Roche & Novartis*,[171] the Court condemned a horizontal conspiracy to divide the market by means of scaremongering. However, instead of calling this cunning market sharing by its name, it engaged in an obscure and amorphous demonstration about the agreement's anticompetitive nature. This perfunctory and unstructured analysis significantly impaired the judgment's doctrinal consistency: instead of construing market division in light of the case, the Court provided a trivial reasoning that may even suggest that any agreement to engage in a communication campaign to distort customers' transactional decisions may be caught in the net of Article 101 (with the possibility to extend this, by analogy, to the unilateral acts of dominant undertakings).

The facts of the case revealed a complex form of market sharing. Hoffmann-La Roche and Novartis marketed two competing drugs (Avastin and Lucentis). Even though these had virtually the same ingredients, they received marketing authorization for different purposes: Avastin for oncological purposes, while Lucentis for eye diseases.[172] Since Avastin was ten times cheaper than Lucentis, it became widely used off-label to treat eye diseases.[173] In response to this, with the view of artificially differentiating between the two products and reducing their substitutability in the eyes of physicians and patients, the two undertakings launched a communication campaign asserting that Avastin raised safety risks if used to treat eye diseases.

The CJEU found that the cooperation between Hoffmann-La Roche and Novartis had an anticompetitive object, because 'it is likely that the dissemination of such information will encourage doctors to refrain from prescribing that product, thus resulting in the expected reduction in demand for that type of use'[174] and 'an arrangement that pursues the objectives (…) of [misleading both the regulators and the general public] must be regarded as being sufficiently harmful to competition to render an examination of its effects superfluous'.[175]

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[171] C-179/16 *Hoffmann-La Roche & Novartis*, EU:C:2018:25.

[172] Hoffmann-La Roche was granted marketing authorization (MA) concerning Avastin for oncological purposes, while Novartis acquired MA concerning Lucentis for ophthalmological purposes, such as macular degeneration and glaucoma.

[173] C-179/16 *Hoffmann-La Roche & Novartis*, EU:C:2018:25, para 46.

[174] *Ibid*, para 93.

[175] *Ibid*, para 94.

Although the ruling could be read as suggesting that the cooperation was a 'cartel agreement',[176] neither the Court nor AG Saugmandsgaard Øe tried to subsume it under one of the existing object categories. This makes it intensely difficult to ascertain the holding of the judgment. Might any misleading communication carried out by two or more undertakings (under Article 101) or a dominant undertaking (under Article 102), that is capable of having a substantial effect on the competitive process, violate EU competition law? It probably needs no explanation that such a principle would be odd and lead to extremely far-reaching consequences, especially because EU law already has a comprehensive regime addressing such issues: the Unfair Commercial Practices Directive prohibits misleading business communication affecting consumers' transactional decisions. What role might antitrust law have besides the Directive? While customers' informed decisions are key to the sound operation of the competitive process, is antitrust law, which has generally been regarded as tackling the repercussions of market power, really supposed to deal with this issue?

It is conspicuous that *Allianz* and *Hoffmann-La Roche & Novartis* have some odd similarities. Both cases centred around business practices that could earn no sympathy and aimed to deceive consumers. In *Allianz*, illicit financial incentives stimulated brokers to abuse the trust consumers placed in them. In *Hoffmann-La Roche & Novartis*, false information was used to mislead consumers. Likewise, in both cases, the CJEU was called upon to rectify a serious failure of the sectoral regulation. Taking these into account, the two rulings raise far-reaching questions. Do they open a new chapter in EU competition law? Do they imply that, as a general principle, Articles 101 and 102 prohibit practices that impair consumers' chance to make informed decisions, given that such practices distort the competitive process?

It seems that, instead of these far-reaching conclusions, the ruling in *Hoffmann-La Roche & Novartis* is nothing more than a very poorly reasoned condemnation of a horizontal market-sharing scheme. In fact, the ruling is the object lesson of how the frivolous *Allianz* doctrine impairs the traditional categories of anticompetitive object. The CJEU could not see the forest for the trees. What Hoffmann-La Roche and Novartis were doing was a peculiar form of market division, which is a traditional and settled category of anticompetitive object.[177] Namely, the notion of market division also encompasses

[176] *Ibid*, para 80.

[177] Both drugs were developed by the Roche group, but Novartis was entrusted with the commercial exploitation of Lucentis by means of a licence agreement; hence, one may argue that this relationship was vertical. Nonetheless, although the Court was not explicit about the horizontal relationship between the parties, it did

arrangements that do not reach the level of an absolute ban. Besides straight promises not to sell outside a territory or to a group of consumers, market sharing also embraces their functional equivalents, where competitors strive to reduce the substitutability of their products by means of disadvantaging outward sales or making inward orders from outside the allotted territory more difficult – for instance, by making them costlier or increasing customers' search costs. It amounts to market division if two competitors, while not banning cross-supplies, agree to compensate each other via a fee for deliveries to the other undertaking's home country or they inform each other if they get an order from an out-of-state customer and give time to the other undertaking to intervene. In the same vein, the promise not to make out-of-state advertisements (active sales), though not an absolute ban, may equally amount to market sharing.

Interestingly, in *Hasselblad*,[178] the CJEU had no difficulty in treating the functional equivalent of RPF as RPF. Here, the Court put an equality sign between the *per se* treatment of RPF under Article 101(1) and the authorization of the producer to control dealers' advertisements on selling prices.[179] The dealers' freedom to set the price was not limited; they simply could not communicate their discounted prices to the public.

A quick look at US antitrust case law provides an array of examples of market-sharing arrangements that are short of an absolute ban. In *US v Sealy*[180] and *US v Topco*,[181] the parties were allowed to sell outside the territory allotted to them; the only restriction was that they could not use the Sealy and Topco trademarks. In *US v Cooperative Theatres*,[182] the parties agreed to abstain 'from actively soliciting each other's customers'. The Court of Appeals for the Sixth Circuit held that 'the so-called "no-solicitation" agreement alleged in this case is undeniably a type of customer allocation scheme which courts have often condemned in the past as a *per se* violation of the Sherman Act'. The Court found 'it unnecessary to engage in the "incredibly complicated and prolonged economic investigation" under the rule of reason standard

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regard them, notwithstanding the licensing agreement, as competitors in relation to the post-licence joint communication. It considered the arrangement not to be ancillary to the licensing agreement (para 75) and the reason why it condemned it was that it was put in place between "two undertakings marketing two competing products" (paras 77 and 95) in order to reduce the substitutability of these competing products and to diminish demand for Avastin in favour of Lucentis (para 93).

178 Case 86/82 *Hasselblad*, EU:C:1984:65.

179 *Ibid*, para 49.

180 *US v Sealy*, 388 US 350 (1967).

181 *US v Topco*, 405 US 596 (1972).

182 *US v Cooperative Theatres of Ohio*, 845 F2d 1367 (6th Cir.1988).

where, as here, the alleged agreement is a "naked restraint" with no possible pro-competitive justification'. In *Blackburn and Green v Sweeney and Pfeifer*,[183] two personal injury law firms agreed not to advertise in the other's territory, although their right to practise law was not restricted. The Court of Appeals for the Seventh Circuit considered the advertising restriction to be *per se* illegal market division and held that '[t]o fit under the *per se* rule an agreement need not foreclose all possible avenues of competition'.

From an economic perspective, there seems to be no difference between these arrangements and the joint campaign of two competitors to reduce the substitutability of their products. In fact, under the circumstances, this was very likely the only way to isolate the two markets. It is most unfortunate that the CJEU, instead of elaborating the definition of market sharing and its functional equivalents, summarily condemned the communication campaign and, thus, further impaired the consistency and predictability of object-analysis.

In *HSBC Holdings*,[184] banks manipulated the Euribor, which is an interest rate benchmark. This practice went beyond mere information exchange and amounted to a complex form of price fixing. Banks could not fix the interest rate, as it was linked to the interest rate benchmark the clients were aware of, but they could fix the interest rate benchmark. Still, instead of linking the practice to the category of horizontal price fixing, the CJEU engaged in a comprehensive case-by-case analysis to demonstrate the arrangement's anticompetitive object:

> [T]he Commission's characterisation of that manipulation as an infringement by object was essentially based on a restriction of competition created by an informational asymmetry between market participants, since participants in the manipulation, first, were better able to know in advance with a certain accuracy at what level Euribor would be and/or was intended to be set by their colluding competitors and, second, knew whether or not the Euribor on a given day was at artificial levels.[185]

In *Royal Antwerp Football Club*,[186] the CJEU encountered an input-side market-sharing arrangement. Nonetheless, instead of concluding that the restriction was in effect an atypical form of a traditional category of anticompetitive object (market sharing), it condemned it after an amorphous analysis. The UEFA rules required football clubs to have a minimum number of players who were trained nationally. This appeared to be a territorial division of the human resources among competitors and, as such, market sharing. Still,

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183 *Blackburn v Sweeney*, 53 F3d 825 (7th Cir 1995).
184 Case 883/19 P. *HSBC Holdings*, EU:C:2023:11.
185 Para 110.
186 Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010.

instead of applying this traditional object category and explaining why the restriction at issue amounted to a peculiar market sharing, it started the analysis from the forbidden fruit. Although the Court acted as if market sharing were not a traditional object category, it virtually provided a textbook explanation of the anticompetitive repercussions of input-side market sharing. The key issue was whether this market sharing was ancillary to the championships and, hence, calling for an effects-analysis, or naked and, hence, restrictive by object. However, the Court did not address this facet at all.

The Court established that:

> [the impugned rules] limit or control one of the essential parameters of the competition in which professional football clubs may engage, namely the recruitment of talented players, whatever the club or place where they were trained, which could enable their team to win in the encounter with the opposing team. (…) [T]hat limitation is likely to have an impact on the competition in which the clubs may engage, not only in the 'upstream or supply market', which, from an economic point of view, is constituted by the recruitment of players, but also in the 'downstream market', which, from the same point of view, is constituted by interclub football competitions.[187]

Then, it held that it was for the referring court to make the final determination on the basis of the following factors:

> [The referring court will have to take into account] the access of professional football clubs to the 'resources' essential to their success which, from an economic point of view, the players already trained are, by requiring them to recruit a minimum number of players trained nationally, to the detriment of the cross-border competition in which they could normally engage by recruiting players trained within other national football associations. The proportion of players concerned is, from that point of view, particularly relevant.[188]
>
> It will also be for the referring court (…) to assess whether or not the adoption of those rules had the objective of restricting the clubs' access to those resources, of partitioning or re-partitioning markets according to national borders or of making the interpenetration of national markets more difficult by establishing a form of 'national preference'.[189]

4.3.2.3 Applied by reason of clear anticompetitive effects

The rulings in *European Superleague*[190] and *International Skating Union*[191] introduced the idea that an agreement may be anticompetitive by object on

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[187] Para 107.
[188] Para 109.
[189] Para 110.
[190] Case C-333/21 *European Superleague*, EU:C:2023:1011.
[191] Case C-141/21 P *International Skating Union*, EU:C:2023:1012.

account of being clearly anticompetitive by effect. The two cases concerned constructive non-compete clauses used by dominant sporting organizations. The sporting associations engaged in economic activities related to the organization and marketing of competitions[192] and were in a vertical relationship with their members, who used these services. Although vertical non-compete clauses qualify as effect agreements and, owing to the dominant position of the 'service provider', anticompetitive effects could have been easily established (and were, in fact, established), the CJEU held that the restrictions at issue were anticompetitive by object, because they clearly had anticompetitive effects.

In *European Superleague*,[193] the CJEU examined the statutes of FIFA and UEFA which made participation in other club championships subject to their prior discretionary approval.[194] The European Superleague, an emerging alternative football championship, challenged this provision.

The CJEU established anticompetitive object after an obscure substantive analysis. It pointed out that the prior discretionary approval enabled FIFA and UEFA to control market access and exclude competing undertakings:

> [T]hose rules confer on those entities the power to authorise, control and set the conditions of access to the market concerned for any potentially competing undertaking, and to determine both the degree of competition that may exist on that market and the conditions in which that potential competition may be exercised. Those rules thus make it possible, by their nature, if not to exclude from that market any competing undertaking, even an equally efficient one, at least to restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, they also completely deprive professional football clubs and players of the opportunity to participate in those competitions, even though they could, for example, offer an innovative format whilst observing all the principles, values and rules of the game underpinning the sport. Ultimately, they completely deprive spectators and television viewers of the opportunity to attend those competitions or to watch the broadcast thereof.[195]

The Court portrayed this as an object-inquiry, but in fact it carried out a truncated effects-analysis fit for the case and based on common-knowledge facts. The only reason why FIFA and UEFA controlled access to the market and were able to exclude competitors was that they had market power, nay, dominance.[196] In the absence of market power, they would have had little chance to do that.

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[192] Case C-333/21 *European Superleague*, EU:C:2023:1011, para 179; Case C-141/21 P *International Skating Union*, EU:C:2023:1012, para 7.

[193] Case C-333/21 *European Superleague*, EU:C:2023:1011.

[194] Paras 171–174.

[195] Para 176.

[196] Para 117.

It was blatantly contradictory for the Court to conclude that the requirement of prior discretionary approval was anticompetitive irrespective of market power (which is a characteristic of object restrictions), because FIFA and UEFA had market power to put it into effect and, hence, it was anticompetitive irrespective of its effects, because it did have specific anticompetitive effects.

The restriction at issue was a constructive vertical non-compete obligation, where a championship organizer (FIFA, UEFA), which provided an idiosyncratic cooperative service, constructively blocked (or reserved the right to block) participation in competing championships (a competing service). Given that this amounted to a non-compete obligation with no time limit imposed by an undertaking having super-dominance, the anticompetitive effects could have been established without detailed empirical evidence or quantitative analysis. The near monopoly position of FIFA and UEFA is common knowledge and the negative effects on competition could be reasonably inferred from the combination of the super-dominance and the inherent foreclosure effects of non-compete obligations. The analysis would have been expected to extend to the measures' eventual redeeming virtues; however, none were demonstrated to justify a discretionary ban. The CJEU noted that if the prior approval had been linked to substantive criteria, that would have given the Court a chance to inspect whether these criteria were legitimate and embodied procompetitive considerations:

> For all of the foregoing reasons, the Court finds that, where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate (…) rules on prior approval, participation and sanctions such as those at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition and thus have as their object the prevention thereof.[197]

As a corollary, the CJEU's conclusion that the measures were anticompetitive was correct, but its classification flawed. Although it made no difference whether the restriction was anticompetitive by object or effect, the CJEU's ruling exacerbated the confusion about object and gave rise to perverse implications. For instance, it implied that single-championship requirements cannot benefit from *de minimis* and are anticompetitive even if the championship has small market share and, hence, cannot affect competition in the market. Furthermore, single-championship requirements might have procompetitive benefits in certain sports or protect investments against free riding. The object label rules out the consideration of these aspects under Article 101(1).

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[197] Para 178.

In *International Skating Union*,[198] the CJEU encountered essentially the same restriction. The International Skating Union, the dominant organizer of skating competitions, required all skaters affiliated with national member federations to stay away from unauthorized competitions, thus restricting the access of competing organizers to the relevant market. As in *European Superleague*,[199] the CJEU established anticompetitive object after an obscure substantive analysis, where it pointed out that the prior discretionary approval enabled the International Skating Union to control market access and exclude competing undertakings.[200]

Interestingly, in a case decided a decade before, the CJEU classified a similar restriction as not restrictive by object and condemned it as anticompetitive by effect. In *Ordem dos Técnicos Oficiais de Contas*,[201] the Portuguese Chamber of Chartered Accountants introduced a compulsory training system and put in place rules on the approval of service providers, while it also provided such services directly. The CJEU found that the system affected competition in the market for compulsory training for chartered accountants by establishing the conditions of access to this market. It found that the Chamber reserved a part of the market for itself and applied discriminatory conditions as to the other part, which vested it with a good deal of uncontrolled discretion. This suggests that the CJEU could have easily treated the non-compete rules in *European Superleague*[202] and *International Skating Union* as effect restrictions and, given the sporting associations' immense market power, condemn them as anticompetitive by effect. In all these cases, a major (or even dominant) service provider reserved a market for itself. Although it could be argued that in *European Superleague* and *International Skating Union* the associations made more intensive use of prior approval to exclude rivals,[203] there is no indication in the rulings that this was, indeed, the case or the outcome turned on this at all. Furthermore, it could be argued that the restriction in *Ordem dos Técnicos Oficiais de Contas* was even more effective, as it was mandatory for accounts to join the Portuguese Chamber, while there was no legal obligation to join the sporting associations in *European Superleague* and in *International*

[198] Case C-141/21 P *International Skating Union*, EU:C:2023:1012.
[199] Case C-333/21 *European Superleague*, EU:C:2023:1011.
[200] Paras 145–146 & 148.
[201] Case 1/12 *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127.
[202] Case C-333/21 *European Superleague*, EU:C:2023:1011.
[203] *See* Case 1/12 *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127, para 20 (Although the Chamber granted most of the applications, it did refuse approval in certain cases.)

Skating Union. Be that as it may, it is difficult to see the point in designating restrictions anticompetitive by effect as anticompetitive by object.

4.3.3 The Full-blown Doctrine

The post-*Allianz* case law made a couple of additions and clarification to the doctrine of unspecified object category and turned it into a full-blown doctrine. In *Visma Enterprise*,[204] the CJEU provided a muster of circumstances relevant for this object-inquiry, which was, in essence, based on the key elements set out in *Allianz*. These are 'the nature of the goods or services affected',[205] 'the nature and quantity, limited or otherwise, of the products covered by the agreement',[206] 'the real conditions of the functioning and the structure of the market or markets in question'[207] (presumably including absolute and relative market shares), 'the position and the importance of the parties on the market for the products concerned, [presumably including market power,] and the isolated nature of that agreement or, alternatively, its position in a series of agreements'.[208]

This list was subsequently extended to the agreement's procompetitive effects, which need to be taken into account as part of the object-inquiry if they are 'demonstrated, relevant and specifically related to the agreement'.[209] In *Generics (UK)*,[210] the CJEU held that although:

> the mere existence of such pro-competitive effects cannot as such preclude characterisation as a 'restriction by object' (…) [i]f such effects are demonstrated, relevant and specifically related to the agreement concerned, those pro-competitive effects must be sufficiently significant, so that they justify a reasonable doubt as to whether the (…) agreement concerned caused a sufficient degree of harm to competition, and, therefore, as to its anticompetitive object.[211]

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[204] Case C-306/20 *Visma Enterprise*, EU:C:2021:935.
[205] Para 72.
[206] Para 75.
[207] Para 72.
[208] Para 75.
[209] C-307/18 *Generics (UK)*, EU:C:2020:52, para 107; Case C-883/19 P *HSBC*, EU:C:2023:11, para 197; Case C-331/21 *EDP v Autoridade da Concorrência*, EU:C:2023:812, para 104.
[210] C-307/18 *Generics (UK)*, EU:C:2020:52.
[211] Para 106–107. *See also* para 103 (The procompetitive effects are relevant "in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition and, consequently, of whether it should be characterised as a 'restriction by object'.").

This was later confirmed in *HSBC*[212] and in *Autoridade da Concorrência v Ministério Público*.[213]

It seems that the only methodological element of the effects analysis that did not make its way into the object-inquiry is the counterfactual analysis. In the rulings in *Lundbeck*,[214] *Arrow*[215] and *Xellia Pharmaceuticals*,[216] handed down on the very same day, the CJEU established that it is not mandatory to carry out a counterfactual analysis to identify the agreement's object. The Court argued that if a counterfactual analysis were required, there would be absolutely no difference between object and effect:

> [U]nless the clear distinction between the concept of 'restriction by object' and the concept of 'restriction by effect' arising from the wording itself of Article 101(1) TFEU (…) is to be held not to exist, an examination of the 'counterfactual scenario', the purpose of which is to make apparent the effects of a given concerted practice, cannot be required in order to characterise a concerted practice as a 'restriction by object'.[217]

4.3.4 *Allianz* and the Specified Categories of Anticompetitive Object

The ruling in *Allianz* raised a paramount issue of conceptualization: did the doctrine sweep away the pre-existing categories of anticompetitive object and replace them with a truncated effects-analysis? The subsequent case law confirmed that these traditional categories were not replaced but completed. For a while, it could be argued that the Court made a step towards adding a new item to the list of anticompetitive agreements by sowing the seeds of a new specific category. Later case law confirmed that *Allianz* cannot be interpreted as merely creating a new category of vertical hardcore restraints but as redefining anticompetitive object at large.[218] According to this, anticompetitive object is an open box made up of a set of specified agreement categories (established categories) and the unspecified category of object agreements. Put otherwise, the revisable but relatively closed list of object agreements was turned into an illustrative list. An agreement coming under none of the specified categories

[212] Case C-883/19 P *HSBC*, EU:C:2023:11, paras 139, 141, 196–197.

[213] Case C-331/21 *EDP v Autoridade da Concorrência*, EU:C:2023:812, para 104.

[214] Case C-591/16 P *Lundbeck*, EU:C:2021:243.

[215] Case C-601/16 P. *Arrow*, EU:C:2021:244.

[216] Case C-611/16 P *Xellia Pharmaceuticals*, EU:C:2021:245.

[217] Case C-591/16 P *Lundbeck*, EU:C:2021:243, para 140. The CJEU repeated the same language in Case C-601/16 P. *Arrow*, EU:C:2021:244, para 85 and in Case C-611/16 P *Xellia Pharmaceuticals*, EU:C:2021:245, para 115.

[218] *See e.g.* Case C-331/21 *EDP v Ministério Público*, EU:C:2023:812, paras 99–102.

may still be automatically condemned if, after an abridged effects-analysis, it is found ‘sufficiently injurious to competition’.

In this spirit, in *Toshiba*,[219] AG Wathelet distinguished between agreements that ‘form (…) part of a category expressly referred to in Article 101(1) TFEU’[220] and those that ‘do (…) not come within one of the situations referred to in Article 101(1) TFEU or (…) ha[ve] features that render [it] (…) atypical or complex’.[221] The former may be condemned quickly, while in the case of the latter, since they are unspecified, a ‘more thorough’ contextual analysis is required.[222]

This also finds reflection in the *2023 Horizontal Guidelines*, which identify two major cases of anticompetitive object. The first one is made up of the specified categories of object agreements. Here, the condemnation is based on ‘reliable and robust experience’, which naturally cannot pertain to a specific agreement but to a type of agreement. The second cluster is made up of the unspecified category of agreements that are considered anticompetitive by object on a case-by-case basis, as a result of their ‘specific characteristics’, after analysing the agreement’s objectives and economic and legal context:

> According to the case law, restrictions can be categorised as restrictions ‘by object’ on the basis of sufficiently reliable and robust experience for the view to be taken that the agreement in question is, by its very nature, harmful to the proper functioning of competition, or on the basis of the specific characteristics of the agreement, from which it is possible to infer its particular harmfulness for competition, where appropriate as a result of a detailed analysis of the agreement, its objectives and its economic and legal context.[223]

4.3.5 Comparative Perspectives: *Allianz*, *Per se* and Intermediate Modes of Analysis

The idea that *per se* illegality may be applied after a truncated substantive analysis is unknown to US antitrust law. The unspecified category of anticompetitive object can, however, be juxtaposed with the intermediate modes of analysis. In fact, the idea that *Allianz* is, one way or another, the European ‘quick look’ is relatively widely accepted in the scholarship.[224] A closer look,

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[219] Opinion of AG Wathelet in Case C-373/14 P *Toshiba*, EU:C:2015:427.
[220] Para 89.
[221] Para 90.
[222] Para 90.
[223] Para 24.
[224] *See e.g.* Kelvin Hiu Fai Kwok, *Re-conceptualizing “Object” analysis Under Article 101 TFEU: Theoretical and Comparative Perspectives*, 14(3) Journal of Competition Law & Economics 467 (2018); Borbála Dömötörfy, Barnabás Sándor

however, reveals important conceptual differences, which showcase the idiosyncrasy of *Allianz*.

The crucial difference between 'quick look' and the *Allianz* doctrine lies in how and which agreements are caught in their nets. The prohibitive side of 'quick look' is identical to that of the *per se* rule. 'Quick look' is an exception to and not the extension of *per se* illegality. It softens the *per se* rule by creating a limited escape hatch. In *NCAA v Board of Regents*,[225] where 'quick look' was born, the Supreme Court explicitly found that the arrangement at stake constituted horizontal price fixing and output limitation, but 'decided that it would be inappropriate to apply a *per se* rule to this case'.[226] Accordingly, 'quick look' applies to specified agreements, which fall into one of the *per se* pigeonholes, and, hence, employs the *per se* rule's subsumption and classification analysis. On the contrary, the *Allianz* doctrine applies to unspecified agreements, which are located outside of the *per se* pigeonholes, and requires a kind of effects-analysis, although a truncated one.

Procompetitive benefits can save the agreement under both concepts, but the *Allianz* doctrine sets out more demanding requirements. Under 'quick look', procompetitive benefits exempt the agreement. This saving test is based on plausibility and its function is to ascertain whether the proffered justifications can be taken into account if and when proved and, hence, whether they merit a full consideration. In the *Allianz* doctrine, economic benefits are factored in at two points. First, they are factored into the classification analysis but subject to more demanding requirements than under 'quick look'. More is required here than plausibility. To falsify the classification as object, the procompetitive benefit need not only be 'relevant and specifically related' but also 'demonstrated'. Although this does not require a full proof and it is sufficient if the purported procompetitive effects 'justify a reasonable doubt' as to whether the agreement is anticompetitive by object, it does require an evidentiary substantiation. Second, in theory, like any object restriction, agreements falling into the unspecified category of anticompetitive object may be tested under Article 101(3), which can save them, if the defendant meets the high burden of proof embedded in this provision.

The abbreviated rule of reason has a closer resemblance to the *Allianz* doctrine. First, the two react to the same enforcement needs and have very similar rationales. Both are guided by the motivation to facilitate the enforcement of

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Kiss & Judit Firniksz, *Látszólagos dichotómia?: Versenykorlátozó cél és hatás vizsgálata az uniós versenyjogban, különös tekintettel a Budapest Bank ügyre*, 12 Verseny és Szabályozás 2019 26 (2020).

[225] *NCAA v Board of Regents*, 468 U.S. 85 (1984).

[226] Page 468 U.S. 100.

antitrust law against agreements that, while not *per se* illegal, are inherently suspect and, hence, do not deserve a full-blown rule of reason. Second, their scopes overlap: the abbreviated rule of reason applies to non-*per se* agreements, while the *Allianz* doctrine applies to agreements falling outside of the *per se* pigeonholes.

There is, however, a major conceptual difference between the two. The truncated rule of reason is still a rule of reason, even if an abbreviated one, and offers the defendant the right of full defence. It does not require the definition of the relevant market and the proof of market power or market effects in detail. Still, it requires the demonstration either that effects can be inferred from the circumstances or the effects emerged, although it is satisfied with a lower evidentiary standard. While it eases the burden to demonstrate a *prima facie* case (anticompetitive effects), it still requires some corroboration of these and affords the defendant a full opportunity to rebut and justify the restriction. The *Allianz* doctrine identifies agreements anticompetitive by object, and this entails a different conceptualization. Granted, the abbreviated effects-analysis it prescribes entails a circularity. It requires a quick look into the effects to identify if the agreement is anticompetitive by object and, hence, prohibited irrespective of its effects. Still, in theory, it prohibits agreements irrespective of effects and affords the undertaking no full chance to rebut the effects. The object label implies that the defendant cannot avoid condemnation even if proving lack of market power or market effects. Anticompetitive object cannot benefit from *de minimis* and is prohibited irrespective of market power and effects. Furthermore, the object label raises scepticism against countervailing economic benefits. The standard for the consideration of procompetitive benefits under Article 101(1) is not demanding. As noted above, procompetitive benefits are factored into the object-inquiry, and they may turn over the classification if they 'justify a reasonable doubt' as to whether the agreement is anticompetitive by object. On the other hand, it is a general principle that object agreements are unlikely to meet the conditions of Article 101(3).

Notwithstanding the above conceptual differences, as noted above, the *Allianz* doctrine and the abbreviated rule of reason are reactions to the same enforcement needs. They aim to replace the full-blown effects-analysis, in cases where it is needlessly lavish, with an intermediate analysis that fits the case. EU competition law placed this in the object-inquiry, and US antitrust in the rule of reason. The following section demonstrates that the former was an erroneous choice. In the chapter on anticompetitive effects, Section 5.4 demonstrates that, similarly to US antitrust law, EU competition law should accommodate its intermediate inquiry in effects-analysis.

4.3.6 Why the Object-Inquiry Should Involve No Comprehensive Case-by-Case Analysis

The case-by-case analysis established by the CJEU in *Allianz* for the object-inquiry deprives anticompetitive object of its very essence. Anticompetitive object prohibits a particular *conduct*, while anticompetitive effect prohibits a particular combination of *conduct and effect*. The idea that a frameless assessment of the totality of the circumstances must be carried out, where 'everything is relevant, nothing is dispositive',[227] goes against the very rationale of anticompetitive object[228] and is irreconcilable with the principle of automatic condemnation.[229]

The CJEU's maundering in *Visma Enterprise*[230] very well demonstrates the circularity and inconsistency generated by this flawed conception. The ruling lists the very same aspects and considerations for the object-inquiry as for the effects-analysis and gives the impression as if the two were the same. It does not even indicate that the analysis carried out as part of the object-inquiry should be perfunctory, less detailed, or quicker. In the first step, the ruling provides that when deciding whether an agreement:

> reveals a sufficient degree of harm to competition to be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration *the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market* or markets in question.[231]

If this inquiry identifies no anticompetitive object, the agreement's effects have to be examined:[232]

> To that effect, it is necessary to take into consideration the actual context in which the agreement occurs, in particular the economic and legal context in which the undertakings concerned operate, the *nature of the goods or services affected, as well*

[227] Frank H. Easterbrook, *The Limits of Antitrust*, 63 Texas Law Review 1, 12 (1984).
[228] *See* David Bailey, *Restrictions of Competition by Object Under Article 101 TFEU*, 49 Common Market Law Review 559, 586 (2012).
[229] *Cf.* Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* 67 & 85 (2018) (Referring to object as a "rule" and effect as a "standard".).
[230] Case C-306/20 *Visma Enterprise*, EU:C:2021:935.
[231] Para 62 (emphasis added).
[232] Para 71.

> *as the real conditions of the functioning and the structure of the market or markets in question.*[233]

Put it simply, an agreement may be condemned for being anticompetitive by object, if this is confirmed by an effects-analysis, and, if this effects-analysis identifies no anticompetitive object, the agreement may be condemned for being anticompetitive by effect if this is proved by an effects-analysis.

It is very difficult to extract any meaningful guidance from the CJEU's circular construction. Of course, common sense suggests that there should be a difference between the object-inquiry and the effects-analysis. It cannot be assumed that the Court envisaged the same analysis for both, even if indicating that the same analysis has to be carried out. Probably the most reasonable way of conceptualization is to conceive the object-analysis, as AG Rantos did in *Banco BPN/BIC Português*,[234] by examining the same aspects but in a less profound manner and focusing on salient cases. If a quick look does not reveal a compelling reason for condemnation, the inquiry has to proceed with a full-fledged effects analysis. In this construction, it is not the aspects but the depth of the analysis that distinguishes object from effect.

Most of the virtues of anticompetitive object accrue from its formalism, that is, the fact that it can be applied in a clear and predictable way. Case-by-case analysis stands for the lowest level of predictability law can afford. The principal merit of anticompetitive object is predictability and certainty. Competition law is notorious for having only a limited number of formal rules. Anticompetitive object is one of them. The requirement of a comprehensive case-by-case assessment extending to the totality of the circumstances destroys the formal character of this rule. Effects-analysis is not only time-consuming and costly but also unpredictable, and unpredictability comes at a cost.[235] Competition law cannot provide a better yardstick without generating false positives. At the same time, competition law does attempt to save clearly anticompetitive and clearly competition-friendly agreements from the quagmire of effects-analysis. The rationale of these formal rules is that a substantive case-by-case analysis would be of little added value; hence, there is no benefit counterbalancing the compliance and enforcement costs that the lack of formal rules generates. By adopting clear-cut rules, competition law establishes a no-go zone for arrangements that are always or almost always

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[233] Para 72 (emphasis added). See also para 82.

[234] Opinion of AG Rantos in Case C-298/22 *Banco BPN/BIC Português*, EU:C:2023:738, paras 43, 45 & 47.

[235] *See* Jan Broulík, *Predictability: a mistreated virtue of competition law*, Journal of Antitrust Enforcement (2023).

anticompetitive without a redeeming virtue (anticompetitive object) and a safe harbour for those that are always or almost always innocuous or even procompetitive (agreements of minor importance, block-exempted agreements). This 'regulatory utility' is, however, lost if the agreement is expected to be tested under the elusive and unpredictable concept of anticompetitive object, while the quick condemnation generates little value outside of favouring the competition authority or the plaintiff.

The idea behind anticompetitive object is to screen out agreements that are always or almost always anticompetitive without any redeeming virtue. This does not imply, however, that courts and competition authorities should scrutinize in individual cases whether the agreement is always or almost always anticompetitive without any redeeming virtue. The general and quite cryptic definition of anticompetitive object is not meant to be applied to 'flesh and blood' arrangements, but to create specific categories of agreements that are hit by automatic condemnation.[236]

The function of anticompetitive object can be fulfilled only if conceiving it as the 'definition of definitions' or a principle of 'judicial rule-making' used to frame the development of the various categories (pigeonholes) of agreements and not as a judiciable principle used for case-by-case assessment. Anticompetitive object is a category-building principle. Agreements are not afforded a general assessment and it is not examined on a case-by-case basis whether an agreement is anticompetitive by object or not. Instead, categories are elaborated based on the nature of agreements and experience, and the only task of the analyser is to decide whether the arrangement at stake comes under one of these categories. The function of anticompetitive object is not fulfilled if real agreements are subjected to a comprehensive assessment but if a relatively clear list of restrictions is created that are pronounced outright prohibited (automatically condemned) and are offered no chance for justification under Article 101(1). This implies that the concept works indirectly: it defines categories of automatically condemned restrictions, and it is these categories that are actually applied in competition matters. In this thinking, the relevant issue is not the speculative question if the arrangement is anticompetitive by object but if it comes under one of the categories of anticompetitive object. Of course, the list of the types of agreements that qualify as anticompetitive by object can and should change over time.

The CJEU's ruling in *Autoridade da Concorrência v Ministério Público*[237] provides a good illustration of how anticompetitive object's category-based

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[236] *Cf.* Alison Jones, *Left Behind by Modernisation – Restrictions by Object under Article 101(1)*, 6 European Competition Journal 649, 656–57 (2010).

[237] Case C-331/21 *EDP v Ministério Público*, EU:C:2023:812.

mode of operation is applied to a ‘not smoke-filled-hotel-room agreement’. In the context of a potentially horizontal non-compete clause, the Court abstained from engaging in a comprehensive case-by-case analysis, but availed itself of the established category of market sharing and strictly limited the substantive analysis to the question of subsumption and classification, that is, to deciding whether the arrangement was, indeed, a naked market sharing:

> Certain collusive practices between undertakings reveal, in themselves and having regard to the content of their provisions, their objectives, and the economic and legal context of which they form part, a *sufficient degree of harm to competition* for the view to be taken that it is not necessary to assess their effects, since some forms of coordination between undertakings can be regarded, *by their very nature*, as being harmful to the proper functioning of normal competition (…).
>
> Those collusive practices, which are capable of falling within the category of restrictions by object, *include market-sharing agreements*. Such agreements constitute particularly serious breaches of the competition rules (…), since they have, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by Article 101(1) TFEU, and such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned (…).
>
> The same is true of *market-exclusion agreements*, which have as their object the elimination of potential competition and the prevention of competition by keeping a potential competitor outside the market concerned.
>
> In such a situation, *the analysis of the economic and legal context* of which the agreement forms part *may be limited to what is strictly necessary* in order to establish the existence of a restriction of competition by object (…).[238]

This *modus operandi* parallels US antitrust law’s concept of *per se* illegality, with the qualification that under EU competition law, *per se* condemnation is formally confined to Article 101(1). It has to be noted, however, that, as a matter of practice, it is highly unlikely that an object agreement could meet the conditions of Article 101(3). *Per se* illegality is reserved for agreements that are always or almost always anticompetitive, without the prospect of any redeeming virtue. The court does not make a comprehensive assessment as to whether the agreement at stake has such characteristics (that is, whether it is always or almost always anticompetitive); on the contrary, there are certain categories of agreements that fall into a *per se* pigeonhole, and the role of the court is to decide whether the arrangement at stake falls into one of these pigeonholes.

Competition authorities and plaintiffs may be tempted to push the practice towards automatic condemnation for the purpose of simplifying the assessment. However, anticompetitive object is not meant to make the life of com-

[238] Paras 99–102 (emphasis added).

petition authorities more comfortable. It is meant to single out arrangements where the effects-analysis is indeed superfluous.

The *Allianz* doctrine and the idea that the object-inquiry is a comprehensive analysis carried out on a case-by-case basis caused significant damage to the coherence, predictability, and effectiveness of competition law.

One of the first victims of *Allianz* was the *De Minimis* Notice. The Commission's 2001 *De Minimis* Notice, a memento of the pre-*Allianz* era, followed a simple pattern made up of market share caps (10% for horizontal and 15% for non-horizontal restraints)[239] and a list of specifically defined restrictions that it labelled as anticompetitive by object and that could not benefit from the safe harbour.[240] The exhaustive list of excluded agreements set out in the 2001 *De Minimis* Notice created a clear negative (or reverse) checklist. If the legal counsel went through it and concluded that the agreement came under none of these categories, they could rest assured that the agreement would definitely benefit from the safe harbour, provided, of course, the relevant market share cap was not exceeded. In the wake of *Allianz*, the 2014 *De Minimis* Notice turned the earlier Notice's exhaustive enumeration into an illustrative list:

> In view of the clarification of the Court of Justice referred to in point 2, this Notice does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market. The Commission will thus not apply the safe harbour created by the market share thresholds set out in points 8, 9, 10 and 11 to such agreements. *For instance*, as regards agreements between competitors, the Commission will not apply the principles set out in this Notice to, *in particular*, agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers. *Likewise*, the Commission will not apply the safe harbour created by those market share thresholds to agreements containing any of the restrictions that are listed as hardcore restrictions in any current or future Commission block exemption regulation, which are considered by the Commission to generally constitute restrictions by object.[241]

Although the Commission adopted a guidance on the interpretation of anticompetitive object (*Guidance on Restrictions by Object*) to facilitate the application of the *De Minimis* Notice, this contains, likewise, only an illustrative

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239 Para 8.

240 Para 2. See *Expedia*, where the CJEU confirmed that hard-core restrictions are prohibited irrespective of market share. Case C-226/11 *Expedia*, EU:C:2012:795.

241 Para 13. (Emphasis added)

list.[242] It seems that agreements of minor importance no longer benefit from a safe harbour; they have to content themselves with a 'simple' harbour.[243]

The fate of *de minimis* is an epitome of how the *Allianz* doctrine eliminates the precious predictability of formal rules without offering any meaningful benefit in exchange. The idea behind *de minimis* is that whatever the parties agree to, their agreement will not be capable of appreciably affecting competition in the market, unless they have some sort of market power. The concept of agreements of minor importance does not imply that all agreements coming under its ambit are procompetitive. It simply implies that they are innocuous. In fact, restrictions by object are no exception to this. A horizontal price-fixing cartel where the parties have less than 10% market share cannot harm competition in the market. It would harm cartelists more than competition. The reason why these arrangements still cannot benefit from the *de minimis* is that this exception would go counter to and impair the compliance and enforcement benefits of the categorical prohibition. Given this background, there is no pressing need to damage the safe harbour of *de minimis* to catch some extremely rare and harmless cases, which allegedly slip out of the net of object categories.

