Yearbook of European Law, 2024, **00**, 1–37
https://doi.org/10.1093/yel/yeae010
Article

OXFORD

Restrictions by object under Article 101(1) TFEU: From dark art to administrable framework

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ABSTRACT

This article presents the principles underpinning the approach followed by the Court of Justice (ECJ) when evaluating whether a practice has, as its object, the restriction of competition. It discusses, inter alia, what an authority (or claimant) needs to prove and explains what the evaluation of the economic and legal context involves in concrete terms. The analysis shows that the ECJ's overall approach is both predictable (in the sense that the notion has clear and finite boundaries) and administrable (in the sense that the said approach places adequate and workable demands on authorities and claimants). It appears, on the other hand, that there are ways in which some principles underpinning the case law could be streamlined and made more explicit so as to guarantee the uniform application of Article 101 (1) TFEU across the European Union at a time when private enforcement is on the rise.

I. INTRODUCTION

What practices amount to a restriction of competition by object within the meaning of Article 101(1) TFEU? Over the past two decades, the Court of Justice (hereinafter, the 'Court' or the 'ECJ') has been regularly invited to clarify the scope and meaning of the notion. It has addressed a wide array of points of law, ranging from the general to the specific. As far as issues of principle are concerned, it has considered, among others, how the analysis of the relevant economic and legal context is to be performed,[1] whether the pro-competitive gains resulting from a practice influence its legal characterization,[2] and the extent to which experience plays a role in the assessment.[3] As far as behaviour-specific issues are concerned,

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

[2] Case C-307/18 *Generics (UK) Ltd and others v Competition and Markets Authority*, EU:C:2020:52; followed by Case C-151/19 P *Commission v KRKA, tovarna zdravil, d.d.*, EU:C:2024:546, para 61; and Case C-176/19 P *Commission v Servier SAS and others*, EU:C:2024:549, para 94.

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

the case law has shed light on the legal status of well-known practices, such as resale price maintenance[4] and exchanges of information,[5] but also of factual scenarios with which the Court had not been confronted before, including reverse payment settlements[6] and restrictions on sales via online marketplaces.[7]

In spite of the breadth and richness of these additions to the body of law, there is no definite sense among commentators that the meaning of the notion of restriction by object has been clarified.[8] One may be tempted to conclude, when going through the literature, that the scope of Article 101 TFEU is, and will forever remain, shrouded in mystery.[9] A careful reading of the case law shows, however, that this perception is not accurate. The judgments of the past two decades provide the basis for an approach that is both predictable and administrable. The Court's approach is predictable in the sense that it has meaningful and finite boundaries but also in the sense that one can infer from it an operational methodology to determine whether or not a given practice is caught, by its very nature, by Article 101(1) TFEU. The approach is administrable, in turn, insofar as it places workable demands on authorities and claimants.[10] It is also flexible: the assessment adjusts to, and is modulated by, the features of the practice and the relevant context. Thus, establishing a restriction by object will be more or less straightforward depending on the nature of the behaviour in issue and the experience acquired in relation to it. This is the first point of the article. It is grounded on an extensive analysis of the case law.

The key to make sense of whether conduct is restrictive by its very nature lies in the plain meaning of the word 'object'. The objective purpose of a practice determines whether it is, in and of itself, contrary to Article 101(1) TFEU. If anything, this conclusion has become less contentious following the most recent rulings. A close reading of the case law shows that there are three aims that are inherently inimical to the European Union ('EU') system of undistorted competition: collusion (ie, the substitution of cooperation for the risks of competition[11]), exclusion (ie, the foreclosure of actual or potential rivals[12]) and the limitation of cross-border trade within the EU (ie, the re-erection of the barriers that the Treaty of Rome was designed to bring down[13]). The identification of the object of a practice is a context-specific exercise: it considers the realities and dynamics of which it is a part.

The second point of the article is that any ideas that the notion has a volatile and inscrutable scope can be attributed to the gap that occasionally opens between the law as stated by the Court and the law as applied by authorities and national courts. The principles enunciated in the case law have not fully trickled down to other decision-making bodies (or have only done so imperfectly and unevenly).[14] This is so for two main reasons. First, received

[4] Case C-211/22 *Super Bock Bebidas, SA and others v Autoridade da Concorrência*, EU:C:2023:529.

[5] Case C-8/08 T-*Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343; and Case C-298/22 *Banco BPN/BIC Português SA and others v Autoridade da Concorrência*, EU:C:2024:638.

[6] *Generics* (n 2), Case C-591/16 P *H. Lundbeck A/S and Lundbeck Ltd v Commission*, EU:C:2021:243'; and *Servier* (n 2).

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

[8] See, for instance, Svend Albaek. 'Why I Don't Understand the Case Law on Object Restrictions' (*Chillin' Competition*, 14 June 2018); Peter Alexiadis and Pablo Figueroa, 'Mixed Messages in the "By Object" vs "By Effects" Saga: The Enigma of *Lundbeck*' (*Competition Policy International*, February 2018); and Okeoghene Odudu, 'The Object/Effect Distinction' in Nicolas Charbit and Sonia Ahmad (eds), *Taking Competition Law Outside the Box: Liber Amicorum in Honour of Richard Whish* (Concurrences 2020).

[9] In a relatively recent piece exploring the notion, a leading academic concluded on the following pessimistic note: 'This is a debate for the future, and it simply remains to say, as Whish wrote in his first edition, "behind the apparent simplicity of this provision there lie many problems". So it was. And so it continues to be'. See Odudu ibid.

[10] The remainder of this article will refer to authorities as a shorthand for both authorities and claimants.

[11] *T-Mobile* (n 5), para 26.

[12] Case C-234/89 *Stergios Delimitis v Henninger Bräu AG*, EU:C:1991:91.

[13] Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, EU:C:1966:41, 339.

[14] The regular stream of preliminary references submitted to the Court, some of which will be discussed at length hereinafter, provide the most eloquent evidence about the gap that sometimes opens between the law as stated and the law as applied.

ideas (in addition to doctrines borrowed from US antitrust law) interfere with the criteria laid down in the case law. For example, there is, to this day, a tendency to rely on the formal features of an agreement (such as the fact that it involves price-fixing or market sharing) to conclude that it is restrictive by its very nature. This is so even though the Court has consistently held that form, in and of itself, is insufficient to establish a 'by object' infringement.

The gap between the law as interpreted and the law as applied is also explained by the very success of Regulation 1/2003.[15] The decentralized enforcement of Article 101(1) TFEU means that disagreements about the meaning of the notion of restriction by object have become more profound than they were when the European Commission was, by some distance, the preeminent actor in the system. With decentralization, the potential scope for confusion—and the concomitant need for clarity—grows larger. The rise of private enforcement—another success story of Regulation 1/2003—exacerbates this trend. One should bear in mind, in this regard, that private claimants' motivations and incentives are fundamentally different from those of public authorities, and that this difference is necessarily reflected in the legal interpretations they favour.

The third point that this article makes is normative in nature. It is submitted that an approach to restrictions by object like the existing one (ie, an approach that is stable, flexible and has finite boundaries) is to be preferred over one that fluctuates from case to case. The predictable and administrable framework underpinning the case law has obvious and substantial advantages over more volatile or unstable interpretations of Article 101(1) TFEU. It is submitted, moreover, that the current approach favours balanced outcomes for all actors involved. The need for stability and continuity in the interpretation and application of the law has, if anything, become ever more apparent over time. Because private enforcement is on the rise, the principles of the case law are put to the test more frequently and in more unusual ways before national courts.

The fourth point in the article relates to the third. The case law, while predictable and administrable, remains vulnerable. Its vulnerabilities will become more apparent with the growing pressures coming from the shift in enforcement patterns. It is submitted that, in a changing landscape, the current framework could become more resilient if certain aspects pertaining to its operation were articulated more directly and explicitly. Similarly, the case law would gain in clarity if some—potentially misleading—formulas were downplayed. This streamlining exercise would make it clear, above all, that figuring out whether a practice is restrictive by object is not a dark art. The moment one looks beneath recurrent formulas and received wisdom, the meaning of the notion becomes, in fact, transparent.

The above points are presented and organized in the remainder of the article as follows. Section II identifies some of the reasons behind the perception that the notion of restriction by object lacks a clear meaning. Section III advances the overarching thesis of the piece and,

Four concrete examples, some of them drawn from pending cases, show how the contextual approach has failed to fully trickle down to national courts and authorities. Consider the reference that would lead to the Court judgment in *Super Bock* (n 4). At first instance, the national court had ruled that vertical price-fixing is a restriction of competition by object without the need to consider the economic and legal context (in blatant contradiction with the Court's consistent approach). Another example is that provided by Case C-209/23, *FT and RRC Sports GmbH v Fédération Internationale de Football Association (FIFA)*, pending. In the dispute at the national level that preceded the reference, the national court reached the preliminary conclusion that the rules at stake in the case were restrictive by object, based on the fact that it involves the fixing of prices. The third and fourth examples come from earlier cases, which are equally eloquent about the approach consistently displayed by competition authorities (even though at the time the Court had consistently signalled that a formalistic approach cannot substantiate the conclusion that an agreement is restrictive by object). One of these is *Budapest Bank* (n 3), where the national competition authority concluded that the practice at stake amounted to a restriction by object insofar as it amounted to indirect price-fixing; another is Case C-345/14 *SIA 'Maxima Latvija' v Konkurences padome*, EU:C:2015:784, where the Latvian authority had concluded that a non-compete clause included in a lease agreement between a shopping centre and its anchor tenant amounted to a restriction by object.

[15] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1.

in the same vein, defines the three instances in which a practice falls within the scope of Article 101(1) TFEU by its very nature. It also explains what an authority would need to prove to establish an infringement. Sections IV and V explain how the evaluation of the object of an agreement is assessed in practice. Section IV focuses on the factors that are internal to the practice (such as its terms, the extent and depth of the cooperation and the nature of the products involved). Section V, in turn, moves to the external factors (such as the conditions of competition, the role of experience, and the regulatory context). Finally, Section VI identifies the remaining points of contention, which might jeopardize the acquis of the past two decades.

II. EXPLAINING THE PERSISTENT UNCERTAINTY AROUND THE NOTION

A. Background

Even though the case law on restrictions by object has proved to be remarkably stable over the years, the principles underpinning it compete with alternative interpretations of Article 101(1) TFEU. The approach consistently embraced by the Court, in other words, is not necessarily, or not always, reflected in the output of authorities and national courts. One can think of three main explanations behind the occasional mismatch between the law as stated and the law as applied. First, a formula often used by the Court since *Cartes Bancaires*—'sufficient degree of harm'—is both ambiguous and insufficiently specific. Secondly, the 'object box' approach continues to shape thinking, even though it is at odds with the case law. Finally, there is a tendency to rely on US antitrust law concepts (such as per se and rule of reason) to make sense of the nature and scope of Article 101(1) TFEU. This is so in spite of the fact that the two legal orders differ substantially from one another.

B. A 'Sufficient degree of harm'

Cartes Bancaires[16] is one of the most significant milestones of the case law interpreting the notion of restriction by object. In this judgment, the Court relied upon a formula that it would reiterate in the judgments that followed.[17] The ECJ regularly presents it as the 'essential legal criterion' to determine whether a practice is restrictive of competition by its very nature.[18] According to this formula, certain 'types of coordination' reveal a 'sufficient degree of harm' and thus are caught by Article 101(1) TFEU irrespective of their effects. The formula was not new. Its origins can be traced back to the very early days of the discipline, and more precisely to *Société Technique Minière*.[19] Pursuant to the latter, a case-by-case analysis of the effects of an agreement is only required where its impact is not 'sufficiently deleterious' (which is an alternative translation of the French, and original, version).[20]

In spite of its ubiquity in the most recent case law, the 'sufficient degree of harm' criterion does not provide the basis for an operational framework. It does not even capture the methodology applied by the Court. The first reason is that it is a vacuous formula. 'Sufficient

[16] *Cartes Bancaires* (n 1), paras 49–53.

[17] See, among others, *Maxima Latvija* (n 14); Case C-373/14 P *Toshiba Corporation v Commission*, EU:C:2016:26; *Generics* (n 2); *Budapest Bank* (n 3); *Lundbeck* (n 6); *Super Bock* (n 4); and Case C-333/21 *European Superleague Company SL v Fédération internationale de football association and Union of European Football Associations*, EU:C:2023:1011.

[18] See inter alia, *Cartes Bancaires* (n 1), *Maxima Latvija* (n 14), *Budapest Bank* (n 3), and *Super Bock* (n 4).

[19] Case 56/65 *Société Technique Minière*, EU:C:1966:38.

[20] ibid 249: '[…] Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent'.

degree of harm' is as broad and vague a concept as 'restriction of competition'. In and of itself, it does not shed light on what practices infringe Article 101(1) TFEU by their very nature and does not say anything about the factors actually considered in the case law when establishing a breach of the provision. It is, in other words, a purely descriptive formula, as opposed to an analytical one. It merely states that the 'by object' category comprises particularly egregious breaches.

One could in fact go further and argue that the formula is not just vacuous but potentially misleading. This is so because it blurs the line between object and effect. The former and the latter are, as the Court has consistently held, alternative conditions that should not be conflated.[21] What is more, they are considered in succession, so that the impact of a practice is only ascertained once it is ruled out that its object is anticompetitive. The 'sufficient degree of harm' criterion is at odds with this acquis insofar as it gives the (incorrect) impression that the first legal category (object) is established in light of the second (effect). This impression is only confirmed if one takes a look at the English version of the judgment in *Société Technique Minière*, according to which a practice is restrictive by its very nature (ie, it amounts to a 'by object' infringement) if its 'effects on competition' are 'sufficiently deleterious'.[22]

The blurring between object and effect that the formula implies is, at least in part, a consequence of the translation of both *Société Technique Minière* and *Cartes Bancaires* into English. The French version of the two judgments makes no mention of 'effects'. Instead of 'harm', moreover, it speaks of '*nocivité à l'égard de la concurrence*'.[23] This wording in the original language is more careful in that it does not suggest that the object of a practice is evaluated by reference to its impact. Instead, it simply suggests that the 'by object' category applies to conduct that is particularly egregious (or '*nocive*'). This said, the French version of the 'sufficient degree of harm' formula is not any less descriptive (and not any more analytical) than its English counterpart. If anything, it confirms that 'sufficient degree of harm', rather than an operational criterion to tell apart 'by object' and 'by effect' behaviour, is a recipe for the perpetuation of some misunderstandings that have, in the meantime, been fully addressed by the Court.

C. The lasting attraction of 'object box' thinking

The uncertainty around the notion of restriction by object is also explained by the persistent attraction of the 'object box'.[24] This expression refers to an analytical approach that identifies inherently restrictive conduct on the basis of abstract categories. Under this approach, for instance, price-fixing and market sharing among competitors would fall within the 'object box'.[25] The same would be true, in the context of vertical relationships, of resale price maintenance.[26] It is not necessary to explain at much length why this approach cannot

[21] If anything, the Court has become more emphatic on this point over time. See in this sense *Servier* (n 2), para 93, where it held that art 101(1) TFEU, as interpreted in the case law '[…] makes a clear distinction between the concept of restriction by object and the concept of restriction by effect, each of those concepts being subject to different rules with regard to what must be proved […]'; and *Banco BPN* (n 5), para 46, where the Court makes it clear that the analysis of the object of an agreement 'in no way requires that the effects of that agreement, decision or practice on competition, be they actual or potential, or negative or positive, be examined or, a fortiori, proven'.

