

WHEN DO AGREEMENTS RESTRICT COMPETITION IN EU COMPETITION LAW?

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Under EU competition law, it is prohibited to conclude agreements distorting competition, but little guidance is available on what to consider anti-competitive. However, case law has given rise to patterns holding some practices anti-competitive by object while others must be assessed in detail and against their effect without providing a workable definition on the lines between these two approaches. Other issues remain equally open-ended, e.g., when the anti-competitive effect is appreciable. In this paper, a possible roadmap for the appraising of restrictive agreements in EU competition law will be provided.

1 INTRODUCTION

It follows directly from the wording of Article 101 of the Treaty on the Functioning of the European Union (Article 101) that agreements, decisions, or concerted practices can be anti-competitive by *object* or *effect*. It also follows from case law that the form, official purpose, or subjective intent is immaterial¹ jointly with ignorance of Article 101.² Nor does it matter whether the agreement in question is restrictive in itself or by virtue of specific elements herein, or only by its impact on the market in light of the prevailing market conditions. Only the actual or plausible consequences for competition matter under Article 101(1). Naturally, mitigating factors, e.g., a socially desirable purpose, may be accommodated under Article 101(3), but only subject to the strict conditions here. While indicating some easily applicable principles, the reality is, as always, more complex, and very little can be extracted from the examples provided in the text of Article 101.³ However, the European Commission has in its guidelines tried to capture the essence of the assessment by explaining that:⁴

If an agreement is not restrictive of competition by object it must be examined whether it has restrictive effects on competition. Account must be taken of both actual and potential effects... 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. The prohibition rule of Article [101] does not apply when the identified anti-competitive effects are insignificant. [Neither is it]

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¹ See case C-209/07, *Beef Industry* EU:C:2008:643, para 21; case C-67/13P, *Groupement des cartes bancaires* EU:C:2014:2204, para 54; and case C-32/11, *Allianz Hungária* EU:C:2013:160, para 37.

² Case T-61/89, *Danske Pelsdyravlørforening*, EU:T:1992:79, para 157.

³ Article 101(1) refers to (a) fixing of prices and trading conditions; (b) limiting of production or developments; (c) share of markets; (d) discrimination; and (e) tying.

⁴ *Guidelines on the application of Article 81(3) of the Treaty*, recital 24, and footnote 31.

sufficient in itself that the agreement restricts the freedom of action of one or more of the parties.... This is in line with the fact that the object of Article [101] is to protect competition on the market for the benefit of consumers.

From case law, it follows that the object of Article 101(1) is not confined to protecting competitors and consumers, as indicated above, but it also encompasses market structure and the notion of consumer welfare.⁵ Moreover, in the assessment, regard must be made to the agreement's content, the objectives it seeks to attain, and the economic and legal context of which it forms part,⁶ thereby readmitting the issue of intent to the assessment under Article 101(1).

From these principles, it follows that enforcers must start by formulating a theory of harm,⁷ outlining how an agreement, decision, or concerted practices (potentially) are detrimental to the object of Article 101(1), and then substantiate this by testing the matter. This can be implemented by contemplating whether the practice in question:

- 1) Is concluded between two or more undertakings that are directly or indirectly actual or potential competitors, making it a horizontal agreement. Alternately, if their relationship is vertical within a distribution chain or activities attributable to different markets. The latter two are appraised much more leniently compared to the former.
- 2) Has as its object or effect the restriction of competition, which in practice often comes down to the ability to refer to a legitimate purpose. Formally, restriction by effect requires, in contrast to restriction by object, substantial analysis of its impact on competition. Typically, such an analysis is performed by comparing competition with and without the practice in question.
- 3) Has an appreciable adverse effect on competition, or if this can be precluded based on its ancillary nature or insignificant impact. While in principle an extension of the counterfactual analysis outlined above, the questions remain a separate step not to be confused with the issue of finding a restriction by object or effect.

In this paper, these three steps will be developed to outline the notion of anti-competitive agreements under Article 101. The presentation will not touch upon what to consider an agreement, decision, or concerted practices in the first place, nor any of the other requirements⁸ embedded in Article 101. E.g., that trade between the EU member states must be affected, and that the conduct in question originates from the undertakings involved. Neither will it explore the matter of exemption under Article 101 (3). Moreover, for

⁵ United cases C-501/06P, C-513/06P, 515/06P, and 519/06, *GlaxoSmithKline Services* EU:C:2009:610, para 63, and *Guidelines on the application of Article 81(3) of the Treaty*, recital 13. For further discussions on the objects of EU competition law, see, e.g., Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 5-9 and 228-235, and Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge, 2004, pp. 17-30.

⁶ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 25.

⁷ Examples of possible theories can be found in *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recitals 33-38, and *Guidelines on Vertical Restraints* (2022), recitals 18-20.

⁸ For further, see, e.g., Richard Whish, *Competition Law*, 10th Edition, 2021, pp. 83-120, and Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 204-226.

simplicity, the concept of agreements will also encompass decisions and consorted practices unless otherwise specified, regardless of three concepts that are equally open-ended. Finally, the paper pertains to EU competition law, but as the national competition law of the EU members states must be aligned with Article 101,⁹ the outlined principle would also apply to national enforcement.

2 THE LINE BETWEEN HORIZONTAL AND NON-HORIZONTAL BEHAVIOUR

Nothing in the wording of Article 101 indicates a division between horizontal and non-horizontal agreements and restrictions. However, it could be argued that the examples listed in Article 101(1) are more horizontal than vertical in nature, making it clear that the former should form the core of enforcement. This has transcended into practice rendering a much more lenient appraisal available for non-horizontal behavior, even involving a presumption of substantial scope for efficiencies associated with these.

In *Allianz Hungária*,¹⁰ involving agreements concluded between Hungarian insurances companies and auto shops, the Court of Justice felt compelled to state that vertical agreements also could infringe Article 101(1) by object or effect. However, vertical agreements would often be less damaging to competition than horizontal agreements by their nature. This was made even more explicit in *Visma*,¹¹ involving the review of restrictive provisions in a distribution agreement, potentially limiting competition between the distributors. In reply to a preliminary reference, the Court of Justice recalled how vertical agreements, in general, are less likely to be harmful than horizontal agreements and how restrictions of competition between distributors of the same brand (intra-brand competition) would rarely be problematic unless competition between different brands (inter-brand competition) was already weakened. In *Consten and Grundig*,¹² involving the assessment of vertical exclusivity agreements, the parties even argued that Article 101(1) did not apply to vertical agreements but only horizontals. The Court of Justice rebutted this, clarifying that Article 101 was not limited in scope and application to horizontal agreements, but also covered non-horizontal agreements.

The qualification of an agreement is done against the market definition and the parties' position herein. However, the market structure or the senior management's actions may taint the appraisal, transforming a non-horizontal agreement into a horizontal concluded between competitors, with legal consequences for the assessment.

In *Hasselblad*,¹³ the EU Commission did not object to the vertical exchange of sensitive price information between a wholesaler and its retailer, but only that the information had also been passed on to the latter, adding a horizontal element to the vertical agreement. In *HFB*,¹⁴ a group of undertakings had colluded in prices and allocation of customers, infringing Article 101(1). In its decision, the EU Commission had included some additional undertakings as these

⁹ For further see, e.g., Richard Whish, *Competition Law*, 10th Edition, 2021, pp. 77-82.

¹⁰ (n 1), para 43. See also *Guidelines on Vertical Restraint*, recital 6.

¹¹ Case C-306/20, *Visma* EU:C:2021:935, para 78.

¹² United cases C-56/64 and 58/64, *Établissements Consten S.à.r.l. and Grundig-Verkaufs-GmbH* EU:C:1966:41, pp. 339-340.

¹³ Case IV/25.757, *Hasselblad*, O.J. 1982L 161/18, recital 49. Partly overturned by case C-86/82 - *Hasselblad*.

¹⁴ Case T-9/99, *HFB* EU:T:2002:70, paras 8-33 (background) and 55-68 (controlled by one entity).

were considered group-affiliated to one of the cartelists. This was done against overlaps in ownership and management, joint representation, and internal documents indicating a single common strategy.