The *Allianz* doctrine also erodes the traditional categories of anticompetitive object. As explicated in Section 4.3.2.2, in *Hoffmann-La Roche & Novartis*,[244] *HSBC Holdings*[245] and *Royal Antwerp Football Club*,[246] the CJEU encountered atypical price-fixing and market-sharing agreements but, instead, condemned them under the general concept of anticompetitive object. These rulings are the poster child of how *Allianz*'s unsophisticated approach blocks the development of well-established categories of anticompetitive object and destructs competition law analysis. Due to the case-by-case approach of *Allianz*, there is no need to improve and enhance the definition of object categories and bother with developing guiding principles for the characterization of borderline cases. They can be condemned after a summary analysis.

In the same vein, as presented in Section 4.3.2.3, the rulings in *European Superleague*[247] and *International Skating Union*[248] suggest that an agreement may be anticompetitive object on account of being clearly anticompetitive by

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[242] *Ibid*, 5.

[243] Csongor István Nagy, *The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law*, 36(4) European Competition Law Review 154, 158 (2015).

[244] C-179/16 *Hoffmann-La Roche & Novartis*, EU:C:2018:25.

[245] Case 883/19 P. *HSBC Holdings*, EU:C:2023:11.

[246] Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010.

[247] Case C-333/21 *European Superleague*, EU:C:2023:1011.

[248] Case C-141/21 P *International Skating Union*, EU:C:2023:1012.

effect. This is a blatantly inconsistent proposition, which goes against the very language of Article 101(1).

Finally, it should not be overlooked that EU competition law is applied in a decentralized system.[249] A solution that may seem plausible in a unitary system may not produce the same rules in a heterogeneous, decentralized one. Given that the EU enforcement system involves national competition authorities and courts with varying levels of competition law expertise, this exacerbates the risk of false positives inherent in the elusive *Allianz* doctrine and puts the consistent application of EU competition law at danger. Procedure and institutional frameworks do have implications for substantive law. Since the application of competition law is, in general, fact-intensive, clear-cut rules are extremely precious not only for enterprises (and their counsels) but also for national authorities and courts. For the effectiveness of the decentralized system, it is essential to preserve EU institutions' primacy to interpret EU competition law (which is, in case of the CJEU, in fact a monopoly). Therefore, it would be advisable to give, as far as possible, a uniform definition to legal concepts; otherwise, the uniform and consistent application of EU competition law would be unnecessarily endangered. Since it is inevitable to afford national authorities and courts a considerable give as to effects-analysis, this highly appreciates the value of a uniform and clear-cut concept of anticompetitive object.

In *Cartes bancaires*, AG Wahl drew attention to the foregoing risk very eloquently:

> 59. Such caution is all the more necessary because the analytical framework that the Court is led to identify will be imposed both on the Commission and on the national competition authorities, whose awareness and level of expertise vary.
> 60. The advantage in terms of predictability and easing the burden of proof entailed by identifying agreements that are restrictive by object would appear to be undermined if that identification ultimately depends on a thorough examination of the consequences of that agreement for competition which goes well beyond a detailed examination of the agreement.[250]

The risk the *Allianz* doctrine poses to the decentralized enforcement system is illustrated by the national follow-up judgment in the very case. The CJEU's preliminary ruling required the national court to thoroughly examine if the arrangement under scrutiny had an anticompetitive object in the light of all the circumstances of the case and its consequences in the market. In reality, however, the follow-up judgment of the Hungarian Supreme Court did not

[249] *See* Regulation 1/2003; ECN Communication.
[250] Paras 59–60.

provide, not by far, such a thorough examination, but quickly concluded that the arrangement was restrictive by object.[251]

The sequels of the *Allianz* ruling also provide examples where the national court did not seem to be familiar with the fundamentals of competition economics. In *Maxima Latvija*,[252] the job of the CJEU was not to develop EU competition law but to simply retell it. The national court sought to know if a vertical non-compete obligation (which is block-exempted under the VBER for five years) is anticompetitive by object. In the pre-*Allianz* era, this would have been close to an *acte claire*, but in the post-*Allianz* era virtually any agreement may be considered anticompetitive by object depending on the circumstances. In the end, the CJEU confirmed the obvious: vertical non-compete agreements are not anticompetitive by object and call for an effects-analysis.[253] The cases referred to the CJEU are top-level matters which the national judiciary finds particularly complex and difficult to dismantle. Hence, it can be reasonably assumed that the above references were only the tip of the iceberg.

One may wonder whether the unspecified category of anticompetitive object has any added value that could make up for the harm it causes in competition law. Since *Allianz*, all the cases where this legal test yielded a positive result were either covered by a specified object category anyway (Section 4.3.2.2) or were clearly anticompetitive by effect (Section 4.3.2.3). Those cases where the CJEU engaged with this doctrine in detail but finally identified no anticompetitive object were in the penumbra of a specific object category and could have been analysed as questions of delimitation (Section 4.3.2.1). The only exception is *Maxima Latvija*, which, however, was clearly not an object case and, hence, should have never been referred to the CJEU in the context of anticompetitive object. All in all, it seems that the *Allianz* doctrine has nothing to offer in exchange for the immense harm it causes to competition law.

4.4 SPECIFIED CATEGORIES OF ANTICOMPETITIVE OBJECT

The overwhelming majority of object cases deal with specified object categories. This section analyses these individual categories.

Section 4.4.1 explores the meaning of hardcore restraints and examines if they are anticompetitive by object. Sections 4.4.2–4.4.7 address the various individual object categories in terms of definition and delimitation, analyse them in the context of Article 101(1) and 101(3) and the block exemption

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[251] Judgment of the Hungarian Supreme Court in Case *Kfv.II. 37.268/2013/8.*
[252] C-345/14 *Maxima Latvija*, EU:C:2015:784.
[253] *Ibid*, paras 21 & 23–24.

regulations' hardcore lists, and explore their comparative perspectives. The first three of these are horizontal object agreements. Section 4.4.2 deals with the most emblematic forms of object restrictions: naked horizontal price fixing, output limitation and market sharing, jointly referred to as 'cartels'. Section 4.4.3 deals with the relatively new object category of horizontal information exchange. Section 4.4.4 deals with the very scant case law on group boycott. This is followed by the analysis of the three vertical object restrictions. Section 4.4.5 provides an analysis of vertical resale price fixing and demonstrates that the current approach that treats it as *per se* violating Article 101(1) but to be tested under Article 101(3) is inconsistent and impractical. Section 4.4.6 deals with absolute territorial and customer protection and provides a critical assessment. Section 4.4.7 deals with selective distribution. Section 4.4.8 provides a general assessment of the case law. It demonstrates that, perversely, the era of 'more economic approach' has seen a remarkable proliferation of object categories.

4.4.1 Are Hardcore Restrictions Anticompetitive by Object?

The term 'hardcore' is one of the most often used buzzwords of EU competition law, although its content and status are uncertain and the term itself has limited statutory basis.

In competition parlance, 'hardcore' may have two meanings. First, it may be used as a rough equivalent of anticompetitive object and *per se* illegality. In general, 'hardcore' is a synonym of anticompetitive object and the two terms are used interchangeably in colloquial jargon. Second, 'hardcore' may have a more limited meaning and refer to those agreements that are excluded from the benefit of block exemption. Although these are risky agreements and the Commission treats them as anticompetitive by object,[254] pursuant to the CJEU's case law, not all agreements figuring in the block exemption regulations' hardcore lists have an anticompetitive object.

The term 'hardcore' is unknown to the language of Article 101 and the term appears only in the various block exemption regulations (and in Commission guidelines and notices). From a strictly statutory perspective, the only legal consequence attached to them is the exclusion of the block exemption. Agreements containing a hardcore restriction cannot benefit from the block exemption but, technically speaking, they are not burdened by a presumption

[254] *De Minimis* Notice, para 13.

of illegality. In terms of statutory interpretation, not meeting the conditions of presumed legality does not imply presumed illegality.[255]

Nonetheless, in competition jargon, the term ‘hardcore’ is the telegraphese designation of agreements that are anticompetitive by object under Article 101(1) and are highly unlikely to be saved under Article 101(3). The Commission has consistently used the term in this sense. The *De Minimis* Notice expressly states that hardcore restrictions listed in block exemption regulations ‘are considered by the Commission to generally constitute restrictions by object’.[256] Parties that have a low market share (10% in case of horizontal, 15% in case of vertical agreements) are too small to harm competition and, hence, their agreements are pronounced compliant with Article 101(1). This safe harbour benefits, however, only effect agreements, given that object agreements have an anticompetitive nature and are restrictive irrespective of market circumstances and, hence, they breach Article 101(1) whatever the parties’ market share is. If hardcore restrictions are treated the same as object restrictions in the context of *de minimis*, this implies that they are anticompetitive under all circumstances.

While, in principle, all agreements have the chance to meet the requirements of Article 101(3) and no type of agreement is categorically excluded,[257] it is very unlikely that a hardcore restraint could fulfil these conditions.[258] By way of example, the *2022 Vertical Guidelines* note that the hardcore restrictions embedded in Article 4 of the VBER ‘are generally restrictions of competition

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[255] The harshness of this legal consequence distinguishes hardcore from ‘merely’ excluded restrictions. The latter are also excluded from the benefit of the block exemption, but, contrary to hardcore restraints, they do not drag down the entire agreement with themselves. If an agreement contains an excluded clause, it can still benefit from the block exemption; it is only the excluded clause that loses this benefit and needs to be defended under Articles 101(1) and 101(3). On the contrary, a hardcore clause puts the entire agreement outside the block exemption, which, then, needs to be defended under Articles 101(1) and 101(3).

[256] Para 13.

[257] *See* Section 6.3.

[258] *See* Valentine Korah & Denis O’Sullivan, *Distribution Agreements under the EC Competition Rules* 233 (2002); Frank Wijckmans, Filip Tuytschaever et al., *Vertical Agreements in EC Competition Law* § 2.134 (2006); Ali Nikpay, Lars Kjølbye et al., *Chapter 3: Article 81*, *in* The EC Law of Competition § 3.405 (Jonathan Faull and Ali Nikpay ed., 2007). *See also* Case 28/77 *Tepea*, EU:C:1978:133, para 57; Case 35/83 *BAT Cigaretten-Fabriken*, EU:C:1985:32, para 41.

by object within the meaning of Article 101(1)'[259] and 'unlikely to fulfil the conditions of Article 101(3)'.[260] In this conception, the designation as hardcore has wider repercussions than the label of anticompetitive object. Technically speaking, restrictions by object are by their very nature anticompetitive and are part of the terminology of Article 101(1).[261] On the other hand, the concept of 'hardcore' has a much broader application, as it is a notion used in the context of both Article 101(1) and Article 101(3).[262]

The CJEU's case law has been rejective of the equivalence of the two categories. Nonetheless, it is dubious if, as a rule of thumb, this judicial practice questions their practical congruence. The Court's case law establishes two principles in this regard. On the one hand, there is no formal equivalence between anticompetitive object and the BER's hardcore lists. On the other hand, hardcore restrictions are very strong candidates for anticompetitive object.

In *Pierre Fabre*[263] and *Coty*,[264] the CJEU dealt with this question. It gave no explicit answer, but the rulings may arguably be interpreted as suggesting that the categories generally coincide. The restriction in *Pierre Fabre* was found anticompetitive by object and excluded from the block exemption pursuant to Article 4. The restriction in *Coty* was not found anticompetitive by object and excluded from the block exemption pursuant to Article 4.

Recently, however, in *Super Bock Bebidas*,[265] the CJEU expressly held that no equality sign may be put between hardcore restrictions and anticompetitive object. At the same time, it also established that although being listed as hardcore in a BER is not determinative of the classification, it is part of the object-inquiry 'as an element of the legal context'.[266] 'However (…) that does not exempt (…) from carrying out the assessment' required by the object-inquiry.'[267] The Court noted that anticompetitive object and the BERs'

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[259] *2022 Vertical Guidelines*, para 179. *See also 2010 Vertical Guidelines*, para 47 and *2000 Vertical Guidelines*, para 7.

[260] *2022 Vertical Guidelines*, para 180(b).

[261] *See* Case C-306/96 *Javico v Yves Saint Laurent*, EU:C:1998:173, paras 14 & 20–21.

[262] *See Guidelines on Article 101(3)*, para 23; Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.41 (Jonathan Faull and Ali Nikpay ed., 2007).

[263] Case C-439/09 *Pierre Fabre,* EU:C:2011:649.

[264] Case C-230/16 *Coty,* EU:C:2017:941.

[265] The CJEU also encountered this question of interpretation in *Pierre Fabre* but refrained from answering it.

[266] Para 38.

[267] Para 39.

hardcore lists serve different purposes. The latter's sole purpose is to exclude certain restrictions from the block exemption.[268] The hardcore lists 'do not contain an indication as to whether those restrictions must be categorised as a restriction "by object" or "by effect". (…) It is therefore necessary to examine restrictions falling outside that exemption, on a case by case basis, with regard to Article 101(1) TFEU.'[269]

All in all, there are two compelling reasons that refute the congruence of 'object' and 'hardcore'. First, as noted by the CJEU in *Super Bock Bebidas*, the function of hardcore lists is not to set out the purview of the prohibition embedded in Article 101(1), but to draw the limits of an exemption to it. Accordingly, as they limit a presumption of legality, they can create no presumption of illegality. Second, the equivalence of the two categories would also raise serious problems of constitutional authorization. The interpreter of Article 101 is the CJEU and not the Commission. The Commission's delegated legislative power is limited to the block exemption. It would be *ultra vires*, if it used this power to legislate on the prohibitive purview of Article 101(1).

The lack of formal equivalence, however, does not rule out treating the two categories as being, as a matter of practice, more or less the same. The ruling in *Super Bock Bebidas* suggests that being listed as hardcore may indicate anticompetitive object. The pivotal question is, of course, how strong this indication is and whether its force is comparable to a presumption, and if it is, how strong that presumption is. An overly strong presumption would lead to salient contradictions and significantly increase the risk of false positives. The BERs' hardcore lists contain not only classic object restrictions, but also restraints that have never been declared anticompetitive by object by the CJEU and are not considered to be always or almost always harmful to competition. Furthermore, at times, BERs define the hardcore restriction more widely than the congenial object category. For instance, the VBER treats the prohibition of passive sales in the same way in relation to both territorial and customer protection, even though the case law pronounces only the former anticompetitive by object. The key reason that makes absolute territorial exclusivity anticompetitive by object is the single market imperative: market actors should not be allowed to partition the internal market along the national borders the Member States are not allowed to maintain. The Commission extrapolated this to customer restrictions, where the purpose of market integration has no relevance; hence, a more permissible approach would be sensible. In the same vein, the VBER sets up a requirement of reservation for exclusivity arrangements, which is, however, unknown to the CJEU's case law. Pursuant to Article 4

[268] Para 40.
[269] Para 41.

of the VBER, the restriction of active sales into a territory or to a customer group is acceptable only if that territory or customer group was 'reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors'.[270] The CJEU's case law contains no such requirement.

4.4.2 Cartels: Price Fixing, Output Limitation and Market Sharing

Cartels are the poster child of restrictive agreements. They feature the most straightforward theory of harm, and if something has to be prohibited by competition law, it is these arrangements. Though their boundaries may raise questions of interpretation, the justification of these categories is unquestionable, and they face the same harsh treatment in both EU and US antitrust law. The three forms of cartelization (naked horizontal price fixing, output limitation and market sharing), including their functional equivalents, such as bid rigging, are the different faces of the same evil. It has to be noted that cartelization may be carried out not only by way of an agreement and concerted practice but also by a decision of an association of undertakings.[271]

Section 4.4.2.1 explains the common features and congeniality of cartels. Section 4.4.2.2 deals with atypical cases and questions of delimitation.

4.4.2.1 Congeniality of cartels

Cartels are horizontal naked restrictions manifesting themselves in price fixing, market sharing or output (and innovation) limitation (or a combination of these). They are each other's functional equivalents. Price cartels fix prices. Quantity cartels fix output, for example, by setting production quotas. Market sharing may be based either on territory or customer groups. These types of collusion are closely linked in economic terms. As a basic rule, higher prices entail lower quantity, lower quantity entails higher prices. Accordingly, price fixing indirectly determines quantity, collusion on quantity indirectly determines prices. Market sharing creates a single-seller status in a given territory or market segment and, hence, indirectly determines prices and quantity.

This implies that the three basic types of cartel are different but interchangeable means to achieve the very same end, and the choice is based on questions of effectiveness and practicality. Cartelist companies usually have imperfect information about the profit-maximizing point on the demand curve, which yields the profit-maximizing price and the corresponding profit-maximizing quantity. At times, it is easier for them to agree on a price, while in other cases it may be more effective to agree on quantity (or quotas). Furthermore, the

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[270] Articles 4(b)(i), 4(c)(i)(1) & 4(d)(i) VBER.
[271] *See e.g.* Case C-128/21 *Lietuvos notarų rūmai*, EU:C:2024:49, paras 94–96.

different forms of cartel feature different degrees of detectability of cheating. In some cases, it may be easier for cartelist companies to detect under-pricing than overproduction. They may even combine price fixing with quantity limitation or quotas to make detection easier and compliance more transparent.

Cartels are less organized than a single firm but strive to act as such. Hence, the economic theory describing monopoly conduct also applies to cartelized markets, although the market power of most cartels falls short of a complete monopoly. In terms of impact on the market, all these forms of collusion lead to higher prices and lower quantity. In terms of impact on social surplus, cartels, in essence, have twofold effects. First, they transfer a part of the surplus from the buyers to the sellers (in case of a buyer cartel, from the sellers to the buyers). This means that social surplus is not reduced but allocated differently. Second, they generate deadweight loss, which is made up of those transactions where the buyers are willing to pay the competitive price but cannot or are not inclined to pay the cartel price.

Although cartels aim to function as a monopoly, they are less effective for three major reasons.

First, the main difference between a cartel and a monopoly is that the former has a decentralized organization and power structure. Contrary to a monopoly, which is a single firm with a centralized organizational structure, cartels are made up by individual firms, which preserve their independence. As a corollary, cartels do not function through organizational hierarchy but through agreement. This implies both less effective decision-making and less effective implementation.

Second, a monopoly has a uniform cost structure and a uniform perception about supply and demand. On the contrary, cartelist companies have dissimilar cost structures and may have discordant perceptions about the elasticity of supply and demand; hence, their views on the profit-maximizing monopoly price may differ. This implies that decision-making needs to reconcile and accommodate different views on the profit-maximizing price. Given that framework conditions may be constantly changing, this may call for the continuous revisitation of the compromise.

Third, cartels also feature a moral hazard in terms of cheating. Cartel members are interested in both cartelization and opportunistic behaviour. A member of a price-fixing cartel is interested in selling under the cartel price, as, this way, it can expand output and still sell at an inflated price. If it sells at the cartel price, it charges a higher price but faces a reduced demand. If there is no cartel and it sells at the competitive price, it can sell more but at a reduced price. Joining the cartel but cheating results, however, in the best individual outcome. The cheating cartelist can increase both price and output by slightly undercutting the cartel price. Its prices are more attractive than those of obedient cartelists, thus attracting customers, while they are still higher than the prices it could charge absent the cartel. Opportunistic behaviour yields higher profits than competition and cartel obedience. Hence, the detection and punishment mechanisms are important elements of effective cartel management. These, however, may leave traces and, hence, increase the chance of being caught.

4.4.2.2 Atypical cases and ancillary restraints

Substantive legal issues emerge in the context of atypical forms of collusion and the distinction between ancillary and naked restraints.

The Commission investigated the manipulation of interest rate benchmarks in a number of cases and treated them as price fixing.[272] A contextual analysis confirms that tampering with the interest rate benchmark was, in fact, tantamount to the fixing of the interest rate. The financial institutions could not fix the interest rate, as it was linked to the benchmark the clients were aware of. Nonetheless, they could fix the interest rate benchmark. This practice goes beyond mere information exchange. By manipulating the interest rate benchmark, banks made use of the information asymmetry and market customs to indirectly fix the interest rate. In *HSBC Holdings*,[273] the CJEU confirmed this characterization.

> 108(…) [T]he manipulation of 19 March 2007 consisted of submitting low quotes for the 3m Euribor with a view to reducing that rate on that date for the purpose of making a gain on a category of EIRDs, namely interest rate futures linked to the 3m Euribor. According to those findings, which are not challenged by the HSBC companies, that manipulation consisted of gradually gaining a very large 'buyer' exposure, in respect of which the bank thus receives the fixed rate and pays the variable rate, and reducing the level of the variable rate at the maturity date by concerted action. (…)
>
> 110(…) [T]he Commission's characterisation of that manipulation as an infringement by object was essentially based on a restriction of competition created by an informational asymmetry between market participants, since participants in the manipulation, first, were better able to know in advance with a certain accuracy at what level Euribor would be and/or was intended to be set by their colluding competitors and, second, knew whether or not the Euribor on a given day was at artificial levels.

The CJEU encountered a similarly atypical cartel in *Hoffmann-La Roche & Novartis*,[274] where the parties divided the market by means of a publicity campaign. Although the CJEU did not specify this but condemned the practice

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272 See the Commission's decisions in Case AT.40135 *FOREX*.
273 C-883/19 *HSBC Holdings*, EU:C:2023:11.
274 C-179/16 *Hoffmann-La Roche & Novartis*, EU:C:2018:25.

by means of the *Allianz* doctrine, the arrangement was an idiosyncratic form of market sharing (see Section 4.3.2.2).

The economic and legal context serves a crucial role in distinguishing naked restrictions, which are anticompetitive by object, from ancillary restraints, which deserve an effects-analysis.

In the last decade, payment card systems' multilateral interchange fees (MIFs) gave rise to a number of cases. This fee is used in inter-bank clearing and is paid by the acquiring bank (which operates the bank card terminal installed at the merchant) to the issuing bank (which issued the bank card used for the payment). When the customer pays by card, the acquiring bank charges a fee to the merchant. Afterwards, the acquiring bank passes a portion of the merchant fee on to the issuing bank. Accordingly, the issuing bank has two sources of income: the cardholder may pay a fee for the issuance of the payment card, and the acquiring bank shares a part of the merchant fee. As a corollary, the payment card industry is a two-sided market. These fees are normally fixed on a multilateral basis. This practice gave rise to various competition investigations in Europe,[275] where competition authorities approached the MIF in various ways: some considered it to be an effect agreement, some pronounced it anticompetitive by object. In the end, the controversies about the MIF resulted in a European legislative intervention in the form of a regulatory cap.[276]

While the MIF may have the appearance of price fixing, as the fee paid in consideration of the services provided by the issuing bank is fixed uniformly by competitors, this conclusion is overshadowed by the fact that both sides of the market (sellers and buyers) are involved in the agreement, and the MIF may be regarded as ancillary to the effective operation of the payment card system.

The question of classification has been addressed by the CJEU in several rulings. This strand of the case law is presented in detail in Section 4.3.2.1. In these cases, the CJEU, in essence, held that, given their legal and economic context, the MIF is generally presumed not to be anticompetitive by object.

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[275] *See e.g.* Case C-382/12 *MasterCard*, EU:C:2014:2201; *Sainsbury's v MasterCard*, [2016] CAT 11; Michele Giannino, *The Italian Competition Authority finds an anti-competitive agreement in the banking sector but does not impose any fine* (ABI / SEDA), April 28, 2017, e-Competitions April 2017, Art. N° 84366; Commission Decision of April 29, 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39398 – *Visa MIF*).

[276] Regulation 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions. OJ L 123, 19.5.2015, p. 1–15.

The distinction between naked and ancillary restraints plays a pivotal role in cases involving joint purchasing, joint selling (commercialization) and technology pools. These arrangements feature elements characteristic to object restrictions but are not naked, that is, they are reasonably linked to a legitimate cooperation. As demonstrated in Section 4.2.4, what distinguishes, in this context, ancillary restraints from naked restrictions is the integration of economic activities. Joint production, selling, commercialization, technology pools and joint purchasing may very naturally involve price limitations and territorial restrictions but have nothing to do with naked restraints. As put by the US Supreme Court in *Texaco v Dagher*, a price determination ancillary to a joint venture 'may be price fixing in a literal sense, but it is not price fixing in the antitrust sense'.[277] The classification of these agreements turns on whether they involve a genuine integration of economic activities. If they do, they qualify as effect agreements. Evidently, the fact that the effects-analysis yields a positive result cannot imply that the agreement is anticompetitive by object.

The Commission's *2023 Horizontal Guidelines* reflect the notion that classification turns on the integration of economic activities. Joint purchasing arrangements are not anticompetitive by object 'if they genuinely concern joint purchasing, namely where two or more purchasers jointly negotiate and conclude an agreement with a given supplier relating to one or more trading terms governing the supply of products to the cooperating purchasers'.[278] On the contrary, 'buyer cartels' are naked restrictions and are distinguished from joint purchasing by the lack of 'joint negotiations vis-à-vis the supplier'.[279] Price fixing, output limitations or market partitioning are anticompetitive by object. Nonetheless, if included in a commercialization agreement and are 'ancillary to the main aim of the agreement and where that main aim falls outside the prohibition of Article 101(1)', they are not automatically condemned.[280] A bidding consortium, to be assessed on the basis of effects, implies 'a joint bid in a public or private procurement competition'.[281] On the contrary, bid rigging (collusive tendering) is anticompetitive by object.[282] The major difference between the two is that '[b]id rigging generally does not involve joint participation in the tender procedure',[283] while '[b]idding consortium agreements

[277] *Texaco v Dagher*, 547 U.S. 1, 6 (2006), citing *Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1, 9 (1979).
[278] *2023 Horizontal Guidelines*, para 278.
[279] *2023 Horizontal Guidelines*, para 279.
[280] Para 328.
[281] Para 347.
[282] Para 348.
[283] Para 349.

can involve a significant degree of integration of resources and activities by the parties for the purpose of participating in the tender procedure, in particular when forms of joint production are included in the activity subject to the tender'.[284] In the absence of a significant degree of integration of resources and activities, a bidding consortium may avoid 'by object' condemnation, if the parties are unable to bid individually.[285]

The *2023 Horizontal Guidelines'* distinction between naked and ancillary restraints, which turns on the existence of and linkage to the genuine integration of resources and activities, represents a major improvement in comparison with the earlier generation of guidelines.

The *2011 Horizontal Guidelines* provided that horizontal joint selling agreements 'are (…) likely to restrict competition by object'[286] but failed to specify why and when. The explanation the *Guidelines* offered was that these agreements 'have the object of coordinating the pricing policy of competing manufacturers or service providers'.[287] This is, however, both inconsistent and useless. Namely, it is not price fixing as such but the lack of ancillarity that may make these arrangements anticompetitive by object. Every arrangement involving joint productive activities may easily involve price determinations; hence, it is of little help to say that tampering with prices may make them anticompetitive by object. What may make these arrangements anticompetitive by object is not that they tamper with prices but that they are not ancillary, because they do not involve a genuine integration of economic activities, or they are not reasonably related to economic integration.

The above unguided methodological approach features the EFTA Court's ruling in *Ski Taxi*[288] analysed in Section 4.2.2. The judgment failed to identify the dividing line between object and effect; instead, it ruled that 'everything is relevant, nothing is determinative' for this inquiry. The Court overlooked that what makes price fixing not naked is not its ultimate impact on competition demonstrated by a speculative assessment of the totality of the circumstances, but its ancillarity to the genuine integration of resources and activities.

Unfortunately, the *2023 Horizontal Guidelines* contradict themselves at a later point, when providing that '[a]greements limited to joint selling and in general commercialisation agreements that include joint pricing (…) are (…) likely to restrict competition by object'.[289] Joint pricing ancillary to joint selling

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284 Para 350.
285 Paras 352 & 357.
286 *2011 Horizontal Guidelines*, para 234.
287 *Ibid*, para 234.
288 *Ski Taxi*, E-3/16, [2016] EFTA Ct Rep 1002.
289 Para 329.

that consists of the genuine integration of resources and activities should merit an effects-analysis, since it may feature significant procompetitive effects and raises little competition concern in case of no or low market power. For instance, a joint logistic platform and marketing cooperative created by SMEs may enhance the effectiveness of the commercialization of their products and, thus, intensify competition, while the participating firms' low market share may raise no outweighing competition concerns. This shortcoming is partially rectified by the provision that puts non-exclusive arrangements outside the ambit of anticompetitive object.

> That assessment does not change if the agreement is non-exclusive (that is to say, where the parties are free to sell individually outside the agreement), as long as it can be concluded that the agreement will lead to a coordination of the prices charged by the parties to all or part of their customers.[290]

The same applies to output limitations, where the *2023 Horizontal Guidelines* apply the object rule to exclusive arrangements:

> Similarly, output limitations are a serious competition concern that can arise from commercialisation agreements. Where the parties to the agreement decide jointly on the quantity of the products to be marketed, the available supply of the contractual products may be reduced, which increases their price. Each party to the agreement should in principle remain free to independently decide to increase or reduce its output to meet market demand. The risk of output limitations is more limited in the case of non-exclusive commercialisation agreements, provided that the parties remain free and truly available to serve individually any additional demand and provided that the agreement does not lead to a coordination of the supply policy of the parties.[291]

The Article 101 treatment of joint-venture-like cooperations, such as joint purchasing, joint selling (commercialization) and technology pools, also must have regard to the fact that these arrangements are functional equivalents of mergers. An asymmetric treatment of the same competition issues under Article 101 and merger control could create an incentive for undertakings to carry out economic cooperations by way of concentrations instead of agreements. If undertakings set up a cooperative joint venture to purchase, produce or sell their product, that is governed by Article 101. If they set up a full-function joint venture, that is governed by the merger control

[290] Para 330.
[291] Para 331.

rules.[292] Although there are important differences between cooperative and full-function joint ventures they need to consider when making the choice, the eventually higher competition risks attached to the former may create an incentive for the latter and, hence, distort sound market decisions.

Unfortunately, the *2014 Technology Transfer Guidelines* still follow the blinkered approach of the earlier generation of guidelines. It pronounces the pooling of competing technologies anticompetitive by object and attaches no relevance to the integration of resources and activities:

> Technology pools may also be restrictive of competition. The creation of a technology pool necessarily implies joint selling of the pooled technologies, which in the case of pools composed solely or predominantly of substitute technologies amounts to a price fixing cartel.[293]

This practically means that horizontal technology pools may run the risk of object treatment, although the inclusion of substitute technologies does not amount to a cartel, if they do not make up an overwhelming part of the pool. This approach applies even if the pool is not exclusive, that is, the licensors' right to license their technologies outside the pool is untouched. Naked price fixing and price fixing ancillary to joint selling are treated alike, although the latter may have significant procompetitive benefits, including economies of scale and scope, as well as reduction of transaction and administration costs. The counterfactual analysis suggests that, if the pool has no exclusive licensing rights, it does not take away from competition. This shortcoming is mitigated by the *Guidelines'* notion that substitutability is not a technical but an economic quality and, hence, substitutable technologies have to be treated as complementary, if there is a joint demand for them in the market. Although the parties may be competitors in general, if there are no competitive relationships between the technologies included in the pool, the cooperation is not horizontal:

> The distinction between complementary and substitute technologies is not clear-cut in all cases, since technologies may be substitutes in part and complements in part. When due to efficiencies stemming from the integration of two technologies licensees are likely to demand both technologies, the technologies are treated as complements, even if they are partly substitutable. In such cases it is likely that in the absence of the pool licensees would want to licence both technologies due to the additional economic benefit of using both technologies as opposed to using only one of them. Absent such demand based evidence on the complementarity of the pooled

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[292] Article 3(4) Merger Control Regulation; *Merger Control Jurisdictional Notice*, paras 91–109.

[293] Para 246.

> technologies, it is an indication that these technologies are complements if (i) the parties contributing technology to a pool remain free to license their technology individually and (ii) the pool is willing, besides licensing the package of technologies of all parties, to license the technology of each party also separately and (iii) the total royalties charged when taking separate licences to all pooled technologies do not exceed the royalties charged by the pool for the whole package of technologies.[294]

The ancillarity rationale has a general application and is and ought to be valid outside the circle of joint purchasing, joint production and joint commercialization. The CJEU used this approach as to patent settlement agreements. In *Generics*[295] and the *Lundbeck* cases,[296] it held that a patent settlement involving reverse payments is not anticompetitive by object if it is connected with a genuine patent dispute. In the same vein, according to the *2023 Horizontal Guidelines*, the exchange of commercially sensitive information is not anticompetitive by object if it is ancillary to a legitimate cooperation or a merger, including the acquisition process.[297]

The BERs are also impregnated by the concept of ancillarity when it comes to the classification of horizontal (non-naked) cooperation agreements. Although, as explained in Section 4.4.1, no equality sign may be put between anticompetitive object and the BERs' hardcore lists, the latter do provide important guidance.

The SBER lists price fixing, output limitation and market and customer sharing as hardcore;[298] however, this classification does not apply to ancillary restrictions in production agreements.[299] '[T]he fixing of prices when selling the specialisation products to third parties' is a hardcore restriction, 'with the exception of the fixing of prices charged to immediate customers in the context of joint distribution'.[300] The limitation of output or sales is a hardcore restric-

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[294] Para 254.

[295] Case C-307/18 *Generics*, EU:C:2020:52. *See* Bernadette Zelger, *By Object or Effect Restrictions – Reverse Payment Settlement Agreements in light of* Lundbeck, Servier*, and* Generics, 12(4) Journal of European Competition Law and Practice 273 (2020).

[296] Case C-586/16 P *Sun Pharmaceutical & Ranbaxy*, EU:C:2021:241, paras 68–71; Case C-588/16 P *Generics*, EU:C:2021:242, paras 66–69; Case C-591/16 P *Lundbeck*, EU:C:2021:243, paras 1112–115; Case C-601/16 P *Arrow*, EU:C:2021:244, paras 71–75; Case C-611/16 P *Xellia & Alpharma*, EU:C:2021:245, paras 96–99; Case C614/16 P *Merck*, EU:C:2021:246, paras 84–88.

[297] *2023 Horizontal Guidelines*, paras 357(d), 369 & 371.

[298] Article 5 SBER.

[299] See *Horizontal Guidelines*, paras 222–223.

[300] Article 5(a) SBER.

tion, ‘with the exception of: (i) provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements; (ii) the setting of capacity and production volumes in the context of a joint production agreement; (iii) the setting of sales targets in the context of joint distribution’.[301]

The RDBER follows a similar approach. ‘[T]he limitation of output or sales’ is a hardcore restriction, with the exception of:

(i) the setting of production targets, where the joint exploitation of the results includes the joint production of the contract products;
(ii) the setting of sales targets, where the joint exploitation of the results:
  (1) includes the joint distribution of the contract products or the joint licensing of the contract technologies; and
  (2) is carried out by a joint team, organisation or undertaking, or is jointly entrusted to a third party;
(iii) practices constituting specialisation in the context of exploitation;
(iv) the restriction of the freedom of the parties to produce, sell, assign or license products, technologies or processes which compete with the contract products or contract technologies during the period for which the parties have agreed to jointly exploit the results.[302]

In the same vein, ‘the fixing of prices when selling the contract products or licensing the contract technologies to third parties’ is a hardcore restriction, ‘with the exception of the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the joint exploitation of the results: (i) includes the joint distribution of the contract products or the joint licensing of the contract technologies; and (ii) is carried out by a joint team, organisation or undertaking, or is jointly entrusted to a third party’.[303]

The idea of ancillarity is similarly present in US antitrust law and governs the distinction between naked restrictions, which are *per se* illegal or subject to a quick look, and non-naked restrictions, which benefit from a rule of reason. In *Broadcast Music v Columbia Broadcasting*,[304] competitors fixed prices, but this was ancillary to the joint blanket licensing scheme, so the Supreme Court refused to apply the *per se* rule. In *Texaco v Dagher*,[305] the price fixing was ancillary to a joint venture; hence, the court applied the rule of reason. In *FTC v Actavis*,[306] the concept of ancillarity was applied to a patent settlement

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[301] Article 5(b) SBER.
[302] Article 8(b) RDBER.
[303] Article 8(c) RDBER.
[304] *Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1 (1979).
[305] *Texaco v Dagher*, 547 U.S. 1 (2006).
[306] *FTC v Actavis*, 570 U.S. 136 (2013).

involving reverse payment. Absent a genuine patent dispute, this would have amounted to market sharing. Because, however, the restriction was ancillary, the Court found the rule of reason applicable.

4.4.3 Horizontal Information Exchange

In the first half-century of EU competition law, horizontal information exchange was not anticompetitive by object, although it could imply or amount to another restriction, such as price fixing, that was considered anticompetitive by object. If competitors share information on future prices or promise to provide early notice on price changes, they may be viewed as tampering with prices and, as such, engaging in price fixing. In these cases, of course, the pertinent rules were applied but the arrangement was not condemned as anticompetitive information exchange but as horizontal price fixing.

It is worthy of note that horizontal information exchange is not a separate *per se* category in US antitrust law. It may amount to price fixing or come under another *per se* pigeonhole. Nonetheless, if the exchange of pricing information cannot be viewed as in fact resulting, for example, in constructive price fixing, it needs to be scrutinized under the rule of reason.[307]

4.4.3.1 Emergence and definition of the object category

The roots of the separate object category of horizontal information exchange go back to the CJEU's obscure ruling in *T-Mobile Netherlands*.[308] Here, in the context of a horizontal exchange of pricing information (commissions paid to dealers), the CJEU pointed out that '[a]n exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings'.[309] The ruling could be viewed as creating a stand-alone object category for horizontal information exchange that removes uncertainty concerning future conduct. According to the case law at the time, the exchange of pricing information, depending on the circumstances, could constitute price fixing in one or two steps. If it could be viewed as implying a tacit collusion

[307] *American Column & Lumber Co. v US*, 257 US 377 (1921); *Maple Flooring Manufacturers v US*, 268 US 563 (1925). Although the Supreme Court applied the *per se* rule to a horizontal information exchange in *Sugar Institute v US*, 297 US 553 (1936), in *United States v Gypsum Co.*, 438 US 422 (1978), it held that information exchange as such is not *per se* illegal. For an overview, *see* Daniel A. Crane, *Cartels and the exchange of information*, in Research Handbook on Cartels 221 (Peter Whelan ed., 2023).

[308] Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343.

[309] C-8/08 *T-Mobile Netherlands*, EU:C:2009:343, paras 41 & 43.

on prices, the exchange on pricing information turned into an agreement on prices. Failing this, anticompetitive object could be established in two steps: information exchange could give rise to a presumption that the undertakings acted based on the disclosed information and, hence, engaged in concerted practice, which is anticompetitive by object.[310] The language of the ruling in *T-Mobile Netherlands*,[311] however, suggests that there is a separate object category for information exchange and anticompetitive object can be established in one step in case uncertainties concerning future conduct are removed, even if this implies no tacit collusion on prices. The distinction between the two-step notion and the separate category of information exchange is subtle but important. It adumbrates the extension of *per se* treatment to communications that remove uncertainties concerning future conduct that have otherwise not been treated as anticompetitive by object.

It is difficult to ascertain if the CJEU was determined to create a separate category for information exchange. The interpretation of the ruling in the context of the fact pattern may suggest a negative answer. The undertakings discussed the intended modifications of their commissions paid to dealers and the reference suggested that the commissions were not set independently but 'discussed'. In the same vein, AG Kokott confirmed that the undertakings 'exchanged confidential information *and* held discussions on it which in turn resulted in coordination of their market conduct in relation to reductions in certain commission payments to their respective dealers'.[312] Given that the competitors' discussion related to a strategic choice to be implemented, the separate category of information exchange was not necessary for the condemnation under Article 101(1)[313] and would, under holding analysis, amount to *obiter dictum*.

After the first express mention of information exchange as a separate object category in *T-Mobile Netherlands*,[314] the Commission included a separate

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[310] Joined Cases 40 to 48, 50, 54 to 56, 111, 113, 114/73 *Suiker Unie*, EU:C:1975:174, paras 173–74; Case 172/80, *Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paras 14–15 & 53; *See* C-49/92 P *Anic Partecipazioni*, EU:C:1999:356, para 121; C-199/92 P *Hüls*, EU:C:1999:358, paras 161–62.

[311] Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343.

[312] Para 36 (emphasis added).