[22] ibid: '[w]here, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious'.

[23] The French version of the relevant passage of *Société Technique Minière* (n 19) reads (p 359) as follows: '*qu'au cas cependant où l'analyse desdites clauses ne révèlerait pas un degré suffisant de nocivité à l'égard de la concurrence, il conviendrait alors d'examiner les effets de l'accord et, pour le frapper d'interdiction, d'exiger la réunion des éléments établissant que le jeu de la concurrence a été, en fait, soit empêché, soit restreint ou faussé de façon sensible*'.

[24] The term 'object box' is borrowed from Richard Whish and David Bailey, *Competition Law* (11th edn, OUP 2024).

[25] ibid 136–39.

[26] ibid.

be reconciled with some core aspects of the case law. The Court has invariably held, since *Société Technique Minière*, that a restriction of competition, whether by object or effect, must be established in light of the relevant economic and legal context.[27] Thus, the formal aspects of a practice are only—if at all—the starting point of the analysis. They cannot substantiate, in and of themselves, a finding that an agreement restricts competition by its very nature. The 'object box', however, continues to influence the thinking of commentators and practitioners—which should not come as a surprise given that it promises, after all, a simple framework that is seemingly straightforward to administer.

D. The (undue) influence of US antitrust

Finally, the influence of US antitrust law has also contributed to the uncertainty around the notion of restriction by object. The application of the US Sherman Act on the other side of the Atlantic has a long history dating back to the late 19th century. One consequence is that the case law and scholarly commentary were already well developed in the US when the EU regime was still in its infancy. It is therefore natural to turn to the categories and methodological approaches developed in US antitrust and try and transpose them to their rough equivalents on this side of the Ocean.[28] The instinct to borrow from the case law and literature of that country is reflected, inter alia, in a marked tendency to equate the notion of restriction by object and that of per se restraint within the meaning of section 1 of the US Sherman Act.[29] More precisely, the nature and substantive content of the former and the latter are frequently deemed to be the same.

For instance, it is not unusual to read that the 'by object' category is, just like per se, a mechanism introduced for the sake of procedural economy.[30] Accordingly, the point of the category would be to make it easier for authorities to discharge more easily their burden of proof in relation to those practices that are particularly likely to restrict competition. The 'by object' route, in essence, would provide a shortcut[31] to a finding of infringement. In a similar vein, it has been argued that the fundamental criterion to establish the object of a practice relates to whether it is likely—or particularly likely—to have anticompetitive effects.[32] The

[27] *Société Technique Minière* (n 19), 250: 'The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute'. This position would be invariably reiterated in subsequent judgments. See, for instance, *Cartes Bancaires* (n 1), para 53 and *Super Bock* (n 4), para 35.

[28] This inclination could be noticed from the very early days of the discipline. See René Joliet, *The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective* (Martinus Nijhoff 1967)

[29] For a detailed analysis of the concept of per se restraint in US antitrust law, see Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (7th edn, West Academic 2024) 313–21. As far as scholarship drawing parallels between per se and 'by object' infringements, see, in particular, Whish and Bailey (n 24) 135 (who claim that '[t]here is an obvious analogy between an agreement that is per se illegal under the Sherman Act and one that is restrictive of competition by object under Article 101(1) TFEU'; for the authors, the main difference between 'by object' and per se would be the availability of art 101(3) TFEU under the former); Saskia King, 'The Object Box: Law, Policy or Myth?' (2011) 7 Competition Law Journal 269 ('restrictions of competition by object are akin to a form of per se offence as understood within the context of section 1 of the Sherman Act 1890'); and Arianna Andreangeli, 'From Mobile Phones to Cattle: How the Court of Justice Is Reframing the Approach to Article 101 (Formerly 81 EC Treaty) of the EU Treaty' (2011) 34 World Competition 215 (who applies to EU law some of the concepts introduced by federal courts in the US context).

[30] See, for instance, James Killick and Jeremie Jourdan, 'Cartes Bancaires: A Revolution or A Reminder of Old Principles We Should Never Have Forgotten?' (Competition Policy International, December 2014); and Bernadette Zelger, '"By Object" Restrictions Pursuant to Article 101(1) TFEU: A Clear Matter or a Mess, and a Critical Analysis of the Court's Judgement in Expedia?' (2017) 13 European Competition Journal 356. This argument has even found its way in some Advocates General opinions. See, in particular, Opinion of Advocate General Kokott in Case C-8/08 T-*Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:110, in particular para 43, where the Advocate General explains that the categorization of practices as restrictive by object '[…] sensibly conserves resources of competition authorities and the justice system.').

[31] The expression 'shortcut' is frequently used in the literature. See, for instance, Ginevra Bruzzone and Sara Capozzi, 'Restrictions by Object in the Case Law of the Court of Justice: In Search of a Systematic Approach' in Gian Antonio Benacchio and Michele Carpagnano (eds), *L'applicazione delle regole di concorrenza in Italia e nell'Unione europea: Atti del V Convegno biennale Antitrust Trento, 16-18 aprile 2015* (Editoriale Scientifica 2015).

[32] See, for instance, Richard Whish, 'Anticompetitive Object vs Anticompetitive Effect: Does It Really Matter?' (New Frontiers of Antitrust Conference, Paris, 10 February 2012).

category, from this perspective, would encompass practices that are known from experience to have anticompetitive effects. These ideas, borrowed from the US literature, do not reflect the reality of EU competition law when analysed systematically.

To begin with, there is no support in the case law for the idea that the 'by object' category is something akin to a shortcut, or that it is designed to make it easier for an authority to establish an infringement. In fact, it is not difficult to think of instances in which showing that a practice restricts competition by its very nature can be at least as complex and time-consuming as establishing its effects. This is true, in particular, of cases where the contentious behaviour is known from experience to be aimed at improving the conditions of competition. Where credible and case-specific evidence about the legitimate aims of a practice is provided, showing that its object is anticompetitive is likely to prove demanding in terms of resources (and may not represent a net gain relative to the 'by effect' route from the authority's perspective).

Secondly, the likelihood of anticompetitive effects has never been, in and of itself, a criterion to determine whether a practice has, as its object, the restriction of competition. In fact, the Court expressly dismissed the significance of this factor in *T-Mobile*.[33] The practice at stake consisted of a single meeting and was not particularly likely to have restrictive effects; this fact, however, did not preclude a finding that it was caught by Article 101(1) TFEU by its very nature.[34] This position would be confirmed in subsequent cases. In *Expedia*, the Court held that there is no need to show that a 'by object' infringement restricts competition significantly or appreciably.[35] In *Bananas*, in turn, it concluded that the exchange of information in issue amounted to a 'by object' infringement, even though there were genuine reasons to question the extent to which the practice could influence the competitive process.[36] The essence of this case law was crisply summarized in *Superleague*: when establishing a restriction by object, the Court held, the (positive or negative) effects of the practice are neither a necessary nor a relevant consideration in the assessment.[37]

Finally, and more generally, a close analysis of the ways in which 'by object' and per se are interpreted shows how different their respective substantive scopes are. This idea, about which a whole monograph could be written,[38] is best illustrated, for the purposes of this article, by reference to a particular example. Both the ECJ and the US Supreme Court have considered the lawfulness of reverse payment settlements. In *Actavis*, the latter ruled that such agreements are not to be treated as per se (or even presumptively unlawful) infringements, and that their legality must be examined, case-by-case, under the rule of reason.[39] The ECJ, in turn, held in *Generics* that reverse payment settlements may restrict competition by object or by effect (and may even escape the prohibition altogether), depending of the particularities of each arrangement and the relevant context.[40]

Generics shows that the evaluation of the object of a practice takes into account aspects of the economic and legal context which, under US antitrust law, are only relevant under the 'rule of reason'. The analysis of practices at the 'by object' stage, in other words, is more case-specific than the (relatively abstract and formalistic) categorization of practices as per

[33] *T-Mobile* (n 5).

[34] ibid, para 31.

[35] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795.

[36] Case C-286/13 P *Dole Food Company, Inc. and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, para 123.

[37] *Superleague* (n 17), para 166.

[38] There is no shortage of monographs engaging in a comparative analysis of the two provisions. See, in particular, Joliet (n 28); Daniel Fasquelle, *Droit américain et droit communautaire des ententes* (Joly 1993) ; and Csongor István Nagy, *The Conceptual Structure of EU Competition Law Restrictive Agreements* (Elgar 2024).

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

[40] *Generics* (n 2), para 84 ('[...] Such an agreement cannot, however, be considered, in all cases, to be a "restriction by object", within the meaning of Article 101(1) TFEU'.

se infringements. In concrete terms, the Court held in *Generics* that the size of the payment is the fundamental factor that determines whether a reverse payment settlement restricts competition by object within the meaning of Article 101(1) TFEU.[41] In US antitrust law, this factor only comes into play when considering, at the rule of reason stage, whether an agreement of this kind amounts to a restraint of trade. Thus, the analysis of the object of an agreement in the EU system ventures into contextual considerations that, in the US regime, are only relevant when balancing the pro- and anticompetitive dimensions of the practice (as opposed to the per se stage).[42]

III. IDENTIFYING RESTRICTIONS BY OBJECT

A. The meaning of object

The preceding section has shown that the potential of a practice to cause harm is not a relevant factor, in and of itself, when evaluating whether it is inherently restrictive of competition. It has also been explained why the object of clause (or agreement) cannot be inferred from its formal features alone. Approaches that revolve around these two factors are problematic not just because they fail to reflect the Court's own, but because they drive attention away from the core question at stake. A close reading of the case law shows that the most reliable starting point to navigate the case law and make sense of the underlying methodology is to rely on the plain meaning of the word object.[43] In other words, identifying the aim or rationale behind the conduct—what the said conduct seeks, objectively speaking, to achieve—is the central criterion in the assessment as conducted by the Court.[44] Thus, where the object of a practice is found to be inherently anticompetitive, conduct will be prohibited without the need to show its effects.

The remainder of this article develops this point at length and from a variety of perspectives. Before proceeding to the in-depth analysis of the question, it makes sense to mention, as a preliminary point, that the reference to the 'object' of agreements in the Treaty of Rome is not a coincidental one. In fact, it is a conscious choice that supports the conclusion that the assessment focuses on the objective purpose of the agreement. As observed by Chiriţă in her historical account of EU competition law provisions, the final version of the Treaty relied on concepts drawn from French law (and, more precisely, from its law of obligations).[45] In that legal tradition, contracts must have a valid aim (*but*).[46] Accordingly, a contract that

[41] ibid, para 90: 'In order to assess whether transfers of value contained in a settlement agreement, such as those at issue in the main proceedings, can have no explanation other than the commercial interest of the parties to that agreement not to engage in competition on the merits, it is important, first […] to take into consideration all the transfers of value made between the parties, whether those were pecuniary or non-pecuniary'.

[42] See in this sense, *Actavis* (n 39) 'The rationale behind a payment of this size cannot in every case be supported by traditional settlement considerations. The payment may instead provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost'.

[43] The Cambridge Dictionary defines 'object' as 'a reason for doing something, or the result you wish to achieve by doing it'.

[44] This conclusion, which was apparent from the days of *Société Technique Minière* (n 19) has, if anything, become more apparent in the most recent case law. See in this sense *Banco BPN* (n 5), para 56: 'Lastly, as regards the "objective aims" pursued by that exchange, it should be noted that that concept refers, in its legal sense, to the primary reason for the agreement, decision by an association of undertakings or concerted practice, that is to say, to the immediate and direct aims pursued by the coordination in question which led the undertakings concerned to participate in it. Therefore, an exchange of information which, although not formally presented as pursuing an anticompetitive object, cannot, in the light of its form and the context in which it occurred, be explained other than by the pursuit of an objective contrary to one of the constituent elements of the principle of free competition must be regarded as constituting a restriction by object'.

[45] Anca Chiriţă, 'A Legal Historical Review of the EU Competition Rules' (2014) 63 International & Comparative Law Quarterly 281.

[46] Solène Rowan, *The New French Law of Contract* (OUP 2022) 105–06. Prior to a recent overhaul of contract law in France, the notion of *cause*—to which Chiriţă (n 45) refers—was central in the field. Accordingly, the validity of the contract was contingent on it having actual rationale (*cause*). For a discussion of this historical notion, see Alain Bénabent, *Droit des obligations* (LGDJ 2023) 184–93.

has an unlawful aim will be deemed null and void[47] (just like agreements with a restrictive object are in principle null and void pursuant to Article 101(2) TFEU).[48]

B. The meaning of restrictive object

According to the case law, there are three aims that are deemed to be at odds, by their very nature, with the system of undistorted competition created by the EU Treaties. These are captured in Figure 1. A practice is inherently restrictive, first, where its object is to 'knowingly substitute practical cooperation' between the parties 'for the risks of competition'.[49] In such an instance, the rationale for the conduct is collusion (or, if one prefers, the avoidance of rivalry between the undertakings involved). Firms can cooperate to attain a collusive aim in a number of ways, depending on the context. Where the cooperating undertakings are actual competitors, they can coordinate their behaviour along one or several parameters of competition (such as price,[50] output,[51] or innovation[52]). Where they are potential competitors, firms can seek to avoid competition by sharing markets[53] or the profits made by one of them in a market.[54]

A practice is also deemed to be inherently anticompetitive, second, where its object is the exclusion of third parties; that is, where firms cooperate with the aim of denying actual or potential rivals the ability or incentive to compete. The case law provides several examples illustrating the ways in which cooperation pursuing this purpose can occur in practice. In *ANSEAU-NAVEWA*, a coalition of manufacturers relied on a certification mechanism to exclude importers other than their sole distributors from the Belgian market.[55] In *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied*, a group of undertakings across different levels of the value chain had put in place a collective exclusive dealing arrangement with the aim of preventing entry by wholesalers established in other Member States.[56]

Finally, practices have a restrictive object where they have been designed with the purpose of limiting or disincentivizing intra-EU trade. This is conduct, in other words, that is aimed at re-erecting the very barriers that the EEC Treaty was intended to bring down.[57] Undertakings can prohibit (or limit) the cross-border flow of goods and services in several ways. In the first place, firms may rely upon contractual mechanisms. For instance, a contract may be designed to give an exclusive distributor 'airtight' protection within the allocated territory.[58] Similarly, an agreement between a manufacturer and a wholesaler may prohibit the latter from exporting the good or service,[59] or may implement a dual pricing mechanism to

[47] Pursuant to art 1162 of the French Civil Code, '*Le contrat ne peut déroger à l'ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties.*'

[48] Pursuant to art 101(2) TFEU: 'Any agreements or decisions prohibited pursuant to [Article 101 TFUE] shall be automatically void.'

[49] *T-Mobile* (n 5), para 61.

[50] See, for instance, *Bananas* (n 36).

[51] See, for instance, Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*, EU:C:2008:643.

[52] See, for instance, *Car emissions* (Case AT.40178) Commission Decision of 8 July 2021.

[53] See, for instance, *Toshiba* (n 17).

[54] That was essentially the issue at stake in *Lundbeck* (n 6).

[55] Joined Cases 96-102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission*, EU:C:1983:310.

[56] Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, EU:C:2006:592.

[57] *Consten-Grundig* (n 13).