The undertakings in question does not have to be actual competitors although they would compete in the same market and for the same customers. It is sufficient that they could qualify as *potential* competitors. Nor is it material if the restrictions in question affected competition between different brands and products (inter-brand competition) or between different suppliers (intra-brand competition). All types of conduct are covered by the scope of Article 101(1) if anti-competitive.

2.1 ACTUAL AND POTENTIAL COMPETITORS AND THIRD PARTIES

Following the process of defining the market, it can then be decided if the parties are, as a minimum, potential competitors. Usually, this is accepted if both are active in the same market,¹⁵ even where the agreement involved is in principle non-horizontal, and the overlap is related to different but associated markets, e.g., up- or downstream.

In *Screensport/EBU*,¹⁶ a group of broadcasters had established a consortium directed at buying sports rights and, at the same time, a transnational satellite-based sports channel directed at utilizing these. However, one of the members was at the same time engaged in establishing its own transnational satellite-based sports channel potentially competing with the consortium, creating a horizontal overlap at a downstream market. In *Cekacan*,¹⁷ a Swedish and a German company had formed a joint venture to market a new packing technology currently only utilized by the latter for the German market. The cooperation was exclusive and included the underlying machines and production facilities. The European Commission held it anti-competitive that the agreement had de facto eliminated the German company as a separate competitor.

In particular, associations of undertakings can blur the lines as some members might compete against each other. Decisions made by the governing bodies of associations of undertakings can therefore blend horizontal and non-horizontal elements, requiring separate assessments of these.¹⁸ It is not even required that all members to an anti-competitive practice should be competitors, provided that a minimum of two would qualify as such, as detailed later. Further, in a vertical distribution chain, the lines become even more blurred as undertakings might be customers on the upstream (wholesale) market, but competitors on the downstream retail or aftermarket, giving what is in principle a vertical agreement a horizontal twist.

¹⁵ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 10.

¹⁶ Case IV/32.524 - *Screensport/EBU*, O.J.1991L 63/32, recitals 52-66.

¹⁷ Case IV/32.681 - *Cekacan*, O.J. 1990L 299/64, recitals 34-39.

¹⁸ Pursuant to *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 12, the horizontal elements are to be assessed first followed by the verticals.

2.1[a] Potential Competitors

As outlined above, Article 101(1) does not require direct and imminent competition between the involved undertakings. It is sufficient that this could emerge following market entry, expanding the concept to potential competitors.

In *Toshiba*¹⁹ and *Franco-Japanese ball-bearings agreement*,²⁰ the parties had concluded gentleman agreements directed at shielding their respective home markets. In the assessment, it was considered irrelevant that none of these actually competed there as they could have entered the markets void of the understanding. The General Court even referred to the understanding as evidence of their status as potential competitors.

An undertaking would qualify as a potential competitor if market entry was feasible without the agreement in question as a reaction to a small, but significant and non-transitory increase in price (this is known as the SSNIP test).²¹ If relevant, matters can be taken into account following investments or procurements of resources or termination of restrictive agreements.

In *VISA*,²² involving the condition for being accepted into the VISA credit card system, the General Court was called to clarify when to consider an undertaking a potential competitor. To challenge this, the parties i.a. submitted that the European Commission had rested its conclusion on an intention to enter the market in question rather than actual facts. The Court refuted this, but also declared that the assessment could not be made in the abstract. Instead, it had to be based on evidence or an analysis of the relevant market structures where declared intentions were one factor and market structure void of the involved agreements another. Further, an undertaking could not be described as a potential competitor if entry was not an economically viable strategy or if entry would not take place with sufficient speed to exert a competitive constraint on market participants. In *Roche*,²³ the reversed situation was presented as the activities, and thus market entry, of one of the parties rested on an IP license granted by the other. It could therefore be submitted that void of the agreement, it would not be possible to enter, nor remain, in the market. However, the Court of Justice did not accept this but identified the parties as competitors under Article 101(1).

Guidance on when to consider undertakings as potential competitors can be found in the principles used when defining the relevant market and the concept of potential competition.²⁴ Here, an undertaking would normally be considered a potential competitor if entry would be possible within 2 to 3 years.²⁵ However, the legal standard was formulated in *VISA*, requiring entry to take place with sufficient speed to exert a competitive constraint

¹⁹ Case T-519/09, *Toshiba* EU:T:2014:263, paras 230-232. Upheld with case C-373/14P, *Toshiba* EU:C:2016:26

²⁰ Case IV/27.095 - *Franco-Japanese ball-bearings agreement*, OJ. 1974L 343/19.

²¹ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 10. Other possible tests are available, including e.g. the GUPPI test where entry would occur with a General Upwards Pressure on Pricing Indices.

²² Case T-461/07, *VISA* EU:T:2011:181, paras 162-176 and 189-190.

²³ Case C-179/16, *F Hoffmann-La Roche* EU:C:2018:25, paras 35 and 75. In contrast, the Advocate General had rebutted this in his Opinion in Case C-179/16, *F Hoffmann-La Roche* EU:C:2017:714, para 94.

²⁴ See, e.g., *VISA*, (n 22) para 170, referring to the definition of 'potential competitor' in the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011). Recital 10, footnote 3, of this refers to less than three years.

²⁵ In *Guidelines on Vertical Restraints* (2022), recitals 90 within one year is used a benchmark.

on market participants. In this the market structure also plays a role as entry might be prevented by legal restraints.

In *E.ON Ruhrgas*,²⁶ the European Commission had intervened against a supply agreement between the German and French gas incumbents stipulating that the latter could not enter the German market directly. A clause considered restrictive by object. However, there was no competition between the companies at the time of the agreement as the German market was reserved for Ruhrgas by law precluding entry. Therefore, the General Court overturned the decision, holding that Article 101(1) only applied to sectors open to competition.

A special practice has been developed and applied to the pharmaceutical sector. Here the question must be decided against the background of the underlying IP rights and the different license agreements potentially concluded between the parties.

In *Roche*,²⁷ a company was granted an IP license to sell medical drugs for specific purposes under the marketing authorization held by the licensor. Consequently, market entry was made possible solely by virtue of that agreement, which did not preclude the status as competitors. Neither did it matter to the Court of Justice that the use was outside the issued marketing authorization, potentially making it punishable, but not illegal, to sell the drug. In *Lundbeck*,²⁸ the European Commission had labeled a patent settlement between the original manufacturer and a potential infringer as a hidden market sharing agreement involving pay for delay. The former argued unsuccessfully that competition between the parties was precluded by virtue of the patent. While not accepted for the specific case, perhaps influenced by the fact that production had already been initiated, the argument appears to have carried some weight in *Teva/Cephalom*.²⁹ Here it was rebutted to include a generic competitor as a potential competitor if market entry infringed valid patents. Further, does *Roche* indicate a reading where market entry would not be accepted if illegal. These principles were developed further in *Generics*,³⁰ also involving pay for delay settlements, where the Court of Justice focused on the existence, or lack of, insurmountable barriers for entry and whether different forms of preparatory steps had been taken which indicated entry as plausible. In this, circumstantial evidence could be useful, e.g., if that payment was made in exchange for delaying market entry, making it plausible that the parties viewed themselves as competitors. Against these cases, it appears that IP rights formulate a rebuttable presumption that must be further substantiated before a conclusion can be rendered.

2.1[b] *Non-Competitors' Participation in a Horizontal Agreement*

An anti-competitive agreement infringing Article 101(1) may encompass undertakings with different roles where some act as ring leaders while others play a passive role. Newer practice

²⁶ Case T-360/09, *E.ON Ruhrgas* EU:T:2012:332, para 84, 97-117. See also Joined Cases T-374/94, T-375/94, T-384/94, and T-388/94, *European Night Services* EU:T:1998:198, para 139, and Case C-307/18, *Generics and others* EU:C:2020:52, para 36.

²⁷ *F Hoffmann-La Roche*, (n 23), paras 35, 52-59, 67 and 75.