[313] Bernd Meyring, *T-Mobile: Further confusion on information exchanges between competitors*, 1(1) Journal of European Competition Law & Practice 30, 31 (2010) ("Where two competitors discuss, on the basis of their market knowledge and strategic planning, how their competing products should best be priced, we would hardly speak of an information exchange but rather of a price fixing cartel.").

[314] Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343.

chapter on information exchange in the *2011 Horizontal Guidelines*, which declared an undefined cluster of horizontal information exchange as anticompetitive by object.[315] When introducing it, the *2011 Guidelines* exemplified but did not define the object category. They identified two groups of agreements. The first one was defined and consisted of the exchange of information concerning future prices and quantity. The second one was undefined and made up of arrangements whose anticompetitive object was corroborated by a case-by-case analysis extending to the totality of the circumstances. In essence, any arrangement could come under this category, except for those which were specifically excepted (exchange of historical, statistical and genuine public data).[316]

This approach, including the uncertainty emerging from the case-by-case assessment implied in the undefined category, was maintained by the *2023 Horizontal Guidelines*. The exchange of information on future conduct, in particular prices and quantities, may amount to a restriction by object:

> Depending on the legal and economic context and on the objectives an undertaking seeks to attain, a public disclosure that signals the undertaking's future intentions on key competition parameters, for instance, prices or quantities, may also be considered a restriction by object.[317]
>
> Exchanging information relating to undertakings' future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome.[318]

Apart from these, the exchange of any other information, in particular commercially sensitive information, may lead to a restriction by object, depending on the context. This requires a case-by-case assessment:

> In particular, an information exchange will be considered a restriction of competition by object where the information is commercially sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market. (…) the Commission will pay particular attention to its content, its objectives and the legal and economic context in which the information exchange takes place.[319]
>
> Depending on the objectives that the exchange seeks to attain, and the legal and economic context thereof, exchanges of other types of information may also

315 Chapter 2.
316 *2011 Horizontal Guidelines*, paras 89–90, 92–94.
317 *2023 Horizontal Guidelines*, para 416.
318 Para 414.
319 Para 413.

constitute restrictions of competition by object. It is therefore necessary to assess exchanges of information on a case-by-case basis.[320]

The above amounted to a strikingly novel development. Before the 2009 ruling in *T-Mobile Netherlands*[321] and the *2011 Horizontal Guidelines*, the classification as anticompetitive by object had no basis in the CJEU case law and found no reflection either in the earlier Commission guidelines[322] or the scholarship.[323]

4.4.3.2 Futility of the object category

What is good in the object category of horizontal information exchange is not new, and what is new is not good.

On the one hand, the defined category of information exchange anticompetitive by object is redundant. It is made up of arrangements that, as noted above, had always been condemned as anticompetitive by object, though not as an information exchange but as a cartel. The information exchanges that can reasonably be considered anticompetitive by object had been and are still covered by the traditional pigeonholes of anticompetitive object.

All horizontal arrangements 'tamper[ing] with price structures'[324] may easily amount to illegal price fixing.[325] In the same vein, disclosing future prices may imply an 'invitation to follow suit'. Furthermore, the CJEU held that even if an information exchange does not fit in one of the traditional categories, it may give rise to a stifling presumption that the undertakings engaged in concerted practice,[326] by way of example, to fix the prices. It is settled case

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[320] Para 414.

[321] Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343.

[322] *2001 Horizontal Guidelines*

[323] Richard Whish, *Competition Law* 118–20 (2009).

[324] *US v Socony-Vacuum*, 310 US 150 (1940).

[325] C-199/92 P *Hüls*, EU:C:1999:358, paras 160–61.

[326] Joined Cases 40 to 48, 50, 54 to 56, 111, 113, 114/73 *Suiker Unie*, EU:C:1975:174, paras 173–74 ('[E]ach economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells. … [The] requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, *it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*'.) (emphasis added). Case 172/80, *Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paras 14–15.

law that if competitors exchange information concerning future prices, it is presumed that they act on the basis of this information, thus plunging into an automatically condemned concerted practice.[327] If the information exchange is systematic, it is virtually impossible to rebut this presumption.[328]

This is acknowledged by the *2011 Horizontal Guidelines* themselves, when they provide that sharing future prices and quantity not only amounts to an information exchange anticompetitive by object but also qualifies as a genuine price-fixing and quantity cartel.[329]

On the other hand, neither the *2011*, nor the *2023 Guidelines* give any key to the undefined category but try to explain it with a tautology. The *2011 Guidelines* provided that '[a]ny information exchange with the *objective* of restricting competition on the market will be considered as a restriction of competition by *object*'.[330] The *2023 Guidelines* preserved this tautology: '[d]epending on the *objectives* that the exchange seeks to attain, and the legal and economic context thereof, exchanges of other types of information may also constitute restrictions of competition by *object*'.[331] While the undefined category is not expected to have a specific meaning (after all, it is supposed to be applied on a case-by-case basis), it is expected to be accompanied with meaningful selection criteria. In contrast, the *Guidelines* essentially provide that all arrangements that have an anticompetitive object are anticompetitive by object and try to cover up this tautology with a wordplay. The subtle semantic difference between 'objective' and 'object' has no role in EU competition law, the two terms are, in this context, synonymous. This finds reflection in most of the language versions.[332] The two terms have such a close meaning that, for instance, the Hungarian version uses the very same word for 'objective' and 'object' (even though Hungarian language also offers roughly synonymous expressions, like 'célzat').

This, again, puts the factfinder in a difficult position. On the basis of the content of the agreement it cannot be decided whether the information exchange is anticompetitive by object or not.[333] The *2023 Guidelines* provide

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[327] *Ibid*, para 53.

[328] *See* C-49/92 P *Anic Partecipazioni*, EU:C:1999:356, para 121; C-199/92 P *Hüls*, EU:C:1999:358, paras 161–62.

[329] *2011 Horizontal Guidelines*, para 74.

[330] *Ibid*, para 72 (emphasis added).

[331] *2023 Horizontal Guidelines*, para 414 (emphasis added).

[332] In the French version: "objectif" and "objet", in the German version: "zum Ziel hat" and "bezweckte Wettbewerbsbeschränkung", in the Romanian version: "scop" and "obiect", in the Spanish version: "objetivo" and "objeto".

[333] As for the complexities of the assessment of information exchange agreements, *see* Matthew Bennett & Philip Collins, *The Law and Economics of*

that this analysis extends to the 'legal and economic context in which the information exchange takes place'.[334] It is very difficult to imagine how the arrangement could be classified without looking into the market and carrying out some sort of an effects-analysis.

All in all, it may be concluded that the exchange of information on future prices and quantities has always been condemned with the conceptual difference that it melted into the notion of price-fixing and quantity cartel. What is really new in the *2011* and the *2023 Horizontal Guidelines* is that they create an undefined cluster of information exchanges that are anticompetitive by object and, hence, any arrangement may be automatically condemned (aside from the ones specifically excepted) after an abridged market analysis.

The *2023 Horizontal Guidelines* also contain some odd provisions on unilateral information sharing:

> Depending on the legal and economic context and on the objectives an undertaking seeks to attain, a public disclosure that signals the undertaking's future intentions on key competition parameters, for instance, prices or quantities, may also be considered a restriction by object. Similarly, a public disclosure that does not clearly benefit customers but does signal to competitors how they should act, or the consequences of acting or failing to act in a certain way, or how the undertaking will react to competitors' conduct, will be considered a restriction by object.[335]

Although the exchange of the above information on a consensual basis may give rise to an agreement anticompetitive by object, the situations circumscribed by the above provision refer to genuine unilateral conduct and the *Guidelines* provide no indication why they should come under the notion of agreement or concerted practice.

Perversely, notwithstanding the above development, none of the BERs list any form of horizontal information exchange as hardcore, although the horizontal BERs (the 2023 RDBER and the 2023 SBER) were adopted long after the ruling in *T-Mobile Netherlands*[336] and the *2011 Horizontal Guidelines*. This is a salient contradiction, as the Commission meticulously includes object restrictions in the BERs' hardcore lists; it even includes restrictions the CJEU has never pronounced anticompetitive by object.

Information Sharing: The Good, the Bad and the Ugly, 6 European Competition Journal 311 (2010).

[334] *2023 Horizontal Guidelines*, para 413.

[335] Para 416.

[336] Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343.

As noted above, before the CJEU's 2009 ruling in *T-Mobile Netherlands*[337] and the *2011 Guidelines*, one could find no ruling in the case law of the CJEU where an information exchange was condemned as a *sui generis* restriction by object and not as part of a cartel. Thereafter, this label naturally gained ground. Still, since its introduction, the cases that were labelled as 'by object' information exchanges could equally be assessed and condemned under one of the traditional categories of cartels.[338]

According to the *2023 Horizontal Guidelines*, the exchange of information, including commercially sensitive information, is presumed to be compliant with Article 101(1) if it is ancillary to a legitimate cooperation or a merger, including the acquisition process. '[T]he information strictly necessary for the formulation of the bid and the performance of the contract' may be shared with consortium members. The circulation of this information 'should be restricted to relevant staff on a "need to know" basis'.[339] Information exchange ancillary to a horizontal cooperation agreement, such as joint purchasing, joint production or joint commercialization, is compliant with Article 101, provided the main cooperation in the context of which it takes place does not violate Article 101.[340] In the same vein, information exchange directly related to and necessary for the acquisition of a business, including the information shared during the screening of the target enterprise, may benefit from the same favourable presumption.[341]

4.4.4 Group Boycott

Group boycott has had a less important role in the history of EU competition law than in US antitrust law. During the first five decades of EU competition law, the status of collective boycott had been unclear,[342] and it had been uncertain if these practices amounted to a violation by object. The *2011 Horizontal Guidelines* did not address the issue. In *Slovak Banks*,[343] however, the CJEU pronounced the collective boycott of Slovak banks against a competitor, which had no licence and, hence, allegedly operated on the market illegally, to *per se*

[337] Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343.
[338] *See e.g.* Case C-286/13 P *Dole*, EU:C:2015:184; Case C-99/17 P *Infineon Technologies*, EU:C:2018:773.
[339] *2023 Horizontal Guidelines*, para 357(d).
[340] *2023 Horizontal Guidelines*, para 369.
[341] Para 371.
[342] Richard Whish, *Competition law* 535–538 (2009).
[343] Case C-68/12 *Slovenská sporiteľňa*, EU:C:2013:71.

violate Article 101(1). The Court held that the lack of a licence did not justify the group boycott.

Consequent on this judicial development, the *2023 Horizontal Guidelines* pronounce horizontal group boycotts, where competitors conspire to exclude a competitor by means of collective refusal to deal, anticompetitive by object. The boycott may be carried out both directly, by the conspiring competitors' refusal to deal with the targeted rival, and indirectly, by boycotting or threatening to boycott the trading partners (suppliers, dealers) of the targeted rival to coerce them to break up business ties. Competitors' agreement to boycott a supplier or a buyer (vertical boycott) is to be judged based on its effects.

> A joint purchasing arrangement that aims to exclude an actual or potential competitor from the downstream selling market(s) is a form of horizontal boycott and amounts to a restriction of competition by object. Horizontal boycotts should be distinguished from vertical boycotts, namely an agreement between purchasers not to buy from particular suppliers on the upstream market. While a vertical boycott may amount to a restriction of competition by object in certain circumstances, this is not generally the case. For example, an agreement between purchasers to no longer buy products from certain suppliers due to particular product characteristics, production processes or working conditions, for example because the products offered are unsustainable whereas the purchasers want to buy only sustainable products, does not have the object of restricting competition. Vertical boycotts must therefore be considered in their legal and economic context to assess their actual or likely effects on competition.[344]

In US antitrust law, horizontal group boycotts[345] have a more extensive case law.[346] Although in *Northwest Stationers* the Supreme Court admitted 'that there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine',[347] naked horizontal agreements not to deal with a competitor or its trading partners seems to fall into the *per se* category.[348]

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[344] Para 284.

[345] In *NYNEX Corp. v Discon, Inc.*, 525 U.S. 128 (1998), the Supreme Court held that vertical boycotts are not *per se* illegal.

[346] *Fashion Originators' Guild of America v FTC*, 312 U.S. 457 (1941); *Associated Press v US*, 326 U.S. 1 (1945); *Klor's v Broadway-Hale Stores*, 359 U.S. 207 (1959); *Northwest Wholesale Stationers v Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985); *NYNEX Corp. v Discon, Inc.*, 525 U.S. 128 (1998).

[347] *Northwest Wholesale Stationers v Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985).

[348] Daniel Francis & Christopher Jon Sprigman, *Antitrust: Principles, Cases, and Materials* 222 (American Bar Association, 2023).

4.4.5 Resale Price Fixing

EU competition law's approach has always been very hostile towards RPF. While maximum resale price fixing and recommended prices are not anticompetitive by object,[349] the fixing of specific or minimum resale prices (RPF) is an object restriction[350] and, hence, *per se* violates Article 101(1). Besides the economic arguments against RPF, EU law's approach has also been influenced by the purpose of market integration.[351] RPF is often used as a tool to back a system of territorial protection by maintaining approximately uniform prices in different Member States, thus impeding the inter-state flow of goods.[352]

Section 4.4.5.1 examines the anticompetitive object of RPF. Section 4.4.5.2 provides an analysis of RPF in the context of Article 101(3). Section 4.4.5.3 explores the comparative perspectives of vertical price fixing. Section 4.4.5.4 provides an assessment and demonstrates that EU competition law's approach is both inconsistent and goes against sound economic theory.

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[349] The CJEU approved a price recommendation system in *Pronuptia* holding that "although provisions which impair the franchisee's freedom to determine his own prices are restrictive of competition, that is not the case where the franchisor simply provides franchisees with price guidelines, so long as there is no concerted practice between the franchisor and the franchisees or between the franchisees themselves for the actual application of such prices." Case 161/84 *Pronuptia*, EU:C:1986:41, para 25. The CJEU has not yet ruled on maximum resale prices. Likewise, the Commission also takes a more relaxed view with regard to recommended prices and maximum price fixing. *See 2022 Vertical Guidelines*, paras 198–201; *2010 Vertical Guidelines*, paras 226–229; Case COMP/B-1/38348 *Repsol CPP SA* [2004] OJ C 258/03, paras 18–20.

[350] *See* Bhawna Gulati, *Minimum Resale Price Maintenance Agreements – and the Dilemma Continues*, 8(2) The Competition Law Review 129, 133 (2012); Mart Kneepkens, *Resale Price Maintenance: Economics Call for a More Balanced Approach*, 28(12) European Competition Law Review 656, 656 (2007) (Stating that in practice RPF is "subject to a *per se* prohibition.")

[351] *See* Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 105 (2002); Lennart Ritter & W. David Braun, *European Competition Law: a Practitioner's Guide* 269–270 (3d ed., 2005); Femi Alese, *Unmasking the Masquerade of Vertical Price Fixing*, 28(9) European Competition Law Review 514, 525 (2007).

[352] As shown by several Commission decisions. *See e.g.* 77/66/EEC *GERO-fabriek* [1977] OJ L 16/8, para II(3)(c); 2002/190/EC *JCB* [2002] OJ L 69/1, paras 168–172.

4.4.5.1 Anticompetitive object

In *Binon*,[353] the CJEU ruled that RPF agreements 'constitute, of themselves, a restriction of competition'[354] (i.e. they are anticompetitive by object).[355] The automatic condemnation of RPF under Article 101(1) was also confirmed in *Erauw-Jacquery*.[356] In *Pronuptia*,[357] the CJEU subjected recommended prices to an effects-analysis but declared that RPF is regarded as automatically restrictive.[358] In accordance with this case law, the Commission's decisional practice is replete with cases where the anticompetitive nature of RPF was established,[359] and the 'soft law' documents issued by the Commission also follow this approach.[360] RPF may be accomplished both directly and indirectly (through practices having tantamount effects).[361]

The judicial and decisional practice has been at fault for a comprehensive explanation on why RPF is treated as anticompetitive by object, albeit some hints were given. One reason could be the elimination of intra-brand price competition. In *Erauw-Jacquery*, the CJEU referred to the dealer-cartel theory,

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[353] Case 243/83 *Binon*, EU:C:1985:284.

[354] Or as the authentic French version of the judgment says: "*sont en elles-memes restrictives de concurrence*".

[355] The CJEU held that RPF comes under Article 101(1)(a) ("directly or indirectly fix purchase or selling prices or any other trading conditions". Para 44.

[356] Case 27/87 *Erauw-Jacquery*, EU:C:1988:183, paras 12–15 (Condemning the fixing of the minimum "resale" price in a technology transfer agreement concerning plant breeders' rights.).

[357] Case 161/84 *Pronuptia*, EU:C:1986:41.

[358] Para 25.

[359] 73/322/EEC *Deutsche Philips* [1973] OJ L 293/40, para 2(b); 77/66/EEC *GERO-fabriek* [1977] OJ L 16/8, para II(3)(c); 80/1333/EEC *Hennessy-Henkell* [1980] OJ L 383/11, para 20; 97/123/EC *Novalliance/Systemform* [1996] OJ L 47/11, para 101; 2001/135/EC *Nathan-Bricolux* [2001] OJ L 54/1, para 72; 2002/190/EC *JCB* [2002] OJ L 69/1, paras 168–172; Case COMP/37.975 *PO/Yamaha* Commission decision of 16.07.2003 (unpublished but available at http://ec.europa.eu/competition/antitrust/cases/decisions/37975/en.pdf), paras 88, 127. 137, 144 and 155–156; 2001/711/EC *Volkswagen* [2001] OJ L 262/14, paras 71 and 74; 2001/135/EC *Nathan-Bricolux* [2001] OJ L 54/1, paras 86 and 88. See Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 105–106 (2002).

[360] *Guidelines on Article 101(3)*, para 23; *2010 Vertical Guidelines,* paras 48 & 223; *2022 Vertical Guidelines*, para 195.

[361] *See* Case 86/82 *Hasselblad*, EU:C:1984:65, para 49 (In this case a clause enabled the producer to control dealers' advertisements as regards selling prices and empowered it to prohibit such advertisements.).

when asserting that RPF 'agreements have the same effects as a price system fixed by a horizontal agreement'.[362]

The *2010 Vertical Guidelines* contained a detailed list of the competition risks RPF may bring forth:[363] (1) it may facilitate collusion between suppliers; (2) it may facilitate collusion between dealers; (3) 'it may more generally soften competition between manufacturers and/or between retailers'; (4) 'the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand'; (5) 'it may lower the pressure on the margin of the manufacturer, in particular where the manufacturer has a commitment problem'; (6) it 'may be implemented by a manufacturer with market power to foreclose smaller rivals'; and (7) RPF 'may reduce dynamism and innovation at the distribution level'.[364]

The *2022 Vertical Guidelines* identify the competition risks of RPF in a similar way: (1) RPF may facilitate collusion between suppliers; (2) it may facilitate collusion between dealers; (3) it 'may (…) soften competition between manufacturers and/or between retailers'; (4) it may 'reduce the pressure on the supplier's margin'; (5) it 'may prevent or hinder the entry and expansion of new or more efficient distribution formats, thus reducing innovation at the distribution level'; (6) it 'may be implemented by a supplier with market power to foreclose smaller rivals'; and (7) it eliminates 'intra-brand price competition'.[365]

Economic literature demonstrates that while RPF agreements may bring forth all the above repercussions, this is not necessarily so, and they may even generate procompetitive effects. By way of example, price-transparency-induced horizontal concerns emerge only if RPF is widely practised in the industry and the market is susceptible of tacit collusion; as far as the risk of price increase is concerned, RPF relates to the price of *a particular brand* and *not to the market price*; hence, the increase of the market price is not inevitable. All in all, these examples suggest that RPF is *not always* anticompetitive, but it may

[362] Case 27/87 *Erauw-Jacquery*, EU:C:1988:183, para 15.

[363] Contrary to the *2000 Vertical Guidelines*, which failed to demonstrate with compelling arguments that RPF is "always or almost always" anti-competitive and, in para 112, pointed only to two main negative effects: "(1) a reduction in intra-brand price competition, and (2) increased transparency on prices. (…) Increased transparency on price and responsibility for price changes makes horizontal collusion between manufacturers or distributors easier, at least in concentrated markets. The reduction in intra-brand competition may, as it leads to less downward pressure on the price for the particular goods, have as an indirect effect a reduction of inter-brand competition."

[364] Para 224.

[365] Para 196.

raise concerns *under certain circumstances*. Accordingly, the circumstances of the case at stake must be taken into account in order to ascertain whether these potential negative effects are, indeed, present. This suggests that RPF can be reasonably judged only on the basis of an effects-analysis and, hence, the automatic condemnation under Article 101(1) increases the risk of false positives.

Recently, in *Super Bock Bebidas*,[366] the CJEU revisited the *per se* treatment of RPF under Article 101(1) and held that:

> the finding that a vertical agreement fixing minimum resale prices entails a 'restriction of competition by object' may only be made after having determined that that agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterise the economic and legal context of which it forms part.[367]

If stripped of its context, the ruling may suggest that vertical resale price fixing is not necessarily and not automatically anticompetitive by object. This interpretation would, however, be excessive. Instead, the ruling appears to be an idiosyncratic rephrasing of the existing case law. First, context has always been part of the object-inquiry, and the case law has consistently repeated the mantra that the agreement's legal and economic context has to be taken into account and the agreement has to be assessed in this context. The national court asked whether this mantra actually means something, and the CJEU answered the question in the affirmative. Second, the ruling was adopted without an AG opinion, which may happen if the case raises no new point of law.[368] This implies that the CJEU envisaged no paradigmatic change, whereas the above interpretation would amount to a fundamental change in the status of resale price fixing under Article 101(1).

All block exemption regulations list vertical RPF as hardcore. Article 4 of the VBER[369] classifies RPF as hardcore and deprives it of the benefit of the block exemption:

> The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
>
> (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or

[366] Case C-211/22 *Super Bock Bebidas*, EU:C:2023:529.

[367] Para 43.

[368] Article 20(5) Statute of the Court of Justice of the European Union.

[369] This provision repeats Article 4 of the 2010 VBER, which, in turn, repeats Article 4 of the 1999 VBER.

minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

The same language is used in Article 4(2)(a) of the 2014 TTBER:[370]

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:
   (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

4.4.5.2 RPF and Article 101(3)

The last decade has seen a quiet transformation in the status of RPF. Until the *2010 Vertical Guidelines*, it had generally been understood that RPF violated Article 101 nearly *per se*.[371] It had been anticompetitive by object under Article 101(1), and it had been highly unlikely to meet the requirements of Article 101(3). Nonetheless, in response to mounting economic criticism[372] and the US Supreme Court's invalidation of the *per se* rule on RPF in *Leegin*, the Commission signalled a subtle change in its policy in the *2010 Vertical Guidelines*. It invited undertakings to defend RPF arrangements under Article 101(3), while keeping all the other elements of the regime intact. RPF

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370 This provision repeats Article 4(2)(a) of the 2004 TTBER.

371 Mart Kneepkens, *Resale Price Maintenance: Economics Call for a More Balanced Approach*, 28(12) European Competition Law Review 656, 656 (2007). *See* Alison Jones, *Resale Price Maintenance: a Debate about Competition Policy in Europe*, 5(2) European Competition Journal 479, 501–502 (2009).

372 *See e.g.* Alison Jones, *Resale Price Maintenance: a Debate about Competition Policy in Europe*, 5(2) European Competition Journal 479 (2009); Sandra Marco Colino, *Vertical Agreements and Competition Law* 183–194 (2010); Andreas P. Reindl, *Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach*, 33(4) Fordham International Law Journal 1300 (2010); Csongor Istvan Nagy, *EU and US Competition Law: Divided in Unity?*, 131–138 & 159–162 (2013); Csongor István Nagy, *Resale Price Fixing after the Revision of the EU Vertical Regime – A Comparative Perspective*, 54(4) *Acta Juridica Hungarica* 349 (2013); Ioannis Apostolakis, *Resale price maintenance and the limits of Article 101 TFEU: reconsidering the application of EU competition law to vertical price restraints*, PhD thesis, University of Glasgow (2016), https://theses.gla.ac.uk/7101/; Christy Kollmar, Resale Price Maintenance and the Law (2023).

remained anticompetitive by object under Article 101(1), listed as hardcore in Article 4 of the 2010 VBER and presumed not to meet the conditions of Article 101(3). The only change was that the *2010 Vertical Guidelines* stressed that this presumption is rebuttable, and the parties have an improbable but not unrealistic chance to survive on the basis of individual exemption.[373]

The point that RPF is unlikely to fulfil the conditions but may be tested under Article 101(3)[374] was not new at all. It had always been possible to plead an efficiency defence under Article 101(3),[375] and this possibility also remained highly exceptional under the *2010 Guidelines*. The novelty of the *2010 Vertical Guidelines* was that they provided three examples when RPF could meet the requirements of Article 101(3): introduction and promotion of a new product;[376] coordinated short-term low-price campaign in a franchise or similar distribution system applying a uniform distribution format;[377] tackling the free-rider problem concerning pre-sale services, especially in case of experience or complex products.[378] Notwithstanding these examples, RPF remained highly risky and the *2010 Guidelines* provided no clear guidance as to when it may be practised. The burden on undertakings pleading an efficiency defence under Article 101(3) is extremely high and, besides the above three examples, the *2010 Guidelines* seemed to offer only a little more than what was offered by the *2000 Guidelines*. As a matter of fact, RPF was unlikely to fulfil the requirements of an individual exemption, although it was theoretically possible.

This approach was maintained by the 2022 VBER and the *2022 Vertical Guidelines*. RPF is anticompetitive by object and excluded from the benefit of the VBER as hardcore[379] (the prohibition does not apply to genuine agency agreements[380]), but the parties 'may rely on efficiency justifications under Article 101(3) of the Treaty'.[381] The *2022 Vertical Guidelines* repeated the three examples provided by the *2010 Guidelines* and completed them with a fourth one (prevention of using the product as a loss leader):

(a) When a manufacturer introduces a new product, RPM may be an efficient means to induce distributors to better take into account the manufacturer's

[373] *2010 Vertical Guidelines*, para 47.
[374] Para 223.
[375] Case 243/83 *Binon*, EU:C:1985:284, para 46.
[376] Para 225.
[377] Para 225.
[378] Para 225.
[379] *2022 Vertical Guidelines*, paras 45 188 & 195; Article 4(a) VBER.
[380] *2022 Vertical Guidelines*, para 192.
[381] *2022 Vertical Guidelines*, para 195.

interest in promoting that product. Article 101(3) of the Treaty also requires that there are no realistic and less restrictive alternative means (…).

(b) Fixed resale prices, and not just maximum resale prices, may be necessary to organise a coordinated short-term low price campaign (of 2 to 6 weeks in most cases), in particular in a distribution system where the supplier applies a uniform distribution format, such as a franchise system. (…)

(c) A minimum resale price or MAP can be used to prevent a particular distributor from using the product of a supplier as a loss leader. (…)

(d) In some situations, the extra margin provided by RPM may allow retailers to provide additional pre-sales services, in particular in the case of complex products. (…) The supplier must demonstrate that there is a risk of free riding at the distribution level, that fixed or minimum resale prices provide sufficient incentives for investments in pre-sale services and that there is no realistic and less restrictive alternative means of overcoming such free riding.[382]

It is noteworthy that there has never been a single formal Commission decision granting leave to RPF under Article 101(3), neither before the *2010 Guidelines* nor afterwards. Until the entry into force of Regulation 1/2003, the Commission had monopoly over the application of Article 101(3),[383] and it had never ever granted individual exemption to an RPF agreement.[384] The only case where the Commission found that the conditions of an individual exemption were met was *Newspaper Distribution Contracts in Belgium – AMP*. However, here the Commission adopted a comfort letter and not a formal decision.[385] In this case, it was the essential characteristic of the market that the products (newspapers and magazines) had an extremely short lifespan and the publisher used a sale or return system. Nevertheless, it was not clear whether the arrangement was accepted for being an agency agreement or for meeting the conditions of Article 101(3). The dealers did not acquire title over the periodicals and the commercial risks were borne by the supplier. The Commission noted that '[i]t is therefore economically acceptable in the distribution system concerned that the operator *who incurs the main economic risk* should control the selling price'. Genuine agency agreements, at least as to intra-brand restraints, fall outside of the scope of Article 101(1).[386] Subsequently, the application of EU competition law, including Article 101(3), was decentralized; nonetheless, it is scarcely conceivable that this provision would be interpreted otherwise

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[382] *2022 Vertical Guidelines*, para 197.

[383] Article 9(1) of Regulation 17.

[384] *See* Richard Whish, *Competition Law* 637 (2009); Bhawna Gulati, *Minimum Resale Price Maintenance Agreements – and the Dilemma Continues*, 8(2) The Competition Law Review 129, 133 (2012).

[385] Cases IV/C-2/31.609 and 37.306, XXIXth *Report on Competition Policy* 161 (1999).

[386] *Vertical Guidelines*, paras 29–30.

in practice, especially as the formation of competition policy, contrary to its enforcement, remained essentially centralized.

4.4.5.3 Comparative perspectives

In US antitrust law, RPM had been *per se* illegal since the Supreme Court's judgment in *Dr. Miles* in 1911.[387] This rule was invalidated a century later in response to mounting economic criticism. In 1997, in *State Oil v Khan*,[388] the Court abolished the *per se* treatment of maximum resale prices and then, in 2007, in *Leegin*,[389] a highly divided Supreme Court, in a four-to-five judgment, completely overruled *Dr. Miles* and provided for assessment under the rule of reason. It is to be added that the treatment of RPF had been tempered long before *Leegin*. In 1984, in *Monsanto*,[390] the Supreme Court, whilst preserving *per se* illegality, held that the agreement between the producer and a complaining distributor to expel a price-cutting dealer from the distribution network does not qualify as an agreement on the resale price. This odd grasp of agreement was heavily and admittedly influenced by the considerations (free riding, dealer services, etc) that subsequently justified the complete abolition of the *per se* illegality of RPF.

The post-*Leegin* treatment of RPF may be paralleled with the approach of EU law, especially after the *2010 Vertical Guidelines*.[391] Although some similarities exist, the two systems' congruence is illusionary. Theoretically, RPF could always be tested under Article 101(3), even before this was spelled out in the *2010 Guidelines* and confirmed in the *2022 Guidelines*. It is unquestionable that there is a certain parallel in the sense that the rule of reason implies a substantive analysis, while RPF is not outright excluded from the possibility to benefit from Article 101(3). However, putting an equality sign between the rule-of-reason analysis envisaged by the Supreme Court in *Leegin* and the Article 101(3) scrutiny of RPF overlooks the reality of competition law. The rule of reason and the Article 101(3) analysis differ considerably as regards the burden and standard of proof. As a matter of practice, the full-blown analysis under the rule of reason and the restricted scrutiny under Article 101(3) diverge very significantly.

The Article 101(3) analysis is, in numerous regards, more burdensome for the defendant than the rule of reason. First, under the rule of reason, the

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387 *Dr. Miles v Park*, 220 U.S. 373. (1911).
388 522 U.S. 3 (1997).
389 *Leegin v PSKS*, 551 U.S. 877 (2007).
390 *Monsanto v Spray-Rite*, 465 U.S. 752, 762–763 (1984).
391 *See* Richard Whish & David Bailey, *Competition Law* 128–129 (2015).

plaintiff has to show a *prima facie* case (competitive harm or market power);[392] on the other hand, in EU competition law, RPF *per se* violates Article 101(1) and, hence, the burden of proof (the burden to prove that the conditions of Article 101(3) are met) automatically shifts to the defendant. Second, Article 101(3) focuses on (productive) efficiency benefits, while the potential merit of RPF is that it may intensify rivalry. The best case for the legality of RPF is when the parties' market share is low, given that, in the absence of some market power, intra-brand restrictions cannot harm competition. This may be a strong argument under Article 101(1) and may warrant the application of the *de minimis* principle, but cannot be translated to the language of Article 101(3). Third, Article 101(3) places a heavier burden on the undertakings than the rule of reason. The individual exemption is exceptional, where the defendant faces a very high standard of proof and is expected to submit a rather detailed set of substantiated and empirically verified evidence. On the other hand, in respect of the rule of reason, the general perception is that plausible and reasonably substantiated allegations of justification can save the defendant.[393] This may be traced back to the fact that in the US more than 90% of antitrust matters are civil actions governed by the standard of preponderance of evidence (balance of probabilities) and this applies to the justifications too. Fourth, not surprisingly, in EU competition law, no formal decision has ever exempted an RPF arrangement under Article 101(3).

4.4.5.4 Assessment

As a general principle, those restrictions are anticompetitive by object that, due to their nature, are always or almost always anticompetitive without the prospect of a redeeming virtue. Although economic scholarship showcases the negative effects of RPF (e.g. dealer cartel,[394] manufacturer cartel,[395] exclusion of the emergence of new cost-effective methods of distribution[396]), it is also replete with theories that explain its procompetitive side (e.g. dealer ser-

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[392] *See NCAA v Board of Regents*, 468 U.S. 85, 109 (1984); *FTC v Indiana Federation of Dentists*, 476 U.S. 447 (1986).

[393] Phillip Areeda, *The Rule of Reason – A Catechism on Competition*, 55 Antitrust Law Journal 571, 582 (1986).

[394] *See* Richard A. Posner, *Antitrust Law: An economic perspective* 148 (1976); Robert H. Bork, *The antitrust paradox: A policy at war with itself* 282 (1978).

[395] *See* Herbert Hovenkamp, *Federal Antitrust Policy. The law of competition and its practice* 443–445 (1999).

[396] *See* Luc Peeperkorn, *Resale Price Maintenance and its Alleged Efficiencies*, 4(1) European Competition Journal 201, 208 (2008).

vice,[397] protecting different channels of distribution,[398] quality certification,[399] tackling distribution risks attached to uncertain demand[400]). Furthermore, a producer would not engage in RPF if the benefits from higher demand did not compensate for the eventual loss caused by higher prices.[401] Although, in general, it may be more probable than not that RPF has anticompetitive effects, RPF is not always or almost always anticompetitive. There are cases where it even enhances competition. The empirical evidence concerning RPF is very scarce, but the available surveys suggest that horizontal collusion is not prevalent in cases involving resale price fixing.[402]

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[397] *See* Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 Journal of Law and Economics 86 (1960). *Cf.* Ward Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 University of Chicago Law Review 825 (1955); Basil S. Yamey, The Economics of Resale Price Maintenance (1954); Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance*, in 3 Issues in Competition Law and Policy 1841, 1842–1844 (ABA Section of Antitrust Law 2008). *Contra* Warren Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 California Law Review 1015 (1992) (Asserting that RPM may expose consumers to excessively aggressive promotion and makes them enter unwise purchases.)

[398] *See* Greg Shaffer, *Rendering Alternative Offerings Less Profitable with Resale Price Maintenance*, 3(4) Journal of Economics and Management Strategy 639 (1995) (Giving an explanation for RPM in cases where free riding is not a problem.)

[399] *See* Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15(3) Rand Journal of Economics 346 (1984).

[400] Patrick Rey & Jean Tirole, *The Logic of Vertical Restraints*, 76 American Economic Review 921 (1986); Richard J. Gilbert & Paul Klemperer, *An Equilibrium Theory of Rationing* (Working Paper, February 1993); Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom,* 63 Antitrust Law Journal 59, 73–77 (1994); Raymond Deneckere, Howard P. Marvel & James Peck, *Demand Uncertainty, Inventories, and Resale Price Maintenance* (Working Paper, Ohio State University, June 1994).

[401] Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13(1) Review of Industrial Organization 57–84 (1998).

[402] *See* H. J. Ostlund & C. R. Vickland, *Fair Trade and the Retail Drug Store* (1940); Thomas Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 80 (Bureau of Econ., Fed. Trade Comm'n 1983); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 Journal of Law and Economics 263 (1991). *See also* Stanley I. Ornstein, *Resale Price Maintenance and Cartels*, 30 Antitrust Bulletin 401 (1985) (Concluding that hints of a cartel were present in less than a third of the RPF cases.); Andrew N. Kleit, *Efficiencies without Economists: the Early Years of Resale Price*

As a corollary, it is only the analysis of the intricacies of the case that may reveal whether the anticompetitive or procompetitive effects are prevalent. It is a false positive to condemn instances where there is no competitive harm, either because there are no anticompetitive repercussions (e.g. the market position of the parties is trivial) or because they are outweighed by procompetitive effects (e.g. the RPF handles a market failure). Furthermore, one of the basic rules of thumb is that RPF may not raise concerns if there is no market power. In such cases, there is a strong presumption for the absence of competitive harm and for the enhancement of competition.

The above considerations are not reflected in the treatment of RPF in EU competition law.

First, the *de minimis* argument is ruled out by the treatment as anticompetitive by object. As noted above, one of the strongest arguments for RPF is that if implemented by a small supplier and not widespread in the industry (there are no cumulative effects), it is simply not capable of being harmful. This argument does not fit Article 101(3) but suggests that instead the *De Minimis Notice* should be amended to cover RPF agreements.

Second, Article 101(3) is not the proper field to examine RPF. As demonstrated in Section 6.1, Article 101(3) focuses on questions of efficiency, while economic justifications for RPF are predominantly connected with rivalry and the intensity of competition. For instance, the enhanced services provided by the retailers may increase the demand for the product and thus trigger competitive pressure on competing products; producers may have access to distribution channels not available in the absence of RPF. These theories, in fact, suggest that RPF increases rivalry but, by way of example, normally reveal no cost savings. Hence, the escape hatch of Article 101(3) seems to drive RPF onto a field where it cannot win the battle.

Third, the examination of RPF under Article 101(3) places an overly heavy burden and high risk on the undertakings. This is exacerbated by the VBER, which does not simply exclude RPF from the benefit of block exemption but lists it as hardcore. If an agreement contains an excluded clause (enumerated in Article 5 of the VBER), the agreement itself does not lose the block exemption, but this exclusion is limited to the incriminated contractual provision. Nonetheless, if an agreement contains a hardcore restraint (enumerated in Article 4 of the VBER), the entire agreement loses the safe harbour of the block exemption. Accordingly, an enterprise taking its chances under Article 101(3) risks the entire distribution agreement's competition law compliance, not merely the RPF. This ramps up the risk implied in RPF.

Maintenance, 59 Southern Economic Journal, 597 (1993) (Reaching a similar conclusion regarding RPF's use as a cartelization tool.)

The 2010 regulatory package of vertical restraints ignores the transaction costs and realities of competition assessment and balancing. The Article 101(3) assessment is very expensive and time-consuming, and definitely needs specialized expertise. If individual exemption under the notification system amounted to a torture,[403] this is truer in respect of the self-assessment under Article 101(3). Such resources normally pertain to big enterprises; nevertheless, these are the ones where a stringent RPF policy would be justified. Comparatively, the Article 101(3) assessment may require more burdensome efforts and induce higher transaction costs for small undertakings. Although it is normally the small enterprises that should be allowed to fix the resale price, they are also the ones that shrink from the Article 101(3) assessment due to the high risks and expenses.

The status of (relative) territorial protection demonstrates the mistreatment of RPF. The most important argument for territorial protection is the free-rider theory. The story of the parasite dealer intruding in the field cultivated by the local distributor and free riding on its investments is so picturesque that EU competition law waives the claim to inquire in detail whether free riding is a real problem in the particular case, whether the dealer assumed distributorship in the absence of exclusivity, whether it took on the efforts and expenses of promotion on the optimal level or whether there was underinvestment. Here, competition law is satisfied that it regards these restraints as lawful in the absence of market power (according to the VBER under 30% market share), and presumes that they are justified and follow a legitimate end. In other words, EU competition law accepts that *in abstracto* these restraints aim at tackling the free-rider problem and does not analyse whether this consideration is present *in concreto*. Several agreements involving territorial protection would fail if it were required to be proved in detail under Article 101(3) that the restraint's purpose and actual effects are the tackling of the free-rider problem, the supplier would find no dealer for the product, the dealer would not be incited to promote the merchandise and, hence, there would be underinvestment in promotion and, finally, there is no alternative and less restrictive method to handle free riding.

