

ARTICLE 101 TFEU AND THE EU COURTS: ADAPTING LEGAL FORM TO THE REALITIES OF MODERNIZATION?

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Abstract

The modernization of EU competition law directly invited classic interpretations of Article 101 TFEU to be attuned to the realities of a more economically sound effects-focused assessment framework. More economics-inspired analysis did not however imply the end of formal legal reasoning in EU competition law. In their recent case law, the European Court of Justice and General Court rather developed or restructured particular form-based legal arguments and presumptions into essential supporting instruments for an administrable and effective effects-focused application and enforcement of Article 101 TFEU. This contribution outlines those restructured arguments and presumptions and identifies the newly developing balance between legal form and effects-focused analysis taking shape in that regard.

1. Introduction

The modernization of EU competition law profoundly challenged the analytical framework within which competition law provisions had been embedded.¹ Relinquishing previously existing formal categorical distinctions in favour of a more effects-based analysis of factual situations,² the European Commission has been instrumental in adapting EU competition law to economics-grounded realities³ and in paying more attention to the actual

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1. For background, see Wesseling, *The Modernization of EC Antitrust Law* (Hart Publishing, 2000), pp. 80–83; on the mere supporting role of economic argumentation underlying the more economic approach, see Witt, “From *Airtours* to *Ryanair*: Is the more economic approach to EU merger law really about more economics?”, 49 *CML Rev.* (2012), 217–246.

2. Basedow, “Introduction”, in Basedow and Wurmnest (Eds.), *Structure and Effects in EU Competition Law: Studies on exclusionary conduct and State aid* (Kluwer, 2011), p. 4.

3. The Commission did not of course develop its more economic approach in a legal vacuum. In adapting its policies, it had to respect the Treaty provisions and their interpretation

harmful effects of behaviour on a particular relevant market.⁴ Increased attention to the actual effects of market behaviour did not however imply a complete retreat from existing EU competition law concepts and principles. The EU Courts⁵ have sought in particular to tailor those concepts and principles to the vicissitudes of a more economic approach.⁶

This contribution outlines and analyses the extent to which the EU Courts endeavoured to strike a refined balance between the demands of a more economic and effects-focused approach and the need for clear, predictable and consistent legal concepts, tests and categories underlying the application of Article 101 TFEU. Two distinct yet interrelated “modernization” tendencies have guided the Courts in that regard.

Firstly, the modernization of EU competition law placed renewed emphasis on ways to enhance the effectiveness of EU competition law enforcement.⁷ The better known part of this leg of modernization comprises Regulation 1/2003 and its enforcement mechanism in accordance with which powers are shared between the Commission, national competition authorities and

by the EU Courts. Arts. 101 and 103 TFEU and the judicial interpretations thereof were nevertheless sufficiently open-ended to be read as granting the Commission the opportunity to shift the focus of competition law assessments. It goes without saying that the EU Courts still have the final authority to review – and limit – those choices when exercising their judicial mandate.

4. The starting point in that regard is considered to have been the Commission’s *Green Paper on vertical restraints in EC competition policy* (97/C 296/05).

5. For the purposes of this contribution, “the EU Courts” means the Court of Justice and the General Court, as mentioned in Art. 19 TEU. The Court of Justice will be referred to as the Court of Justice, the ECJ, or the Court; the General Court will be referred to as the General Court or the GC.

6. Despite general agreement that a more economic effects-focused analysis is the way forward for EU competition law, the economic aims which EU competition rules should protect, promote and maintain are not as focused and clear as one might have expected; See Joined Cases C-501, 513, 515 & 519/06 P, *GlaxoSmithKline Services Unlimited v. Commission* and *Commission v. GlaxoSmithKline Services Unlimited* and *European Association of Euro Pharmaceutical Companies (EAEPIC) v. Commission* and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v. Commission*, [2009] ECR I-9291, paras. 62–65 and Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, [2009] ECR I-4529, paras. 38–39, where the Court listed the protection of consumers and the protection of the market structure, competitors or competition itself as simultaneously applicable goals in EU competition law. See also Jedličková, “One among many or one above all? The role of consumers and their welfare in competition law”, 33 ECLR (2012), 568–575.

7. See to that extent, the Commission *White Paper on the Modernization of the Rules implementing Articles 85 and 86 of the EC Treaty*, O.J. 1999, C 132/1, para 41 referring to the effectiveness of policy as a policy concern guiding the reform of enforcement structures. The Commission did not however clarify the specific proxies or benchmarks against which effectiveness should be measured in that regard.

national courts.⁸ In addition however, it can be submitted that effective and decentralized enforcement also calls for a system that would not allow potential anticompetitive behaviour to escape competition law scrutiny by virtue of narrowly interpreted legal concepts or categories. One way to ensure such effective enforcement is a broad interpretation of the legal concepts determining the scope of application of competition law provisions. A broad scope of application not only allows many types of behaviour to be captured within the confines of EU competition law, it equally enables enforcement authorities to proceed more swiftly to an assessment of the merits of a particular case. The EU Courts have confirmed this tendency by continuing to rely on an open-ended and functional interpretation of the concepts (undertaking, effect on trade, agreement, decision and concerted practice) demarcating the scope of the Article 101 TFEU prohibition.

Secondly, by virtue of the “more economic approach” leg of modernization, the Commission extensively promoted the taking into account of (economic) effects of market behaviour when assessing the merits of a particular restrictive arrangement. Although the more economic approach seems to focus on the actual effects of behaviour in a relevant market, the Commission and Courts also left room for likely or potential effects to be captured by the Article 101 TFEU prohibition as well.⁹ Taking those actual or potential effects into account directly determines the scope and format of an analysis on the merits of market behaviour. Whereas the Commission previously considered the form and phrasing of particular agreements and clauses and the likely effects of those clauses on competition to be guiding in determining whether or not a practice was deemed restrictive of competition, the more economic approach advocated a shift towards analysing the actual effects produced by particular clauses or practices.¹⁰ More enhanced attention to the effects of market behaviour enabled the EU Courts in particular to maintain and further

8. Council Regulation 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2002, L 1/1. For overviews of the decentralized enforcement system, see Brammer, *Co-operation between national competition agencies in the enforcement of EC competition law* (Hart Publishing, 2009), pp. 17–28 and Wils, “Ten years of Regulation 1/2003 – A retrospective”, 4 *Journal of European Competition Law & Practice* (2013), 293–301.

9. This also confirms a long-standing line of case law, see among others Joined Cases 56 & 58/64, *Consten and Grundig v. Commission*, [1966] ECR 342; Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission*, [2006] ECR I8725, para 125; *T-Mobile Netherlands*, cited *supra* note 6, para 29.

10. For background, Monti, “New directions in EC competition law”, in Tridimas and Nebbia (Eds.), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart Publishing, 2004), p. 186.

develop earlier non-formalistic effects-focused interpretations of Article 101 TFEU concepts already reflected in the case law.¹¹

This contribution outlines and analyses recent Article 101 TFEU case law developments in relation to both “modernization” tendencies. Section 2 revisits the ways in which the EU Courts have interpreted the “economic entity” and the “affectation of inter-state trade” tests incorporated in Article 101 TFEU analysis. Section 3 elaborates on the extent to which the concepts of “decisions by an association of undertakings” and “concerted practices” have come to be interpreted. Both sections highlight that the Courts have been willing to maintain or enlarge the already broad scope of application of Article 101 TFEU by enhancing or fine-tuning legal presumptions that generally work in favour of enforcement authorities. The adoption or enhancement of those presumptions effectively enables more cases to be examined on their merits as a matter of Article 101 TFEU. Section 4 subsequently addresses the contentious features of the “restriction of competition” concept, which have surfaced in recent case law. It particularly distinguishes between the different constitutive roles of object and effect restrictions and the blurring of a clear dividing line between the two categories in recent case law. Such blurring also challenges the structure and scope of Article 101(3) TFEU and its distinctive and separate role compared to Article 101(1) TFEU. The end result is a more confusing than ever interpretation, conceptualization and application of the restriction of competition concept, which calls for legislative or even constitutional intervention. Section 5 concludes.

The primary purpose of this contribution is to analyse recent substantive law developments and to highlight how legal tests and frameworks have resisted or enabled a fine-tuned economically and legally sound interpretation of Article 101 TFEU. It does not seek to provide an overview of particular developments in and challenges related to ensuring the effective enforcement of that provision, which also takes place in a modernized environment.¹² Within such environment, the direct effect of Article 101(3) and the parallel

11. See for early examples of such effects-focused and non-formalistic interpretations, e.g. Case 56/65, *Société La Technique Minière v. Maschinenbau Ulm GmbH*, [1966] ECR 239 (effect on inter-state trade), Case 23/67, *Brasserie De Haecht v. Consorts Wilkin-Janssen*, [1967] ECR 405 (effects on competition within the common/internal market), Joined Cases 32 & 36–82/78, *BMW Belgium and Others v. Commission*, [1979] ECR 2435, para 30 (the concept of agreement) and Case C-234/89, *Delimitis*, [1991] ECR I-935, paras. 20–22 (restrictions by effect).

12. See Case C-439/08, *VEBIC*, [2010] ECR I-12471 (in relation to public enforcement) and Case C-557/12, *Kone AG and Others v. ÖBB Infrastruktur AG*, judgment of 5 June 2014, nyr (in relation to private enforcement) for judicial interventions aimed at enhancing the effectiveness of the EU competition law enforcement system at Member State level.

application of EU competition law by national competition authorities, national courts, the Commission and EU Courts raise significant additional challenges,¹³ as does the increasing attention paid to fundamental rights in infringement procedures.¹⁴ In the same way, adapted enforcement techniques and the judicially stimulated rise of private enforcement of Article 101 TFEU impose their own set of unique challenges and developments.¹⁵ Whereas those developments are not directly and explicitly covered in this contribution, their emergence should likewise be understood to take place against the very same background of EU competition law searching for a more effective and effects-focused analytical framework.¹⁶

2. Modernizing the scope of application of Article 101 TFEU?

The Article 101(1) TFEU prohibition applies only to restrictive agreements concluded between and/or concerted practices engaged in by two or more undertakings as well as to decisions by associations of undertakings, which affect trade between Member States. Prior to assessing whether or not a restrictive agreement, decision or practice is effectively in place, the concepts of undertaking and “affectation of inter-state trade” provide legal buffers against a boundless application of Article 101(1) TFEU to all sorts of market behaviour.

