Resale Price Maintenance in EU Competition Law: Understanding the Significance of *Super Bock*

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The Court of Justice (ECJ) ruling in Super Bock is a significant development in EU competition law. The judgment marked the end of the Court's sui generis approach to resale price maintenance. Whether or not this practice amounts to a restriction of competition by object is now evaluated in light of the same factors against which the legality of the rest of practices is assessed (namely the content of the agreement, its objective aims and the economic and legal context of which it is a part). Accordingly, it is conceivable that, at least in some scenarios, resale price maintenance does not have, as its object, the restriction of competition. It remains to be seen whether the potential for change will be reflected in subsequent developments.

Keywords: RPM, restrictive object, vertical restraints, distribution, VBER

1 INTRODUCTION

In June 2023, the Court of Justice (hereinafter, the 'Court' or the 'ECJ') delivered its preliminary ruling in *Super Bock*.[1] At first glance, the judgment comes across as unremarkable and brief, at least by EU competition law standards (it runs over a mere sixty-six paragraphs). So unremarkable, in fact, that an Opinion of the Advocate General was not deemed necessary.[2] The substance of the ruling fails to dispel this impression. The Court does little more than reiterate the relevant case law. In the steady stream of judgments handed down since *Cartes Bancaires*,[3] the Court has consistently held that a restriction by object cannot be established in the abstract. In order to determine whether a practice falls within the scope of Article 101(1) TFEU by its very nature, it is necessary to consider not just its content, but also the relevant economic and legal context as well as its aims.[4]

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

2 Pursuant to Art. 20 of the Statute of the Court of Justice, a 'case shall be determined without a submission from the Advocate General' where the ECJ considers that it 'raises no new point of law'.

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

4 *Ibid.*, para. 53.

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In spite of the above, the judgment is a significant development in EU competition law. Its importance is not to be underestimated. The ruling is significant, first and foremost, because it concerned the legality of resale price maintenance (whereby a supplier sets fixed or minimum retail prices, and which is hereinafter also referred to as 'vertical price-fixing'). The *Tribunal da Relação de Lisboa* asked a number of questions pertaining to the legal status of this practice under EU competition law. The first of the questions concerned, directly, the issue of whether fixing resale prices amounts to a restriction of competition by object.[5] The Court had not had the chance to examine the lawfulness of this conduct for almost forty years, since the 1980s.[6] *Super Bock* is significant, second, because resale price maintenance was subject to a different, sui generis legal test, which departed from the orthodoxy of the case law. Unlike the rest of practices potentially falling within the scope of Article 101(1) TFEU, vertical price-fixing had been considered, at least since *Binon*, to be restrictive of competition always and in every circumstance (that is, irrespective of the legal and economic context and of the aims pursued by the parties).

If *Super Bock* is a valuable addition to the body of case law, therefore, this is so because it expressly confirms that resale price maintenance is no longer the 'odd one out' in the EU legal order. The judgment marks the end of the last pocket of formalism in the case law. Following the Court's ruling in *Super Bock*, the lawfulness of vertical price-fixing is examined in accordance with the same principles that apply across the board to the rest of horizontal and non-horizontal arrangements. This subtle but significant shift in the case law means that, at least in theory, one can conceive instances in which resale price maintenance is not prohibited (and, similarly, instances in which it falls outside the scope of Article 101(1) TFEU altogether). The ambition of this article is to spell out, from a positive standpoint, the reasons why *Super Bock* entails a significant change in the case law and discuss, in light of other recent developments and the institutional framework, the concrete consequences it might (or might not) have in practice (both in terms of public and private enforcement). The article does not take a normative stance on these matters and is eminently legal in its approach (and thus only mentions, briefly and where relevant, the abundant economic literature on the effects of resale price maintenance).

The remainder of the paper is organized as follows. Section 2 explains that *Super Bock* addressed an anomaly in the case law, in the sense that it put an end to the sui generis legal approach to the assessment of resale price maintenance. The

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5 *Super Bock, supra* n. 1, para. 19.

6 Case 243/83, *SA Binon & Cie v. SA Agence et messageries de la presse*, EU:C:1985:284; Case 161/84, *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paras 15–17; and Case 27/87, *SPRL Louis Erauw-Jacquery v. La Hesbignonne SC*, EU:C:1988:183, para. 15.

discussion of this point is completed with subsequent developments that help understand and contextualize the significance of the contribution. Section 3 identifies the reasons that support the idea that, at least in some economic and legal contexts, resale price maintenance may not be restrictive of competition by its very nature. Section 4, on the other hand, identifies the legal and institutional factors that may impact the evolution of the case law. The fact that it is conceivable that vertical price-fixing could, in some instances, be seen as not inherently anticompetitive does not necessarily mean that a court or an authority will come to that same conclusion in practice.

2 *SUPER BOCK*: EMBRACING ORTHODOXY

2.1 *Resale price maintenance in* Binon *and* Pronuptia

Until *Super Bock*, the legal treatment of resale price maintenance was peculiar (in the sense that it departed from the orthodox approach followed to identify whether conduct has, as its object, the restriction of competition). The legal status of vertical price-fixing was outlined in *Binon*, delivered back in 1985.[7] In that case the ECJ held, in categorical terms, that 'provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of Article [101(1) TFEU]'.[8] In the same vein, it clarified that clauses that provide for resale price maintenance can only escape the prohibition where they meet the conditions laid down in Article 101(3) TFEU.[9] This interpretation of Article 101(1) TFEU would be confirmed in *Pronuptia*, where the Court held that some aspects pertaining to the design and operation of franchising systems escape the prohibition altogether.[10] Vertical price-fixing, on the other hand was found to be restrictive of competition in and of itself.[11]

The Court's approach in *Binon* (and *Pronuptia*) is notable for three reasons. First, the status of resale price maintenance as an inherently restrictive practice was justified on strictly formalistic grounds. In this sense, the ECJ pointed out that the Treaty refers to price-fixing as one of the examples of agreements prohibited under Article 101(1) TFEU.[12] Second, the judgment is based on a sui generis (and long abandoned) understanding of the concept of competition, according to which a