[58] Airtight protection defines an instance where the distributor is insulated not only from passive sales coming from distributors based in other territories but also from parallel traders. In *Consten-Grundig*, for instance, the parties sought to achieve airtight protection by assigning the manufacturer's trade mark to the distributor in the territory covered by the agreement.

[59] See, for instance, Case 19/77 *Miller International Schallplaten v Commission*, EU:C:1978:19. Any reference to 'products' hereinafter must be understood as relating to both goods and services.

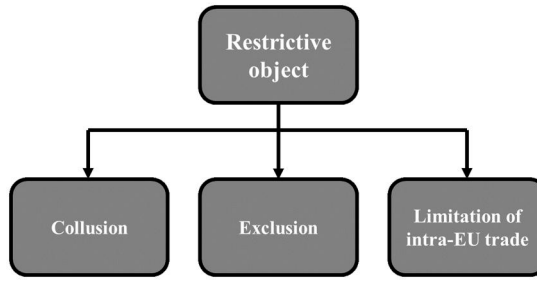

Figure 1. The meaning of 'restrictive object'.

make exports less profitable.[60] In the second place, the parties to an agreement may rely on technical measures. For instance, end-users may be prevented from accessing websites of retailers established in a different territory (the website may be made inaccessible,[61] or the end-users may be redirected to another retailer's website[62]).

It is not difficult to think of scenarios where two or more of these anticompetitive aims overlap. For instance, an agreement may have a collusive object, all while partitioning the internal market. Such would be the case where two undertakings, each enjoying a monopolistic position in their Member State, agree not to enter into one another's territory.[63] In the same vein, a group of undertakings that conclude a collusive agreement may also conceive a mechanism aimed at excluding potential competitors seeking to enter the market within which they operate.[64] For the purposes of the interpretation of Article 101(1) TFEU, it is sufficient to show that the practice pursues one of the three aims that are deemed anticompetitive by their very nature. The fact that the practice is inherently anticompetitive for more than one reason would only reinforce the finding of a 'by object' infringement.

C. How the restrictive object of a practice is assessed

(i) The object is established in light of objective criteria

The Court has invariably held that the object of an agreement is identified in light of objective considerations, not subjective ones. Whether the parties intend to affect competition is neither necessary nor sufficient to prove that a practice is restrictive by its very nature.[65] Accordingly, undertakings cannot escape the infringement merely by claiming that their subjective aim was not to distort the competitive process but a different one. What matters is not what the parties sought to achieve by cooperating, but what the agreement, objectively speaking, is capable of achieving.[66] Subjective considerations play, at best, a marginal role in the evaluation. Pursuant to the case law, the parties' intent may be relied upon as additional evidence shedding light on the underlying object.[67]

[60] See, for instance, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* EU:C:2009:610.

[61] Guidelines on vertical restraints [2022] OJ C248/1, para 206.

[62] ibid.

[63] Case T-360/09, *E.ON Ruhrgas AG and E.ON AG v Commission*, EU:T:2012:332; and Case T-370/09, *GDF Suez SA v Commission*, EU:T:2012:333.

[64] This is a risk that might arise, for instance, in the context of a standard-setting agreement. Guidelines on the applicability of art 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C259/1.

[65] *BIDS* (n 51), para 21.

[66] *Servier* (n 2), para 447.

[67] *ANSEAU-NAVEWA* (n 55), paras 23–25, which was subsequently relied upon in Case C-551/03 P *General Motors BV v Commission*, EU:C:2006:229, para 78.

It is easy to understand why the parties' intent is relevant, if at all, at the margins. An interpretation that revolves around subjective considerations would all but empty the 'by object' category of its substance. As the case law itself shows, it is not unusual that the parties to some of the most egregious infringements of Article 101(1) TFEU claim—if not genuinely believe—that their agreement pursues a legitimate or pro-competitive aim. In *BIDS*, for instance, the undertakings argued that their arrangement—a quintessential crisis cartel[68] and, as such, unquestionably a 'by object' infringement—could improve the functioning of the sector.[69] These arguments were rejected by the Court, as they were incapable of casting doubt on the fact that the agreement restricted competition by its very nature. Subsequent case law would confirm that any evidence produced by the parties would have to be adequately substantiated and based on objective criteria. The latter point is addressed in detail below.

(ii) The unit of analysis is the individual clause, not the agreement

It is not unusual that inter-firm cooperation comprises several dimensions and thus serves more than one purpose. A distribution agreement, for instance, may constrain the freedom of action of one or both parties in several ways, and this with a view to attaining a variety of aims. It makes sense to consider a concrete example. Pursuant to a distribution agreement, the supplier may agree to appoint the buyer as its exclusive reseller in a given area. The latter, in turn, may agree not to acquire competing goods from any other supplier (ie, a form of single branding) and may, in addition, agree to respect a minimum resale price. Such complex arrangements are the rule rather than the exception. A question that regularly emerges, and in different guises, is whether the restrictive object is assessed by reference to the arrangement taken as a whole or by reference to its individual components instead.

In *EDP*, the Court had the opportunity to make it clear that each building block of a complex arrangement (for instance, each clause in a contract) is the relevant unit of analysis.[70] Accordingly, it is not sufficient to claim that an agreement, taken as a whole, pursues a legitimate or pro-competitive aim. If an individual building block (or clause) is found to have a restrictive object, it will be prohibited, by its very nature, under Article 101(1) TFEU. In this sense, the parties cannot argue that the contentious clause shares its aims with the overall agreement. *EDP* confirms a long line of case law. The judgments addressing the ancillary restraints doctrine, for instance, already showed that the relevant unit of analysis is the clause.[71] Thus, the legal qualification of each individual building block may vary (some clauses may be deemed restrictive by object, whereas other blocks may require an analysis of their effects—or may even fall outside the scope of Article 101(1) TFEU altogether).

(iii) Content, context, aims

It has already been pointed out above that a restriction of competition cannot be established in the abstract and, in the same vein, that there is no such thing as an off-the-shelf list (or box) of 'by object' infringements. Establishing the object of a practice is a case-specific exercise. The Court has identified three central criteria to consider when conducting the assessment.[72] The first is the content of the agreement of which the clause is a part. The

[68] A crisis cartel is an attempt to address the overcapacity in an industry by reducing output in a coordinated manner. See René Joliet, 'Cartelisation, Dirigism and Crisis in the European Community' (1981) 3 World Economy 403.

[69] *BIDS* (n 51), para 33.

[70] Case C-331/21 *EDP—Energias de Portugal SA and others v Autoridade da Concorrência*, EU:C:2023:812, para 105.

[71] In *Pronuptia*, the Court held that some clauses that are objectively necessary for the adequate operation of a franchising agreement escape the prohibition altogether. See in this sense Case 161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paras 15–17. Other clauses (such as those providing for exclusive territorial protection and vertical price-fixing) may fall within the scope of art 101(1) TFEU—sometimes by their very nature (ibid, paras 23–25).

[72] *Superleague* (n 17), para 165.

second is the economic and legal context. This step must take into account 'the nature of the products or services concerned, as well as the real conditions of the structure and functioning of the sectors or markets in question'.[73] The analysis of these two criteria sheds light on the third, which is the objective aim pursued by the practice.

Sections IV and V examine in detail how the content of the practice and the objective aims it pursues are assessed in the relevant economic and legal context. The analysis of the three criteria is broken down as follows. Section IV addresses the aspects that are internal to the practice, namely its content (and more precisely issues such as the nature of the cooperation, its literal terms and whether the parties enjoy discretion to pursue one or several aims), the extent and depth of the cooperation (ie, whether the clause amounts to a 'naked' restriction or whether it is the expression of a broader arrangement), the nature of the goods and services as well the aims recognized as legitimate in the case law. Section V, in turn, addresses factors that are external to the practice, and more precisely the conditions of competition (including the degree of concentration of the industry or market and the position of the parties therein), the regulatory context as well as the experience accumulated in relation to the said practice.

Before embarking in a detailed analysis of these questions, it makes sense to mention that, if a practice is found to have an anticompetitive object, it is irrelevant that it also pursues other aims.[74] As already pointed out, it would not be possible to argue that a 'by object' clause inserted in a franchising agreement does not restrict competition by its very nature because it shares the overarching aims pursued by the distribution system.[75] The same conclusion would apply where a particular clause simultaneously pursues two different goals, one that is inherently anticompetitive and one that is not. For instance, a distribution agreement may seek to incentivize a distributor to sell a new product and, in addition, aim at partitioning the internal market. As the case law stands, once the latter is established, the agreement will be prohibited by its very nature.[76]

D. What needs to be proved (and disproved)

(i) What an authority (or claimant) needs to prove

To discharge its burden of proof, an authority needs to establish, to the requisite legal standard, that the practice has, as its object, the restriction of competition. It does not need to prove anything else. In particular, an authority cannot be required to define the relevant market or to show its impact therein. As already pointed out, the Court expressly held in *Superleague* that it is neither necessary nor relevant to show that the behaviour has positive and/or negative effects on competition at the 'by object' stage.[77] Restrictive effects are presumed to result from the implementation of the practice and need not be established case-by-case. It is open to the parties to rebut this presumption by showing that the contentious provision is incapable of restricting competition (which would be the case, for instance, where the applicable regulatory framework prevents actual or potential rivalry between the parties).

From the perspective of an authority, establishing that a practice falls, by its very nature, within the scope of Article 101(1) TFEU involves the following steps, summarized in Figure 2. First, the potentially restrictive object of the conduct ('the candidate object') must be identified. More precisely, the authority will need to identify the reason why the practice

[73] ibid, para 166.
[74] *ANSEAU-NAVEWA* (n 55), para 25.
[75] *Pronuptia* (n 71), para 23.
[76] For a factual scenario that fits these characteristics, see, for instance, *Miller* (n 59).
[77] *Superleague* (n 17), para 166.

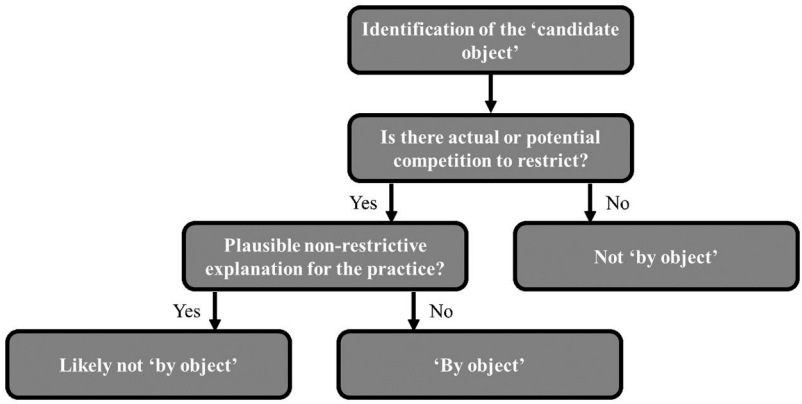

Figure 2. The three-step operation of the case law after *Servier*.

may restrict competition by its very nature. As already explained, there are three inherently anticompetitive aims: collusion, exclusion and limitation of intra-EU trade. It is sufficient for an authority to identify a single 'candidate object' to carry out the analysis. In *Generics* and *Servier*, for instance, the Court identified collusion by means of market-sharing as the 'candidate object'.[78] If the restriction is established in relation to it, it is irrelevant that the practice pursues, or is said to pursue, other goals.

Once a candidate object identified, the authority will need to show, second, that there is (inter-brand or intra-brand) competition to restrict in the first place. For instance, collusion is implausible where the parties to an agreement are neither actual nor potential rivals.[79] In such an instance, there would be no inter-brand competition to restrict by means of coordinated conduct. For the same reason, the object of the agreement cannot be inherently anticompetitive. The same is true where the candidate object is exclusion. To mention a concrete example, an authority could not credibly argue that the objective purpose of an agreement is the foreclosure of potential rivals where there would have been no 'real and concrete possibilities'[80] for the latter to enter the relevant market. These principles also apply where intra-brand competition is at stake. For instance, a set of exclusive territorial licensing agreements cannot have, as its object, the restriction of competition where the regulatory framework precludes the cross-border provision of services (and thus intra-brand competition among licensees).[81]

[78] *Generics* (n 2), para 76: 'It must be observed that, according to the very wording of the questions referred, the background to those agreements is a genuine dispute relating to a process patent, that dispute being the subject of proceedings before a national court. Accordingly, those agreements cannot be regarded as agreements bringing to an end entirely fictitious disputes, or as designed with the sole aim of disguising a market-sharing agreement or a market-exclusion agreement. When agreements are of that nature, they are as harmful to competition as market-sharing agreements or market-exclusion agreements, and such agreements have to be characterised as 'restrictions by object'; and *Servier* (n 2), para 97.

[79] *Servier* (n 2), para 100. See also Advocate General Kokott's Opinion in Case C-307/18 *Generics (UK) Ltd and others v Competition and Markets Authority*, EU:C:2020:28, para 57, who makes the same point eloquently: '[…] To qualify an agreement between undertakings as having the object or effect of restricting competition presupposes, therefore, that there is competition which may be restricted'.

[80] *Generics* (n 2), para 36, where the Court held that 'In order to assess whether an undertaking that is not present in a market is a potential competitor of one or more other undertakings that are already present in that market, it must be determined whether there are real and concrete possibilities of the former joining that market and competing with one or more of the latter'. This point would be reiterated in subsequent judgments. See, in particular, *Servier* (n 2), para 100.

[81] This was the issue at stake, in essence, in Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others*, EU:C:1982:334.

If it appears that there is competition (actual or potential; inter-brand or intra-brand) to restrict, an authority will need to establish, third, that the available evidence is consistent with the characterization of the practice as an inherently anticompetitive one. In *Generics*, the Court laid down a test which is sufficient to conclude that a given line of conduct has, as its object, the restriction of competition.[82] This test would be reiterated in the judgments that followed, including *Lundbeck*,[83] *Servier*,[84] and *Banco BPN*.[85] According to this case law, an agreement will be deemed to have, as its object, the restriction of competition where there is no plausible rationale for it other than the 'candidate object' identified.[86] In *Generics*, for instance, the question was whether the reverse payment settlement could be explained other than as a means to collude with a potential competitor.[87]

If it appears that the behaviour cannot be plausibly rationalized on grounds other than the 'candidate object', the authority will have proved, to the requisite legal standard, that it infringes Article 101(1) TFEU by its very nature. Conversely, the fact that there is an alternative explanation for the practice (for instance, a genuine out-of-court settlement aimed at bringing an end to a dispute), is (at the very least) a strong indicator that the said practice does not have, as its object, the restriction of competition (and thus that it can only be prohibited following an assessment of its effects on competition). In such an instance, however, it would still be possible for the authority to establish an infringement. However, any evidence produced would have to outweigh the prima facie indicator that the aim of the practice is not inherently anticompetitive.

An analysis of the case law suggests that a finding of a 'by object' infringement is more likely where the limitation of intra-EU trade is at stake. Where market integration is the 'candidate object', the fact that the practice can be justified on grounds other than the restriction of competition carries less weight than it does in instances where collusion or exclusion are in issue. In fact, it is precisely in cases involving the limitation of intra-EU trade that the Court clarified that a finding of a 'by object' infringement cannot be ruled out even when conduct pursues other, non-restrictive aims.[88] The strict stance vis-à-vis market integration is not surprising. One should bear in mind the fact that the 'system ensuring that competition is not distorted', of which Articles 101 is a part, is instrumental to the establishment of the internal market.[89]

[82] *Generics* (n 2), paras 87–90.

