

# Characterizing Hard Core Cartels Under Article 101 TFEU

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Niamh Dunne\*

## Abstract

The prohibition of cartels embodies arguably the sole universal norm of global competition law. Yet a precise understanding of what constitutes a cartel remains elusive, a problem that is exacerbated in the context of Article 101 Treaty on the Functioning of the European Union by the Commission's administrative enforcement procedures and the expansive approach to the "by object" category of restraints. This article aims to provide a more precise characterization of the hard core cartel concept as reflected in EU competition case law and practice and to explore why such conduct continues to constitute the "supreme evil" of contemporary antitrust enforcement.

## Keywords

cartels, Article 101 TFEU, EU law

## I. Introduction

The prohibition of cartels has the dubious distinction of embodying perhaps the sole universal norm of global competition law: "[t]he supreme evil of antitrust,"<sup>1</sup> "the most egregious violations of competition law,"<sup>2</sup> and "cancers on the open market economy."<sup>3</sup> For all the obvious tropes—smoke-filled rooms in anonymous hotels, and so forth—a precise understanding of what constitutes a cartel for this purpose remains elusive. This is particularly the case under Article 101 of the Treaty on the Functioning of the European Union (TFEU), where an absence of criminal sanctions and an expansive approach to the notion of "by object" restrictions means that the legal assessment of cartel behavior often has little to distinguish it from other forms of anticompetitive coordination. Nonetheless, within current enforcement practice, cartels are recognized as a particular (and, it will be argued, particularly acute)

1. *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
2. OECD, RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS (1998), updated in 2019 but retaining the same description.
3. Competition Commissioner MARIO MONTI, FIGHTING CARTELS WHY and HOW? WHY SHOULD WE BE CONCERNED WITH CARTELS and COLLUSIVE BEHAVIOUR? (Speech at the 3rd Nordic Competition Policy Conference, Stockholm, Sept. 11, 2000).

\* Department of Law, London School of Economics, London, United Kingdom

## Corresponding Author:

Niamh Dunne, Department of Law, London School of Economics, Houghton Street, London WC2A 2AE, United Kingdom.  
Email: [n.m.dunne@lse.ac.uk](mailto:n.m.dunne@lse.ac.uk)

violation of Article 101,<sup>4</sup> thus requiring distinctive enforcement processes and meriting special substantive treatment. This article seeks to bridge the gap between the theory and practice of anti-cartel enforcement, through an exploration of the cartel as it is conceptualized within competition practice and case law. Although a precise and exhaustive definition is arguably impossible in light of the wide (and ever-evolving) range of behaviors that the cartel concept must cover, the object of the exercise, ultimately, is to identify and better understand what is so inherently “unacceptable” about cartel conduct, specifically, within contemporary competition law.

Most antitrust lawyers would no doubt claim to know a “hard core”<sup>5</sup> or “plain vanilla”<sup>6</sup> cartel when they see it. Yet crafting an effective legal definition is a surprisingly complex business, and disagreement exists about the outer parameters of the cartel concept.<sup>7</sup> The archetypal hard core cartel involves secret collusion between competing undertakings to restrict fundamental parameters of competition, such as price-fixing or market-sharing. Yet such an approach risks both over- and underinclusiveness, potentially catching welfare-enhancing forms of horizontal behavior, for instance, or neglecting cartels effected through nonhorizontal channels.

Under Article 101, in particular, there is a fundamental mismatch between the formal legal approach to identifying prohibited anticompetitive behavior, and the enforcement processes utilized at European Union (EU) level to tackle cartel conduct. Article 101(1) prohibits forms of coordination between individual undertakings that can be deemed restrictive of competition by virtue of their “object or effect.” Yet while cartels are treated as unambiguous “by object” restraints, the parameters of the object category extend beyond cartel conduct as such. It thus encompasses, *inter alia*, certain vertical restraints, alongside less overtly anticompetitive horizontal coordination. Strictly speaking, therefore, whether an arrangement is classified as a cartel or instead as some other form of anticompetitive coordination is irrelevant to whether it is deemed restrictive of competition. Within enforcement practice at the EU level, however, cartels are singled out for distinctive and exceptional treatment within the Commission’s enforcement tool kit. Categorizing behavior as a cartel thus opens multiple procedural avenues for defendants—including the Commission’s leniency program and cartel settlement procedure—but also closes off others, in particular the Article 9 commitment procedure. Moreover, despite a nominal starting point that all agreements must be assessed within their wider legal and economic context under Article 101(1), recent case law suggests that putative cartel restraints may benefit from a truncated assessment which places greater emphasis on the type of restraint and less on its broader context.

Given this significance, it is important, *ex ante*, to have a clearer understanding of what sorts of behavior fall within the contours of the cartel concept, and perhaps more usefully, why such behavior is approached in this manner. The starting point is thus that the notion of a cartel is not an agreed term of art which is subject to any authoritative definition under Article 101. In light of the implications in practice of designation as a cartel, however, the argument is that it should be amenable to more precise demarcation or “characterization.”<sup>8</sup> The purpose of this article is to do so.

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4. Most basically, on its website ([https://ec.europa.eu/competition/index\\_en.html](https://ec.europa.eu/competition/index_en.html)), the EU’s Directorate-General for Competition divides its enforcement activities between four broad categories of cases: cartels, antitrust (which encompasses all violations of Articles 101 and 102 TFEU *excluding* cartels), mergers and State aid.

5. OECD, RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS (2019). The term is used in this article to describe anticompetitive practices that may be considered to fit squarely within the cartel category and thus merit distinctive legal treatment on this basis.

6. Frank H. Easterbook, *Workable Antitrust Policy*, 84 MICH. L.R. 1696, 1701 (1984).

7. An obvious open question is whether and when blatantly restrictive regulation that governs self-employed professionals should be treated as cartel conduct: see, e.g., Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PENN. L.R. 1093 (2014).

8. ALISON JONES et al., JONES & SUFRIN’S EU COMPETITION LAW, 7th ed. 679 (2019).

This article is structured as follows. Section II makes the case for this characterization exercise, by reference to both the procedural and substantive implications of treating particular conduct as a cartel. Section III introduces and explores four key elements of the hard core cartel concept under Article 101: (i) cartels comprise forms of horizontal collusion, (ii) which restrict key parameters of competition, (iii) involving purely private profit-maximizing behavior, and (iv) which almost invariably include some form of deliberate secrecy and/or deception on the part of participants. Section IV concludes briefly by considering further what this expanded definition tells us about the nature of hard core cartels and the priorities of contemporary antitrust enforcement in the EU.

## II. Understanding the Concept of a Cartel: The Importance of Characterization

Pose the question “what is a cartel?” in the context of U.S. antitrust law, and two glib but broadly accurate answers might present themselves: it is a *per se* breach of §1 of the Sherman Act,<sup>9</sup> and it is an antitrust infringement for which defendants may be sent to prison.<sup>10</sup> Such treatment marks cartels as qualitatively distinct—indeed, elevated—violations of the antitrust rules. *Per se* condemnation is reserved for restrictions that “have manifestly anticompetitive effects and lack any redeeming virtue,”<sup>11</sup> a heightened standard that, today, is satisfied only in the context of cartel behavior. The rationale is that such behavior constitutes an immediate and direct interference with “the free play of market forces”<sup>12</sup> and thus presents an almost existential challenge to the free market philosophy that underpins the antitrust system. Criminalization goes hand in hand with the automatic and unqualified condemnation of cartel behavior, moreover, marking such conduct for heightened moral censure over and above the private and administrative law penalties that attach to other antitrust violations.

What is missing from either formulation is an explanation of what types of behavior, and why, may be subject, *ex post*, to such distinctive treatment.<sup>13</sup> This, as noted, is similarly the case under Article 101—and here, such absence is particularly notable, insofar as even the (trite, yet relatively effectual) distinguishing features of U.S. law do not apply. Strictly as a matter of formal assessment, categorizing conduct as a cartel or otherwise is essentially unnecessary: Article 101 prohibits a broad spectrum of types of anticompetitive coordination between undertakings, including—but not limited to—cartels. While condemnation under Article 101(1) requires the identification of either an anticompetitive “object” to the arrangement or a consequent anticompetitive “effect” on a relevant market, designation as a “by object” restraint is not reserved for the classic cartel offenses. It thus encompasses, for instance, certain vertical restraints,<sup>14</sup> reverse payment settlements between potential competitors,<sup>15</sup>

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9. See, e.g., the judgment of Kennedy J in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007): “[r]estraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, or to divide markets... Resort to *per se* rules is confined to restraints... that would always or almost always tend to restrict competition and decrease output. To justify a *per se* prohibition a restraint must have manifestly anticompetitive effects, and lack... any redeeming virtue” (case law references omitted).

10. See, e.g., SPEECH OF THOMAS O. BARNETT, CRIMINAL ENFORCEMENT OF ANTITRUST LAWS: THE U.S. MODEL (Speech of Sept. 14, 2006); also Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

11. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

12. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 221 (1940).

13. Characterization as an inherently restrictive (i.e., *per se* illegal) practice is largely retrospective in nature: either the behavior has been characterized in the past as constituting a *per se* offense, or such a determination can be made only *ex post*, by a court or competition authority looking back on past practice: see HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 114–115 (2005).

14. See, e.g., Cases C-56/64 *Consten and Grundig v. Commission* EU:C:1966:41 (exclusive distribution with territorial restraints), C-243/83 *SA Binon & Cie v. SA Agence et messageries de la presse* EU:C:1985:284 (resale price maintenance), and C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649 (online sales bans).

15. See, e.g., Case T-472/13 *Lundbeck v. Commission* EU:T:2016:449.

and even exclusionary rules of sporting organizations.<sup>16</sup> Moreover, whereas per se restraints constitute an automatic, and always unjustifiable, breach of §1, the unshakable presence of the Article 101(3) exception rule means that, at least in principle, even hard core cartels are capable of justification and exemption where these produce sufficient countervailing efficiency benefits.<sup>17</sup> While, in practice, a true cartel is unlikely to satisfy the necessary cumulative criteria,<sup>18</sup> the possibility remains that an apparent cartel may nonetheless be permissible in certain circumstances.

Moreover, whereas in the United States, the application of criminal sanctions is shorthand for the presence of cartel behavior, the Commission does not have such a luxury, possessing only administrative enforcement powers which are explicitly stated not to be criminal in nature.<sup>19</sup> Enforcement practice recognizes that antitrust violations may be more or less serious in nature, circumstances that are marked primarily by the magnitude of the fine imposed.<sup>20</sup> But Article 101 itself, coupled with the rather black-and-white power to take infringement decisions granted to the Commission by Article 7 of Regulation 1/2003, is a relatively blunt instrument, nominally as susceptible to breach through, for instance, restrictive exclusive purchasing arrangements as hard core cartels. Beyond the level of the fine imposed, it is difficult for the Commission to reflect the perceived severity of the harm caused or the culpability of the defendants involved, both factors that support the use of individual criminal sanctions against cartel participants.<sup>21</sup>

Nonetheless, the concept of a cartel is present throughout the EU competition framework, even if it has no formal textual grounding within Article 101. There are two reasons, one procedural and the other substantive, why designation as a cartel is of relevance for both defendants and enforcers. First, although even hard core cartels are subject to purely administrative enforcement at EU level, cartel cases receive distinctive treatment within the procedural framework of the Commission's enforcement powers. Designating anticompetitive collusion as constituting a cartel brings the enforcement procedure within the ambit of several cartel-specific innovations, in particular the Commission's Leniency Program<sup>22</sup> (which grants immunity from fines for cartelists that provide the Commission with proactive assistance in the prosecution of cartels in which they have participated) and its Cartel Settlement Procedure<sup>23</sup> (which provides defendant undertakings with a 10% discount on fine for cooperation

16. See, e.g., Case AT.40208—International Skating Union's Eligibility rules (Decision of Dec. 8, 2017), currently on appeal as Case T-93/18 International Skating Union v. Commission.