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7 *Binon, supra* n. 6.
8 *Ibid.*, para. 44.
9 *Ibid.*, para. 45.
10 *Pronuptia, supra* n. 6, paras 15–17.
11 *Ibid.*, para. 25.
12 *Binon, supra* n. 6, para. 44, where the Court takes the view that Art. 101(1) TFEU (Art. 85(1) EEC at the time) 'refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty'.

limitation of an undertaking's freedom of action amounts to a restriction of competition.[13] Third, and most importantly, the Court rejected the idea that the potentially pro-competitive objectives pursued by a practice can play a role in the assessment under Article 101(1) TFEU. More precisely, it held that resale price maintenance would be prohibited by its very nature even when it appears to be objectively necessary in the relevant economic and legal context.[14]

It makes sense to elaborate on the latter aspect. *Binon*, concerned a distribution system for the delivery of newspapers and other periodicals. The German government had relied on some elements of the relevant economic and legal context to argue that vertical price-fixing, in the specific circumstances of the case, was indispensable to ensure the appropriate operation of the distribution system. This is so, the Member State argued, due to the fact that the nature of 'newspapers and periodicals requires an extremely rapid system for their distribution in view of the very limited period during which they can be sold before they are out of date; at the end of that period'.[15] More generally, the German government claimed that the principles developed in other contexts cannot mechanically apply to the distribution of the products at stake in the case, and that the interpretation of Article 101(1) TFEU had to adjust accordingly. These arguments were summarily rejected by the Court.

At the time of *Binon* and *Pronuptia*, the Court's strict stance in relation to resale price maintenance was in two important respects at odds with some core principles of the case law. To begin with, the sui generis understanding of competition underpinning the analysis cannot be reconciled with a consistent line of case law that had already made it clear that not every limitation of a firm's freedom of action necessarily amounts to a restriction of competition.[16] For instance, a selective distribution system

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[13] This sui generis understanding of competition, while relatively marginal in the Court's case law, would feature in some judgments including *Binon*. For an exhaustive discussion of the ECJ interpretation of the notion of competition over the years, *see* Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge University Press 2018). For a discussion of the sui generis interpretation, which equates competition and restriction of a firm's freedom of action, *see* Giuliano Marenco, *La notion de restriction de concurrence dans le cadre de l'interdiction des ententes*, in *Mélanges en hommage à Michel Waelbroeck* (Marianne Dony & Aline De Walsche eds, Bruylant 1999).

[14] *Binon, supra* n. 6, para. 46.

[15] *Ibid.*, para. 41.

[16] This conclusion is apparent from landmark cases like Case 56/65, *Société Technique Minière*, EU:C:1966:38, at 250, where the Court held that an exclusive distribution agreement, whereby the supplier relinquishes its freedom to designate other distributors in the territory allocated to a reseller, is not necessarily restrictive of competition; Case 48/72, *SA Brasserie de Haecht v. Wilkin-Janssen*, EU:C:1973:11 (where the Court held – as it would do again in Case C-234/89, *Stergios Delimitis v. Henninger Bräu AG*, EU:C:1991:91 – that exclusive dealing does not have as its object the restriction of competition and is only caught by the prohibition where it is likely to have appreciable effects in the relevant market); and 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, where it held that an exclusive territorial licence giving a licensee the exclusive right to authorize or prohibit any communication to the public in a given Member State is not restrictive of competition.

limits, by definition, distributors' freedom of action: it can only work if resellers are prohibited from delivering the contractual products to non-members of the system.[17] However, selective distribution is not necessarily restrictive of competition; in fact, it falls outside the scope of Article 101(1) TFEU altogether in some instances pursuant to the *Metro I* doctrine.[18] *Binon* and *Pronuptia* were at odds with the case law in another important respect. The analysis of restrictions has never been formalistic, but context-dependent. Therefore, a finding of infringement cannot ignore the nature of the product and the features of the industry.

The tension between *Binon* and the orthodoxy in the case law is apparent when one compares the analytical approach taken in that case with that adopted in *Coditel II* and *Erauw-Jacquery*, delivered in the same decade. The latter two concerned the lawfulness of some clauses imposed as part of an intellectual property licensing agreement. *Coditel II* provided for absolute territorial protection and *Erauw-Jacquery* for an export prohibition. These two clauses are, in principle, egregious no-nos under Article 101(1) TFEU. If the Court had followed the formalistic approach adopted in Binon, it would have found them to be restrictive of competition. Because the analysis of agreements is context-dependent, however, the ECJ ruled that, in the specific circumstances of both cases, they were not inherently restrictive of competition.[19] As *Société Technique Minière* made clear in the very early stages of the case law, a restraint that is 'really necessary' for the parties to attain a pro-competitive aim does not fall within the scope of the prohibition, whether by object or effect.[20]

2.2 Super Bock: Vertical price-fixing

The tension between *Binon* and orthodoxy was addressed in *Super Bock*. As already pointed out in the introduction, the Court closed the gap between the two conflicting doctrines unceremoniously. In essence, *Super Bock* made it explicit that the principles of the mainstream line of case law also apply to resale price maintenance. Accordingly, it abandoned both the formalism and the sui generis understanding of competition underpinning *Binon*. The Court held, to begin with, that the scope of the notion of restriction by object is to be interpreted 'restrictively'[21] (or, if one prefers, 'strictly').[22] Second, it acknowledged, in line with consensus views, that vertical restraints are less

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17 Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v. Commission*, EU:C:1977:167, para. 27.
18 *Ibid*.
19 *Coditel II, supra* n. 16, para. 15; and Case 27/87, *Erauw-Jacquery, supra* n. 6, para. 10.
20 *Société Technique Minière, supra* n. 16, at 250.
21 *Super Bock, supra* n. 1, para. 32. This position dates back to *Cartes Bancaires, supra* n. 3, para. 58.
22 This term was used in the case law that followed Super Bock. *See* for instance Case C-151/19 P *Commission v. KRKA, tovarna zdravil, d.d.*, EU:C:2024:546, para. 63.