[83] *Lundbeck* (n 6), para 114.

[84] *Servier* (n 2), para 104.

[85] *Banco BPN (n 5)*, para 56: '[…] an exchange of information which, although not formally presented as pursuing an anticompetitive object, cannot, in the light of its form and the context in which it occurred, be explained other than by the pursuit of an objective contrary to one of the constituent elements of the principle of free competition must be regarded as constituting a restriction by object'.

[86] *Generics* (n 2), para 87: '[…] such a characterisation as a "restriction by object" must be adopted when it is plain from the analysis of the settlement agreement concerned that the transfers of value provided for by it cannot have any explanation other than the commercial interest of both the holder of the patent and the party allegedly infringing the patent not to engage in competition on the merits'.

[87] ibid.

[88] See, in particular, *Consten-Grundig* (n 13), which concerned an agreement giving absolute territorial protection to the exclusive reseller in France, thereby re-erecting the borders that the Treaty of Rome sought to bring down. Arguments pertaining to the pro-competitive object of the 'airtight' distribution agreement might pursue (for instance, the need to address free-riding or to incentivize the reseller to commit the necessary investments to distribute the product in a different territory) were rejected by the Court, and this in spite of the position expressed by the Advocate General (see the Opinion of Advocate General Roemer in Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, EU:C:1966:19). See also, *ANSEAU-NAVEWA* (n 55), para 25, which concerned an agreement restricting access to the Belgian market by distributors based in other Member States.

[89] Protocol (No 27) on the internal market and competition [2008] OJ C/115/309, according to which '[…] the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted'.

(ii) Disproving the alleged restrictive object of a practice

It is possible for the parties to produce evidence showing that the practice does not have an anticompetitive object. They may do so in two ways. First, undertakings may provide evidence showing that the conduct is incapable of having restrictive effects in the relevant economic and legal context (ie, evidence pertaining to the second step described above and depicted in Figure 2). As will be discussed in detail in Section V, where there is no actual or potential competition to restrict, it is implausible that the practice pursues the 'candidate object' identified by the authority. For instance, there may be, in a given economic and legal context, regulatory barriers to entry that make intra-EU transactions impossible, or unlawful. In such circumstances, the restriction of cross-border trade cannot be said to be the object of the practice. This line of defence was endorsed in *Murphy*, where the Court held that the parties would escape a 'by object' finding where they can show that the agreement is not 'liable' to restrict competition.[90]

Secondly (and alternatively), firms may produce evidence pertaining to the third of the steps described above and show, in this vein, that the objective aim of the practice is not inherently anticompetitive. It is clear, at least since *Generics*, that undertakings may explain that the conduct under consideration can be rationalized on non-restrictive grounds. For instance, the fact that that an agreement is shown to be a plausible means to improve the conditions of competition suggests that its object is not collusive (anticompetitive coordination by means of, say, market-sharing) or exclusionary, but a different one.[91] Sections IV and V elaborate at greater length how these claims may influence the analysis depending on the 'candidate object' in issue. Before moving on to the detailed analysis, there are two points that are worth clarifying at this stage.

To begin with, the evidence produced by the parties must be case-specific, that is, it must be appropriately substantiated and informed by the concrete nature of the agreement and the economic and legal context of which it is a part. Thus, it would not be sufficient to argue that a given agreement is generally speaking (or in the abstract) legitimate or not inherently restrictive.[92] The second point to note is that arguments pertaining to the pro-competitive aims of a practice are to be distinguished from arguments relating to the positive effects that the said practice may have. As already pointed out, the Court held, in *Superleague*, that the latter are not relevant at the 'by object' stage.[93] The former, on the other hand, have always had a fundamental role to play, and this insofar as they can shed light on whether the behaviour under consideration can be rationalized on non-restrictive grounds.

IV. THE ROLE OF INTERNAL FACTORS IN THE ASSESSMENT

A. Content of the agreement

(i) Nature of the cooperation

The probability that a practice has, as its object, the restriction of competition depends in part on its nature. Where the parties are not competitors, cooperation between them is less

[90] Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, EU:C:2011:631, para 143.

[91] In the specific context of *Generics*, the pro-competitive benefits could flow from the settlement of their dispute out of court (or, arguably, from the launch of the generic version of the product earlier than it would otherwise have been the case).

[92] Case C-151/19 P *KRKA, tovarna zdravil, d.d. v Commission*, EU:C:2024:546, para 395 ('[…] the fact that agreements pursue an objective which, in the abstract, may be legitimate cannot exclude those agreements from the application of Article 101 TFEU if it is established that those agreements also have the aim of sharing markets or restricting competition in other ways. Furthermore, as has been recalled in paragraphs 141 to 147 of the present judgment, the fact that an agreement takes a legal form which is in principle legitimate and that the wording of that agreement does not reveal an apparent anticompetitive object is not, in itself, decisive in determining whether the agreement gives rise to an infringement of Article 101(1) TFEU').

[93] *Superleague* (n 17), para 166.

likely to be inherently contrary to Article 101(1) TFEU.[94] Agreements between non-rivals can be observed, among others, in the context of vertical restraints relating to the distribution of goods and services,[95] technology transfer agreements[96] and copyright licensing.[97] It is not difficult to rationalize why the Court considers that it is less probable that the object of these arrangements is restrictive of competition. In the first place, experience[98] and economic analysis[99] show that distribution agreements and intellectual property licensing are a credible means to attain pro-competitive goals. In addition (and since they do not, in and of themselves, lead to an increase in market power), they can only lead to restrictive effects in relatively limited instances.[100] Against this background, it seems reasonable to conclude that, as a rule, the objective aim of these practices will not be anticompetitive, but pro-competitive instead. This fact, however, does not preclude a finding of a 'by object' infringement in a particular economic and legal context.[101]

It has been clear from the very early days that the EU antitrust system protects both intra-brand and inter-brand competition.[102] Accordingly, a practice may be prohibited by its very nature where its objective aim is to limit rivalry among resellers of the same product. This said, a practice is more likely to amount to a 'by object' infringement where it relates to inter-brand competition. The Court has had the chance to clarify that, as a matter of principle, restrictions to intra-brand rivalry are only problematic where there is insufficient inter-brand competition.[103] Thus, the restriction of the former may be tolerated for as long as the latter is sufficiently intense.[104] For instance, selective distribution systems severely limit distributors' ability and incentive to compete on price.[105] In spite of this fact, this selling method is not deemed to be inherently restrictive of competition (and, as discussed below, may even fall outside the scope of Article 101(1) TFEU altogether).

(ii) Terms of the agreement

The terms of an agreement shed light on the object of a practice, even though they are not always decisive in and of themselves. In some instances, the terms of the agreement do not reflect the actual rationale underpinning it and thus might give an inaccurate picture of the objective aim pursued by the parties. In this vein, the Court has consistently held that the analysis must consider how the practice is actually implemented, and not just how it is drafted.[106] In other instances, the literal terms of the agreement are not conclusive, in the

[94] *Maxima Latvija* (n 14), para 15.

[95] See, among other examples, franchising, at stake in *Pronuptia* (n 71); selective distribution, at stake in Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission*, EU:C:1977:167; and exclusive dealing, at stake in *Delimitis* (n 12).

[96] Case 258/78 *LC Nungesser KG and Kurt Eisele v Commission*, EU:C:1982:211.

[97] *Coditel II* (n 81).

[98] These are the lessons to draw from *Société Technique Minière* (n 19), *Metro I* (n 95), *Nungesser* (n 96); *Pronuptia* (n 71), and *Coty* (n 7), all of which provide specific examples in which the practice under consideration was at least capable of improving the conditions of competition (as acknowledged by the Court itself in its analysis).

[99] For an overview of the economic consensus in relation to these practices, see the Guidelines on vertical restraints (n 61), paras 12–17; and the Guidelines on the application of art 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C89/3 (which provide an overview of various restraints and their pro-competitive potential).

[100] See in this sense, the Guidelines on vertical restraints (n 61), para 21, which acknowledge that, generally speaking, vertical restraints are unlikely to give rise to restrictive effects on competition unless there is insufficient inter-brand competition.

[101] *Maxima Latvija* (n 14), para 21; and *Super Bock* (n 4), para 33.

[102] *Consten-Grundig* (n 13),

[103] This point has been expressly acknowledged by the Court in Case C-306/20 *SIA 'Visma Enterprise' v Konkurences padome*, EU:C:2021:935, para 78.

[104] According to the case law market may become less dynamic where the network of agreements involving rival suppliers leads to market foreclosure—*Delimitis* (n 12)—or where the multiplication of distribution agreements limiting intra-brand competition leads to price rigidities—*Metro I* (n 95).

[105] *Metro I* (n 95), paras 21 and 22.

[106] Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paras 36 and 38.

sense that they do not necessarily reveal the economic and legal context of which the practice is a part. As will be discussed in detail below, a clause drafted in the exact same terms may be found to restrict competition in a particular factual scenario and not to be inherently restrictive (and even escape the prohibition altogether) in another one.

In spite of these caveats, the terms of agreements have been regularly considered by the Court as a relevant factor in the assessment. Two examples illustrate this idea well. First, the nature of the information exchanged by rivals may be a particularly relevant indicator of the object of the arrangement. The case law suggests that certain forms of cooperation are particularly likely to have, as their object, the restriction of competition. This is true, in particular, where rivals share information that is both confidential and strategic (and, in particular, but not only, information about their future intentions).[107] An agreement that contains such information goes against the principle whereby undertakings must determine autonomously their conduct on the market, as it removes the uncertainty that is inherent in the operation of the competitive process.[108] As a second example, it is sufficient to note that the terms of the agreement have sometimes been found to be so broad or far-reaching that they make it implausible that they relate to a legitimate aim (and, by the same token, are a strong indicator that their object is inherently restrictive).[109]

(iii) Discretion

An agreement restricts competition by its very nature where it gives the parties discretion to decide whether to pursue an anticompetitive object or a pro-competitive one instead. Where, for instance, a regulatory or a quasi-regulatory body subject to Article 101(1) TFEU enjoys the necessary leeway to enforce its rules to exclude actual or potential competitors, the said rules will be deemed inherently restrictive of competition and as such prohibited by their very nature.[110] The Court's position is easy to rationalize (and is reminiscent of the way EU law approaches similar questions in other areas, such as State aid[111]). If a regulatory body gives itself discretion, it is not possible to draw a clear link between any alleged pro-competitive aims and the rules under consideration. Arguments pertaining to the pro-competitive aims of the latter, in other words, would lack credibility, even when they would otherwise be prima facie plausible (as they were found to be in both *Superleague*[112] and *FIFA v BZ*[113]).

B. Extent and depth of the cooperation

The extent and depth of the cooperation between the parties involved in the practice is a second internal factor to consider. Generally speaking, the more extensive and the deeper the cooperation, the less likely it is that the object of the behaviour will be found to be inherently restrictive of competition (and the more difficult it will be for an authority to prove that it is inimical, by its very nature, to the EU system of undistorted competition). Conversely, the more limited the scope of the practice, the more likely the finding that it is

[107] *Banco BPN* (n 5), para 62.

[108] ibid, para 54.

[109] Case C-650/22 *Fédération internationale de football association v BZ*, EU:C:2024:824, para 145.

[110] *Superleague* (n 17), paras 171–79; and *FIFA v BZ* (n 109), para 135.

[111] In EU State aid law, a measure will be deemed selective where the Member State has discretion to decide whether or not to award an advantage. See in this sense Joined Cases C-649/20 P, C-658/20 P and C-662/20 P *Spain and others v Commission*, EU:C:2023:60, para 57.

[112] *Superleague* (n 17), para 144 ('Those various specific characteristics support a finding that it is legitimate to subject the organisation and conduct of international professional football competitions to common rules intended to guarantee the homogeneity and coordination of those competitions within an overall match calendar as well as, more broadly, to promote, in a suitable and effective manner, the holding of sporting competitions based on equal opportunities and merit. […]').

[113] *FIFA v BZ* (n 109), para 143.

caught by Article 101(1) TFEU by its very nature. In the latter scenario, any claims that the cooperation relates to a pro-competitive aim, or that it is implemented for reasons other than the restriction of competition, will be, generally speaking, less credible (which in turn will make it more difficult for the parties involved to cast a 'reasonable doubt' about the anti-competitive object of the arrangement).

When considering how the extent and depth of the cooperation influence the analysis, it is useful to think in terms of a spectrum, which is depicted in Figure 3. At the left end of the spectrum, one can think of the so-called 'naked restraints', which achieve nothing other than the limitation of the parties' freedom of action. The defining feature of 'naked restraints', in other words, is that they lack redeeming virtues. For instance, a group of competitors may, as in *T-Mobile*, agree to exchange non-public information relating to their future behaviour, without there being anything else to the concerted practice.[114] Similarly, two rivals may agree, without more to it, not to enter into one another's territory,[115] or to respect a common price level.[116] The only credible object of such conduct is the restriction of competition. By the same token, it will be typically straightforward for an authority to prove a breach to the requisite legal standard.

Cartels, which involve actual or potential competitors, are the quintessential example of the 'naked' restraint. The fact that these agreements cannot be plausibly explained on pro-competitive grounds is their core characteristic. Cartels take many different forms. What matters, in theory and in practice, is that the limitation of the parties' freedom of action can only be rationalized as a means to extract rents at the expense of customers and/or suppliers. It is therefore not surprising that the Court has summarily dismissed attempts to justify cartels on pro-competitive grounds. *BIDS*, as observed above, concerned a 'crisis cartel'.[117] Thus, any claims about the potential for the agreement to improve competition lacked credibility. There was no realistic link between the benefits alleged and the 'naked restraints' at stake. The gains invoked by the parties in *BIDS* (such as the efficiency benefits in terms of economies of scale[118]) would not have been attributable to the crisis cartel; they would have been equally achieved if the parties had determined their conduct on the market in an autonomous way.

One can think, second, of stand-alone provisions. These practices are similar to naked restraints in that they are not a part of a wider cooperation arrangement. They differ from them, however, in that they could be, at least in the abstract, a means to attain a pro-competitive objective. For instance, a stand-alone provision may be a conceivable mechanism to address a market failure. Specifically, the provision in question may be, in theory, an appropriate mechanism to tackle the risk of free-riding and thus allow the parties to appropriate the benefits resulting from their investment in, say, the training of employees, or in intangible property.[119] To the extent that they could potentially serve a legitimate aim, these stand-alone provisions are not necessarily in breach of Article 101(1) TFEU by their very nature. Because they are not a part of a broader cooperation arrangement, on the other hand, it may be challenging for the parties to substantiate their claim in light of the relevant economic and legal context. By the same token, it will be easy for an authority, in relative terms, to conclude that the practice is caught, by its very nature, by Article 101(1) TFEU.

[114] *T-Mobile* (n 5).
[115] *Toshiba* (n 17).
[116] *Cartes Bancaires* (n 1), para 51.
[117] Joliet (n 68).
[118] *BIDS* (n 51), paras 32 and 33.
[119] These are the examples given by the Commission in Alessio Aresu and others, 'Antitrust in Labour Markets' Competition Policy Brief (May 2024) <https://ec.europa.eu/competition-policy/publications_en>

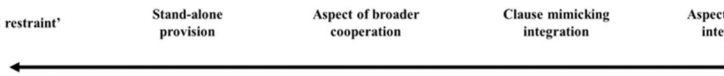

Figure 3. Extent and depth of the cooperation.

