

Vertical restraints after *Generics* and *Budapest Bank*

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Forthcoming in (2020) 17 Concurrences

I. Introduction

1. The meaning of the notion of restriction of competition seemed elusive for a long time.¹ As a result of the most recent case law, however, most remaining doubts regarding the scope of Article 101(1) TFEU have been clarified. In particular, the rulings of the Court of Justice (hereinafter, the ‘Court’ or the ‘ECJ’) in *Generics*² and *Budapest Bank*³ address and make explicit some aspects that were implicit – and thus not entirely uncontroversial – in previous judgments. In particular, it seems now clear beyond doubt that the pro-competitive effects of an agreement are relevant when considering whether it amounts to a restriction by object.⁴ The evaluation of the conditions of competition that would have existed in its absence is also a relevant consideration in this regard.⁵ More generally, *Generics* and *Budapest Bank* show that the evaluation of the object of an agreement is a context-specific inquiry (and thus not one based on abstract categories).

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¹ For an overview of the issue, see Pablo Ibáñez Colomo and Alfonso Lamadrid de Pablo, ‘On the Notion of Restriction of Competition: What We Know and What We Don’t Know We Know’ in Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017).

² Case C-307/18 *Generics (UK) Ltd and others v Competition and Markets Authority*, EU:C:2020:52.

³ Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, EU:C:2020:265.

⁴ *Generics* (n 2), para 103.

⁵ *Budapest Bank* (n 3), paras 82-83.

2. The purpose of this paper is to examine the impact of these rulings on debates around vertical restraints. The link between the two may not seem obvious, as *Generics* and *Budapest Bank* concerned horizontal agreements. It is submitted, however, that the relevance of these rulings – and the extent to which they clarify the scope of Article 101(1) TFEU – is particularly apparent in the context of distribution agreements. This is so for several reasons. To begin with, vertical restraints have long known to be a plausible source of pro-competitive gains.⁶ What is more, they are less likely to have anticompetitive effects. As a result, it is typically the case that they are not prohibited by their very nature, as held by the Court in *Maxima Latvija*.⁷ In the same vein, the Commission has long acknowledged, in the successive versions of its Guidelines, that vertical restraints are unlikely to give rise to competition issues unless there is insufficient inter-brand competition.⁸
3. With the growing importance of digital markets, second, some vertical restraints that had attracted little attention until recently are now at the forefront of disputes between firms and high on competition authorities' agendas. Of these arrangements, the so-called 'most-favoured nation' clauses (hereinafter, 'MFN clauses') are probably the ones that have proved more controversial and have given rise to more theoretical and practical discussions. In the absence of any case law specifically addressing its nature and whether (and if so in what circumstances) they amount to a restriction of competition, it is necessary to reason by analogy. In this exercise, the principles deriving from *Generics* and *Budapest Bank* are particularly useful to get an idea of a legal treatment that is consistent with the case law and the logic of the Block Exemption Regulation and the Guidelines.
4. This paper focuses on two key rationales behind vertical restraints, which are the fight against free riding and the creation and preservation of a brand image. From the very early

⁶ Vincent Verouden, 'Vertical Agreements: Motivation and Impact' in *Issues in Competition Law and Policy*, vol 3 (American Bar Association 2008).

⁷ Case C-345/14 *SIA 'Maxima Latvija' v Konkurences padome*, EU:C:2015:784, para 21.

⁸ Guidelines on vertical restraints [2010] OJ C130/1, para 6.

days, the Court noted that the parties to distribution agreements may include contractual devices to address the risk of opportunistic behaviour.⁹ Thus, in some circumstances, clauses aimed at addressing free riding conduct may be necessary for the agreement to exist in the first place. As a result, the said agreement may fall outside the scope of Article 101(1) TFEU altogether.¹⁰ Similarly, the ECJ understood, from the outset, how brand protection may be an indispensable precondition for a supplier to rely on third parties.¹¹ This restraint is particularly prominent in selective distribution and franchising systems.

II. Article 101(1) TFEU after *Generics* and *Budapest Bank*

1. How *Generics* and *Budapest Bank* clarify the case law

5. *Generics* and *Budapest Bank* are two landmarks in the case law. They were delivered by the Court following a period of uncertainty and some doctrinal controversy about the interpretation of Article 101(1) TFEU, in particular of the notion of restriction of competition. The essence of the uncertainty concerned the nature and intensity of the assessment that is required to establish whether an agreement falls within the scope of Article 101(1) TFEU by its very nature. By the time the two preliminary references had reached the Court, it was well-established that, in order to establish a ‘by object’ infringement, it is necessary to take into account the economic and legal context of which the agreement is a part.¹² However, there were still disagreements about how penetrating this analysis had to be as a matter of law.