likely to have, as their object, the restriction of competition, but that there are circumstances where they fall within the scope of Article 101(1) TFEU by their very nature.[23] Third, the Court reiterated what has become the 'essential legal criterion' to determine whether a practice is inherently anticompetitive, namely whether it 'presents a sufficient degree of harm'.[24]

The evaluation of the object of an agreement[25] is not formalistic, but context-specific and based on substance. Accordingly, the analysis must be informed by the content of provisions, the economic and legal context of which they are a part and, third, the objective aims they pursue.[26] Taking into account the economic and legal context involves, in essence, considering factors such as 'the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market or markets in question'.[27] An element of the legal context is, for instance, the status of resale price maintenance as a 'hardcore restraint' under the Vertical Block Exemption Regulation (hereinafter, 'VBER').[28] On the other hand, the Court is careful to clarify that the concept of restriction by object and that of hardcore restraint are not to be conflated[29]; and that, similarly, evidence that the practice qualifies as the latter is insufficient, alone, to prove an infringement within the meaning of the former.[30]

The *Tribunal da Relação de Lisboa* (the court of appeal for competition law matters in Portugal; hereinafter, the '*Tribunal*' or the 'national court') meticulously applied the preliminary ruling in its judgment.[31] In so doing, it noted, to begin with, that the first-instance court had erred in law by holding that resale price maintenance reveals a 'sufficient degree of harm' without the need to consider content of the agreement, the economic and legal context of which it is a part and the aims it pursues.[32] The *Tribunal* went on to identify the object of the agreement

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23 *Super Bock, supra* n. 1, para. 33.
24 *Ibid.*, para. 34.
25 The term agreement is used hereinafter as a shorthand for the concepts of agreement (stricto sensu), concerted practice and decision by association of undertakings.
26 *Super Bock, supra* n. 1, para. 35.
27 *Ibid.*
28 *Ibid.*, para. 38. The versions of the Vertical Block Exemption Regulation (or 'VBER') at stake in the case were Commission Regulation (EC) No 2790/1999 of 22 Dec. 1999 on the application of Art. 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21; and Commission Regulation (EU) No 330/2010 of 20 Apr. 2010 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 [2010] OJ L102/1. The current version of the VBER is 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 L134/2.
29 *Ibid.*, para. 41.
30 *Ibid.*, para. 42.
31 Tribunal da Relação de Lisboa Judgment of 12 Sep. 2023 in Case nº 71/18.3YUSTR – M.L1, *Super Bock Bebidas, SA and others v. Autoridade da Concorrência.*
32 *Ibid.*, at 137–138.

in light of the contextual framework defined by the Court. It paid particular attention to two aspects of the agreement and the surrounding context. As far as the latter is concerned, the national court noted that the supplier in the case is the largest manufacturer of beverages in Portugal.[33] In relation to the aims, in turn, the *Tribunal* concluded that the objective purpose of the contentious clauses was to limit intra-brand competition,[34] without there being any evidence that there might be a countervailing pro-competitive dimension.[35]

2.3 The case law that followed Super Bock: Superleague and Servier

The Court held in *Super Bock* that, as part of the assessment of the economic and legal context, it is open to the parties to show that it is a source of pro-competitive effects. These effects must be substantiated, in the sense that they must be 'demonstrated, relevant, intrinsic to the agreement concerned and sufficiently significant'.[36] Subsequent developments in the case law suggest, however, that this position is no longer good law. In *Superleague* the Court held that it is not 'necessary to examine nor, a fortiori, to prove the effects of that conduct on competition, be they actual or potential, or negative or positive'.[37] In the *Servier* saga, it confirmed this recalibration of the case law and clarified, moreover, that the parties involved in a practice cannot challenge a finding of a 'by object' infringement by advancing evidence pertaining to the pro-competitive impact of a practice.[38] The objective[39] aims pursued by the parties, on the other hand, may still be a part of the assessment (it is, as pointed out above, one of the three aspects of the evaluation of the object of a practice).

The recalibration of the case law in *Superleague* is relevant for another reason, which is particularly pertinent when dealing with resale price maintenance. This practice is often seen as inherently problematic precisely because it can lead to higher prices (and this at the very least at the intra-brand level).[40] The very fact that it prevents competition among distributors could justify, he argument goes, a finding that it is

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33 *Ibid.*, at 146.
34 *Ibid.*
35 *Ibid.*, at 147.
36 *Super Bock, supra* n. 1, para. 36. This doctrine was introduced in Case C-307/18, *Generics (UK) Ltd and others v. Competition and Markets Authority*, EU:C:2020:52, paras 103, 105 and 107.
37 Case C-333/21, *European Superleague Company SL v. Fédération internationale de football association and Union of European Football Associations*, EU:C:2023:1011, para. 166.
38 Krka, *supra* n. 22, para. 399.
39 Both *Superleague* and the *Servier* saga are careful to differentiate the objective purpose of the practice and the subjective intent of the parties. *See* in particular *Superleague, supra* n. 37, para. 167.
40 Guidelines on vertical restraints [2022] C248/1, para. 196(g), where the Commission explains that 'the direct effect of RPM is the elimination of intra-brand price competition, by preventing some or all distributors from lowering their sale price for the brand concerned, thus resulting in a price increase for that brand'.

restrictive by its very nature. *Superleague* shows that this understanding of what amounts to a 'by object' infringement cannot be reconciled with the case law. The Court's position in *Superleague* confirms that the actual or potential restrictive effects of a practice are neither necessary nor relevant considerations at the 'by object' stage. The analysis of the objective purpose of a practice must be neatly distinguished from the evaluation of its impact on the relevant markets affected by it. The interpretation of Article 101(1) TFEU enshrined in *Superleague* should come as no surprise, since the preceding case law provides abundant examples showing that there are practices with the potential to significantly affect inter-brand competition (such as exclusive dealing and, more generally, non-compete obligations) but that are not deemed restrictive by object.