Third, a restriction by object will be more difficult to prove where the provision is a building block of a broader cooperation arrangement and where the latter, taken as a whole, pursues a non-restrictive object. In such a legal context, any claims that the clause under consideration has a legitimate aim that coincides with that of the agreement taken as a whole will be more credible (and more difficult to dispute or dismiss by the authority). For instance, a clause providing for market-sharing is not necessarily restrictive by object where it is an element of an agreement that is not inherently anticompetitive. In *Ideal Standard*, the Court held that, where inserted in the context of a trade mark assignment, a market sharing clause may not have, as its object, the restriction of competition.[120] In *Generics*, in turn, it found that a similar practice (whereby a potential competitor agrees not to enter the market) is not necessarily restrictive by its very nature if it is a constituent element of a genuine intellectual property settlement.[121] In this sense, experience shows that agreements bringing an end to court disputes are not necessarily restrictive and can be concluded for pro-competitive reasons.[122]

Cooperation becomes deeper and more extensive as one moves towards the right-end of the spectrum. For the same reason, it will be more difficult for an authority to establish a 'by object' infringement in such scenarios. As shown in Figure 3, one can distinguish between two situations. The first one concerns an instance where the parties use contractual arrangements to mimic the integration of their activities (that is, to behave as if they had merged them). It is not unusual for undertakings to mimic integration when they are in a vertical relationship. Franchising and selective distribution are two examples that come to mind immediately. These two methods rely on contractual devices (as opposed to outright vertical integration) to preserve and recreate the specific 'look and feel' that the supplier intends to convey and that is consistent with the brand image it has built around its product.

In such instances, restraints that could otherwise have been deemed restrictive by object may not be in breach of Article 101(1) TFEU (and this insofar as the said restraints pursue a legitimate aim). The Court made this point expressly in *Pierre Fabre*.[123] Clauses aimed at mimicking integration may escape the prohibition altogether in some scenarios. Suppose, for instance, that a distributor is prevented from selling the contractual products via online marketplaces. Where this ban is a constituent element of a distribution system, it is not necessarily caught by Article 101(1) TFEU. It may, in fact, be a necessary and appropriate means to attain the legitimate aims pursued by the agreement. For the same reason, it is less likely to restrict competition by its very nature. In *Coty*, the Court held that a prohibition on the use of online marketplace serves a non-restrictive object, namely the protection of the manufacturer's luxury image, where it is imposed in the context of a selective distribution agreement.[124]

[120] Case C-9/93 *IHT Internationale Heiztechnik GmbH and Uwe Danzinger v Ideal-Standard GmbH and Wabco Standard GmbH*, EU:C:1994:261, para 59.

[121] *Generics* (n 2), para 86.

[122] Guidelines on technology transfer agreements (n 99), para 235.

[123] 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, para 39: 'As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market […]. Such agreements are to be considered, in the absence of objective justification, as "restrictions by object".'

[124] *Coty* (n 7), paras 29 and 46.

At the right-end of the spectrum one can think of instances of actual integration, whereby the undertakings (partially) join forces across one or more levels of the value chain. For instance, two undertakings may decide to cease manufacturing a particular product separately (say, batteries for electric vehicles) to start doing so, jointly, from a new, state-of-the-art plant.[125] Similarly, a group of firms may decide to engage in research and development activities and license the results of their efforts via a joint venture.[126] The Court has been confronted with scenarios of this nature. There have been several cases involving payment systems which are, in essence, joint ventures aimed at the integration of some of the participating banks' activities.[127] Copyright collecting societies, at stake in cases like *Tournier*[128] and *Lucazeau*,[129] provide another example. It is by means of these societies that, inter alia, authors and performers jointly license and enforce their copyright.

These cases provide concrete examples showing that some restraints which would probably have been found to restrict competition by object in a different context, may not infringe Article 101(1) TFEU in and of themselves (and may sometimes even escape the prohibition altogether). Since cooperative joint ventures typically pursue a legitimate aim, it is more likely that each individual building block shares the same rationale. By the same token, it will be distinctly challenging for an authority to establish a 'by object' infringement where there is a genuine and deep cooperation arrangement. Suppose that the parties to a production agreement decide to jointly sell the inputs manufactured in the plant they own and exploit in common. By definition, the joint sale of inputs involves price-fixing, which, in its 'naked' form, would amount to a 'by object' infringement. In the context of a joint venture of this kind, however, price-fixing does not necessarily have, as its object, the restriction of competition.[130] Similarly, price-fixing on the purchasing side is not a 'naked' collusion device when imposed in the context of the joint acquisition of inputs by the members of a cooperative.[131]

C. Nature of the goods or services

The case law shows that the nature of the goods (or services)[132] involved in the cooperation may sometimes determine the outcome of the assessment. In particular, the Court has acknowledged that some restraints may be reasonable—if not necessary—adaptations to the features of the contractual products. More precisely, it seems clear from the case law that products that are novel or that are intangible may demand a higher degree of protection. Therefore, clauses that would have been deemed restrictive by their very nature in a different economic and legal context may not be categorized as a 'by object' infringement. This idea is present from the very early days. As far back as to *Société Technique Minière*, the Court held that 'it may be doubted' whether an agreement restricts competition where it 'seems really necessary for the penetration of a new area by an undertaking'.[133]

To begin with, products that are new may be characterized by the fact that they are not well-known by customers in a territory. As a result, a distributor may only be willing to invest in the promotion and sale of these goods or services if insulated, at least to some extent,

[125] See, by analogy, the relevant chapter in the Guidelines on horizontal co-operation agreements (n 64), paras 172–272.

[126] ibid paras 51–171. Joint licensing as an element of the research and development agreement is addressed specifically in paras 65–70.

[127] See, inter alia, *Cartes Bancaires* (n 1), *Budapest Bank* (n 3), and Case C-382/12 P *MasterCard Inc and others v Commission*, EU:C:2014:2201.

[128] Case 395/87 *Ministère public v Jean-Louis Tournier*, EU:C:1989:319.

[129] Joined Cases 110/88, 241/88 and 242/88 *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, EU:C:1989:326.

[130] Guidelines on horizontal co-operation agreements (n 64), para 223.

[131] Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, EU:C:1994:413

[132] *Superleague* (n 17), para 166.

[133] *Société Technique Minière* (n 19), 250.

from intra-brand rivalry.[134] In addition, a new product may have been the result of substantial investments in research and development, which may be difficult to recoup. Such a scenario was explored by the Court in *Nungesser*. The nature of the technology at stake in the case was key in the finding that some of the clauses did not restrict competition in the relevant economic and legal context. More precisely, the ECJ held that the plant variety covered by the exclusive territorial licence had been the result of 'years of research and experimentation' and that, at the time of the agreement, was 'unknown' in the relevant Member State.[135]

Intangible property, in turn, is characterized by the fact that it is non-rival in use.[136] As a result, the value that such property generates may only be meaningfully appropriated by limiting contractually other parties' freedom of action. This idea is perhaps best illustrated in light of *Erauw-Jacquery*, which also concerned the licensing of plant varieties.[137] The agreement featured an export prohibition. In principle, such clauses are inherently restrictive of competition, as they are aimed at limiting intra-EU trade. In the specific circumstances of *Erauw-Jacquery*, however, the Court concluded that the export ban fell outside the scope of Article 101(1) TFEU. The contentious clause applied to basic seed. Basic seed is unusual in that it is best seen as the very technology that is being licensed, rather than a product as such.[138] Against this background, the object of the agreement was not found to be the restriction of cross-border trade, but the preservation of the intangible property (ie, the plant variety), which needs to remain distinct, uniform and stable if it is to benefit from legal protection.[139]

D. Objective aims

(i) Non-restrictive aims

An overview of the case law suggests that there are (at least) five distinct non-restrictive aims that undertakings may pursue. First, formal analysis may reveal that, where an agreement can be plausibly rationalized as a means to improve productivity, it does not have, as its object, the restriction of competition. *Delimitis*, which expressly evaluated the object of the practice, is eloquent in this regard. When concluding that exclusive dealing does not amount to a 'by object' infringement, the Court acknowledged that this practice allows the supplier to align its incentives with the distributor's. Such aim was not found to be inherently anticompetitive. As a result of the alignment of incentives, the Court explains, the supplier may be able to organize 'production and distribution more effectively'.[140] What is more, exclusive dealing also benefits distributors insofar as it gives them the security of guaranteed supplies in addition to the lower costs that come with them.[141] In *Gøttrup-Klim*, the Court acknowledged that a purchasing cooperative may allow for 'more effective

[134] See in this sense Valentine Korah, 'EEC Competition Policy—Legal Form or Economic Efficiency' (1986) 39 Current Legal Problems 85. The point is also acknowledged in the Guidelines on vertical restraints (n 61), paras 16 and 136.

[135] *Nungesser* (n 96), para 56.

[136] A good is said to be non-rival in use where consumption by one user does not prevent another user's ability to consume it. Think, for instance, of a musical performance. As a result of this feature, the production of non-rival goods will tend to be suboptimal, which is why there is public intervention, including by means of intellectual property protection, to allow firms to appropriate such goods by their producers. For a discussion of public goods and their features, see N Gregory Mankiw and Mark P Taylor, *Economics* (6th edn, Cengage 2023) 204.

[137] Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1988:183.

[138] Opinion of Advocate General Mischo in Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1987:538, para 11: 'Basic seed is to a certain extent comparable to a manufacturing process protected by a patent, since certified seed of the first and second generation intended for sale to farmers for use in cereal production is produced from it […]'.

[139] ibid, para 9. See also art 6 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights [1994] OJ L227/1.

[140] *Delimitis* (n 12), para 11.

[141] ibid, para 12.

competition' (in that it allows it members to achieve gains in terms of scale).[142] Therefore, it is not restrictive by its very nature, even when it prevents its members from taking part in similar ventures.[143]

Secondly, a practice pursues a non-restrictive aim where it seeks, objectively speaking, to remedy a market failure.[144] The term market failure refers to an instance where market forces do not live up to their promise of delivering efficient outcomes. Decades of experience show how inter-firm cooperation may be an effective way to address these features. *Cartes Bancaires* captures this idea well. The contentious clauses in the case penalized some members within a cooperative joint venture.[145] While the Commission had come to the conclusion that they had an anticompetitive object, the Court took the opposite view, once it noted that ascertaining their purpose could not ignore the fact that they were a plausible means to address genuine free-riding concerns jeopardizing the operation of the joint venture.[146] In other words, the features of the relevant market suggested that the contentious clauses were a means to internalize the positive externalities generated by the activities of some participants in the system.

The preliminary reference in *Asnef-Equifax*, in which market failures featured equally prominently, concerned the lawfulness of a system for the exchange of information among competitors. As already pointed out above, there are instances (of which *Banco BPN* is an example) where rivals share information with a view to substituting cooperation for the risks of competition.[147] In other instances, the aim of an information exchange is not restrictive, but legitimate. Economic analysis is useful to tell the egregious infringement apart from the plausibly non-restrictive. In *Asnef-Equifax*, the Court found that the practice at stake was an effective mechanism to address an asymmetry of information between creditors and debtors.[148] In the relevant economic and legal context, therefore, the exchange was understood to be aimed at facilitating transactions which, in their absence, would not have occurred (and thus not aimed at restricting competition).

Thirdly, a practice is not inherently restrictive of competition where it is aimed at reducing or eliminating market frictions that undertakings would otherwise have faced. In particular, the case law provides a number of examples showing how agreements are not anticompetitive by their very nature where they are a plausible means to reduce transaction costs. *Tournier* and *Lucazeau*, both mentioned above, capture the Court's position well. Copyright collecting societies, at stake in both cases, allow (inter alia) authors and performers to enforce their rights effectively. In their absence, the transaction costs faced by right holders would be so prohibitive that their exclusive rights would be unenforceable, and as such de facto devoid of substance.[149] From the perspective of users, in turn, the joint exploitation of copyright via a collecting society gives them a degree of certainty that they otherwise would not have had.

Tournier and *Lucazeau* are useful in that they also illustrate a fourth potential non-restrictive aim pursued by a practice. In some instances, cooperation is aimed at the development of a

[142] *Gøttrup-Klim* (n 131), para 32.

[143] ibid, para 34.

[144] The Commission has defined a market failure as 'a situation where the market does not lead to an economically efficient outcome'. See Commission, 'State aid action plan—Less and better targeted state aid: a roadmap for state aid reform 2005-2009' COM (2005) 107 final.

[145] The contentious measures in the case sought to impose additional burdens on new members of the joint venture, and this on account of the fact that they were not understood to bear their fair share of the burden involved in some of the activities that were deemed necessary for the appropriate operation of the project. See *Cartes Bancaires* (n 1), para 8.

[146] ibid, para 75.

[147] See, for instance, *T-Mobile* (n 5); *Banco BPN* (n 5).

[148] Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios*, EU:C:2006:734, paras 46–48.

[149] For an analysis of this question, see Opinion of Advocate General Jacobs in Case 395/87 *Ministère public v Jean-Louis Tournier*, EU:C:1989:215, para 49.

new product that would not have been offered in its absence. Cooperation via a copyright collecting society, for instance, allows for works to be licensed jointly and thus for a blanket licence to be offered.[150] Similar examples include that of a patent pool, an arrangement aimed at bringing together all the intellectual property rights needed for the exploitation of a complex technology. Even though the creation of such a one-stop shop (which individual patentees would not have been in a position to offer) necessarily involves the joint determination of prices, it does not necessarily restrict competition, let alone by its very nature.[151]

One can think of a fifth pro-competitive aim that features prominently in the case law. The success of a complex organization that pursues a legitimate aim often depends on the ability to prevent opportunistic conduct by individual participants. Where a joint venture of this kind mimics or actually achieves integration, it is natural for some undertakings to try and benefit from cooperation, all while undermining it at the same time. Against this background, the Court has long acknowledged that governance mechanisms aimed at tackling opportunistic behaviour are not inherently anticompetitive. *Gøttrup-Klim*, mentioned above, illustrates this idea effectively. Participants in the joint purchasing cooperative were prohibited from taking part in similar ventures, so they would be invested in its success and not jeopardize it. This restraint was found not to infringe Article 101(1) TFEU by its very nature.[152] Similar governance mechanisms may be required in other contexts, such as those involving regulated professions[153] or sports.[154]

(ii) How economic insights inform the analysis

The case law suggests that economic insights are valuable when shedding light on the objective aim of a practice. They can be incorporated in several ways. In some cases, economic theory has informed the legal assessment. There have been instances where formal concepts have been explicitly relied upon by the Court. *Cartes Bancaires* is a case in point. When ascertaining the rationale behind the contentious clauses, the ECJ made an express reference to the fact that the relevant activity displayed the typical features of a two-sided platform,[155] and held that the economic dynamics underpinning such platforms must be considered at the 'by object' stage.[156] Failure to do so, in fact, is what led to the GC judgment being set aside. In other cases, the Court does not expressly rely on formal analysis. This said, its insights are in line with consensus positions. In *Delimitis*, just to mention one example, the Court's analysis captured effectively mainstream views on exclusive dealing.[157]

Economic insights can also inform the analysis when invoked by the parties. The way in which such arguments may be introduced in the overall assessment became apparent in

[150] ibid. Advocate General Jacobs refers, by analogy, to *Broadcast Music Inc. v Columbia Broadcasting System Inc.*, 441 U.S. 1 (1979), where similar issues of principle were raised.