⁹ Case 56/65 *Société Technique Minière*, EU:C:1966:38, 250.

¹⁰ *Ibid.*

¹¹ Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41.

¹² Case C-67/13 P, *Groupement des cartes bancaires v Commission*, EU:C:2014:2204, para 53.

6. The Court clarified in *Generics* and *Budapest Bank* that the analysis of whether an agreement has as its object the restriction of competition is context-specific. In this sense, it confirmed that the mere fact that a restraint is suspicious does not suffice, in and of itself, to conclude that the agreement breaches, by its very nature, Article 101(1) TFEU. Formally speaking, the restraints in the two cases seemed particularly egregious, at least on surface. In *Generics*, an incumbent in a market made a payment to a potential competitor to stay out of the market. In *Budapest Bank*, a group of rivals coordinated their conduct in relation to prices. Even though these restraints tend to be associated with the most serious violations of competition law, the Court ruled that they are not necessarily restrictive of competition by object. In a given economic and legal context, they may even fall outside the scope of Article 101(1) TFEU altogether.
7. Second, these two rulings confirm that the pro-competitive effects resulting from an agreement are a relevant consideration when evaluating whether it breaches Article 101(1) TFEU by its very nature. In this sense, the Court rejected the suggestion that such pro-competitive gains are only relevant under Article 101(3) TFEU. There was consistent case law leading to this conclusion,¹³ but no prior judgment was as explicit as *Generics* and *Budapest Bank* on this point. In the latter ruling, the Court held that, where there are ‘strong indications’ suggesting that an agreement is capable of having pro-competitive or at least ambivalent effects on competition, it does not amount to a ‘by object’ infringement.¹⁴ Similarly, in *Generics*, the Court held that an agreement does not restrict Article 101(1) TFEU by its very nature where there is a ‘plausible’ pro-competitive explanation for it.¹⁵

¹³ See inter alia Case 42/84 *Remia BV and others v Commission*, EU:C:1985:327; Case C-234/89 *Stergios Delimitis v Henninger Bräu AG*, EU:C:1991:91; Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734; and *Cartes Bancaires* (n 12).

¹⁴ *Budapest Bank* (n 3), para 82.

¹⁵ *Generics* (n 2), para 89.

8. Third, and more generally, the two judgments emphasise the relevance of the counterfactual in the analysis of restrictions under Article 101(1) TFEU. The Court confirmed in *Budapest Bank* that an evaluation of the conditions of competition that would have prevailed in the absence of the practice is a factor to consider in that regard. For instance, the parties may be able to provide evidence showing that the prices would have been higher if the parties had not concluded an agreement.¹⁶ Similarly, they may show that there are pro-competitive benefits that would not have materialised absent the practice.¹⁷ The analysis of the counterfactual can lead to the conclusion that the agreement is not restrictive by object – insofar as it would provide evidence that there is a plausible pro-competitive rationale for it – or that it falls outside the scope of Article 101(1) TFEU altogether (which would be the case, for instance, where the practice is found to be objectively necessary).¹⁸
9. A final lesson one may draw from *Generics* and *Budapest Bank* is that the lessons of experience and economic analysis must be considered when evaluating whether an agreement amounts to a ‘by object’ restriction. In the latter ruling, the Court explicitly held that the ‘by object’ label would not be appropriate where there is insufficiently ‘reliable and robust’ experience about the nature of the practice and its potential effects.¹⁹ The ECJ appears to suggest that there should be a consensus suggesting that it is appropriate to treat the practice as prima facie unlawful irrespective of its effects. In this regard, mainstream economics can provide valuable insights. In *Budapest Bank* – and previously, in *Cartes Bancaires* – research on two-sided markets shed light on the nature and potential effects of the agreements at stake.²⁰

¹⁶ *Budapest Bank* (n 3), paras 82-83.

¹⁷ *Generics* (n 2), paras 103-111.

¹⁸ *Société Technique Minière* (n 9) and *Pronuptia* (n 11).

¹⁹ *Budapest Bank* (n 3), para 76.