17. Case T-17/93 Matra Hachette EU:T:1994:89, para. 85.

18. See the discussion in Section III(iii) below. Generally, within EU law, derogations from general principles must be construed strictly.

19. Article 23(5), 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 (OJ L 1/1, Jan. 4, 2003), hereafter "REGULATION 1/2003." See, e.g., Case C-386/10 Chalkor v. Commission EU:C:2011:815, in which, without engaging in the question as to whether cartel fines imposed by the Commission are criminal or otherwise in nature, the Court of Justice nonetheless applied Article 47 of the Charter, on the right to effective judicial protection, to the Commission's decision-making in this area.

20. Under the 2006 fining guidelines, the starting point is a "basic amount . . . related to a proportion of the value of sales, depending on the degree of gravity of the infringement," with gravity determined "on a case-by-case basis": see EUROPEAN COMMISSION, GUIDELINES ON THE METHOD OF SETTING FINES IMPOSED PURSUANT TO ARTICLE 23(2)(A) OF REGULATION No 1/2003 (OJ C 210/2, Sept. 1, 2006), hereafter "2006 FINING GUIDELINES," paras. 19–20. The earlier fining guidelines were more explicit about the relative gravity levels of different sorts of infringements, and in particular, cartels were placed within the most egregious category of "very serious infringements": see EUROPEAN COMMISSION, GUIDELINES ON THE METHOD OF SETTING FINES IMPOSED PURSUANT TO ARTICLE 23(2)(A) OF REGULATION No 1/2003 (OJ C 9/3, Jan. 14, 1998).

21. Conversely, criminal cartel penalties are available to public enforcers in several Member States: *infra* note 196.

22. EUROPEAN COMMISSION, NOTICE ON IMMUNITY FROM FINES AND REDUCTION OF FINES IN CARTEL CASES (OJ C 298/17, Dec. 8, 2006), hereafter "LENIENCY NOTICE."

23. EUROPEAN COMMISSION, NOTICE ON THE CONDUCT OF SETTLEMENT PROCEDURES IN VIEW OF THE ADOPTION OF DECISIONS PURSUANT TO ARTICLE 7 AND ARTICLE 23 OF COUNCIL REGULATION (EC) No 1/2003 in cartel cases (OJ C 167/1, July 2, 2008), hereafter "SETTLEMENT PROCEDURE NOTICE."

during the enforcement procedure, in particular for noncontestation of the Statement of Objections). On the other hand, designation as a cartel denies defendant undertakings the possibility of settling their case under the (not uncontroversial) commitment decision procedure governed by Article 9 of Regulation 1/2003.<sup>24</sup> This is a mechanism that often requires significant concessions from undertakings, but which also brings important overriding advantages, including avoidance of a formal finding of breach or the imposition of a fine.<sup>25</sup>

In the realm of *private* enforcement, similarly, the Antitrust Damages Directive has required Member States to introduce various civil procedure innovations that provide certain privileges to cartel defendants in follow-on damages actions.<sup>26</sup> Yet, arguably, implicit in the Directive is an intention *only* to facilitate cartel litigation, thus further disadvantaging and in essence punishing cartelists.<sup>27</sup> The public and private enforcement contexts are linked, furthermore, insofar as the policy pledge to conclude cartel investigations solely through Article 7 infringement decisions promotes follow-on damage claims specifically in this sphere.<sup>28</sup> Accordingly, a determination that collusion is to be classified as a “cartel” is likely to have significant impact in terms of the nature and magnitude of the legal consequences that follow for defendants, in terms of both public and private enforcement efforts (including possible criminal penalties in certain Member States<sup>29</sup>).

Moreover, placing behavior within the (unofficial) cartel category appears to have the effect of truncating the required *substantive* analysis to find the existence of a “by object” restraint contrary to Article 101(1). An example is found in the Commission’s guidelines on the assessment of horizontal cooperation agreements, which are repeatedly subject to the caveat that the nuanced advice provided therein is immaterial to “disguised cartels,”<sup>30</sup> the implication being that the latter restrict competition unreservedly. The jurisprudence of the Court, too, singles out cartel conduct, implicitly, for more categorical and automatic condemnation. In *European Night Services*, the General Court reiterated the orthodoxy that “in assessing an agreement under Article [101(1)], 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.”<sup>31</sup> Yet the Court added an exception to this conventional approach, for any “agreement containing *obvious* restrictions of competition such as price-fixing, market-sharing or the control of outlets,” where context is relevant only to the extent that it may provide an efficiency defense under Article 101(3).<sup>32</sup> Although the Court did not elaborate upon the criterion of obviousness, the case law cited to support the distinction indicates that its focus was not a literal condemnation of the identified

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24. See Recital 13, Regulation 1/2003, reflected in EUROPEAN COMMISSION, ANTITRUST MANUAL OF PROCEDURES (Nov. 2019), Chap. 16, para. 13.

25. Case C-441/07 P Commission v. Alrosa EU:C:2010:377.

26. 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 (OJ L 349/1, Dec. 5, 2014), hereafter “ANTITRUST DAMAGES DIRECTIVE.”

27. A point discussed by this author previously in Niamh Dunne, *The Role of Private Enforcement within EU Competition Law*, 16 C.Y.E.L.S. 143 (2014).

28. Pursuant to Article 16 of REGULATION 1/2003 and Article 9 of the ANTITRUST DAMAGES DIRECTIVE, infringement decisions taken by the Commission and national competition authorities provide conclusive evidence of the existence of a violation of Article 101 in follow-on damages litigation before national courts, whereas commitment decisions have no such evidential effect.

29. See *infra* note 196.

30. EUROPEAN COMMISSION, GUIDELINES ON THE APPLICABILITY OF ARTICLE 101 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO HORIZONTAL CO-OPERATION AGREEMENTS (OJ C 11/1, Jan. 14, 2011), hereafter “HORIZONTAL COOPERATION GUIDELINES,” paras. 128, 205, & 248.

31. Case T-374/94 *European Night Services and Others v. Commission* EU:T:1998:198, para. 136.

32. *Id.* emphasis added.

categories of proscribed conduct but rather functions as a proxy for behavior that might be described as *cartel-esque* in nature.<sup>33</sup>

The question of how we formulate a legal test for the assessment of alleged cartel conduct under Article 101(1) has returned to the policy agenda more recently, in the context of the much-discussed *Cartes Bancaires* judgment.<sup>34</sup> In that instance, faced with an appeal against a Commission infringement decision condemning several rules of a payment system that was conceptualized as restrictive horizontal coordination,<sup>35</sup> the Court of Justice stressed the comparatively narrow nature of the “by object” category of prohibited restraints.<sup>36</sup> By object condemnation is thus limited to collusive practices which are “by their very nature . . . *harmful to*”<sup>37</sup>—and not merely *restrictive of*<sup>38</sup>—the proper functioning of normal competition. This determination turns, the Court emphasized, not only on the content of the restraint, but moreover, on “the economic and legal context of which it forms a part,” including “the real conditions of the functioning and structure of the market or markets in question.”<sup>39</sup> The strong emphasis placed on context in *Cartes Bancaires*, even in relation to the “by object” category, raised questions about the extent to which the case might blur the line between object and effects analysis within Article 101(1).<sup>40</sup> One possible consequence could be that even nominally “obvious” (i.e., cartel) restraints would require an inquiry into their anticipated impact in practice prior to prohibition under Article 101(1), an approach at odds with the Commission’s conventional enforcement practice, which largely equates the mere existence of cartel behavior with the existence of automatic and unjustifiable “by object” restraints.

Yet subsequent case law appears to curtail substantially the breadth and depth of analysis required where behavior constitutes incontrovertible hard core cartel conduct. The point first arose in *Toshiba*,<sup>41</sup> where the defendant argued, relying upon the forceful judgment in *Cartes Bancaires*, that the absence of a comprehensive contextual analysis of the circumstances of a global market-sharing cartel invalidated the Commission’s finding of infringement.<sup>42</sup> While acknowledging the implications of the *Cartes Bancaires* jurisprudence, the Court of Justice focused its attention on the nature of the restraint, in that instance, an unequivocal market-sharing agreement albeit between potential competitors. Upholding the finding of breach, the Court held that “[i]n respect of such agreements, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object.”<sup>43</sup> In *Toshiba*, that meant primarily taking into account factual evidence confirming the existence of the cartel arrangement, coupled with evidence of an absence of insurmountable entry barriers into the

33. The judgment, for instance, cited the hard core cartel in Case T-148/89 Tréfilunion v. Commission EU:T:1995:68 as an example of an obvious restriction, which it contrasted with the exclusive purchasing obligation in Case C-234/89 Delimitis v. Henninger Bräu EU:C:1991:91 and the cooperation purchasing arrangement in Case C-250/92 Göttrup-Klim EU:C:1994:413, neither of which were deemed to meet the required threshold of obviousness.

34. Case C-67/13 P CB v. Commission EU:C:2014:2204.

35. Case COMP/D1/38606—Groupement des cartes bancaires “CB” (Decision of October 17, 2007), initially upheld on appeal in Case T-491/07 CB v. Commission EU:T:2012:633.

36. Case C-67/13 P CB v. Commission EU:C:2014:2204, para. 58.

37. *Id.* para. 50 (emphasis added).

38. A distinction that the Court brought out, in particular, at *Id.* para. 69.

39. *Id.* para. 53.

40. See, e.g., JAMES KILLICK & JEREMIE JOURDAN, *Cartes Bancaires: A Revolution or A Reminder of Old Principles We Should Never Have Forgotten?*, in COMPETITION POLICY INTERNATIONAL (Dec. 2014); BERNARD AMORY et al., *The Object-Effect Dichotomy and the Requirement of Harm to Competition: On the Road to Clarity after Cartes-Bancaires?*, in THE NOTION OF RESTRICTION OF COMPETITION 65-86 (DAMIEN GERARD et al. eds., 2017).

41. Case C-373/14 P Toshiba v. Commission EU:C:2016:26.

42. Case COMP/39.129—Power Transformers (Decision of October 7, 2009), initially upheld on appeal in Case T-519/09 Toshiba v. Commission EU:T:2014:263.

43. C-373/14 P Toshiba Corporation v. Commission EU:C:2016:26, para. 29.

relevant affected markets.<sup>44</sup> This approach was followed in *FSL Holdings* in respect of a price-fixing cartel in a heavily regulated industry.<sup>45</sup> Here, again, the identification of unambiguous cartel behavior with “a readily apparent anticompetitive object”<sup>46</sup> negated any need to consider whether the wider context might disprove its harmful nature.

Together, these cases suggest that where conduct is perceived clearly as hard core cartel-like in substance, it is subject to near per se condemnation under Article 101(1): that is, the exceptional suspicion directed at such “obvious” restraints continues to have purchase, even though the so-called more economic approach has moved away from the use of such shortcuts generally within EU competition analysis.<sup>47</sup> The principal exception is where market circumstances render any competitive, and thus *anticompetitive*, behavior impossible on the facts.<sup>48</sup> But beyond this narrowly interpreted limitation,<sup>49</sup> cartels continue to receive unique treatment within the framework of Article 101(1), insofar as the contextual analysis that is required places its emphasis on demonstrating the existence of a *cartel*, which is treated as a proxy for circumstances whereby the arrangement poses an intrinsic risk of *harm* to competition.