[151] Guidelines on technology transfer agreements (n 99), paras 244–73, in particular para 245 ('[…] The creation of a pool allows for one-stop licensing of the technologies covered by the pool. This is particularly important in sectors where intellectual property rights are prevalent and licences need to be obtained from a significant number of licensors in order to operate on the market. In cases where licensees receive on-going services concerning the application of the licensed technology, joint licensing and servicing can lead to further cost reductions […]'.

[152] *Gøttrup-Klim* (n 131), para 32.

[153] See, for instance, Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, EU:C:2013:127, para 69 (where the Court held that a system of compulsory training for chartered accountants does not have, as its object, the restriction of competition).

[154] *Superleague* (n 17), para 144 (where, as already mentioned, the Court did not object, as a matter of principle, to the creation of rules aimed at coordinating the activities of various actors involved in the organization of sporting activities) and *FIFA v BZ* (n 109), paras 143–44.

[155] *Cartes Bancaires* (n 1), para 73.

[156] ibid, paras 74–75.

[157] *Delimitis* (n 12), paras 11–12. For an overview of the consensus, see Vincent Verouden, 'Vertical Agreements: Motivation and Impact', in Wayne D Collins (ed), *Issues in Competition Law and Policy*, vol 3 (American Bar Association, Section of Antitrust Law 2009).

Budapest Bank.[158] In its judgment, the Court held that a practice is not inherently anticompetitive where there are 'strong indications' that it is capable of improving the conditions of competition that would have existed in its absence.[159] For instance, such evidence may show that an agreement led to a downwards pressure on prices and therefore that its object is, at least plausibly, a pro-competitive one.[160] In line with what has already been mentioned, arguments about the positive effects of a practice are not relevant in and of themselves at the 'by object stage'. This said, they can be considered, as part of the evaluation of the economic and legal context, insofar as they help figure out the objective purpose of the practice.

V. THE ROLE OF EXTERNAL FACTORS IN THE ASSESSMENT

A. Conditions of competition

The conditions of competition within which the practice operates influence the analysis and sometimes determine the outcome of a case. The features of the industry, first, and the position of the parties therein, second, can shed light on the underlying aims. To begin with, the Court has had the chance to clarify that a practice is more likely to be inherently restrictive of competition where the sector is concentrated.[161] The relevance of this factor is not surprising. It has long been understood that undertakings' ability to collude is more pronounced where there are few firms competing, given that it makes coordination easier.[162] For the same reason, it makes it more likely that an agreement involving rivals has, as its object, the restriction of competition.

The second factor is an equally important aspect of the assessment. Generally speaking, the stronger the parties' position vis-à-vis rivals, customers and suppliers, the more likely it is that the practice will be restrictive by its very nature. Industry-wide agreements are particularly problematic in this sense. It is not a coincidence that the preceding sections have discussed several examples involving such agreements, including *ANSEAU-NAVEWA*, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* and *BIDS*. Where an agreement covers the whole of a sector, it is easier for the parties to pursue and attain an anticompetitive object. It gives them the ability to raise prices (or otherwise influence the conditions of competition) to profit-maximizing levels. It also means that there may not be holdouts opportunistically seeking to undercut participants. Thus, an industry-wide arrangement could add to the stability of a cartel over time (in particular if it is in some way sanctioned or otherwise viewed favourably by a government authority[163]).

The extent to which industry-wide practices influence the assessment of restrictions by object became apparent in two sagas addressing the status of quasi-regulatory measures put in place by private bodies. In *Superleague*, the Court examined a scenario in which two organizations—FIFA and UEFA—enjoyed a de facto monopoly over the organization of (international and European) football competitions. Insofar as they did, they had the means to engage in exclusionary conduct.[164] For the same reason, the Court held that, for rules to have a credible legitimate object in the relevant economic and legal context, these organizations need to provide a procedural and substantive framework that ensures that any regulatory requirements remain 'transparent, objective, precise, non-discriminatory and

[158] *Budapest Bank* (n 3).
[159] ibid, para 82.
[160] ibid.
[161] *Banco BPN* (n 5), para 58.
[162] Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization* (4th edn, Addison Wesley 2004) 126–36.
[163] See, for instance, *BIDS* (n 51), para 4, which shows that the crisis cartel was instigated, at least in part, by a report requested by the Irish government.
[164] *Superleague* (n 17), paras 139 and 149.

proportionate'.[165] Given the degree of market power they enjoy, in other words, any scope for discretion would allow them to pursue an exclusionary object.[166] The Court considered a similar scenario in *Em akaunt BG*.[167] In this case, it found price-fixing by the Romanian Bar Association to be akin to a cartel arrangement.[168]

Where, conversely, the position of the parties is relatively modest (which would be the case, for instance, where they face strong competition and powerful suppliers and/or buyers), the practice is less likely to be restrictive by its very nature. If the firms lack the means to negatively affect the conditions of competition, it is not plausible to argue that the object of the practice is inherently anticompetitive. *Gøttrup-Klim* is a case in point. Because the joint purchasing arrangement in issue involved a set of small players facing strong rivals and suppliers, the Court concluded that its object was not anticompetitive, but pro-competitive.[169] In the relevant context, the practice could in fact make way for 'more effective competition'. It is not difficult to think of other examples in which the relatively modest position of the parties could make a difference in the analysis. For instance, two small rivals joining forces in the context of a public tender may be a plausible means to increase, rather than decrease, competition.

The corollary to the above is that there are circumstances where the position of the parties is the determinant factor in the analysis. It is, in fact, a good example showing that the formal features of an arrangement are not reliable indicators of its legal status under Article 101(1) TFEU. A particular practice may, in a given economic and legal context, have, as its object, the restriction of competition. In a different context, the very same practice may allow for 'more effective competition'. Depending on the parties' position, for instance, an agreement may amount to bid-rigging[170] (which would have a restrictive object insofar as it is aimed at substituting cooperation for the risks of competition) or may instead be a pro-competitive joint venture that pursues a legitimate aim and that intensifies rivalry in a public tender.[171] Similarly, a group of firms acquiring products jointly may in some instances amount to a purchasers' cartel[172] and, in others, not restrict competition by its very nature.[173]

In such ambiguous scenarios, the outcome of the analysis will typically depend on whether the parties have the ability to significantly influence prices and other parameters, such as output or quality. After all, rational operators can only be expected to engage in cartel conduct where it would be feasible and profitable for them to affect the conditions of competition.[174] Thus, cooperation for the purposes of joint purchasing and joint tendering may only amount

[165] ibid, para 179.

[166] ibid, para 177.

[167] Case C-438/22 *Em akaunt BG v Zastrahovatelno aktsionerno druzhestvo Armeets AD*, EU:C:2024:71.

[168] ibid, para 51.

[169] See above and *Gøttrup-Klim* (n 131), para 32.

[170] According to the OECD, 'Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process'. See OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (OECD iLibrary 2009).

[171] For an attempt to distinguish between one and the other, see Richard Whish and David Bailey, *Horizontal Guidelines on Delineation between Purchasing Agreements: By Object and By Effect Restrictions* (European Union 2022).

[172] For two examples of purchasers' cartels, see *Raw Tobacco—Spain* (Case COMP/C.38.238/B.2) Commission Decision of 20 October 2004; and *Ethylene* (Case AT.40410) Commission Decision of 14 July 2020.

[173] See *Gøttrup-Klim* (n 131); and, more generally, the Guidelines on horizontal co-operation agreements (n 64), para 278 ('Joint purchasing arrangements generally do not amount to a restriction of competition by object if they genuinely concern joint purchasing, namely where two or more purchasers jointly negotiate and conclude an agreement with a given supplier relating to one or more trading terms governing the supply of products to the cooperating purchasers') and 279 ('Joint purchasing arrangements should be distinguished from buyer cartels, which have as their object the restriction of competition in the internal market contrary to Article 101(1) […]').

[174] See Carlton and Perloff (n 162).

to a cartel where the participants have a substantial degree of market power. Conversely, the weaker the participants' position (and the stronger the position of rivals, purchasers and suppliers), the more plausible it is that the aim of the practice is to improve the conditions of competition and, by the same token, the less likely that it is restrictive by its very nature.

B. Regulatory context

The legal environment within which firms operate sheds light on whether a given practice is a credible means to collude, exclude and/or limit intra-EU trade. It has already been explained that a finding of a 'by object' infringement presupposes that there is competition to restrict in the first place (it is the second step of the framework described in Section III). In this sense, an agreement will be incapable of restricting competition where the regulatory context precludes (inter-brand or intra-brand) rivalry. If, in other words, the absence of competition is attributable to the legal environment (as opposed to the practice under consideration), there will be no infringement of Article 101(1) TFEU, whether by object or effect. The regulatory context would preclude (inter-brand or intra-brand) competition, generally speaking, where it raises 'insurmountable barriers to entry'.[175]

Such 'insurmountable barriers to entry' exist, for instance, where an industry has not been liberalized. In *E.On Ruhrgas*, the GC concluded that a French incumbent was not a potential competitor to its German counterpart given that the latter enjoyed a de facto legal monopoly.[176] The Commission decision was annulled insofar as it found that an infringement had been committed in Germany. The intellectual property system could also work as an 'insurmountable' barrier. Consider the *Coditel* saga. In *Coditel I*, the Court held that the exercise of the right of communication to the public, whereby the right holder is entitled to prohibit every communication to the public within a given territory (including those lawfully originating in other Member States) is compatible with EU law.[177] In the subsequent instalment of the saga (*Coditel II*), the ECJ ruled that an agreement granting a right holder an exclusive territorial licence (and thus the right to authorize or prohibit every communication to the public within the territory) is not as such contrary to Article 101(1) TFEU.[178]

The judgment in *Coditel II* is remarkable insofar as the agreement gave the licensee absolute territorial protection (ie, the right to authorize or prohibit all transmissions lawfully originating in other Member States). Even if prima facie at odds with its strict stance vis-à-vis agreements limiting market integration, the Court's position is easy to rationalize. Where the absence of intra-EU trade is attributable to the copyright regime, as opposed to the agreement, the object of the latter cannot be the restriction of competition. It can only be a legitimate one (namely to ensure that the right of communication to the public fulfils its function).[179] In a different factual scenario, however, the limitation of intra-EU trade may well fall within the scope of Article 101(1) TFEU. The GC judgment in *Valve*[180] is an example in this sense. The facts of this case are different from *Coditel II* in that the copyright holders had given the platform operator a worldwide non-exclusive licence.[181] In such a legal

[175] *Generics* (n 2), para 45.

[176] Case T-360/09 *E.ON Ruhrgas AG and E.ON AG v Commission*, EU:T:2012:332, para 104; and Case T-370/09 *GDF Suez SA v Commission*, EU:T:2012:333, para 97.

[177] Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*, EU:C:1980:84, paras 15-16.

[178] *Coditel II* (n 81), para 15.

[179] ibid, para 12 ('[…] the right of the owner of the copyright in a film and his assigns to require fees for any showing of that film is part of the essential function of copyright'). For an in-depth analysis of this specific question, see Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law* (Sweet & Maxwell 1996) 87–88.

[180] Case T-172/21 *Valve Corporation v Commission*, EU:T:2023:587.

[181] Ibid, para 3. See also *Focus Home, Koch Media, ZeniMax, Bandai Namco* and *Capcom* (Cases AT.40413, AT.40414, AT.40420, AT.40422, and AT.40424) Commission Decision of 20 January 2021, para 83.

context, any restriction of intra-EU trade was attributable to the distribution agreements, in the sense that the terms of the licence expressly allowed for the cross-border provision of content. For the same reason, the parties could not credibly argue that the aim of the contentious clauses was to ensure the proper operation of the copyright regime.[182]

C. Experience

Experience fulfils three main roles in the assessment of restrictions by object. First, competition authorities can rely on experience to conclude that certain types of cooperation are in breach of Article 101(1) TFEU by their very nature. In *Cartes Bancaires*, the Court held that the lessons learnt over decades make it clear beyond doubt that cartel agreements are inherently anticompetitive and that they are a (net) source of anticompetitive effects.[183] This position was expressed again in subsequent rulings.[184] Where courts and authorities have accumulated experience in relation to a practice, it will be much harder (if not virtually impossible) for the parties to show that its object, in a specific economic and legal context, is not anticompetitive. By the same token, an authority will be able to summarily dismiss arguments to that effect and, similarly, the analysis of the economic and legal context can afford to be cursory.

Experience fulfils a second role in the assessment. The Court held, in *Budapest Bank*, that a practice cannot be categorized as having a restrictive object unless there is 'sufficiently reliable and robust' experience about it.[185] This cautious position comes across as reasonable. Businesses adjust to a changing environment in novel and often unpredictable ways that are not always immediately obvious to grasp. As a result, the understanding of the rationale and operation of potentially restrictive conduct is often imperfect. More importantly, it typically lags behind real-world developments. Against this background, the Court's position in *Budapest Bank* is, in essence, a warning against jumping to conclusions based on intuition or on an imperfect and impressionistic understanding of novel conduct.

This point is perhaps best illustrated in light of a specific example. Think of price-parity clauses (ie, most-favoured nation or 'MFN' clauses) required by online platforms such as travel agencies or marketplaces.[186] When first introduced by Internet actors, they had been rarely observed. As a result, their rationale and impact on the competitive process were not fully understood by economists and authorities.[187] They could be seen as contractual devices aimed at achieving collusion, as variations of resale price maintenance clauses or, instead, as a new and different (and potentially pro-competitive) arrangement. It took some time for the dust to settle and for decision-making bodies to gain a full understanding of the role they play in online platforms' strategies. In spite of their formal features, the Commission does not treat them as 'hardcore restrictions' within the meaning of its Vertical Block Exemption Regulation.[188] Against this background, it is unsurprising that the Court has

[182] ibid, para 202 ('[…] the geo-blocking of the Steam keys did not pursue an objective of protecting the publishers' copyright, but was used to eliminate parallel imports in order to protect sales of the video games at issue and the high royalty amounts collected by the publishers […]'.

[183] *Cartes Bancaires* (n 1), para 51.

[184] See, in particular, *Maxima Latvija* (n 14), para 19; *Budapest Bank* (n 3), para 36; and *Superleague* (n 17), para 163; and *Em akaunt BG* (n 167), para 51.

[185] *Budapest Bank* (n 3), para 76.

[186] Guidelines on vertical restraints (n 61), para 356. The Commission defines these clauses as those that '[…] require a seller of goods or services to offer the goods or services to another party on conditions that are no less favourable than the conditions offered by the seller to certain other parties or via certain other channels […]'.

[187] See in this sense, Pinar Akman and Morten Hviid, 'A Most-Favoured-Customer Clause with a Twist' (2006) 2 European Competition Journal 57; and Amelia Fletcher and Morten Hviid, 'Retail Price MFNs: Are they RPM "at its worst"?' (2016) 81 Antitrust Law Journal 65; and Jonathan Baker and Fiona Scott Morton, 'Antitrust Enforcement Against Platform MFNs' (2018) 127 Yale Law Journal 2176.