All in all, the fact that there is a conceptual escape hatch for RPF in the form of Article 101(3) appears to be rather a disadvantage: in US antitrust law, the compelling economic criticism concerning the status of RPF resulted in the comprehensive revision of the law; in EU competition law, the perspective of such a fundamental rethinking seems to be delayed or even impeded by the opportunism enabled by Article 101(3).

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[403] *See* Richard Whish, *Competition Law* 114 (2009).

4.4.6 Absolute Territorial and Customer Protection

The nearly *per se* treatment of absolute territorial exclusivity is an emblematic rule of EU competition law, which shows the marks of EU competition law's unique goal of market integration. As an extrapolation of questionable validity, the Commission has extended this approach to consumer exclusivity, where the purpose of market integration is incomprehensible.

Section 4.4.6.1 examines the anticompetitive object of territorial exclusivity. Section 4.4.6.2 deals with customer exclusivity and presents how its treatment differs and should differ from territorial exclusivity. Section 4.4.6.3 presents the approach of BERs to territorial and customer exclusivity. Section 4.4.6.4 examines exclusivity in the context of intellectual property. Section 4.4.6.6 provides an overview of the status of vertical exclusivity in the context of Article 101(3). Section 4.4.6.7 explores the comparative perspectives of the subject and sheds light on the comparative effect of the purpose of market integration. Section 4.4.6.8 provides an assessment.

4.4.6.1 Anticompetitive object

EU competition law has developed a peculiar approach to vertical territorial exclusivity, which is hallmarked by the unique normative purpose of market integration.[404] Territorial protection is a textbook example of how the restriction of intra-brand competition can actually stimulate competition by tackling free riding. The local distributor may invest more in promotion and marketing if the ensuing benefits cannot be appropriated by non-investing dealers. This clear economic consideration, however, comes into conflict with the political goal of market integration. Territorial restraints impede intra-Union free movement, as they partition the internal market along the national borders that Member States are not allowed to maintain.[405]

These conflicting considerations result in an idiosyncratic compromise, which precludes the economic rationale from fully playing out. This features the following narrative. EU competition law recognizes the free-rider rationale; however, beyond a certain point, it is overshadowed by the purpose of

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[404] *See* Pablo Ibanez Colomo, *Article 101 TFEU and Market Integration*, 12(4) Journal of Competition Law and Economics 749 (2016).

[405] *See* Luc Gyselen, *Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale under EEC Competition Law*, 21 Common Market Law Review 647, 650–651 (1984); Jean-Yves Art & Dirk van Liedekerke, *Developments in EC Competition Law in 1994 – an Overview*, 32(4) Common Market Law Review 921, 930 (1995); Lennart Ritter & W. David Braun, *European Competition Law: a Practitioner's Guide* 269 (3d ed., 2005).

market integration and the benign treatment of territorial protection turns into automatic condemnation. As a result, absolute territorial exclusivity is anticompetitive by object, while relative territorial exclusivity is an effect restriction. The distinction between the two categories turns on the prohibition of passive sales. The comprehensive prohibition of exports, which embraces both active and passive sales, amounts to an absolute territorial protection. If the scheme prohibits only active sales outside the territory allotted to the distributor, the territorial protection is relative.[406]

Passive transactions are unsolicited orders for which the dealer made no effort. Active transactions are sales that are entailed by the distributor's endeavours. Location clauses, areas of primary responsibility and restrictions on advertisements are considered active sales. Given that, as a matter of practice, it is very difficult, if not impossible, to identify sales made as a result of a promotion activity and to distinguish them from those that were not, the term 'active sales' is used as a synonym of marketing activities, such as promotion, advertising and commercial presence.

Article 1(1)(l)–(m) of the VBER defines active and passive sales as follows:

(l) 'active sales' means actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established;

(m) 'passive sales' means sales made in response to unsolicited requests from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender.

[406] For an ancient statutory definition, *see* Regulation 1983/83 [1983] OJ L 173/1, Article 2(2)(c) (The regulation defined active sales as follows: "the obligation to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch, and from maintaining any distribution depot.").

The above principles were laid down as early as 1966, when the CJEU handed down two landmark rulings in two weeks. Interestingly, absolute territorial exclusivity was the very first object category the CJEU created.[407]

In *Société Technique Minière v Maschinenbau Ulm*,[408] the CJEU endorsed the free-rider rationale as to relative territorial exclusivity. The distribution arrangement at stake contained no export ban and was mainly based on areas of primary responsibility. The Court held that 'it may be doubted whether there is an interference with competition if the said agreement [containing relative territorial protection] seems really necessary for the penetration of a new area by an undertaking'[409] and gave a list of factors to be taken into account when evaluating vertical territorial restraints:

> [I]t is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.[410]

Two weeks later, in *Consten & Grundig*,[411] the CJEU encountered a case where the producer 'undertook not to deliver even indirectly to third parties products intended for the area covered by the contract', imposed export bans on Consten and other distributors, and assigned the 'gint' trademark to Consten in order to afford protection against parallel import.[412] The CJEU found that absolute territorial protection was anticompetitive by object.[413] Although the

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[407] *See* Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 59 (2002) ("The law and practice relating to exclusive distribution was developed in the 1960s before any other aspect of competition law. The Commission's earliest decisions in 1964 related to exclusive distribution systems, most of which included export restraints to prevent poaching in other dealers' territories.").

[408] Case 56/65 *Société Technique Minière v Maschinenbau*, EU:C:1966:38, p. 249.

[409] *Ibid*, 250.

[410] *Ibid*, 250.

[411] Case 56/64 & 58/64 *Consten & Grundig*, EU:C:1966:41.

[412] Case 56/64 & 58/64 *Consten & Grundig*, EU:C:1966:41.

[413] The approach followed in *Consten & Grundig* was not unprecedented. Leon J. de Keyser, *Territorial Restrictions and Export Prohibitions under the United States and the Common Market Antitrust Laws*, 2 Common Market Law Review 271, 287–289 (1964) (Citing AG Lagrange's opinion in Case 13/61 *de Geus v*

Court did not expressly rule out the application of Article 101(3), it was rather rejective. Obviously, the most important concern was that absolute territorial protection 'results in the isolation of the French market and makes it possible to charge for the products in question prices which are sheltered from all effective competition'.[414]

The Court recognized the free-riding problem, but did not give it full weight. First, although it recognized the higher importance of inter-brand competition, it immediately added that an intra-brand restriction cannot escape the prohibition of Article 101(1) merely because it enhances inter-brand competition.[415] Second, the Court was rather hostile against product differentiation, strong trademarks and brand image. It viewed trademarks as restrictions and product differentiation as an impairment to substitutability and rivalry.[416]

All in all, *Société Technique Minière*[417] and *Consten & Grundig* established that absolute territorial protection (export bans) is anticompetitive by object and *per se* infringes Article 101(1),[418] while relative territorial protection is an effect agreement. Furthermore, *Consten & Grundig* strongly suggests that absolute territorial protection can hardly meet the requirements of Article 101(3). These propositions have remained the cornerstones of EU competition law since then.[419]

The Commission's soft law instruments reproduce the above case law.[420] Interestingly, the *2010 Vertical Guidelines* contained a very tight exception to the outright prohibition of absolute territorial protection. It provided that even an absolute territorial protection clause may be lawful for two years, if it is necessary for penetrating a new market, although the CJEU has never regarded an absolute territorial protection in a distribution arrangement as not anticom-

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Bosch, [1962] ECR 45., national judgments and a Commission decision; concluding that in light of these cases "it cannot be said that the *Grundig-Consten* decision came as a surprise.").

414 *Ibid*, 343.

415 *Ibid*, 342.

416 *Ibid*, 343.

417 Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38.

418 In *Miller*, the CJEU held that an export ban violates Article 101(1) irrespective of whether the measure was actually enforced by the parties. This suggests that export bans amount to a *per se* infringement of Article 101(1). Case 19/77 *Miller*, EU:C:1978:19, para 7; Case T-66/92 *Herlitz*, EU:T:1994:84, para 40; Case T-77/92 *Parker Pen*, EU:T:1994:85, para 55.

419 *See* Richard Whish, *Competition law* 629 (2009); Kassie Smith, *Vertical Agreements Affecting Distribution or Supply*, *in* Bellamy & Child's European Community Law of Competition 6.084 (Peter Roth and Vivien Rose ed., 2008).

420 *Guidelines on Article 101(3)*, paras 23 & 55; *2010 Vertical Guidelines*, para 47.

petitive by object.[421] The *2022 Guidelines on Vertical Restraints* dropped this exception. The *2014 Guidelines on Technology Transfer*, however, which are still in force, contain such a two-year exception for licence agreements.

Interestingly, however, the GC in *JCB Service*[422] suggested that compensation paid for free riding may be in conformity with Article 101(1). Here, the selling dealer paid a fee to the dealer in the territory of which the customer was located. The GC found this acceptable, provided the amount was a realistic compensation for the after-sale services.[423]

Online activities raise difficult issues of classification. The general prohibition of the use of internet amounts to a ban on passive sales, while a ban on those ways of use that target out-of-state customers qualifies as relative territorial protection. It amounts to a restriction of passive sales if the dealer is expected, for instance, to block out-of-territory access to the website,[424] re-route customers to the online store of the manufacturer or another dealer, or terminate the online transaction once the credit card data reveals an out-of-state address or the dealer is prohibited from using the supplier's trademarks or brand names online.[425]

This is in line with Article 4(e) of the VBER, which lists the 'prevention of the effective use of the internet' as hardcore, while simple restrictions on online advertising, which do not result in 'preventing the use of an entire online advertising channel', are covered by the block exemption:

> (e) the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold within the meaning of points (b), (c) or (d), without prejudice to the possibility of imposing on the buyer:
> (i) other restrictions of online sales; or
> (ii) restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel;

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421 *2010 Vertical Guidelines*, para 61.

422 Case T-67/01 *JCB Service*, EU:T:2004:3.

423 Case T-67/01 *JCB Service*, EU:T:2004:3, para 149.

424 As for geo-blocking, *see* Case T-172/21 *Valve*, EU:T:2023:587 and Regulation 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations 2006/2004 and 2017/2394 and Directive 2009/22/EC, [2018] OJ L 60I/1.

425 *Vertical Guidelines*, para 206.

Article 1(1)(l) of the VBER defines 'active sales' as follows:

> targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established;

It seems that the dividing line is not between full and partial restriction. An outright prohibition amounts to a hardcore restriction. However, a restriction aiming to limit the volume of online sales may also qualify as hardcore. According to Recital (15) of the VBER, 'online sales restrictions should not benefit from the block exemption established by this Regulation where their objective is to significantly diminish the aggregate volume of online sales of the contract goods or services in the relevant market or the possibility for consumers to buy the contract goods or services online'.

The *2022 Vertical Guidelines* consider an internet ban equivalent to the ban on passive sales.[426] Nonetheless, marketing activities that go beyond a local website (that is, a website with a top-level domain corresponding to the particular territory) and carrying out local online advertising generally amount to out-of-territory active sales and may generally be restricted. As a rule of thumb, '[o]nline sales restrictions generally do not have (…) [the object of preventing the effective use of the internet] where the buyer remains free to operate its own online store and to advertise online'.[427] At the same time, the *2022 Vertical Guidelines* seem to go beyond that when taking the view that 'prohibiting the buyer from using an entire online advertising channel, such as search engines or price comparison services, or restrictions which indirectly prohibit the use of an entire online advertising channel' is hardcore.[428] Unfortunately, it is unclear if this extensive interpretation of 'passive sales' has any basis in the CJEU's case law.[429]

4.4.6.2 Customer exclusivity

The status of customer exclusivity under Article 101 is dubious. On the one hand, the CJEU has never declared consumer exclusivity (absolute or relative)

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[426] *Vertical Guidelines*, para 203.

[427] *Vertical Guidelines*, para 208.

[428] *Vertical Guidelines*, para 206.

[429] The Vertical Guidelines refer to Commission Decision in AT.40428 – *Guess*, recitals 118–126.

to be anticompetitive by object. On the other hand, BERs treat territorial and customer exclusivity alike and label both absolute territorial and customer exclusivity as hardcore.[430]

It is submitted that absolute customer exclusivity is one of the cases where the hardcore label should entail no 'by object' classification at all. In economic sense, there is no difference between territorial and customer exclusivity. In fact, both are customer exclusivities. Territorial protection singles out a group of customers along geographical factors. However, the treatment of territorial exclusivity is not based on economic but normative considerations that are not valid as to customer exclusivity. The single market imperative, which makes absolute territorial protection automatically prohibited under Article 101(1), is incomprehensible in the context of customer exclusivity. This implies that the *per se* treatment of absolute territorial exclusivity cannot reasonably be extrapolated and there is no obstacle for economic justifications, particularly the free-riding rationale, to fully play out and establish a treatment by effect.

Interestingly, the prohibition of active and passive sales by a wholesaler to end users is not hardcore under either the VBER or the TTBER.[431] The separation of wholesale and retail is a customer restriction that distinguishes between resellers and end users. This begs the question: why is the free-rider rationale valid here but not as to other customer classifications? The answer is probably not logic but opportunism. The suppression of customer exclusivity goes against sound economic logic irrespective of the distinction it rests on, but the economic harm it causes may not be immediately conspicuous. However, the distinction between wholesale and retail has such a high practical importance that its suppression would immediately cause blatant harm and demonstrate the irrationality of the above principle.

4.4.6.3 Exclusivity in the VBER

As noted above, the VBER excludes the absolute forms of both territorial and customer exclusivity from the benefit of block exemption as hardcore. The VBER defines the hardcore category more widely than the corresponding object category.

First, as explained in Section 4.4.6.2, absolute customer exclusivity is treated as hardcore, although it should not be and has never been held anticompetitive by object by the CJEU.

Second, a ban on active sales escapes the designation as hardcore only if it concerns a 'reserved' territory or customer group. The restriction of active

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[430] Article 4 VBER, 4(2)(b) TTBER.

[431] Articles 4(b)(iii), Article 4(c)(i)(4) & Article 4(d)(iv) VBER; Article 4(2)(b)(iv) TTBER.

sales into a territory or to a customer group is covered by the block exemption if that territory or group of customers was 'reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors'.[432] The requirement of reservation is unknown to the CJEU's case law.

It is worthy of note that Article 4 of the VBER only refers to restrictions on the buyer's freedom to sell; restrictions on the supplier are covered by the block exemption, even if they cover both active and passive sales.[433]

Under the 1999 and 2010 VBER, the requirement of reservation was fulfilled only if the territory of destination was reserved to the supplier or a single buyer.[434] This seemed to deprive semi-exclusivity (where there is more than one 'exclusive' distributor) from the block exemption, despite being justified by the same reasons as those warranting the block exemption of one-distributor territorial protection. Accordingly, if a supplier appointed one exclusive distributor for Member State 'A', and two distributors for Member State 'B', the restriction of the former's active sales to Member State 'B' were not block-exempted as the latter was not reserved to 'another buyer'.[435] The 2022 VBER solves this problem as long as the territory is reserved to the supplier or, at most, five distributors.

It is noticeable that the block exemption regulations before 1999 contained no requirement of reservation. In old-style vertical block exemption regulations, restrictions on active sales were block-exempted unconditionally.[436] The

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[432] Article 4(b)(i) & 4(c)(i)(1) VBER. *See also* the definition of "exclusive distribution system" in Article 1(1)(h) VBER.

[433] *See* Luc Peeperkorn, *E.C. Vertical Restraints Guidelines: Effects Based or Per Se Policy? – a Reply*, 23(1) European Competition Law Review 38, 38 (2002); Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.216 (Jonathan Faull and Ali Nikpay ed., 2007).

[434] Article 4(b) 1999 VBER; Article 4(b) 2010 VBER.

[435] *See* Frank Wijckmans, Filip Tuytschaever et al., *Vertical Agreements in EC Competition Law* §§ 188–189 (2006). This interpretation is reinforced by para 51 of the *2010 Vertical Guidelines*. *See* Romano Subiotto & Filippo Amato, *The Reform of the European Competition Policy Concerning Vertical Restraints*, 69 Antitrust Law Journal 147, 175 (2001); Frank Wijckmans & Filip Tuytschaever, *Active Sales Restrictions Revisited*, 25(2) European Competition Law Review 107, 109 (2004).

[436] Article 2(1)(b) of Regulation 67/67/EEC [1967] OJ L 57/849 provided that "no restriction on competition shall be imposed on the exclusive dealer other than (…) the obligation to refrain, outside the territory covered by the contract, from seeking customers for the goods to which the contract relates, from establishing any branch, or from maintaining any distribution depot." This formulation was repeated by subsequent block exemption regulations. Regulation 1983/83 [1983] OJ L 173/1, Article 2(2)(c); Regulation 4087/88 [1988] OJ L 359/46, Article 2(d).

1999 BER introduced a new-style vertical regime. Although this did not affect the general treatment of territorial protection, it introduced a requirement of 'reservation', which has been maintained by the block exemption regulations since then.

The requirement of reservation does not apply to the restriction of the distributor's place of establishment,[437] although location clauses qualify as a form of restriction of active sales.

The VBER rules out the simultaneous use of exclusivity and selective distribution, though the supplier may decide to market its products via selective distribution in one Member State (or as to one customer group) and via exclusive distribution in another.

The restriction of cross-supplies among selected distributors is hardcore. The block exemption applies only if selected distributors are allowed to sell to any other authorized distributor, whether it be wholesaler or retailer, irrespective of territory.[438] Furthermore, with the exception of the separation of wholesale and retail,[439] limitations on sales to end users by a selected distributor, whether active or passive, are also hardcore,[440] including 'the restriction of the place of establishment of the members of the selective distribution system'.[441]

It is not hardcore to restrict active and passive sales to unauthorized distributors in a territory where the supplier operates a selective distribution system, although this could be considered a customer restriction.[442] In the same vein, it is not hardcore to restrain selected distributors in making active sales into a territory or to a customer group covered by exclusive distribution (that is, reserved to the supplier or a maximum of five exclusive distributors).[443]

It is questionable whether the requirement of 'reservation' is met in case of sole distributorship, that is, when a single distributor is appointed in a given area, but the supplier reserves the right to effect sales towards this territory.

The same legislative practice featured the regulations on motor vehicle distribution. Regulation 123/85 [1985] OJ L 15/16, Article 3(8)–(9); Regulation 1475/95 [1995] OJ L 145/25, Article 3(8)–(9).

437 Articles 4(b)(iii), 4(c)(iii) & 4(d)(iii) VBER.
438 Article 4(c)(ii) VBER.
439 Article 4(c)(i)(4) VBER.
440 Article 4(c)(iii) VBER.
441 Article 4(c)(i)(3) VBER.
442 Articles 4(b)(ii), 4(c)(i)(2) & 4(d)(ii) VBER.
443 Article 4(c)(i)(1) VBER.

The *2010 Vertical Guidelines* addressed this question and answered it in the affirmative:

> A territory or customer group is exclusively allocated when the supplier agrees to sell its product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into its territory or to its customer group by all the other buyers of the supplier within the Union, *irrespective of sales by the supplier*.[444]

Although it would be quite unreasonable to treat sole distributorship differently from exclusive distributorship, the 2022 regulatory package on vertical agreements requires interpretation. The *2022 Vertical Guidelines*, contrary to the *2010 Guidelines*, contain no specific provisions on this. The 2022 VBER defines 'exclusive distribution' as 'a distribution system where the supplier allocates a territory or group of customers *exclusively to itself or to a maximum of five buyers* and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group'.[445] The territory coming under sole distributorship is not allocated 'exclusively to [the supplier]'. Although it is allocated to two entities, it is not allocated 'exclusively (…) to a maximum of five buyers', given that one of the two entities is not a buyer but the supplier. At the same time, the second clause of the definition, by referring only to 'other buyers', suggests that the distribution is exclusive even if the supplier remains free to sell. Furthermore, and more importantly, Article 4 of the 2022 VBER – that is, the actual normative provision – drops the term 'exclusively' when referring to the reservation to the supplier and uses this adverb of manner solely in relation to the reservation to the resellers ('reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors').[446]

The rule that the restriction of active sales is required to relate to a territory or consumer group reserved for a *supplier* or a maximum of five other exclusive *distributors* implies that this requirement is not met if it is reserved for a *licensee*.[447] The language of the VBER fails to take into account the perspec-

[444] Para 51 (emphasis added).

[445] Article 1(1)(h) of the 2022 VBER (emphasis added).

[446] Article 4(b)(i) and 4(c)(i)(1) VBER.

[447] For a categorical opinion, which can be hardly opposed *see* Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 62 (2002) ("The lack of protection possible under Regulation 2790/99 for technology licensees makes no sense."). *See also* Valentine Korah, *Draft Block Exemption for Technology Transfer*, 25(5) European Competition Law Review 247, 258 (2004) ("I regret that the Commission assumes that all Member States are served by dis-

tive of vertical arrangements where technology transfer and distribution are combined, although such an extension would perfectly comply with both the case law and the principles underlying the VBER.

Hence, if the owner of a particular technology decides to license the technology in one Member State and to employ an exclusive distributor to market the products in another, the VBER would not apply, as the former Member State is not reserved for the supplier or a buyer (but a licensee).

As discussed in Section 4.4.6.2, the prohibition of active and passive sales by a wholesaler to end users and, hence, the separation of wholesale and retail, does not amount to a hardcore restriction and is block-exempted.[448]

Furthermore, the VBER contains special hardcore categories for sales limitation concerning components:

> Article 4(b)(v)
> the restriction of the exclusive distributor's ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
>
> Article 4(c)(i)(5)
> the restriction of the ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
>
> Article 4(d)(v)
> the restriction of the buyer's ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
>
> Article 4(f)
> the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end users or to repairers, wholesalers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

4.4.6.4 Exclusivity in the context of intellectual property

The CJEU very exceptionally followed a more permissive approach in the context of intellectual property rights, and in unique cases it gave a green light to arrangements built upon absolute territorial protection.[449] The case law on

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tributors, or all by licensees, when often some areas are exploited one way and some another.")

[448] Articles 4(b)(iv), Article 4(c)(i)(4) & Article 4(d)(iv) VBER.

[449] The purview of these cases is rather narrow. *See* Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 82–83 (2002), Richard Whish, *Competition law* 761 (2009). According to the

licensing started out the same as distribution agreements. In *Nungesser*,[450] in the first CJEU case on technology transfer, the Court followed the pattern established in *Consten & Grundig*: exclusive licences entailing absolute territorial exclusivity were held anticompetitive by object, while open exclusive licences (equivalents of relative territorial protection) were considered effect agreements:

> [There are] two legal situations which are not necessarily identical. The first case concerns a so-called open exclusive licence or assignment and the exclusivity of the licence relates solely to the contractual relationship between the owner of the right and the licensee, whereby the owner merely undertakes not to grant other licences in respect of the same territory and not to compete himself with the licensee on that territory. On the other hand, the second case involves an exclusive licence or assignment with absolute territorial protection, under which the parties to the contract propose, as regards the products and the territory in question, to eliminate all competition from third parties, such as parallel importers or licensees for other territories.[451]

Nevertheless, subsequent cases established limited exceptions to the foregoing proposition.

In *Coditel II*,[452] the dealer that acquired exclusive distribution rights in Belgium over the film *Le Boucher* (*The Butcher*) sued three cable television companies for retransmitting the film broadcasted in Germany. The CJEU held that the very special features of performing rights and the film producers' need to achieve an adequate rate of return may warrant absolute territorial protection from re-transmissions and, hence, an effects-analysis needs to be carried out to assess the arrangement:

> [The relevant question is] whether or not the exercise of the exclusive right to exhibit a cinematographic film creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry, or the possibility of charging fees which exceed a fair return on investment, or an exclusivity the duration of which is disproportionate to those requirements, and whether or not, from a general point of view, such exercise within a given geographic area is such as to prevent, restrict or distort competition within the common market.[453]

Commission, *Erauw-Jacquery* applies only to basic seeds, 1999/6/EC *SICASOV* [1999] OJ L 4/27, paras 50 & 53.

[450] Case 258/78 *Nungesser*, EU:C:1982:211.

[451] Para 53.

[452] Case 262/81 *Coditel v Ciné-Vog*, EU:C:1982:290.

[453] Para 19.

In *Erauw-Jacquery*,[454] the CJEU held that a provision of an agreement that 'prohibits the licensee from selling and exporting the basic seed is compatible with Article 85(1) of the Treaty in so far as it is necessary in order to enable the breeder to select the growers who are to be licensees'.[455] Basic seeds are a very special commodity: they are covered by plant breeders' rights and used for producing certified seeds, which are sold to farmers. Basic seeds are multiplied by propagators. The Court explained the above exceptional rule with the circumstance that:

> the development of the basic lines may involve considerable financial commitment. Consequently, a person who has made considerable efforts to develop varieties of basic seed which may be the subject-matter of plant breeders' rights must be allowed to protect himself against improper handling of those varieties of seeds. To that end the breeder must have the right to reserve propagation for the propagating establishments chosen by him as licensees. To that extent the clause prohibiting the licensee from selling and exporting basic seeds does not come within the prohibition laid down by Article 81(1) of the Treaty.[456]

It is worthy of note that the free-rider rationale appears in none of the above judgments, even though this theory is *a fortiori* valid in the case of technology transfer. Licensees usually invest more capital and need more protection than distributors.[457] Nonetheless, the CJEU was persuaded by different arguments. In *Coditel II*, the fundamental theory of IP was used: the object of the legal monopoly secured by the IP is to enable the recovery of the investment and to incentivize the production of IP; the impermissibility of vertical territorial exclusivity may frustrate this objective. In *Erauw-Jacquery*, the main concern was the 'improper handling of those varieties of seeds'. Although both judgments were guided by the requirement of adequate return, this was the return on the IP owner's and not the distributor's investment.

In the above cases, the CJEU approved the arrangement already under Article 101(1), without getting to Article 101(3). These cases reached the Court as references and at the relevant time individual exemption under Article 101(3) came under the Commission's exclusive competence. Hence, the restraints could not have been exempted under Article 101(3), if the Court had come to the conclusion that they violated Article 101(1).

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[454] Case 27/87 *SPRL Erauw-Jacquery*, EU:C:1988:183.
[455] Para 11.
[456] *Ibid*, para 10.
[457] *See* Valentine Korah, *Intellectual Property Rights and the EC Competition Rules* 28 (2006).

In *GlaxoSmithKline*,[458] the GC was close to diluting the imperative nature of the prohibition on absolute territorial protection and to creating a narrow exception;[459] however, the judgment was annulled on appeal: the CJEU reiterated the categorical nature of the traditional principle.[460]

Considering the CJEU's more tolerant jurisprudence regarding licensing agreements, it is not surprising that the TTBER adopts an approach that is slightly more permissive than the VBER. The most important practical difference is that the licensee's passive sales into the territory or to the customer group reserved to the licensor can be restricted, while in the case of distribution agreements, restraints on the dealers' passive sales into the territory or the customer group reserved to the producer qualify as hardcore.

The TTBER, in relation to non-competitors, block-exempts all restraints on active sales without establishing a requirement of reservation and it also exempts certain prohibitions on passive sales. Restrictions on active sales are not regarded as hardcore; there is no requirement of 'reservation', that is, it is not required that the territory or customer group in question be reserved to the producer or another licensee. Article 4(2)(b) defines hardcore territorial protection as 'the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products'. Furthermore, it sets out a number of exceptions, which, accordingly, exempt even bans on passive sales:

(i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor,
(ii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,
(iii) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer,
(iv) the restriction of sales to end-users by a licensee operating at the wholesale level of trade,
(v) the restriction of sales to unauthorised distributors by the members of a selective distribution system;

Apart from cases of limited licensing, such as production for own use and outsourcing the supply of a particular customer, there is an exemptible restriction that does not feature in the VBER: the exemption of a ban on passive sales

[458] Case T-168/01 *GlaxoSmithKline v Commission*, EU:T:2006:265.
[459] Case T-168/01 *GlaxoSmithKline v Commission*, EU:T:2006:265, para 121.
[460] Joined Cases C-468/06 to C-478/06 *Lélos v GlaxoSmithKline*, EU:C:2008:504, para 65.

into the territory or to the customer group reserved to the licensor. The VBER tolerates no restrictions on the reseller concerning passive sales. The TTBER exempts such restrictions if they aim to protect the territory or the customer group reserved to the licensor itself but not to other licensees.

The 2004 TTBER also contained a two-year exception to the general hardcore rule on passive sales:

> (ii) the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group.

This two-year exception does not figure in the 2014 TTBER, but it was preserved in the *2014 Technology Transfer Guidelines* as a blind-eye exception.[461]

The 2014 TTBER also hampers the cumulation of exclusivity and selective distribution. Article 4(2)(c) of the TTBER provides that it is a hardcore restriction to restrict either active or passive sales to end users in a selective distribution system.

4.4.6.5 Exclusivity and Article 101(3)

It is highly unlikely that an absolute territorial protection arrangement could benefit from an individual exemption.[462] Therewith, the Commission's soft law instruments and its decisional practice are replete with indications that absolute territorial protection is simply not capable of fulfilling the conditions of Article 101(3), as it fails at least at the point of indispensability.[463] In *Nathan-Bricolux*, in the context of an express export ban, the Commission

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[461] Para 126.

[462] This is a proposition that was not made completely clear in *Consten & Grundig*, *see* Leon J. de Keyser, *Territorial Restrictions and Export Prohibitions under the United States and the Common Market Antitrust Laws*, 2 Common Market Law Review 271, 290–293 (1964) (Asserting that exemption under Article 101(3) is possible for absolute territorial protection.), but became clear subsequently. *See* Luc Gyselen, *Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale under EEC Competition Law*, 21 Common Market Law Review 647, 660 (1984) ("Territorial restraints (…) have virtually no chance of being exempted."); Paul M. Taylor, *The Vertical Agreements Regulation*, 3 The Cambridge Yearbook of European Legal Studies 525, 538 (2000); Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 233 (2002) ("[T]here appears to be no real possibility of redeeming the so-called "hardcore" restraints.").

[463] *See* Guidelines on Article 101(3), paras 46 & 79; *Vertical Guidelines*, para 180(b).

declared categorically that '[a]n export prohibition of this nature falls under Article 85(1) and cannot be exempted under Article 85(3)'.[464] In *Yamaha*, the Commission used categorical language when classifying both RPF and absolute territorial protection as arrangements that cannot meet the requirements of Article 101(3) by their very nature.[465] Similarly categorical language was used in *Peugeot*, suggesting that even though, theoretically, all types of agreements may benefit from an individual exemption, absolute territorial protection tends not to meet the requirements of Article 101(3) by nature.[466] For the time being, no formal Commission decision has ever exempted an arrangement involving absolute territorial exclusivity under Article 101(3). This fact is all the more important when considering that, until the entry into force of Regulation 1/2003, the Commission had legal monopoly over granting individual exemptions.

4.4.6.6 Comparative perspectives

A comparison with US antitrust law enlightens very important aspects of the EU regime on territorial and customer exclusivity. It reveals the comparative effects of the purpose of market integration. Both regimes draw on the same economic literature and theories; hence, it may be a reasonable assumption that the differences between the two are caused by the differences in teleology. The distinctions between active and passive sales and absolute and relative territorial protection are completely unknown to US antitrust law, which suggests that these are not the consequence of pure economic theory but the purpose of market integration.

The treatment of vertical non-price restraints has been fluctuant and controversial throughout the history of US antitrust law. In *White Motor*,[467] the Supreme Court was reluctant to condemn territorial and customer exclusivity automatically. Four years later, in *Schwinn*, it pronounced them *per se* illegal. Ten years thereafter, however, in *Sylvania*, it invalidated the *per se* rule and returned to the rule of reason.

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[464] 2001/135/EC *Nathan-Bricolux* [2001] OJ L 054/1, para 107; 2002/190/EC *JCB* [2002] OJ L 069/1, para 45.

[465] Case COMP/37.975 *PO/Yamaha* Commission decision of 16.07.2003, para 175.

[466] 86/506/EEC *Peugeot* OJ 1986 L295/19, [1989] 4 CMLR 371, para 38. *See* Luc Gyselen, *Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale under EEC Competition Law*, 21 Common Market Law Review 647, 660 (1984).

[467] 372 U.S. 253, 256 (1963).

In *White Motor v US*,[468] the Supreme Court held that territorial and customer exclusivity raises several questions that can be answered only after a full trial. The Court was probably influenced by the appellant's free-riding arguments.[469] Although *White Motor* is normally read as mandating a rule-of-reason analysis, the Court was simply hesitant and 'intimate[d] no view one way or the other on the legality of such an arrangement'.[470] The Court noted that '[a] vertical territorial limitation may or may not have that purpose or effect' and it did 'not know enough of the economic and business stuff out of which these arrangements emerge to be certain'.[471]

Four years later, in *Schwinn*,[472] the Supreme Court held that vertical territorial exclusivity was *per se* illegal.[473] Unfortunately, it is very hard to reconstruct the Court's motives of characterizing vertical territorial exclusivity as *per se* illegal, apart from the reference to 'the ancient rule against restraints on alienation', where one 'has parted with dominion over the goods'.[474] Whereas the Court noted that 'such restraints are so obviously destructive of competition that their mere existence is enough', it failed to give any detailed explanation, nay, it expressly acknowledged that such territorial restraints do have a procompetitive potential.[475] Nevertheless, that circumstance did not warrant a rule-of-reason treatment. The Court established that in genuine resale agreements, territorial exclusivity clauses 'are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.'[476] At the end of the day, Schwinn's franchise scheme escaped antitrust condemnation owing to the exception established for consignment sales. The Court held that where title and risk remained with the producer, territorial exclusivity breached antitrust law only if it was '"unreasonably" restrictive of competition'.[477]

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[468] 372 U.S. 253, 256 (1963).
[469] *Ibid*. at 256.
[470] *Ibid*. at 261. See also *Id*. at 264.
[471] *Ibid*. at 263.
[472] 388 U.S. 365 (1967).
[473] 388 U.S. 365, 382 (1967).
[474] *Ibid*, at 380. This was expressly admitted by the Supreme Court in *Continental v Sylvania*, 433 U.S. 36, 51 (1977), which overruled *Schwinn*. ("Only four years later the Court in *Schwinn* announced its sweeping *per se* rule (…) with no explanation of its sudden change in position.")
[475] 388 U.S. 365, 379–380 (1967).
[476] *Ibid*, at 379.
[477] *Ibid*, at 380.

Schwinn was overruled 10 years later in *Sylvania*, where – influenced by the free-rider theory[478] and the notion that inter-brand competition prevails over intra-brand rivalry[479] – the Supreme Court acknowledged that vertical territorial exclusivity has economic merits[480] and returned to the rule of reason.[481] This case very well illustrated how territorial protection can intensify competition by galvanizing the distributor. Sylvania introduced its system of location restrictions after having suffered a considerable decrease in market share (to 1–2%). The new system resulted in remarkable expansion (to approximately 5% market share).[482] Since there was intensive competition in the market (the 5% market share made Sylvania the eighth television producer in the country), it could hardly be argued that the system was anticompetitive.

It is noteworthy, in the context of EU competition law, that the Supreme Court expressly refused to attach significance to the distinction between active and passive sales and absolute and relative territorial exclusivity. The producer imposed location clauses. Distributors could operate only at particular locations, but they were not forbidden to sell outside the assigned territory. The Court refused to distinguish this case from *Schwinn* on the basis that, in the latter, the distributors were forbidden to sell outside the territory assigned to them. The Court held that '[i]n intent and competitive impact, the retail-customer restriction in *Schwinn* is indistinguishable from the location restriction in the present case'.[483]

4.4.6.7 Assessment

The reason that territorial exclusivity is so sensitive for EU competition law is the single market imperative, which has basically two projections. First, the purpose of market integration is an institutional target. No hindrances against intra-Union trade should be tolerated. Undertakings are not allowed to covertly reproduce those state measures that were broken down vehemently on the basis of the four freedoms. In this narrative, the parallel trader is not a 'parasite' dealer free riding on the efforts of the exclusive distributors but a 'hero because his sales foster the free movement of the brand within the common market and thus contribute to market integration'.[484] The intra-Union flow of goods is

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[478] *Ibid*, at 54–55.
[479] *Ibid*, at 52.
[480] *Ibid*, at 58.
[481] *Ibid*, at 59.
[482] *Ibid*, at 38–39.
[483] *Ibid*, at 46.
[484] Luc Gyselen, *Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale under EEC Competition Law*, 21 Common Market Law Review 647, 648–649 (1984). *See also* Leon J. de Keyser, *Territorial*

considered to be a value in itself. Furthermore, parallel trade has the inherent tendency of equalizing prices through the mechanism of arbitrage.[485] Second, the single market imperative is considered to imply the fundamental and inalienable right of consumers to purchase wherever they want. This right is not a matter of economics. It is symbolic, categorical and cannot be subjected to economic scrutiny.[486]

EU competition law acknowledges the free-rider theory, but it is also bound by the single market imperative. The requirement to limit territorial exclusivity to active sales features a compromise between these conflicting requirements.[487] Nonetheless, this is a perverse compromise because relative territorial exclusivity often fails to ensure effective protection against free riding.[488] Buyers pay two types of costs: the price, including transportation costs, and search costs, which may encompass out-of-pocket expenses and time. If search costs are low as compared with the price, consumers may be ready to invest in

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Restrictions and Export Prohibitions under the United States and the Common Market Antitrust Llaws, 2 Common Market Law Review 271, 294 (1964); Vivien Rose and Peter Roth, *Article 81(1)*, *in* Bellamy & Child's European Community Law of Competition 2.068 (Peter Roth and Vivien Rose ed., 2008); Doris Hildebrand, *The role of economic analysis in the EC competition rules* 279 (1998); Joanna Goyder, EU Distribution Law 73 (4th ed., 2005); Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 62 (2002).

485 *See* Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.09 (Jonathan Faull and Ali Nikpay ed., 2007); Thomas Hays, *Parallel Importation under European Union law* 130 (2004); Doris Hildebrand, *The role of economic analysis in the EC competition rules* 278 (1998); Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 263 (2002).

486 *See* 2001/146/EC *Opel* [2001] OJ L 59/1, 129–130 paras. *See also* Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.09 (Jonathan Faull and Ali Nikpay ed., 2007).

487 *Contra* Giorgio Monti, *EC Competition Law* 363–366 (2007) (The policy concerning absolute territorial protection, besides furthering market integration, also "rests upon a sound economic rationale".).

488 *See* Paul M. Taylor, *The Vertical Agreements Regulation*, 3 The Cambridge Yearbook of European Legal Studies 525, 539 (2000). *Contra* Giorgio Monti, *Article 81 EC and Public Policy*, 39 Common Market Law Review 1057, 1067 (2002) (Submitting that "the distinction between active and passive sales makes economic sense", for the following reasons. First, the most effective way for the free rider to use the marketing efforts of another is through active sales, which are forbidden. (…) Conversely, if a distributor exploits the territorial protection he has received by behaving anticompetitively, buyers will have an incentive to invest resources in finding alternative suppliers outside the territory.").

finding the cheapest source. A ban on active sales prevents authorized dealers from mitigating the customers' search costs. Nevertheless, it does not impede non-authorized dealers. The shielding effects of search costs are diminishing in the online age,[489] especially as the Commission, in general, does not consider the internet to be a form of active selling, though acknowledging the 'extraterritorial' effects of websites.[490]

At the same time, the right-based rationale does not explain the rigid interdiction of passive sales. The argument that European citizens have the right to purchase goods and services in the common market, wherever they want, is valid only on the retail level and only regarding consumers; nevertheless, territorial exclusivity is normally, though certainly not always, imposed on resellers.

Likewise, it is not defined what the purpose of market integration is: does it mean that artificial borders should not thwart the free flow of goods and services, or it also encompasses 'strained' integration? It is doubtful whether the latter would be the case. It is questionable whether EU competition law is meant to extort the flow of goods where market realities and sound business mechanisms would not ensure that.[491] Competition law and internal market law have different mindsets. While the latter addresses state acts, the former addresses market choices. The rules of the internal market may be counterproductive if applied to undertakings, as they may discourage distributors from investing in the penetration of new markets.[492] Finally, the limitations on territorial exclusivity may be harmful for low-price Member States. If parallel trade cannot be restricted, producers may find it reasonable not to supply cheap markets or to charge more than the local profit-maximizing price.