²⁸ Case T-472/13, *Lundbeck* EU:T:2016:449, para 121. Upheld as case C-591/16P, *Lundbeck*. EU:C:2021:243. The outcome cannot be fully aligned with *European Night Services*, (n 26), para 139 referring to regulatory obstacles as precluding market entry.

²⁹ Case COMP/M.6258 - *Teva/Cephalom*, recitals 98-99. See also case *F Hoffmann-La Roche*, (n 23), para 52, and case AT.39.612 - *Perindopril (servier)*, recitals 1156-1183.

³⁰ *Generics and others*, (n 26), paras 36-39, 42-56.

has taken this a step up by introducing a concept of *cartel facilitation*³¹ under which third parties may be deemed to enter a horizontal agreement if they are somehow instrumental in bringing it about.

In *AC-Treuband II*,³² an intermediary had coordinated the operation of a cartel concluded between groups of undertakings. As the intermediary's activities felt outside the sector, it could in principle not be considered a full cartel member, but rather complicity to this. However, this concept, originated in criminal law, and had no place in administrative law, why the Advocate General preparing the case recommended precluding the company from responsibility.³³ This was not accepted by the Court of Justice, having no problem in including the undertaking giving ground for the concept of cartel facilitation. In *Yes Interest Rate Derivatives*,³⁴ also involving a facilitator, a group of financial institutions had manipulated the pricing of financial instruments linked to the Japanese yen through a strategy of information exchange and incorrect reporting to the market. After concluding the main cases, the European Commission directed its interest at a company that had acted as an intermediary between the cartel members inter partes and vis-vis third parties. More importantly, the company had knowingly assisted and should therefore be held liable jointly with the full cartel members. The General Court accepted the concept of cartel facilitation and joint responsibility, but rebutted the facts supporting knowledge of the (entire) infringement and thus application to the specific case.

From *AC-Treuband II* and *Yes Interest Rate Derivatives* follows that undertakings can become members of, e.g., a cartel if they have knowledge about this and are instrumental in bringing it about. Even where their activities must be allotted to completely different markets and segments and thereby precluded from contributing to the reduction in competition directly. It is sufficient that others can provide this, implementing the anti-competitive understanding. From this, it follows that while an anti-competitive horizontal agreement per definition must involve two undertakings that can be considered competitors, this is not a requirement for the remaining parties. Moreover, it is even possible to be 'sucked' into a cartel by association, making it dangerous to be associated with these.

2.2 RESTRICTIONS IN INTER-BRAND VERSUS INTRA-BRAND COMPETITION

As already indicated, the assessment of anti-competitive effects should encompass the context of the agreements in question and how the competition would develop void of this. This involves taking account of the likely impact on **a)** inter-brand competition, i.e., competition between suppliers of competing brands, and on **b)** intra-brand competition, i.e., competition between distributors of the same brand. Where the first group of restrictions can foreclose third parties, the second would predominately victimize the producers in the short term, making it likely they have balanced its effect, seeing it as positive in the longer perspective. Regardless of that, Article 101(1) covers both, but accepts intra-brand restrictions to be (significant) less capable of distortion.

³¹ For further on this concept, see Lukas Solek, *Passive Participation in Anticompetitive Agreements*, Journal of European Competition Law & Practice, 2017, vol 8 (1), pp. 15-24.

³² Case C-194/14P, *AC-Treuband (II)* EU:C:2015:717, paras 33-47.

³³ See Advocate General Wahl's Opinion in Case C-194/14P, *AC-Treuband (II)* EU:C:2015:350, paras 78-84.

³⁴ Case AT.39.861 - *Yen Interest Rate Derivatives (YIRD)*, recitals 77-179 (behavior) and 206-209 (knowledge). Partly uphold with Case T-180/15, *Icap* EU:T:2017:795, and case C-39/18P, *Commission v Icap* EU:C:2019:584

In *Consten and Grundig*,³⁵ the parties had concluded an exclusive distribution agreement covering part of France and subsequently attempted to prevent parallel imports from outside the allotted territory. On appeal, the Court of Justice held that Article 101(1) was not confined to restrictions in inter-brand competition, but also covered restrictions in intra-brand competition. Therefore, it was not possible to grant absolute territorial protection preventing all forms of sales into allotted areas. In *Visma*,³⁶ the Court of Justice was called to offer guidance on the appraisal of a distribution system in which six months of priority were granted to the first distributor approaching a potential customer. Regardless of some confusion on the precise effect and scope of the priority clauses, it remained clear how they only restricted the distribution of the company's own products and thus were intra-brand restrictions. In its reply, the Court of Justice recalled how vertical agreements, in general, were less likely to be harmful and how restrictions of competition between distributors of the same brand (intra-brand competition) would rarely be problematic unless competition between different brands (inter-brand competition) was already weakened.

The concepts of inter- and intra-brand restrictions are not considered mutually exclusive as an agreement could influence both, e.g., if suppliers restrict their distributors from competing both with each other (intra-brand competition) and with third parties (inter-brand competition). Neither can restrictions in one be offset by increases in the other.

In *Metropole*,³⁷ the European Commission had intervened against a partnership directed at establishing a new pay TV channel in France and obligations tying the parents to supply certain channels exclusively to this. The clauses thereby restricted access to the channels and thus intra-brand competition, but were purportedly required to bring about the partnership and thus introduce a new competitor for the benefit of the inter-brand competition. The General Court did not accept this and held that agreements restricting intra-brand competition did not elude Article 101(1) merely because they increased inter-brand competition. This would entail a pro and con analysis outside the scope of Article 101(1).

While the segmentation does not influence the assessment of horizontal agreements, the treatment of vertical differs. As already indicated, the theory of harm associated with *intra-brand* restrictions is weaker as the direct victim is the producer, restricting access to own products and services. Presumably, against a careful balancing of different interests making it imprudent to intervene without a solid theory of harm. This explains why distribution forms confined to intra-brand restrictions as franchise, exclusive and selective distribution are treated leniently under Article 101(1)³⁸ and void of other factors should elude this completely.

3 A RESTRICTION BY OBJECT OR EFFECT

Pursuant to the text of Article 101(1), this covers agreements having as ‘...*their object or effect the prevention, restriction or distortion of competition...*’, making it apparent that testing for this involves considering if:

³⁵ (n 12), pp. 339-340. See also *Guidelines on the application of Article 81(3) of the Treaty*, recital 17.

³⁶ (n 11), para 78.

³⁷ Case T-112/99, *Metropole* EU:T:2001:215, paras 64, 70 and 77.

³⁸ See, e.g., Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, 2010, pp. 195-196, citing the EU Commission 1997 Green Paper and subsequent vertical guidelines.

- a) The *object* of the agreement in question appears to be of an anti-competitive nature, making it less pivotal to include and undertake a careful balancing of different interests, as these, at the core, are incompatible with the object of Article 101.
- b) The *effect* of the agreement in question might be anti-competitive, but this is not the object of this, making it pivotal to include, and undertake, a careful balancing of different interests, as these comply with the object of Article 101.

The segregation between object and effect is rooted in the factual wording of Article 101(1) as outlined above and is observable in foundational case law.

In *Consten and Grundig*,³⁹ the parties had concluded an exclusive distribution agreement covering part of France and subsequently attempted to prevent parallel imports from outside the allotted territory. The agreement thereby attempted to create absolute territorial protection detrimental to Article 101(1) objects, making further analysis redundant. In *Société Technique Minière*,⁴⁰ also involving an exclusive distribution agreement, the Court of Justice added further by stating that restriction by object or effect was not cumulative but alternative requirements. If an analysis of a clause did not reveal the effect on competition to be sufficiently deleterious, its effect could be evaluated as an alternative.