[188] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of art 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L134/4. For an analysis, see also the Guidelines on vertical restraints (n 61), paras 253–55.

been asked whether MFN clauses may even fall outside the scope of Article 101(1) TFEU altogether in certain circumstances.[189]

The *Budapest Bank* doctrine applies only to genuinely novel practices. As the Court clarified in the rulings that followed, this doctrine must not be understood as meaning that well-known conduct must be treated as a novel one simply because it arises in a different, unusual factual scenario. Consider reverse payment settlements. As mentioned above, these agreements may or may not fall within the scope of Article 101(1) TFEU depending on the content of the relevant clauses and on other aspects of the economic and legal context (such as the status of the underlying intellectual property). In some circumstances, a settlement of this kind restricts competition by its very nature. This is so, as already explained, where it serves no plausible purpose other than a restrictive one. In such an instance, the reverse payment will be nothing other than a 'naked restraint' aimed at sharing markets.[190] Since there is abundant experience about the rationale and impact of 'naked restraints' on competition, the *Budapest Bank* doctrine would have no role to play.

Finally, the case law suggests that experience fulfils a third role. The Court's ruling in *Super Bock* shows that it may also be relied upon to recalibrate existing doctrines as new knowledge provides a more nuanced understanding of the rationale and impact of some practices. In *Binon*, the ECJ had held that resale price maintenance falls, always and everywhere, within the scope of Article 101(1) TFEU,[191] even when it may serve a pro-competitive purpose.[192] In *Super Bock*, by contrast, the Court held that its legality must be assessed in accordance with the same criteria that apply to the rest of practices. Even though the judgment is not explicit about the question, the shift in approach reflects the evolution of economic thinking regarding resale price maintenance.[193] While it involves price-fixing and precludes any intra-brand rivalry, this practice is no longer seen as one akin to a cartel.

VI. INTO THE FUTURE: FRICTIONS, CONSISTENCY, AND POTENTIAL FOR CHANGE

A. The administrability of the case law

It is legitimate to wonder whether the case law has made it too difficult for authorities to establish, to the requisite legal standard, that a practice restricts competition by object. The range of internal and external factors discussed in Sections IV and V may come across, at first glance, as excessively demanding. For some, the evolution of the case law may be at odds with the very point of the 'by object' category.[194] One could take the view, in this sense, that egregious breaches of Article 101(1) TFEU, such as cartel arrangements, should not be subject to an extensive evaluation of the circumstances surrounding their conclusion. It is possible to argue, in the same vein, that giving the members of a cartel (and, indeed, every other clear violation of competition law) the chance to provide arguments pertaining to the economic and legal context only serves to delay a finding of infringement without any

[189] Case C-264/23 *Booking.com BV and Booking.com (Deutschland) GmbH v 2Shours Hotel Company Berlin GmbH and others*, EU:C:2024:764.

[190] *Generics* (n 2), para 77.

[191] Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284.

[192] ibid, para 46.

[193] The consensus views are summarized in Guidelines on vertical restraints (n 61), para 197.

[194] See, for instance, Stefan Enchelmaier, 'Restrictions "by object" after *Generics*, *Lundbeck*, and *Budapest Bank*: Are We Any Wiser Now?' (2023) 11 Journal of Antitrust Enforcement i72.

obvious benefit. This concern is sufficiently widespread to have found its way in Advocates' General Opinions.[195]

What the analysis of the case law reveals in this regard—and this is a point that has not been sufficiently emphasized—is that the breadth and depth of the analysis is not uniform across the board. As already suggested in the preceding sections, the intensity of the scrutiny (and the demands placed upon authorities) varies depending on the specific features of the behaviour under consideration and of the underlying context. Accordingly, a finding that a practice has, as its object, the restriction of competition will be straightforward where all or most of the factors described in Sections IV and V suggest that it falls within the scope of Article 101(1) TFEU by its very nature. Conversely, it will be more demanding to establish an infringement where all or most of the factors suggest, by contrast, that the practice can be plausibly rationalized as a means to attain a legitimate aim.

The modulation of the analysis, and the extent to which it adjusts to the specificities of each case, is best illustrated by reference to some concrete examples. Consider a plain-vanilla cartel, which is depicted in Figure 4. Such a practice, which involves actual or potential competitors, is primarily characterized by the fact that is made up of 'naked' restraints that are not credible mechanisms to attain pro-competitive goals. That the object of this practice is inherently anticompetitive can be confirmed by other factors, such as the fact that cartels involve the largest players in an industry, or the fact that there is long experience about their purpose and expected effects. If one considers all of these factors together, it is apparent that showing that a cartel infringes Article 101(1) TFEU will typically be a straightforward exercise. This is all the more so where there are additional elements at play, such as the fact that the agreement had been kept in secret and/or the fact that it had been uncovered in the context of a leniency application.

Consider a second example of a practice that, generally speaking, amounts to a 'by object' infringement, and which is depicted in Figure 5. Agreements for the distribution of goods that provide for clauses limiting intra-EU trade (such as export prohibitions and outright bans on online sales) are, in principle, restrictive by their very nature. Typically, this finding will be straightforward. Where an agreement concerns the distribution of goods, any intellectual property rights will have been exhausted.[196] Accordingly, it will not be possible for the parties to argue that what prevents intra-EU trade is the regulatory context (as in *Coditel II*), as opposed to the clauses aimed at restricting it. Similarly, the fact that the relevant restraints can be said to pursue other pro-competitive aims will not be sufficient for the parties to escape the prohibition. As already pointed out, market integration has a special place in the EU legal order and benefits from a heightened degree of protection.

In other instances, however, establishing that a clause has, as its object, the restriction of competition, will be more challenging for an authority. Consider the example of resale price maintenance, captured in Figure 6. Unlike cartels, this practice involves firms that are at different levels of the value chain, often in a non-competitive situation. What is more, it may be a part of a broader agreement and may sometimes share the overarching, non-restrictive aims of the latter. If included as part of a selective distribution arrangement, for instance, vertical price-fixing may in fact be a building block contributing to the preservation of the brand image of the contractual product (a concern that would be particularly pressing if it is a luxury item[197]), as opposed to a stand-alone provision. One should consider,

[195] See, for instance, Opinion of Advocate General Rantos in Case C-298/22 *Banco BPN/BIC Português SA and others v Autoridade da Concorrência*, EU:C:2023:738.

[196] Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, EU:C:1971:59.

[197] *Coty* (n 7), para 27.

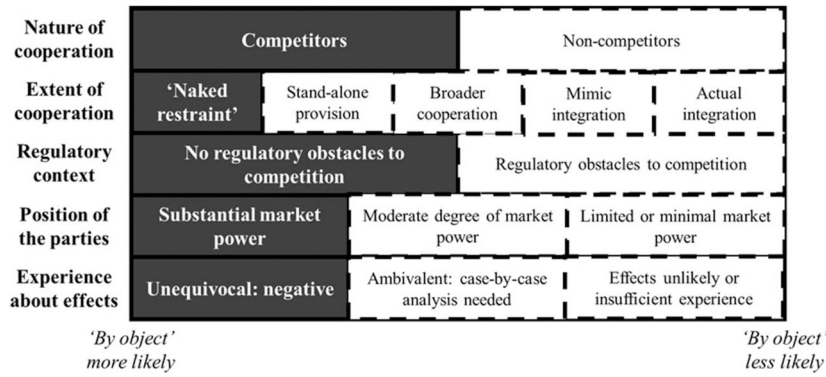

Figure 4. Features of a cartel agreement.

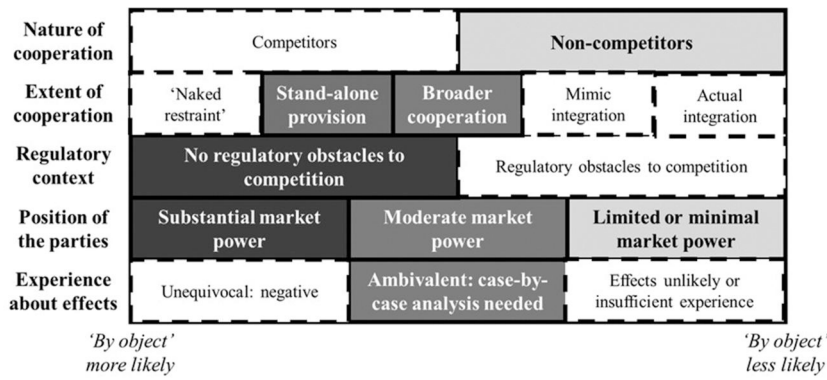

Figure 5. Features of the typical distribution agreement limiting intra-EU trade.

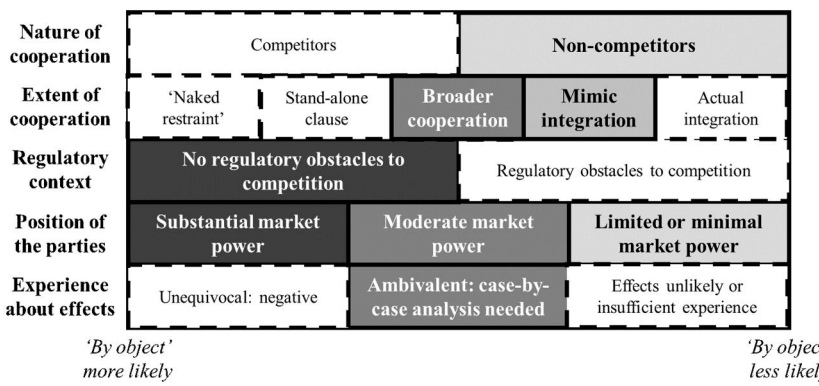

Figure 6. Features of the typical resale price maintenance agreement.

finally, that the lessons of experience and economic analysis suggest that vertical price-fixing is not invariably anticompetitive and that a case-by-case evaluation of its effects may in fact be appropriate.

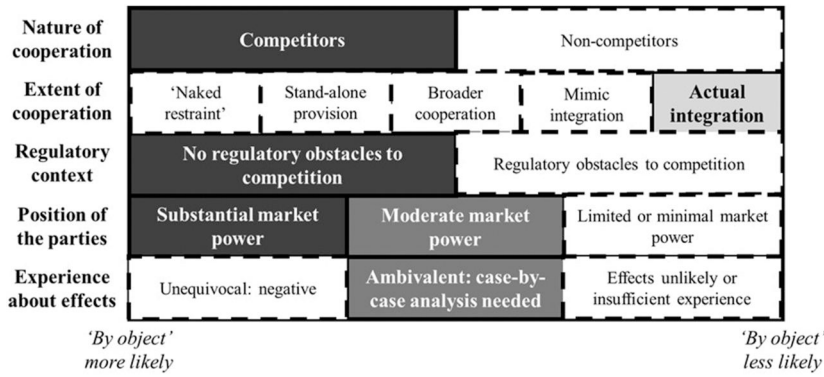

Figure 7. Features of the typical 'airline alliance'.

Consider a final example, that of a joint venture that does not qualify as a concentration within the meaning of Regulation 139/2004.[198] Think, more precisely, of an 'airline alliance' partially merging the activities of two or more operators.[199] This scenario is sketched in Figure 7. By virtue of such a joint venture, airlines share some of their activities and behave, in some respects, as a single entity (they may share, inter alia, their routes and schedules).[200] A partial merger of this kind requires the parties to coordinate their conduct along several parameters of competition. For instance, where airlines decide to share their routes they might have to agree, inter alia, on their joint output. Such clauses, in their 'naked' form, would amount, in all likelihood, to a 'by object' infringement. Where they are a constituent element of a partial merger, by contrast, it would be challenging for an authority to show that they are inherently restrictive of competition. In such economic and legal context, it is more plausible that such restraints are intended to attain the productivity gains (in terms of economies of scale and scope) sought by the airline alliance.

The point of these four examples is to show that establishing a 'by object' infringement will be more or less straightforward depending on the nature and content of the agreement, as well as other contextual factors. A careful analysis of the case law suggests, in fact, that proving that a practice is inherently anticompetitive is easy where it should be, and, conversely, it is challenging where it makes sense for it to be so. In other words, the Court has developed built-in mechanisms to ensure that authorities do not yield to the temptation of over-stretching the scope of the notion and, similarly, that the same notion is interpreted 'restrictively'.[201] For instance, the fact that the object of the contentious clauses in *Cartes Bancaires* was not found to be inherently anticompetitive does not mean that it is distinctly hard for authorities to prove that a practice infringes Article 101(1) TFEU by its very nature. It simply means that the 'by object' categorization of the practice was not appropriate in the specific circumstances of the case (as explained above, the practice served the broader, pro-competitive aims of the joint venture).

[198] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

[199] See, for instance, *BA/AA/IB* (Case COMP/39.596) Commission Decision of 14 July 2010.

[200] ibid, para 32: '[…] the parties agreed to jointly establish fares, regulate capacity, coordinate their respective schedules, and cooperate with respect to sales and marketing. Moreover, the parties decided to share overall revenues and sell each other's products and services without regard to which party is operating the aircraft'.

[201] *Cartes Bancaires* (n 1), para 58.

B. On the (alleged) conflation of object and effect

(i) Object and effect are different inquiries

It is not unusual to read that the case law has evolved in a way that conflates object and effect.[202] From this perspective, the inquiry to evaluate whether a practice restricts, by its very nature, Article 101(1) TFEU is not fundamentally different from that undertaken to assess its impact on competition. It is easy to see how one may reach this conclusion. After all, some aspects of the economic and legal context discussed in this piece may also be taken into account at the 'by effect' stage. In spite of this fact, a careful reading of the case law shows that the two stages (object and effect) remain distinct. They have not been conflated in the case law. Ascertaining whether the object of the practice is inherently anticompetitive differs from the analysis of its restrictive effects in two fundamental ways. First, the nature of the inquiry is different. Second, the intensity of the analysis also varies.

As explained above, the 'by object' stage seeks to identify, in essence, the objective rationale behind the practice, that is, whether it is aimed at collusion, exclusion or the limitation of intra-EU trade. The factors pertaining to the underlying economic and legal context are relevant to the extent that they shed light on that question. They are not relied upon with a view to proving the effects of a practice. Consider some factors that may be relevant at both the 'by object' and the 'by effect' stages, such as the level of concentration and the position of the parties. When the analysis concerns the object of the practice, these factors assist the analysis insofar as they help determine whether the available evidence is consistent with (say) collusion as the underlying aim. When the analysis concerns the impact of the conduct on the relevant market, by contrast, the position of the parties will be taken into consideration insofar as it can provide indications about the harm that the practice can be expected to have on the relevant market.

The second difference between object and effect relates to the intensity of the analysis. When the inquiry concerns the former, the assessment does not necessitate an evaluation of the relevant market. A cursory overview of the industry and its features, the case law suggests, is sufficient for an authority to establish a 'by object' infringement to the requisite legal standard. In the same vein, the authority cannot be required to evaluate the effects of the practice at the 'by object' stage. It has already been mentioned, in this regard, that conduct may restrict competition by its very nature even when it is not particularly likely to negatively affect competition. This aspect contrasts with the analysis of the restrictive effects of a practice under Article 101(1) TFEU. The definition of the relevant market is the indispensable starting point at the latter stage.[203]

(ii) The inclination to conflate object and effect

The fact that a practice is likely to have restrictive effects on competition (or the fact that it can be safely presumed to have such effects) does not mean that it necessarily has, as its object, the restriction of competition. In other words, the object of a practice cannot be inferred from the fact that its effects are assumed or deemed to be, upon cursory analysis, important or serious. In fact, the Court has expressly acknowledged that conduct may even fall outside the scope of Article 101(1) TFEU even when it can be safely presumed to affect, significantly, one or several parameters of competition. In *Metro II*, for instance, the Court acknowledged that selective distribution agreements significantly limit, by their very nature, intra-brand price rivalry among members of the network.[204] In spite of this fact, it confirmed

[202] See, for instance, Enchelmaier (n 194).