All of this means that, although Article 101 is in principle uninterested in distinguishing between cartel and noncartel behavior, in enforcement practice much turns on this determination: including whether the defendant can benefit from immunity for blowing the whistle, whether it can avoid a finding of breach through commitments offered in lieu, and the extent to which Commission must probe the wider context of the restraint in order to understand its full competitive implications. Accordingly, even if the concept of a cartel is not a term of art within EU competition law, there are compelling reasons why it is important to have a clear understanding of the substantive underpinnings and outer parameters of the concept.

### III. Exploring the Elements of a Cartel

The complexities of Article 101, and the attendant difficulties of carving out a clear and definitive concept of a cartel from its multilayered provisions, bring us to the central task of this article, namely, identification and analysis of the basic constituent elements of the cartel concept under EU competition law. There is, occasionally, a deliberate vagueness within EU law on this issue. The Commission’s horizontal cooperation guidelines, for instance, use the term cartel repeatedly but explicitly refuse to provide a definition thereof, deferring instead to “the decisional practice of the Commission and the case-law of the Court of Justice” to flesh out the concept.<sup>50</sup> For its part, while the Court of Justice has recognized and employed the term in its jurisprudence informally,<sup>51</sup> the claimed “common

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44. *Ib.* paras. 31–35.

45. Case C-469/15 P *FSL Holdings NV* EU:C:2017:308.

46. Opinion of Advocate General Kokott in Case C-469/15 P *FSL Holdings* EU:C:2016:884, para. 101.

47. Although contrast Anne C. Witt, *The Enforcement of Article 101 TFEU: What Has Happened to the Effects Analysis?*, 55 COMMON MARKET L.R. 417 (2018).

48. As arose in Case T-370/09 *GDF Suez v. Commission* EU:T:2012:333.

49. In the *Bananas* cartel, for instance, the competition-suppressing effects of the regulatory framework—the Common Agricultural Policy—were so pervasive that the defendants received a 60% reduction on the fine imposed, yet this had no impact on the determination that Article 101 had been breached: see Case COMP/39188—*Bananas* (Decision of Oct. 15, 2008).

50. HORIZONTAL COOPERATION GUIDELINES, *supra* note 30, para. 9.

51. See, e.g., Cases C-67/13 P *CB v. Commission* EU:C:2014:2204, C-286/13 P *Dole Food Company, Inc. v. Commission* EU:C:2015:184, para. 115, and T-216/13 *Telefónica v. Commission* EU:T:2016:369, para. 102, where the Court referred specifically to “horizontal price-fixing by cartels” as an example of behavior falling squarely within the “by object” category of restraints. The term was similarly deployed in Case C-226/11 *Expedia* EU:C:2012:795, albeit perhaps more questionably, to describe a joint venture in the market for travel agency services, where the Court stated unequivocally that “[c]artels are already prohibited by the primary law of the European Union, that is, by Article 101(1) TFEU” (para. 33).

understanding”<sup>52</sup> should not be overstated.<sup>53</sup> A more appropriate starting point is therefore the Commission’s 2006 Leniency Notice, according to which:

[c]artels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behavior on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.<sup>54</sup>

This definition is replicated in the Settlement Procedure Notice.<sup>55</sup> Moreover, with minor amendment to emphasize its deliberately nonexhaustive nature,<sup>56</sup> the definition makes the jump from “soft” to “hard” EU law within the Antitrust Damages Directive<sup>57</sup> and ECN+ Directive.<sup>58</sup> It provides a broad—and broadly speaking, plausible—account of what is conventionally understood by the term cartel. It mirrors, moreover, international best practice, such as an Organization for Economic Cooperation and Development’s (OECD) Recommendation against Hard Core Cartels, which are defined as:

anticompetitive agreements, concerted practices or arrangements by actual or potential competitors to agree on prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by, for example, allocating customers, suppliers, territories, or lines of commerce.<sup>59</sup>

As a workable legal definition, however, the approach within the Leniency Notice leaves much to be desired. Taken literally, it is too broad, ostensibly placing within the cartel category all horizontal cooperation relating to the key parameters of competition. Yet the definition is also too narrow, failing to reflect, for instance, vertical means of horizontal collusion. Finally, with its unhelpful reference to “relevant parameters of competition,” it is almost inexcusably vague, a significant flaw which limits its *ex ante* utility as a means of determining what, precisely, falls within the category of cartels. Taking the definition as a starting point, nonetheless, this article will identify and examine the four key elements of the conventional understanding of a cartel, grounding this analysis within the existing case law and practice under Article 101.

## A. Coordination Between Competitors

The most basic feature of any cartel is that it involves coordination between ostensible competitors and thus comprises a direct limitation of the competitive forces that would otherwise exist between these rivals. The rationale for concentrating efforts against horizontal collusion is set out in the Commission’s Leniency Notice:

52. Opinion of Advocate General Wathelet in Case C-373/14 P Toshiba EU:C:2015:427, para. 98.

53. Contrast, for example, the approach of Advocate General Kokott in her Opinion in Case C-469/15 P FSL Holdings EU:C:2016:884, para. 103, who used the term cartel to describe “self-evidently anticompetitive” behavior, with that of Advocate General Wahl in his Opinion in Case C-194/14 P AC-Treuhand EU:C:2015:350, paras. 51 & 53, who suggested that cartels might comprise violations either by object *or* by effect.

54. LENIENCY NOTICE, *supra* note 22, para. 1.

55. SETTLEMENT PROCEDURE NOTICE, *supra* note 23.

56. The latter legislation clarifies that the concept of a cartel encompasses, “but [is] not limited to,” the specified examples.

57. Article 2(14), ANTITRUST DAMAGES DIRECTIVE, *supra* note 26.

58. DIRECTIVE (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 DECEMBER 2018 TO EMPOWER THE COMPETITION AUTHORITIES OF THE MEMBER STATES TO BE MORE EFFECTIVE ENFORCERS AND TO ENSURE THE PROPER FUNCTIONING OF THE INTERNAL MARKET (OJ L 11/3, Jan. 14, 2019), hereafter “ECN+ DIRECTIVE,” Article 2(1)(11).

59. OECD, *supra* note 5.

[b]y artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods . . . They ultimately result in artificial prices and reduced choice for the consumer.<sup>60</sup>

The concept of a cartel is thus targeted at behavior that presents the most obvious and immediate interference with the assumed norm of “an open market economy with free competition.”<sup>61</sup> Whereas a restrictive vertical agreement—for example, vertical price-fixing—may be considered in certain circumstances as so harmful as to justify condemnation “by object” under Article 101(1),<sup>62</sup> such behavior is not *inherently* at odds with the presumed functioning of the market mechanism. Indeed, as the Commission’s Guidelines on Vertical Restraints note, vertical agreements typically involve contracting parties engaged in activities that are *complementary* to each other.<sup>63</sup> Conversely, rival undertakings that form horizontal cartels are seeking to temper the natural *conflictual* relationship that exists between them.

Characterizing cartels as horizontal coordination is far from revelatory, of course. Yet a nuanced approach to what constitutes pertinent horizontal coordination emerges from the jurisprudence, reflecting a more functional than formalistic understanding of why this criterion is the obvious starting point to identify “the supreme evil of antitrust.” In particular, Article 101(1) incorporates a degree of flexibility with respect to both the need to establish explicit coordination and a preexisting relationship of horizontal competition.

First, application of Article 101(1) is not restricted to express or legally binding agreements, in the sense that might be required under domestic contract law principles, for instance.<sup>64</sup> It also encompasses the more amorphous concept of a “concerted practice,” defined in rather less than pithy terms as

a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market.<sup>65</sup>

In essence, the concerted practice notion endeavors to infer the prior existence of anticompetitive coordination from its later perceived impact as reflected in the behavior of market actors. Quite logically, as a result, the concept is premised not merely upon demonstrating evidence of *concertation* but also subsequent market *conduct* and a relationship of cause and effect,<sup>66</sup> although a causal connection is presumed in many circumstances.<sup>67</sup>

The concept is of particular relevance in the cartel context due to the obviously illegal nature of most cartel behavior and the attendant secrecy that this generates: in the frequent absence of a “smoking gun,” the question for enforcers is typically whether sufficient evidence of underlying coordination can be gathered to sustain a prosecution. In particular, the concerted practice concept has provided a means by which to bring various information exchange arrangements within the cartel sphere,<sup>68</sup> including more

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60. LENIENCY NOTICE, *supra* note 22, para. 2.

61. *See, e.g.*, Articles 119-120 TFEU.

62. *Supra* note 14.

63. EUROPEAN COMMISSION, GUIDELINES ON VERTICAL RESTRAINTS (OJ C 130/1, May 19, 2010), hereafter “VERTICAL GUIDELINES,” para. 98.

64. *See, e.g.*, Case C-41/69 *Chemiefarma v. Commission* EU:C:1970:71.

65. Case C-40/73 *Coöperatieve Vereniging “Suiker Unie” v. Commission* EU:C:1975:174, para. 26.

66. Case C-199/92 *Huls* EU:C:1999:358, para. 161.

67. *Id.* para. 162.

68. *See, generally*, HORIZONTAL COOPERATION GUIDELINES, *supra* note 30, paras. 55–110.

borderline situations such as one-off exchanges of sensitive information,<sup>69</sup> and exchange of pricing information in markets where prices are largely dictated by the underlying regulatory framework.<sup>70</sup> The concerted practice concept is also the lynchpin of the predicted legal treatment of potential algorithmic collusion, considered by many as the next frontier for cartel prosecutions.<sup>71</sup> Crucially, EU law recognizes the possibility of treating purely parallel market conduct as evidence of an underlying cartel.<sup>72</sup> Yet where an alternative plausible explanation for the parallel behavior exists, it is necessary to adduce additional evidence of coordination to discharge the prosecutor's burden of establishing the existence of coordinated behavior.<sup>73</sup> Accordingly, although the concept of a cartel under Article 101(1) is interpreted broadly to encompass a wide spectrum of horizontal coordination beyond explicit agreements between competitors, the notion is targeted at the deliberate<sup>74</sup> and reciprocal<sup>75</sup> alignment of competitive behavior within a marketplace and not merely a widespread but essentially unilateral absence of competitive dynamics.

A second issue of relevance is where horizontal coordination is effected through what are, at first glance, nonhorizontal means. The most obvious example is the so-called hub-and-spoke cartel, whereby horizontal collusion occurs through the conduit of parallel instances of vertical coordination through a common contracting party. While vertical restraints may constitute "by object" restrictions, they are clearly outside the purview of the cartel concept. Implicit in the hub-and-spoke idea, however, is that the ostensibly vertical nature of the arrangement belies certain horizontal coordination that underpins it, whether because of prior communication between the horizontal competitors<sup>76</sup> or because the common contracting party actively takes on a cartel facilitator role.<sup>77</sup>

Well recognized within the antitrust literature,<sup>78</sup> the hub-and-spoke concept is underdeveloped in Article 101 jurisprudence. The key case to date is the preliminary ruling in *ETURAS*, where the Court of Justice scrutinized the application of Article 101(1) by the Lithuanian competition authority to an alleged cartel between travel agents, administrated through an online travel booking website.<sup>79</sup> The prosecution hinged on a series of emails, sent by the online platform to its travel agent users, informing them of a platform-wide policy to make the granting of discounts more difficult. The Court of Justice held that this series of parallel *vertical* contacts could sustain a finding of *horizontal* coordination, provided that there was sufficient proof of the existence of at least a concerted practice between the travel agents themselves. This required evidence that the would-be cartelists had read the message concerned, coupled with a presumption that they acted in accordance with its anticompetitive contents.<sup>80</sup> If actual receipt and reading could not be demonstrated, other "objective and consistent"

69. Case C-8/08 T-Mobile Netherlands and Others EU:C:2009:343.

70. Case COMP/39188—Bananas (Decision of Oct. 15, 2008).

71. See, e.g., ARIEL EZRACHI & MAURICE STUCKE, *VIRTUAL COMPETITION* (2016).

72. Case C-48/69 Imperial Chemical Industries Ltd. v. Commission ("Dyestuffs") EU:C:1972:70.

73. Case C-89/85 A. Ahlström Osakeyhtiö v. Commission ("Woodpulp II") EU:C:1988:447.

74. See Opinion of Advocate General Wathelet in Case C-542/14 VM Remonts EU:C:2016:578, para. 40, emphasizing the need for deliberateness.