Restrictions by object or effect are alternatives and not cumulative requirements. Thus, if an agreement restricts competition by object, it is unnecessary to show that it is also restrictive by effect and vice versa. However, assuming the doctrine to be fully developed from the beginning would be manifestly wrong.⁴¹ Rather, decisional practice in the early years leaned heavily on the impact on the freedom of action of firms and a rather mechanic appraisal of restrictions in these. Looking back, it is more likely that the doctrine did not come about in its own right before the turn of the millennium and is still subject to lacunas and ambiguity. This descends into the use of older cases as these might not represent the current reading of the doctrine. Further, as detailed later, this, rather than a list of object infringements, involves a case-by-case approach where restrictive elements, depending on the context, may be either object or effect infringements, complicating the matter further.⁴²

3.1 WHAT TO CONSIDER RESTRICTIVE BY OBJECT

Restrictions by object cover classic cartel infringements of Article 101(1). This includes agreements between competitors (active or potential) on prices, output, and sharing of markets and customers and when it comes to non-competitors (e.g., vertical arrangements) fixing (minimum) resale prices and (some) territorial restrictions. Beyond these classic

³⁹ (n 12), p. 340.

⁴⁰ Case C-56/65, *Société Technique Minière* EU:C:1966:38, p. 249. See also case C-234/89, *Delimitis* EU:C:1991:91, para 13, and Case C-228/18, *Budapest Bank* EU:C:2020:265, para 44.

⁴¹ For an outline of early practice, see e.g., D. Waelbroeck & D Slater, *The Scope of object vs. effect under Article 101 TFEU*, contribution to Jacques Bourgeois and Denis Waelbroeck, *Ten Years of the Effects-Based Approach in EU Competition Law Enforcement*, Bruylant, 2012, pp. 131-157. See also Opinion by Advocate General Bobek in case C-228/18, *Budapest Bank* EU:C:2020:265, paras 1, 2 and 49, for some notable considerations on the lack of clarity and simple applicable principles.

⁴² In principle, an agreement stripped of restrictive clauses can still restrict competition, e.g., by virtue of information exchange as detailed later.

examples, what to consider inappropriate conduct becomes blurred, and even restrictions by effect are unclear, making it challenging to apply the correct test. However, a justification⁴³ for having a category of object infringements has been provided by referring to the concept of 'risk offenses' in general criminal law, e.g., driving under the influence of alcohol or drugs. Here, punishment is warranted wholly irrespective of whether actual danger or accident is endured. The Court of Justice has also provided justification by noting how:⁴⁴

[...] certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition . . . , in order to determine whether an agreement between undertakings reveals a sufficient degree of harm that it may 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 part.

To make the concept clearer and help identify by object infringements, the European Commission has explained how:⁴⁵

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 [101(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. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.

Further elements to the mosaic have been provided by two rulings from 2020 essentially establishing that an agreement would amount to a restriction by object when it has no plausible purpose but the restriction of competition. Moreover, it rested with the enforcers to establish this.

In *Budapest Bank*,⁴⁶ the Court of Justice was requested to clear up if a national agreement on interbank fees was restrictive by object and if the concepts of restriction by object and effect were mutually exclusive. In reply, the Court rebutted the latter and held that an agreement that was capable of having a pro-competitive effect should not be considered restrictive by object. Even when the latter was found, the actual effect could still be relevant

⁴³ Opinion by Advocate General Kokott in Case C-8/08, *T-Mobile Netherlands* EU:C:2009:110, para 47.

⁴⁴ *Toshiba*, (n 19), paras 26-27. See also *Groupement des cartes bancaires*, (n 1), para 51, and *Guidelines on the application of Article 81(3) of the Treaty*, recital 21.

⁴⁵ *Guidelines on the application of Article 81(3) of the Treaty*, recital 21.

⁴⁶ *Budapest Bank*, (n 40), paras 44 and 82-83.

for the final evaluation under Article 101(1). In *Generics*,⁴⁷ also involving the matter of when to accept an agreement as restrictive by object, the Court of Justice essentially held that this could be assumed when the agreement served no other purpose but the restriction of competition.

In preparing *Budapest Bank*, Advocate General Bobek⁴⁸ even recommended that the concept of by object infringements was reserved to obvious infringements easily identifiable, noting that:

[...] 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.

Budapest Bank and *Generics* were national cases referred to the Court of Justice, but their principles, including the need to check for a commercial explanation, are also observable in cases challenging a decision by the EU Commission.

In *Krka*,⁴⁹ the European Commission had acted against a set of agreements closing a patent conflict. Under the terms of these, the (alleged) infringer accepted the validity of the patent and divested certain overlapping IP rights, and was in return granted a license. To the European Commission, this masked a market sharing understanding, and in particular the low royalty (3%) indicated how the infringer was paid for stopping the infringement. The General Court did not agree on this. First and foremost, did patent settlements per se involve a form of market sharing where one party accepts the other party's rights. Secondly, did internal documents indicate how the 'infringer' was concerned about the merits of his claims and how this motivated the decision to settle. Thirdly, it had not been established that the royalty was suspiciously low why all elements of the settlement appeared commercially based to the extent they were linked or unusual.

Against this, it becomes apparent that restriction *by object* does more than table a presumption of unlawfulness that can be rebutted,⁵⁰ but relates to actions that by their very nature are harmful to the proper functioning of normal competition, reducing the need for further investigations. This encompasses behavior where the anti-competitive effect can be expected from **i**) their serious nature, **ii**) experience, or **iii**) high potential for damage.⁵¹ An assessment to be undertaken against the objective content, purpose, legal context, and background⁵² of the behavior in question, including any alternative explanation than the

⁴⁷ *Generics and others* (n 26), paras 82 and 87-90.

⁴⁸ Opinion of Advocate General Bobek in *Budapest Bank* (n 40) para 51.

⁴⁹ Case T-684/14, *Krka Tovarna Zdravil* EU:T:2018:918, paras 19-25 (the agreements), 140 (settlements imply a form of market sharing), 221, 250, 268, 293 and 298 (not by object), 425 and 451, 453, 470 (not by effect) and 471-473 (conclusion). Pending appeal as Case C-151/19P, *Commission v Krka*.

⁵⁰ See the Opinion by Advocate General Kokott in *T-Mobile Netherlands* (n 43), para 45.

⁵¹ *Guidelines on the application of Article 81(3) of the Treaty*, recital 21.

⁵² See Joined Cases C-29/83 & 30/83, *Compagnie royale asturienne des mines SA and Rhein-zink GmbH* EU:C:1984:130, paras 25-26; Case C-67/13P, *Groupement des cartes bancaires*, (n 1), paras 53-54; and *Budapest Bank*, (n 40) para 76.

pursuit of an anti-competitive aim.⁵³ In contrast, it is immaterial **iv**) what the parties subjectively intended,⁵⁴ or **v**) if they lacked commercial interest in limiting competition,⁵⁵ **vi**) pursued another and more acceptable purpose,⁵⁶ and **vii**) acted in full public⁵⁷ with consent from, e.g., the buyers.⁵⁸ However, **viii**) the elements in question should not be considered restrictive by object if ancillary to an (unproblematic) agreement⁵⁹ allowing even horizontal price agreements to elude. Moreover, while **ix**) less likely to be problematic, vertical agreements can also be restrictive by object.⁶⁰ Finally, the concept should be used restrictively⁶¹ and would most likely be unwarranted if **x**) a pro-competitive rationale only can be excluded by studying the actual effects⁶² or **xi**) if the organization of the market excludes any potential for competition.⁶³

3.1[a] *Two Readings of the Concept of Object Restrictions*

Regardless of some colorful metaphors providing justifications for the concept of by object infringements, no operative definition, that can be applied directly has been developed.⁶⁴ However, two readings have emerged, centered on:

- a) *A two-step analysis* where regard first must be made to the *content* of the practice in question and then its economic and legal *context*. Although the parties' intention is not a necessary factor, there is nothing precluding it from being taken into account. Under this analysis, even horizontal price agreements could fall short of being restrictive by object, and normally benign agreements could be included. Of particular relevance would be the ability (or inability) to refer to a legitimate explanation for the practice and how competition would have developed void of this.
- b) Segregation between *obvious and less obvious* by object infringements, where the latter requires more substantial examinations, including reviewing the parties' subjective

⁵³ See Advocate General Saugmandsgaard Øe in Case C-179/16, *F Hoffmann-La Roche* EU:C:2017:714, para 148.