²⁰ *Ibid*, para 85.

2. *Generics, Budapest Bank* and vertical restraints

10. In many respects, the Court's case law on vertical restraints provided the most reliable signals that *Generics* and *Budapest Bank* would be decided the way they did. Rulings like, inter alia, *Delimitis* (on exclusive dealing),²¹ *Pronuptia* (on franchising)²² and *Metro I* (on selective distribution) were based on the very same approach.²³ A reading of these judgments shows that, because the agreement was found to have a pro-competitive rationale, it was deemed not to restrict competition by object. Since, for instance, an exclusive dealing arrangement can be plausibly required for reasons that have nothing to do with rival foreclosure, the 'by object' label was not deemed appropriate for the practice.²⁴ In some circumstances, the counterfactual analysis reveals that some clauses are objectively necessary for an agreement to exist and thus fall outside the scope of Article 101(1) TFEU. Accordingly, a clause that is 'really necessary' for a supplier to enter a new market is not restrictive of competition, whether by object or effect.²⁵
11. The analysis that follows focuses on the role of vertical restraints as a tool to tackle free riding and brand protection. Experience and economic analysis show that some frequent categories of distribution agreements are in fact a contractual device to address the risk of free riding.²⁶ Exclusive distribution, for instance, allows the reseller to prevent third parties from capturing the fruits of the promotional efforts it makes in the territory allocated by its supplier.²⁷ Vertical restraints also have a major role to play in the preservation of a brand image. As acknowledged by the Court in *Pronuptia*, a supplier may not be willing to rely

²¹ *Delimitis* (n 13).

²² *Pronuptia* (n 11).

²³ Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission*, EU:C:1977:167 (*'Metro I'*).

²⁴ *Delimitis* (n 13), paras 10-12.

²⁵ *Société Technique Minière* (n 9), 250.

²⁶ Guidelines on vertical restraints (n 8), para 107.

²⁷ *Ibid.*

on third parties to sell its products if the brand image surrounding its products would be jeopardised as a result.²⁸ Franchising and selective distribution, inter alia, are contractual mechanisms that allow suppliers to preserve the value of their brand.

III. Brand protection under Article 101(1) TFEU

1. Brand protection in the case law: certainties and uncertainties

12. The seminal rulings on the legal status of selective distribution and franchising were delivered by the Court between the mid-1970s (*Metro I*) and mid-1980s (*Pronuptia*). In these early judgments, it was assumed that brand protection is one of the main drivers behind the recourse to these distribution methods. In fact, the restraints included in selective distribution systems are uniquely suited to ensure that the aura of a product or firm is not harmed in dealings with third parties. The sort of clauses found in these agreements relate, inter alia, to the location, look and feel of the premises as well as the training of employees.²⁹ If *Metro I* concerned technically sophisticated products, the perfume judgments of 1980 concerned luxury goods. Nothing in the Court's reasoning in the latter suggests that the use of selective distribution in relation to such products would turn the clauses into restrictions of competition, let alone by object.³⁰ According to the prevailing view after 1980, a selective distribution system concerning luxury goods would fall outside the scope of Article 101(1) TFEU altogether where the rest of the conditions set out in *Metro I* are fulfilled.³¹

²⁸ Ibid.

²⁹ Ibid, para 174.

³⁰ Joined Cases 253/78 and 1 to 3/79 *Procureur de la République and others v Bruno Giry and Guerlain SA and others*, EU:C:1980:188; Case 37/79 *Anne Marty SA v Estée Lauder SA*, EU:C:1980:190; Case 99/79 *SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV*, EU:C:1980:193.

³¹ See for instance Case T-87/92 *BVBA Kruidvat v Commission*, EU:T:1996:191.

13. Doubts about the relationship between selective distribution and the protection of the supplier's brand image emerged in the aftermath of *Pierre Fabre*.³² The Court held in this judgment that the 'aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU'.³³ This paragraph could be interpreted as suggesting that the preservation of a brand image does not justify the setting up of a selective distribution system. In *Coty*, however, the Court clarified that *Pierre Fabre* must be interpreted as relating to the specific facts of that case alone – a clause that banned all forms of online selling by selective distributors.³⁴
14. One can safely conclude from *Coty* that the clauses in a selective distribution agreement that seek to protect the brand image of a product do not restrict competition by object and that, where the conditions set out in *Metro I* are fulfilled, they fall outside the scope of Article 101(1) TFEU altogether. However, this conclusion is not entirely uncontroversial. It has been suggested that the brand protection argument in *Coty* is only relevant concerning luxury goods.³⁵ According to this view, a selective distribution system applying to non-luxury goods (such as for instance running shoes) would amount to a 'by object' infringement. By the same token, arguments relating to the protection of a firm's brand image in such cases would only be relevant, from this perspective, under Article 101(3) TFEU.³⁶

³² Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, EU:C:2011:649.