3 THE POTENTIAL IMPACT OF *SUPER BOCK*

3.1 Background

The main conclusion to draw from the preceding section is that resale price maintenance is not restrictive of competition always and in every instance. By emphasizing the need to engage in a case-specific, contextual evaluation, Super Bock suggests that there may be circumstances where resale price maintenance does not amount to a 'by object' infringement. For instance, the nature of the product and the features of the industry in which a supplier operates may lead to the conclusion that, in the relevant economic and legal context, the practice does not present a 'sufficient degree of harm'. The point of this section is to define the reasons why vertical price-fixing is not necessarily (or not always) restrictive by object. There are four factors to consider, and which are discussed in turn: first, the fact that, indeed, resale price maintenance can be rationalized on non-restrictive grounds; second, the very status of the practice as a vertical restraint; third, the fact that it is either a complement or a substitute to other practices; and finally, the lessons of experience.

3.2 The non-restrictive aims of resale price maintenance

A supplier may require its resellers to respect a fixed or a minimum price for reasons that are not necessarily anticompetitive. The protection of a firm's brand image is one of them. The Court has long recognized this aim as legitimate (that is, not inherently restrictive). In *Pronuptia*, the ECJ acknowledged that the appropriate operation of a franchising system demands the introduction of contractual devices aimed at preserving the uniformity and reputation of the franchisor's formula.[41] To

[41] *Pronuptia, supra* n. 6, paras 15–17.

the extent that it does, the said contractual devices are not caught by Article 101(1) TFEU (in fact, where necessary and proportionate, they escape the prohibition altogether). In *Coty*, in turn, it confirmed (in line with previous judgments like *Copad*[42]) that it is legitimate for a supplier to protect, by means of an agreement, the prestigious image with it wants to associate its luxury items.[43] Thus, prohibiting resellers from selling via unauthorized marketplaces (and which may harm the said image) is not inherently anticompetitive.[44]

Resale price maintenance can contribute to the preservation of the brand image of a product. It is well understood that price levels are a signal that may give end-users an idea of the prestige and/or quality of the good that is being purchased. For instance, heavily discounting a good may be at odds with the image with which luxury items are typically associated.[45] Luxury items are often difficult to purchase, and there is generally an aura of (real or artificial) scarcity around them. Resale price maintenance could preserve or promote this aura of scarity. The protection of brand image could be potentially relevant in relation to other goods, such as high-end and technically sophisticated products. To give an example of one that has frequently featured in national case law and administrative practice, consumers may rely on the price of running shoes to get a sense of the quality of the design and of other features, such as their ability to prevent injuries.[46]

Resale price maintenance can conceivably pursue non-restrictive aims other than brand protection. For instance, it has long been understood that the appropriate operation of franchising and selective distribution systems makes it necessary to insulate, at least to some extent, resellers from price competition. In fact, the Court has been explicit about the fact that these two distribution methods severely limit, by their very nature, price-based rivalry.[47] Suppliers relying on franchising or selective distribution typically require members of the network to respect some

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

43 Case C-230/16, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, EU:C:2017:941, para. 29.

44 *Ibid.*, para. 51.

45 Concerns with the image of prestige products underpinned the case that led to a shift in the approach to resale price maintenance by the US Supreme Court. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 US 877 (2007), at 3, where the US Supreme Court explains that 'Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy. It also expressed concern that discounting harmed Brighton's brand image and reputation'. For a discussion, *see* Kenneth G. Elzinga & David E. Mills, *Leegin and Procompetitive Resale Price Maintenance*, 55 Antitrust Bull. 349 (2010), doi: 10.1177/0003603X1005500204.

46 Running shoes have featured prominently in disputes at the national level, typically in the context of selective distribution arrangements. *See* in this sense Bundeskartellamt, *ASICS dealers allowed to use price comparison engines – Federal Court of Justice confirms Bundeskartellamt's decision* (Bonn 25 Jan. 2018); and Janith Aranze, *Dutch Court Upholds Nike's Selective Distribution*, Global Competition Rev. (London 11 Oct. 2017).

47 *Metro I, supra* n. 17, para. 21. Franchising is best understood as a combination of vertical restraints, including selective distribution.

conditions pertaining, inter alia, to the location of the premises, to the training of the employees for the provision of pre-sales advice, and to the way in which stock is presented to consumers. Resellers may not be willing to engage in the investments required to join the system unless the scope for inter-brand competition among resellers is significantly restrained.

Against this background, and more to the point, one could plausibly argue that resale price maintenance, when introduced in the context of a selective distribution or a franchising system, pursues a legitimate aim (at least so in certain circumstances). For instance, it is a credible and effective mechanism for the supplier to incentivize resellers to commit to the necessary investments to join the network and thus ensure a uniform 'look-and-feel'. It may be a compelling device, in other words, for the supplier to effectively respond to concerns that some distributors may free ride on others' investments. It is important to bear in mind, in this regard, that the Court has already ruled that it is legitimate for the parties to an agreement to put in place mechanisms aimed at tackling free-riding, and, similarly, that clauses aimed at addressing the phenomenon do not have, as their object, the restriction of competition.[48]

In addition to the fight against free-riding, one can think of two additional non-restrictive aims that resale price maintenance may pursue. These have been identified by the European Commission (hereinafter, the 'Commission') in its Guidelines on vertical restraints. In the first place, vertical price-fixing may allow a supplier to enter a new market, and this insofar as it guarantees a margin to the distributor (which may otherwise be reluctant, or unwilling, to take the risks associated with the launch of a new product and invest in its promotion).[49] In the second place, this practice may be the only way to successfully coordinate a nationwide campaign within a distribution network. It is sufficient to think, in this sense, of a short-term promotion launched by a franchisor, whereby some products are to be offered at a discount. Such an initiative may only be effective where all franchisees respect the advertised price.[50]

3.3 Resale price maintenance as a vertical restraint

The very fact that resale price maintenance is a vertical restraint may be relevant when ascertaining whether it has a restrictive object – and this, in a number of ways. As already pointed out, the Court has consistently held, since *Maxima Latvija*, that agreements between non-competitors are less likely to infringe

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48 *Cartes Bancaires, supra* n. 3, paras 74–75.
49 Guidelines on vertical restraints, *supra* n. 40, para. 197(a).
50 *Ibid.*, para. 197(b).