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[489] Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 62 (2002).

[490] *Vertical Guidelines*, paras 203.

[491] *See* Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 62 (2002); Emmanuel P. Mastromanolis, *Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law,* 15 University of Pennsylvania Journal of International Business Law 559, 615 (1994); *Cf.* Sandra Marco Colino, Vertical agreements and competition law 194 (2010).

[492] *See* Doris Hildebrand, *The role of economic analysis in the EC competition rules* 279 (1998); Emmanuel P. Mastromanolis, *Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law,* 15 University of Pennsylvania Journal of International Business Law 559, 614–615 (1994).

4.4.7 Selective Distribution

Selective distribution is a vertical arrangement that confines distribution to dealers selected on the basis of qualitative or quantitative criteria. Those who are not admitted to the system are excluded from distributing the products, as neither the producer nor the selected dealers supply them.[493]

It has to be noted that the supplier's unilateral choice to limit supplies to certain dealers does not constitute selective distribution, if these dealers remain free to sell to whoever they wish. The distinguishing principle of selective distribution is that unauthorized traders are excluded from the distribution, and neither the producer nor the authorized traders are allowed to supply them. On the contrary, the unilateral limitation of supplies presupposes no agreement and does not imply the prohibition of cross-supplies between authorized and unauthorized dealers.

In *Bayer*,[494] the CJEU held that it amounts to unilateral conduct and falls outside of the scope of Article 101 if the producer reduces the quantity delivered to the distributors or answers the orders of the latter only to the extent that is necessary to satisfy local demand. This uncoordinated conduct can be judged only on the basis of Article 102. This principle may also apply to cases where the producer does not reduce the quantity supplied but the number of dealers it supplies to.

Selective distribution is a peculiar area of EU competition law. This antitrust category has been completely unknown in US antitrust law – the same as the pertinent categories of anticompetitive object: the vertical price and non-price restraints included in selective distribution may be assessed under the rule-of-reason standard, like any other vertical restraint.[495]

Since *Pierre Fabre*,[496] the CJEU's case law has been permeated by the controversial idea that selective distribution and its accompanying restrictions are anticompetitive by object, unless objectively justified. This principle is both irreconcilable with sound economic theory and inconsistent with other elements of EU competition law.

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[493] Article 1(1)(g) VBER; Article 1(1)(o) TTBER.

[494] Joined Cases C-2/01 & C-3/01 *Bayer*, EU:C:2004:2.

[495] Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law – An Analysis of Antitrust Principles and Their Application, Volume VIII* §1600b in fn 14 & accompanying text & Ch. 16D and 16E (4th edn Wolters Kluwer 2017); Florian Wagner-von Papp, *Selective distribution*, Global Dictionary of Competition Law, Concurrences, Art. N° 1222.

[496] Case C-439/09 *Pierre Fabre*, EU:C:2011:649.

Selective distribution's history started out with the CJEU's ruling in *Metro*,[497] where the Court created a safe harbour for qualitative selective distribution and its accompanying restrictions on conditions of fulfilling three criteria.[498] First, given the characteristics of the product, selective distribution needs to be necessary to preserve the product's quality and ensure its proper use (high-quality and high-technology products).[499] Second, distributors are 'chosen on the basis of objective criteria of a qualitative nature' and these criteria 'are laid down uniformly' and 'are not applied in a discriminatory fashion'.[500] Third, the criteria laid down are proportionate in the sense that they do not go beyond what is necessary.

Systems and clauses meeting the *Metro* criteria are deemed *per se* lawful. In *Metro*, the Court indicated that selective distribution systems not meeting these criteria are relevant for competition law, as they affect competition in the market. Nonetheless, the category it set up was a safe harbour, that is, the inverse of anticompetitive object, and the ruling did not suggest that systems and clauses outside this cluster are presumed to be anticompetitive. Nonetheless, in *Pierre Fabre*, the CJEU turned this architecture upside down and held that selective distribution is anticompetitive by object, unless it meets the *Metro* criteria:

> As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market (…). Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'.[501]

The ruling indicates that if a clause in a selective distribution is not justified by a legitimate aim, it automatically violates Article 101(1).[502]

Although the above excerpt creates the pretence that the Court simply rehearsed the case law, this holding did not follow from *Metro*, which created a safe harbour and not an object category. Paragraph 33 of the ruling in *Metro*, which is referred to above, simply states that '[i]t is common ground that agreements constituting a selective system necessarily affect competition in the common market'. This does not imply more than the fact that selective distribution is relevant in the context of competition in the market, given that it determines the framework of intra-brand competition. As a corollary, the

[497] Case 26/76 *Metro*, EU:C:1977:167.
[498] *See* Case C-439/09 *Pierre Fabre,* EU:C:2011:649, para 41.
[499] Paras 33–34.
[500] Para 35.
[501] Para 39.
[502] Para 42.

object classification of unjustified selective distribution was established as late as *Pierre Fabre*.

In *Pierre Fabre*,[503] the sale of cosmetic and personal care products was required to occur in the presence of a qualified pharmacist, which implied the exclusion of internet sales. The Court found this to be restrictive by object and hardcore pursuant to the VBER. The complete exclusion of internet sales was considered to be equivalent to a territorial restriction, and Article 4(c) of the VBER excludes from the block exemption the cumulation of selective distribution and (territorial or customer) exclusivity ('without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment').

In *Coty*,[504] the contractual clause did not exclude internet sales but prohibited distributors from using third-party platforms for the visible sale of goods over the internet. The Court did not consider this to be anticompetitive by object, provided it aimed to preserve the luxury image of the goods, was uniformly defined, applied in a non-discriminatory manner and was proportionate to the objective pursued.

It follows that objectively unjustifiable restrictions adopted in the context of selective distribution have an anticompetitive object, or, put another way, selective distribution and the restrictions adopted in the context of selective distribution have an anticompetitive object unless they are objectively justifiable. This implies two important points.

First, each restriction included in a selective distribution has to be assessed as to whether it is warranted. Unjustified restrictions *per se* violate Article 101(1), even if they did not amount to an object restriction outside of selective distribution. Accordingly, the hardcore restrictions set out in Article 4(c) of the VBER may be considered to be anticompetitive by object:

> (c) where the supplier operates a selective distribution system,
> (i) the restriction of the territory into which, or of the customers to whom, the members of the selective distribution system may actively or passively sell the contract goods or services, except:
> (1) the restriction of active sales by the members of the selective distribution system and their direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors;
> (2) the restriction of active or passive sales by the members of the selective distribution system and their customers to unauthorised

[503] Case C-439/09 *Pierre Fabre*, EU:C:2011:649.
[504] Case C-230/16 *Coty,* EU:C:2017:941.

distributors located within the territory where the selective distribution system is operated;

(3) the restriction of the place of establishment of the members of the selective distribution system;

(4) the restriction of active or passive sales to end users by members of the selective distribution system operating at the wholesale level of trade;

(5) the restriction of the ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(ii) the restriction of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade;

(iii) the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade, without prejudice to points (c)(i)(1) and (3);

Second, given that only qualitative selective distribution can meet the *Metro* criteria, quantitative selective distribution is altogether anticompetitive by object.

This object classification is inconsistent with other elements of EU competition law, such as the BERs and the Commission's guidelines. The *Vertical Guidelines* treat qualitative selective distribution meeting the *Metro* criteria as a safe harbour.[505] They do not regard quantitative selective distribution to be anticompetitive by object.[506] This is reinforced by the fact that both qualitative and quantitative selective distribution are covered by the VBER and, as such, none of them are regarded as hardcore.[507] It is inconsistent to maintain that quantitative selective distribution is anticompetitive by object but it is not hardcore and benefits from the block exemption. It is also quite difficult to comprehend how selective distribution could be harmful to competition irrespective of market share. According to the logic of competition law, in the absence of some market power, market operators should be allowed to do whatever they want and let competition in the market 'judge' the practice. Only restrictions that are always or almost always restrictive are deprived of this possibility on account of having no redeeming virtue. It is difficult to see why quantitative selective distribution is not given the chance to be ruled by the market in case there is no market power.

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505 *Vertical Guidelines*, paras 148–150.

506 *Vertical Guidelines*, paras 143–164

507 *Vertical Guidelines*, para 151.

4.4.8 Assessment

EU competition law features a remarkable plethora of the object categories. A part of this is made up of some traditional but inconsistent vertical categories that EU law has refused to reconsider (absolute territorial exclusivity, resale price fixing). Another part of it is made up of new but similarly controversial categories (horizontal information exchange, unjustified selective distribution), which emerged simultaneously to the *Allianz* doctrine analysed in Section 4.3.

Absolute territorial exclusivity and resale price fixing have been anticompetitive by object since the early days of EU competition law. Although these rules have been subject to sharp and cogent criticism, they have remained intact.

The purpose of market integration purports to justify the *per se* treatment of absolute territorial protection, which otherwise goes against economic reasonableness. Perversely, the rule on absolute territorial protection works against the very market integration that is supposed to justify it. Territorial protection helps the penetration of new markets and, hence, stimulates cross-border trade. The *per se* treatment of absolute territorial protection was extrapolated to customer exclusivity, although the consideration that justified the automatic condemnation of territorial restraints (market integration) is incomprehensible in the context of customer restraints.

The treatment of RPF is similarly inconsistent. Most of the arguments for RPF are considerations relevant for Article 101(1), where the substantive analysis is excluded, while they hardly match the focus of Article 101(3), where a substantive analysis is offered. The clearest instance where RPF causes no harm to competition is when the parties have low market share. Nonetheless, the *de minimis* rule does not apply to RPF on account of being anticompetitive by object.

In the last decade, EU competition law has seen the emergence of two new object categories.

Pierre Fabre[508] and *Coty*[509] indicate that unjustified selective distribution, including restrictions in a selective distribution that are not justified by the selective distribution itself, is anticompetitive by object. Although it may be argued that this idea is not new in EU competition law and the rulings in *Pierre Fabre* and *Coty*, indeed, purport that this rule had been part of the case law since *Metro*, in reality, *Metro* sets up a *per se* lawful (safe harbour) and not a *per se* unlawful category.

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[508] Case C-439/09 *Pierre Fabre*, EU:C:2011:649.
[509] Case C-230/16 *Coty,* EU:C:2017:941.

The idea that certain forms of horizontal information exchange are, as a separate object category, anticompetitive by object was introduced by the CJEU's 2009 ruling in *T-Mobile Netherlands*[510] and the Commission's *2011 Horizontal Guidelines*. The emergence of this category is unfortunate, as it increases the risk of false positives without offering any redeeming virtue. On the one hand, the communication that is supposed to be outright prohibited, just as before the introduction of this category, can be pursued as a cartel or as giving rise to a presumption of a cartel. On the other hand, the object category is defined in a nebulous manner and may dissuade undertakings from engaging in legitimate activities. Interestingly, contrary to cartels, BERs do not list horizontal information exchange as hardcore.

The proliferation of European object categories becomes especially salient if contrasted with the *per se* categories of US antitrust law. The comparison reveals a striking difference. There are no vertical *per se* categories in US antitrust law. The automatic condemnation of RPF was abolished in 2007 in *Leegin*, while that of territorial exclusivity in 1977 in *Sylvania*. US antitrust law has never distinguished between absolute and relative territorial protection (which is a fundamental distinction in EU competition law) but treated these categories alike. Horizontal information exchange is not *per se* illegal. These arrangements may be judged as cartels, as it had been the rule in EU competition law before the CJEU's ruling in *T-Mobile Netherlands*[511] and the *2011 Horizontal Guidelines*. Selective distribution and the special treatment of restraints adopted as part of selective distribution are unknown to US antitrust law. All in all, it seems that US antitrust law has been dismantling *per se* treatment, while EU law has been widening it.

Perversely, the proliferation of the European object categories occurred during the reign of the 'more economic approach'. It is difficult to say whether this was causation or correlation, but the fact of the matter is that automatic condemnation gained ground in an age that promised more substantive analysis.

4.5 FINAL CONCLUSIONS

Four decades ago, Robert H. Bork penned a seminal book on how competition law may suppress competition it is supposed to protect.[512] He called this the 'antitrust paradox'. His assessment was largely based on US antitrust law's shift to *per se* illegality. For a long time, it seemed that EU

510 Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343.
511 Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343.
512 Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978).

competition law would avoid this trap. The more 'economic approach', the ever-improved flexibility of the block exemption regulations, the endeavours to eliminate straitjacketing effects, and the de-bureaucratization of competition enforcement all suggested that EU competition law was able to profit from the misfortunes of US antitrust law. Unfortunately, these hopes proved to be in vain.

The last decade has seen the profound transformation of anticompetitive object in EU competition law, which manifested itself in the emergence of the unspecified category ushered by *Allianz* and the proliferation of specified categories. Interestingly, the European developments of the last decade parallel the 1960s and 1970s in US antitrust law, where the Supreme Court established several new and controversial *per se* categories and played down the rule of reason to dismantle them a couple of decades later thanks to mounting economic criticism. The Supreme Court's inclination to treat suspicious and likely anticompetitive arrangements as always anticompetitive and to ramp up false positives for procedural convenience resembles the last decade's proliferation of anticompetitive object in EU competition law.

First, as a result of the CJEU's ruling in *Allianz* and the ensuing case law, anticompetitive object became an elusive and unpredictable concept which enables automatic condemnation after an abridged effects-analysis. This permits competition authorities and Member State courts to deny the right to an effects-analysis, if they find the arrangement anticompetitive at first sight. The *Allianz* doctrine, without offering any redeeming virtue, seriously impairs the consistency and predictability of competition analysis and boosts the risk of false positives by allowing courts to condemn complex market practices quickly without looking into the effects and has a significant chilling effect. This goes against the very rationale of anticompetitive object and suppresses practices that do not harm but benefit consumers.

On the doctrinal side, the conceptual considerations emerging from the notion of anticompetitive object suggest that this category should be confined to agreements that are anticompetitive in themselves, that is, the restriction of competition results from the agreement and not from the interaction between the agreement and market circumstances. Those agreements are anticompetitive by object that have an anticompetitive nature. This implies that these agreements' anticompetitiveness emerges from the very characteristics of the agreement and not from the joint effects of the agreement and extrinsic circumstances (such as market power, market structure, and entry barriers).

On the 'regulatory utility' side, the conception of anticompetitive object should rule out (or at least minimize) false positives by limiting automatic condemnation to agreements whose assessment is backed by extensive experience and have proved to be always or almost always anticompetitive. This keeps erroneous decisions to a minimum and also obviates undertakings' self-censorship. Although it generates somewhat higher enforcement costs than the elusive *Allianz* doctrine, these are dwarfed by the social damage it avoids (in comparison with the latter).

On the institutional side, it should not be overlooked that EU competition law is applied in a decentralized system made up of national competition authorities and courts with varying levels of competition law expertise. This exacerbates the risk of false positives inherent in the elusive *Allianz* doctrine.

These considerations warrant a category-building principle of 'judicial rule-making' ('definition of the definitions'), which is not applicable to individual arrangements directly. Furthermore, the *Allianz* doctrine conflates contextual analysis, which is a natural part of object-inquiry, and effects-analysis, which should have no role to play in the quest for the agreement's object. Consequently, the doctrine disturbs competition law's doctrinal compass and, by increasing the risk of 'friendly fire', may suppress the very competition it is supposed to foster.

Second, EU competition law has traditionally contained vertical object categories that go against sound economic theory.[513] A prominent example is the *per se* treatment of absolute territorial protection and vertical resale price fixing. The purpose of market integration purports to justify the *per se* treatment of absolute territorial protection, which otherwise goes against economic reasonableness. Perversely, the rule on absolute territorial protection works against the very market integration that is supposed to justify it. Territorial protection helps the penetration of the market and, hence, stimulates cross-border trade. The *per se* treatment of absolute territorial protection was extrapolated to customer exclusivity, although the consideration that justified the automatic condemnation of territorial restraints (market integration) is incomprehensible in the context of customer restraints. The treatment of RPF is similarly inconsistent. Most of the arguments for the RPF are considerations relevant from the perspective of Article 101(1), where the substantive analysis is excluded, while they little match the focus of Article 101(3), where a substantive analysis is offered. The clearest instance where RPF causes no harm to competition is when the parties have low market share. Nonetheless, the *de minimis* rule does not apply to RPF on account of being anticompetitive by object. In addition to these, new futile

[513] *See* Miguel de la Mano & Alison Jones, *Vertical agreements under EU competition law: proposals for pushing Article 101 analysis, and the modernization process, to a logical conclusion*, *in* Research Handbook on Methods and Models of Competition Law 167, 179–193 (Deborah Healey, Michael Jacobs & Rhonda L. Smith eds., 2020).

categories of anticompetitive object emerged. The principle that unjustified selective distribution is anticompetitive by object covers agreements that are not necessarily anticompetitive. The anticompetitive object of horizontal information exchange is defined in an obscure manner and may dissuade undertakings from engaging in legitimate activities. At the same time, this category has no added value, as anticompetitive information exchange could equally be pursued as a cartel.

The cost–benefit analysis of anticompetitive object is essentially governed by two considerations: the avoidance of false positives and the saving of unnecessary enforcement costs. False negatives are not a major issue here, as agreements that do not come under the scope of anticompetitive object can still be condemned by means of an effects-analysis. The relationship between these two considerations features, however, no balancing, because cost-saving comes into the picture only if it does not increase the risk of false positives. This is why anticompetitive object is expected to suppress merely those arrangements that are always or almost always anticompetitive without any redeeming virtue.

Competition law's analytical structure, the legal tests and the burden of proof are all set in a way that minimizes false positives and negatives. The effects-analysis is extremely costly and burdensome. Still, the desire to obviate erroneous decisions prevails and the need for a complex effects-analysis is done away with solely in cases where the risk of erroneous decisions is insignificant. EU competition law's clear-cut rules feature this notion. The safe harbours of *de minimis* and block exemption exempt agreements that are certainly in accordance with the requirements of competition law; these safe harbours are not open to agreements that are 'merely' very unlikely to be anticompetitive. If there is reasonable doubt, the agreement needs to be inspected in detail. In the same vein, automatic condemnation is limited to agreements that are always or almost always anticompetitive, without the prospect of a redeeming virtue. A detailed effects-analysis is warranted, even if it is more likely than not that the agreement is anticompetitive. Anticompetitive object was not designed for 'suspect' agreements but for incorrigible ones.

The main risk attached to anticompetitive object is overenforcement (false positives). This is why the scope of automatic condemnation has been kept to the minimum on both sides of the Atlantic. It is generally understood that the social costs of an overly wide ambit clearly outweigh the procedural convenience and reduction in enforcement costs. The temptation that often captures competition authorities and courts is fuelled by the fact that the difference between the two is, at times, positive on the individual but negative on the social level. The oversimplified approach of *Allianz* and the new object categories saved significant enforcement costs in a case where the effects-analysis was not expected to deliver an opposing conclusion. However, this came at horrendous costs on the side of false positives. These costs are made up of potential overenforcement in other cases (where the outcome of an effects-analysis is not so certain) and of self-censorship in cases where the parties abstain from engaging in legitimate cooperation because they do not want to run the risk of being hit by a loose cannon.[514]

[514] Csongor István Nagy, *The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law*, 36(4) European Competition Law Review 154 (2015).

5. Agreements anticompetitive by effect

If an agreement is not anticompetitive by object, it breaches Articles 101(1) only if it has proven anticompetitive effects in the market. This puts an onerous burden on competition authorities and plaintiffs. The effects-analysis requires an economic examination of the agreement's context and impact, which is costly and unpredictable. Furthermore, effect agreements are generally considered to be less pernicious, although they may be equally harmful to competition if backed by market power. Effect cases are considered to be rare, and the lack of anticompetitive object significantly increases the chances of surviving antitrust scrutiny. The higher enforcement costs and the lower risks to competition explain why effect agreements are not an enforcement priority and account for less than 10% of competition cases.[1] As a result, the case law on effects-analysis is limited and has remained relatively undeveloped.[2]

This chapter explores and analyses the concept of anticompetitive effect in terms of rationale, frame of analysis and methodology. Section 5.1 demonstrates that a restriction on the undertaking's freedom of action is a necessary but not sufficient precondition of breaching Article 101(1), and that the identi-

[1] *See* The preliminary results of the "Mapping Judicial Review of National Competition Authorities Competition Law Decisions" led by Or Brook & Barry Rodger, available at Mapping Judicial Review of National Competition Authorities Competition Law Decisions. The results of the research are being published in Or Brook & Barry Rodger (eds), Beyond the ECN+ Directive: Mapping Judicial Review of National Competition Law Decisions (Kluwer). *See also* Barry James Rodger & Or Brook, *UK Report Beyond ECN Directive – Empirical Study Mapping Judicial review of national competition law decisions*, p. 16. Available at SSRN: https://ssrn.com/abstract=4549672 (The paper is a preliminary publication of the results of the "Mapping Judicial Review of National Competition Authorities Competition Law Decisions." This was a comprehensive empirical project on judicial review in EU and national competition cases, based on the empirical study of 10,000 published appeals on the application of Articles 101 and 102 TFEU and their national equivalents by national competition authorities.); Anne C. Witt, *The Enforcement of Article 101 TFEU: What Has Happened to the Effects Analysis?*, 55 Common Market Law Review 417 (2018).

[2] Pablo Ibáñez Colomo, *Anticompetitive Effects in EU Competition Law*, 17(2) Journal of Competition Law & Economics 309, 311 (2020) (Describing the case law on anticompetitive effects "fragmentary" and "sometimes embryonic").

fication of anticompetitive effects calls for a substantive analysis. Section 5.2 presents this substantive analysis and addresses the question whether this is limited to the identification of the negative effects on competition or it extends to the balancing of the anti- and procompetitive effects and, if it does, how this balancing should be carried out. Section 5.3. addresses the CJEU's judicial mantra that Article 101(1) contains no rule of reason and contrasts this with the substantive analysis presented in Section 5.2. It demonstrates that this mantra has mainly 'terminological' relevance and, in fact, the case law mandates a rule-of-reason analysis under Article 101(1). This differs from the American rule of reason in that the latter has a comprehensive focus, while Article 101(1) has a limited one.[3] Only a part of the agreement's redeeming virtues can be taken into account under Article 101(1), as there are benefits that may be considered only under Article 101(3). Section 5.4 inquires whether the effects-analysis may accommodate a sliding scale and whether a truncated effects-analysis can meet the requirements of Article 101(1). It demonstrates that the case law labelled as the unspecified category of anticompetitive object and hallmarked by the *Allianz* doctrine,[4] in fact, applied such a truncated effects-analysis. It is argued that this analysis is carried out under the wrong heading and should be transposed to the effects-analysis. Section 5.5 presents two partial methodologies used in effects-analysis (appreciability and ancillarity). These do not offer a methodology of general application but rules of thumb based on conventional wisdom, which help the easy and simple solution of some cases. Section 5.6 inquires whether public interest considerations may be taken into account under Article 101(1) to assess undertakings' self-regulation, in particular in the field of professional services and sports. Section 5.7 provides an outlook to US antitrust law and compares Article 101(1)'s effects analysis with the American rule of reason. Section 5.8 summarizes this chapter's assessment and proposals.

This chapter demonstrates, first, that Article 101(1) should contain and does contain a substantive analysis aimed to identify the net effect on competition and prohibits those agreements that are, on balance, anticompetitive. Second, it is a major shortcoming that EU competition law has not developed any form of abbreviated effects-analysis where the strictness of the scrutiny varies along

[3] *See* Richard Whish, *Competition Law* 143 (2015); Pietro Manzini, *The European Rule of Reason – Crossing the Sea of Doubt*, 23 European Competition Law Review 392, 395 (2002); Vincent Verouden, *Vertical Agreements and Article 81(1) EC: the Evolving Role of the Economic Analysis*, 71 Antitrust Law Journal 525, 564 (2003); Doris Hildebrand, *The role of economic analysis in the EC competition rules* 235 (1998).

[4] Case C-32/11 *Allianz*, EU:C:2013:160.

a sliding scale. The demanding standard adumbrated by the case law makes this strand of enforcement unnecessarily onerous and pushes it into extending the scope of anticompetitive object. It is proposed that the legal test should be set to minimize false positives and false negatives. The requirement of a scrutiny fit for the agreement's restrictive potential would ease the burden of proof without substantially increasing the risk of false positives. Furthermore, although the lack of plausible justifications does not corroborate that the agreement is detrimental to competition, it suggests a lower risk of false positives and, hence, it warrants a less demanding standard on anticompetitive effects.

5.1 WHEN IS COMPETITION RESTRICTED BY EFFECT?

The CJEU established in numerous rulings that not every self-imposed restriction on an undertaking's freedom of action amounts to a restriction under Article 101(1).[5] Although, in theory, a self-imposed behavioural restriction could be a candidate for a violation, 'not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 101(1) of the Treaty'.[6] If an equality sign were put between the restriction of freedom of action and the restriction of competition, that would lead to the absurd and impractical plight where all commitments that meet the requirement of appreciability violate Article 101(1). 'Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.'[7] Every commitment limits the undertaking's freedom of action and, if viewed in isolation, may be considered anticompetitive. If a supplier sells products to one buyer, it may be able to sell less to other buyers. A dealer who concludes a framework contract with a supplier, which offers a discount and makes the execution of individual orders easier, although not obliged to do so, may be less willing to look for other sources of supply. Although competitors are expected to determine their

[5] Case T-112/99 *Métropole*, EU:T:2001:215, paras 75–77.; Case C-309/99 *Wouters*, EU:C:2002:98, para 97; Case C-333/21 *European Superleague*, EU:C:2023:1011, para 183; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010, para 113; Case C-141/21 P *International Skating Union*, EU:C:2023:1012, para 111; Case C-128/21 *Lietuvos notarų rūmai*, EU:C:2024:49, para 97; Case C-438/22 *Em akaunt BG EOOD*, EU:C:2024:71, para 30.

[6] Case C-309/99 *Wouters*, EU:C:2002:98, para 97.

[7] *Board of Trade of City of Chicago v US*, 246 U.S. 231, 238–239 (1918).

conduct in the market independently[8] and, hence, horizontal contacts may be viewed with some degree of suspicion, a horizontal commitment is not *per se* tantamount to a restriction of competition. Furthermore, contacts, communication and cooperation are a natural part of vertical relations, hence, they may not even be viewed as suspicious.

Accordingly, a self-imposed restriction on the undertaking's freedom of action is a necessary but not sufficient element of a violation. Restrictions in a literal sense (restriction on freedom of action) need to be distinguished from restrictions in an antitrust sense (restrictive effects on competition). For a restriction to breach Article 101(1), it needs to have negative effects on competition in the market. Article 101(1) protects competition, while Article 101(3) exempts cooperative arrangements that enhance efficiency and social and consumer surplus. 'Competition' is, however, a nebulous term, especially as it needs to be distinguished from the benefits considered under Article 101(3). This issue, including the divergent focuses of Article 101(1) and 101(3), is addressed in Section 6.1, where it is argued that the term 'competition' refers to the competitive process and rivalry, while Article 101(3) exempts cooperative arrangements that are proved to produce a larger surplus than competition.

Anticompetitive effects may be actual or potential, 'but they must, in any event, be sufficiently appreciable'.[9] Potential effects are not merely possible or likely effects, but they are subject to the same standard of proof. Potential effects are relevant in cases where the actual effects did not materialize, for instance, because the agreement was not implemented yet or was implemented but there was not sufficient time for it to work out.[10] Criminal law's concept of complete attempt may provide an illustrative analogy. A complete attempt occurs when the perpetrator creates all the preconditions of the criminal outcome, but the latter does not occur for reasons outside their control. Likewise, in case of potential effects, the actual effects are not proven but all their preconditions are in place. There is, of course, an important difference

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[8] Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114–73 *Suiker Unie*, EU:C:1975:174, para 173; Case 172/80 *Züchner v Bayerische Vereinsbank AG*, EU:C:1981:178, para 13; C-114/85, C-116/85, C-117/85 & C-125/85 to C-129/85 *Ahlström*, EU:C:1993:120, para 63; C-7/95 P *John Deere*, EU:C:1998:256, para 86; Case C-194/99 *Thyssen Stahl*, EU:C:2003:527, para 82; Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643, para 34. *See also Guidelines on Article 101(3)*, para 14.

[9] Case C-307/18 *Generics (UK)*, EU:C:2020:52, para 117; Case C-306/20 *Visma Enterprise*, EU:C:2021:935, para 73.

[10] *See* Pablo Ibáñez Colomo, *Anticompetitive Effects in EU Competition Law*, 17(2) Journal of Competition Law & Economics 309, 323–325 (2020).

between a complete attempt and potential effects. A complete attempt remains just an attempt and fails to work out due to circumstances outside of the perpetrator's control, while potential effects are presumed to turn into actual effects as time passes by. Still, in both cases, the conduct goes beyond constituting a risk of harmful outcome and it constitutes the preconditions of this harmful outcome.

Anticompetitive effects may be proved both directly and indirectly. The most straightforward way to prove anticompetitive effects is to demonstrate an anticompetitive outcome (e.g. price increase) and a causal link. This is often difficult or even unfeasible. Effects may also be proved indirectly, by means of circumstantial evidence, where those circumstances are proved that, according to economic common sense, entail anticompetitive effects (e.g. the arrangement's anticompetitive potential and the parties' market power). These 'causing facts' (or 'leads') are used as surrogates of effects. For instance, there are two ways to prove the anticompetitive effects of a non-compete clause. By means of direct proof, it may be demonstrated that competing suppliers were foreclosed from the market. This, however, may come with high or even prohibitive costs. Alternatively, foreclosure may also be proved indirectly, by demonstrating that the supplier has significant market power and has tied a considerable part of the market.

The effects-analysis contains no hard requirement of market power, that is, the ability to effectively replace the competitive market equilibrium with entrepreneurial decisions, for instance, as regards prices, output, quality, product variety and innovation.[11] Although it is not indispensable to prove market power in order to establish anticompetitive effects, this principle is valid with three caveats.

First, there is a soft requirement of market power, as effects are unlikely to emerge without it.[12] This requirement is soft also in the sense that the required degree of market power is case-dependent and, hence, undefined. This much is certain in that it needs to exceed the appreciability threshold (the *De Minimis* Notice sets a 10% market share cap for horizontal and a 15% cap for non-horizontal agreements) and 'is less than the degree of market power

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[11] *See Guidelines on Article 101(3)*, para 25 ("Market power is the ability to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time."), repeated in *Vertical Guidelines*, para 11; *Horizontal Guidelines*, para 32(c) fn 40.

[12] *Vertical Guidelines*, para 11; *Horizontal Guidelines*, para 32(c), *Guidelines on Article 101(3)*, para 25–26.

required for a finding of dominance under Article 102'.[13] The BERs' market share caps may serve as indicators of the degree of market power required by the effects-analysis. In *Visma Enterprise*,[14] the CJEU found it relevant that the supplier's market share did not exceed 30%, which is the market share cap established by the VBER, and held that this 'fact, together with other factors, must be taken into account in order to determine the structure of the market at issue'.[15] The SBER applies if the parties' combined market share does not exceed 20%.[16]

Second, although there is no need to prove market power if effects can be proved directly, it is difficult to prove anticompetitive effects indirectly in the absence of market power.

Third, the soft requirement of market power also follows from competition law's creed that choices have to be made by competition in the market, unless the market fails. If there is no market power, the parties cannot impose an anticompetitive policy and are supposed to fail.

An important principle accruing from competition law's teleology is the infallibility of workable competition. As explained in Section 2.1, competition law protects competition by interfering with the free market. This apparent oxymoron can be resolved by limiting competition law's intervention to cases where competition fails to function for lack of certain preconditions and if the outcome of workable competition is not second-guessed. Competition law favours the 'judgment seat' of the market to that of a legal procedure. The former is infallible; the latter is not. Provided the preconditions of workable competition are met, the outcome of the market process is, by definition, optimal. The contrary would be a 'frontal assault on the basic notion of competition law.'[17] The 'discipline of the market'[18] is superior to the discipline of a legal procedure. If an arrangement functions in the market in the absence of any market power and does not fail in competition, it is probably either efficient or harmless. It appears to be redundant to judge it by means of a legal procedure if it was already judged by the market. After all, competition law works for and not against competition. Arrangements anticompetitive by object, which are always or almost always anticompetitive, are an exception to this approach for being outright prohibited irrespective of market power. As

[13] *Guidelines on Article 101(3)*, para 26.
[14] Case C-306/20 *Visma Enterprise*, EU:C:2021:935.
[15] Para 80.
[16] Article 3 SBER.
[17] *National Society of Professional Engineers v US*, 435 U.S. 679, 692, 695 (1978).
[18] *FTC v Indiana Federation of Dentists*, 476 U.S. 447, 462 (1986).

demonstrated in Section 4.1.4, the justification of the outright prohibition is not that these restrictions may cause harm even in the absence of market power. In the absence of any market power whatsoever, cartels are failed attempts to raise prices and self-destructive. The rationale of the outright prohibition is that it generates no false positives, given the lack of a redeeming virtue; it may entail 'false neutrals' at most, while it offers the benefits of a clear-cut rule.

5.2 THE ELEMENTS OF SUBSTANTIVE ANALYSIS: CONTEXT, COUNTERFACTUAL AND PROCOMPETITIVE EFFECTS

The central question of the substantive analysis to be carried out under Article 101(1) is whether it considers only the negative effects on competition or it involves a balancing of the anti- and procompetitive effects. Evidently, Article 101(3) requires balancing. It is also clear that Article 101(1) cannot accommodate all justifications, otherwise it would deprive Article 101(3) of its meaning. It is, however, not self-evident, if Article 101(1) can serve as a floor for contrasting anti- and procompetitive effects.[19]

The Court developed three important principles to distinguish restrictions on the freedom of action from restrictions of competition: contextual analysis, counterfactual analysis and the weighing of the anti- and procompetitive effects. These jointly make up the methodology of the effects-analysis and imply that Article 101(1) calls for the balancing of anti- and procompetitive effects.

The requirement to assess the agreement in its legal and economic context is a pervasive principle, which governs object and effect restrictions alike. In the object-inquiry, the function of contextual analysis is to distinguish naked from non-naked (ancillary) restrictions. In the effects-analysis, it is used to ascertain the effects. The requirement that the effects-analysis must be carried out in the actual market context was established as early as *Société Technique Minière*[20] and became the CJEU's *jurisprudence constante*.[21] This contextual analysis extends to the products' nature and quantity, the parties' market posi-

[19] For a comprehensive overview of the status and role of procompetitive effects in EU competition analysis, *see* Stavros Makris, *Procompetitive Effects in EU Competition Law*, in Antitrust and the Bounds of Power – 25 Years On 117 (Oles Andriychuk ed., 2023).

[20] Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38.

[21] *See e.g.* Case 23/67 *Brasserie de Haecht*, EU:C:1967:54; Case 31/80 *L'Oréal*, EU:C:1980:289, para 19; Case C-306/20 *Visma Enterprise*, EU:C:2021:935, para 95; Case C-399/93 *Oude Luttikhuis v Verenigde Coöperatieve Melkindustrie Coberco*, EU:C:1995:434, para 10; Case C-234/89 *Delimitis v Henninger Bräu*,

tion and market power, the 'severity of the clauses', the cumulative effects of parallel systems and the business opportunities left for other undertakings. An agreement may be anticompetitive in one context and non-restrictive or even procompetitive in another.

The ruling in *Société Technique Minière* also established that the competition assessment requires a temporal comparison of the market,[22] which was subsequently referred to as 'counterfactual analysis'.[23] Competition with the agreement needs to be compared with the would-be competition without the agreement.[24] 'The sole purpose of the counter-factual is to establish the realistic possibilities with respect to (…) [the economic operators'] conduct in the absence of the agreement at issue (…) [and] to determine how the market will probably operate and be structured if the agreement concerned is not concluded.'[25] An agreement is anticompetitive if it leads to less competition than the market would experience in the absence of it. This comparison implies that individual anticompetitive effects are not relevant in themselves, and the ultimate question is the final effect on competition. If an agreement gives more to competition than it takes away, at the end of the day it is procompetitive, notwithstanding the individual anticompetitive effects.

The agreement's anti- and procompetitive effects need to be contrasted, compared and weighed. An agreement breaches Article 101(1) if its net effects are anticompetitive. This may be the case if the agreement has no anticompetitive effects at all or if its procompetitive effects outweigh the anticompetitive ones.

The requirement to compare the anti- and procompetitive effects is implied in the market context and counterfactual analysis but was also recognized by the CJEU as an independent requirement.

EU:C:1991:91, paras 28 & 31; Case C-306/20 *Visma Enterprise*, EU:C:2021:935, paras 72–75.

[22] Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, p. 250.

[23] The comparison is accomplished through reference to the counterfactual (the would-be competitive situation). *See* Beverley Robertson, *What is a Restriction of Competition?*, 28(4) European Competition Law Review 252, 257 and 258 (2007); Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* 78 (2007); *Guidelines on Article 101(3)*, para 18.

[24] *See e.g.* Case 42/84 *Remia*, EU:C:1985:327, para 18; Case C-306/20 *Visma Enterprise*, EU:C:2021:935, para 74; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010, para 100.

[25] C-307/18 *Generics (UK)*, EU:C:2020:52, para 120, reiterated in Case C-306/20 *Visma Enterprise*, EU:C:2021:935, para 76.

In *Super Bock Bebidas*[26] and *Autoridade da Concorrência v Ministério Público*,[27] the CJEU held, in the context of object-inquiry, that the inspection of the procompetitive effects is part of the contextual analysis. In rare cases, it might be possible to effectively compare the market with and without the agreement. For instance, if little time has elapsed since the conclusion of the agreement and the conditions in the pre- and post-agreement markets are identical (except for the agreement itself), the counterfactual analysis can be carried out. However, if input costs, inflation, demand and other external factors changed since the conclusion of the agreement, the counterfactual analysis cannot be carried out by means of a simple data comparison. The more different the pre- and post-agreement markets are, the more the counterfactual is a metaphor rather than an actual methodology. This implies that in case the temporal comparison is not feasible or fails to produce a reliable result, the comparative effects need to be reconstructed, and this reconstruction may occur through using the various effects as building blocks. In other words, in case the would-be market existing absent the agreement cannot be established for the purpose of a straightforward counterfactual analysis, it needs to be reconstructed and this reconstruction can be carried out by identifying the anti- and procompetitive effects.

The CJEU also recognized the balancing of the anti- and procompetitive effects as an independent requirement. Although these rulings provided for the consideration of the procompetitive benefits in the context of the object-inquiry, this requirement should *a fortiori* be applicable to effects-analysis. The purpose of the object-inquiry is to establish if the agreement is anticompetitive irrespective of its effects. If the question is answered in the affirmative, that concludes the analysis under Article 101(1). This classification can be made only after both anti- and procompetitive effects are considered. It would be contradictory to argue that the procompetitive benefits are relevant in the object-inquiry but not relevant in the effects-analysis, and in case of effect agreements they can be considered solely under Article 101(3). Article 101(3) applies to object and effect agreements alike and it has the same focus irrespective of which category it is applied to.

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26 Case C-211/22 *Super Bock Bebidas*, EU:C:2023:529, para 36. Case C-331/21 *EDP v Autoridade da Concorrência*, EU:C:2023:812, para 103.

27 Case C-331/21 *EDP v Autoridade da Concorrência*, EU:C:2023:812, para 104.

In *Generics (UK)*,[28] the CJEU held that the contextual analysis, as part of the object-inquiry, embraces the examination of the procompetitive effects.

> [W]here the parties to that agreement rely on its pro-competitive effects, those effects must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a 'restriction by object' (…) in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition and, consequently, of whether it should be characterised as a 'restriction by object'.[29]

The CJEU underlined that it does not suffice to allege the procompetitive effects, but they need to be substantiated.