75. See Opinion of Advocate General Szpunar in Case C-74/14 ETURAS EU:C:2015:493, para. 46, emphasizing the need for "reciprocity" or "consensus."

76. As in Case COMP/AT.39847—E-BOOKS (Decisions of Dec. 12, 2012, and July 25, 2013).

77. As in Case C-74/14 Eturas and Others EU:C:2016:42.

78. See, e.g., Okeoghene Odudu, *Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion*, 7 EUR. COMP. J. 205 (2011); Joseph E. Harrington, *How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies* (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3238244](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238244); Margaret C. Levenstein & Valerie Y. Suslow, *How Do Cartels Use Vertical Restraints? Reflects on Bork's The Antitrust Paradox*, 57 J. LAW & ECON. 33 (2014); Benjamin Klein, *The Apple E-Books Case: When Is a Vertical Contract a Hub in a Hub-and-Spoke Conspiracy?*, 13 J. COMP. LAW & ECON. 423 (2017); and OECD, *ROUNDTABLE ON HUB-AND-SPOKE ARRANGEMENTS—BACKGROUND NOTE BY THE SECRETARIAT*, DAF/COMP (2019) 14.

79. Case C-74/14 Eturas and Others EU:C:2016:42.

80. *Id.* paras. 43–44.

evidence was required to establish tacit assent to the cartel arrangement.<sup>81</sup> While the travel agents could rebut the presumption of participation, including by consistent noncompliant conduct, the burden of proof lay with the defendants.<sup>82</sup>

*ETURAS* accordingly confirmed that horizontal collusion can arise absent any direct evidence of concertation between rival undertakings—*provided* that their own conduct discloses evidence of sufficient awareness of the extent to which parallel vertical coordination has prompted or facilitated cartel-type behavior.<sup>83</sup> The importance of individual awareness to a defendant’s presumed participation was emphasized in *VM Remonts*.<sup>84</sup> In that instance, an independent contractor had drawn up submissions to the same procurement exercise on behalf of three separate competitors, taking advantage of information provided by all three in compiling each bid. The Court, again, confirmed the potential liability of undertakings for indirect horizontal collusion but stressed that this could arise only where an individual defendant was either aware of more direct anticompetitive efforts in the background or could reasonably have foreseen such a risk and did nothing to negate its realization.<sup>85</sup> Thus, cartel participation cannot be inadvertent, unless the very fact of unawareness discloses some degree of culpability in itself.

Beyond the question of whether hub-and-spoke cartels reveal horizontal coordination between the undertakings that comprise its “spokes” is the equally complex issue of whether and on what basis a “hub” undertaking might infringe Article 101(1). The potential liability of so-called cartel facilitators was confirmed by the Court of Justice in *AC-Treuhand*.<sup>86</sup> The defendant in that instance was an undertaking that provided secretarial services to companies, and it had in effect organized the *Heat Stabilizers* cartel.<sup>87</sup> The conceptual objection to holding such an entity liable in cartel cases is that the undertaking concerned operates in an entirely distinct market, meaning that any agreement between that defendant and the immediate cartel participants is, in effect, a vertical agreement for the provision of services rather than a horizontal agreement that directly limits competitive dynamics between the parties.<sup>88</sup> The counterargument, of course, is that many would view those who “aid and abet” the commission of a serious offense as incurring broadly equivalent moral culpability to that of the principal offender. The Court in *AC-Treuhand* endorsed the latter viewpoint, holding that it would be contrary to the policy goals of Article 101 to allow a defendant to escape liability, where it had “actively participated” in the organization of a cartel, merely on the basis that although it had assisted others to engage in cartel conduct, it was not present on the relevant cartelized market.<sup>89</sup> That was the case, specifically, where “the very purpose of the services provided . . . [was] the attainment, in full knowledge of the facts, of the anticompetitive objectives in question,” in that instance a price-fixing and market-sharing cartel.<sup>90</sup>

Accordingly, liability again hinges on the extent of the defendant’s knowledge of the overall anticompetitive arrangement, coupled with some form of proactive participation in the breach. This confirms that the cartel concept is broad enough to encompass nonhorizontal modes of participation, but that liability, in such circumstances, is contingent upon demonstrating *positive* efforts toward

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81. *Id.* para. 45.

82. *Id.* paras. 46–49.

83. Emphasizing the extent to which the parties’ awareness of the context may substitute for evidence of direct concertation, *see Id.* paras. 38–41.

84. Case C-542/14 *VM Remonts and Others* EU:C:2016:578.

85. *Id.* paras. 29–31.

86. Case C-194/14 P *AC-Treuhand v. Commission* EU:C:2015:717.

87. Case COMP/38589—*Heat Stabilisers* (Decision of Nov. 11, 2009).

88. *See*, most notably, the Opinion of Advocate General Wahl in Case C-194/14 P *AC-Treuhand* EU:C:2015:350, paras. 42–55 in particular.

89. Case C-194/14 P *AC-Treuhand v. Commission* EU:C:2015:717, paras. 36–39.

90. *Id.* para. 38.

realizing the *known* cartel objectives. The latter caveat proved decisive in *ICAP*, where the General Court annulled one of the six findings of cartel facilitation by a financial services broker, on the basis that the Commission failed to demonstrate sufficient awareness on the defendant's part of the underlying collusion between various competitor banks in that instance.<sup>91</sup> While this line of case law challenges the simple assumption that cartelists are necessarily involved in a competitive relationship, the close link required to the direct restriction of horizontal competition at the heart of a cartel marks facilitator liability as a form of accessory liability, tying the responsibility of the facilitator closely to the underlying (serious) violation of Article 101.<sup>92</sup>

Although the concept of a cartel is premised upon horizontal coordination, Article 101 does not require that the undertakings concerned *currently* compete directly within the same relevant market: a restriction of *potential* competition is sufficient. This issue arose, inter alia, in the *Toshiba* case, considered above.<sup>93</sup> The objection to characterizing an agreement to limit potential competition as a “by object” restriction—and, by implication, a cartel restraint—is that not only does such an arrangement not (yet) limit “the competition that would normally prevail between” the undertakings concerned,<sup>94</sup> moreover, it remains an open question as to whether effective competition would in fact materialize should the undertakings concerned attempt to compete. Yet the Court of Justice has notably rejected challenges to findings of infringement and fines imposed in such cases, even where abstention from competition within the EU market translates into very low levels of affected sales.<sup>95</sup>

The most interesting question for our purposes is how broadly the concept of a potential “competitor” should be construed in the cartel context. In *Toshiba*, the Court was satisfied that future competition could exist where the Commission adduced evidence of new entry into the power transformers market in other worldwide regions.<sup>96</sup> Moreover, the very fact that the undertakings concerned had considered it advantageous to enter the market-sharing arrangement, in itself, suggested that the defendants viewed each other as plausible potential competitors; otherwise, the underlying concertation was without purpose.<sup>97</sup> This latter point, though at first glance somewhat circular—the anti-competitive nature of the agreement being derived from the very existence of the agreement—was similarly emphasized in the (noncartel) case of *Lundbeck*.<sup>98</sup> The latter stressed the extent to which merely potential competitors may nonetheless pose immediate competitive constraints on market operators: the question being whether the putative future rival has “real concrete possibilities of entering the market within a sufficiently short period to exert effective competition pressure.”<sup>99</sup> Although the concertation at issue is, therefore, not “horizontal” in a literal sense, its effects are essentially the same, in particular enabling the undertakings concerned to “avoid exactly those pressures that lead them to innovate.”<sup>100</sup>

An interesting variant is seen in the *Hoffmann-La Roche & Novartis* case,<sup>101</sup> involving collective lobbying efforts by two pharmaceutical companies, which was held by a Grand Chamber sitting of the

91. Case T-180/15 *Icap and Others v. Commission* EU:T:2017:795.

92. Advocate General Wahl in his Opinion in Case C-194/14 *AC-Treuhand* EU:C:2015:350 accepted that the defendant could, in principle, be held liable as “an accomplice to an infringement of the prohibition on cartels” (para. 78), albeit he expressed serious doubts as to whether accomplice liability should exist in the sphere of administrative law (para. 82).

93. Case C-373/14 P *Toshiba v. Commission* EU:C:2016:26.

94. LENIENCY NOTICE, *supra* note 22, para. 2.

95. *See, e.g.*, Case C-444/11 P *Team Relocations NV v. Commission* EU:C:2013:464.

96. Case C-373/14 P *Toshiba v. Commission* EU:C:2016:26, para. 32.

97. *Id.* para.33.

98. Case T-472/13 *Lundbeck v. Commission* EU:T:2016:449.

99. *Id.* para. 203.

100. LENIENCY NOTICE, *supra* note 22, para. 2.

101. Case C-179/16 F. *Hoffmann-La Roche Ltd and Others v. Autorità Garante della Concorrenza e del Mercato* EU:C:2018:25.

Court of Justice to constitute a cartel within the meaning of Article 101. The defendants, at first glance, were not horizontal competitors: each held a license, granted by a U.S. company, to engage in the commercial exploitation outside the U.S. of separate drugs with very different therapeutic indications, thus serving distinct product markets. Yet off-label prescribing of one of those medicines (Avastin) had the effect of bringing it into competition with the other (Lucentis), insofar as both were then used to treat the same disease. The impugned cartel conduct accordingly consisted, in essence, of coordinated efforts to raise scientific concerns about the practice of prescribing Avastin off-label, which had the effect, subsequently, of increasing sales of the (vastly more expensive) Lucentis.<sup>102</sup> The Court was thus unmoved by claims that the market for each medicine should be defined by the scope of its authorized application and focused instead on their use in practice, which disclosed a clear horizontal overlap.<sup>103</sup>

A further complication in the case—which doubtless explains the motivation of the Avastin licensee, Roche, to enter this otherwise disadvantageous arrangement—is that Roche was also the ultimate parent of the U.S. licensor. Thus, the relationship between Roche and the Lucentis licensee, Novartis, was, at its core, a vertical one, so that both benefited from higher sales of the more lucrative drug.<sup>104</sup> Yet the Court, following the approach (and nomenclature) of the Italian competition authority, applied the cartel label to this coordinated activity, designed to reduce the competitive pressure between two ostensibly competing products, even if both ultimately were controlled by the same company.<sup>105</sup> This approach confirms that horizontality, in the context of anti-cartel enforcement, is an essentially functional concept, directed against activities that artificially limit the disciplining effects of the process of competition, without necessarily turning upon the prior existence of an established relationship of structural competition.