Although the concept of “undertaking” traditionally and mainly provided a shield against Article 101 TFEU analysis, the Commission also consistently

13. On problematic parallel application, see among others Devroe, “How general should general principles be? *Ne Bis in Idem* in EU competition law”, in Bernitz, Groussot and Shulyok (Eds.), *General Principles of EU Law and European Private Law* (Kluwer, 2013), pp. 401–442 and Ost, “From regulation 1 to regulation 2: National enforcement of EU cartel prohibition and the need for further convergence”, 5 *Journal of European Competition Law & Practice* (2014), pp. 125–136.

14. On challenges raised by “alternative” enforcement techniques such as commitments and settlements, see Wagner-von Papp, “Best and even better practices in commitment procedures after *Arosa*: The dangers of abandoning the ‘struggle for competition law’”, 49 *CML Rev.* (2012), 929–970; Laina and Laurinen, “The EU cartel settlement procedure: Current status and challenges”, 4 *Journal of European Competition Law & Practice* (2013), 302–311; see also the speech by Commissioner Almunia on “Remedies, commitments and settlements in antitrust”, delivered on 8 March 2013, available at <europa.eu/rapid/press-release_SPEECH-13-210_en.htm?locale=en>.

15. For a comprehensive overview of early developments in the realm of private enforcement, see Milutinovic, *The ‘right to damages’ under EU competition law: from Courage v. Crehan to the White Paper and beyond*, (Kluwer, 2010), p. 405.

16. See for that point of view, Van Cleynenbreugel, “Efficient justice in the service of justiciable efficiency? Varieties of comprehensive judicial review in a modernised EU competition law enforcement context”, 10 *The Competition Law Review* (forthcoming 2014).

holds parent or holding companies liable for competition law infringements committed by their subsidiaries, since both parent/holding and subsidiary are said to be a part of the same “undertaking”. Supporting and sustaining that position, the EU Courts developed and refined a form-based “single entity” presumption on the basis of ownership and control rights. Successful rebuttals of that presumption have so far been confined to exceptional circumstances where the Commission did not adduce at least some additional elements directly pointing towards a parent company’s effective or potential involvement in the competition law infringement (2.1). The affectation of inter-state trade criterion has continuously been applied in a remarkably lenient and wide-ranging fashion. Recent case law nevertheless made clear that modernization-inspired market share thresholds also already play a supplementary role in the present format and shape of the affectation of inter-state trade test (2.2).

2.1. *Single economic entity claims and parental liability presumptions*

The ECJ interprets the undertaking concept in a non-formal and functional way.¹⁷ Since 1991, an undertaking has consistently been defined as “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.¹⁸ This definition comprises two components: entity and economic activity. Whereas the concept and nature of “economic activity” remains problematic in its own right,¹⁹ recent Article 101 TFEU developments have mainly focused on the allegedly less problematic “entity” part of the undertaking definition.

The case law confirms that an entity can consist of “several persons, natural or legal”.²⁰ To the extent that a particular business structure comprising

17. See already Joined Cases 17 & 20/61, *Klöckner Werke AG and Hoesch v. High Authority of the European Coal and Steel Community*, [1962] ECR 345, holding that “the close ties between the parent company and its subsidiaries, in particular by reason of ‘organschaft’ (inter-group) contracts... are of no significance in the present cases because they can in no way eliminate the fundamental difference which has been declared to exist between a group of undertakings and an undertaking considered as a single entity”.

18. Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] ECR I-1979, para 21. The definition had already been used by the Commission in an earlier case: Commission Decision 86/398/EEC relating to a proceeding under Art. 85 of the EEC Treaty (IV/31.149 – *Polypropylene*), O.J. 1986, L 230/1, para 99.

19. See on that issue, among many others, Dunne, “Knowing when to see it: State activities, economic activities and the concept of undertaking”, 16 CJEL (2009–2010), 427–463; Szydło, “Leeway of Member States in shaping the notion of an ‘undertaking’ in competition law”, 33 *World Comp.* (2010), 549–568.

20. See Case 22/71, *Béguelin Import Co. v. S.A.G.L. Import Export*, [1971] ECR 949, para 8. Case 170/83, *Hydrotherm Gerätebau GmbH v. Compact del Dott. Ing. Mario Andreoli & C. Sas.*, [1984] ECR 2999, para 11.

multiple legal persons is to be considered a single entity, the Article 101 TFEU prohibition will not apply to agreements concluded between legal persons belonging to that same structure.²¹ At the same time, however, the single entity notion also determines the scope of a business structure “to which a certain behaviour is attributable”.²² The latter function allows competition authorities to impose fines on groups of corporate entities which are to be considered a single undertaking.²³

The most important factor in determining whether different corporate legal persons belong to a single entity or single undertaking is not whether the group members have a separate legal personality, but whether or not they act together on the market as a single unit.²⁴ Single unit market conduct implies that a subsidiary or affiliate has no real freedom to determine its course of action on the market.²⁵ The ECJ traditionally maintains a “belts and braces”²⁶ approach to the identification of a single economic entity. In accordance with

21. As the well-known *Viho* judgment makes abundantly clear, see Case C-73/95 P, *Viho Europe BV v. Commission*, [1996] ECR I-5457, paras. 6 and 16.

22. See Opinion of A.G. Jacobs in Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751, para 206.

23. See Art. 23(1) Regulation 1/2003, referring to undertakings being fined for anticompetitive behaviour. The reference to undertakings notwithstanding, different corporations comprising a single economic entity must be acknowledged as separately existing legal persons in the Commission’s fining Decision. Art. 299 TFEU states that Commission acts imposing pecuniary sanctions on *persons* other than States shall be enforceable. The reference to persons requires corporate legal persons to be indicated *ad nominem* in a fining Decision. In its 2014 *Siemens* judgment, the ECJ additionally determined that the the Commission cannot be obliged to define the individualized shares payable by the different legal persons forming part of one undertaking. The actual division of shares is a matter of national (private and corporate) law, see Joined Cases C-231-233/11 P, *Commission v. Siemens Österreich and Others, Siemens Transmission & Distribution Ltd, Siemens Transmission & Distribution SA and Nuova Magrini Galileo SpA v. Commission*, judgment of 10 Apr. 2014, nyr, para 74.

24. See Case 30/87, *Corinne Bodson v. SA Pompes funèbres des régions libérées*, [1988] ECR 2479, para 19; Case T-9/99, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v. Commission*, [2002] ECR II-1487, para 66; Case T-66/99, *Minoan Lines SA v. Commission*, [2003] ECR II-5515, para 123; Case T-325/01, *DaimlerChrysler AG v. Commission*, [2005] ECR II-3319, para 85; Briggs and Jordan, “Developments in the law: The presumption of shareholder liability and the implications for shareholders in private damages actions and otherwise”, (2009) *Global Competition Litigation Review*, 203–204.

25. Case 48/69, *Imperial Chemical Industries Ltd. v. Commission*, [1972] ECR 619, para 134; Case 15/74, *Centrafarm BV et Adriaan de Peijper v. Sterling Drug Inc.*, [1974] ECR 1147, para 41; *Bodson*, cited *supra* note 24, para 4; Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989] ECR 803, para 35.

26. See in that regard Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission*, [1983] ECR 3151, paras. 49–50; more recent examples include Case T-109/02, *Bolloré e.a. v. Commission*, [2007] ECR II-947, para 132; Case T-69/04, *Schunk v. Commission*, [2008] ECR II-2567, para 57; Case T-301/04, *Clearstream Banking en*

that approach, the Commission had to demonstrate that different legal persons actually acted as a single undertaking. The presence of control or ownership rights are deemed guiding in that regard, without however being conclusive.²⁷ Whilst control rights could provide an indication of such influence, additional elements would need to be adduced to demonstrate that any corporate legal intertwinement actually made the legal persons involved act like a single undertaking for the purposes of ascertaining the anticompetitive scope or nature of particular market behaviour. This approach continues to be relied upon in the Courts' recent case law.²⁸

In its 2009 *Akzo* judgment, the ECJ additionally held that:

“in the specific case where a parent company owns 100% of the shares in a subsidiary which has infringed the [EU] competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary”.²⁹

Full control through ownership rights thus *prima facie* presumes decisive market conduct influence.³⁰

Over the past five years, the *Akzo* presumption has consistently been applied by the Courts. In doing so, not only direct parent companies, but also “grandparent” companies have been captured by the presumption. In *General Quimica*, the Court ruled that “a holding company may be held jointly and severally liable for the infringements of EU competition law committed by a subsidiary of its group whose capital it does not hold directly, in so far as that holding company exercises decisive influence over that subsidiary, even indirectly via an interposed company”.³¹ Whilst the General Court accepted that a foundation not engaged in economic activities itself did not fall within

Clearstream International v. Commission, [2009] ECR II-3155, paras. 199–200; Case T-112/05, *Akzo Nobel e.a. v. Commission*, [2007] ECR II-5049, para 60.

27. For background, see Riesenkampf and Krauthausen, “Liability of parent companies for antitrust violations of their subsidiaries”, 31 ECLR (2010), 38–41.

28. For recent confirmation by the ECJ, see Joined Cases C-628/10 P & 14/11 P, *Alliance One International and Standard Commercial Tobacco v. Commission* and *Commission v. Alliance One International and Others*, judgment of 19 July 2012, nyr, para 47 and Case C-679/11, *Alliance One International Inc. v. Commission*, judgment of 26 Sept. 2013, nyr, para 40.

29. Case C-97/08 P, *Akzo Nobel NV and Others v. Commission*, [2009] ECR I-8237, para 60.

30. *Ibid.*, para 63.

31. Case C-90/09 P, *General Quimica and others v. Commission*, [2011] ECR I-1, para 87.

the undertaking definition,³² the Court of Justice made clear on appeal that “[t]he only decisive factor for the purpose of the penalty is that all the legal entities which are held jointly and severally liable, in whole or in part, for payment of the same fine together constitute with the entity whose involvement in the infringement has been established (‘the author of the infringement’) a single undertaking for the purpose of Article [101 TFEU]”.³³

By virtue of the *Akzo* presumption, parent companies owning all the shares in a subsidiary are always presumed to be part of a single economic entity together with the subsidiary involved in an Article 101 TFEU infringement. Somewhat remarkably, the ECJ marginally extended the presumption beyond 100% ownership situations to instances where “virtually 100%” of the shares were held by a parent company.³⁴ The GC equally applied this extended presumption to situations where a parent company held the “quasi-totality” of shares in a subsidiary.³⁵ Both Courts nevertheless refrained from drawing clear quantitative boundaries as to what should be understood by “virtually all shares” or the “quasi-totality” of shares. As a result, it is unclear whether a 90% or an 85% ownership of shares by a parent company would be sufficient to trigger the application of the *Akzo* presumption.