³³ *Ibid*, para 46.

³⁴ Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941.

³⁵ Bundeskartellamt, '.

³⁶ Bundeskartellamt, 'ASICS dealers allowed to use price comparison engines - Federal Court of Justice confirms Bundeskartellamt's decision' (Bonn, 25 January 2018).

2. Addressing the uncertainties in light of *Generics* and *Budapest Bank*

15. *Generics* and *Budapest Bank* provide a useful background to address the abovementioned uncertainties. The two judgments suggest that the most reasonable interpretation of *Coty* is one where the brand protection argument is relevant under Article 101(1) TFEU irrespective of whether the selective distribution system relates to a luxury or a non-luxury good. Both rulings clarify that the pro-competitive aspects of an agreement can be considered when evaluating its object. What is more, the experience of decades of enforcement, as reflected in the Commission's Guidelines on vertical restraints, shows that the protection of the brand image of a product or firm is a plausible explanation for the recourse to selective distribution. This is also consistent with the lessons of economic analysis.³⁷

16. Third, experience also shows that concerns with the brand image of a product or firm are not limited to the luxury industry. Product differentiation is a relevant aspect of competition in many sectors in which firms offer heterogeneous goods. This becomes apparent when one takes into account the intellectual property dimension of brand protection. Firms in a wide range of sectors seek trade mark protection for their goods. Crucially, the intellectual property regime does not distinguish between luxury and non-luxury goods in this regard. The 'essential function' of a trade mark is the same in all cases, and it is to ensure the 'identity of origin' of the products.³⁸ Crucially, the Court accepted, in *Copad*, that a selective distribution system may be an integral aspect of brand protection.³⁹

³⁷ Oxera and Accent, 'Vertical restraints: new evidence from a business survey' (London, 24 March 2016).

³⁸ Case C-59/08 *Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie*, EU:C:2009:260, para 22.

³⁹ *Ibid*, para 30.

IV. MFN clauses under Article 101(1) TFEU

1. The rise of MFN clauses in digital markets

17. MFN clauses have attracted the attention of competition authorities in recent years. The rise in prominence of these clauses is explained, by and large, by their role in digital markets. The essence of MFN clauses in the online context is easy to summarise. Typically, it is a requirement on suppliers selling goods or services via an online platform not to offer lower prices on other distribution channels. It is, in other words, a ‘best price’ guarantee given to the platform operator. MFN clauses have two apparent effects. First, they constrain the freedom of the suppliers to offer lower prices elsewhere, including their own website. Second (and as a result of the first), they reduce price competition and thus deny some of the expected benefits of online distribution. As a result of these features, they are often seen with suspicion, and have been likened to resale price maintenance (hereinafter, ‘RPM’), which – as the law stands – is restrictive of competition by object. By limiting price competition, MFN clauses may have not only collusive but also exclusionary effects.
18. A careful analysis of the nature and purpose behind MFN clauses suggests, however, that there are plausible pro-competitive explanations for their inclusion in online distribution agreements. In particular, the free-riding explanation comes across as particularly compelling.⁴⁰ Online platforms provide visibility to suppliers, which may as a result reach a larger number of potential users than they would if they had relied on their own distribution network alone. Platform operators, however, need to develop mechanisms to ensure they receive adequate remuneration for their investments. In this sense, MFN

⁴⁰ Jonathan B Baker, Fiona Scott Morton, ‘Antitrust Enforcement Against Platform MFNs’ (2018) 127 Yale Law Journal 127.

clauses allow them to tackle the supplier's opportunistic behaviour, which may benefit from the exposure given by the platform while offering lower prices elsewhere.