## B. Restriction of “Relevant Parameters of Competition”

Under §1 of the Sherman Act, per se condemnation is limited to so-called naked restrictive practices, a vivid term which suggests a certain threshold of flagrancy or overtness associated with the perceived harmfulness of the particular restraint.<sup>106</sup> The language used in the basic cartel definition found in EU law is more prosaic, referring to the restriction of “relevant parameters of competition.”<sup>107</sup> This section aims to flesh out this fairly oblique definition, to get a clearer understanding of what parameters may be relevant, and why.

In many ways, this is the most straightforward component, since certain categories of cartel behavior are well established within the literature and jurisprudence. Use of the term cartel is restricted to conduct comprising the perceived “most serious” violations of Article 101(1).<sup>108</sup> The cartel definition in the Leniency Notice identifies six broad categories of potential restraints: price-fixing, collusive setting of nonprice trading conditions, production or sales quotas, market-sharing, restricting imports or exports, and collective boycotts.<sup>109</sup> This mirrors, to a large extent, the categories identified within the OECD Recommendation against Hard Core Cartels, which lists collusion “to fix prices, make rigged bids . . . , establish output restrictions or quotas, or share or divide markets by allocating

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102. See the description of the cartel conduct, *Id.* paras. 22-33.

103. *Id.* in particular paras. 48-67.

104. *Id.* para. 23.

105. *Id.* in particular paras. 80 & 92. The issue was discussed in more detail, however, in the Opinion of Advocate General Saugmandsgaard Øe in Case C-179/16 F. Hoffmann-La Roche, paras. 91-132 in particular.

106. Discussed most helpfully by HOVENKAMP, *supra* note 13, 112-115.

107. LENIENCY NOTICE, *supra* note 22, para. 1.

108. *Id.*

109. *Id.*

customers, suppliers, territories, or lines of commerce . . . ”<sup>110</sup> Thus, there is widespread agreement about what behaviors comprise the hard core of the cartel concept.

What might thus be termed the classic or plain vanilla cartel offenses each shares an important characteristic. Each is aimed, directly, at limiting or even entirely removing an important component of any well-functioning market mechanism, whether it is the ability to vary prices or output in response to demand, to seek cheaper supplies or profitable new sales opportunities, or in the case of collective boycotts, to compete on the merits. The restriction of competition involved is not merely immediate and overt; it is also intrinsic, being directly targeted, in the language of *Socony-Vacuum*, at “the free play of market forces.”<sup>111</sup> In such circumstances, as the Court of Justice argued in *Schenker* in respect of a price-fixing cartel, defendants “quite evidently cannot be unaware of the anticompetitive nature of their conduct.”<sup>112</sup> This is not to suggest that every such restriction will ultimately be considered a cartel offense, as context may do much to mitigate or justify the *prima facie* restraint, as the discussion in the following subsections illustrates. Yet our starting point is that the core categories of cartel behavior essentially revolve around the key parameters of competition: price, output, and markets served.

Yet there are risks of over- and underinclusiveness here. As noted, the post-*Cartes Bancaires* case law singles out horizontal “price-fixing” and “market-sharing” arrangements for continued *quasi*-per se condemnation under Article 101(1). Yet these notions, in themselves, are not legally precise terms of art, and a wide range of existing case law makes clear that a literal reading of either requirement is incompatible with Article 101.<sup>113</sup> Thus, the mere fact that ostensible competitors engage in horizontal coordination in respect of an identified “relevant” parameter of competition does not *necessarily* mean that conduct will be construed as a cartel. An obvious example is *MasterCard*, where the Commission found that “price-fixing,” in the form of the coordinated setting of the multilateral interchange fee (MIF) within the MasterCard payment system, violated Article 101(1). But it did so on the basis of the practice’s anticompetitive effects rather than by simply condemning the horizontal price-fixing as such, and there is no sense in the infringement decision or subsequent appeals that what we were dealing with was a hard core cartel.<sup>114</sup> It may even be argued that the approach in *Toshiba* and *FSL Holdings* rather begs the question: it assumes the identification of neat categories of cartel behavior that can be exempted from the stringent assessment requirements reaffirmed in *Cartes Bancaires*, without indicating how these categories are to be identified as a matter of law. Thus, at most, the type of conduct at issue is a useful indicator of its likely status but cannot be determinative of subsequent legal treatment.

This point is of equal importance when it comes to the risk of underinclusiveness. The relevant parameters of competition identified in the Leniency Notice definition are expressly denoted as nonexhaustive,<sup>115</sup> and the label of cartel behavior has been applied to coordinated behavior beyond the standard categories of price-fixing and market-sharing, typically by analogy with the established offenses. Take, for instance, the *Consumer Detergents* case, which involved a secret agreement

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110. OECD, *supra* note 5.

111. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940), 221. *See also* the Opinion of Advocate General Szpunar in Case C-74/14 *ETURAS* EU:C:2015:493, para. 68, where he described “an attempt to influence free formation of prices” as behavior that “manifestly has as its object to restrict competition.”

112. Case C-681/11 *Schenker & Co.* EU:C:2013:404, para. 39.

113. *See, e.g.*, Case C-250/92 *Göttrup-Klim* EU:C:1994:413.

114. COMP/34.579—*MasterCard* (Decision of Dec. 19, 2007). Upheld on appeal in Cases T-111/08 *MasterCard v. Commission* EU:T:2012:260 and C-382/12 P *MasterCard v. Commission* EU:C:2014:2201. *See also* Case AT.39398—*Visa MIF* (Decision of Feb. 26, 2014), where the Commission treated horizontal price-setting activity within the Visa payment system as a likely “by object” restriction but concluded the investigation through an Article 9 commitment decision, a clear indication that it did not consider it to constitute hard core cartel conduct.

115. LENIENCY NOTICE, *supra* note 22, para. 1 & 56.

between the three major EU manufacturers of washing powder, inter alia, to refrain from spending on advertising activities and not to pass on to consumers cost-savings arising from an environmental initiative. This behavior was characterized, unambiguously, as a hard core cartel, with the practices construed as forms of “price collusion.”<sup>116</sup> The well-known *LIBOR* investigation involved collusive efforts by financial institutions to manipulate several important financial benchmarks in order to maximize the profitability of trading positions held by those institutions. Pursued in other jurisdictions as forms of fraud or violations of financial services regulation, these cases were treated as indirect price-fixing cartels under Article 101(1) and prosecuted and fined by the Commission accordingly.<sup>117</sup> Finally, *Hoffmann-La Roche and Novartis*, discussed in the preceding subsection, provides a good example of the flexibility of the Court of Justice, too, in recognizing complex and somewhat convoluted activities as cartel conduct: in that instance, as in essence a form of market-sharing.<sup>118</sup>

What these cases demonstrate is that, under Article 101, the outer boundaries of the cartel concept are by no means fixed. Thus, while the indicative list of “relevant parameters” provided by the Leniency Notice definition offers a useful summary of the most obvious, and perhaps most likely, offenses that may be encountered, by no means should it be interpreted as an obstacle to the recognition of new forms that the “supreme evil of antitrust” might take. Indeed, strictly as a matter of law under Article 101(1), the only constraint when recognizing new categories of cartel conduct is that the (necessarily horizontal) collusion must be “harmful” to competition by its very nature.<sup>119</sup> Yet, cases like the *International Skating Union (ISU)* decision<sup>120</sup> remind us that, even in the horizontal context, not every “by object” restraint will or should be treated as a cartel. Here, the Commission condemned in the context of an Article 7 infringement decision the eligibility rules maintained by the ISU, an international sporting organization, which prohibited skaters from participating in rival unauthorized sporting events. The blatantly exclusionary nature of the policy, coupled with the severe consequences for skaters who violated its terms,<sup>121</sup> prompted the Commission to characterize the arrangement as a restriction “by object”—and also, in the alternative, one which had the effect of restricting (potential) competition within the relevant market.<sup>122</sup> Yet it declined to characterize the underlying horizontal coordination as a cartel, and in particular, chose not to impose fines in the first instance.<sup>123</sup> In doing so, the Commission noted the public interest dimension of the ISU’s activities over and above its commercial endeavors and the publicly known nature of the eligibility rules:<sup>124</sup> both characteristics, it will be argued in the next subsections, that further serve to demarcate cartel from noncartel conduct.

Finally, characterization as a “by object” restriction renders the question of the actual effects of behavior largely moot. Accordingly, there is no need to demonstrate that cartel defendants have actually *succeeded* in restricting the identified relevant parameter of competition, as the mere existence of the agreement is sufficient. This means, in particular, that defendants cannot escape liability on the basis that they “cheated” or neglected to implement the cartel agreement, nor that the cartel as a whole was a failure so that consumers suffered no harm.<sup>125</sup>

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116. Case COMP/39.579—Consumer Detergents (Decision of Apr. 13, 2011), in particular para. 25.

117. Including Cases AT.39861—Yen Interest Rate Derivatives (Decision of Dec. 4, 2013), AT.39924—Swiss Franc Interest Rate Derivatives (CHF LIBOR; Decision of Oct. 21, 2014), and AT.39914—Euro Interest Rate Derivatives (Decision of Dec. 7, 2016).

118. Case C-179/16 F. Hoffmann-La Roche Ltd EU:C:2018:25.

119. In particular, *supra* note 37.

120. Case AT.40208—International Skating Union’s Eligibility rules (Decision of Dec. 8, 2017).

121. A potential lifetime ban from participating in ISU events, including the Olympic Winter Games.

122. Case AT.40208—ISU, paras. 154–209.

123. The infringement decision made provision for imposition of periodic penalty payments in the event that the ISU failed to comply with its obligations to modify the restrictive rules: *see Id.* paras. 343–346.

124. *Id.* para. 348.

125. *See, e.g.,* Cases T-308/94 *Cascades v. Commission*, para 230, and T-59/02 *Archer Daniels Midland*, para. 189.

On the other hand, an agreement to restrict a relevant parameter of competition cannot be characterized as a cartel in a market where, even absent the best efforts of would-be cartelists, no competition would otherwise have existed. This is the key takeaway of the *E.On/GDF Suez* gas pipeline cartel, which involved a market-sharing arrangement between former monopoly energy providers in Germany and France. The cartel predated liberalization and continued afterward. Yet the defendants' activities began to violate Article 101(1) only *after* each home market was opened to competition and thus became potentially contestable.<sup>126</sup> Accordingly, even if a cartel need not succeed in its anti-competitive purpose to be characterized as such, that purpose must be realizable at least in principle for a cartel to arise.

### C. Purely Private Profit-Maximizing Behavior

Defining a cartel simply as a horizontal agreement involving certain particularly acute “relevant” parameters of competition is, however, of limited use in distinguishing, for instance, the horizontal price-fixing in *Toshiba* (treated as a hard core cartel) from that in *MasterCard* (treated as a mere effects-based restriction). In order to narrow the parameters of the concept, we suggest two additional characteristics that almost invariably mark out behavior treated as cartel-like in nature. These are the fact that defendant undertakings engage in concertation purely for private profit-maximizing reasons, discussed in this subsection, and that the behavior involves a degree of secrecy and/or deception in its execution, discussed in the next.

Starting with the first, again we return to the notion that cartels comprise the “most serious” violations of competition law. This is not merely because they involve a direct limitation of fundamental parameters of competition, however. Moreover, the harm associated with cartels, at least if successfully implemented, is both particularly acute and illegitimate: typically resulting in a direct diminution of consumer welfare, with few if any countervailing efficiencies to compensate consumers for their losses. We take each of these ideas in turn.