Recent case law developments particularly addressed the factors necessary for a successful rebuttal in case the presumption applies. Unsurprisingly, different parent companies have sought to demonstrate that they should not be considered a single economic entity, despite the existence of full ownership links between parent and subsidiaries. So far, successful rebuttals have been extremely limited in scope and scale. On most occasions, the General Court argued that the evidence adduced by the parent companies was insufficient to rebut the presumption, most often because the Commission case file contained additional elements hinting at decisive influence by the parent company.³⁶ In 2010, the General Court in that regard accepted that the

32. Case C-440/11 P, *Commission v. Stichting Administratiekantoor Portielje and Gosselin Group NV*, judgment of 11 July 2013, nyr, para 44.

33. Joined Cases T-208 & 209/08, *Gosselin Group NV and Stichting Administratiekantoor Portielje v. Commission*, [2011] ECR II-3639, para 42.

34. In the *Portielje* appeal, cited *supra* note 32, para 40, the ECJ also referred to “virtually 100% shareholding” situations. In Case C-508/11 P, *Eni SpA v. Commission*, judgment of 8 May 2013, nyr, para 49, the ECJ stated that 99.97% of the shares held by a parent company was sufficient to trigger the presumption’s application. More recently, the ECJ found in Case C-36/12 P, *Armando Álvarez SA v. Commission*, judgment of 22 May 2014, nyr, paras. 17–18, that a 98.6% shareholding was sufficient for the application of the presumption.

35. See for recent illustrations Case T-40/10, *Elf Aquitaine v. Commission*, judgment of 6 Feb. 2014, nyr, paras. 126–127.

36. See for a recent overview and references to the extensive case law in that regard, Joshua, Botteman and Atlee, “‘You can’t beat the percentage’ – The parental liability presumption in EU cartel enforcement”, (2012) *EU Antitrust Review*, 7. Presenting oneself to the market as a

presumption could not play in a case where “none of the material relied on by the Commission in the contested decision supports the conclusion that [a parent undertaking] in fact exercised such influence during the period from 5 May 1998 until the date of adoption of the contested decision. In this respect, the Commission cannot rely on the mere fact that [the latter] held all the capital of [an infringing subsidiary]”.³⁷ Since the Commission materials did not immediately allow to draw the conclusion that the particular parent undertaking exercised influence in that particular period – it basically constituted an empty shell through which other cartel participants placed their orders and transferred the money to the subsidiary – it was not to be considered a constituent part of the undertaking concerned during the specific time frame.³⁸ In this particular instance, the parent company could thus successfully rebut the presumption by demonstrating that it did not play an active or influential role in the organization and operation of a cartel, banking on insufficient data in the Commission file to support that conclusion. This case shows that the presumption is indeed rebuttable, but highly dependent on the elements included in the Commission’s case file. Any rebuttal assessment will therefore have to be considered on a case-by-case basis.

To the extent that a competition authority’s case file allows for inferences of influence to be made, the rebuttal of the presumption is very difficult in practice. Elements that have been adduced but have been rejected include the fact that the parent company did not directly participate in the infringement,³⁹ the fact that it did not have any knowledge of the infringement,⁴⁰ the fact that it was a mere holding or investment company,⁴¹ the fact that no specific information reporting mechanism from the subsidiary to the parent company

single entity can already constitute significant evidence of single economic entity status, see Case T-399/09, *Holding Slovenske elektrarne d.o.o. (HSE) v. Commission*, judgment of 13 Dec. 2013, nyr, para 36.

37. Case T-24/05, *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v. Commission*, [2010] ECR II-5329, para 218.

38. *Ibid.*, para 3.

39. *Akzo Nobel* (appeal), cited *supra* note 29, para 59; *General Química*, cited *supra* note 31, para 38. See also Case T-189/06, *Arkema France SA v. Commission*, [2011] ECR II-5455, para 63. In principle, the parent company would be able to rebut the presumption if it maintains that the subsidiary acted against explicit and specific instructions not to engage in anticompetitive behaviour; that argument can be based upon an *a contrario* reading of Joined Cases C-201 & 216/09 P, *ArcelorMittal Luxemburg SA v. Commission*, [2011] ECR I-2239, para 96 and Case C-352/09 P, *ThyssenKrupp Nirosta GmbH v. Commission*, [2011] ECR I-2359, para 37.

40. Among others, Case T-112/05, *Akzo Nobel*, cited *supra* note 26, para 58 and Case T-24/05, *Alliance One*, cited *supra* note 37, para 127.

41. Case T-384/09, *SKW Stahl-Metallurgie Holding AG and SKW Stahl-Metallurgie GmbH v. Commission*, judgment of 23 Jan. 2014, nyr, para 84 and Case T-395/09, *Gigaset AG v. Commission*, judgment of 23 Jan. 2014, nyr, para 54.

was in place,⁴² and the fact that it was not active in the same economic sector as the subsidiary.⁴³ Given that those factors have all been deemed insufficient within particular case contexts, it has rightfully been argued that the presumption is difficult if not impossible to rebut in practice.⁴⁴ Responding to such criticism, the Court of Justice obliged both the General Court and the Commission to investigate carefully and diligently the rebuttal arguments delivered; they are particularly:

“required to take account of and to conduct a concrete examination of the factors which were raised by the appellants to show that [the subsidiary] implemented its commercial policy independently, in order to ascertain whether the Commission had made a manifest error of assessment in regarding that evidence as insufficient to demonstrate that, in this case, that subsidiary did not constitute a single economic entity with [its parent company]”.⁴⁵

Taking such arguments into consideration, the General Court nevertheless confirmed that a mere strategic role or the coordination of financial investments made by a subsidiary could be sufficient in order for a decisive influence over a subsidiary’s activities to be presumed.⁴⁶

In *Alliance One*, the ECJ further confirmed that “the Commission is not bound to rely exclusively on [the] presumption. There is nothing to prevent the Commission from establishing that a parent company *actually* exercises decisive influence over its subsidiary by means of other evidence or by a combination of such evidence and that presumption”.⁴⁷ To the extent that the Commission effectively relies on such “dual basis”⁴⁸ to establish parental competition law liability, the scope for rebuttal of the presumption and the additional evidence by the parent company concerned will be reduced significantly. In practice, the Commission would therefore be tempted to rely

42. *Arkema France*, cited *supra* note 39, para 78.

43. *Ibid.*, para 77.

44. See for that argument, Briggs and Jordan, “Presumed guilty: Shareholder liability for a subsidiary’s infringements of Article 81 EC Treaty”, 8 *Business Law International* (2007), 28.

45. *General Química*, cited *supra* note 31, para 78. See also Case T-185/06, *L’Air liquide, société anonyme pour l’étude et l’exploitation des procédés Georges Claude v. Commission*, [2011] ECR II-2809, paras. 53–54.

46. Case T-24/05, *Alliance One*, cited *supra* note 37, para 167; Case T-392/09, *I. garantovaná a.s. v. Commission*, judgment of 12 Dec. 2012, nyr, para 54; Case C-289/11 P, *Legris Industries v. Commission*, judgment of 3 May 2012, nyr, para 49. For more information, see Hummer, “Alliance One: General Court overturned parental liability of a pure financial holding company”, 2 *Journal of European Competition Law & Practice* (2011), 127.

47. Joined Cases C-628/10 P & 14/11 P, *Alliance One*, para 49 and Case C-679/11, *Alliance One*, para 40, both cited *supra* note 28.

48. Joined Cases C-628/10 P & 14/11 P, *Alliance One*, para 50 and Case C-679/11, *Alliance One*, para 41, both cited *supra* note 28.

not only on the presumption, but also – if possible – on additional elements directly highlighting the actual involvement of a parent company in the anticompetitive behaviour concerned.

Alliance One makes clear that the presumption merely supports the attribution of competition law liability in instances where the Commission is unable to rely on additional situational elements. In such a situation, proof that legal persons concerned presented themselves as a single economic entity in relation to the EU competition law infringement under scrutiny would still be inferred from a full-ownership or full-control situation. It is then for the Commission to decide on a case-by-case basis whether that person is indeed liable for the conduct of the undertaking perceived by being a part of the single economic unit comprising that undertaking.⁴⁹

Despite those clarifications in *Alliance One*, it still remains unclear from the Court's case law what is required in practice for a successful rebuttal. As long as those requirements remain unclear, a risk of corporate legal persons being held liable for infringements they did not commit, appears to be prevailing in this regard. Scholarly criticism in relation to parent company liability rightfully focuses on that perspective.⁵⁰ It should nevertheless also be clear that the form-based presumption only captures a particular and rather specific ownership situation within the single economic entity conception. The *Akzo*-presumption allows enforcement authorities to hold a parent company liable more easily in that regard, without however fully replacing the classic "belts and braces" evidentiary standard required. If the enforcement authority cannot indeed make a strong case that a parent company (potentially) influenced a subsidiary's market behaviour within a particular time frame, the parent company will most likely succeed in rebutting the presumption. More precise requirements for a successful rebuttal of parent company liability, especially in cases where the presumption applies, cannot at present be extracted from the Courts' case law.

49. Case T-41/05, *Alliance One International v. Commission*, [2011] ECR II-7101, para 112. See for a recent example where a successor company taking over control of another company could be held liable, Case C-448/11 P, *SNIA SpA v. Commission*, judgment of 5 Dec. 2013, nyr, para 29.

50. Montesa and Givaja, "When parents pay for their children's wrongs: Attribution of liability for EC antitrust infringements in parent-subsidiary scenarios", 29 *World Comp.* (2006), 571, seem to hint at this situation. See also Thomas, "Guilty of a fault that one has not committed. The limits of the group-based sanction policy carried out by the Commission and the European Courts in EU-antitrust law", 3 *Journal of European Competition Law & Practice* (2012), 14.