Article 101(1) TFEU by their very nature.[51] The clarification provided in *Visma* is arguably more illuminating. According to the latter, 'a restriction of intra-brand competition is, in principle, problematic only if inter-brand competition on the market in question is reduced'.[52] This position is in line with the philosophy underpinning the VBER and the accompanying Commission Guidelines. The latter two revolve around a 30% market share threshold, which is nothing other than a proxy for the intensity of inter-brand competition.

One could argue, in light of *Visma*, that resale price maintenance may not be restrictive of competition by object where there is vigorous inter-brand competition across all levels of the value chain (and, perhaps in addition, where the position of the parties is weak). After all, the analysis of the anticompetitive nature of a practice must invariably take into account the 'actual conditions of the functioning and structure of the market or markets in question'.[53] If it appears that the sector is relatively unconcentrated (with no supplier and no reseller exceeding the 30% market share threshold defined in the VBER), and that the market position of both the supplier and reseller under consideration is modest (that is, with a share of around 10–15%), arguing that resale price maintenance has, as its object, the restriction of competition may not come across as particularly compelling, or plausible. In such an economic and legal context, a legitimate aim may well be the most (if not the only) reasonable explanation for the practice.

3.4 Resale price maintenance as a complement and substitute

There is a second reason why the status of resale price maintenance as a vertical restraint may be relevant. One must bear in mind that vertical price-fixing is interchangeable with other conduct pursuing the same objective aim. It is apparent from the discussion above, for instance, that the sort of requirements imposed on resellers in the context of a selective distribution system (or a franchising network) are not fundamentally different, in their nature and aims, to resale price maintenance. What is more, the former and the latter can work as substitutes. For instance, instead of specifying at length the sort of (pre or after-sales) services that a distributor must provide and how products are to be displayed, the supplier may induce such investments by dictating the price at which they are to be sold.[54] That

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[51] *See* the discussion above and also Case C-345/14 *SIA, 'Maxima Latvija' v. Konkurences padome*, EU:C:2015:784, para. 15.

[52] Case C-306/20, *SIA 'Visma Enterprise' v. Konkurences padome*, EU:C:2021:935, para. 78.

[53] *Super Bock, supra* n. 1, para. 35. This point was reiterated in *Superleague, supra* n. 37, para. 53.

[54] For a discussion of this rationale, *see* Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance*, in *Issues in Competition Law and Policy*, vol 3 (Wayne D. Collins ed., American Bar Association, Section of Antitrust Law 2009).

resale price maintenance is, in effect, interchangeable with other vertical restraints is also apparent when one thinks of the legitimate aims that it may pursue. As the Court pointed out in *Société Technique Minière*, for instance, exclusive distribution – just like vertical price-fixing – may allow a manufacturer to enter a new market by insulating the reseller from intra-brand competition[55]; and by addressing any free-riding concerns.[56] Similarly, the aims often pursued by exclusive dealing (or single-branding) may also be effectively attained by means of resale price maintenance.

When discussing the legal status of resale price maintenance, one must also bear in mind that vertical price-fixing is not just as a substitute to other practices, but a complement to them. To the extent that it is, it may support the broader aims pursued by the rest of the clauses in an agreement. It has already been mentioned, for instance, that the protection of a product's brand image is a central concern behind the implementation of franchising and selective distribution. Vertical price-fixing may contribute to this goal alongside the rest of restraints that form the core of these two distribution methods. The fact that the practice is not ancillary to the main transaction (in the sense that it is not objectively necessary to attain the aims sought by the parties) does not mean that its aims and rationale are any different. It simply means that it does not escape Article 101(1) TFEU altogether and thus requires an evaluation of its effects.

To the extent that resale price maintenance can be seen as interchangeable with other vertical restraints (and, similarly, as a complement strengthening the goals of the broader distribution agreement), one would expect the former to be subject to the same legal treatment as the latter. If other conduct pursuing the same aims in the relevant economic and legal context is not deemed to restrict competition by its very nature, it would be difficult to rationalize why the legal treatment of vertical-price fixing should be any different, at least as a matter of positive law. One can potentially think of a reasonable argument in support of the differential legal treatment of, respectively, resale price maintenance and other functionally equivalent vertical restraints. It may be argued, in this sense, that vertical price-fixing is more likely to have a negative impact on (inter-brand or intra-brand) competition.[57] This argument, however, brings considerations pertaining to the actual or potential effects of the practice. As

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55 *Société Technique Minière, supra* n. 16, at 250.

56 As noted by commentators, *Société Technique Minière* reveals a clear understanding of the sort of free-riding concerns that might justify reliance on vertical restraints, including exclusive distribution. For a discussion, *see* Anne-Lise Sibony, *Le juge et le raisonnement économique en droit de la concurrence* 245–277 (LGDJ 2008).

57 For a summary of these anticompetitive effects, *see* Guidelines on vertical restraints, *supra* n. 40, para. 196.

already pointed out, the Court has emphatically left out such considerations from the 'by object' stage of the assessment since *Superleague*.