A defining feature of any cartel is that it involves intrinsic consumer harm: that is, unlike certain other forms of horizontal collusion, it can be presumed that cartels are inherently and exclusively aimed at the exploitation of consumers (through higher prices, poorer quality goods, reduced innovation, etc.<sup>127</sup>) for the direct benefit of cartelists. Consumer harm is explicitly recognized as a defining element of hard core cartel behavior within the OCED’s 1998 Recommendation, which states that:

[c]onsidering that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others . . .

Thus, it is assumed that the principal purpose of any cartel is to make life easier—in the sense of being more profitable—for cartelists, at the expense of actual and potential consumers.<sup>128</sup> We also see this in the analogies frequently drawn between cartel behavior and theft offenses: former Competition Commissioner Kroes, for instance, argued that “when we break up cartels, it is to stop money being

126. Case T-370/09 *GDF Suez v. Commission* EU:T:2012:333.

127. See EUROPEAN COMMISSION, GUIDANCE ON THE COMMISSION’S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS (OJ C 45/7, Feb. 24, 2009), para. 11, where the Commission explains that it uses the term “increase prices” to refer to the various “the parameters of competition—such as prices, output, innovation, the variety or quality of goods or services—[that] can be influenced . . . to the detriment of consumers.”

128. See also John M. Connor & Robert H. Lande, *Does Crime Pay? Cartel Penalties and Profits*, 33 ANTITRUST 29 (Spring 2019), providing evidence that cartels on balance make significant profits for their participants even when both public fines and private damages are taken into account.

stolen from customers' pockets."<sup>129</sup> The additional profit that cartelists earn from preferring collusion over competition is thus conceptualized as an ill-gotten gain: involving a transfer of wealth from consumers to producers to which the latter are not entitled, and which is broadly equivalent to appropriating that money directly from customers. Moreover, over and above immediate exploitation of consumers, hard core cartels are rarely if ever associated with countervailing efficiency gains which can compensate for the harm to consumers and competition more generally. Ibanez Colomo thus suggests that "[t]he fundamental feature of cartels is that they are known to have no plausible explanation other than the restriction of competition; in other words, that they lack any redeeming virtues and can thus be safely presumed to have restrictive effects."<sup>130</sup>

Of course, ultimately, the potential exploitation of consumers is a harm associated with all forms of anticompetitive conduct within the purview of the competition rules. Yet it is notable that cartel-related harms are viewed through a particularly uncompromising lens. The argument that a cartel merely allows its participants to realize "reasonable" prices has long been rejected as a valid defense.<sup>131</sup> The orthodox view was arguably best expressed by the U.S. Supreme Court in *Trenton Potteries* almost a century ago.

The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may, through economic and business changes, become the unreasonable price of tomorrow.<sup>132</sup>

Thus, *any* cartel overcharge, regardless of its magnitude, is deemed innately unreasonable and thus unacceptable.

Yet it is not the case that all higher prices are necessarily condemned by competition law outside the cartel context.<sup>133</sup> Most notably, under Article 102, very high prices charged by dominant undertakings are considered abusive only if it can be demonstrated that price bears "no reasonable relation to the economic value of the product supplied."<sup>134</sup> Accordingly, in respect of cartels, any deviation from market-based price-setting is deemed inherently unreasonable; whereas in the realm of dominant conduct, uncompetitive price-setting practices are prohibited only where the price that is charged itself fails a (fairly rigorous<sup>135</sup>) test of unreasonableness. The payment system cases, involving non-cartel horizontal coordination to set the MIF charged between banks, provide an interesting hybrid. In this set of decisions, coordinated price-setting was deemed contrary to Article 101, whether by virtue of a (claimed) anticompetitive object<sup>136</sup> or established anticompetitive effects.<sup>137</sup> Notably, however, the crux of the antitrust concern was not the simple fact of horizontal coordination but rather that the

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129. COMPETITION COMMISSIONER NOELIE KROES, TAKING COMPETITION SERIOUSLY—ANTI-TRUST REFORM IN EUROPE (Speech of Mar. 10, 2005).

130. Pablo Ibañez Colomo, *The Future of Article 102 TFEU After Intel*, 9 JECLAP 293, 298 (2018).

131. See, e.g., Case T-29/92 *SPO v. Commission* EU:T:1995:34, paras. 287-294, where the General Court expressly rejected the relevance of the defendants' argument that the cartel arrangements allowed them to make merely low profits in the face of otherwise "ruinous competition."

132. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), 397.

133. In the context of vertical restraints, the Court noted famously in Case C-26/76 *Metro SB-Großmärkte GmbH & Co. KG v. Commission* EU:C:1977:167, para. 21, that "[a]lthough price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded."

134. Case C-27/76 *United Brands v. Commission* EU:C:1978:22, para. 250.

135. See, in particular, the discussions in the Opinions of Advocate General Trstenjak in Case C-52/07 *Kanal 5 and TV 4* EU:C:2008:491 and Advocate General Wahl in Case C-177/16 *Biedrība "Autortiesību un komunikācijas konsultāciju aģentūra - Latvijas Autoru apvienība"* Konkurences padome EU:C:2017:286.

136. Case AT.39398—*Visa MIF* (Decision of Feb. 26, 2014).

137. Case COMP/34.579—*MasterCard* (Decision of Dec. 19, 2007).

resulting MIF was set at an excessive—that is, unreasonably high—level in fact. The result of both the *MasterCard* and *Visa* cases was a drastically reduced MIF, but these decisions do not, ultimately, challenge the premise that some degree of coordination in price-setting was both necessary and welfare-enhancing.<sup>138</sup>

Various aspects of the existing EU framework reflect the contention that cartels, in particular, are a manifestation of purely private profit-maximizing behavior that comes at the expense of consumer welfare. This is seen, most obviously, in the realm of private enforcement. The Antitrust Damages Directive, for instance, introduces a rebuttable legal presumption of harm, binding upon national courts, which applies *only* in private damage actions involving cartels but no other forms of private antitrust litigation.<sup>139</sup> This is premised upon the finding that, in at least 90% of cartel cases, “the cartel caused higher prices to be charged than if the cartel had not existed.”<sup>140</sup> The Commission’s “practical” guide on quantifying harm in private damage cases similarly emphasizes the harms that cartels can and do generate, noting that these “normally produce an immediate illegal profit for the infringers and immediate harm for their customers.”<sup>141</sup> The guide is more ambivalent about exclusionary conduct, recognizing that such behavior “could result in an initial disadvantage for the infringers and in better prices for customers in the short run.”<sup>142</sup> The Commission’s more recent guidance on the assessment of the passing on of overcharges to indirect purchasers again focuses on the distribution of (the presumptively almost unavoidable) harm in the cartel context.<sup>143</sup> While the right of victims to claim private damages under the principle established in *Courage v. Crehan* is read broadly to encompass *any* antitrust breach,<sup>144</sup> therefore, the supporting legal framework evinces a clear priority for plaintiffs in cartel cases, with the implication that it is the latter who are most likely to suffer real and demonstrable harm.

Moreover, both the Commission’s guidance and the Court’s case law under the Article 101(3) exception rule evince a deep skepticism about the potential for true cartel behavior to (ever) benefit from the defense. Article 101(3) exempts otherwise restrictive agreements contrary to the Article 101(1) prohibition rule, on the basis of the “positive economic effects” that those arrangements nonetheless generate.<sup>145</sup> It is premised upon satisfying four cumulative requirements, set out in Article 101(3), with the burden of proof lying with the defendant.<sup>146</sup> Although, as noted, in principle the exception can apply to any restrictive arrangement falling foul of Article 101(1),<sup>147</sup> the Commission’s guidance on the exception rule takes the clear position that “severe restrictions of competition are unlikely to fulfil the conditions of Article [101(3)].”<sup>148</sup> The archetypal example cited of such a severe

138. Ultimately, however, price regulation through individual instances of competition enforcement was replaced by a top-down EU-wide REGULATION (EU) 2015/751 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 29 APRIL 2015 ON INTERCHANGE FEES FOR CARD-BASED PAYMENT TRANSACTIONS (OJ L 123/1, May 19, 2015).

139. Article 17(2), ANTITRUST DAMAGES DIRECTIVE, *supra* note 26.

140. EUROPEAN COMMISSION, PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 (COM(2013) 404 final), p. 18.

141. EUROPEAN COMMISSION, STAFF WORKING DOCUMENT, PRACTICE GUIDE QUANTIFYING HARM IN ACTIONS FOR DAMAGES BASED ON BREACHES OF ARTICLE 101 OR 102 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (C(2013) 3440), para. 182.

142. *Id.*

143. EUROPEAN COMMISSION, GUIDELINES FOR NATIONAL COURTS ON HOW TO ESTIMATE THE SHARE OF OVERCHARGE WHICH WAS PASSED ON TO THE INDIRECT PURCHASER (OJ C 267/4, Aug. 9, 2019), para. 3, fn. 5.

144. *See* Case C-453/99 *Courage and Crehan* EU:C:2001:465, and now Article 2(1), ANTITRUST DAMAGES DIRECTIVE, *supra* note 26.

145. EUROPEAN COMMISSION, GUIDELINES ON THE APPLICATION OF ARTICLE 81(3) OF THE TREATY (OJ C 101/97, Apr. 27, 2004), hereafter “ARTICLE 101(3) GUIDELINES,” para. 32.

146. *Id.* paras. 41 & 42.

147. Matra Hachette, *supra* note 17.

148. ARTICLE 101(3) GUIDELINES, *supra* note 145, para. 46.

restriction is “a horizontal agreement to fix prices,”<sup>149</sup> that is, the paradigmatic illustration of cartel behavior. The Commission’s horizontal cooperation guidelines similarly take the approach that “disguised cartels” (a concept, as discussed above, left deliberately undefined<sup>150</sup>) are “very unlikely” to fulfill the conditions for exception under Article 101(3).<sup>151</sup>

It is worthwhile to consider further why this is the case, insofar as the mismatch with the Article 101(3) exemption criteria usefully illustrates how the harm associated with cartel conduct is conceptualized. The first, and baseline, requirement for exemption is that the behavior must contribute “to improving the production or distribution of goods or to promoting technical or economic progress.”<sup>152</sup> Although earlier case law read this criterion expansively, accepting any benefit associated with “the pursuit of the public interest,”<sup>153</sup> the Commission has since 2004 insisted that it requires “objective economic efficiencies,”<sup>154</sup> namely, cost or qualitative efficiencies that typically stem from an integration of economic activities between distinct undertakings.<sup>155</sup> Conversely, the Commission’s guidance is clear that *subjective* benefits that accrue to the coordinating parties as a result of their increased market power—such as cost savings associated with the ability to profitably reduce output—are “irrelevant” for this purpose.<sup>156</sup> While the Article 101(3) guidelines do not reference cartel conduct expressly, the examples of circumstances leading to inadmissible subjective gains—namely, price-fixing and market-sharing—underline that this difficulty is most likely to arise in the face of hard core cartelization.<sup>157</sup> Indeed, in the *Bananas* cartel, claims that pricing discussions resulted in more efficient market clearing were construed, not as evidence of objective benefit but rather as evidence that the information exchange practices had affected individual pricing decisions, and thus as *confirmation* of their anticompetitive nature.<sup>158</sup>

Second, the Article 101(3) guidance takes the view that “severe” restrictions of competition are also unlikely to fulfill the requirement that consumers receive “a fair share of the resulting benefit.”<sup>159</sup> One of the clearest indications that EU competition law does not adopt a total welfare standard is that this criterion requires that “the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article [101(1)].”<sup>160</sup> The difficulty, in the context of cartel behavior, is that hard core examples of such conduct are precisely intended to transfer value from consumers to producers, leading to higher prices (in a broad sense<sup>161</sup>), without producing any countervailing additional value for consumers.<sup>162</sup> Simply put, even if we accept that economic operators have a legitimate interest to engage in profit-maximizing behavior generally,<sup>163</sup> the fact that this comes purely at the expense of the consumer side of the equation in the cartel context negates the validity of the claim.