2.2. *Affection of “inter-state trade”: A superficial preliminary market assessment*

It is well known that Article 101 TFEU only prohibits agreements, decisions or practices engaged in by undertakings *which may affect trade between Member States*. The affectionation of inter-state trade requirement already appeared within the Court’s earliest case law. In *Brasserie de Haecht*, the Court held that “it must be possible for the agreement, decision or practice, ... to be capable of ... being conducive to a partitioning of the market and of hampering the economic interpenetration sought by the Treaty”.⁵¹ This implied more specifically that it had to be possible “to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States”.⁵² That definition has remained in place ever since and gave rise to a requirement that inter-state trade must be *appreciably* affected.⁵³ As long as the Commission, a national competition authority or a private claimant can maintain that the pattern of trade between Member States would be affected by presumably anticompetitive behaviour, this condition will be fulfilled. That is particularly the case if the arrangement extends over the whole of a particular Member State or an area comprising parts of different Member States.⁵⁴ On the basis of a contextual analysis of the nature of the agreement and practice, the nature of the products covered by the agreement or practice, and the position and importance of the undertakings concerned, it should be determined whether or not inter-state trade is effectively affected.⁵⁵

Although the “affectionation of inter-state trade” criterion at least requires potential and indirect effects on patterns of trade to be proven, the Court did not demand a fully-fledged assessment of the effects a measure has on trade. It rather imposed on the Commission an additional benchmark to check whether Article 101 TFEU would indeed be applicable to particular agreements, decisions or practices, without mandating a predictable and quantifiable assessment standard to be in place in that regard. The Commission confirmed this position and maintained that particular

51. *Brasserie De Haecht*, cited *supra* note 11, 415.

52. See to that extent already *Société La Technique Minière*, cited *supra* note 11, 249.

53. *Béguelin*, cited *supra* note 20, para 16; Case C-238/05, *Asnef-Equifax and Administración del Estado*, [2006] ECR I-11125, paras. 34–35. For a recent application, see Case T-370/09, *GDF Suez SA v. Commission*, judgment of 29 June 2012, nyr, para 118.

54. Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, O.J. 2004, C 101/81, para 21.

55. *Béguelin*, cited *supra* note 20, para 18.

agreements affect trade between Member States by their very nature.⁵⁶ The presence of an effect on trade does not however mean that those agreements are necessarily restrictive of competition. It only indicates that they could fall within the scope of application of EU competition law and could thus be the subject of an investigation on their merits.⁵⁷

The more economic approach introduced a more quantitative way of assessing appreciability by means of market share thresholds.⁵⁸ In 2004, the so-called “pattern of trade” test was developed by the Commission in its Guidelines on the effect on trade concept.⁵⁹ That test requires the appreciable effects on trade to be measured both in absolute terms (turnover) and in relative terms, comparing the position of the undertaking(s) concerned to that of other players on the market (market share).⁶⁰ The concept “may affect” additionally implies that “the assessment is based on the ability of the agreement or practice to affect trade between Member States rather than on the impact on actual flows of goods and services across borders”.⁶¹ The market position of the undertakings concerned and their turnover in the products concerned should therefore only be indicative of the ability of an agreement or practice to affect trade between Member States. The Commission to that extent introduced a negative presumption that when undertakings having concluded an agreement hold an aggregate market share of less than 5% on any relevant market within the EU and when the turnover of the undertakings concerned does not exceed 40 million euros, inter-state trade is not appreciably affected.⁶² If and to the extent that those thresholds have not been met, the Commission – unless it adduces other evidence of inter-state affectation – will not initiate Article 101 TFEU infringement proceedings.⁶³ In addition, the Commission introduced a positive presumption that agreements which are capable by their very nature of affecting trade between Member States, for example, because they concern imports and exports or cover several Member States, appreciably affect trade between Member States if only one of the thresholds relied upon in the negative presumption is fulfilled.⁶⁴

56. Guidelines, cited *supra* note 54, para 53.

57. *Ibid.*, para 16.

58. On the importance of market shares in a modernized competition law environment, see the Commission’s *White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty*, para 1.

59. Guidelines, cited *supra* note 54, para 24.

60. *Ibid.*, para 47.

61. *Ibid.*

62. *Ibid.*, para 52. In case of vertical agreements, the turnover requirement only applies to the supplier, the licensor and licensee or the buyer if the latter buys products from several suppliers.

63. *Ibid.*, para 51.

64. *Ibid.*, para 53.

Although the appreciability thresholds and presumptions included in the 2004 Commission notice sought to rationalize the criteria relied upon to determine the applicability of Article 101 TFEU and to make competition law enforcement more predictable, the tests did not address the preliminary question as to what kinds of agreements or practices affect inter-state trade by their very nature. In *Asnef-Equifax and Administración del Estado*, the ECJ held that account should be taken of the foreseeable development in the conditions of competition and in the pattern of trade between Member States in order to determine, on a case-by-case basis, whether or not inter-state trade could potentially be affected.⁶⁵ In *Erste Bank der österreichischen Sparkassen*, the Court confirmed this position, stating that the Commission and the General Court could rely on a presumption that inter-state trade is affected once it is clear that a set of products and services covering the entire territory of one Member State are affected by a potentially anticompetitive agreement.⁶⁶ That presumption could only be rebutted “if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary”.⁶⁷ The Court did not refer in either judgment to the quantitative thresholds set out in the Commission guidance. The first case concerned proceedings before the Spanish Competition Authority, which is not technically bound by Commission guidelines, while the *Erste Bank* case dealt with a Commission decision adopted prior to the entry into force of the effect on trade guidelines. As a result, the status of the guidelines and the particular role of the appreciability presumptions in the development of a rationalized affectation of inter-state trade test did not need to be considered in either judgment.

In the 2013 *Ziegler* judgment, however, the ECJ finally had the opportunity to adopt a position on the test outlined in the 2004 Notice. *Ziegler* argued that the Commission had failed to “prove that the condition requiring an appreciable effect on trade between Member States had been met and simply relied on presumptions set out in [the] guidelines” to claim that *Ziegler*’s behaviour could be captured by Article 101 TFEU.⁶⁸ In addition, *Ziegler* maintained that the General Court failed properly to define the relevant

65. *Asnef-Equifax and Administración del Estado*, cited *supra* note 53, para 44. For examples of that approach, *GDF Suez*, cited *supra* note 53, paras. 126–129 and Case T-58/01, *Solvay SA v. Commission*, [2009] ECR II-4781, paras. 210–217.

66. Joined Cases C-125, 133, 135 & 137/07 P, *Erste Group Bank AG, Raiffeisen Zentralbank Österreich AG, Bank Austria Creditanstalt AG and Österreichische Volksbanken AG v. Commission*, [2009] ECR I-8681, para 38.

67. See to that extent already Joined Cases, T-259-264 & 271/02, *Raiffeisen Zentralbank Österreich and Others v. Commission*, [2006] ECR II-5169, para 181.

68. Case C-439/11 P, *Ziegler SA v. Commission*, judgment of 11 July 2013, nyr, para 51.

market on which inter-state trade would appreciably be affected.⁶⁹ The Commission argued that it was not bound by the presumptions in the Guidelines to determine whether an agreement would be capable, in the abstract, to affect inter-state trade. It could not therefore be forced to define the relevant market at the earliest stage of a competition law investigation, as the 2004 Commission guidelines would seem to require.⁷⁰ The Court was thus invited to consider whether the test incorporated in the Guidelines provides the only appropriate legal test to determine effects on inter-state trade.⁷¹ In responding to the Commission's claim, the ECJ first of all reiterated that guidance documents should be understood as limiting the discretion of the Commission, thus creating legitimate expectations that the principles covered in those guidelines will effectively be applied.⁷² More innovatively, however, the Court also stated that:

“even though it is unnecessary, in certain circumstances, to define the relevant market in order to establish whether there is an appreciable effect on trade between Member States for the purpose of Article [101 TFEU], namely where it is possible, even in the absence of such a definition, to establish that the cartel in question is capable of affecting trade between Member States and has the object or effect of preventing, restricting or distorting competition within the common market, it is not possible, by definition, to verify whether a market share threshold has been exceeded *in the absence of any definition whatsoever of that market*”.⁷³

To the extent that the Commission envisaged relying on a market share based effects-on-trade test, the relevant market should be defined by the Commission. The Court – agreeing with the General Court on that matter – nevertheless held that insofar as it “provided a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope”, this enabled “the Court to verify the Commission's basic assertions and...on that basis, it [can be] clear that the combined market share far exceeds the 5% threshold”.⁷⁴ Market definition – as applied in the context of this test – should thus be attuned to the sole purpose of determining whether an agreement in question is capable of affecting trade between Member States and has the object or effect of preventing, restricting or distorting competition within the

69. *Ibid.*, para 51.

70. *Ibid.*, para 55.

71. The General Court on earlier occasions already reviewed the Commission's reliance on the Guidelines, see among others Case T-29/05, *Deltafina SpA v. Commission*, [2010] ECR II-4077, para 173.

72. *Ziegler*, cited *supra* note 68, para 60.

73. *Ibid.*, para 63 (emphasis added).

74. *Ibid.*, para 67.

internal market.⁷⁵ In *Stichting Administratiekantoor Portielje*, the Court supplemented this reasoning by additionally holding that when the market share on the superficially defined relevant market clearly exceeds the 5 percent threshold, the Commission is justified at that stage to conclude that the agreements in question are capable of having an appreciable effect on trade between Member States for the purpose of Article 101(1) TFEU.⁷⁶

Both *Ziegler* and *Portielje* express the Court's ambivalent attitude towards the Commission's effect-on-trade guidelines as a legal test defining the scope of application of Article 101 TFEU, as well as the Court's more general reluctance to introduce a detailed economic effects-focused test replacing the test in force since its earliest case law on the matter. On the one hand, the Court confirms the binding effects of the Commission's market threshold test and the legitimate expectations undertakings can derive from that test. In doing so, the Court appears willing to accept that market shares and the preliminary determination of a relevant market can be helpful tools in deciding whether or not inter-state trade is appreciably affected. On the other hand, the Court remains ambivalent as to the role of market thresholds. Those thresholds do not replace, but at best add to the already existing non-quantitative effects on trade test, which continues to be referred to in the Court's case law and in the Commission's guidelines.⁷⁷ As such, the Court highlighted that market threshold presumptions merely provide a useful tool to structure and rationalize the effects-on-trade test, without however replacing the more open-ended test relied on in the case law. The superficial relevant market definition required at this stage confirms that approach. By allowing the Commission to define the market by means of a quicker look than would be required in instances where the relevant market is necessary to determine anticompetitive behaviour *stricto sensu*, the Court seeks to integrate the threshold test in its traditional extensive interpretation of appreciable affectation of inter-state trade.

The General Court and the Court of Justice have additionally clearly held that the Guidelines only apply in relation to Commission decision-making procedures. National competition authorities cannot be considered bound by

75. *Ibid.*, para 71.

76. *Portielje* appeal, cited *supra* note 32, para 105. The General Court already rubberstamped a similar superficial look test in Case T-144/07, *ThyssenKrupp*, [2011] ECR II-5129, para 68.