> However, taking into consideration such matters presupposes that the pro-competitive effects are not only demonstrated and relevant, but also specifically related to the agreement concerned (…).
>
> Further, (…) the mere existence of such pro-competitive effects cannot as such preclude characterisation as a 'restriction by object'.
>
> If such effects are demonstrated, relevant and specifically related to the agreement concerned, those pro-competitive effects must be sufficiently significant, so that they justify a reasonable doubt as to whether the settlement agreement concerned caused a sufficient degree of harm to competition, and, therefore, as to its anticompetitive object.[30]

These propositions were reiterated in *HSBC*,[31] where the CJEU plainly rejected the GC's position that procompetitive benefits may be taken into account solely under Article 101(3) and held that these justifications need to be examined under Article 101(1).

> It follows from that case law that the General Court erred in law in holding (…) that, with the exception of restrictions ancillary to a main operation, it is only in the context of the assessment of Article 101(3) TFEU that any procompetitive effects can be taken into account.[32]
>
> Such an error led it not to examine the HSBC companies' arguments that the exchanges on mids had procompetitive effects, whereas those exchanges had been raised by those companies in order to call into question the characterisation of those exchanges as a restriction by object.[33]

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[28] C-307/18 *Generics (UK)*, EU:C:2020:52.
[29] Para 103.
[30] Paras 105–107.
[31] Case C-883/19 P *HSBC*, EU:C:2023:11, paras 139 & 196–197.
[32] Para 141.
[33] Para 143.

Of course, in practice it is often nearly impossible to distinguish the three methodologies. The counterfactual analysis implies the examination of the legal and economic context, and it is often not made up of a 'time machine' comparison but of a reconstruction by means of identifying the individual anti- and procompetitive effects. The amalgamation of these different methodologies has been part of the case law from the outset. The CJEU's ruling in *Société Technique Minière*[34] showcases the combination of these.

> The competition in question must be understood within the *actual context* in which it *would occur in the absence of the agreement in dispute*. In particular it may be doubted whether there is an interference with competition if the said agreement seems *really necessary for the penetration of a new area* by an undertaking. Therefore, in order to decide whether an agreement containing a clause 'granting an exclusive right of sale' is to be considered as prohibited by reason of its object or of its effect, it is appropriate to *take into account in particular* the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.[35]

This formulation has been repeated in the subsequent cases dealing with effects-analysis.[36] The CJEU approved several business schemes under Article 101(1) with the simultaneous use of the above three methodologies. In *Société Technique Minière*,[37] an exclusivity clause was accepted due to the free-rider argument.[38] In *Pronuptia*,[39] the Court held that certain restrictions in franchising agreements are not caught by Article 101(1), presumably because they are reasonable and enhance competition. In *Metro*,[40] the same unspoken 'restricts but reasonably' logic was used for endorsing a selective distribution agreement under Article 101(1). In *Nungesser*,[41] the CJEU held that Article 101(1) is not applicable to an exclusive licence due to its being

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[34] Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38.
[35] p. 250 (emphasis added).
[36] *See e.g.* Case 31/80 *L'Oréal*, EU:C:1980:289, para 19; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010, para 100.
[37] Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38.
[38] Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, p. 249.
[39] Case 161/84 *Pronuptia*, EU:C:1986:41.
[40] Case 26/76 *Metro*, EU:C:1977:167.
[41] Case 258/78 *Nungesser*, EU:C:1982:211.

reasonably necessary for penetrating a new market.[42] In *Remia*,[43] the CJEU found no Article 101(1) concerns in case of a non-compete obligation attached to a sale of business contract, asserting that without this restraint 'the agreement for the transfer of the undertaking could not be given effect' and the agreements did 'contribute to the promotion of competition because they lead to an increase in the number of undertakings in the market in question'.[44] In *Göttrup-Klim*,[45] the CJEU established the Article 101(1) compatibility of an agricultural cooperative's rule that required the members of the cooperative not to have membership in another cooperative. The Court considered that the cooperative actually intensified competition in the sense of rivalry; thus, it rather promoted than hindered the competitive process. All in all, the CJEU not only established a test where the reasonableness of the arrangement is to be evaluated from a competition point of view, but it removed certain procompetitive restrictions from the ambit of Article 101(1).

5.3 RULE OF REASON WITHOUT A RULE OF REASON?

There is a long line of case law that explicitly rejects the idea of a rule of reason, while it in fact applies a rule-of-reason analysis.[46] Of course, there is an

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42 Case 258/78 *Nungesser*, EU:C:1982:211, para 57.
43 Case 42/84 *Remia*, EU:C:1985:327.
44 Case 42/84 *Remia*, EU:C:1985:327, paras 19–20.
45 Case C-250/92 *Gøttrup-Klim*, EU:C:1994:413.
46 *See* Emmanuel P. Mastromanolis, *Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law*, 15 University of Pennsylvania Journal of International Business Law 559, 567–568 (1994); *White Paper on Modernisation of the Rules Implementing Article 85 and 86 of the EC Treaty.* Commission Programme 99/027. COM (99) 101 final. [1999] OJ C 132/1, para 57 fn 47 (Referring to the rulings in *Nungesser* and *Pronuptia* as rule-of-reason judgments.). On the issue of the European rule of reason, *see* Valentine Korah, *Rule of Reason: Apparent Inconsistency in the Case Law Under Article 81*, 1 Competition Law Insight 24 (2002); René Joliet *The Rule of Reason in Antitrust Law* 77–106 (1967); Mark Clifford Schechter, *The Rule of Reason in European Competition Law*, 1982(2) Legal Issues in European Integration 1 (1982); Ian Forrester & Christopher Norall, *The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law is and could be Applied*, 21 Common Market Law Review 11 (1984); Valentine Korah, *EEC Competition Policy – Legal Form or Economic Efficiency*, 39 Current Legal Problems 85 (1986); James S. Venit, *Brave New World: the Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty*, 40 Common Market Law Review 545 (2003);

important difference between Article 101(1) and the American rule of reason. While the latter is comprehensive in the sense that it covers the totality of the relevant aspects, Article 101(1) shares the scene with Article 101(3), which would be deprived of its meaning and function if a full rule-of-reason analysis were carried out under Article 101(1).[47] This, however, does not explain why the rule in Article 101(1) should be deprived of reason;[48] it merely implies that there is a division of labour between Article 101(1) and 101(3). The requirement that the assessment should be based on the agreement's legal and economic context, the notion of counterfactual analysis which compares the market with and without the agreement, and the concomitant contrasting of the pro- and anticompetitive effects constitute a rule-of-reason analysis,[49] with

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Donald L. Holley, *EEC Competition Practice; a Thirty-Year Retrospective*, 16 Fordham International Law Journal 342 (1992/1993); Valentine Korah, *The Rise and Fall of Provisional Validity: The Need for a Rule of Reason in EEC Antitrust*, 3 Northwestern Journal of International Law and Business 320 (1981); Ernst Steindorff, *Article 85 and the Rule of Reason*, 21 Common Market Law Review 639 (1984).; Luc Gyselen, *Vertical Restraints in the Distribution Process: Strength and weakness of the Free Rider Rationale under EEC Competition Law*, 21 Common Market Law Review 647 (1984); Richard Whish & Brenda Sufrin, *Article 85 and the Rule of Reason*, 7 1987 Yearbook of European Law 1 (1988); Jan Peeters, *The Rule of Reason Revisited: Prohibition on Restraints of Competition in the Sherman Act and in the EEC Treaty*, 37 American Journal of Comparative Law 521 (1989); G. Wils, *"Rule of Reason": Une Regle Raisonnable en Droit Communautaire?*, 1990 Cahiers de Droit Européen 19 (1990); Pietro Manzini, *The European Rule of Reason: Crossing the sea of doubt*, 23 European Competition Law Review 392 (2002); Phedon Nicolaides, *The Balancing Myth: The Economics of Article 81(1) & (3)*, 32(2) Legal Issues of Economic Integration 123 (2005).

[47] AG Léger in his opinion delivered in *Wouters*, while acknowledging that there are "learned disputes concerning the definition of (…) [the concept of rule of reason] or the advisability of its introduction into Community law", treated the above cases as examples where the ECJ "made limited application of the rule of reason." AG Léger's Opinion in Case C-309/99 Wouters, EU:C:2001:390 para 103. Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 293 & 297 (2002) (Arguing that a rule of reason type analysis should be made under Article 101(1).) Okeoghene Odudu, *The Boundaries of EC Competition Law* 98, 103 & 128–129 (2006).

[48] *See* René Joliet, *The Rule of Reason in Antitrust Law* 5 (1967) (Contending that it is a misconception that Article 101(3) is "nothing more than the codification of the American rule of reason.")

[49] *See* Roger J. Goebel, *Metro II's Confirmation of the Selective Distribution Rules: Is This the End of the Road?*, 24 Common Market Law Review 605, 611 (1987) (Concluding that the CJEU's analysis of selective distribution in *Metro II*

the limitation that some aspects are reserved for Article 101(3).[50] Nonetheless, Articles 101(1) and 101(3) make up a full rule of reason. In the aggregate, they enable the analysis of all the aspects the American rule of reason inquires.[51] The phraseological veil cannot hide what the CJEU is actually doing.

In *Van den Bergh Foods*,[52] the GC held that 'the existence of (…) [the rule of reason] in Community competition law is not accepted'.[53] It noted that all concerns related to 'reason' should belong to Article 101(3), as a different interpretation would be 'difficult to reconcile with the structure of the rules prescribed by Article 85'.[54]

> Article 85 of the Treaty expressly provides, in its third paragraph, for the exemption of agreements that restrict competition where they satisfy a number of conditions (…). It is only within the specific framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed (…). Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had already to be carried out under Article 85(1) of the Treaty.[55]

"obviously represent[s] a 'rule of reason' approach to Article 85(1)."). *But see* Barry E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 Common Market Law Review 973, 987–988 (1995) (Asserting that "there is only one set of economic principles, or to state the converse, there are not two sets of microeconomics and industrial organization theory with one operating under 85(1) and the other operating under 85(3)." Suggesting that economic considerations should be examined under Article 101(1), while Article 101(3) should be the floor for analysing non-competition policies, e.g. environmental policy, industrial policy. Criticizing the bifurcation of Article 101 analysis and submitting that "[a] more fundamental solution would be elimination of the bifurcation through amendment of the Treaty.").

[50] For an analysis of the different focuses of Article 101(1) and 101(3), *see* Section 6.1.

[51] *See* Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* 235 (1998) ("The problem of a rule-of-reason in Community competition law is therefore much more *when* the overall assessment of the competition impact of an agreement should be made, than *if* this assessment is made.").

[52] Case T-65/98 *Van den Bergh Foods*, EU:T:2003:281.

[53] Para 106. It is noteworthy that the GC's earlier judgments neither confirmed nor refuted the existence of rule of reason in EU competition law. *See* Case T-14/89 *Montedipe*, EU:T:1992:36, para 265; Case T-148/89 *Tréfilunion*, EU:T:1995:68, para 109.

[54] Para 106.

[55] Para 107.

This, however, did not rule out the analysis of the legal and economic context, which the GC insisted on.

> When assessing the effects of such a network of distribution agreements, it is necessary to have regard to the economic and legal context in which it operates and in which it might combine with others so as to have a cumulative effect on competition.[56]

In *Métropole*,[57] the GC was a little bit more euphemistic but came to the very same conclusion. It noted that 'the existence of a rule of reason in Community competition law is doubtful'.[58] The GC based this on the same structural argument and reasoned that if the pro- and anticompetitive aspects of a restriction were weighed under Article 101(1), Article 101(3) 'would lose much of its effectiveness'.[59] The GC sensed the tension between the stance that there is no rule of reason in EU competition law and the requirement to analyse the legal and economic context, and made an unsuccessful attempt to reconcile the two.

> It is true that in a number of judgments the Court of Justice and the Court of First Instance have favoured a more flexible interpretation of the prohibition laid down in Article 85(1) of the Treaty (…).
>
> Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) of the Treaty. In assessing the applicability of Article 85(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (…).
>
> That interpretation, while observing the substantive scheme of Article 85 of the Treaty and, in particular, preserving the effectiveness of Article 85(3), makes it possible to prevent the prohibition in Article 85(1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties. It must, however, be emphasised that such an approach does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement when determining whether the prohibition laid down in Article 85(1) of the Treaty applies.[60]

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56 Para 109.
57 Case T-112/99 *Métropole*, EU:T:2001:215.
58 Para 72.
59 Para 74.
60 Paras 75–77.

The GC, in essence, held that Article 101(1) requires the examination of the specific and real effects but ruled out the consideration of the procompetitive effects.[61] Nonetheless, the GC's argument would imply that the examination of the 'market context' is virtually a quest for market power. All self-imposed restraints on an undertaking's freedom of action carry the potential for restriction, which plays out once the undertaking has some market power. If only the anticompetitive effects can be taken into account under Article 101(1),[62] and the procompetitive effects are left to Article 101(3), the defendant may escape from the net of Article 101(1) only if demonstrating that the *in abstracto* dangers did not became a reality *in concreto*. This is, however, a *de minimis* logic. If redeeming virtue is not taken into account, the effects-analysis turns into an appreciability test, where the parties can succeed only if lack of market power is proved.[63] This would go, however, against the elements of the substantive analysis set out in Section 5.2.

The inconsistency of the above notion became particularly salient in *O2 (Germany)*,[64] where the GC found the overall agreement procompetitive notwithstanding the considerable anticompetitive effects. The framework of the substantive analysis had a pivotal role in this case. If considering solely the negative effects, the agreement would have breached Article 101(1). Nonetheless, the GC examined the overall effects and quashed the Commission's decision for not considering certain procompetitive justifications under Article 101(1) and leaving them to Article 101(3).

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[61] The Commission's *Guidelines on Article 101(3)* also follow this approach in para 11.

[62] *See* Beverley Robertson, *What Is a Restriction of Competition?*, 28(4) European Competition Law Review 252, 257 (2007). *Cf.* Vincent Verouden, *Vertical Agreements and Article 81(1) EC: The Evolving Role of the Economic Analysis*, 71 Antitrust Law Journal 525, 563–564 (2003) ("From an economist's point of view, this approach is somewhat difficult to follow. (…) It entails an incomplete analysis of competition in the sense that, when examining whether or not an agreement restricts competition, the Court does not consider the economic context in order to determine the net effect on competition, but rather considers it only to verify the existence of possible anticompetitive effects.")

[63] *Cf. Guidelines on Article 101(3)*, para 24 (As to anticompetitive effects, the relevant consideration is the "weight", that is, "extent" and appreciability, of effects.).

[64] Case T-328/03 *O2 (Germany)*, EU:T:2006:116.

The GC highlighted that the substantive analysis embraces both a contextual and a counterfactual analysis, which are 'intrinsically linked', but denied engaging in a rule-of-reason analysis.[65]

> [T]he effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking.
>
> Such a method of analysis, as regards in particular the taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason, which the Community judicature has not deemed to have its place under Article 81(1) EC (…).
>
> In this respect, to submit, as the applicant does, that the Commission failed to carry out a full analysis by not examining what the competitive situation would have been in the absence of the agreement does not mean that an assessment of the positive and negative effects of the agreement from the point of view of competition must be carried out at the stage of Article 81(1) EC. Contrary to the defendant's interpretation of the applicant's arguments, the applicant relies only on the method of analysis required by settled case law.
>
> The examination required in the light of Article 81(1) EC consists essentially in taking account of the impact of the agreement on existing and potential competition (…) and the competition situation in the absence of the agreement (…), those two factors being intrinsically linked.[66]

Until this point, the insistence that the concept of 'rule of reason' is unknown to EU law has remained a GC practice, as these cases never found their way to the ECJ. The judgments in *Métropole* and *O2 (Germany)* were not appealed. Although in *Van den Bergh Foods* the case reached the ECJ, the appeal was dismissed by order for being in part manifestly inadmissible and in part manifestly unfounded.[67]

In *Montecatini*,[68] the ECJ dodged the question. As the case involved a cartel, it did not require a decision on the issue.

> On this point, it need merely be stated that, even if the rule of reason did have a place in the context of Article 85(1) of the Treaty, in no event may it exclude application of that provision in the case of a restrictive arrangement involving producers accounting for almost all the Community market and concerning price

65 Para 71.
66 Paras 68–71.
67 Case C-552/03 P *Masterfoods*, ECLI:EU:C:2006:607.
68 Case C-235/92 *Montecatini*, EU:C:1999:362.

> targets, production limits and sharing out of the market. The Court of First Instance did not therefore commit an error of law when it considered that the clear nature of the infringement in any event precluded the application of the rule of reason.[69]

Finally, however, the ECJ addressed the issue in *Generics (UK)*[70] and referred to the rejection of the 'rule of reason' as its settled case law. The Court also stressed, as the GC's practice does, that this does not rule out the consideration of the procompetitive effects.

> Since taking account of those pro-competitive effects is intended not to undermine characterisation as a 'restriction of competition' within the meaning of Article 101(1) TFEU, but merely to appreciate the objective seriousness of the practice concerned and, consequently, to determine the means of proving it, that is in no way in conflict with the Court's settled case law that EU competition law does not recognise a 'rule of reason', by virtue of which there should be undertaken a weighing of the pro- and anticompetitive effects of an agreement when it is to be characterised as a 'restriction of competition' under Article 101(1) TFEU.[71]

This was verbatim repeated by the ECJ in *HSBC Holdings*.[72]

The CJEU's insistence on EU law's rejection of the 'rule of reason' can only be explained as a rejection of the terminology instead of the substance. It is contradictory to require, for instance, a counterfactual analysis and, at the same time, to rule out the exploration of the elements that make the market with and without the agreement different. The root cause of this stance is that while the rule of reason is all-embracing in terms of considering merits and benefits, Article 101(1) senses only a certain part of the merits and benefits, while the rest of them are left to Article 101(3).[73]

5.4 SLIDING SCALE AND ABBREVIATED EFFECTS-ANALYSIS

The case law on Article 101(1) establishes an omnipercipient legal test for effect cases that envisages a highly fact-intensive, case-by-case analysis where everything is relevant, but nothing is determinant and there are no set evidentiary values. Although this does not imply a one size fits all, it does

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69 Para 133.
70 C-307/18 *Generics (UK)*, EU:C:2020:52.
71 Para 104.
72 Case C-883/19 P *HSBC Holdings*, EU:C:2023:11, para 140.
73 *Cf.* Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* 235–236 (1998) (Characterizing the jurisprudence of the CJEU as applying a limited kind of a rule of reason.).

imply a monolithic methodology, which accommodates no sliding-scale-based abbreviated inquiry. This is a major shortcoming. The unnecessarily expensive effects-analysis leads to underenforcement (in other words: false negatives) and to the distortion and deformation of anticompetitive object, which is used as a surrogate of the abbreviated effects-analysis. This argument is presented as follows. First, it is demonstrated why a sliding-scale-based abbreviated effects-analysis is needed. Second, it is demonstrated how the case law has inconsistently tried to satisfy the need for such a legal test by distorting the object-inquiry and why this causes more problems than it solves. Third, a proposal for a sliding-scale-based abbreviated effects-analysis is made and it is demonstrated why and how the case law on the unspecified category of anticompetitive object (also referred to as the *Allianz* doctrine) should be transposed to be under the effects heading.

As noted above, effect cases merely account for around 10% of competition matters, which suggests that, as a matter of practice, they have been sidelined. This raises issues not only in terms of underenforcement but also in light of the ‘more economic approach’ ushered in by EU competition law nearly three decades ago. Perversely, in the era hallmarked by the ‘more economic approach’, condemnations without an economic analysis carry the day.[74] This showcases the failure of the idea that, outside cartels, competition enforcement should be based on demonstrated economic effects and of the naive expectation that economics can produce mathematical certainty in individual cases.[75] In reality, empirical economic analysis is as uncertain and amenable to both false positives and false negatives as proof in general. What economic theory can provide instead is error-minimizing presumptions and sound rules on the allocation and shifting of burden of proof and an analysis fit for the case.[76] Furthermore, in case of agreements with a high restrictive potential and market power, a full-fledged effects-analysis appears to be redundant and a waste of resources.

Neither the language of Article 101(1) nor economic common sense justifies that the effects-analysis should always have a permanent intensity and monolithic methodology. What can be deduced from Article 101(1) as a legal

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[74] Anne C. Witt, *The enforcement of Article 101 TFEU: What has happened to the effects analysis?*, 55(2) Common Market Law Review 417 (2018).

[75] Jan Blockx, *The Limits of the ‘More Economic’ Approach to Antitrust*, 42(4) World Competition 475 (2019).

[76] *See* Herbert J. Hovenkamp, *The Rule of Reason*, 70 Florida Law Review 81, 121 (2018) (“The entire debate about antitrust “modes of analysis” is at bottom about presumptions, burdens of proof, and appropriate judicial responses to concerns about plausibility and location of the evidence. Antitrust cases are complex, and judges depend critically on presumptions and other evidentiary shortcuts.”).

requirement is not that competition cases are governed by the same mode of proof, but that they are governed by the same standard of proof. This implies, however, that the mode of proof and the required evidence may vary as a function of the agreement's anticompetitive potential and the parties' market power (referred to as a 'sliding scale') and conventional economic wisdom may warrant a simplified methodology in certain cases (referred to as 'abbreviated effects-analysis').

The unnecessarily expensive effects-analysis generates underenforcement, which, in turn, entails false negatives. Besides these, the overly demanding effects standard also creates perverse incentives in cases featuring conspicuous restrictive effects but no traditional category of anticompetitive object. Arguably, this was a major factor in the emergence of the unspecified category of anticompetitive object (hallmarked by the *Allianz* doctrine), which, as presented in Section 4.3, distorted the conceptual structure of competition law by overstretching anticompetitive object to avoid the effects-analysis.

At the same time, this case law can, in effect, be reclassified as applying, though under the wrong label, the sliding-scale-based abbreviated analysis the effects-analysis misses. The criticism made in Section 4.3.6 against this line of cases demonstrates that the latter, in fact, carried out an abbreviated effects-analysis. The factors and requirements this case law sets out for the object-inquiry are essentially an abbreviated version of the effects-analysis. First, the contextual analysis to be carried out goes beyond the distinction between naked and non-naked and, in fact, stands for a substantive analysis. The agreement has to be assessed in its specific legal and economic context to identify its repercussions under the specific circumstances.[77] Second, these rulings imply that the object-inquiry has an effects angle. It is not simply the alleged anticompetitive nature that is considered here, but the agreement's effects.[78] Third, the object-inquiry also extends to the consideration of procompetitive effects. Although the mere existence of a procompetitive aspect does not rule out anticompetitive object, procompetitive effects may neutralize anticompetitive repercussions. Again, this is not an abstract analysis but takes place in the context of the specific circumstances under which the agreement operates.[79]

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[77] *See e.g.* Case C-32/11 *Allianz*, EU:C:2013:160, para 36; Case C-306/20 *Visma Enterprise*, EU:C:2021:935, paras 72 & 75.

[78] *See e.g.* Case C-306/20 *Visma Enterprise*, EU:C:2021:935, paras 62 & 72; Opinion of AG Rantos in Case C-298/22 *Banco BPN/BIC Português*, EU:C:2023:738, para 43.

[79] *See e.g.* C-307/18 *Generics* (UK), EU:C:2020:52, paras 106–107; Case C-883/19 P *HSBC*, EU:C:2023:11, paras 139, 141, 196–197; Case C-331/21 *EDP v Autoridade da Concorrência*, EU:C:2023:812, para 104.

The cases where the *Allianz* doctrine was applied to actually condemn a conduct fall into two groups. First, there is a set of cases where the CJEU used the unspecified category to condemn agreements that came under one of the specified object categories (horizontal market sharing in *Hoffmann-La Roche & Novartis*[80] and *Royal Antwerp Football Club*[81] and horizontal price fixing in *HSBC Holdings*[82]). Second, in *European Superleague*[83] and *International Skating Union*,[84] the CJEU applied the doctrine to effect agreements whose anticompetitive effects were obvious due to the sporting organizations' super-dominance. These two cases did not require more than an abbreviated effects-analysis and the CJEU just carried out that, although labelled it as object-inquiry. Vertical non-compete obligations may evidently have foreclosure effects if backed by significant market power and market coverage. In these cases, the sporting organizations were dominant in the markets for the organization and marketing of competitions and concluded a vertical agreement with the members. It was very reasonable to deduce the restrictive effects from the interaction of the agreement's restrictive potential and the sporting organizations' eminent market power. The CJEU's argument would have been perfectly consistent, if it had not referred to its analysis as an object-inquiry and had not concluded that the obvious anticompetitive effects constituted anticompetitive object. At the same time, if disregarding the wrong label, the rulings provide an excellent overview of the abbreviated methodology that is missing from the effects-analysis.

The contours of the abbreviated effects-analysis may also be sensed in the EFTA Court's judgment in *Ski Taxi*.[85] The Court held that consortia and joint bids may be anticompetitive by object after what may be viewed as a simplified effects-analysis.[86] Although consortia and joint bids are generally not harmful, they may evidently restrict competition if they are backed by significant market power. Accordingly, if the parties have significant market power and there are no proven procompetitive benefits, the anticompetitive effects can be presumed out of hand. Although a consortium should not be treated as anticompetitive by object simply because it has anticompetitive effects, it may be assessed under an abbreviated effects-analysis. Again, if disregarding

80 Case C-179/16 *Hoffmann-La Roche & Novartis*, EU:C:2018:25.
81 Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010.
82 Case 883/19 P. *HSBC Holdings*, EU:C:2023:11.
83 Case C-333/21 *European Superleague*, EU:C:2023:1011.
84 Case C-141/21 P *International Skating Union*, EU:C:2023:1012.
85 Case E-3/16 *Ski Taxi*, [2016] EFTA Ct Rep 1002.
86 Para 95.

the wrong label, the judgment provided a good overview of the abbreviated methodology that is missing from the effects-analysis.

Vertical non-compete and joint selling (bidding, purchasing, etc) may reasonably be assessed under an abbreviated effects-analysis. The major issue with these is that they are effect agreements that lie close to the border between object and effect. They are clearly not anticompetitive by object for two reasons. First, they do no harm in the absence of market power. Second, they may have significant procompetitive effects. This means that once there is market power, they may appear to be similarly restrictive as object agreements; however, they may still entail procompetitive benefits.

Interestingly, the scheme made up by the safe harbours of Article 101(1) features just such a sliding-scale approach, where the breadth of exclusion varies in function of market power. The *De Minimis* Notice establishes low market share caps (10% for horizontal, 15% for vertical agreements[87]) and excludes only object restrictions. The BERs establish higher market share caps: for horizontal agreements, the SBER and the TTBER set up a 20%,[88] the RDBER a 25% market share cap;[89] for vertical agreements, the VBER and the TTBER set up a 30% market share cap.[90] Nonetheless, in addition to excluding object restrictions, they also exclude a number of restrictions that are otherwise not anticompetitive by object.[91] The reason is that certain restrictions may not be capable of causing harm under the *de minimis* cap but capable under this higher cap. The purpose of the safe harbours is to identify those restrictions that are certainly not anticompetitive, while the effects-analysis' function is to identify those that are. Still, if the logic of sliding scale is valid in the former, there is no reason why it should not be valid in the latter.

The following principles are proposed for the abbreviated effects-analysis. Some of these are in conformity with the case law on the unspecified category of anticompetitive object; some of them depart from it.

First, the abbreviated effects-analysis may apply to restrictions with a significant anticompetitive potential, which are backed by a significant market power. This anticompetitive potential does not reach the level of anticompetitive object. If it did, it would entail anticompetitive object. Although these restrictions raise significant competition risks, they are not always harmful and may have a redeeming virtue. This implies that the summary treatment mandated by anticompetitive object is not justified here. Still, if their inherent

87 *De Minimis* Notice, para 8(a).
88 Article 3 SBER; Article 3 TTBER.
89 Article 6 RDBER.
90 Article 3 VBER; Article 3 TTBER.
91 Article 9 RDBER; Article 5 TTBER; Article 5 VBER.

anticompetitive potential is combined with market power, the anticompetitive effects can be reasonably presumed. This shifts the analysis to the procompetitive justifications. If no such benefits can be proven, it can be concluded that the net effects on competition are negative.

Second, the abbreviated effects-analysis reduces the need for quantitative analysis as a function of the qualitative examination. The costliest element of effects-analysis is its empirical part. The benefit of the abbreviated effects-analysis is that it requires less quantitative analysis depending on the result of the qualitative analysis. It does not completely discard the need for empirical work; however, its demands are satisfied with partial empirical data.

Third, in the abbreviated effects-analysis, the negative effects on competition are presumed as a result of the agreement's restrictive potential and the parties' market power, but the procompetitive benefits need to be proved. Put another way, the negative effects are established by way of a truncated analysis, while the procompetitive benefits have to be presented in detail.

This differs from how the case law on the unspecified category of anticompetitive object treats procompetitive justifications. This case law merely requires these benefits to be 'demonstrated' and to 'justify a reasonable doubt' as to whether the classification as anticompetitive by object is adequate.[92] On the contrary, procompetitive effects need to be proved to be included in the abbreviated effects-analysis. The reason is that the function of the object-inquiry is to classify the agreement and to decide if it merits a substantive examination. If the 'effect' path is chosen for it, the procompetitive benefits need to be proved. The abbreviated effects-analysis is, however, a stage where a final decision needs to be made.

The proposed principle also differs from the traditional treatment of object agreements, which automatically breach Article 101(1) without considering any procompetitive justification, although they can be justified under Article 101(3). It also differs from the full-blown effects analysis, where both anti- and procompetitive effects need to be completely proved and none of them are presumed.

Fourth, the abbreviated effects-analysis should be applied in cases where the parties have some market power. The requirement of appreciability implies that there can be no effects without some market power; however, it is unclear whether the market power threshold is higher than *de minimis*. As demonstrated in Section 5.1, although a soft requirement (or rule of thumb) may be read into it, there is no hard requirement of market power except for the safe

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[92] C-307/18 *Generics (UK)*, EU:C:2020:52, paras 106–107; Case C-883/19 P *HSBC*, EU:C:2023:11, paras 139, 141, 196–197; Case C-331/21 *EDP v Autoridade da Concorrência*, EU:C:2023:812, para 104.

harbour of *de minimis*. Nonetheless, when it comes to an abbreviated analysis, it is reasonable to have such a hard requirement in place, subject to the same simplified methodology of proof. The core feature of effect agreements is that, contrary to object agreements, they are not anticompetitive independent of their effects. The abbreviated analysis uses the surrogates of effects ('leads') to prove effects. The glue between the surrogate and the effects to be proved is economic common sense. However, according to economic common sense, the agreement's anticompetitive potential does not lead to anticompetitive effects, unless there is some market power. In several cases, no detailed empirical inquiry is needed to faithfully demonstrate market power, as happened, for instance, in *European Superleague*[93] and *International Skating Union*.[94]

Fifth, if no *prime facie* plausible procompetitive justification is offered, an even less demanding standard of proof may be applied to anticompetitive effects.[95] Of course, the lack of procompetitive benefits does not prove the existence of anticompetitive effects. Nonetheless, it reduces the risk of false positives. In the absence of procompetitive benefits, the agreement may have no or merely neutral impact on competition but no positive one. This rationale is similar to that of anticompetitive object, which is supposed to single out agreements that are always or almost always anticompetitive without a redeeming virtue. Given the lack of a redeeming virtue, the outright prohibition of these agreements may suppress failed attempts to restrict competition but does not suppress agreements that are beneficial to the society. Although the abbreviated effects-analysis applies to agreements that may be but are not always anticompetitive, the lack of a redeeming virtue similarly reduces the risk of false positives.

Two important points need to be highlighted concerning this principle. The procompetitive benefits need to be specific to the agreement, that is, not general or speculative. Furthermore, the function of the inquiry at this stage is to ascertain whether there are benefits of the kind that, if proved, could counterbalance the eventual anticompetitive repercussions. The relevant question is whether the offered justifications are plausible and credible to deserve consideration.

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[93] Case C-333/21 *European Superleague*, EU:C:2023:1011.

[94] Case C-141/21 P *International Skating Union*, EU:C:2023:1012.

[95] *Cf.* with the argument that those agreements are anti-competitive by object, which "are (highly) unlikely to be used to create efficiencies." Luc Peeperkorn, *Defining Restrictions "by Object"*, September 2015, Concurrences No 3-2015, Art No 74812, p 49. Although the lack of a plausible justification should not justify a *per se* treatment, as the lack of a plausible justification does not prove competitive harm, this is a very strong argument if used to justify an abbreviated effects-analysis.

Sixth, the abbreviated effects-analysis should compare the market with and without the agreement. The counterfactual analysis is not part of the object-inquiry.[96] The CJEU argued that if it were, there really would be no difference between the object-inquiry and the effects-analysis. Nonetheless, there is no reason not to make this valuable analytical tool part of the abbreviated effects-analysis.

5.5 PARTIAL METHODOLOGIES

EU competition law employs two methodologies that have no general application but provide a key to a limited set of cases. The concept of appreciability is based on the notion that effects manifest themselves only if the parties have some market power. Even agreements that have an anticompetitive potential fail to bring about real anticompetitive effects if the parties' market position is weak. Hence, as long as no anticompetitive object is involved, a restriction can breach Article 101(1) only if it is appreciable. This concept obviates the substantive analysis in a number of cases. The concept of ancillary restrictions is used as a rule of thumb to approve restraints reasonably connected with a legitimate cooperation. Although this is a useful analytical tool, it provides no general methodology, as it applies only to cases where the main purpose of the cooperation has been found legitimate in the first place.

5.5.1 The Threshold of Appreciability

Article 101 implies a threshold requirement of appreciability (also referred to as the *de minimis* principle and as agreements of minor importance). This is not a matter of procedural priority-setting but a substantive requirement. Competition law aims to protect competition and agreements of minor importance have no appreciable effect on competition. *De minimis* agreements are not only not pursued, but are lawful.

In the context of Article 101, appreciability is examined at three different points. First, as a jurisdictional requirement, Article 101 applies only if the conduct has an appreciable effect *on inter-state trade*. Second, as a substantive requirement, an effect agreement breaches Article 101 only if it has an appreciable effect *on competition* in the market. Initially, the case law commingled the two aspects of appreciability, and the CJEU consistently referred to appreciable effects on inter-state trade *and* the market. In the same vein,

[96] Case C-591/16 P *Lundbeck*, EU:C:2021:243, para 140. The CJEU repeated the same language in Case C-601/16 P. *Arrow*, EU:C:2021:244, para 85 and in Case C-611/16 P *Xellia Pharmaceuticals*, EU:C:2021:245, para 115.

the first Commission notices on agreements of minor importance also covered both aspects of appreciability.[97] Subsequently, however, the two projections of appreciability pulled apart, and currently the Commission has two separate notices on agreements that have no appreciable effect on competition (*De Minimis* Notice) and agreements that have no appreciable effect on inter-state trade (Guidelines on Effect on Trade). Finally, the concept of appreciability also has a third aspect: Article 101 may be declared inapplicable if the restriction itself is insignificant.[98]

The CJEU established the concept of appreciability in *Völk v Vervaecke*,[99] where the parties to a distribution agreement had a negligible market share (0.08% in the common market, 0.2% in Germany, where the producer was located, and 0.6% in Belgium and Luxembourg, where the distributor was located).[100]

> If an agreement is to be capable of affecting trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that is might hinder the attainment of the objectives of a single market between states. Moreover, the prohibition in Article 85(1) is applicable only if the agreement in question also has as its object or effect the prevention, restriction or distortion of competition within the common market. Those conditions must be understood by reference to the actual circumstances of the agreement. Consequently *an agreement falls outside the prohibition in Article 85 when it has only an insignificant effect on the markets*, taking into account the weak position which the persons concerned have on the market of the product in question. *Thus an exclusive dealing agreement, even with absolute territorial protection, may*, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article 85(1).[101]

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[97] *See Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises*, [1968] OJ C 75/3, corrected in [1968] OJ C 84/14.; *Notice on agreements of minor importance which do not fall within the meaning of Article 85 (1) of the Treaty establishing the European Community*, [1997] OJ C 372/13.

[98] *See* Joined Cases C-180-184/98 *Pavlov*, EU:C:2000:428, paras 94–95.

[99] Case 5/69 *Völk*, EU:C:1969:35.

[100] Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.48 (Jonathan Faull and Ali Nikpay ed., 2007).

[101] Paras 5–7.

This language was reiterated in *Cadillon v Maschinenbau*.[102]

> First of all, for Article 85 of the Treaty to apply to an agreement, that agreement must be capable of affecting trade between Member States.
> This condition is fulfilled if the agreement, on the basis of all the objective factors of law or of fact, makes it possible to foresee with a sufficient degree of probability that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between states.
> Moreover, the prohibition in Article 85(1) is applicable only if the agreement has as its object or effect the prevention, restriction or distortion of competition within the common market.
> Those conditions must be understood by reference to the actual circumstances of the agreement.
> An exclusive dealing agreement may escape the prohibition laid down in Article 85(1) because, in view of the weak position of the parties on the market in the products in question in the territory covered by the exclusive dealing arrangement, it is not capable of hindering the attainment of the objectives of a single market between states, even if it creates absolute territorial protection.

The above rulings establish that in the absence of appreciable effects, Article 101 does not apply, but they do not specify if appreciability refers to the effects on trade or the effects on competition or both.[103] Nonetheless, it is generally accepted that *Völk v Vervaecke* was the genesis of both notions.[104]

For a while it was uncertain whether the requirement of appreciability applies to agreements anticompetitive by object. In *Völk v Vervaecke*, the Court applied it to an object restriction, but it was silent on whether it avoided Article 101(1) as a matter of jurisdiction or as a matter of effects on competition. Although generally accepted that object agreements are prohibited by Article 101 even in the absence of appreciable effects on competition and may avoid condemnation only if they have no appreciable effect on trade,[105] the

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[102] Case 1/71 *Cadillon v Maschinenbau*, EU:C:1971:47, paras 5–9.

[103] *See* Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.47 (Jonathan Faull and Ali Nikpay ed., 2007).

[104] *See* Maija Laurila, *The De Minimis Doctrine in EEC Competition Law: Agreements of Minor Importance*, 14(3) European Competition Law Review 98, 98 (1993); Ernst-Joachim Mestmäcker & Heike Schweitzer, *Europäisches Wettbewerbsrecht* 291 (2004); Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 67 (2002).

[105] *See* Case 27/87 *Erauw-Jacquery*, EU:C:1988:183 (The ruling seems to address the appreciability of effects on trade, while AG Mischo inquired the appreciability of effects on both trade and competition. AG Mischo's opinion in Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne*, EU:C:1987:538, paras 37–47.); Case T-77/92 *Parker Pen Ltd v Commission* [1994] ECR II-549, para

question had not been specifically addressed in the case law for decades.[106] Finally, in *Expedia*,[107] the CJEU held that anticompetitive object cannot benefit from *de minimis*: if an agreement is anticompetitive by object, it is irrebuttably presumed to have perceivable negative effects on competition.[108]

The *De Minimis* Notice establishes specific market share caps for appreciability on competition. Horizontal agreements may benefit from *de minimis* if the parties' aggregate market share does not exceed 10%, while vertical agreements may benefit if market share does not exceed 15%.[109] Restrictions anticompetitive by object cannot benefit from this safe harbour, irrespective of the parties' market share.[110]

5.5.2 The Rule of Thumb of Ancillarity

The concept of ancillarity has a dual role under Article 101.

First, it helps to distinguish between naked restrictions, which are anticompetitive by object, and ancillary restrictions, which call for an effects analysis. The same restriction that, standing alone, may be anticompetitive by object, may merit an effects-analysis if adopted in the context of a legitimate cooperation (Section 4.2.1).

Second, the concept of ancillarity has a role in effects-analysis too. It is a rule of thumb based on conventional wisdom that simplifies the analysis by extending the legal fate of the main transaction to reasonably connected restrictions. The effects-analysis requires the comprehensive assessment of the whole transaction, including the main and the accessory restrictions. The doctrine of ancillarity simplifies this inquiry based on the notion that if the main transaction is legitimate, the accessory restrictions are not likely to overturn this assessment.

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37 (Condemning an export prohibition without any inquiry as to the appreciability of effects on competition); Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.47 (Jonathan Faull and Ali Nikpay ed., 2007); Ali Nikpay, Lars Kjølbye et al., *Chapter 3: Article 81*, *in* The EC Law of Competition 227 (Jonathan Faull and Ali Nikpay ed., 2007).