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149. *Id.*

150. HORIZONTAL COOPERATION GUIDELINES, *supra* note 30, para. 9.

151. *Id.* *supra* note 30, paras. 74, 190, & 248.

152. Article 101(3) TFEU.

153. Case T-528/93 etc. *Métropole v. Commission* EU:T:1996:99, para. 118.

154. Article 101(3) Guidelines, *supra* note 145, para. 59.

155. *Id.* para. 60.

156. *Id.* para. 49.

157. *Id.*

158. Case T-588/08 *Dole Food Company*, paras. 316-317.

159. Article 101(3) TFEU.

160. ARTICLE 101(3) GUIDELINES, *supra* note 145, para. 85.

161. *Supra* note 127.

162. On this generally, see ARTICLE 101(3) GUIDELINES, *supra* note 145, para. 46.

163. In particular, Article 16 of the EU Charter of Fundamental Freedoms recognizes “[t]he freedom to conduct a business in accordance with Union law and national laws and practices.”

Finally, Article 101(3) incorporates an indispensability criterion, namely, a requirement that the arrangement does not “impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives.”<sup>164</sup> Again, this element is unlikely to be fulfilled in relation to hard core cartels. The first difficulty is that the indispensability test is inextricably linked to the nominal “objective economic efficiencies” generated by the arrangement, which, as discussed, is in itself a requirement that is unlikely to be satisfied. Moreover, even to the extent that, say, higher profits are exceptionally cognizable under Article 101(3), it is difficult to argue that anticompetitive concertation is “reasonably necessary”<sup>165</sup> to achieve this benefit, “in the sense that there are no other economically practicable and less restrictive means of achieving the efficiencies.”<sup>166</sup> Simply put, the private advantages that typically construe to cartelists—i.e., higher profits—are almost always achievable, alternatively and individually, through effective competition on the merits. Being required to compete more vigorously in order to make more money denies cartelists the monopoly profit of a quiet life, of course, but it is impossible to argue that this itself is unreasonable.

Things are more complicated in the context of the so-called crisis cartels, namely, cartels that form in response to a serious economic downturn that imperils the profitability or even the viability of many market participants.<sup>167</sup> The primary argument in favor of crisis cartels is that such arrangements do not seek, unreasonably, to increase the profits of economic actors but rather to resist destructive competitive forces that are likely to result in significant levels of market exit with consequent economic—and social—disruption. Accordingly, when the wider societal impact is taken into account, the putative cartel behavior cannot be said to be *purely* private profit-maximizing. Moreover, crisis cartels often have a degree of overtness (a factor considered further in the next subsection) or even governmental sponsorship, thus arguably lessening the perceived reprehensibility of such conduct. In earlier enforcement practice, the Commission was not unreceptive to approving certain crisis cartels notified for exemption under Article 101(3).<sup>168</sup> It may be doubtful, however, whether this practice has survived the switch to a “more economic approach” since 2004.<sup>169</sup> Indeed, there is an inherent risk in being too ready to exempt restrictive arrangements in dysfunctional markets, insofar as these are precisely the sorts of sectors where the effective functioning of the competition process is likely to lead to a more efficient and sustainable market structure in the longer term.<sup>170</sup> Moreover, as the Commission often notes in response to requests for reduced fines by undertakings that are facing financial difficulties,<sup>171</sup> an unduly generous approach may have the perverse effect of “conferring an unfair competitive advantage on the undertakings least well adapted to market conditions.”<sup>172</sup>

It is important to emphasize, however, that the mere fact that coordination contrary to Article 101(1) also fails to satisfy the requirements of Article 101(3) is not enough itself to warrant characterization as a hard core cartel. Indeed, by definition, in each of the noncartel horizontal infringement decisions discussed thus far—including *MasterCard*, *ISU*, and *Lundbeck*—the defendants had similarly failed to discharge their burden of proving the existence of sufficient countervailing pro-consumer efficiencies to justify the restrictive arrangements. What distinguishes the latter cases from the typical cartel prosecution, however,

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164. Article 101(3) TFEU.

165. ARTICLE 101(3) GUIDELINES, *supra* note 145, para. 73.

166. *Id.* para. 75.

167. See generally OECD, CRISIS CARTELS, DAF/COMP/GF (2011) 11.

168. See, e.g., Cases IV/30.810—Synthetic Fibres (Decision of July 4, 1984) and IV/34.456—Stichting Baksteen (Decision of Apr. 29, 1994).

169. See, in particular, the fairly unsympathetic approach outlined in OECD, CRISIS CARTELS. CONTRIBUTION FROM THE EUROPEAN UNION, DAF/COMP/GF/WD (2011) 20.

170. *Id.* in particular paras. 38 & 39.

171. A possibility granted by the 2006 FINING GUIDELINES, *supra* note 20, para. 35.

172. See, e.g., Case T-39/06 *Transcatav v. Commission* EU:T:2011:562, para. 222.

is that the defendants in those instances had at least *plausible*—if ultimately unsuccessful—claims for exemption under Article 101(3). In the average cartel decision, by contrast, such claims are generally dismissed unequivocally and out of hand.<sup>173</sup> Thus, while it may be unlikely that object restrictions more generally can be justified under Article 101(3),<sup>174</sup> it does not seem unfair to suggest that plain vanilla cartel restrictions can never be exempted, absent utterly exceptional circumstances.

#### D. Deliberate Secrecy and/or Deception

We come to our fourth and final characteristic of cartel behavior, namely, the fact that hard core cartels almost invariably involve some degree of deliberate secrecy and/or deception on the part of participants. The reason is straightforward: the unequivocal condemnation of cartels under Article 101(1) and the remote possibility of justification under Article 101(3) mean that defendants who remain determined to engage in cartel conduct necessarily do so *discretely*. There are two aspects to this criterion. On the one hand, the fact that defendants take efforts to conceal their activity indicates a prior awareness of its inherently objectionable illegal nature. On the other, deliberate deception or evasion of scrutiny may be construed as a form of moral wrongfulness, confirming the culpability of defendants even in the absence of anticompetitive effects. We consider both aspects in turn.

Perhaps the most immediate distinguishing feature of the types of behavior that are classified as cartels is that such activity, generally, takes place in secret, with defendants often going to significant lengths to conceal their conduct from scrutiny. Secrecy itself cannot be determinative of the existence of a cartel, of course: a hard-core cartel conducted openly in full view of antitrust authorities would not lose its character as such,<sup>175</sup> nor would the fact that behavior occurs in secret bring otherwise unproblematic conduct within the cartel category.<sup>176</sup> In the various documents that define cartel conduct for the purpose of Article 101, mere cartels are distinguished from secret cartels, suggesting that secrecy is not an inherent characteristic of the former.<sup>177</sup> Moreover, in a sense, to treat secrecy as an element of the *legal* test to determine the existence of a cartel risks “putting the cart before the horse”; that is, secrecy may be a practical necessity for cartelists because cartels constitute such egregious violations of Article 101, but it is not the secrecy itself that raises the antitrust concerns.

Nonetheless, evidence of *deliberate secrecy*—that is, efforts by cartelists to conceal their concertation from both the business world and enforcement authorities—may function to support the finding that a hard core cartel, specifically, exists. First, as noted, the existence of secrecy suggests awareness of manifest illegality on the part of the coordinating parties.<sup>178</sup> The Commission’s cartel leniency

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173. In Case AT.39610 Power Cables, the cartel decision which formed the basis of the subsequent appeal in *Toshiba*, for instance, a mere 3 of a total of 1,078 paragraphs in the judgment was dedicated to the possible application of the Article 101(3) exception, which included setting out the requirements for exemption and the arguments of the parties that it should apply. In Case COMP/39482—Exotic Fruit (Bananas), which preceded the appeal in *FSL Holdings*, discussion of Article 101(3) comprised a single paragraph out of 353, and the Commission expressly noted that the defendants had not advanced any arguments in that regard (para. 258).

174. The approach taken by the Commission, for instance, in its VERTICAL GUIDELINES, in particular paras. 23, 47 & 96.

175. An obvious example is the Organization of the Petroleum Exporting Countries cartel, albeit its members comprise sovereign states rather than “undertakings,” and thus are not susceptible to EU competition enforcement (hence, perhaps, the blatancy).

176. Case T-370/09 GDF Suez v. Commission EU:T:2012:333. This point was also emphasized in the opening paragraph of Advocate General Wahl’s Opinion in Case C-194/14 P AC-Treuhand: “[c]onduct that does not restrict competition . . . , however morally or ethically reprehensible it may be, cannot be caught by . . . [Article 101(1)].”

177. See the LENIENCY NOTICE, *supra* note 22, paras. 1 & 3, and Articles 2(14) & 2(15), ANTITRUST DAMAGES DIRECTIVE, *supra* note 26. The point is most obvious in the ECN+ DIRECTIVE, which offers different definitions of a “cartel” (Article 2(1)(11)) and a “secret cartel” (Article 2(1)(12)).

178. See, for instance, Case AT. 39574—*Smart Card Chips* (Decision of Sept. 3, 2014), para. 273, where the Commission made precisely this point.

program, for instance, construes secrecy as an integral aspect of any hard core cartel, implicitly for this reason.<sup>179</sup> Second, an absence of secrecy suggests the existence of a plausible pro-competitive explanation for the conduct, insofar as the undertakings concerned have either failed to see or are confident that they can justify the restrictive elements of their arrangements. This latter point serves to explain why a case like *BIDS*, for instance, was neither labeled nor prosecuted as a cartel, even though the basic elements—horizontal collusion, restricting a key parameter of competition—were satisfied.<sup>180</sup> On the other hand, the existence of clear and deliberate efforts to conceal evidence of the underlying collusion arguably strengthened the case for treating the *Libor* arrangements, for example, as cartel conduct.<sup>181</sup>

The almost inescapable presence of secrecy is reflected in cartel enforcement practice at EU level. Most obviously, infringement decisions typically involve a statement by the Commission to the effect that uncertainty regarding the very existence of the cartel raises the possibility that it might be ongoing, and so the parties concerned must bring their participation to an end if they have not done so. Similarly, the Court of Justice has recognized that,

[s]ince the prohibition on participating in anticompetitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, . . . and for the associated documentation to be reduced to a minimum.<sup>182</sup>

As this complicates the task of gathering sufficient proof of their existence, the Court accepts that evidence of a cartel may be “fragmentary and sparse,”<sup>183</sup> so that “the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia.”<sup>184</sup>

A number of recent cases illustrate the important dividing role that secrecy may play in enforcement. In *Consumer Detergents*,<sup>185</sup> for instance, the defendants collaborated openly in the context of an environmental initiative, which had received the prior approval of the Commission,<sup>186</sup> and this was unquestioned in the infringement decision. The cartel conduct, by contrast, took place in secret on the fringes of this initiative and was clearly judged to constitute a qualitatively different, more problematic form of coordination.