[203] See in this sense, *Delimitis* (n 12), para 16.

[204] Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission*, EU:C:1986:399, para 45.

the doctrine laid down in the first judgment of the *Metro* saga, which did not find this distribution method to be inherently restrictive of competition.

This position was reiterated in subsequent judgments. The most explicit of these is probably *Maxima Latvija*. This case concerned the legality of an agreement between a shopping centre and its 'anchor tenant'. As part of the agreement, the former gave the latter veto power over the opening of new premises. The necessary consequence of this agreement was that the 'anchor tenant' had the ability to prevent the opening of any stores—including those that could threaten its position or directly compete with it. In spite of this fact, and its undeniable consequences for competition, the Court concluded that its object was not inherently restrictive. The aim of the non-compete clause was deemed to be comparable to that of an exclusive dealing obligation. In fact, the Court expressly relied on *Delimitis* to substantiate its conclusions in this sense.[205]

Even though the Court has been careful not to conflate object and effect, it may be tempting for an authority to establish the object of a practice on the basis of the impact it is assumed or expected to produce. After all, there is a passage in *Cartes Bancaires* that expressly mentions the effects of cartel conduct when explaining why it is restrictive by its very nature.[206] However, *Cartes Bancaires* itself (and the case law that followed) makes it clear that this passage does not in any way imply the endorsement of an alternative methodology. Along the lines of what has been pointed out above, the passage is best understood as expressing the (uncontroversial) view that cartels, precisely because they lack redeeming virtues (ie, they lack a plausible pro-competitive objective), they can be presumed to be a net source of anticompetitive effects.

C. The eternal temptation of formalism (and its unreliability)

For all of its clarity and consistency, the case law has not totally tamed the temptation by some actors in the system to rely on the formal features of a practice (such as the fact that it provides for price-fixing or market sharing) to claim that it is restrictive of competition by object. The persistent attraction of formalism should not come as a surprise, in particular at a time when private enforcement is on the rise. After all, the promise of this approach is that it makes it easier to establish a restriction. There is no shortage of factual scenarios where formalism could be displayed. Some of the examples discussed above show that many complex arrangements (such as patent pools,[207] purchasing cooperatives[208] and sports governance structures[209]) often involve some form of price-fixing, market sharing or output restrictions. To the extent that they do, they provide fertile ground for the exploration of this approach to 'by object' infringements.

It was pointed out in Section II, when discussing the eternal appeal of 'object box' thinking, that formalism does not capture the reality of the case law, which emphasizes the need to consider the relevant economic and legal context. The discussion in Sections IV and V, which reflects decades of experience dealing with the notion, shows that the formal features of an agreement are consistently unreliable as indicators of the object of a practice. The case law and the administrative practice provide numerous examples in this sense. It is not

[205] *Maxima Latvija* (n 14), paras 25–31.

[206] *Cartes Bancaires* (n 1), para 51.

[207] Guidelines on technology transfer agreements (n 99), paras 244–73. By definition, the licensing of technologies by means of a pool involves the joint determination of a price.

[208] See *Gøttrup-Klim* (n 131); and, more generally, the Guidelines on horizontal co-operation agreements (n 64), para 278.

[209] It is not unusual to find, in sports governance structures, clauses restricting the ability to set prices, such as salary caps. The object of these clauses is not necessarily the restriction of competition, but the achievement of the aims sought by the participants (such as competitive balance). For an analysis of this question, see Pablo Ibáñez Colomo, 'Competition Law and Sports Governance: Disentangling a Complex Relationship' (2022) 45 World Competition 323.

surprising, for instance, that the Commission Guidance on restrictions by object is peppered with caveats and qualifications, thereby revealing that the formal features of a practice are, if anything, a very fallible and preliminary rule of thumb.[210]

Against this background, the question is whether there would be any advantage in abandoning the established case law to embrace formalism as a guide to the identification of 'by object' infringements. One could try and argue, in this sense, that an approach that relies on the formal features of a practice has the advantage of being more easily administrable. Using a single factor comes across as more readily applicable by courts and authorities. Experience, however, shows that formalism is not necessarily easier to administer, let alone more predictable.[211] Deciding, case-by-case, whether a practice amounts to, say, price-fixing or market sharing can be as complex and demanding as applying the case law in its current incarnation. For instance, it would be difficult (if not entirely arbitrary) to tell whether or not MFN clauses amount to price-fixing.

It is submitted, moreover, that any attempt to follow formalism would be short-lived, not just because the approach would be difficult to administer, but because it would lead to outcomes that the Court would be unlikely to countenance. When confronted with some of the scenarios discussed in the preceding sections (such as the joint purchasing of inputs by a cooperative of relatively small players or the joint licensing via a copyright collecting society), one cannot expect formalism to survive. If a practice comes across as a plausible means to improve, on balance, the conditions of competition, or to attain something that would have been difficult (if not outright impossible) to achieve in its absence, experience suggests that it is more probable than not that the Court will conclude that it does not have, as its object, the restriction of competition. It is submitted, in this sense, that the rejection of formalism in the case law is not purely capricious. It is a conscious choice that minimizes errors and strikes the right balance between administrability and accuracy.

D. The relationship with Article 101(3) TFEU

Given the range of factors that are relevant when ascertaining the object of a practice (from the degree of concentration and the position of the parties to the market failures that the conduct may be addressing), it is reasonable to raise the question of whether, and if so to what extent, the analysis of restrictions under Article 101(1) TFEU overlaps with that undertaken under the third paragraph of the provision. Has the Court made the balancing exercise under Article 101(3) TFEU irrelevant or redundant? After all, the third paragraph seeks to ascertain, first, whether the agreement under consideration is a source of pro-competitive gains and, second, whether such gains outweigh any restrictive effects resulting from it, all while giving a fair share to consumers and remaining proportionate.

In spite of the superficial similarities, the nature of the assessment is fundamentally different at each stage. The first, most obvious and most important difference is that the pro-competitive effects of an agreement are not relevant under Article 101(1) TFEU. As emphasized above, there is a difference between the legitimate aims pursued by a practice and the pro-competitive effects to which it might lead in a particular economic and legal context (just like there is a difference between the restrictive object and the restrictive effect of a practice). Only the pro-competitive rationale behind the practice is relevant under Article 101(1) TFEU, whereas its impact is considered under the third paragraph. The

[210] Commission, 'Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice' SWD (2014) 198 final.

[211] One obvious example relates to the case law on rebates under art 102 TFEU. The seeming simplicity (whereby loyalty rebates were prohibited as presumptively abusive and volume rebates were deemed presumptively lawful) concealed a byzantine and increasingly complex system that was eventually abandoned as unworkable by the Commission. For a detailed discussion, see Pablo Ibáñez Colomo, 'Form and Substance in EU Competition Law' (2023) 46 World Competition 401.

second difference has to do with the burden of proof. At the Article 101(1) TFEU stage, the authority has the legal burden of showing a restriction of competition to the requisite legal standard. Once a restriction established, by contrast, it is for the parties to the agreement to show that the conditions set out in Article 101(3) TFEU are met.[212] A third difference relates to the intensity of the analysis at each of the two stages. It has already been explained that it is sufficient for the parties to an agreement to show that there is a plausible non-restrictive explanation for the practice.[213] Under the third paragraph, by contrast, undertakings will have to substantiate and provide evidence pertaining to, inter alia, the magnitude of the efficiency gains achieved by the practice and of the moment at which it will be attained.[214]

A final, crucial difference pertains to the nature of the assessment. There is no balancing of the pro- and anticompetitive effects of a practice under Article 101(1) TFEU.[215] The role of the pro-competitive dimension of the practice under Article 101(1) TFEU is not to weigh its positive impact against its negative consequences, but merely to shed light on its object. The said balancing exercise is only undertaken when the evaluation reaches the third paragraph of the provision. Thus, and in spite of the occasional discussions on the topic, the 'rule of reason' is a concept that is foreign to the EU legal order, the relevance of which has been expressly rejected by the Court.[216] As much as the concept of per se, discussed in Section II, it is a notion borrowed from US antitrust law, where it emerged for substantive and institutional reasons that are not relevant on this side of the Atlantic.[217]

VII. CONCLUSIONS

The case law on restrictions by object has the advantage of inter-temporal consistency. The fundamental principles underpinning the interpretation of the notion have not fluctuated over time. Any incremental refinements did not deviate from the logic underpinning the seminal rulings. An advantage of consistency is the predictability it provides: the criteria in light of which the restrictive object of a practice is established (namely its content, its objective aims and the economic and legal context of which it is a part) have been clearly spelled out by the Court. One contribution that this article seeks to make, against this background, is to shed light on how these three criteria are applied in practice. The issue is best approached by dividing the factors that are relevant to the assessment into two broad categories—internal and external. These factors, taken together, determine the probability that a practice will be found to restrict competition by its very nature in a given economic and legal context.

A conclusion to draw from the systematic evaluation of these questions is that the framework enshrined in the case law is not only predictable but also administrable. It appears, more precisely, that the intensity and depth of the assessment adjust by design to the specificities of the practice under consideration. Thus, it is easier for an authority to establish a restriction by object to the requisite legal standard where all, or most, of the relevant factors (think of the position of the parties or the fact that the practice is a 'naked restraint') suggest that the said practice is inherently anticompetitive. Vice versa, it will be more demanding to prove a 'by object' infringement where all, or most, of the factors suggest the opposite

[212] Andriani Kalintiri, 'The Allocation of the Legal Burden of Proof in Article 101 TFEU Cases: A "Clear" Rule with Not-So-Clear Implications' (2015) 34 Yearbook of European Law 232.

[213] *Generics* (n 2), para 89.

[214] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97.

[215] *Superleague* (n 17), para 166.

[216] *Generics* (n 2), para 104.

[217] For an overview of the US case law (in addition to its origins and operation), see Roger D Blair and D Daniel Sokol, 'The Rule of Reason and the Goals of Antitrust: An Economic Approach' (2012) 78 Antitrust Law Journal 471.

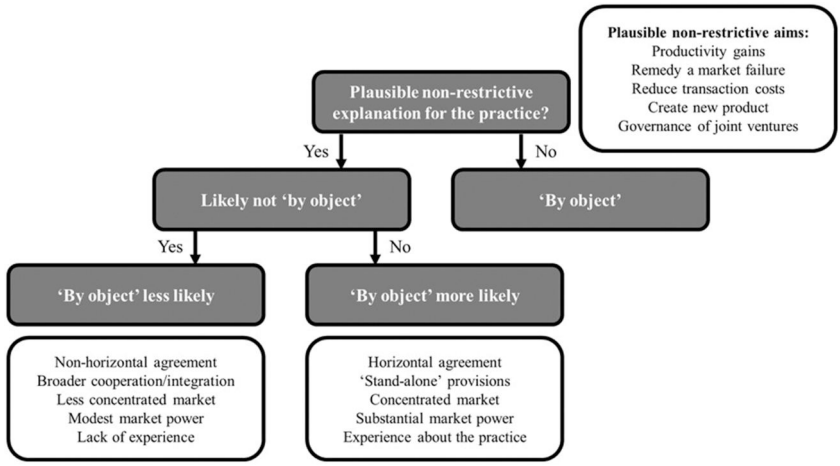

Figure 8. The core test to identify 'by object' infringements.

(which would be the case, for instance, where it appears that a provision serves the overarching aim of an agreement that is, on the whole, pro-competitive). Put differently, the case law makes it difficult for authorities to prove a 'by object' infringement where it is meant to be difficult and, conversely, makes it easy where one can expect it to be.

Figure 8 seeks to capture the core aspects of the framework. Once it has identified the 'candidate object' at stake in the case (collusion, exclusion or limitation of intra-EU trade), which is the first step of the test, and once it has shown that there is actual or potential competition to restrict (the second step), an authority must ascertain whether there is a plausible non-restrictive explanation for the practice (such as those identified in the case law over the years and mentioned in Figure 8). The latter is evaluated in light of the internal and external factors set out in Sections IV and V. If it appears that the behaviour has no explanation other than a restrictive one, it will be deemed to amount to a 'by object' infringement. Conversely, the fact that it can be rationalized as a credible means to attain a pro-competitive aim is a strong indicator that it is not restrictive by its very nature. In such an instance, the authority will have to rely on additional factors pertaining to the economic and legal context to substantiate a finding of a 'by object' breach.

This framework is particularly valuable at a time when the EU competition law system is entering a new era. Most of the landmark rulings of the past two decades—think of *BIDS*, *Cartes Bancaires*, *Maxima Latvija*, *Generics*, *Budapest Bank*, *Super Bock*, *Servier*, and *Banco BPN*—have, as their origin, a decision of a competition authority acting in the public interest. With the rise of private enforcement, one can expect the number of cases originating in disputes before national courts to increase. *Superleague*, from this perspective, is an example of the incoming tide.[218] In this emerging landscape, the need to ensure that the law is uniformly applied across the EU becomes more pressing. One can think of a number of ways in which private enforcement will put the current framework to the test, thereby adding to the risk of legal fragmentation. Evidence from the very preliminary references submitted to the Court suggests that national courts may not always appreciate that the evaluation of the

[218] One can think, among the pending cases at the time of writing, *Booking* (n 189); Case C-209/23 *RRC Sports GmbH v Fédération internationale de football association*, pending.

object of a practice is a context-specific exercise. Similarly, they may occasionally be tempted to infer the restrictive nature of a behaviour from its potential to do harm.[219]

It is submitted, against this background, that there are ways in which existing principles could be streamlined and made more explicit, so the logic guiding the interpretation of Article 101(1) TFEU becomes more visible and less prone to misunderstandings. First, the case law would become more resilient if the Court downplayed the importance of some vacuous formulas that have no actual relevance in the assessment, in the sense that they are purely descriptive and potentially misleading. Secondly, the case law would benefit if the three steps of the test were articulated more clearly and evaluated systematically, to ensure that it is administered uniformly across the EU. Recent judgments like *Servier*, *Banco BPN* and *FIFA v BZ* are more explicit than past rulings about the framework underpinning the case law and its operation. They provide a template for the future case law in a rapidly shifting landscape.

ACKNOWLEDGEMENTS

I am grateful to Jesús Calderón Argüello, Charlotte Emin, Ioanna Kladi and Luca Prete for their comments on a previous version. The article has also benefitted from discussions with College of Europe students of the Jacques Delors promotion. As is true of other articles written during this period, it was hard not to think of the legacy left by Professor Heike Schweitzer while preparing it. I was reminded, in particular, on her plea for a distinctly European approach to the definition of competition law concepts. In accordance with the ASCOLA declaration of ethics, I am happy to clarify that I have nothing to disclose.

[219] This inclination has been displayed even in some Advocates General Opinion. See, for instance, Opinion of Advocate General Szpunar in Case C-650/22 *Fédération internationale de football association v BZ*, EU:C:2024:375, which infer (para 53) the object of a set of rules from the 'draconian' consequences they might have and from the 'deterrent effect' they create. This approach was not followed by the Court, which remained faithful to its orthodox methodology.

Yearbook of European Law, 2024, 00, 1–37
https://doi.org/10.1093/yel/yeae010
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