There is a second argument that could conceivably support the idea that resale price maintenance should be subject to a different, stricter legal treatment. This argument is arguably more compelling, if only because it is directly drawn from the case law. In *Metro I*, the Court held that 'price competition is so important that it can never be eliminated'.[58] There would be a difference, according to this view, between price and the rest of parameters, such as quality or innovation. Given that *Metro I* mirrors the thinking underpinning *Binon*, and given that this thinking appears to have been abandoned in *Super Bock* and *Visma*, on the other hand, it is not fully clear whether it reflects the ECJ's current thinking. The most recent case law does not treat price any differently from other parameters. This shift in approach is consistent with the very evolution of the European economy since the 1970s (when *Metro I* was delivered). In the current knowledge-based economy, price is not necessarily the main factor driving rivalry among undertakings. In myriad industries, quality and innovation have replaced prices as the essential parameters around which competition revolves.[59]

3.5 The lessons of experience

In *Cartes Bancaires*, the Court was explicit about the importance of experience when evaluating whether a practice has, as its object, the restriction of competition. More precisely, it explained that price-fixing in the context of a cartel arrangement is universally understood to be a source of allocative inefficiency (because cartels lack redeeming virtues and thus cannot only be plausibly rationalized on anticompetitive grounds, they can safely be deemed restrictive by their very nature).[60] Accordingly, there is every reason to prohibit cartels without the need to examine, on a case-by-case basis, their effects. The Court's position in *Cartes Bancaires*, which would be reiterated in subsequent judgments,[61] is in line with mainstream positions, which have always been unambiguous about the status of cartels as the single most problematic practice from a competition law standpoint.

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58 *Metro I, supra* n. 17, para. 21.

59 The very rise of selective distribution exemplifies this trend particularly well. This trend was identified and discussed Commission, *Evaluation of the Vertical Block Exemption Regulation* SWD(2020) 172 final, 32. For an extensive analysis of the transformation of the economy and its impact on competition law and policy, *see* Richard J. Gilbert, *Innovation Matters: Competition Policy for the High-Technology Economy* (MIT Press 2020).

60 *Cartes Bancaires, supra* n. 3, para. 51.

61 *See* in particular *Superleague, supra* n. 37, para. 163.

The broad consensus in relation to cartel conduct is not observed as far as resale price maintenance is concerned.[62] Unlike the former, the lessons of experience and economic analysis do not suggest that vertical price-fixing is inherently anticompetitive always and in every circumstance. This is so for two main reasons. As discussed at length above, first, it is understood that the practice can sometimes be rationalized on non-restrictive grounds, even when it has, or can be expected to have, restrictive effects in a particular economic and legal context. Second, and more importantly, resale price maintenance can be distinguished from cartels in that there is empirical evidence showing that, at least in some instances, the legitimate aims that the practice pursues do actually materialize. In and of itself, this factor may not be relevant at the 'by object' stage. However, it is a powerful indicator that the practice cannot be presumed to be driven always, or almost always, by a restrictive objective.

The lessons of experience and economic analysis – and the cautious approach they imply – are well captured in a study prepared for the Commission as part of the latter's evaluation of the VBER.[63] In addition to an overview of the relevant theoretical and empirical literature on resale price maintenance, which suggests that the impact of the practice is ambiguous and very much context-dependent,[64] the authors provide an econometric analysis of the effects of fixed book price policies, which preclude, in some European countries, intra-brand competition among booksellers.[65] The study concludes that such policies did not have a noticeable impact on price levels and led, all while leading to an increase in book sales.[66] As argued in a follow-up study relying on the same data, the reason behind the positive impact of this legislative measure may have to do with the fact that it enhances the diversity of distributors (in that it allows smaller booksellers to remain on the market) and incentivizes them to compete on factors other than price.[67] The point of these findings is not to claim that the conclusions can necessarily be extended to other vertical restraints, but to show that, unlike cartels,

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62 That the effects of resale price maintenance are context-dependent has long been acknowledged in the theoretical literature. *See* in this sense Jean Tirole, *The Theory of Industrial Organization* 186 (MIT Press 1988); and Michael L. Katz, *Vertical Contractual Relations*, in *Handbook of Industrial Organization*, vol 1 (Richard Schmalensee & Robert D. Willing, Elsevier 1989). For a normative discussion, from a legal standpoint, *see* Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press 2006) 181–206.

63 *Support studies for the evaluation of the VBER – Final Report* (European Union 2020).

64 *Ibid.*, at 86–87.

65 *Ibid.*, at 89–90 and Annex X. The legality of these policies was considered by the Court in Case 229/83, *Association des Centres distributeurs Édouard Leclerc and others v. SARL 'Au blé vert' and others*, EU:C:1985:1.

66 *Ibid.*, at 90: 'the evidence suggests that in the book sector RPM agreements lead to a higher output and slightly lower prices'.

67 *See* Rhys J. Williams, *Empirical Effects of Resale Price Maintenance: Evidence from Fixed Book Price Policies in Europe*, 20 J. Competition L. & Econ. 108 (2024), doi: 10.1093/joclec/nhae004.

vertical price-fixing is not always, or almost always, anticompetitive and, similarly, that experience suggests that they are not inherently restrictive.

3.6 Summary and interim conclusions

The main conclusion to draw from this section is that there are, at least in theory, circumstances where resale price maintenance does not have, as its object, the restriction of competition. Based on the very criteria relied upon by the Court in its analysis, one can think of a number of scenarios where the practice does not amount to a 'by object' infringement; and other scenarios where the opposite is true. In some instances, to be defined in light of the content of the agreement in its economic and legal context, vertical price-fixing will be a credible means to attain one of the legitimate goals identified above and thus not prohibited by its very nature. In other instances, by contrast, the only plausible explanation will be the restriction of (inter-brand or intra-brand) competition. For instance, there are factual scenarios where resale price maintenance can only be rationalized as a vehicle to achieve or sustain collusion.[68]