[106] *See* Maija Laurila, *The De Minimis Doctrine in EEC Competition Law: Agreements of Minor Importance*, 14(3) European Competition Law Review 98, 98 (1993) *See also* Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* The EC Law of Competition § 9.50 (Jonathan Faull and Ali Nikpay ed., 2007).

[107] Case C-226/11 *Expedia*, EU:C:2012:795.

[108] Para 37.

[109] Para 8.

[110] Para 13.

A further term to refer to this thinking is 'qualitative appreciability', which may justify, for example, the grant of an exclusive licence, restrictions that are the inherent part of franchising systems and obligations that are necessary for protecting intellectual property rights.[111]

The first express recognition of the doctrine of ancillarity occurred in the borderland of Article 101 and merger control law. Article 8(2) of the 4064/89 Merger Control Regulation provided that the clearance of the concentration also covered 'restrictions directly related and necessary to the implementation of the concentration'. The attached Commission notice expressly referred to these as 'ancillary restrictions'.[112]

In *Remia*,[113] the CJEU found that the transfer of a business (main transaction) enhanced competition because it increased the number of market operators, while the insertion of a non-compete clause into the contract was necessary (ancillary), as otherwise the seller, having profound information and experience in the market concerned, could easily frustrate the legitimate expectations of the purchaser, who, therefore, may not be inclined to enter into the transaction.[114] Although the ruling reflects the doctrine, it does not refer to it expressly.

In *Métropole*,[115] the GC expressly referred to the doctrine and equated the concept of merger control with the notion of Article 101(1). It slurred over the difference between the two. In the case of mergers, the legitimate end is given in the form of a concentration that is in conformity with competition law. On the contrary, under Article 101(1), the fundamental question is whether there is a legitimate end at all. Citing both *Remia* and the provisions of the then-effective EU Merger Control Regulation,[116] the GC concluded that '[i]n

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[111] Lennart Ritter & W. David Braun, *European Competition Law: a Practitioner's Guide* 274 (3d ed., 2005).

[112] *Commission Notice regarding restrictions ancillary to concentrations*, [1990] OJ C 203/5.

[113] Case 42/84 *Remia*, EU:C:1985:327.

[114] Case 42/84 *Remia*, EU:C:1985:327, paras 19–20.

[115] Case T-112/99 *Métropole*, EU:T:2001:215.

[116] Paras 104–106. Article 8(2) of the then-effective Merger Control Regulation provided that "[t]he decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration." Regulation 4064/89, [1989] OJ L 395/1; amended by Regulation 1310/97 [1997] OJ L 180/1. In essence, the same language is used by the currently effective Merger Control Regulation: "[a] decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration." Article 6(1)(a) of Regulation 139/2004 [2004] OJ L 24/1.

Community competition law the concept of "ancillary restriction" covers any restriction which is directly related and necessary to the implementation of a main operation'.[117] A restriction is directly related if it 'is subordinate to the implementation of that operation and (…) has an evident link with it',[118] while the requirement of necessity implies that 'the restriction is objectively necessary for the implementation of the main operation and (…) it is proportionate to it'.[119] The requirement of objective necessity presupposed a relatively abstract examination.[120] The GC also established that the concept of ancillary restraints cannot be used to weigh the pro- and anticompetitive effects, as that would go against the idea that there is no rule of reason in EU competition law.[121] It purported that the doctrine of ancillarity simply embraces an *accessorium sequitur principale* (the accessory follows its principal) logic. Accordingly, the accessory restraint shares the fate of the main transaction. If the main operation is in conformity with Article 101(1), so is the ancillary restraint.[122]

This was followed by a number of ECJ rulings which applied the doctrine without expressly referring to it to transfer of an undertaking, joint ventures, technology transfer, trademark licensing, franchising, exclusive and selective distribution agreements.[123] It was unsettled whether the doctrine of ancillarity could be applied to all cases where there is a legitimate cooperation or it applies solely to situations involving a preservation or transfer of value.[124] A number of other cases were viewed as applying the doctrine.[125] From these some, such as *Nungesser*[126] and *Coditel II*,[127] involved a transfer of value (technology). Nevertheless, there were some, for example, *Pronuptia*,[128] which dealt with

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[117] Para 104.
[118] Para 105.
[119] Para 106.
[120] Para 109.
[121] Paras 107–108.
[122] Paras 115–116.
[123] F. Enrique Gonzalez Diaz, *The Notion of Ancillary Restraints under EC Competition Law*, 19 Fordham International Law Journal 951, 958–996 (1996).
[124] F. Enrique Gonzalez Diaz, *The Notion of Ancillary Restraints under EC Competition Law*, 19 Fordham International Law Journal 951 (1996). *See* Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* 101 (2007).
[125] *See* Joanna Goyder, *EU Distribution Law* 28 (4th ed., 2005); Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* 80–83 (2007).
[126] Case 258/78 *Nungesser*, EU:C:1982:211, paras 56-58.
[127] Case 262/81 *Coditel v Ciné-Vog* EU:C:1982:334, paras 15–20.
[128] Case 161/84 *Pronuptia*, EU:C:1986:41.

franchising, and *Telefunken*[129] and *L'Oréal*,[130] which concerned selective distribution, where it would be far-fetched to read a transfer of value into the fact pattern.

Finally, the ECJ expressly recognized the doctrine of ancillarity in *MasterCard*.[131] It held that the doctrine may apply to any legitimate cooperation (not only transfers of value) and endorsed the requirements set out by the GC in *Métropole*, including the idea that objective necessity is the glue that attaches the ancillary restriction to the legitimate cooperation.[132]

> Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article 81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 81(1) EC.
>
> Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in Article 81(1) EC because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 81(1) EC.
>
> However, that interpretation does not mean that there has been an amalgamation of, on the one hand, the conditions laid down by the case law for the classification — for the purposes of the application of Article 81(1) EC — of a restriction as ancillary, and, on the other hand, the criterion of the indispensability required under Article 81(3) EC in order for a prohibited restriction to be exempted.[133]

The Court held that objective necessity is a two-fold test. The restriction is required to be both 'necessary for the implementation of the main operation or activity' and 'proportionate to the underlying objectives of that operation

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[129] Case 107/82 *AEG-Telefunken*, EU:C:1983:293.

[130] Case 31/80 *L'Oréal*, EU:C:1980:289.

[131] Case C-382/12 P *MasterCard*, EU:C:2014:2201.

[132] In the time between the rulings in *Métropole* and *MasterCard*, the requirement of "objective necessity" was embraced a few years later by the *Guidelines on Article 101(3)*. Para 18(2).

[133] Paras 90–92.

or activity'[134] in the sense that there are no 'realistic alternatives that are less restrictive of competition than the restriction at issue'.[135]

The above legal test was confirmed in *F. Hoffmann-La Roche*[136] and *Autoridade da Concorrência v Ministério Público*.[137]

In effects-analysis, the thinking the doctrine of ancillarity relies on is conceptually inconsistent but offers a very useful and practical rule of thumb based on experience instead of logic.[138]

On the one hand, the doctrine provides no general methodology. It applies only to cases where the main cooperation has been found legitimate in the first place but, apart from referring to common sense, abstains from defining the arrangements that may serve as an 'anchor cooperation'.[139] The latter's assessment under Article 101(1) cannot be spared, which leads back to the pristine competition law issue. Even a transfer of value may be anticompetitive and, hence, require a competition analysis. Furthermore, it is inconsistent to examine only the main instead of the entire cooperation. Although the main cooperation, by definition, has an overwhelming weight in the competition assessment, it is still only a part of the included restrictions.

On the other hand, although the efforts to ascertain if a cooperation may serve as an anchor cannot be saved, ancillarity offers a rule of thumb to approve restraints reasonably connected with a legitimate cooperation and justified by common sense.[140] In practical terms, it is reasonable to assume that

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[134] Para 107.

[135] Para 109.

[136] Case C-179/16 *F. Hoffmann-La Roche*, EU:C:2018:25, paras 70–71 & 75.

[137] Case C-331/21 *EDP v Autoridade da Concorrência*, EU:C:2023:812, paras 89–90 & 94.

[138] *See* Oliver Wendell Holmes, *The Common Law* 1 (1881) ("The life of the law has not been logic; it has been experience…").

[139] *Cf.* Ali Nikpay, Lars Kjølbye et al., *Chapter 3: Article 81*, *in* The EC Law of Competition 252 (Jonathan Faull and Ali Nikpay ed., 2007) ("[T]he very finding that a particular activity is legitimate implies a value judgment; in a commercial ancillarity case this will inevitably involve an assessment of whether the main agreement 'taken as a whole (…) is capable of encouraging competition on the market' or is, at least neutral in competitive terms".).

[140] Ancillarity also has shortcomings in terms of clarity and certainty. Ali Nikpay, Lars Kjølbye et al., *Chapter 3: Article 81*, *in* The EC Law of Competition 242 (Jonathan Faull and Ali Nikpay ed., 2007) ("[I]t is clear that the concept [of ancillarity] still raises more questions than it answers. It is very difficult, if not impossible, to identify in the abstract whether a particular restraint will be treated as ancillary to a particular type of agreement.").

if the main cooperation complies with Article 101(1), the ancillary restraints should not turn the scale.

Furthermore, the ancillarity analysis can be carried out without a detailed effects-analysis or empirical market inquiry. The legal and economic context needs to be considered, but the examination is legal in nature and based on common sense. Although the case law requires the purported ancillary restraint to be proportionate, what it requires here is not a genuine proportionality in terms of balancing the anti- and procompetitive effect, but an inquiry as to whether the restriction goes beyond what is necessary, including whether there are less restrictive alternatives fulfilling the same function.

5.6 PUBLIC INTEREST REASONABLENESS

Although Article 101(1) has an economic yardstick, the effects-analysis may accommodate public interest arguments.[141] This notion is often referred to as regulatory[142] or deontological ancillarity,[143] based on the idea that it is a legitimate regulatory or deontological purpose that justifies restrictions ancillary to this.

The idea that objectives in the general interest may justify a restriction on freedom of action is a relatively recent development in EU competition law, which was established by the CJEU's 2002 ruling in *Wouters*.[144] However, since then, it has been applied in several cases, which clarified various aspects of the doctrine. First, as for its purview, the doctrine essentially applies to the deontological self-regulation (rules of ethics) of professional services, such as learned professions, accountants and auditors, where self-regulation is considered traditional and required by the special features of these services, and sporting associations, where self-regulation is necessary for the product to exist at all.[145] Although the CJEU has not ruled out the application outside these fields, the Court did make clear that the doctrine only applies to a limited

[141] *Cf.* Edith Loozen, *Professional ethics and restraints of competition*, 31(1) European Law Review 28 (2006) (Article 101(1) implies no public interest rule of reason, which would go counter to the function of this provision. *Wouters* may be described as "deontological ancillary", which applies to restraints that "are necessary to ensure the compliance with the fundamental principles of a particular profession.").

[142] *See* Richard Whish & David Bailey, *Competition Law* 138 (2015).

[143] *See* Edith Loozen, *Professional Ethics and Restraints of Competition*, 31(1) European Law Review 28 (2006).

[144] Case C-309/99 *Wouters*, EU:C:2002:98.

[145] For an analysis on sports and competition law, *see* Stefaan Van den Bogaert & An Vermeersch, *Sport and the EC Treaty: a tale of uneasy bedfellows*, 31(6)

set of activities and all cases concerned either of the above. Second, the *Wouters* doctrine's application is limited to the effects-analysis and cannot justify object restrictions.[146] It has to be added, however, that outside the specified object categories, this proposition leads to circular reasoning. Legal and economic context, including deontological considerations, affects the classification as anticompetitive by object. Public interest considerations are part of this context. As a corollary, the same considerations that may be relevant for the *Wouters* doctrine may also be relevant for the classification as object or effect. The *Wouters* doctrine does not apply to object restrictions, but the considerations relevant for this doctrine may justify that the agreement be classified as an effect restriction.

In *Wouters*,[147] the Dutch Bar forbade lawyers and auditors to establish joint partnerships on the ground that they have conflicting roles. Lawyers act in the interest of the principal and are obliged to preserve their secrets, while the auditors' duty is to provide an objective assessment of the books and financial status of the company. The Dutch Bar considered that a joint partnership may jeopardize the proper fulfilment of these functions.

The CJEU established that the rule restricted competition and rejected the Bar's economic justification.[148] According to the then-prevailing judicial practice, this should have ended the analysis. Nonetheless, the CJEU went on to inquire whether the restriction was justified by the general interest in professional ethics and answered the question in the affirmative. It held that only the illegitimate restrictions on one's freedom of action violate Article 101(1), and restrictions aimed to protect professional ethics are legitimate.

> [N]ot every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating

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European Law Review 821, 833–835 (2006); Erika Szyszczak, *Competition and sport*, 32(1) European Law Review 95, 101 and 104 (2007).

[146] Case C-333/21 *European Superleague*, EU:C:2023:1011, para 186; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010, para 115; Case C-141/21 P *International Skating Union*, EU:C:2023:1012, para 113.

[147] Case C-309/99 *Wouters*, EU:C:2002:98.

[148] The Bar argued that the auditing market was concentrated, and multidisciplinary partnerships could entail concentration also in the legal market. The Court found that "the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures." Para 94.

> to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (…). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.[149]

The Court concluded that the ethical rule met the above requirement and suggested that the Dutch Bar had a margin of appreciation in this regard.

> [The Dutch Bar] could reasonably have considered that that regulation (…) is necessary for the proper practice of the legal profession, as organised in the Member State concerned.[150]

In *Meca-Medina and Majcen*,[151] the CJEU applied the doctrine to the International Swimming Federation's anti-doping rules, which it found compliant with Article 101(1). The Court held that the *Wouters* criteria include proportionality (a requirement not specified in *Wouters*[152]),[153] and unjustified rules, such as unreasonable conditions for establishing doping, and excessively severe penalties, do not meet this requirement.[154] It found, however, the International Swimming Federation's anti-doping rules proportionate.

In *Ordem dos Técnicos Oficiais de Contas*,[155] the Portuguese Chamber of Chartered Accountants introduced a compulsory training system and put in place rules on the approval of service providers, while it also provided such services directly. The CJEU found that the system had anticompetitive effects in two directions.[156] First, it affected the provisions of accounting services. Second, and probably more importantly, it affected competition in the market for compulsory training for chartered accountants by setting out the conditions of access to this market. The Court found that the Chamber, who was both a competitor in and a gatekeeper of the market for compulsory training, reserved a part of the market for itself and applied discriminatory conditions as to the rest, which vested it with a good deal of uncontrolled discretion. These considerations would have been sufficient to condemn the Chamber under the general rules; however, the CJEU also inquired whether the anticompetitive effects could be justified under the *Wouters* doctrine. It found that the system

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149 Para 97.
150 Para 110.
151 C-519/04 P. *Meca-Medina & Majcen*, EU:C:2006:492.
152 Case C-309/99 *Wouters*, EU:C:2002:98, para 97.
153 Para 42.
154 Paras 47–48.
155 Case 1/12 *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127.
156 Para 45.

'effectively contribute[d] to the pursuit of (…) [the] objective'[157] 'to guarantee the quality of the services offered by chartered accountants',[158] but went beyond what was necessary to ensure the pursuit of that objective.[159]

The CJEU encountered the issue whether horizontal price fixing by professional associations could benefit from the *Wouters* doctrine in three subsequent cases but evaded the issue. In *Consiglio nazionale dei geologi*,[160] the reference did not enable the CJEU to provide a comprehensive assessment. The Italian Council of Geologists set out various elusive requirements concerning fees. It required geologists to charge a fee 'commensurate with the scale and difficulty of the task to be performed, the dignity of the profession, technical knowledge and the commitment required'.[161] The CJEU found the *Wouters* doctrine applicable but did not have sufficient information to provide a specific analysis. This made the ruling's contribution to the case law quite limited.[162] In *API*,[163] the CJEU encountered a reference to the *Wouters* doctrine in the context of horizontal price fixing but evaded the question by establishing that the restriction had no link to the purported legitimate objective; hence, it could not be justified, if it was applicable at all.[164] Nonetheless, the ruling, though refusing to address the question, indicates a serious doubt as to whether public interest reasonableness may be referred to in the context of cartels.[165] In *CHEZ Elektro*,[166] the CJEU evaded the question by referring it back to the national court to decide whether the measure at issue was necessary for the attainment of a legitimate objective.[167]

On 21 December 2023, the CJEU handed down three rulings concerning sporting associations (*European Superleague*,[168] *International Skating Union*[169] and *Royal Antwerp Football Club*[170]). The three rulings provided three contributions to the *Wouters* doctrine.

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[157] Para 95.
[158] Para 94.
[159] Paras 96–100.
[160] Case C-136/12 *Consiglio nazionale dei geologi*, ECLI:EU:C:2013:489.
[161] Para 9.
[162] Paras 53–57.
[163] Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 & C-208/13 *API*, ECLI:EU:C:2014:2147.
[164] Paras 49–52 & 57–58.
[165] Para 49.
[166] Case C-427/16 *CHEZ Elektro*, ECLI:EU:C:2017:890.
[167] Paras 56–57.
[168] Case C-333/21 *European Superleague*, EU:C:2023:1011.
[169] Case C-141/21 P *International Skating Union*, EU:C:2023:1012.
[170] Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010.

First, they confirmed that the doctrine's role is limited to effects-analysis and it does not apply to restrictions anticompetitive by object.

> [The *Wouters* doctrine] does not apply in situations involving conduct which, far from merely having the inherent 'effect' of restricting competition, at least potentially, by limiting the freedom of action of certain undertakings, reveals a degree of harm in relation to that competition that justifies a finding that it has as its very 'object' the prevention, restriction or distortion of competition. Thus, it is only if, following an examination of the conduct at issue in a given case, that conduct proves not to have as its object the prevention, restriction or distortion of competition, that it must then be determined whether it may come within the scope of that case law.[171]

Second, they recapitulated the three preconditions of applicability of the *Wouters* doctrine.

> [T]he examination of the economic and legal context of which certain of those agreements and certain of those decisions form a part may lead to a finding, first, that they are justified by the pursuit of one or more legitimate objectives in the public interest which are not *per se* anticompetitive in nature; second, that the specific means used to pursue those objectives are genuinely necessary for that purpose; and, third, that, even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition.[172]

Third, for the first time, the CJEU gave some hint as to the scope of the *Wouters* doctrine. It established that it applies 'in particular' to professional and sporting associations, but it took no stance as to whether it may apply to all markets or only to certain activities where deontological self-regulation is traditionally accepted.

> [The *Wouters* doctrine] applies in particular in cases involving agreements or decisions taking the form of rules adopted by an association such as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives and, more broadly, to regulate the exercise of a professional activity if the association concerned demonstrates that the aforementioned conditions are satisfied.[173]

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[171] Case C-333/21 *European Superleague*, EU:C:2023:1011, para 186; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010, para 115; Case C-141/21 P *International Skating Union*, EU:C:2023:1012, para 113.

[172] Case C-333/21 *European Superleague*, EU:C:2023:1011, para 183; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010, para 113; Case C-141/21 P *International Skating Union*, EU:C:2023:1012, para 111.

[173] Case C-333/21 *European Superleague*, EU:C:2023:1011, para 183; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010, para 113; Case C-141/21 P *International Skating Union*, EU:C:2023:1012, para 111.

The last cases where the CJEU applied the *Wouters* doctrine were *Lietuvos notarų rūmai*[174] and *Em akaunt* BG EOOD[175]. In *Lietuvos notarų rūmai*, the Lithuanian Chamber of Notaries fixed the notarial fees and the Court found this anticompetitive by object and, hence, the *Wouters* doctrine inapplicable.[176] In *Em akaunt BG EOOD*, which, the same as *CHEZ Elektro*, emerged from the Bulgarian Bar Association's fixing the lawyer's fees, the CJEU held the *Wouters* doctrine inapplicable to restrictions by object.[177]

A central conceptual question of the *Wouters* doctrine is whether it exempts truly non-economic objectives at the cost of restricting competition or simply attires economic considerations in morality.

The application of the *Wouters* doctrine to competition organized by sporting associations may be conceived in economic terms. After all, these are cooperative services and 'horizontal restraints on competition are essential for the product to be available at all'.[178]

The rationale of the special treatment of professional ethics is, however, not so clear. Although the objectives the CJEU has accepted as legitimate have an ethical meaning, they may also be conceived as rectifying market failures pertaining to certain professional services characterized by significant information asymmetries and experience goods. The strict rules on independence approved in *Wouters* may be viewed not only as an ethical norm but also as the protection of clients against defective service. In the same vein, the compulsory training established in *Ordem dos Técnicos Oficiais de Contas*[179] may be viewed as a restriction of competition. However, the fact that clients have limited ability to assess the quality of accounting services justifies a system of quality assurance, and training may serve an important function in this. Although, at the end of the day, the CJEU found the rules to be excessive and discriminatory, the existence of compulsory training requirements and the establishment of quality requirements for the training provided were held compliant with Article 101(1).

The notion that the *Wouters* doctrine has a role only in effects-analysis and may not exempt object restrictions suggests that it applies to deontological rules that, ultimately, have an economic meaning and respond to the special features of professional services. If the measures relevant for the *Wouters* doctrine have an economic meaning, the exclusion of object restrictions is

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[174] Case C-128/21 *Lietuvos notarų rūmai*, ECLI:EU:C:2024:49.
[175] Case C-438/22 *Em akaunt BG EOOD*, EU:C:2024:71.
[176] Para 97–98.
[177] Para 54.
[178] *NCAA v Board of Regents,* 468 U.S. 85, 100–101 (1984).
[179] Case 1/12 *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127.

conceptually inevitable. Object restrictions are anticompetitive independent of their effects and under no circumstances can be saved under Article 101(1). On the contrary, it is conceptually conceivable to justify an object restriction with non-economic considerations. The fact that the CJEU ruled this out may suggest that the considerations that may be aligned for the application of the *Wouters* doctrine ultimately have an economic meaning.

5.7 COMPARATIVE PERSPECTIVES

A comparison of the Article 101(1) case law with the American rule of reason reveals a general convergence with a number of diverging elements. Some of these diverging elements (limited focus of analysis, allocation of burden of proof) are structural and, hence, inevitable, while others can be traced back to judicial choices (lack of a sliding-scale-based abbreviated effects-analysis in EU competition law).

There is a high-level convergence between the substantive analysis carried out under Article 101(1) and the American rule of reason. Notwithstanding the CJEU rejection of the term, EU competition law's substantive analysis, as far as methodology is concerned, has all the makings of a rule of reason. The judicial practice, in fact, mandates a rule-of-reason analysis made up of the consideration and balancing of the anti- and procompetitive effects.

As part of the substantive analysis, both regimes recognize public interest justifications.[180] In EU law, these special considerations apply in particular to professional services and sporting associations and exempt necessary and proportionate restrictions. Measures anticompetitive by object, however, cannot benefit from this doctrine. This judicial practice parallels the US Supreme Court's case law. In *NCAA v Board of Regents*,[181] the US Supreme Court advanced a permissive approach to sporting associations and sporting rules, as they are activities where self-regulation is necessary for the product to exist at all. In *Goldfarb*,[182] a similarly permissive approach was established for professional services, although the Court also made it clear that this does not apply to *per se* agreements, which are illegal in all markets, including professional services. It is difficult to identify how the special consideration set out in *Goldfarb* could change the rule-of-reason analysis, as it is hard to find any case where the public interest reasonableness had a decisive impact on the outcome.

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[180] *See* Philip Andrews, *Self-Regulation by Professions – The Approach Under EU and US Competition Rules*, 23(6) European Competition Law Review 281 (2002).

[181] *NCAA v Board of Regents*, 468 U.S. 85 (1984).

[182] *Goldfarb v Virginia State Bar*, 421 U.S. 773 (1975).

There are two structural differences between Article 101(1) and the American rule of reason.

First, there is a clear difference between the yardsticks. The American rule of reason is all-embracing, while Article 101(1) shares the floor with Article 101(3). There are aspects that cannot be inspected under Article 101(1) and are relevant only in the context of Article 101(3). Article 101(1) deals with competition; hence, only the procompetitive benefits may be contrasted with the anticompetitive effects. Economic benefits accruing from the higher efficiency of cooperation in comparison with competition are to be considered under Article 101(3). This dualism and division of labour are addressed in detail in Section 6.1. In this sense, the substantive analysis to be carried out under Article 101(1) has all the makings of the American rule of reason with the important difference that the former has a limited focus.

Second, besides the limited focus, the substantive analysis to be carried out under Article 101(1) differs from the American rule of reason also as to the allocation of burden of proof. Article 101 puts the entire burden of proof on the plaintiff and the competition authority. This means that it is them who need to prove the anticompetitive effects and the lack of countervailing procompetitive benefits. Although, as a matter of practice, this manifests itself in the Commission falsifying the procompetitive arguments of the undertaking, in principle, the Commission is required to explore the potential procompetitive aspects with the same enthusiasm as the anticompetitive effects. In US antitrust law, the plaintiff and the defendant share the burden of proof. The plaintiff is expected to present a *prima facie* case (in the EU parlance: prove the anticompetitive effects), and if this is done successfully, the burden to demonstrate the procompetitive benefits shifts to the defendant.

The major non-structural difference between the two regimes is the lack of a sliding-scale-based abbreviated effects-analysis in EU competition law. This is a significant shortcoming of EU law, which reduces enforcement effectiveness and leads to false negatives in terms of underenforcement. US antitrust law offers patterns of analysis, such as the intermediate modes of analysis presented in Section 3.2 and the sliding-scale approach presented in Section 3.3, that carry out 'an enquiry meet for the case'[183] and are worthy of consideration in filling this gap.

5.8 FINAL CONCLUSIONS

Article 101(1) should contain and does contain a substantive analysis aimed to identify the net effect on competition and prohibits those agreements that

183 *California Dental Association v FTC*, 526 U.S. 756, 781 (1999).

are, on balance, anticompetitive. The elements of this substantive analysis are the inquiry into the legal and economic context, the counterfactual examination, and the balancing of the anti- and procompetitive effects. Public interest considerations may also be factored into this substantive analysis if they have an economic meaning. Anticompetitive effects may be actual or potential, but they are held to the same standard of proof. Potential effects are not merely possible or likely effects, but effects that have not materialized. Market power is a soft requirement and a rule of thumb in effects-analysis. The toolkit of effects-analysis contains two partial methodologies (appreciability and ancillarity), which have no general application but provide valuable rules of thumb in a limited set of cases.

It is a major shortcoming of EU competition law that, contrary to US antitrust law, it has not developed any form of abbreviated effects-analysis where the strictness of the scrutiny varies along a sliding scale. Neither the abbreviated rule of reason, nor the sliding scale approach has counterparts in EU law. Granted, EU competition law has an unspecified category of anticompetitive object. Although it may turn effect cases into object cases, it, by definition, does not apply to effect cases. The *Allianz* doctrine, though resembling it, sets out no abbreviated effects-analysis. The legal test accruing from this case law misses some of the important makings of the effects-analysis. Although it goes beyond the legitimate limits of the object-inquiry, it falls short of the expectations against effects-analysis. Furthermore, the CJEU's case law contains no indication that the in-depth nature of the effects-analysis should be set by a sliding scale and suggests a test of general application. Hence, in certain cases, the effects-analysis is unnecessarily onerous. This increases false negatives in terms of underenforcement, and the legitimate enforcement needs the effects-analysis fails to address are redirected to and distort the case law on anticompetitive object.

6. Exempting anticompetitive agreements

Article 101 contains a bifurcated test. Article 101(1) prohibits restrictive agreements. Article 101(3) exempts them. Article 101(3) is, however, exceptional, let alone that it contains notoriously nebulous requirements subject to a heightened standard of proof. Usually, Article 101(3) is a desperate last attempt to save the agreement, which has an exceptionally low chance of success.[1] Article 101 erects a very strong presumption in favour of competition. Although Article 101(3) allows efficiency to trump competition, it requires highly convincing empirical evidence.

This chapter explores and analyses the role and interpretation of Article 101(3). Section 6.1 distinguishes the focuses of Article 101(1) and 101(3) and proposes a theory for Article 101(3). Section 6.2 provides a conceptual analysis of the BERs and demonstrates that they do not create a safe harbour for restrictions exemptible under Article 101(3) but for restrictions that are not anticompetitive by effect under Article 101(1). Section 6.3 inquires whether and how realistically object agreements may benefit from an exemption under Article 101(3). Section 6.4 addresses the issue whether Article 101(3) is susceptible of accommodating non-competition goals to serve the general good. Section 6.5 sets out the chapter's final conclusions.

6.1 THE FOCUS AND ROLE OF ARTICLE 101(3)

The case law has been unclear about whether Article 101(1) and Article 101(3) have different focuses and how they differ. The bifurcated test embedded in Article 101 suggests that the two prongs measure different qualities. The only question that remains is whether these are congenial or not.

The dichotomy of Article 101 may be conceived in two ways.

One may argue that the yardsticks of Article 101(1) and Article 101(3) are congenial. Article 101(1) deals solely or predominantly with the negative implications. Article 101(3) deals solely with the positive ones and with the balancing between the two. In this conception, Article 101(1) screens out

1 *See* David Bailey, *Reinvigorating the Role of Article 101(3) under Regulation 1/2003*, 81(1) Antitrust Law Journal 111, 111–112 (2016).

those agreements that have anticompetitive features and the analysis under this provision deliberately overlooks any procompetitive benefits the agreement may have. This implies that even agreements that are overall procompetitive may violate Article 101(1) on account of having anticompetitive implications. This could be paralleled with the American rule-of-reason analysis, where Article 101(1) could be conceived as not requiring more than the presentation of a *prima facie* case, while any kind of rebuttal taking place under Article 101(3).

This approach is flawed for three reasons.

First, it goes against the language and structure of Article 101, which suggest that the merits relevant for Article 101(1) should not be relevant for Article 101(3) and *vice versa*. In terms of language, Article 101(1) centres around 'competition', while Article 101(3) around 'improving the production or distribution of goods or (…) promoting technical or economic progress'. In terms of structure, the prohibition-exception scheme of Article 101 suggests that the very reason that justifies the prohibition of the agreement should not, at the same time, justify its exemption. Why would Article 101 contain a general prohibition and Article 101(3) an exception if these were concerned about the same thing? The virtues that make an agreement exemptible under Article 101(3) should not be the ones that shield it from the general prohibition under Article 101(1). After all, if an agreement does not breach Article 101(1), the analysis never gets to Article 101(3).

Second, the fact that Article 101(1) involves a substantive analysis where the procompetitive benefits are taken into account implies that the above approach is flawed. This leads back to the discussion of Section 5.3. Without rehearsing this analysis, it suffices to note that although the case law rejects the rule of reason, it also makes it clear that Article 101(1) calls for a substantive analysis, among others, in the form of a counterfactual examination and the consideration of the procompetitive merits. If assuming that the two prongs of Article 101 contain no unnecessary duplications, it follows that Article 101 must contain two canons. In *Van den Bergh Foods*,[2] the GC's strongest argument against the rule of reason was that its existence would be 'difficult to reconcile with the structure of the rules prescribed by Article 85'[3] and 'Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had already to be carried out under Article 85(1) of the Treaty'.[4] Nevertheless, the structure of Article 101 suggests quite the contrary. Article 101(3) would not lose much of its effectiveness if some parts (or rather

2 Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653.
3 Para 106.
4 Para 107.

some aspects) of the examination had to be carried out under Article 101(1).[5] The analysis under Article 101(1) would be senseless if it were deprived of all reason.

The *Guidelines on Article 101(3)* very well demonstrate the salient inconsistency of the idea that Article 101(1) and Article 101(3) involve substantive analyses that have the same focus. According to the *Guidelines*, the relevant consideration in the application of Article 101(1) is whether the agreement has 'negative effects on prices, output, innovation or the variety or quality of goods and services'.[6] On the other hand, the relevant consideration in the application of Article 101(3) is whether the agreement entails efficiency that has positive effects 'on prices, output, innovation or the variety or quality of goods and services'.[7] In other words, what makes an agreement anticompeti-

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[5] *See White Paper on Modernisation of the Rules Implementing Article 85 and 86 of the EC Treaty.* Commission Programme 99/027. COM (99) 101 final. [1999] OJ C 132/1, para 57. "The Commission has already adopted this approach to a limited extent and has carried out an assessment of the pro- and anti-competitive aspects of some restrictive practices under Article 85(1). This approach has been endorsed by the Court of Justice. However, the structure of Article 85 is such as to prevent greater use being made of this approach: if more systematic use were made under Article 85(1) of an analysis of the pro and anti-competitive aspects of a restrictive agreement, Article 85(3) would be cast aside, whereas any such change could be made only through revision of the Treaty. It would at the very least be paradoxical to cast aside Article 85(3) when that provision in fact contains all the elements of a 'rule of reason'. It would moreover be dangerous if modernisation of the competition rules were to be based on developments in decision-making practice, subject to such developments being upheld by the Community Courts. Any such approach would mean that modernisation was contingent upon the cases submitted to the Commission and could take many years. Lastly, this option would run the risk of diverting Article 85(3) from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations.").

[6] *Guidelines on Article 101(3)*, para 24 ("For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. Such negative effects must be appreciable.")

[7] *Guidelines on Article 101(3)*, para 33 ("Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of

tive under Article 101(1) is the negative impact and what makes it exemptible under Article 101(3) is the positive impact on prices, output, innovation and product variety. This logic leads to a vicious circle.[8] If an agreement has positive effects, it should not be caught in the net of Article 101(1). What is more, Article 101(3) should never apply, as an agreement having positive effects on prices, output, innovation and product variety should never reach Article 101(3) at all.

Third, the above approach implies the absurd and impractical rule that every self-imposed restriction on one's freedom of action violates Article 101(1), provided it is not *de minimis*. After all, every commitment limits the undertaking's freedom of action and may give rise to consequences which, if viewed in isolation, are anticompetitive. If a supplier sells its products to one dealer, it may be able to sell less to other dealers. A dealer, who purchases a huge quantity of discounted products, will purchase less from competing suppliers. This would imply that every legal commitment is a potential candidate for being a restriction and would call for a detailed empirical presentation of its merits. This notion has been consistently rejected by the CJEU.[9]

As a corollary, statutory language, as well as structural and practical considerations, suggest that the merits relevant for Article 101(1) and Article 101(3) cannot be congenial and the two provisions focus on different considerations. Accordingly, different qualities are relevant for Article 101(1) and Article 101(3). An arrangement that restricts competition may be exemptible for enhancing efficiency, and an arrangement that is not exemptible may still not be anticompetitive (or may even be procompetitive). The ensuing question is how to distinguish the focus of Article 101(1) from that of Article 101(3).

The response to this question may draw on both legal interpretation and economic theory. Both point to a construction where the focus of Article 101(1) is

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the Community competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals. This analytical framework is reflected in Article 81(1) and Article 81(3). The latter provision expressly acknowledges that restrictive agreements may generate objective economic benefits so as to outweigh the negative effects of the restriction of competition.")

[8] *See* Beverley Robertson, *What Is a Restriction of Competition?*, 28(4) European Competition Law Review 252, 258 (2007).

[9] Case T-112/99 *Métropole*, EU:T:2001:215, paras 75–77.; Case C-309/99 *Wouters*, EU:C:2002:98, para 97; Case C-333/21 *European Superleague*, EU:C:2023:1011, para 183; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010, para 113; Case C-141/21 P *International Skating Union*, EU:C:2023:1012, para 111; Case C-128/21 *Lietuvos notarų rūmai / Lithuanian Chamber of Notaries*, ECLI:EU:C:2024:49, para 97.

the competitive process (rivalry), while Article 101(3) focuses on cases where the efficiency emerges from the restriction of the competitive process and exempts cases where cooperation is more efficient than competition.

First, Article 101 mentions competition twice. Article 101(1) prohibits all agreements that prevent, restrict or distort *competition*. Article 101(3) centres around the improvement of production and distribution and the promotion of technical or economic progress. It refers to competition not as the rationale but as the limit of exemption. Article 101(3)(b) excludes from the exemption agreements that afford the 'undertakings the possibility of eliminating *competition* in respect of a substantial part of the products in question'.[10] This suggests the following propositions. Article 101(1) and Article 101(3) must have different focuses (a conclusion already drawn). Article 101(3) does not centre around competition. The restriction (prevention, distortion) of competition is a matter of degree: Article 101 tolerates some deceleration of competition if that is necessary for the sake of efficiency, but it does not tolerate its complete elimination irrespective of whether efficiency is enhanced or not.[11]

Second, economic common sense and intuition suggest that competition (rivalry) is the most efficient way for the market to operate. This implies that the proof of restriction of competition entails the assumption of harm to social welfare. As competition in the sense of rivalry is presumed to be the most efficient structure of the market, the burden of proof shifts to the defendant only if it intends to rely on justifications based on cooperative efficiency (i.e. efficiency arising from cooperation), which, as both conventional wisdom and intuition suggest, triumphs over competitive efficiency only exceptionally.

It follows from the above considerations that while under Article 101(1) the question is (or ought to be) whether the agreement reduces, enhances or is neutral to the intensity of rivalry (competitive efficiency), Article 101(3) deals with cooperative efficiency.[12] Under Article 101(1), the relevant question is whether the overall effect of the agreements is more or less competition in the sense of rivalry. On the other hand, Article 101(3) deals with efficiency that may be achieved through not competing but cooperating. Notwithstanding the

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[10] Emphasis added.

[11] Matthew Bennett & A. Jorge Padilla, *Article 81 EC Revisited: Deciphering European Commission Antitrust Goals and Rules*, *in* Competition Policy in the EU 63 (Xavier Vives ed., 2009) (Interpreting the term 'competition' in Article 101(3)(b) as rivalry or competitive process.)

[12] *See* Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 65 (2002) ("Article 81(3) permits non-competitive considerations to be brought in, but Article 81(1) forbids only agreements that have the object or effect of *restricting competition*. For the agreement to be forbidden, the object or effect must be to restrict competition and *not merely conduct*.")

decrease in the intensity of competition (rivalry), an agreement may entail, for instance, significant cost savings, which make both producers and consumers better off. The fundamental of Article 101 is that competition (rivalry) is the optimal and most efficient structure of the market, whereas in exceptional cases cooperation can be more efficient than competition.[13] Accordingly, the parties bear the burden of proof only if they argue that in the given case cooperation is socially more beneficial than competition.[14] This is in conformity with conventional wisdom. Rivalry is regarded as the most efficient structure of the market, but cooperation might be more useful under certain circumstances.[15]

Obviously, in its widest sense, the term 'competition' may embrace both rivalry and efficiency justifications and be equated with social or consumer welfare. The ultimate question of competition law is whether the arrangement has a positive or negative effect on prices, output, quality and innovation.[16] Interestingly, the term 'competition' is equally used when exempting restrictions in cases where cooperation is more efficient than competition. Notwithstanding their unquestionable merits in terms of productive efficiency,

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13 *See* René Joliet, *The Rule of Reason in Antitrust Law; American, German and Common Market Laws in Comparative Perspective* 60 (1967) (Stating that in European competition laws "competition is not necessarily the ultimate panacea: in some circumstances, it may be creative of efficiency, while in others destructive of investments.")

14 Regulation 1/2003/EC, Article 2. *See* Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v Commission* [1995] ECR II-289, paras 262 ("It is settled law that it is for undertakings seeking an exemption under Article 85(3) to establish, on the basis of documentary evidence, that an exemption is justified. Accordingly, the Commission cannot be criticized for failing to put forward alternative solutions or to indicate in what respects it would regard the grant of an exemption as justified (…). In applying the competition rules, all that is incumbent upon the Commission, by virtue of its obligation to state reasons, is to mention the matters of fact and of law and the considerations which prompted it to take a decision rejecting the application for exemption, and the applicants may not require it to discuss all the matters of fact and law raised by them in the administrative procedure".)