19. Crucially, the pro-competitive rationale behind MFN clauses appears to be equally plausible irrespective of whether they are of the 'narrow' or the 'broad' variety instead.⁴¹ A 'narrow' MFN clause is one whereby the supplier commits not to offering a lower price on its own website. A 'wide' MFN clause, on the other hand, is one whereby the supplier commits not to offering lowering prices neither via its own website nor via any other platform. While it is generally accepted that the latter variety is typically more problematic, in the sense that it is more likely to lead to anticompetitive outcomes, the 'free riding' rationale is not less plausible.⁴²

2. MFN clauses through the lenses of *Generics* and *Budapest Bank*

20. A joint reading of *Generics* and *Budapest Bank* leads to the conclusion that MFN clauses are unlikely to be deemed restrictive by object by the Court. In particular, the two rulings show that the fact that the clauses limit suppliers' freedom to determine their prices – and the fact that they could have the effect of limiting or eliminating price competition across the board – is not a decisive factor. What matters, according to *Budapest Bank*, is whether there are 'strong indications' suggesting that the MFN clauses are capable of having both pro- and anticompetitive effects. One should bear in mind, in this regard, that the Court expressly accepted, in *Cartes Bancaires*, that the fight against free riding is a legitimate objective and a factor that should be taken into account when evaluating its object.⁴³

⁴¹ Ibid, 2183. See also Commission, 'Support studies for the evaluation of the VBER' (Brussels, May 2020).

⁴² 'Support studies for the evaluation of the VBER' (n 41), 109-110.

⁴³ *Cartes Bancaires* (n 12), paras 74-75.

21. Another crucial factor that pleads against categorising MFN clauses as ‘by object’ infringements has to do with the limited experience acquired so far, in addition to the lessons of economic analysis. MFNs raise a relatively new challenge for competition authorities, and its impact is still discussed in the economic literature, both from a theoretical and an empirical standpoint. What is more, the mainstream position, as research stands, pleads in favour of a case-by-case assessment of the impact of these clauses and thus against a blanket ban that would fail to consider, *inter alia*, the market power of the platform requiring the MFN clause and the features of the relevant market.⁴⁴
22. More generally, one should bear in mind that the impact of MFN clauses on price levels should not be deemed a decisive reason to treat them as restrictions by object. A number of vertical restraints have the same effects without their being treated as infringements, by their very nature, of Article 101(1) TFEU. In *Metro I* and *II*, for instance, the Court acknowledged that selective distribution systems tend to reduce, if not eliminate completely, price competition between resellers.⁴⁵ In spite of this fact, it concluded that they are not necessarily anticompetitive and can fall outside the scope of Article 101(1) TFEU altogether where certain conditions are fulfilled.

V. Implications

1. The review of the Block Exemption Regulation

23. Brand protection (in the context of selective distribution) and MFN clauses feature prominently in discussions about the ongoing review of the Block Exemption

⁴⁴ See in this sense the ‘Support studies for the evaluation of the VBER’ (n 41).

⁴⁵ *Metro I* (n 23) and Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission*, EU:C:1986:399.

Regulation on Vertical Restraints.⁴⁶ There is evidence suggesting that selective distribution is frequent in the resale of goods and services online.⁴⁷ The same is true of MFN clauses.⁴⁸ This is the background against which one should consider the legal treatment that should be given in the future Regulation to these two restraints. Two fundamental points arise. The first is whether the Commission should depart from the hands-off approach it has traditionally taken vis-a-vis (online) selective distribution. The second is whether MFN clauses should be treated as ‘hardcore restrictions’ (which would leave the agreements outside the scope of the block exemption).

24. Concerning the first point, the evolution of the case law suggests that there would be no reason to alter the treatment, as a matter of policy, of selective distribution. If anything, the very nature of online retail makes it arguably more necessary. It is not necessary to explain at length why the Internet makes the protection of a firm’s or a product’s brand image more challenging.⁴⁹ The Commission appears to share the same view. In a Policy Briefing issued after the Court’s judgment in *Coty*, it expressed the view that the distinction between luxury and non-luxury goods is not a crucial one when it comes to the application of the current version of the Block Exemption Regulation.⁵⁰
25. It has been argued that some of the practices aimed at protecting the brand image of a product deserve a stricter approach. In particular, it has been argued that agreements restricting the use of online marketplaces limit retailers’ ability to compete and, by the same token, restrict consumer choice.⁵¹ Other contentious clauses include those limiting retailers’ ability to rely on price comparison tools, which are essentially similar in their

⁴⁶ ‘Support studies for the evaluation of the VBER’ (n 41).