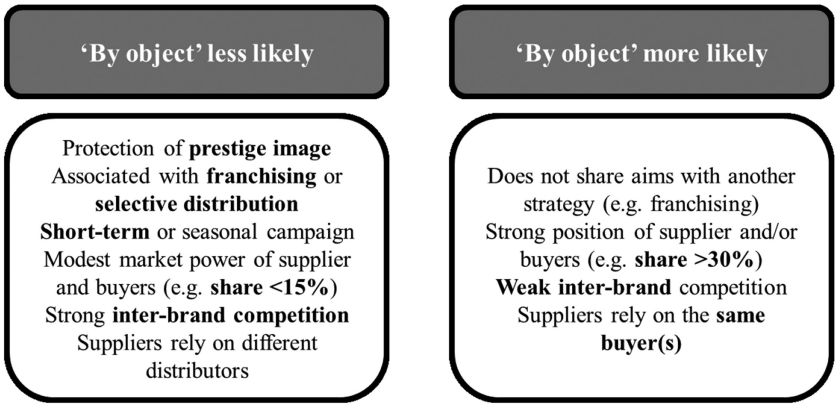
Claims that vertical price-fixing is not inherently anticompetitive would be particularly credible where there are a number of factors that, taken together, suggest that the protection of the image and/or uniformity of a brand is the actual (and not just pretextual) rationale behind the practice. These are summarized in Figure 1. The more of these factors present, the more plausible it will be that resale price maintenance pursues a legitimate aim. A key factor reinforcing this conclusion would be the fact that the practice is not an isolated restraint but one that shares the legitimate aims of a broader cooperation strategy (for instance a selective distribution and a franchising system). The position of the parties to the agreement is another major factor in the analysis. More precisely, a finding of a 'by object' infringement is less likely where the supplier and the distributor(s) involved are relatively modest players (with shares well below the 30% threshold laid down in the VBER). In such an instance (say, where the share of both parties remains below 15%), it will be more difficult to argue that the aim of the practice is the restriction of competition. This claim would be even less plausible where there is vigorous inter-brand rivalry at the upstream level and both levels of the value chain remain relatively unconcentrated.

In a different scenario, however, it may be more challenging for the parties to argue that resale price maintenance pursues a legitimate aim. This is true, in particular, where the content of the agreement of which the clause is a part does

[68] *See* in this sense Patrick Rey & Thibaud Vergé, *Resale Price Maintenance and Interlocking Relationships*, 58 J. Indus. Econ. 928 (2010), doi: 10.1111/j.1467-6451.2010.00439.x.

not suggest that there is a compelling pro-competitive rationale (such as free-riding concerns, brand image considerations or a short-term nationwide promotion requiring uniform prices). Such was the case, for instance, in *Super Bock*. More generally, the stronger the position of the supplier and, similarly, the more concentrated the market, the more plausible it is that vertical price-fixing has the object or effect of achieving or sustaining collusion. Once again, *Super Bock* provides a factual scenario showing the relevance of these considerations (as mentioned above, the supplier's preeminent position was given particular weight by the *Tribunal*). In a similar vein, a finding of a 'by object' infringement is more likely when the practice is requested by a reseller with significant buyer power[69] (in such an instance, the object of the agreement would be to eliminate intra-brand competition and thus would necessarily amount to an infringement).

Figure 1 Assessing the Object of RPM in Practice



4 SUPER BOCK IN PRACTICE: PLACING THE LAW IN CONTEXT

4.1 Background

It is not a given, even after *Super Bock*, that a national court or authority will come to the conclusion that resale price maintenance does not restrict competition by object in a particular economic and legal context. There are several reasons why the refinement heralded in that judgment may fail to materialize in practice. The evolution of the case law is contingent on the relevant actors creating the environment within which legal change can occur, which is not something that can be

[69] This point is made by Hovenkamp, *supra* n. 62, at 188.

assumed to happen. Firms concluding resale price maintenance agreements may be reluctant to engage in vertical price-fixing, considering the severe consequences associated with a finding of a 'by object' infringement and, similarly, given the legal status of the practice as a 'hardcore restraint' within the meaning of the VBER. Authorities and national courts, on the other hand, may not always follow the approach laid down in *Super Bock* and may be inclined to stick to a formalistic understanding of Article 101(1) TFEU.

4.2 Undertakings' willingness to engage in resale price maintenance

Notwithstanding the Court's judgment in *Super Bock*, engaging in resale price maintenance is a risky strategy for undertakings. Irrespective of whether it can be considered to be inherently restrictive of competition in a specific economic and legal context, vertical price-fixing remains a 'hardcore restraint' within the meaning of Article 4(a) of the VBER. The significant legal consequences of including a clause of such nature in a distribution agreement – namely the fact that the agreement as a whole loses the benefit of the block exemption – may well be sufficient to deter a majority of undertakings from engaging in the practice. After all, maximum or recommended prices are not deemed 'hardcore' under the VBER and may be seen as adequate proxies in practice (and superior from a cost-benefit perspective).

Arguably, it may be the case that, following *Super Bock*, resale price maintenance will be less likely to be practised precisely when it could be rationalized on pro-competitive grounds. The experience of the past decades suggests that the more an agreement (taken as a whole) can be explained on non-restrictive grounds, the less probable it is that the parties will be willing to adopt legal risks. After all, it took over thirty years for the Court to be presented with an opportunity to rule on the lawfulness of resale price maintenance. In the same vein, it is more likely that the practice will be observed in scenarios where the pro-competitive explanations for the practice are less compelling. In the latter scenarios, one can expect the parties to be less overt about the fact that they engage in vertical price-fixing (they may, in fact, conceal the behaviour altogether to avoid scrutiny). It is probably not by chance that issues of evidence and proof were central in *Super Bock*.[70]

[70] *See* in this sense *Super Bock, supra* n. 1, paras 44–53 (addressing the concept of agreement within the meaning of Art. 101(1) TFEU) and paras 54–58 (dealing with issues of proof as such).