15 *Cf.* René Joliet, *The Rule of Reason in Antitrust Law; American, German and Common Market Laws in Comparative Perspective* 184 (1967) (Submitting that Article 101(1) demands a rule of reason analysis in the sense of the American one, while Article 101(3) contains values that are not present in US antitrust, *see ibid.* at 59–60. Note that in the relevant time the American rule of reason centred around competition in the sense of rivalry or competitive process, *see ibid.* at 59–60.)

16 *See Guidelines on Article 101(3)*, para 16.; *Guidelines on Horizontal Cooperation Agreements*, paras 20, 48, 183.

these arrangements do exclude competition.[17] Hence, the use of competition in an all-embracing sense is misleading. It is odd to argue that a research cooperation is procompetitive simply because it saves costs by avoiding unnecessary duplications. In reality, this arrangement is efficient and should be exemptible, but it is not procompetitive, as it suppresses research competition.

In *Bayer/Gist-Brocades*,[18] the Commission gave a concise summary of this approach:

> For the agreements to contribute to the improvement of production or distribution, or to promote technical or economic progress, they must objectively constitute an improvement on the situation that would otherwise exist. The fundamental principle in this respect, established at the time the common market was formed, lays down that fair and undistorted competition is the best guarantee of regular supply on the best terms. *Thus the question of a contribution to economic progress within the meaning of Article 85(3) can only arise in those exceptional cases where the free play of competition is unable to produce the best result economically speaking*.[19]

All forms of cooperation that recreate one of the otherwise missing preconditions of perfect competition, or increase the intensity of rivalry, are procompetitive. Arrangement-lowering transaction costs, especially consumers' search costs, for instance, by means of standardization or enhanced transparency, intensify competition. In the same vein, arrangements that create incentives for distributors to invest in promotion[20] or lower entry barriers may intensify competition.[21] On the other hand, collective arrangements reaping the benefits of economies of scale or economies of scope may have merits relevant for Article 101(3). Likewise, R&D cooperations that eliminate unnecessary cost

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[17] *See Guidelines on Article 101(3)*, paras 11 and 30.

[18] 76/172/EEC *Bayer/Gist-Brocades* [1976] OJ L 30/13.

[19] 76/172/EEC *Bayer/Gist-Brocades* [1976] OJ L 30/13, point III/1.

[20] When a producer enters a new geographic market, it may appoint an exclusive distributor. By granting this privilege to the dealer, the producer reduces competition. Intra-brand competition is excluded, if the brand is marketed by an exclusive distributor. However, the small loss sustained by the competitive process is abundantly made up by the procompetitive effects. The exclusive distributor will be interested in fiercely promoting the brand, thus, in reducing the consumers' search costs and, thus, intensifying the competitive process. In the absence of exclusivity, the distributor may not invest in promotion due to the risk that other dealers could reap the benefits of the promotion. All in all, some reduction in intra-brand competition may lead to a much more significant increase in inter-brand competition. If this is the case, the exclusivity does not set back but enhances competition.

[21] *See* Case T-328/03 *O2 (Germany) GmbH & Co. OHG v Commission* [2006] ECR II-1231.

duplications restrict the competitive process but produce benefits relevant for Article 101(3).

The narrative of Article 101 is that EU competition law protects competition but admits that competition (rivalry) is not always more efficient than cooperation. Article 101(3) saves agreements that restrict competition but increase social or consumer surplus, provided that they meet four conditions. The core requirement is the enhancement of efficiency in the sense of improving production or distribution or promoting technical or economic progress. All the other preconditions (fair share to the consumers, proportionality, no full elimination of competition) are mainly accessory. Article 101(3) applies if the efficiency entailed by the agreement outweighs the loss in efficacy caused by the reduction in competition (rivalry). If this condition is met, the scope and modus of cooperation are to be shaped in a way that conforms to the last three conditions.

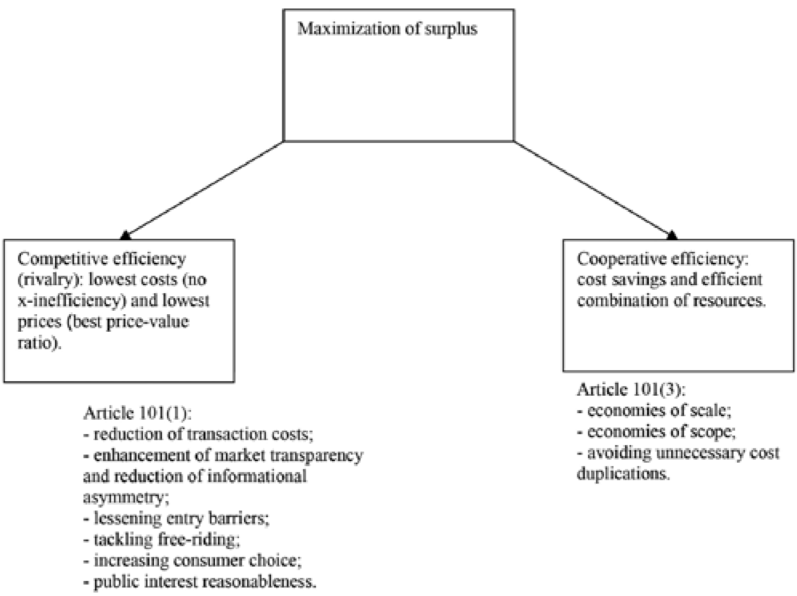

Figure 6.1 Value structure of Article 101

Translating this to the parlance of economics, procompetitive merits can be paralleled with allocative efficiency and dynamism in the sense of intensifying rivalry and strengthening the competitive pressure on market operators,[22] while cooperative efficiency can be paralleled with productive efficiency. Nonetheless, the proposal's conceptualization and economic categories do not perfectly fit each other. The distinction between the two prongs of Article 101 cannot be fully described by the distinction between allocative and productive efficiency. Article 101(1) focuses on competition in the traditional sense, which may enhance not only allocative but also productive efficiency by forcing enterprises to rationalize costs. An industry-wide platform or search engine may facilitate consumers to cheaply (that is, conveniently) acquire information on offers in the market and to compare them. The competition process enhances not only allocative efficiency, by forcing undertakings to content themselves with a reasonable margin, but also productive efficiency, by forcing them to keep costs as low as possible and eliminate inefficiencies to meet the offers of their competitors. Chilling the competitive process hampers not only allocative efficiency, but also productive efficiency, by alleviating the pressure to rationalize costs. At the same time, cooperation may intensify competition and, thus, enhance not only productive but also allocative efficiency.[23] The distinction of focuses, of course, does not mean that no borderline cases and overlaps can exist between the two prongs of Article 101. It merely means that the thrusts of the two inspections are different.

There are cases where it is difficult to distinguish competition and cooperative efficiency. Often, it is easier to establish the economic or efficiency value of a particular arrangement than to ascertain whether it is an Article 101(1) or an Article 101(3) case. Sometimes, economic analysis cannot be broken on the wheel and be forced into predetermined legal boxes and, hence, it might be easier to state that Article 101 does not forbid a particular conduct. Still, the conceptualization of Article 101 is very important from a practical point of view. In competition cases, mathematical equations based on quantifiable variables are rarely available. Due to the permanent lack of adequate data, the fundamental role of abstract economic theory is to serve as an analytical tool to grasp the consequences of different market practices abstractly and to erect presumptions based on probabilities. The main function of the distinction between Article 101(1) and Article 101(3) is to allocate the burden of proof. According to Article 2 of Regulation 1/2003,[24] while the burden of proof

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[22] *Cf.* Okeoghene Odudu, *The Boundaries of EC Competition Law* 98, 103 & 128–129 (2006) (Arguing that Article 101(1) deals with allocative efficiency, while Article 101(3) deals with productive efficiency.)

[23] *2023 Horizontal Guidelines*, para 475.

[24] Regulation 1/2003 [2003] OJ L 1/1.

regarding Article 101(3) rests on the undertaking, the burden of proof concerning Article 101(1) is borne by the party alleging the infringement.[25]

6.2 BLOCK EXEMPTION REGULATIONS

The four conditions set out in Article 101(3) are vague; hence, EU competition law developed a system of block exemption regulations (BERs) to bring clarity to exemption. The BERs are the inverse of anticompetitive object. They are based on the notion that certain agreements always or almost always meet the conditions of Article 101(3); hence, they can be exempted without an individual assessment. Similarly to anticompetitive object, the basis of block exemption is not that the agreement likely meets, but that it certainly meets the requirements of Article 101(3).

Having said that, a closer look at the BERs points out that, in terms of logic and rationale, they rather implement Article 101(1) than Article 101(3). The BERs, for the most part, single out those agreements that are not anticompetitive by effect and not those that can be exempted for being efficient. The path of the BER has not been logic – it has been experience[26] – and this takes nothing away from their immense practical value. Nonetheless, it reveals the conceptual confusion governing EU competition law.

The BERs are an extended version of the *De Minimis* Notice. They follow the same structure and logic, with two important differences. First, they contain a higher market share cap (in general, they double that of the *De Minimis* Notice) and, hence, an enhanced market power requirement. Horizontal restrictions are covered by the *De Minimis* Notice up to 10% market share,[27]

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[25] Nevertheless, if the defendant produces arguments that seem to be plausible, the Commission is obliged to give explanation for non-acceptance. Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, para 236 ("The Commission, for its part, must adequately examine those arguments and that evidence (…), that is to say, it must determine whether they demonstrate that the conditions for the application of Article 81(3) EC are satisfied. In certain cases, those arguments and that evidence may be of such a kind as to require the Commission to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof borne by the person who relies on Article 81(3) EC has been discharged (…). As the Commission agrees in its written submissions, in such a case it must refute those arguments and that evidence."). *See* Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* 78 (2007).

[26] *See* Oliver Wendell Holmes, *The Common Law* 1 (1881) ("The life of the law has not been logic; it has been experience…").

[27] *De Minimis* Notice, para 8(a).

while the SBER applies up to 20%[28] and the RDBER up to 25% market share.[29] The TTBER establishes a 20% cap for horizontal agreements.[30] Vertical restrictions are covered by the *De Minimis* Notice up to 15%,[31] while the VBER applies up to 30% market share.[32] Likewise, the TTBER establishes a 30% cap for vertical agreements.[33] Second, they have a wider list of excluded restrictions. Only object restrictions are excluded from the *De Minimis* Notice, while the BERs also exclude restrictions that are not anticompetitive by object.[34] This is justified by the fact that the BERs have a higher market share cap and certain restrictions may not be capable of causing harm under the *de minimis* cap but may be capable under the BERs higher cap.

The above suggests that the restrictions covered by the BERs are exempted for lack of anticompetitive effects, which is a consideration relevant for Article 101(1), and not for their efficiency benefits, which are the consideration relevant for Article 101(3). The approach of the BERs features the logic of the abbreviated effects-analysis proposed in Section 5.4. Furthermore, the *De Minimis* Notice and the BERs jointly make up a sliding scale, where the breadth of exclusion varies in function of market power. Still, they can only be considered a truncated version of the proposed abbreviated effects-analysis, as the BERs' scope does not make up a general coverage and they are limited to clearly compliant agreements.

6.3 CAN 'OBJECT' AGREEMENTS BENEFIT FROM AN EXEMPTION?

Per se illegality, that is, the notion that certain agreements breach competition law generally and irrevocably, is unknown to EU competition law. Legally speaking, *per se* treatment is limited to Article 101(1), while there are no types of agreements that are categorically excluded from the substantive analysis required to benefit from Article 101(3). There is no formal link between the classification under Article 101(1) and the exemptibility under Article 101(3). The CJEU established in a number of cases that, theoretically, any type of agreement may benefit from Article 101(3) and no category of agreement is excluded from the possibility to be considered on a case-by-case basis,

28 Article 3 SBER.
29 Article 6 RDBER.
30 Article 3 TTBER.
31 *De Minimis* Notice, para 8(b).
32 Article 3 VBER.
33 Article 3 TTBER.
34 Article 9 RDBER; Article 5 TTBER; Article 5 VBER.

although it is highly unlikely that an object restriction could benefit from Article 101(3).[35] Nonetheless, it seems that genuine horizontal object restrictions still cannot benefit from Article 101(3) and, in reality, only the overgrowths of anticompetitive object may be corrected under Article 101(3). The ruling in *Lietuvos notarų rūmai*[36] suggests that horizontal naked restrictions are *en masse* excluded from Article 101(3).

The tenet that, in principle, any agreement may be a candidate for an Article 101(3) exemption was first laid down by the GC in *Matra Hachette v Commission*.[37]

> [I]n principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article 85(3) of the Treaty are satisfied and the practice in question has been properly notified to the Commission.[38]

In *Beef Industry Development Society*,[39] the CJEU adumbrated the same principle concerning a crisis cartel involving market sharing and output limitation. The reference inquired whether the agreement was anticompetitive by object under Article 101(1); hence, the CJEU was not explicit about whether it could be, at least theoretically, eligible for an exemption. The language of the ruling is unclear as to whether the agreement could be considered under Article 101(3). The CJEU rejected the arguments of the Beef Industry Development Society under Article 101(1) with the explanation that '[i]t is only in connection with Article 101(3) that matters such as those relied upon by BIDS *may, if appropriate,* be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article 101(1)'.[40] On the other hand, the ruling indicates a good deal of scepticism about whether the agreement could

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[35] *See* Valentine Korah & Denis O'Sullivan, *Distribution Agreements under the EC Competition Rules* 233 (2002) ("[A]lthough *Matra Hachette* suggests that no restriction of competition is beyond exemption, there appears to be no real possibility of redeeming the so-called 'hardcore' restraints".).

[36] Case C-128/21 *Lietuvos notarų rūmai / Lithuanian Chamber of Notaries*, ECLI:EU:C:2024:49, paras 101–102.

[37] Case T-17/93 *Matra Hachette*, EU:T:1994:89.

[38] Case T-17/93 *Matra Hachette*, EU:T:1994:89, para 85. With this, the GC overruled a couple of its preceding judgments. Case T-14/89 *Montedipe*, EU:T:1992:36, para 265 (Agreements clearly violating Article 101(1) "must be regarded as an infringement per se of the competition rules."); Case T-148/89 *Tréfilunion*, EU:T:1995:68, para 109 ("Agreements clearly violating Article 81(1) "must be regarded as an infringement per se of the competition rules".).

[39] Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643.

[40] Para 21 (emphasis added).

effectively be justified under Article 101(3) ('such matters *may, at the most,* be relevant for the purposes of the examination of the four requirements which have to be met under Article 101(3) in order to escape the prohibition laid down in Article 101(1)').[41] Given that the Irish court's reference concerned solely Article 101(1), it is dubious how much guidance can be extracted from the ruling as to the applicability or lack of applicability of Article 101(3).

The subsequent case law has, however, clearly confirmed the idea that object agreements may be exemptible under Article 101(3). In *GlaxoSmithKline*,[42] the CJEU encountered a vertical dual-pricing scheme aimed at restricting parallel trade, which it considered anticompetitive by object under Article 101(1). Nonetheless, it had no issue with considering it under Article 101(3).[43] In *Pierre Fabre*,[44] the CJEU held that the ban of internet sales in a selective distribution system is anticompetitive by object under Article 101(1) but may be exemptible under Article 101(3).[45] In *European Superleague*[46] and in *International Skating Union*,[47] the dominant sporting organizations restricted members' participation in alternative third-party competitions, which the Court found anticompetitive by object but, in theory, exemptible under Article 101(3).[48] In *International Skating Union*,[49] the Commission's findings concerning Article 101(3) were not challenged, so the Court did not analyse this issue in detail.[50] Nonetheless, in *European Superleague*, it engaged in a lengthy and detailed examination.[51] In *Royal Antwerp Football Club*,[52] the CJEU held that UEFA's requirement that football clubs have a minimum number of nationally trained players was anticompetitive by object but analysed it in detail under Article 101(3).[53]

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[41] Para 39 (emphasis added).

[42] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 *GlaxoSmithKline*, EU:C:2009:610.

[43] Paras 62–66.

[44] Case C-439/09 *Pierre Fabre*, EU:C:2011:649.

[45] Paras 49 & 59.

[46] Case C-333/21 *European Superleague*, EU:C:2023:1011.

[47] Case C-141/21 P *International Skating Union (ISU)*, EU:C:2023:1012.

[48] Case C-333/21 *European Superleague*, EU:C:2023:1011, para 187; Case C-141/21 P *International Skating Union (ISU)*, EU:C:2023:1012, para 114.

[49] Case C-141/21 P *International Skating Union*, EU:C:2023:1012.

[50] Case C-141/21 P *International Skating Union (ISU)*, EU:C:2023:1012, para 90.

[51] Case C-333/21 *European Superleague*, EU:C:2023:1011, paras 231–241.

[52] Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010.

[53] Paras 118–128.

In parallel to the foregoing case law, the idea that even object restrictions have a chance to fulfil the requirements of Article 101(3) has gained ground both in the Commission's competition policy[54] and scholarship.[55] This was boosted by the *2010 Vertical Guidelines*, which reformed the policy on RPF. Before 2010, it had generally been accepted that RPF had been anticompetitive by object and could not realistically benefit from Article 101(3). The *per se* treatment had been subject to mounting criticism and the Commission decided to dilute this criticism by pointing to Article 101(3). The *2010 Vertical Guidelines*, for the first time in EU competition law's history, expressly invited undertakings to test RPF agreements under Article 101(3) and set out a few arguments for RPF. Although, as explained in Section 4.4.5, as a matter of practice, this entailed no fundamental change in the treatment of RPF, as it remained unlikely that in reality it could meet the conditions of exemption, this was probably the first case where a cluster of agreements declared anticompetitive by object received a general invitation to try to fulfil the requirements of exemption and was portrayed as being capable of benefiting from Article 101(3) on a case-by-case basis. This created the perception that object and effect agreements are alike susceptible of meeting the demanding conditions of exemption.

Notwithstanding the above developments, it is difficult to find cases where agreements clearly anticompetitive by object were exempted under Article 101(3) and the cases that could be raised as examples involved borderline or disputable object classifications. For instance, in *Société Air France/ Alitalia Linee Aeree Italiane SpA*,[56] the Commission applied Article 101(3) to an object restriction, but the cooperation was spiced with some ancillarity. In *Reims II*,[57] the Commission did not establish that the agreement had an anticompetitive object, but it simply jumped across this question, and after a brief explanation it reached Article 101(3). In this case, European public postal operators agreed to the amount of terminal dues, which one party had to pay to another for the onward delivery of letters. '[T]erminal dues are the price the PPO [public postal operator] in the country of origin pays to the PPO

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54 *See Guidelines on Article 101(3)*, para 46 ("Article 101(3) does not exclude a priori certain types of agreements from its scope."); *2010 Vertical Guidelines*, para 47 (Emphasizing that although hardcore agreements are presumptively caught by Article 101(1) and unlikely to fulfil the conditions of Article 101(3), this is a rebuttable presumption.).

55 *See* Richard Whish, *Competition law* 150–151 (2009); Richard Whish & David Bailey, *Competition Law* 127–29 (8th ed, 2015).

56 2004/841/EC *Société Air France/Alitalia Linee Aeree Italiane SpA*, Commission decision of 7 April 2004, not published in the OJ.

57 1999/695/EC [1999] OJ L 275/17.

in the country of destination for the service of delivering cross-border mail.'[58] Nevertheless, the Commission came to the conclusion that 'this Agreement fails to be considered as an agreement fixing selling prices within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement'.[59] The reason was that the agreement was not concluded by 'sellers' but by 'sellers' and 'buyers'. Accordingly, the Commission concluded that 'the REIMS II Agreement is a price-fixing agreement with unusual characteristics'.[60] The *Visa International – Multilateral Interchange Fee* decision declares that 'the Commission does not consider the multilateral interchange fee (MIF) agreement to be a restriction of competition by object'.[61] In *MasterCard*, the Commission was less straightforward about the characterization of MIF but stated that it is needless to take a clear position, as the agreement, due to the parties' market power, was certainly anticompetitive by effect.[62]

In *Lietuvos notarų rūmai*,[63] the CJEU revisited the issue and seems to have put limits on the limitless language used as to the exemptibility of restrictions anticompetitive by object. The Court was invited to consider the application of Article 101(1) to a naked horizontal price-fixing arrangement, but rejected it out of hand. In the case, the Lithuanian Chamber of Notaries adopted rules concerning the calculation of notarial fees (referred to as 'clarifications'), which were tantamount to a price-fixing cartel, and attempted to justify this under Article 101(3). The CJEU rejected this out of hand, suggesting that object restrictions cannot be justified under Article 101(3).

> In the present case, the applicants in the main proceedings and the Lithuanian Government submit, in essence, that the clarifications pursue legitimate objectives within the meaning of the case law (…). They seek to safeguard the principles of equal treatment and proportionality and to protect notaries from unjustified civil liability by standardising notarial practice and filling a regulatory vacuum. In addition, the clarifications would aim to protect the interests of users of notarial services, since charging fees at the highest amount allowed under the provisional scale for

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[58] Para 63.
[59] Para 63.
[60] Para 65.
[61] 2002/914/EC [2002] OJ L 318/17, para 69.
[62] Case No COMP/34.579 – *MasterCard*, COMP/36.518 – *EuroCommerce*, COMP/38.580 – *Commercial Cards* (19.12.2009), not published in the OJ, para 407. Interestingly, in the US the Court of Appeals for the Eleventh Circuit refused to condemn MIF as *per se* illegal. *National Bancard Corporation v VISA*, 779 F.2d 592 (11th Cir. 1986).
[63] Case C-128/21 *Lietuvos notarų rūmai*, ECLI:EU:C:2024:49.

> establishing security interests in property of unknown value would help to dissuade people from pledging property whose value has not been established.
>
> However, *since decisions such as the clarifications must (...) be regarded as constituting a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, they cannot, in any event, be justified by the objectives referred to in the preceding paragraph of this judgment.*[64]

The idea that horizontal naked restrictions cannot be considered under Article 101(3) seems to go against the ruling in *Beef Industry Development Society*,[65] where the Court did not rule out this possibility. One way to reconcile this contradiction is to argue that *Beef Industry Development Society* involved a cartel in special circumstances (economic crisis). Nonetheless, *Lietuvos notarų rūmai*[66] also involved a non-standard cartel, given that it was orchestrated by the chamber of a learned profession. The other way to reconcile the two rulings is that *Beef Industry Development Society* did not address the question but simply indicated that the considerations raised had no relevance under Articles 101(1) and might 'at most' be considered under Article 101(3) 'if appropriate' at all. Be that as it may, *Lietuvos notarų rūmai* seems to dissipate the notion that cartels have a theoretical chance of exemption.

The above proposition may also be deduced from the very definition of naked restrictions. These restrictions have no purpose but the restriction of competition. As a corollary, the only argument they can offer for the Article 101(3) analysis is the idea that competition itself is harmful in certain markets and cartelization produces a larger consumer surplus than competition. This resembles the idea of 'ruinous competition', outright rejected in US antitrust law as 'a frontal assault on the basic policy of the Sherman Act'.[67] This is clearly different from the justifications of non-naked restrictions, where the alleged benefits do not emerge from the sheer restriction of competition but, for example, from the combination and integration of resources. Naked restrictions have no such element to offer for Article 101(3).

In summary, generally, all agreements caught in the net of Article 101(1), including agreements anticompetitive by object, may be considered under Article 101(3) and none of them are outright excluded from the benefit of an exemption. Nonetheless, the ruling in *Lietuvos notarų rūmai* suggests that horizontal naked restrictions cannot fulfil the pertinent requirements by their nature and, hence, their exemption can be rejected out of hand. This principle introduced a distinction to the notion of anticompetitive object. It seems it is

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64 Paras 101–102.
65 Case C-209/07 *Beef Industry Development Society*, EU:C:2008:643.
66 Case C-128/21 *Lietuvos notarų rūmai*, ECLI:EU:C:2024:49.
67 *National Society of Professional Engineers v US*, 435 U.S. 679, 95 (1978).

made up of genuine object restrictions, which represent the 'hard core' of the prohibition, and restrictions whose object classification may be debatable or not without doubts. While it is difficult to imagine that a cartel (horizontal naked price fixing, market sharing and output limitation, and their functional equivalents) could ever benefit from Article 101(3), less straightforward examples of horizontal anticompetitive object, such as information exchange, group boycott, vertical object restrictions and agreements condemned by means of the *Allianz* doctrine, can be considered under Article 101(3). This implies that there is a difference between restrictions that are truly anticompetitive by object and other object cases. It also suggests that the overgrowths of anticompetitive object under Article 101(1) can be corrected under Article 101(3), but the latter offers little to no hope for cases involving a genuine anticompetitive object.

6.4 ARTICLE 101(3) AND NON-ECONOMIC VALUES

The statutory language of Article 101(1) leaves little room for non-competition interests to suppress competition goals. Article 101(1) prohibits the prevention, restriction or distortion of competition. Although an agreement's anticompetitive repercussions may be counterbalanced by its procompetitive merits, non-competition virtues are by definition not procompetitive.

This drives the analysis to Article 101(3), which requires that consumers be allowed a fair share of the resulting benefits. Although the language of Article 101(3) refers to consumers in general ('allowing consumers a fair share of the resulting benefit'), the case law has interpreted this as referring specifically to those consumers who are disadvantaged by the restrictive agreement. The CJEU has repeatedly held that 'it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration'.[68] Accordingly, collective and general societal benefits can meet this requirement only if they also benefit those who are injured by the restriction of competition. The phasing-out of an outdated technology to replace it with a more environment-friendly one can meet the requirements of Article 101(3) only if, besides the collective benefit to the society at large in terms of reducing negative externalities, it also results in specific benefits to the individual users. Although 'it is not necessary, in principle, for each consumer individually to

[68] Case C-238/05 *Asnef-Equifax*, EU:C:2006:734, para 70; C-382/12 P *MasterCard*, EU:C:2014:2201, para 236; Case C-306/20 *Visma Enterprise*, EU:C:2021:935, para 87.

derive a benefit (…), the overall effect on consumers in the relevant markets must be favourable'.[69]

The *2023 Horizontal Guidelines* reflect the above approach. The *Guidelines* contain detailed provisions on agreements that pursue sustainability objectives. They identify three types of benefits that may accrue from these cooperations (individual use value, individual non-use value and collective benefits) and provide that these can be exempted only if they benefit the affected consumers in the relevant market, that is, those who are disadvantaged by the restriction of competition.[70] The *Guidelines*, in essence, reproduce *Energy Efficiency of Washing Machines* in an illustrative example[71] and stress that the phasing-out of outdated washing machines is exemptible because 'consumers in the relevant market derive a net benefit'.[72] This limits the use of Article 101(3) for general societal purposes to cases where their pursuit also benefits consumers or the measure's 'overall effect on consumers in the relevant market is at least neutral'.[73]

Notwithstanding the above considerations, the idea to consider the general good under Article 101(3) is not alien to the scholarship[74] and the Commission's decisional practice. Although, for example, the 1999 *White Paper on Modernisation* stressed that Article 101(3) provides a 'legal framework for the economic assessment' and does 'not allow (…) the competition

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[69] Case C-238/05 *Asnef-Equifax*, EU:C:2006:734, para 72.

[70] Para 569 & 583.

[71] Example 5 presented in para 603.

[72] Para 569.

[73] C-238/05 *AsnefEquifax*, EU:C:2006:734, para 72. *See also* C-382/12 P *MasterCard*, EU:C:2014:2201, paras 234 & 242.

[74] *See* James S. Venit, *Brave New World: the Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty*, 545, 579 (2003); Rein Wesseling, *The Commission White Paper on Modernisation of E.C. Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options*, 20(8) European Competition Law Review 420, 422–423 (1999) (Advocating that non-economic values can be taken into account under Article 101(3), like, for instance, environment protection, employment, industrial policy.) Lennart Ritter & W. David Braun, European Competition Law: a Practitioner's Guide 148 (3d ed., 2005) (Giving examples for cases where the maintenance of employment and environment protection were taken into account under Article 101(3).); Joanna Goyder, EU Distribution Law 30–31 (4th ed., 2005); *Cf.* Claus Dieter Ehlermann, *The Modernization of EC Antitrust Policy: a Legal and Cultural Revolution*, 37 Common Market Law Review 537, 549 (2000) (Taking the position that "non-competition-oriented political considerations should not determine the assessment under Article 81(3).").

rules to be set aside because of political considerations',[75] in a few old cases the Commission could be viewed as condoning the suppression of competition for the general good.[76] Still, it is unclear if the competition assessment turned on the non-competition considerations or these reinforced or influenced the assessment of the competition aspects. In *Ford/Volkswagen*,[77] the Commission took note, among others, of the fact that the cooperation served general economic development.[78] The decision, however, lists this among the miscellaneous and not the main considerations. In *Energy Efficiency of Washing Machines*, the Commission exempted European manufacturers' coordinated phasing-out of an outdated technology on account of furthering environmental protection. However, the decision argued that the phasing-out of high energy consumption washing machines also benefited consumers and the cooperation made them financially better off. The Commission stressed that 'savings on electricity bills for individual purchasers more than compensate potentially higher purchase costs'.[79]

6.5 FINAL CONCLUSIONS

Article 101(3) is an exceptional rule of EU competition law and has been sidelined after the abolition of the notification system in 2004.[80] Before the reform, Article 101(3) operated through a notification system. All agreements that breached Article 101(1) were required to be notified to the Commission for approval under Article 101(3). This tilted the balance between the two provisions towards the latter. The scope of Article 101(1) was conceived relatively widely, and the certainty given by the exemption encouraged undertakings to notify agreements that did not necessarily breach Article 101(1). This resulted in the practice of comfort letters, which were not exemptions under Article 101(3) but administrative confirmations of the disapplication of Article 101(1). The abolition of the notification system in 2004 brought about significant institutional and procedural changes, which impacted substantive law. The decentralization of the enforcement made national compe-

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[75] *White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty.* Commission programme No 99/027, para 57.

[76] *See e.g.* Massimo Motta, *Competition Policy: Theory and Practice* 15–16 & 27–28 (2004).

[77] *Ford–Volkswagen*, [1993] OJ L20/14.

[78] Para 36.

[79] IP/00/148: Commission approves an agreement to improve energy efficiency of washing machines (Brussels, 11 February 2000).

[80] *See* David Bailey, *Reinvigorating the Role of Article 101(3) under Regulation 1/2003*, 81(1) Antitrust Law Journal 111, 111–112 (2016).

tition authorities part of the application of competition law. Article 101(3) was vested with direct application and was no longer the prerogative of the Commission. Undertakings no longer had a duty or a possibility to have their agreements approved under Article 101(3) and had to assess the applicability of this provision for themselves (termed as 'self-assessment'). This and the 'more economic approach', which called for more substantive analysis in competition law, tilted the application towards Article 101(1).

The decisional and judicial practice has been at fault for a reasonable distinction between the focuses of Article 101(1) and 101(3). This conceptual inconsistency is well illustrated by the BERs, which are formally the implementation of Article 101(3) and the specification of the requirements included in it, but in fact they implement Article 101(1) in the sense that they, for the most part, identify agreements that do not breach Article 101(1) at all.

This chapter proposed a balanced approach to allocate the burden of proof in accordance with probabilities. In the proposed conception, the relevant question for Article 101(1) is whether the agreement reduces, enhances or is neutral to the intensity of rivalry (competitive efficiency), while Article 101(3) centres around cases where cooperation trumps competition in terms of surplus. This conceptualization is in harmony with the statutory construction of Article 101 and economic wisdom, and minimizes the risk of false positives and negatives. In theory, Article 101(3) may be susceptible of accommodating general non-competition goals; however, the practicality of this is highly limited by the requirement that the efficiency benefits need to profit, for the most part, those consumers who were harmed by the restriction of competition.

In theory, all agreements, including object restrictions, may benefit from Article 101(3). Nonetheless, restrictions anticompetitive by object are very unlikely to meet these conditions. Furthermore, this principle is not without exception: the case law suggests that cartels are still outright excluded from this benefit. When it comes to object restrictions, it is more reasonable to conceive their theoretical exemptibility as a correction to the excessive interpretation of anticompetitive object under Article 101(1).

7. Closing thoughts

The last few decades of EU competition law have been hallmarked by the movement for a 'more economic approach'.[1] In the 1990s, the application of Article 101 was viewed as bureaucratic, inflexible and, at times, irreconcilable with sound economic theory. The emergence of the 'more economic approach' unquestionably ameliorated it and enhanced its contribution to social welfare. It gradually replaced the formalist attitude that had prevailed until the late 1990s with a substantive approach that judges agreements by identifying their real impact on competition and social welfare.[2] This was a welcome development that brought competition law closer to the aims it is meant to pursue. At the same time, however, in the last two decades, the 'more economic approach' significantly changed the balance between formalism and substantiveness.[3]

It is undisputed that the function of Article 101 is to screen out anticompetitive agreements and encourage procompetitive arrangements (whatever these terms may mean). Nonetheless, the 'more economic approach' carries the potential of exaggeration, which, at the end of the day, replaces (or confuses) law with economics,[4] while the 'application of economic theories and models in concrete cases remains an area fraught with difficulty and uncertainty'.[5]

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1 *See* Anne C Witt, *The More Economic Approach to EU Antitrust Law* (2016); An-Sofie Cottyn, *An Interdisciplinary Analysis of the More Economic Approach in EU Competition Policy: At the Crossroad of Markets and Governments* (Doctoral thesis, University of Ghent, 2019), available at https://biblio.ugent.be/publication/8628590.

2 *See* Denis Waelbroeck, *Vertical agreements: 4 years of liberalisation by regulation n. 2790/99 after 40 years of legal (block) regulation*, *in* The Evolution of European Competition Law 85 (Hanns Ullrich ed., 2006); Wolf Sauter, Coherence in EU Competition Law 42–45 (2016); Jan Blockx, *The Limits of the 'More Economic' Approach to Antitrust*, 42(4) World Competition 475 (2019).

3 Justin Lindeboom, *Formalism in Competition Law*, 18(4) Journal of Competition Law & Economics 832 (2022).

4 Csongor István Nagy, *Dogmatik und EU-Kartellrecht: der Begriff der bezweckten Wettbewerbsbeschränkungen*, 10(5) Neue Zeitschrift für Kartellrecht 238, 238–239 (2022).

5 Bo Vesterdorf, President of the European Court of First Instance, *Standards of proof in merger cases: reflections in the light of recent case law of the Community Courts*, Paper presented at the BIICL third annual merger control con-

A radical version of the 'more economic approach', which envisages that all agreements be afforded a full economic inquiry, is downright unfeasible.[6] On the one hand, this would be unreasonably expensive and lead to false negatives in terms of underenforcement. On the other hand, it is an illusion to base competition analysis on the assumption of the availability of complete information. It is not a coincidence that the 'more economic approach' brought about little substantive analysis in individual cases. It brough more economics to the macro level of general rules but it generated no such results on the micro level of application. The 'more economic approach' can take credit for questioning several rules and concepts of competition law, but it did not make economic analysis part of the day-to-day operation of Article 101.

There is a legitimate and pressing need for formalism in competition law. The question is not if formalism is needed, but how much of it is needed.[7] Courts cannot apply economics; they can apply law. And undertakings cannot comply with economics; they can comply with law. The economic considerations need to be converted into judiciable standards that work effectively in legal procedures and provide guidance even under incomplete market information. Competition rules, like all rules of law, operate through norms and procedures and handle factual uncertainties by way of allocating the burden of proof and setting a standard of proof.[8]

In the last three decades, EU competition law has seen the emergence and exacerbation of several structural inconsistencies and contradictions, which symptomatize the loss of a doctrinal compass.

First, by discarding the notion that anticompetitive object is a category-building principle applied through specified object categories, the CJEU embraced the notion that anticompetitive object can be established by means of a comprehensive case-by-case analysis. This conflates object-inquiry and effects-analysis and makes anticompetitive object elusive and unpredictable, while it is its very essence that it is a clear-cut rule. The new approach boosts the risk of false positives by allowing courts to condemn complex

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ference, December 6, 2004), p. 14, quoted by Christopher Decker, *Economics and the Enforcement of European Competition Law* xxi (Elgar, 2009).

6 For an in-depth analysis of the complicated relationship between competition law enforcement and economics, *see* Christopher Decker, *Economics and the Enforcement of European Competition Law* (Elgar, 2009).

7 For a conceptualization of the relationship between formalism and substantiveness through the distinction between "law-intensive" and "fact-intensive" cases, *see* Pablo Ibáñez Colomo, *The shaping of EU competition law* 64–66 (2018).

8 For an overview of the standards of proof in EU competition law, *see* Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach* (2019).

market practices quickly, without carrying out a proper effects-analysis, and has a significant chilling effect. Furthermore, it considerably harms competition law's conceptual consistency and functional framework. Anticompetitive object is factored into various other formal rules and concepts, where its doctrinal malfunction causes blatant harm. The most illustrative example is the *de minimis* principle. The essence of *de minimis* is that it creates a clear-cut rule based on market share. Earlier, the *de minimis* rule was clear-cut. It applied under the pertinent market share cap with the exclusion of object restrictions, which were specifically enumerated. Nonetheless, the new notion of anticompetitive object opened it up to the unpredictable and frameless analysis *de minimis* is meant to avoid. Currently, the safe harbour applies under the market share cap, unless a comprehensive case-by-case analysis points to anticompetitive object.

Second, the case law confuses the object-inquiry's contextual analysis with effects-analysis. There are numerous considerations that distinguish and should distinguish the former. Contextual analysis is essentially a 'lawyer's job'. It extends to the factual context but, contrary to effects-analysis, can be carried out even with a rudimentary understanding of economics and without engaging in any empirical market analysis. Its purpose is to interpret the agreement, comprehend its economic function and apply certain labels of competition law. It is context that helps to ascertain whether the parties are actual or potential competitors, whether the agreement is horizontal or vertical, whether the exchanged data is historical or aggregated, whether the intermediary is a distributor or an agent, whether the restriction is naked or ancillary. All these classifications can be done through traditional legal means and without any deep understanding of economics and empirical market analysis. On the contrary, market structure, market power, entry barriers and alternative distribution channels all require the definition of the relevant market and should have no place in object-inquiry and in the contextual analysis carried out as part of it.

Third, Article 101 has seen a remarkable proliferation of specified object categories. In EU competition law, anticompetitive object has a much larger purview than US antitrust law's *per se* rule. Of course, this, in itself, does not prove the overgrowth of object in EU law. However, a look at the object categories that have no counterparts on the other side of the Atlantic is revealing. EU competition law has traditionally contained vertical object categories that go against sound economic theory. Resale price fixing *per se* violates Article 101(1) and, as such, cannot benefit from the *de minimis*, even though it may be used for a number of legitimate purposes, and it is an economic truism that it cannot harm competition in the absence of some market power. The outright ban of absolute territorial protection admittedly goes against sound economic theory and is justified solely by the normative purpose of market integration. Perversely, territorial protection stimulates the penetration of new markets, and, in this sense, its exclusion may in fact work against market integration. The *per se* treatment of absolute territorial protection is extrapolated to customer protection, where the purpose of market integration is unintelligible. The restrictive treatment of selective distribution also lacks a sound economic rationale. The object category of horizontal information exchange has no added value, as anticompetitive information exchange could equally be pursued as a cartel, while its obscure definition may dissuade undertakings from engaging in legitimate activities.

Fourth, EU competition law has developed no abbreviated effects-analysis and employs no sliding scale. This makes the enforcement against clear effect cases unreasonably expensive and creates a perverse incentive to push cases into the category of anticompetitive object. The proliferation of anticompetitive object may arguably be explained with EU competition law's failure to make the time and energy afforded to individual restrictions commensurate with their potentials and merits. The difficulties of proving effects have created an apparently irresistible temptation to expand anticompetitive object to effect cases with a high anticompetitive potential.

Fifth, Article 101(3) has not found its place in competition analysis. While it had a wide net before the 2004 reform, it was remarkably sidelined in the post-2004 era. Although the bifurcation of Article 101 envisages a two-step analysis with different focuses, the case law has failed to identify the difference between these. As proposed, Article 101(1) centres around the competitive process (rivalry), while Article 101(3) centres around cases where cooperation produces a higher surplus than competition (cooperative efficiency). This structure minimizes the risks of false positives and false negatives, because it allocates the burden of proof according to the agreement's probable effects on consumer welfare.

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