77. See in that regard *Asnef-Equifax and Administración del Estado*, cited *supra* note 53, para 34; *Erste Group Bank*, cited *supra* note 66, para 36; *Ziegler*, cited *supra* note 68, para 93 and *Portielje* appeal, cited *supra* note 32, para 99. See also Guidelines, cited *supra* note 54, para 53.

the Guidelines when applying Article 101 TFEU.⁷⁸ This once again demonstrates that the thresholds-based more economic approach does not completely replace the legal tests that have been in operation since the earliest competition law cases, but merely provide building blocks that can be incorporated into those tests to the extent that the Commission deems such incorporation necessary.

In addition to abovementioned case law developments, the distinct roles of the effect on trade thresholds and the *de minimis* thresholds have also been acknowledged in the 2012 *Expedia* judgment. That case most directly confirmed that the affectation of inter-state trade test retains value as a self-standing test that should be distinguished from the *de minimis* market share thresholds. In its judgment, the Court proclaimed that Article 101(1) TFEU:

“must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings *that may affect trade between Member States*, but that does not reach the thresholds specified by the Commission in its *de minimis* notice, provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision”.⁷⁹

The Court not only and explicitly stated that the *de minimis* criteria had only been incorporated in a non-binding Commission notice,⁸⁰ but also that the “thresholds are no more than factors among others that *may enable* that authority to determine whether or not *a restriction is appreciable* by reference to the actual circumstances of the agreement”.⁸¹ The Court particularly indicated that the *de minimis* thresholds only come into play once a restriction has been determined, and even at that stage they remain mere guidance tools for competition authorities other than the Commission.⁸² More important for

78. *Ziegler*, cited *supra* note 68, para 62 *a contrario*. See for an explicit confirmation of such reasoning in relation to the thresholds in the Commission’s 2001 *de minimis* notice, Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, [2011] ECR I-5161, para 21 and Case C-226/11, *Expedia Inc. v. Autorité de la concurrence and Others*, judgment of 13 Dec. 2012, nyr, para 31.

79. *Expedia*, *ibid.* para 38.

80. At that time, the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art. 81(1) of the Treaty establishing the European Community (*de minimis*), O.J. 2001, C 368/13. In light of the *Expedia* judgment, the Notice has been replaced by a 25 June 2014, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*de minimis* Notice), available at <ec.europa.eu/competition/antitrust/legislation/de_minimis_notice.pdf>.

81. *Expedia*, cited *supra* note 78, para 31.

82. See also Van der Vijver and Vollering, “Understanding appreciability: The European Court of Justice reviews its journey in *Expedia*”, 50 CML Rev. (2013), 1143.

the purposes of this section, however, is that the Court also clearly distinguished the “may affect trade between Member States” requirement from the “appreciable restriction” element necessary to prohibit particular behaviour. From that point of view, the appreciability of a competition restriction differs from the appreciability of inter-state trade affectation.⁸³ Whereas the latter determines whether Article 101 TFEU is applicable in the first place, the former directly seeks to ascertain whether or not a particular restriction produces effects that warrant the application of the prohibition in Article 101(1) TFEU and the voidness sanction in Article 101(2) TFEU.

The clear distinction between the two types of test highlights that the Court is unwilling to replace established legal concepts completely in the service of market threshold-based appreciability criteria that could be relevant in both appreciability assessments. Although it can be questioned whether such a distinct test is truly necessary in situations where the assessment of the existence and the appreciability of a restriction on competition is becoming more important,⁸⁴ the Court in *Expedia* made clear that the affectation of inter-state trade test should remain in place for now as a distinct and separate condition governing the applicability of Article 101 TFEU. As the case law on affectation of inter-state trade makes clear, the Courts continue to distinguish between a rather superficial jurisdictional inquiry by competition authorities into the conditions governing the applicability of Article 101 TFEU and the actual assessment of the merits of the case, which is subject to different legal tests and conditions.

The case law on the affectation of inter-state trade criterion at the very least makes clear that market share thresholds and turnover number presumptions are – albeit somewhat hesitantly – also considered to form part of the jurisdictional assessment of potential Article 101 TFEU infringements. The Court therefore explicitly invites the Commission superficially to determine the relevant market prior to assessing whether a restriction is in place and whether that restriction should be deemed applicable. At the same time, similar market definition requirements are not directly imposed on national competition authorities applying EU competition law. In those instances, the Court continues to rely on its non-quantitatively structured affectation of inter-state trade test developed in its early case law. The market threshold-based appreciability approach proposed by the Commission is thus considered to represent only one manifestation of a wider – and less threshold focused – direct or indirect, actual or potential patterns of trade affectation test emerging from the Court’s case law. As such, the Court appears at least willing

83. Which had previously already been confirmed by the 2004 Commission Guidelines, cited *supra* note 54, para 4.

84. See section 4 *infra* for case law evolution in that regard.

to incorporate more economically inspired assessment data – market share calculations – into its well-established judicial affectation of inter-state trade test. Market share thresholds are tolerated and applied by the Courts without however being relied on completely to replace the existing legal test.

3. Formats of allegedly restrictive behaviour in a modernized Article 101 TFEU setting

Article 101(1) TFEU targets restrictive agreements, decisions of associations of undertakings and concerted practices between undertakings. The concepts of agreement, decision and concerted practice serve “from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves”.⁸⁵ Agreements, decisions and practices therefore constitute mere formal legal categories that jointly and separately serve to apply the Article 101(1) prohibition to as many types of collusive behaviour.⁸⁶ From that point of view, it is hardly surprising that the Court fundamentally agrees with the Commission’s classification of collusive behaviour as comprising an “agreement and/or concerted practice”.⁸⁷ As long as presumably anticompetitive behaviour can be classified within one of the Article 101 categories, the Commission can continue to analyse the restrictive object or effect of such behaviour. The legal standards governing (proof of) the existence of agreements, decisions and concerted practices have as a result also been interpreted in such a way as to allow the capturing of as many kinds of collusive behaviour as feasible. An agreement has consistently been defined as any “concurrence of wills”⁸⁸ between competitors or between

85. See Case C49/92 P, *Commission v. Anic Partecipazioni*, [1999] ECR I4125, para 131 and *T-Mobile Netherlands*, cited *supra* note 6, para 23.

86. See in that regard particularly, Case T-305/94, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v. Commission*, [1999] ECR II-931, para 698.

87. See for additional examples in that regard, Bailey, “Single, overall agreement in EU competition law”, 47 CML Rev. (2010), 477. See also Case C-449/11 P, *Solvay Solexis SpA v. Commission*, judgment of 5 Dec. 2013, nyr, para 60.

88. See Joined Cases C-2 & 3/01 P, *Bundesverband der Arzneimittel-Importeure eV & Commission v. Bayer*, [2004] ECR I-23, para 69. For a critique as to the “concurrence of wills” requirement, Black, “Agreement: Concurrence of wills or offer and acceptance?”, 4 *European Competition Journal* (2008), 103–125.

different actors in the production or distribution chain.⁸⁹ Decisions and concerted practices provide alternatives for instances where the Commission cannot demonstrate that an agreement governed undertakings' collusive behaviour.

Recent case law developments mainly confirmed the open-ended and functional definitions of all concepts and made more explicit the underlying *substantive law presumptions* giving shape to those concepts. The EU Courts have particularly felt more confident to identify, refine and even enhance those presumptions. The notions of “decision by an association of undertakings” and “concerted practice” have most directly become the subject of such refined interpretations. The General Court’s 2012 *MasterCard* judgment and the ECJ’s 2013 *OTOC* judgment clearly advocate this approach in relation to decisions by an association of undertakings, as does the GC’s *CISAC* judgment in relation to concerted practices. The Courts’ interpretations of both concepts highlight how freshly refined legal presumptions can serve as a means to promote a more effects-focused assessment scheme underlying Article 101 TFEU.

3.1. Revisiting “decisions of an association of undertakings”

The General Court reconsidered the concept of decision by an association of undertakings in a judgment on the compatibility of a multilateral interchange fee system maintained by MasterCard. Interchange fees comprise a set of charges imposed on banks in return for allowing their customers to use a particular payment card system such as Visa or MasterCard.⁹⁰ Originally conceived as a compensation mechanism for services provided to merchants by the issuing bank, interchange fees have more recently been described as a tool to ensure that merchants can reliably accept payments from customers using cards issued by a particular bank.⁹¹ Interchange fees had collectively been determined by the MasterCard payment organization, originally a cooperative association representing the issuing banks, which was later transformed into a corporation whose shares are traded publicly. In assessing the anticompetitive effects of the MasterCard interchange fee system, the Commission argued that fees directly resulted from a decision by an

89. For an overview of the different characteristics of the “agreement” concept as apparent from the Court’s case law, see Willis and Hughes, “What is an agreement?”, 6 *Competition Law Journal* (2007), 123–146.

90. For background, see Mathis, “European competition law and multilateral interchange fees in the market for payment cards: A critical outlook”, 34 *ECLR* (2013), 141.

91. Case T-111/08, *MasterCard, Inc. and Others v. Commission*, judgment of 24 May 2012, nyr, para 19.

association of undertakings.⁹² Contesting the Commission decision, MasterCard *inter alia* argued that it could not be considered an association of banks having adopted a decision to set fees in that regard. The General Court – building on classic case law – nevertheless maintained that the payment organization did comprise an association of undertakings and that its fee-setting standards did conform to the concept of a decision. The GC particularly stated that “it follows from the case law of the Court of Justice that the existence of a commonality of interests or a common interest is a relevant factor for the purposes of assessing whether there is a decision by an association of undertakings”.⁹³ It was subsequently maintained that – despite the banks no longer directly participating in MasterCard payment organization’s setting of fees – this commonality of interests translated into the retention of fee-setting decision-making powers within the MasterCard payment organization.⁹⁴ Since it was in the interest of issuing banks to have fees set by such organization at a high level, the GC argued that the Commission “was fully entitled to characterize as decisions by an association of undertakings the decisions taken by the bodies of the MasterCard payment organisation in determining the [multilateral interchange fee]”.⁹⁵

The GC judgment did not refer directly to the judicial criteria that had previously been developed in relation to a decision by an association of undertakings. In accordance with those criteria, it must first be established whether a particular association indeed comprises an association of undertakings and whether it adopted a decision in that capacity.⁹⁶ Since the MasterCard payment organization was engaged in economic activities itself and thereby represented the interests of banks, also undertakings in their own right, the case raised few doubts as to the existence of an association of undertakings.⁹⁷ The establishment of a decision on the basis of a mere commonality of interests appears more revolutionary at first sight. A decision,

92. See Commission Decision of 19 Dec. 2007 (Case COMP/34.579 – MasterCard, Case COMP/36.518 – EuroCommerce, Case COMP/38.580 – Commercial Cards), paras. 391–393, summary published in O.J. 2009, C 264/8.