⁵⁴ *Beef Industry* (n 1), para 21; Case C-67/13P, *Groupement des cartes bancaires*, (n 1), para 54; and Case C-32/11, *Allianz Hungária*, (n 1), para 37.

⁵⁵ Case C-403/04P, *Sumitomo Metal Industries Ltd* EU:C:2007:52, paras 45-46.

⁵⁶ Case C-551/03P, *General Motors BV* EU:C:2006:229, para 64; *Beef Industry Development Society Ltd*, (n 1), para 21; and Case T-587/08, *Del Monte* EU:T:2013:129, para 425. However, Case C-519/04P, *David Meca-Medina and Igor Majcen* EU:C:2006:492, para 45, might be read differently.

⁵⁷ *Toshiba*, (n 19), para 26, which, in contrast to older practice does not refer to secret agreements as a special trait of cartels.

⁵⁸ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 22.

⁵⁹ See e.g. Advocate General Wahl in *Groupement des cartes bancaires*, (n 1), para 56; Case E-3/16, *Ski Follo Taxidrøft AS*, para 99; and further in section 3.3.

⁶⁰ See e.g., *Visma* (n 11), para 61.

⁶¹ *Groupement des cartes bancaires* (n 1), para 58.

⁶² Opinion of Advocate General Bobek in *Budapest Bank* (n 40), para 81.

⁶³ *E.ON Ruhrgas* (n 26), para 84.

⁶⁴ Unless accepted that restriction by object is agreements that have no plausible purpose but the restriction of competition. Attempts to provide operative guidelines can be found with Advocate General Trstenjak in Case C-209/07, *Beef Industry* (n 1), paras 50-52, and Advocate General Saugmandsgaard Øe in *F Hoffmann-La Roche* (n 53), paras 145-150.

intent.⁶⁵ This reading is of particular attractiveness by feeding directly into the sanctioning as the fine can be graduated accordantly, but does provide for a problematic expansion of the concept and the introduction of three categories of infringements deprived of support in the text of Article 101(1). Not to mention additional blurring of the lines and mingling of what should be alternatives; restrictive by object or by effect.⁶⁶

More references have been made to **i)** the hardcore lists incorporated in the different block exemptions,⁶⁷ **ii)** the absence of a legitimate purpose,⁶⁸ and **iii)** the examples offered in Article 101(1).⁶⁹ This would, e.g., cover different forms of market sharing and price-fixing arrangements and allow any agreements attaining to secure this to be held restrictive by object. However, the concept of object infringements is not confined to these,⁷⁰ but covers also surrogates if pursuing such objects as demonstrated by the approach to pay-for-delay arrangements. Further, even traditional hardcore infringements of Article 101(1) as price agreements could elude labeling as anti-competitive by object if concluded within joint production, research, purchase arrangements,⁷¹ or for the purpose of public safety or health.⁷² The same would apply to market sharing that follows from a trademark assignment.⁷³ The only solid and persistent elements to the concept of restriction by object are the call for a restrictive application⁷⁴ and the matter of alternative explanations. It then rests with the enforcers to provide a plausible link between the tabled theory of harm and the agreement in question.

3.1[b] What Not to Consider as Object Infringements

Across the two possible readings of what to consider a restriction by object, a number of practices have been reviewed and considered outside the scope, including **i)** exclusive elements in a lease contract,⁷⁵ **ii)** award of exclusivity in a vertical relationship,⁷⁶ and **iii)** prohibiting internet sales in selective distribution.⁷⁷ However, in particular the *two-step analysis* indicates that the true objectives of an agreement trump legal structure and form, extending the concept of a restriction by object to surrogates. Under this, there is, in principle, no safe

⁶⁵ The idea of two categories is advanced by Advocate General Wathelet in case C-373/14P, *Toshiba* EU:C:2015:427, paras 87-90, where the first would cover the examples provided in Article 101(1) and the second would require a more thorough analysis of the economic and legal context.

⁶⁶ See, e.g., Advocate General Saugmandsgaard Øe in *F Hoffmann-La Roche* (n 53), para 148.

⁶⁷ See 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), recital 13.

⁶⁸ See, e.g., Advocate General Saugmandsgaard Øe in *F Hoffmann-La Roche*, (n 53), para 148.

⁶⁹ *Toshiba*, (n 19), paras 89-90.

⁷⁰ See *Beef Industry Development Society Ltd*, (n 1), para 23.

⁷¹ Guidance on restrictions of competition ‘by object’ for the purpose of defining which agreements may benefit from the De Minimis Notice, section 2.

⁷² See Guidelines on Vertical Restraints (2022), recital 180, and Guidance on restrictions of competition ‘by object’ for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.

⁷³ See C-9/93, *IHT Internationale Heiztechnik GmbH* EU:C:1994:261, para 59.

⁷⁴ *Groupement des cartes bancaires*, (n 1), para 58, and case E-3/16 - *Ski Follo Taxidrift AS*, para 62.

⁷⁵ See Case C-345/14, *Maxima Latvija*, EU:C:2015:784, para 24.

⁷⁶ *Football Association Premier League Ltd*, (n 55) para 137, and Case C-262/81, *Coditel* EU:C:1982:334, para 15. *Visma*, (n 11), paras 60-61 would probably fit into this. However, the fact of the case was blurred, and the Court of Justice did not provide a clear answer to the request for clarification.

⁷⁷ Case C-230/16, *Coty* EU:C:2017:941, para 58. However, this might not apply to all forms of selective distribution.

harbor, and while horizontal agreements are more likely to be caught by the restrictive concept of restriction by object, this is by no means confined to these. Also, vertical arrangements can fall within the by object concept.⁷⁸

3.2 RESTRICTION BY OBJECT AND REQUIRED ANALYSIS

In contrast to the ambiguity dominating the lines between being anti-competitive by object or effect, a consensus has emerged on the legal implications as the former is considered covered by Article 101(1) per se. Instead, any positive or pro-competitive elements would be referred to Article 101(3),⁷⁹ providing for exemptions if warranted. Newer practices appear to have modified the first to a context analysis inducing some analysis requirements even for by object infringements.

In *Groupement des cartes bancaires*,⁸⁰ both the European Commission and the General Court had labeled horizontal agreements on interbank fees as restrictions by object and in defiance of Article 101(1). However, the Court of Justice did not accept this, overturning and remanding the decision back to the General Court. In addition to commanding a restrictive use of the concept, it was also required to make regard to the content of the agreement in question, its provisions, objectives, and the economic and legal context of which it forms part, including 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. In short, the agreements had to be viewed broader than against their naked content, commanding some analysis.

Against *Groupement des cartes bancaires*, it appears that in order to determine if an agreement reveals a sufficient degree of harm to competition, warranting labeling as restriction of competition by object, regard must be made to its content and context. Embedded in this, some analysis of its effects might be warranted. Further, as even traditional hardcore infringements of Article 101(1) could elude labeling as anti-competitive by object if pursuing certain objects, as outlined above, this context analysis does, in reality, readmit the subjective intent of the agreement to the analysis. In contrast, it is immaterial if the agreement had not been implemented⁸¹ or concluded between undertakings normally considered too small to thwart competition (*de minimis*).⁸² Neither is it required to provide a full and final market definition⁸³ past the need to establish the parties' positions inter partes (competitors v non-competitors).

⁷⁸ See, e.g., *Visma*, (n 11) para 61.

⁷⁹ See, e.g., *Beef Industry*, (n 1), paras 19-21; case C-439/09, *Pierre Fabre* EU:C:2011:649, paras 49 and 59; and Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.

⁸⁰ *Groupement des cartes bancaires*, (n 1), paras 53 and 58. See also *Budapest Bank*, (n 40) para 82.

⁸¹ See COMP/36.545/F - PO/*Amino acids*, recital 376.

⁸² See case C-226/11, *Expedia* EU:C:2012:795, para 37, and Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.

⁸³ Case C-439/11P, *Ziegler* EU:C:2013:513, para 63.