4.3 The reception of Super Bock by national courts and authorities

The move away from *Binon* announced in *Super Bock* does not imply that the principles laid down by the Court in the latter will be universally observed by national courts and authorities. In this sense, the *Tribunal*'s careful application of the law to the facts of the case may well be the exception rather than the rule. One can think of two main reasons why *Super Bock* may be embraced unevenly and imperfectly at the national level. The first one has to do with the lasting attraction of formalism among stakeholders. Even though the Court has consistently held that it cannot, alone, determine that it has, as its object, the restriction of competition, national courts and authorities have displayed a tendency to rely on the form of a practice to substantiate their conclusions. For instance, one can observe a marked inclination to identify inherently problematic conduct in the abstract (that is, without due regard to the economic and legal context), by placing it within an 'object box'.[71] Such was, in fact, the approach favoured by the first-instance court in *Super Bock*. The fact that these approaches are so pervasive suggests that they are likely to permeate into judicial and administrative action, even after the Court's clarification.

There is a second, somewhat related, reason why *Super Bock* may not have the actual impact one could in theory expect from it. As already pointed out, resale price maintenance, irrespective of its legal status under Article 101(1) TFEU, remains a 'hardcore restraint' under the VBER. Even though the Court expressly warned national courts against conflating them in *Super Bock*,[72] the two legal concepts ('by object' infringement and 'hardcore restraint' for the purposes of the block exemption) may be treated as one and the same in practice. As a result, the evaluation of the aims of the agreement in the relevant economic and legal context may amount, in effect, to little more than a formality due to the gravitational pull of the VBER. The Guidelines on vertical restraints may favour this inclination, if only because of the influence they have at the national level. The Commission states therein that '[h]ardcore restrictions within the meaning of Article 4 of Regulation (EU) 2022/720 are generally restrictions of competition by object within the meaning of Article 101(1) of the Treaty'.[73]

One can think of a third reason why *Super Bock* may not necessarily have any immediate or significant impact. This factor relates specifically to the nature of public enforcement and to the powers that national authorities enjoy under Regulation 1/2003.[74] Unlike the Commission, national authorities cannot adopt

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71 This approach was introduced and popularized by Richard Whish, who relied on it in the successive editions of his celebrated textbook. *See* Richard Whish and David Bailey, *Competition Law* (11th ed., Oxford University Press 2024).

72 *Super Bock*, *supra* n. 1, para. 41.

73 Guidelines on vertical restraints, *supra* n. 40, para. 179.

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

decisions declaring that a practice does not restrict competition within the meaning of Article 101(1) TFEU or that it meets the conditions set out in Article 101(3) TFEU.[75] As a result, if resale price maintenance features in a formal administrative decision, it will be, most likely, in one establishing an infringement (or, perhaps, in one accepting commitments from the undertakings involved in a practice),[76] not in one reaching the conclusion that, in the specific economic and legal context, it can be plausibly rationalized on pro-competitive grounds.[77]

4.4 The reception of Super Bock by the Commission

The experience of two decades of enforcement under Regulation 1/2003 suggests that it is unlikely that the Commission will devote its limited resources to the adoption of a decision finding that, in an economic and legal context, resale price maintenance does not have, as its object, the restriction of competition. Generally speaking, the authority has been reluctant to adopt 'finding of inapplicability' decisions within the meaning of Article 10 of the Regulation.[78] Even though its attention has shifted towards vertical restraints during the past decade (including in some cases involving vertical price-fixing),[79] it is unlikely that it will adopt decisions other than in cases that it perceives to amount to clear violations of Article 101(1) TFEU. Any changes, if at all, may be observed in future iterations of the VBER or, more likely, of the Guidelines on vertical restraints.

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[75] Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o., devenue Netia SA*, EU:C:2011:270.

[76] Pursuant to Art. 5 of Regulation 1/2003, *supra* n. 74, national competition authorities can adopt the following decisions:
'– requiring that an infringement be brought to an end,
– ordering interim measures,
– accepting commitments,
– imposing fines, periodic penalty payments or any other penalty provided for in their national law'.

[77] The only conceivable avenue for an authority to adopt a decision along these lines is to decide that there are no grounds for action, which is possible pursuant to Art. 5 of Regulation 1/2003. For an example of a decision in this sense, *see Impulse Ice Cream*, CMA Decision of 9 Aug. 2017.

[78] Pursuant to Art. 10 of Regulation 1/2003, *supra* n. 74: 'Where the Community public interest relating to the application of Articles [101 and 102] of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article [101] of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article [101(1)] of the Treaty are not fulfilled, or because the conditions of Article [101(3)] of the Treaty are satisfied'.

[79] *See* in particular *Philips* (Case AT.40181) Commission Decision of 24 Jul. 2018; *Denon & Marantz* (Case AT.40428) Commission Decision of 24 Jul. 2018; and *Asus* (Case AT.40465) Commission Decision of 24 Jul. 2018; and *Guess* (Case AT.40428) Commission Decision of 17 Dec. 2018.

5 CONCLUSIONS

In the course of the past decade, since the seminal ruling in *Cartes Bancaires*, the Court has incrementally clarified and refined the scope and meaning of the notion of restriction by object. When the *Tribunal* submitted its preliminary reference in *Super Bock*, the case law provided already a meaningful framework for the interpretation of Article 101(1) TFEU. Against this background, the brief and unassuming nature of the Court's ruling is not a surprise. It remains, however, a significant development in EU competition law. It is significant, first, because it represents the abandonment of the last bastion of formalism in the interpretation of Article 101(1) TFEU. More importantly, the judgment in *Super Bock* means that, at least in theory, there may be circumstances where resale price does not amount to a 'by object' infringement.

This piece suggests that vertical price-fixing is less likely to fall within the scope of Article 101(1) TFEU by its very nature where a number of cumulative conditions are met. Where the clause is an integral part of a broader agreement that is not inherently anticompetitive, where the position of the parties is relatively modest (say, well below the 30% threshold set in the VBER and the accompanying Guidelines), and where, in addition, the market is relatively unconcentrated (with suppliers relying on different distributors), it is at least plausible that the objective aim of vertical price-fixing is not the restriction of competition but another one (such as the protection of the aura of prestige around a luxury product or the need to coordinate a nationwide promotion).