93. Case T-111/08, *MasterCard*, cited *supra* note 91, para 251.

94. *Ibid.*, para 255.

95. *Ibid.*, para 259.

96. The Commission conducted this assessment in a more detailed fashion, see Commission Decision of 19 Dec. 2007 (Case COMP/34.579 – MasterCard, Case COMP/36.518 – EuroCommerce, Case COMP/38.580 – Commercial Cards), paras. 338–399.

97. Case T-111/08, *MasterCard*, cited *supra* note 91, paras. 245–247; contrary to precedents such as Case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, para 69, the Court did not have to delve into the nature of economic activities supported by the MasterCard payment organization, as the latter did not engage in a public or

it has been held, “covers any measure, even if it is not binding, which, regardless of what its precise legal status may be, constitutes the faithful reflection of the association’s resolve to coordinate the conduct of its members”.⁹⁸

MasterCard lodged an appeal against the GC judgment, maintaining that “to infer from a mere coincidence of interests between two or more economic operators the existence of an association of undertakings” would extend the scope of Article 101 TFEU beyond its original purpose.⁹⁹ Advocate General Mengozzi fundamentally disagreed with this assertion and opined that “the existence of an institutionalized framework to which the banks belong and within which they cooperate among themselves and with MasterCard in order to achieve a joint project which entails limiting their commercial autonomy and defines the lines of their reciprocal action” suffices to infer the existence of an association.¹⁰⁰ More specifically:

“it cannot be precluded outright that a body may be classified as an association of undertakings even where, as in MasterCard’s case, the decisions which it adopts are not taken by a majority of the representatives of the undertakings in question or in their exclusive interest, if it follows from a global assessment of the circumstances of the case that those undertakings intend or at least agree to coordinate their conduct on the market by means of those decisions and that their collective interests coincide with those taken into account when those decisions are adopted. *A fortiori*, such a classification cannot be precluded outright in a context such as that of the present case, where the undertakings in question pursued, over several years, the same objective of joint regulation of the market within the framework of the same organisation, albeit under different forms”.¹⁰¹

Even though the banks participating in the MasterCard payment organization did not directly set the multilateral interchange fee, these banks essentially acquiesced in such fee being set by the organization, which overall benefited them. Evidence of such acquiescence would therefore suffice to presume the

semi-public law regulatory role, supported or enabled by public authorities. The MasterCard payment organization was indeed set up as a private body in its own right.

98. See e.g. Case 45/85, *Verband der Sachversicherer*, [1985] ECR 405, para 32 and Commission Decision of 19 Dec. 2007 (Case COMP/34.579 – MasterCard, Case COMP/36.518 – EuroCommerce, Case COMP/38.580 – Commercial Cards), para 368.

99. As restated in the Opinion of A.G. Mengozzi of 30 Jan. 2014 in Case C-382/12 P, *MasterCard and Others v. Commission*, pending, para 41.

100. *Ibid.*, para 42.

101. *Ibid.*, para 45.

existence of an association of undertakings having adopted a decision to set interchange fees.¹⁰²

In the 2013 *OTOOC* judgment, the ECJ similarly questioned whether a professional association of accountants which was obliged by law to provide professional training programmes could be considered an association of undertakings. In this judgment, the Court confirmed and applied the *Wouters* criteria, according to which “a regulatory body of a profession the practice of which constitutes...an economic activity”¹⁰³ adopting rules “without any input from the State”¹⁰⁴ yet under a legal obligation to do so¹⁰⁵ constitutes an association of undertakings even if its rules “do not have any direct effect on the economic activity of the members of that professional association”, as long as “the infringement of which that professional association is accused concerns a market on which it itself carries on an economic activity”.¹⁰⁶ As such, and in line with the *MasterCard* GC judgment, the Court summarily agreed that a decision by a professional association to set up a compulsory training programme for chartered accountants qualifies as a decision by an association of undertakings, even in cases where such decision does not directly contribute to the undertakings engaging in collusive behaviour themselves.¹⁰⁷ The mere fact that the undertakings concerned had an interest in obligatory training programmes to be organized in a particular way, was deemed sufficient for *OTOOC*’s behaviour to fall within the scope of a “decision by an association of undertakings”. In so holding, the Court of Justice – albeit implicitly – confirmed that a mere alignment of interests between the chartered accountants and the professional association suffices presumably to place decisions by that association within the scope of Article 101 TFEU.¹⁰⁸

3.2. *Concerted practices extended?*

The notion of concerted practice has also been the subject of recent judicial attention. In *T-Mobile*, the ECJ repeated that a concerted practice “is a form of coordination between undertakings by which, without it having been taken to

102. *Ibid.*, para 47.

103. Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*, judgment of 28 Feb. 2013, nyr, para 45.

104. *Ibid.*, para 52.

105. *Ibid.*, para 4.

106. *Ibid.* paras. 48–52; for an overview of the application of those rules, see Gorecki, “Decision of an association of undertakings: Reflections on a recent Irish Supreme Court decision, *Hemat v. The Medical Council*”, 32 *ECLR* (2011), 153–160.

107. *OTOOC*, *ibid.*, para 45.

108. See also Baumé, “*OTOOC*: The provision of training by professional associations”, 4 *Journal of European Competition Law & Practice* (2013), 321.

the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition”.¹⁰⁹ In order to prove such practice, the Court allowed the Commission to adduce evidence of “contacts” between the undertakings involved as well as evidence of collusive behaviour. If both elements are proven, EU law presumes a causal link between the contacts and the collusive behaviour to be in place.¹¹⁰ It would then be for the undertakings concerned to rebut the presumption by maintaining that their market behaviour results from another plausible explanation, such as rational parallel conduct on a highly oligopolistic market.¹¹¹ In instances where no proof of contacts can be provided, the existence of a concerted practice will only be accepted if the Commission or a national competition authority can maintain that concertation is the only plausible explanation for any parallel conduct identified.¹¹² Mere proof of parallel conduct cannot therefore suffice to establish the existence of a concerted practice.

On the basis of the traditional line of case law, proof of contacts would suffice to shift the burden of proving (non-)concertation from the Commission to the defendant undertaking, whereas the Commission would bear the burden of proof in cases where mere parallel conduct has been demonstrated. In the 2013 *CISAC* judgment however, such a black and white approach towards concerted practices was no longer fully maintained. *CISAC* concerned bilateral agreements concluded between collective (intellectual property) rights management societies concerning the membership of such societies and exclusive licensing of rights by those societies in particular allocated territories. The Commission maintained that national territorial limitations included in all collective rights management societies’ agreements resulted from a concerted practice restricting competition.¹¹³ *CISAC*, as well as other collective rights management societies, challenged the Commission’s findings that such a concerted practice was in place. It argued in particular that the Commission based its finding solely on the presence of parallel conduct,

109. *T-Mobile Netherlands*, cited *supra* note 6, para 26, referring to classic judgments in Joined Cases 40–48, 50, 54–56, 111, 113 & 114/73, *Suiker Unie and Others v. Commission*, [1975] ECR 1663, para 26, and Joined Cases C-89, 104, 114, 116, 117, 125–129/85, *Ahlström Osakeyhtiö and Others v. Commission (Woodpulp II)*, [1993] ECR I-1307, para 63.

110. See for a recent reconfirmation of that approach, Case C-455/11 P, *Solvay SA v. Commission*, judgment of 5 Dec. 2013, nyr, paras. 39–41. Contacts will most likely be proven by means of documents pointing at the existence of such contacts.

111. Case C-199/92 P, *Hüls v. Commission*, [1999] ECR I-4287, para 167. See in that regard, *T-Mobile Netherlands*, cited *supra* note 6, para 34.

112. *Woodpulp II*, cited *supra* note 109, paras. 126–127; *Limburgse Vinyl Maatschappij*, cited *supra* note 86, para 725.

113. Commission Decision of 16 July 2008, (COMP/C2/38.698 – *CISAC*), O.J. 2008, C 323/12, para 156.

without properly contemplating other plausible explanations for such conduct.¹¹⁴ The Commission argued that its finding of parallel conduct was substantiated by documents, thus imposing the burden of proving that a concerted practice did not exist on the collective rights management societies. The General Court agreed with CISAC and maintained that the Commission did not sufficiently examine or accept other equally plausible explanations for the parallel conduct.¹¹⁵ In assessing whether the Commission considered those alternatives however, the GC stated that:

“it is necessary to examine the question of whether the Commission, as it claims, established the existence of an infringement in relation to the national territorial limitations by evidence other than the mere finding of parallel conduct, a claim which the applicant contests. It is necessary to examine that issue before examining whether or not the explanations other than concertation are well founded, since, if the Court concludes that such evidence was provided in the contested decision, those explanations, even if they were plausible, would not invalidate the finding of the infringement”.¹¹⁶

In so stating, the General Court essentially established a “middle-ground” way of proving a concerted practice. In addition to the establishment of contacts through “documents” or the combination parallel conduct and no other plausible explanation, the Commission would in this understanding also be able to establish a concerted practice if it can demonstrate parallel conduct and some other evidence is present. According to the GC, the existence of a concerted practice can be proven “by factors other than the parallel conduct of the collecting societies that are comparable to ‘documents’,...on which the Commission relies”.¹¹⁷ It did not however specify what factors would be sufficient and what should be understood by other factors comparable to “documents”. Since the GC concluded that no such evidence was effectively adduced, it chose to apply the plausibility test in this case.¹¹⁸ As a result, the scope of this “middle ground” test remains unclear for now. The General Court nevertheless seemed able and willing to read such a test in Article 101 TFEU. It could in that regard be considered that if proof of parallel conduct could be supplemented by clear evidence of a commonality of interests underlying particular market behaviour, the existence of a concerted practice could be

114. Case T-442/08, *International Confederation of Societies of Authors and Composers (CISAC) v. Commission*, judgment of 12 Apr. 2013, nyr, para 87.

115. *Ibid.*, para 162.

116. *Ibid.*, para 101.

117. *Ibid.*, para 102.

118. As apparent from *CISAC*, *ibid.*, para 182. See also Whelan, “*CISAC*: How difficult it is to prove a concerted practice”, 4 *Journal of European Competition Law & Practice* (2013), 488.

conclusively presumed under the *CISAC* parallel conduct plus other evidence standard. It remains to be seen whether the Court will indeed confirm and further develop this standard to that extent. The General Court at the very least seems to consider such a “parallel conduct plus” standard to present a way forward in fine-tuning Article 101 TFEU to the needs of an effects-focused more economic assessment framework.