3.3 RESTRICTION BY EFFECT AND REQUIRED ANALYSIS

Practices not having as their object to restrict⁸⁴ and would only be covered by Article 101(1) if:⁸⁵

[...] 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 [...].

This involves an objective analysis of the agreement's impact on the competitive situation where restraints are not to be viewed in isolation or abstractly, but under the existing conditions for market entry and prevailing market forces.⁸⁶ An approach that essentially involves a counterfactual analysis where the effect is compared to the competition in the absence of the restriction in dispute. Only where this involves a tangible reduction in the parameters of competition, such as price, the quantity and quality of goods and services,⁸⁷ would Article 101(1) be applicable. Moreover, the anti-competitive effect should neither be confused with a pro and con analysis⁸⁸ nor a loss of consumer welfare.⁸⁹ It is not even required that the effect is imminent or have already materialized, only that it appears plausible.⁹⁰

3.3[a] Anti-Competitive Effect Must be Established or Indicated

Void of analysis and evidence making the anti-competitive effect plausible, decisions have been suspended and remanded.⁹¹ Further, the General Court has dictated that the effect analysis⁹² must be real and substantiated by the facts and the market structure rather than different presumptions. Therefore, an investigation should initiate with outlining a theory of harm followed by explaining and if, relevant, testing how consumers, competitors and the structures in the market are impacted negatively by the agreement in accordance with this. Case law offers some examples of this.

In *Servier*,⁹³ five patent settlements involving pay for delay were held anti-competitive by object as they appeared to serve no other purpose than to prevent potential competitors from entering the market. However, the European Commission did not rest its finding

⁸⁴ See *Guidelines on the application of Article 81(3) of the Treaty*, recital 24 and note 31.

⁸⁵ Case T-328/03 - *O2*, para 69; case T-111/08, *MasterCard* EU:T:2012:260, para 128; and *Société Technique Minière*, (n 40) pp. 249-250.

⁸⁶ Case AT.40.208 - *ISU*, recital 190, and the cited case law.

⁸⁷ Case C-382/12P, *Mastercard* EU:C:2014:2201, para 93.

⁸⁸ *Metropole*, (n 37), para 77, and section 2.4. below.

⁸⁹ See, e.g., Case C-8/08, *T-Mobile Netherlands* EU:C:2009:343, para 38.

⁹⁰ Case C-1/12, *Ordem dos Técnicos Oficiais de Contas mod Autoridade da Concorrência* EU:C:2013:81, para 71, and *Maxima Latvija* (n 75) para 30.

⁹¹ See *European Night Services* (n 26), paras 139-147. See also case *O2* (n 85), paras 65-117.

⁹² *VISA* (n 22), para 167.

⁹³ Case AT.39.612 - *Perindopril (Servier)*, recitals 1125-1211 (restriction by object), 1212-1269 (restriction by effect) and 1270-2061 (assessment of the five settlements). Partly upheld with Case T-691/14, *Servier* EU:T:2018:922. Pending appeal as case C-176/19P and C-201/19 P, *Servier* EU:C:2022:577.

merely on the agreement being anti-competitive by object, but also undertook to consider its effect. This involved establishing market power, lack of effective competition, and how the payments altered the incentives of potential competitors. Further, the absence of a legitimate purpose and an overall foreclosure strategy had already been established. In *ISU*,⁹⁴ the European Commission acted against a skating union banning members from tournaments outside the union. The European Commission held this to be an infringement by object, but also found it restrictive by effect as it served no legitimate purpose but the financial interests of the union and could foreclose competing unions by denying them access to sources of supply (skaters).

Elements of the contrafactual analysis can be found with the European Commission decisions,⁹⁵ referring to: if **a**) the parties have market power and **b**) how the agreement potentially contributes to creating, maintaining or strengthening this. Further, this must involve an objective analysis of the plausible impact on the competitive situation⁹⁶ at the time of the conclusion of the agreement.⁹⁷ Again, case law offers some examples of these considerations.

In *Night Service*,⁹⁸ the European Commission had intervened against a joint venture, arguing that it could foreclose third parties, but failed to substantiate this further. Moreover, the parties' market shares were negligible, and the rendered market description somewhat superficial. The General Court therefore decided to overturn the decision. In *Van den Bergh Foods*,⁹⁹ the use of freezer exclusivity, reserving these for the supplier's products, was held anti-competitive. Not by virtue of the individual agreements, but of the cumulative effects of these tying a substantial part of the market and foreclosing it for competition. In *Servier*,¹⁰⁰ the patent settlements had to be assessed based on the fact at the time of the settlement and not against the later factual development as claimed by the parties. In *UK Tractor*,¹⁰¹ the parties had established an extensive information exchange system that created a high degree of market transparency in an already concentrated market, limiting any competition. The system did not involve internal sensitive information, e.g., on prices, why the anti-competitive effect did not follow from the adopting specific restrictions as traditional but rather the market as highly concentrated.

These considerations indicate an analysis based on **i**) the competitors' abilities to remain viable alternatives, **ii**) market power with the parties, **iii**) penetration of the agreements in question, **iv**) their cumulative effects joint with others, and **v**) other prevailing

⁹⁴ Case AT.40.208 - *ISU*, recitals 154-160 (principles), 161-188 (restriction by object), 189-208 (restriction by effect). Upheld in substance as case T-93/18, *International Skating Union* EU:T:2020:610. Pending appeal as case C-124/21P, *International Skating Union*.

⁹⁵ See *Guidelines on the application of Article 81(3) of the Treaty*, recital 25.

⁹⁶ O2, (footnote 85), para 77.

⁹⁷ Case AT.39.612 - *Perindopril (servier)*, recital 1220. Partly upheld with *Servier*, (n 93). Pending appeal as Case C-176/19P and C-201/19P, *Servier* EU:C:2022:577.

⁹⁸ See *European Night Services*, (footnote 26), paras 97 and 139-160. See also case O2, (footnote 85), paras 65-117.

⁹⁹ Case T-65/98, *Van den Bergh Foods* EU:T:2003:281, para 83. See also Case C-23/67, *Brasserie de Haecht* EU:C:1967:54, p. 416.

¹⁰⁰ Case AT.39.612 - *Perindopril (servier)*, recitals 1125-1211 (restriction by object), 1212-1269 (restriction by effect) and 1270-2061 (assessment of the five settlements). Partly upheld with *Servier*, (n 93). Pending appeal as case C-176/19P and C-201/19P, *Servier*,

¹⁰¹ Case IV/31.370 and 31.446 - *U.K. Agricultural Tractor Registration Exchange*, O.J. 1992L 68/19, recitals 36-37. Uphold with Case C-7/95P - *John Deere* and C-8/95P, *New Holland* EU:C:1998:256.

conditions in the market commanding a restrictive approach. Moreover, it must be explained how the agreements influence these by creating a plausible link between the tabled theories of harm and submitted evidence. In contrast, pro-competitive elements would only be relevant for exemption under Article 101(3) as the counterfactual analysis does not encompass these.¹⁰²

The European Commission¹⁰³ has summarized this into a two-step test where it can be contemplated if:

- 1) the agreement or practice in question would be *capable of restricting competition* assessed against a counterfactual analysis of its impact for inter-and intra-brand competition, and
- 2) this would be a *plausibility*, taking into consideration whether the parties have market power and how the agreement influence the exercise of this in light of prevailing market conditions. Moreover, the impact must be appreciable.

This is supplemented by different forms of presumptions, e.g., that market power could not be identified merely against market shares: **a)** exceeding what is considered *de minimis* (< 10-15%) under *EU de minimis notice*,¹⁰⁴ or **b)** the thresholds in the different block exemptions (> 20-30%) issued under Article 101(3). Neither would it establish a presumption of anti-competitive effect that the block exemptions are unavailable unless caused by infringing their incorporated hardcore lists, as these traditionally are seen as mirroring the concept of restrictions by object.¹⁰⁵ Finally, it can be noted that as case law¹⁰⁶ does not require implementation of the agreements in question, both the effect and contrafactual analysis may be somewhat abstract and hypothetical. The essential part is establishing a link between the theory of harm and realities, making the former plausible.