⁴⁷ Commission, ‘Preliminary Report on the E-commerce Sector Inquiry’ SWD(2016) 312 final.

⁴⁸ *Ibid.*

⁴⁹ ‘Support studies for the evaluation of the VBER’ (n 41), 65-66.

⁵⁰ Commission, ‘EU competition rules and marketplace bans: Where do we stand after the *Coty* judgment?’ (April 2018).

⁵¹ Bundeskartellamt, ‘Competition restraints in online sales after *Coty* and *Asics* – what’s next?’ (Bonn, October 2018).

nature and potential anticompetitive effects.⁵² Nothing in these clauses, however, is different from those traditionally found in selective distribution systems. The point of all such restraints is to keep tight control over who retails the supplier's product, and how. In this sense, a manufacturer's refusal to supply its products to a cash-and-carry chain (at stake in *Metro I*) is not fundamentally different from a restraint preventing a firm's products being associated with service operators (such as marketplaces and price comparison websites) with which it has not chosen to deal.

26. As far as MFN clauses are concerned, the experience accumulated over the past decade and the current state of the academic literature advise against imposing a blanket ban on them by means of a Block Exemption Regulation. The most obvious conclusion, accordingly, would be not to provide any specific rules for MFN clauses. Given their high profile and the concerns to which they give rise in practice, however, the Commission may be tempted to introduce bright lines specifically conceived for them. If so, consistency with the logic of the case law suggests that such bright lines come closer to a standard analysis of effects. For instance, 'wide' MFN clauses could be deemed an excluded (Article 5) restriction above the market share threshold. Accordingly, their lawfulness would require a case-by-case assessment.

2. The future of RPM in the case law

27. When considering the case law as a whole, it is difficult to escape the conclusion that the current treatment of RPM in the case law is not immediately obvious to reconcile with the logic underpinning *Generics* and *Budapest Bank*. Economic analysis shows that vertical price-fixing is a plausible source to achieve pro-competitive gains relating,

⁵² 'Support studies for the evaluation of the VBER' (n 41), 72.

in particular, to brand protection and the prevention of free riding.⁵³ Suffice it to take a look at a case like *Leegin* to realise that, in practice, the nature and purpose of the practice is not fundamentally different from that of selective distribution systems.⁵⁴ Accordingly, it would be natural to conclude that RPM should not be treated as a ‘by object’ infringement.

28. However, RPM has traditionally been considered to be restrictive of competition by its very nature, and this, irrespective of the circumstances of the case. In *Metro I*, the ECJ held that price competition is ‘so important that it can never be eliminated’.⁵⁵ In *Binon*, it took the view that any pro-competitive effects of the practice (which were invoked by the parties and not disputed in the judgment) would have to be considered under Article 101(3) TFEU, not under Article 101(1) TFEU.⁵⁶ This aspect of the ruling is difficult to reconcile with *Generics* and *Budapest Bank*. This is also true of the Court’s analytical approach, which suggested that the context of which the practice is a part is irrelevant. The ‘by object’ status of RPM was reiterated in *Pronuptia*.⁵⁷

29. The fundamental question, against this background, is whether the legal treatment of RPM would change if the case were brought again before the Court. Even though the ECJ is cautious when revisiting its case law, such an outcome cannot be completely ruled out. This is so for two main reasons. First, experience and economic analysis suggest that RPM can have pro-competitive effects. In the support studies prepared for the Commission in the context of the review of the Block Exemption Regulation, the ambivalent effects of the practice are acknowledged. In fact, the empirical evidence from the book publishing sector show that it can sometimes enhance consumer

⁵³ *Ibid*, 85-87.

⁵⁴ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁵⁵ *Metro I* (n 23), 21.

⁵⁶ Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284, para 46.

⁵⁷ *Pronuptia* (n 11), para 25.

welfare.⁵⁸ Second, it has become increasingly apparent that it may not be obvious to distinguish between RPM and other practices that are not treated as ‘by object’ infringements. The example of selective distribution has already been mentioned. In addition, authorities and commentators have noted that it is not obvious to tell MFN clauses apart from RPM.⁵⁹

⁵⁸ ‘Support studies for the evaluation of the VBER’ (n 41), 89-90.

⁵⁹ See for instance Amelia Fletcher and Morten Hviid, ‘Broad Retail Price MFN Clauses: Are They RPM “At Its Worst”’ (2016) 81 *Antitrust Law Journal* 65.