Conversely, although prompted by notification for exemption under Regulation 17, *Cartes Bancaires* originally ran as a cartel investigation, where the Commission suspected that the defendants were party to a “secret anticompetitive agreement” and that the notification had been made “with the aim of concealing the real content of the anticompetitive agreement.”<sup>187</sup> The Commission subsequently dropped its cartel claims and focused on restrictions within the membership rules as notified. Yet, although it treated the latter as a “by object” restriction, the Commission abandoned its stated

179. LENIENCY NOTICE, *supra* note 22, paras.1 & 3.

180. Case C-209/07 *Beef Industry Development Society and Barry Brothers* EU:C:2008:643. The case involved an agreement between beef processors in Ireland to reduce capacity in the sector by 25%, with the processors who remained in the market paying compensation to those who exited. Although on its face a blatant collective output restriction, the scheme was encouraged by the agriculture ministry as a means to improve the economic performance of the sector, and had been notified by participants to the national competition authority for authorization on this basis.

181. *Supra* note 117.

182. Case C-204/00 *P Aalborg Portland and Others v. Commission* EU:C:2004:6, para.55.

183. *Id.* para. 56.

184. *Id.* para. 57. This point was similarly emphasized by Advocate General Szpunar in his Opinion in Case C-74/14 *ETURAS*, para. 77, specifically in the context of “secretive anticompetitive practices.”

185. Case COMP/39.579—*Consumer Detergents* (Decision of Apr. 13, 2011).

186. *Id.* para. 20.

187. Case C-67/13 *P CB v. Commission* EU:C:2014:2204, para. 5.

intention to fine the undertakings concerned,<sup>188</sup> suggesting that horizontal coordination pursued openly is viewed less critically (and thus subject to less onerous sanctions) than secret collusion.

An interesting dilemma arose in *Bananas*, where company executives in the course of a financing exercise discovered that certain employees had engaged in secret bilateral discussions with competitors. The conduct at issue, strictly speaking, lay on the boundary of which might be considered cartel behavior. But its clandestine nature, and the possibility that it might subsequently be uncovered and investigated by competition regulators—a “known unknown”—apparently worried the investors. The defendant accordingly chose to blow the whistle on its own dubious conduct, in order to have greater certainty about its future legal position.<sup>189</sup> Having framed its behavior as a cartel through an application for immunity, moreover, the label stuck, and was confirmed by both the Commission and Courts on appeal.<sup>190</sup>

The notion that cartel offenses represent a qualitatively different, more serious violation of Article 101 on account of the inherent moral reprehensibility of the conduct concerned is worthy of consideration. Surveying the Commission’s cartel enforcement procedures in *KME*, Advocate General Sharpston argued that the treatment of cartel offenses under Article 101(1) should be considered to fall within the category of “criminal” forms of misconduct, on the basis, inter alia, that “the offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma.”<sup>191</sup> A ready example is *Hoffmann-La Roche & Novartis*, where characterization of the conduct as a “by object” restriction hinged upon whether the collective efforts were intended to mislead, confuse, and/or otherwise manipulate public opinion erroneously to the defendants’ advantage.<sup>192</sup> Similarly, in *ETURAS*, Advocate General Szpunar justified a finding of cartel conduct premised upon the mere receipt and reading of the suspect email, on the basis that “[t]he lack of opposition to an illicit communication is reprehensible” in itself, as it could encourage others to act anticompetitively.<sup>193</sup> In declining to follow the advice of its Advocate General in *AC-Treuhand*, moreover, the Court of Justice put less emphasis on the technical question of whether the consultancy firm exercised a competitive constraint on its cartel clients,<sup>194</sup> and more on the fact that it had willingly and knowingly assisted a blatant violation of Article 101.<sup>195</sup>

As noted, this criterion of enhanced moral wrongfulness is reflected, within U.S. antitrust law, through the application of individual criminal sanctions for cartel conduct, and this is similarly the case within a growing number of national jurisdictions in Europe.<sup>196</sup> Evaluating the arguments for criminalization, Whelan drew broad though not absolute parallels to three established areas of criminal conduct: stealing, deception, and cheating. Pertinently, he argued that the “rational actor” model that underpins economic deterrence theory can provide support for the argument that cartelists have the relevant (direct) intentions required to substantiate claims that they violate established moral norms,

188. *Id.* paras. 5-9.

189. See the discussion in Case T-588/08 *Dole Food Company*, para. 90.

190. COMP/39188—*Bananas* (Decision of October 15, 2008), finally confirmed in Case C-286/13 P *Dole Food v. Commission* EU:C:2015:184.

191. Opinion in C-272/09 P *KME Germany and others* EU:C:2011:63, para. 64.

192. Case C-179/16 F. *Hoffmann-La Roche Ltd* EU:C:2018:25, in particular paras. 89 & 92–94.

193. Opinion of Advocate General Szpunar in Case C-74/14 *ETURAS* EU:C:2015:493, para. 49.

194. A point that Advocate General Wahl had particularly exercised in his Opinion Case C-194/14 P *AC-Treuhand* EU:C:2015:350, paras. 62–70.

195. Case C-194/14 P *AC-Treuhand* EU:C:2015:717, para. 38.

196. Discussed, e.g., PETER WHELAN, *European Cartel Criminalisation and Regulation 1/2003: Avoiding Potential Problems, in THE CONSISTENT APPLICATION OF EU COMPETITION LAW. SUBSTANTIVE AND PROCEDURAL CHALLENGES* 109-29 (ADRIANA ALMÄŞAN & PETER WHELAN eds., 2017).

thus justifying punishment on a retribution-oriented basis.<sup>197</sup> EU law, as noted, does not currently allow the imposition of criminal sanctions directly by the EU institutions.<sup>198</sup> Nonetheless, the current enforcement framework still marks out cartels as qualitatively more serious than other antitrust infringements.

On the one hand, in *Schenker*, the Court of Justice held that defendants which had engaged in cartel conduct could avoid the imposition of a fine only “exceptionally”—such as, in that instance, following a successful application for immunity under a leniency program.<sup>199</sup> (A skeptic might query whether the use of leniency is really “exceptional” in practice,<sup>200</sup> although the continuing importance of such programs in the EU in future has been questioned.<sup>201</sup>) This contrasts with the treatment of other noncartel horizontal “by object” restraints, such as the membership rules condemned in *ISU*, where the Commission noted, inter alia, the publicly known nature of the impugned restraints to justify its conclusion that no fine was warranted.<sup>202</sup> On the other, the Commission has interpreted the statement in Regulation 1/2003, that “[c]ommitment decisions are not appropriate in cases where the Commission intends to impose a fine,”<sup>203</sup> as precluding outright the application of the Article 9 procedure to “secret cartels” within the meaning of its Leniency Notice.<sup>204</sup> The stated rationale hinges solely on “the nature of the infringement,”<sup>205</sup> with the clear implication, again, that cartels as a class of infringement are somehow hierarchically more serious or harmful than any other category of breach. While this again sidesteps the trickier technical question of what constitutes a cartel, it confirms our starting point that hard core cartels comprise unique, and uniquely grave, violations of competition law.

#### IV. Concluding Remarks: Characterizing Hard Core Cartels under Article 101

This article set itself a straightforward task: characterization of the hard core cartel concept for the purposes of Article 101. The prohibition of cartels is the clearest and arguably least contentious norm of global competition law, and anti-cartel enforcement lies “at the heart of antitrust” in all jurisdictions.<sup>206</sup> Yet almost paradoxically, the concept of a cartel itself defies clear or ready definition within EU law, and the fairly basic description used in current enforcement practice suffers from both over- and underinclusiveness and inherent vagueness. The aim of this article was thus to bring greater clarity to a question which is of considerable practice importance, by stripping the hard core cartel notion down to its basis constituent elements and by situating these within the evolving EU jurisprudence.

197. Peter Whelan, *Cartel Criminalization and the Challenge of “Moral Wrongfulness,”* 33 *Ox. J. LEG. STUD.* 535 (2013). Contrast, however, certain empirical work which indicates that public attitudes to the merits of cartel criminalization lag behind the legislature in many jurisdictions: see, e.g., Caron Beaton-Wells & Christine Parker, *Justifying Criminal Sanctions for Cartel Conduct: A Hard Case*, 1 *J. ANT. ENF.* 198 (2013); and Andreas Stephan, *An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation*, 37 *LEG. STUD.* 621 (2017).

198. *Supra* note 19. Discussed further by Wouter P. Wils, *Is Criminalisation of EU Competition Law the Answer?*, 28 *WORLD COMP.* 117 (2005).

199. Case C-681/11 *Schenker & Co.* EU:C:2013:404, para. 40.

200. See, e.g., CARON BEATON-WELLS & CHRISTOPHER TRAN eds., *ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIANCE* (2015).

201. In particular, Johan Ysewyn & Siobhan Kahmann, *The Decline and Fall of the Leniency Programme in Europe*, N° 1-2018 *CONCURRENCES REVIEW* 44 (2018).

202. Case AT.40208—International Skating Union’s Eligibility rules (Decision of Dec. 8, 2017), para. 348.

203. Recital 13, REGULATION 1/2003.

204. EUROPEAN COMMISSION, *ANTITRUST MANUAL OF PROCEDURES* (Nov. 2019), Chap. 16, para. 13.

205. *Id.*

206. See INTERNATIONAL COMPETITION NETWORK, *CARTEL WORKING GROUP. 2019—2022 WORK PLAN 1*, <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/07/WorkPlan2019-22CWG.pdf>.

A four-pronged definition has been suggested: namely, that (i) cartels comprise forms of horizontal collusion, (ii) which restrict fundamental parameters of competition, (iii) involving purely private profit-maximizing behavior, and (iv) which almost invariably include some form of deliberate secrecy and/or deception on the part of participants. This article sought both to explain why each limb contributes toward the characterization of cartel behavior as “the supreme evil of antitrust” and to provide a more nuanced account of how each has been interpreted and developed in the case law. What remains to be done is to consider the collective importance of the four elements, and why, in sum, they connote particularly suspect and hazardous behavior from a competition policy perspective. The first two elements, it is suggested, represent the source of the inherent risk; the second two confirm that the balance of convenience in antitrust policy terms lies with an absolute rule against cartel conduct.

Cartels involve precisely the opposite of what neoclassical economic theory tells us is the structure of a well-functioning market: coordination between undertakings that otherwise should compete, in respect of precisely those factors about which they ought to compete most vigorously. To the extent that competition law is committed to enhancing consumer welfare through robust and effective competition, cartels therefore pose an inherent obstacle to this goal. Yet the mere fact that behavior has certain associated risks from a competition policy perspective does not, in a discipline enamored of error-cost analysis, justify its per se condemnation. Thus, it is the latter two elements which condition the circumstances in which an automatic and absolute prohibition is justified. The requirement of purely private profit-maximizing behavior seeks to avoid the risk of false positive findings of anti-competitive conduct, by limiting the most heavy-handed application of the competition rules to those activities that lack any plausible public interest justification. The requirement of secrecy and/or deception functions as an additional proxy for an absence of public benefit, insofar as the perceived moral reprehensibility of the underlying conduct reinforces arguments for its outright proscription. Cartels thus involve behavior that carries an inherent *risk of harm* from a competition policy perspective, where the wider circumstances (the absence of objective justification for the conduct, coupled with more subjectively suspicious behavior on the part of defendants) serve to confirm that such a risk is *likely to materialize*.

Inevitably, anti-cartel enforcement is a task that remains somewhat within the eye of the beholder: one man’s hub-and-spoke cartel may simply be another’s restrictive distribution agreement. Delimiting the outer limits of the hard core cartel concept is a heroic undertaking, and one which is arguably impossible or at least undesirable in view of the ever-shifting sands of market (and thus potentially anti-competitive) behavior. What this article has sought to do, instead, is to provide a clearer and more systematic roadmap for the characterization exercise that must be undertaken in novel or borderline cases, in order to identify what it is that renders cartel conduct still so firmly and intrinsically unacceptable from a competition policy perspective today.

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