3.4 THE US RULE OF REASON

US antitrust law, which has historically served as an inspiration for EU competition law, has adopted a distinction between restrictions *per se anti-competitive* and those subject to a *rule of reason* approach where the former are condemned rather mechanically. A doctrine that appears to mirror the EU's by object doctrine at first glance, but involving balancing pro- and anti-competitive elements of the restrictions. Any transfer of this to EU law has clearly and irrevocably been refused in case law.¹⁰⁷ Moreover, what to consider *per se* infringements in the US involve a limited catalog of actions whereas the EU's by object concept is more dynamic and decided on a case-by-case basis as outlined above.

¹⁰² *Metropole*, (n 37), para 72.

¹⁰³ See *Guidelines on the application of Article 81(3) of the Treaty*, recitals 18 and 24-25. For further, see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 281-288.

¹⁰⁴ See *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)*, recital 8. For further on the concept of *de minimis*, see section 3.2 below.

¹⁰⁵ See *De Minimis Notice* (n 104), recital 13.

¹⁰⁶ See *HFB Holding*, (n 14), paras 193 and 200-201; case C-199/92P, *Hüls* EU:C:1999:358, paras 163-165; and Case T-25/95, *Cimenteries CBR v Commission* EU:T:2000:77, paras 1864-1865.

¹⁰⁷ See, e.g., *Metropole*, (n 37), para 77. However, practice is not consistent, making the matter more open, as detailed by Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 269-278.

4 HAVING AN APPRECIABLE NEGATIVE EFFECT ON COMPETITION

Article 101(1) refers to agreements that prevent, restrict or distort competition by object or effect, which by case law¹⁰⁸ has been read to include that this must be *appreciable*. Conceptually, the latter can be segmented into:

- 1) Restrictions that by their *content* do not appear capable of restricting competition, allowing, e.g., quality-based requirements to elude.
- 2) Restrictions that by their *limited impact* do not appear capable of restricting competition, precluding agreements held to be *de minimis*.
- 3) Restrictions that by their *context* do not appear capable of restricting competition, permitting different forms of ancillary restraint.

The assessments are made against the agreements, incorporated restrictions, and the position of the undertaking involved, but if competition is already reduced or eliminated through regulation, this translates into the analysis.¹⁰⁹ Obviously, there must be competition to prevent, restrict or distort, as expressed in Article 101(1), making the prevailing market condition essential for the analysis.

4.1 RESTRICTIONS THAT ELUDE BY VIRTUE OF CONCENT

It was established by early practice that not all forms of restrictions would be covered by Article 101(1), giving ground for an understanding that there had to be some substance allowing, e.g., quality-based requirements to fall outside.

In *Société Technique Minière*,¹¹⁰ the Court of Justice, when reviewing an exclusive agreement, explained the need to take into account the context of the agreement. This was developed further in *Brasserie de Haecht*,¹¹¹ also involving exclusivity. Here, the Court of Justice considered it pointless to consider the effect of an agreement dislodged from the market in which it operated and its factual and legal circumstances. In *Prenuptia*,¹¹² involving a dispute over franchise fees, the Court of Justice refused to hold franchise as anti-competitive in itself, but then went on extending this to restrictions directed at protecting the concept and know-how. A ruling that subsequently has given ground for a presumption that many restrictive elements associated with the franchise and later selective distribution would fall short of infringing Article 101(1).¹¹³

The doctrine never came into maturity, but was absorbed into the distinction between restrictions by object versus effects, where the latter must be assessed further and against its content and objective. However, the doctrine appears to imply that restrictions of an indirect

¹⁰⁸ See, e.g., *Groupement des cartes bancaires*, (n 1), para 52.

¹⁰⁹ *E.ON Rubrgas*, (n 26), paras 84, 97-117.

¹¹⁰ *Société Technique Minière*, (n 40) p. 250.

¹¹¹ Case C-23/67, *Brasserie de Haecht* EU:C:1967:54, p. 415.

¹¹² Case C-161/84, *Prenuptia* EU:C:1986:41, paras 15-23.

¹¹³ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recitals 175 and 190.

nature and many intra-brand restrictions would fall short of Article 101(1), but the doctrine is not limited to this and would be applicable broadly provided that the restriction is justifiable.

4.2 RESTRICTIONS THAT ELUDE BY VIRTUE OF DE MINIMIS

Provided that the market functions normally and supports a healthy level of competition, it should be evident that the position of some undertakings would be too trivial to have an appreciable adverse effect on competition, giving ground for the concept of *de minimis*. This was embraced and developed in case law.

In *Völk*,¹¹⁴ involving an exclusivity agreement, the Court of Justice held that the agreement would fall outside Article 101(1) if having an insignificant effect on the markets, taking into account the weak position of the parties. In *Night Service*,¹¹⁵ where the European Commission had held a joint venture anti-competitive, the General Court rebutted that a presumption of being anti-competitive could be accepted solely against not being *de minimis*. Finally, did the Court of Justice in *Expedia*¹¹⁶ rule that the concept of *de minimis* did not apply to restrictions by object as these always restricted competition.

While case law had established a concept of *de minimis*, it would rest with the European Commission to provide further guidance on the matter. This was set out in a series of successive notices, explaining how the concept would be enforced. The current notice (2014)¹¹⁷ holds a practice *de minimis* if:

- a) The aggregate market share by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement when the parties are *competitors* (horizontal *de minimis*), or
- b) The market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement when the parties are *non-competitors* (non-horizontal *de minimis*).

In the case of mixed agreements or when it is difficult to classify the agreement as either horizontal or non-horizontal, the 10% threshold is applicable. Further, if competition is restricted by the cumulative effect from parallel networks of agreements, covering 30% of the market, the thresholds set out above are reduced to 5%. Exceeding these thresholds does not establish a presumption of appreciable effect nor does it preclude holding an agreement *de minimis*.¹¹⁸ For example, the notice, e.g., allows agreements to be covered if only exceeding the thresholds by less than two percentage points for two successive calendar years. Embedded in this, the relevant market must be defined in order to assess the parties' market shares and positions *inter partes*. Further, *de minimis* is only applicable outside the scope of restrictions by object,¹¹⁹ as such restrictions always are considered appreciable.

¹¹⁴ Case C-5/69, *Franz Völk* EU:C:1969:35, paras 5-7.

¹¹⁵ *European Night Services*, (n 26), para 102.

¹¹⁶ *Expedia*, (n 82) paras 35-37. See also *De Minimis Notice* (n 104), recital 2.

¹¹⁷ *De Minimis Notice* (n 104), recitals 8-11.

¹¹⁸ *De Minimis Notice* (n 104), recitals 3 and 11.

¹¹⁹ *Expedia*, (n 82) paras 35-37.

4.3 RESTRICTIONS THAT ELUDE BY VIRTUE OF CONTEXT

Case law has given rise to a number of doctrines where restrictive elements are seen as ancillary to others, making it meaningless to evaluate them in isolation. Under this doctrine, restrictions might not infringe Article 101(1) by virtue of their context, provided that they are *necessary*. The latter involves establishing whether the restrictions are **a)** objectively necessary for implementing the main operation and **b)** proportionate to this.¹²⁰ Below, two possible ancillary restraint doctrines under Article 101(1) are detailed.

4.3[a] Commercial Ancillary

A doctrine has emerged involving certain commercial restrictions and obligations linked to horizontal joint purchase agreements that neither can nor should be appraised in isolation from the underlying arrangement.

In *Gottrup-Klim – DLG*¹²¹ and *Metropole*,¹²² involving partnerships regarding joint purchasing and satellite TV respectively, different purchase and non-compete clauses had been adopted. While restricting the parties vis-a-vis third parties, they clauses were held necessary for bringing the partnerships about and therefore ancillary to this.

The doctrine of commercial ancillary has been detailed by the Court of Justice,¹²³ accepting that restrictions might elude Article 101(1) by virtue of being ancillary to a main operation, provided:

[...] 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.

From this follows that restrictions are considered ancillary to the main operation if **i)** directly linked to this, **ii)** necessary for the implementation, and **iii)** proportionate to it.¹²⁴ It should also carry some weight if they are **iv)** adopted with the main operation and not subsequently¹²⁵ and **v)** confined to the parties, not limiting the commercial freedom of third parties.¹²⁶ Finally, **vi)** the main operation must be pro-competitive or neutral as the assessment would ultimately follow this, and **vii)** the evaluation should be made objectively and isolated from the parties' subjective view.¹²⁷

The doctrine on commercial ancillary is not limited to agreements between competitors, but also covers non-horizontal arrangements, e.g., vertical distribution agreements concluded as part of a distribution or sales chain.

¹²⁰ See Case T-111/08, *MasterCard* EU:T:2012:260, paras 77-79, and *Metropole*, (n 37), para 106.

¹²¹ Case C-250/92, *Gottrup-Klim DLG* EU:C:1994:413, para 45

¹²² *Metropole*, (n 37) paras 115-117.

¹²³ *MasterCard*, (n 87), paras 89 and 91.

¹²⁴ See *Guidelines on the application of Article 81(3) of the Treaty*, recitals 28-31. For further analysis, see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 255-260.

¹²⁵ F *Hoffmann-La Roche*, (n 23), para 73.

¹²⁶ F *Hoffmann-La Roche*, (n 23), para 73, para 72.

¹²⁷ *Guidelines on the application of Article 81(3) of the Treaty*, recital 18 (2).

In *Metro*¹²⁸ and *Pronuptia*,¹²⁹ where restrictive elements supported a system of selective distribution and franchise, respectively, the Court of Justice held that these eluded separate assessments under Article 101(1) if directed at protecting know-how or the uniformity of the concept.¹³⁰ Therefore, the assessment of the restrictions followed the main operation and should not be reviewed separately from this.

A variation of the doctrine on *commercial ancillary* also treated leniently involves being *commercially necessary* for bringing an agreement about or opening new markets for the benefit of competition.

In *Société Technique Minière*¹³¹ and *Nungesser*,¹³² involving the distribution of machines and granting of IP licenses, the Court of Justice expressed understanding for the use of exclusivity provisions if required to open new markets. An understanding most likely bedded in the clauses as unable to thwart competition in an appreciable manner in light of their object – the introduction of a new competitor to the market.

The lenient treatment of restrictions directed at opening new markets is understandable as the alternative might be less rather than more competition. Regardless, it must be appraised under the same principles as set out above for commercial ancillary. However, it is unclear whether the doctrines can be separated from the restriction by object v effect doctrine or have been absorbed into this.¹³³ Presuming this is not the case, an ancillary defense should mostly have relevance for object restrictions, allowing these to be viewed in their context rather than against their naked appearances. In contrast, would the matter feed into the contrafactual analysis used for restriction by effect and be challenging to separate.

4.3[b] Regulatory Ancillary

It has been contemplated¹³⁴ whether a doctrine of regulatory ancillary can be tabled that would allow restrictions directed at implementing regulatory obligations to elude Article 101 by virtue of being unrelated to the operation of economic activities. However, the scope of the doctrine remains open and case law are not consistent.

In *Wouters*,¹³⁵ a Dutch ban on interdisciplinary partnerships between lawyers and accountants was presented before the Court of Justice. In contrast to other countries, the ban was not adopted by law, but decided by the national association of lawyers that had been delegated to regulate the matter and opted for a ban. In reply to a request for clarification, the Court of Justice found that this fell outside Article 101, taking into account its objective,

¹²⁸ Case C-26/76, *Metro SB* EU:C:1977:167, para 27.

¹²⁹ *Pronuptia*, (n 112), paras 14, 15, 24 and 27.

¹³⁰ See also Case C-262/81, *Coditel* EU:C:1982:334, paras 19-20, and Case C-27/87, *SPRL Louis Eraum-Jacquery* EU:C:1988:183, paras 10-11, relating to the exercise of IP rights.

¹³¹ *Société Technique Minière*, (n 19) p. 250.

¹³² Case C-258/78, *L.C. Nungesser KG and Kurt Eisele* EU:C:1982:211, paras 57-58.

¹³³ For further, see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford 2014, pp. 262-263, including a possible limitation to vertical agreements.

¹³⁴ See, e.g., Richard Whish & David Bailey, *Competition law*, 10th Edition 2021, pp. 139-142 and Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 253-255.

¹³⁵ Case C-309/99, *Wouters*, EU:C:2002:98, paras 97 and 107. Some of the same considerations can be seen in Case T-144/99, *Institute of Professional Representatives* EU:T:2001:105, para 78; Case C-184/13, *API* EU:C:2014:2147, paras 48 and 55; case AT.40.208 - *ISU*, recitals 210-266; and Joined Cases C-427/16 and 428/16, *CHEZ Elektro Bulgaria* EU:C:2017:890, para 54.

the need to regulate professional services, and the inherent nature of this. In *Meca-Medina*,¹³⁶ the General Court applied these principles to a self-regulatory sports body, finding that adopted rules on doping also fell outside Article 101 as the campaign against doping did not pursue any economic objectives and therefore was not covered by EU competition law. The Court of Justice, on appeal, overturned this, holding that the anti-doping rules in question were covered by Article 101, but did not restrict competition in manners conflicting with Article 101(1). In *ISU*,¹³⁷ the EU Commission acted against a skating union banning members from participation in tournaments with competing unions. An initiative that served no legitimate purpose but the union's financial interests and could lead to foreclosure of competing unions. By virtue of this, it fell outside any window available from *Wouter* and *Meca-Medina*.

The European Commission¹³⁸ has added further to the development of a doctrine on regulatory ancillary by noting that restrictions directed at protecting public safety and health may be permissible under Article 101(1) even when involving restrictions otherwise seen as restrictions by object.

Wouter was a national case tabled before the Court of Justice, leaving it to the national Court to implement the outlined principles.¹³⁹ The ruling established a practice allowing some restrictions to elude Article 101 entirely by virtue of being surrogates for regulation. The General Court did in *Meca-Medina* attempt to develop this further, but was overturned on appeal by the Court of Justice, finding the adopted anti-doping rules covered by Article 101, but not infringing Article 101(1). Regardless, *Wouter* and *Meca-Medina* did establish a doctrine allowing restrictions directed at implementing regulatory obligations to elude either Article 101(1) or Article 101 completely. This would cover different self-regulatory bodies, provided that the restrictions are **i**) pursuing legitimate objectives, **ii**) are inherent for the pursuit of these, **iii**) proportionate to them, and **iv**) not directed at protecting fiscal interests.¹⁴⁰ However, the doctrine remains open-ended and subject to lacunas, but appears real and available if warranted.

¹³⁶ Case T-313/02, *David Meca-Medina and Igor Majcen* EU:T:2004:282, paras 42-47. Overturned by *Meca-Medina and Igor Majcen*, (n 56) paras 30-34.

¹³⁷ Case AT.40.208 - *ISU*, recitals 154-160 (principles), 161-188 (restriction by object), 189-208 (restriction by an effect) and 210-266 (not covered by any regulatory exemption). Upheld in substance as Case T-93/18, *International Skating Union* EU:T:2020:610. Pending appeal as Case C-124/21P, *International Skating Union*.

¹³⁸ See *Guidelines on Vertical Restraints* (2022), recital 180, and Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.

¹³⁹ For further on possible readings of *Wouter*, see Richard Whish & David Bailey, *Competition law*, 10th Edition, 2021, pp. 141-142.

¹⁴⁰ Case AT.40.208 - *ISU*, recitals 210-266. Upheld in substance as Case T-93/18, *International Skating Union* EU:T:2020:610. Pending appeal as Case C-124/21P, *International Skating Union*. See also *Ordem dos Técnicos Oficiais de Contas*, (n 90), paras 54-59, 95-103, and Case C-136/12, *Consiglio nazionale dei geologi* EU:C:2013:489, paras 45 and 53-57.

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