3.3. *Enhanced substantive law presumptions*

The *MasterCard*, *OTOC* and *CISAC* judgments demonstrate that the EU Courts continue to build on the functional interpretation of the “decision by an association of undertakings” and “concerted practices” notions. The GC particularly sought to clarify the legal benchmarks that have to be met for market behaviour to be classified as a decision or a concerted practice. In introducing a “commonality of interests” criterion and a “parallel conduct plus additional evidence” approach, it basically introduced two presumptions inherent in the notions of decision and concerted practice. To the extent that the Commission can demonstrate that particular market behaviour comprises the expression of a “commonality of interests” emerging from a private law body or from a professional association with which different private market players can be associated (however vague the terms of such association may be, as both *MasterCard* and *OTOC* highlight), a presumption that such behaviour emerges from a “decision by an association of undertakings” can be established. The same goes for the “parallel conduct plus” approach identified in *CISAC*. If the Commission identifies parallel conduct among undertakings and can adduce additional evidence that such parallel conduct does not merely amount to rational market behaviour, EU law establishes a legal presumption that such behaviour could amount to a concerted practice, without the Commission having to demonstrate that collusion was the only plausible explanation for such behaviour. Both presumptions essentially allow the Commission – or a national competition authority or a private claimant for that matter – to build a case file and move on to the assessment of the restrictive nature of the alleged collusive behaviour rather than having to rebut presumptions that such behaviour did not fall within the agreement, decision or concerted practice categories of Article 101 TFEU.

From a modernized competition law perspective, those presumptions emphasize that the form of collusive behaviour does not matter at all and that enforcement authorities or private claimants should be able to move on to the analysis of the restrictive behaviour as soon as possible. The Courts’ reliance on or development of vague benchmarks and presumptions attests to competition law analysis being more than ever focused on the restrictive

nature of the behaviour concerned. Once the preliminary obstacles to the application of Article 101 TFEU have been removed on the basis of those benchmarks and presumptions, an effects-focused assessment on the merits of each case can be engaged in. By developing such benchmarks and presumptions, the Courts essentially contribute to capturing as many forms of collusive behaviour as possible within the confines of Article 101 TFEU and its effects-focused merits analysis emerging in the wake of modernization.

Whilst the objective of including so many forms of collusive behaviour is laudable, the technique relied upon by the Courts is controversial. It should be recalled that presumptions underlying the concepts of decision and concerted practice form integral parts of the applicable EU substantive law and thus immediately determine the ways in which that law has to be interpreted and applied at the EU and national levels.¹¹⁹ As a result, those presumptions effectively and directly enable enforcement authorities – or private claimants – to capture undertakings’ behaviour within the confines of Article 101 TFEU.¹²⁰ In order to include as many types of behaviour as possible within an effects-oriented and restrictions-focused analytical framework, “commonality of interest” and “parallel conduct plus” presumptions are aimed at facilitating the enforcement authorities’ roles in instances where a concurrence of wills cannot readily be proven. As such, the legal concepts of decision and concerted practice are not interpreted to provide legal limits on the enforcement authorities’ assessment powers, but rather to enable those authorities to determine the restrictive nature of all kinds of behaviour alleged on a case-by-case basis, whilst paying attention to the actual practices under consideration rather than to the form in which those practices take shape.¹²¹ Despite formally continuing to refer to the concepts of agreement, decision or practice, the presumptions identified here show that the Courts are now at least equally willing to look for collusive behaviour on the basis of presumed commonalities of interest guiding undertakings’ market behaviour rather than on the basis of an actual or presumed concurrence of wills. As such, the Courts seem to respond to the need for a more “collusion”-oriented and less contract

119. *T-Mobile Netherlands*, cited *supra* note 6, para 52.

120. Confirming this point of view is Case T-27/10, *AC-Treuhand AG v. Commission*, judgment of 6 Feb. 2014, nyr, para 88; whilst that judgment particularly deals with the “burden” of proof rather than the substantive law requirements underlying the decision or concerted practices concepts, it highlights a particular standard of proof (sufficiently convincing and coherent evidence) that is guiding in relation to the concepts discussed here as well.

121. See for a more developed proposal made in that regard, Lianos, “Collusion in vertical relations under Article 81 EC”, 45 CML Rev. (2008), 1034–1035. Lianos questioned the role of concepts such as agreement and concerted practices. It should be clear that the Court is not willing to relinquish those categories. At the same time, the Court does not seem completely unwilling to at least interpret them in an even less formal way.

law focused interpretation of the agreement, decision and concerted practices concepts.¹²²

4. Object as *prima facie* effect: Restrictions of competition in the wake of modernization

The “restriction of competition” notion lies at the heart of any assessment of the merits of a situation covered by Article 101 TFEU. To the extent that particular behaviour (in the form of an agreement, decision or concerted practice) is deemed restrictive, it can be prohibited, fines can be imposed, and agreements or decisions have to be declared void.¹²³ Despite its importance in Article 101’s analytical framework, the “restriction of competition” concept remains elusive.¹²⁴ The Treaty distinguishes between restrictions by object and restrictions by effect. Those concepts reflect the different intensities with which particular market behaviour will be scrutinized by the Commission or national enforcement authorities. Restrictions by object, in that understanding, allow the Commission to consider particular behaviour as restrictive, without in-depth analysis of the actual effects such behaviour produces on the relevant market. Classifying a restriction in the “object” category (or object-box¹²⁵) allows the Commission more easily and less thoroughly to conclude that particular behaviour should be prohibited.¹²⁶ The object-box does not however comprise a fixed set of behavioural practices that

122. See for an insightful scholarly discussion of those dynamics in U.S. antitrust law, Page, “Objective and subjective theories of concerted action”, 79 *Antitrust Law Journal* (2013), 215–251.

123. On the voidness sanction and its implications, Cauffman, “The impact of voidness for infringement of Article 101 TFEU on related contracts”, 8 *European Competition Journal* (2012), 95–122.

124. Proposals to bring more clarity – on the basis of informed economic insights – have nevertheless consistently been proposed. See above all Nazzini, “Article 81 EC between time present and time past: A normative critique of ‘restriction of competition’ in EU law”, 43 *CML Rev.* (2006), 497–536 and also Ibanez Colomo, “Market failures, transaction costs and article 101(1) TFEU case law”, 37 *EL Rev.* (2012), 541–562, stating at 542 that the “EU Courts have regularly displayed a remarkably solid, if often intuitive, understanding of the transactions examined under Article 101(1) TFEU, and that the concepts used in mainstream economics can help systematise this understanding”.

125. 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”, 34 *World Comp.* (2011), 236.

126. See Nagy, “The distinction between anti-competitive object and effect after *Allianz*: The end of coherence in competition analysis?”, 36 *World Comp.* (2013), 547 and Waelbroeck and Slater, “The scope of object vs. effect under Article 101 TFEU”, in Bourgeois and Waelbroeck (Eds.), *Ten Years of Effects-Based Approach in EU Competition Law Enforcement* (Bruylant, 2012), p. 145, questioning the parasitic nature of the restriction by object concept.

always constitute restrictions of competition. Quite the contrary: new shapes and formats of “restrictions by object” continue to be identified.

The Courts particularly shed new light on the notion of “restriction by object” and on its relationship with restrictions by effect. First of all, the Court made clear that object restrictions can by no means be identified without at least some analysis of the actual or potential effects of an agreement, decision or practice (4.1.). That position has rightfully been criticized, though case law on restrictions by effect confirms that the object category mainly serves as a “quick look” effects-based analysis (4.2.). Such quick-look analysis is problematic in its own right – especially from the points of view of predictability and legal certainty – but nevertheless fits the more effects-focused approach and the resulting singularly structured restriction of competition test emerging in a modernized assessment context (4.3.). At the same time, Article 101(3) TFEU exemptions and the balancing test reflected in that provision fully remain in place. The Court has so far refrained from clarifying the interrelationship between the “restriction” analysis in Article 101(1) and the exemption analysis in Article 101(3) TFEU (4.4.).

4.1. *Restrictions by object in the Courts’ recent case law*

According to the Court, “the distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”.¹²⁷ Behaviour which has “the potential to have a negative impact on competition”, meaning that “it must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the [internal] market”, falls within the object category.¹²⁸ In order to be classified as an object restriction, such naturally injurious forms of collusion should emerge directly from the precise purpose of the behaviour at stake as well as the economic context in which it is to be pursued.¹²⁹

In its recent case law, the ECJ has been able to refine – and to some extent redefine – the boundaries between restrictions by object and restrictions by effect. In particular, the Court expanded the scope of “restriction by object” assessments to situations that require a more in-depth and effects-focused

127. Case C-209/07, *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, [2008] ECR I-8637, para 17; *T-Mobile Netherlands*, cited *supra* note 6, para 29; *Expedia*, cited *supra* note 78, para 36.

128. *T-Mobile Netherlands*, cited *supra* note 6, para 31.

129. *BIDS*, cited *supra* note 127, para 15; *T-Mobile Netherlands*, cited *supra* note 6, para 28.

contextual analysis (4.1.1.), thus shaping a nuanced yet confusing contextual restrictions by object test (4.1.2.). Several objections can be raised against that test, as it effectively frustrates the need for clear-cut prohibitions supporting the emergence of a more developed system of private enforcement of Article 101 TFEU (4.1.3.).

4.1.1. *Expanding the scope of “restrictions by object”*

Summarizing previous case law on the matter, it can be stated that the content of the agreement, the objective aims pursued by it, the context in which it is (to be) applied, the actual conduct and behaviour of the parties on the market, the way in which an agreement is actually implemented and, additionally yet not necessarily, evidence of subjective intent on the part of the parties to restrict competition are guiding in order generally to determine the existence of a restriction by object.¹³⁰ In *Allianz Hungaria*, the Court added that in such assessment, the *real conditions* of the functioning and the structure of the markets in question should also be appraised in this context.¹³¹

To the extent that this analysis allows to conclude that an object restriction is in place, “there is no need to take account of actual effects” resulting from the behaviour under scrutiny.¹³² Only:

“[w]here...an analysis of the terms of the [agreement, decision or] concerted practice does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and, for it to be caught by the prohibition [of Article 101 TFEU], it is necessary to find that those factors are present which establish that competition has in fact been prevented or restricted or distorted to an appreciable extent”.¹³³

Identification of a restriction by object therefore allows the Commission – or a national enforcement authority or private claimant – prematurely to end its analysis and to hold or argue that the scrutinized behaviour comprises a restriction of competition.¹³⁴

Despite its seemingly straightforward definition, the substance of the restriction by object concept remains shrouded in vagueness. Being “simply capable” of resulting in a restriction of competition is hardly a detailed and insightful criterion to classify particular types of behaviour as restrictive by

130. Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, O.J. 2004, C 101/97, para 21.

131. Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal*, judgment of 14 March 2013, nyr, para 36.

132. *BIDS*, cited *supra* note 127, para 15.

133. *T-Mobile Netherlands*, cited *supra* note 6, para 28.

134. Nagy, op. cit. *supra* note 126, 545.

object in a precise and predictable fashion. Whilst it can be argued that so-called “hardcore” restrictions (price fixing,¹³⁵ resale price maintenance, output restrictions, market partitioning, absolute territorial protection clauses in vertical agreements, etc.) identified by the Commission in the *de minimis* notice and in certain block exemption regulations fall within the object restriction category, those lists merely provide an indication of serious restrictions and do not fully overlap with the restriction by object category. In *BIDS*, the Court indeed rejected the claim made by Irish beef producers that the restriction by object notion should be interpreted restrictively in order only to capture hard core anticompetitive behaviour such as direct price fixing.¹³⁶ Adding to the open-ended nature of the object category, the Court confirmed in *GlaxoSmithKline* and *T-Mobile* that it is not necessary for final consumers to be deprived of the advantages of effective competition in terms of supply or price in order for an object restriction to be established.¹³⁷ As a result, any behaviour whose goal is to affect the interests of competitors or of consumers, or the structure of the market and, in so doing, competition as such, can be captured by the object category.

In light of the foregoing, it should be no surprise that the Courts have recently identified different types of behaviour as falling within the object category on the basis of the abovementioned criteria. In *BIDS*, the Court stated that “an agreement with features such as those of the standard form of contract concluded between the 10 principal beef and veal processors in Ireland... and requiring, among other things, a reduction of the order of 25% in processing capacity, has as its object the prevention, restriction or distortion of competition”.¹³⁸ *T-Mobile* enabled the Court to hold that “[a]n exchange of information between competitors is tainted with an anti-competitive object if

135. See Case T-588/08, *Dole Food Company, Inc. and Dole Germany OHG v. Commission*, judgment of 24 May 2013, nyr, para 66. For examples of recent Commission Decisions in that regard, see among others Commission Decision of 28 March 2012 (Case COMP/39.452 – Mountings for windows and window doors), O.J. 2012, C 292/6; Commission Decision of 5 Dec. 2012 (Case COMP/39.437 – TV and computer monitor tubes), O.J. 2013, C 303/13; Commission Decision of 29 Jan. 2014 (COMP/39.801 – Polyurethane Foam), not yet published.

136. *BIDS*, cited *supra* note 127, paras. 22–24. In so stating, the Court basically agreed with A.G. Kokott’s Opinion in the case, para 48. More recently, A.G. Cruz Villálon argued in favour of a more restrictive interpretation of the object category in his Opinion in *Allianz Hungária*, cited *supra* note 131, para 81. Likewise, A.G. Wahl in his 27 March 2014 Opinion in Case C-67/13 P, *Groupement des Cartes Bancaires (CB) v. Commission*, nyr, opined in favour of a more restrictive interpretation of the concept, see para 74.

137. *GlaxoSmithKline*, cited *supra* note 6, paras. 62–65 and *T-Mobile Netherlands*, cited *supra* note 6, paras. 38–39; confirmed in amongst others Case T-491/07, *Groupement des cartes bancaires (CB) v. Commission*, judgment of 29 Nov. 2012, nyr, para 148 and *Dole*, cited *supra* note 135, para 65.

138. *BIDS*, cited *supra* note 127, para 40.

the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings”.¹³⁹ In *GlaxoSmithKline*, and building upon previous experience, the Court stated that a prohibition on parallel imports of pharmaceuticals was to be classified as a restriction by object.¹⁴⁰ The General Court equally held in *Groupement des cartes bancaires (CB)* that tariffs that imposed more elevated charges on new market entrants compared to incumbent banking card issuers amounted to a restriction by object, since the very object of the tariff measures was to render more difficult or impossible the entry of new issuers on the market.¹⁴¹ In its 2013 *Lundbeck* decision, the Commission classified arrangements whereby generics producers received compensation for delaying market entries as restrictions by object.¹⁴² In other recent decisions the Commission also opted for a classification as a restriction by object, thus avoiding a more extensive and potentially long-winded analysis of the actual or potential effects of the scrutinized behaviour.¹⁴³

The identification of a restriction by object does not however appear to be a final and irrebuttable classification. In *Premier League*, the Court maintained that “where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its

139. *T-Mobile Netherlands*, cited *supra* note 6, para 43.

140. *GlaxoSmithKline*, cited *supra* note 6, paras. 57–64.

141. Case T-491/07, *Groupement des cartes bancaires (CB)*, cited *supra* note 137, para 76; an appeal against that judgment, and the wide interpretation of the object category by the General Court, is presently pending, and A.G. Wahl concluded that the restrictions by object classification should not readily apply to this case, see note 136.

142. Although a public version of the Decision (of 19 June 2013) is not yet available, Alexander Italianer confirmed the classification of the restriction in *Lundbeck* as being by object, see Italianer, “Competitor agreements under EU competition law”, delivered 26 Sept. 2013, available at <ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf>, p. 9; see also Carlin and Batchelor, “Turducken on the menu: Initial reflections on the implications of the European Commission’s *Lundbeck* decision”, 34 ECLR (2013), 454–456.

143. See Gerard, “The effects-based approach under Article 101 TFEU and its paradoxes: Modernization at war with itself?”, in Bourgeois and Waelbroeck, op. cit. *supra* note 126, 38. In addition to decisions that amounted to price fixing, which is a restriction by object as a matter of course, see among others also Commission Decision of 27 June 2012 (COMP/39.611 Water management products), O.J. 2012, C 335/4; Commission Decision of 25 July 2013 (Case COMP/39.847 E-BOOKS), O.J. 2013, C 378/25; Commission Decision of 18 June 2012 (Case COMP/39.736 Siemens/Areva), O.J. 2012, C 280/8. Identifying restrictions by object additionally serves as a means to end procedures by means of a commitment decision on the basis of Art. 9 Regulation 1/2003. See also Commission Decision of 23 May 2013 (Case AT.39595 – Continental/United/Lufthansa/Air Canada), O.J. 2013, C 201/8, which equally relied on the object category in that regard.

object the restriction of competition”.¹⁴⁴ Somewhat remarkably, it nevertheless added that *other circumstances* falling within its economic and legal context could justify the finding that such an agreement is not liable to impair competition, despite its *prima facie* restrictive object.¹⁴⁵ Attention granted to other circumstances equally resurfaced in the specific context of assessing the restrictive object of selective distribution agreements, where the Court had previously adopted a similar approach when interpreting Article 101 TFEU.¹⁴⁶ In *Pierre Fabre*, the Court stated that:

“in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, *that clause is not objectively justified*”.¹⁴⁷

In *Allianz Hungaria*, the Court confirmed the role of “objective justifications” as a part of Article 101(1) TFEU’s restriction of competition analysis outside the narrow context of selective distribution agreements. The case concerned Hungarian insurers Allianz and Generali, which had agreed with car repair shop dealers conditions and rates applicable to repair services payable by the insurer in the case of accidents involving insured vehicles.¹⁴⁸ Those repair shop dealers also acted as agents of the insurers, offering car insurance on the occasion of sales or repairs of vehicles.¹⁴⁹ Both Allianz and Generali separately concluded contracts with either the national association of authorized dealers or with individual dealers directly which provided for higher remuneration to repair shops that reached certain targets in the sales of

144. Joined Cases C-403 & 429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others and Karen Murphy v. Media Protection Services Ltd*, [2011] ECR I-9083, para 140.

145. *Ibid.*, para 140. In *BIDS*, the Court maintained that such other circumstances could only be adduced in the framework of Art. 101(3) TFEU, see *BIDS*, cited *supra* note 127, para 21. The Court no longer referred to that provision in this judgment.

146. See among others Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v. Commission*, [1977] ECR 1875, para 20 and *AEG-Telefunken*, cited *supra* note 26, para 33.

147. 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*, [2011] ECR I-9419, para 47; see also already para 39.

148. *Allianz Hungária*, cited *supra* note 131, para 6.

149. *Ibid.*, para 8.

car insurance products.¹⁵⁰ The Hungarian Competition Authority found that the bundle of agreements concluded between the insurers and the repair shops in that regard constituted a restriction of competition by object.¹⁵¹ The Court argued that the agreements could indeed be considered a restriction of competition “by object” within the meaning of Article 101 TFEU. It nevertheless maintained that such a conclusion could only be reached “following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form a part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned”.¹⁵² Only “[w]here...the analysis of the content of the agreement does not reveal a *sufficient degree of harm to competition*”, should the effects of the agreement be considered in more detail.¹⁵³

In the abovementioned three judgments, the Court posits that the classification of a restriction by object follows from a preliminary analysis of the extent to which competition is being harmed by the very terms of the agreement under scrutiny and of the context in which it operates. If the analysis of the content of the agreement reveals “a sufficient degree of harm to competition” that cannot be “objectively justified” by the context in which it took shape, the existence of a restriction of competition can safely be established and a more fully-fledged effects analysis should not be embarked upon. As such, the Court essentially establishes – as a matter of EU competition law – a conclusive presumption of sufficient harm if and to the extent that the terms and/or context of the agreement, decision or practice directly enable such conclusion.

It would be tempting to argue that, in establishing that presumption, the Court fundamentally relates the restriction by object to the U.S. antitrust law concepts of “*per se*” and “quick look” prohibitions. Not unlike object restrictions, *per se* prohibitions are “so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality”.¹⁵⁴ *Per se* prohibitions therefore form particular categories that are to be considered unlawful under any circumstances. In that regard, restrictions by object equally comprise categories of agreements, decisions or practices that are presumably anticompetitive and therefore prohibited and void. In addition, however, U.S. antitrust law interprets *per se* prohibitions as providing conclusive presumptions of illegality which cannot in any case be rebutted by

150. *Ibid.*, paras. 9–10.

151. *Ibid.*, para 12.

152. *Ibid.*, para 51.

153. *Ibid.*, para 34.

154. US Supreme Court, *National Society of Professional Engineers v. United States* (1978), 435 U.S. 679.

procompetitive justifications adduced by parties to an agreement.¹⁵⁵ “Quick look” in that regard offers an analytical compromise between the *per se* and more elaborate *rule of reason* approaches and allows for an efficient method of managing antitrust litigation that can otherwise become overly complex.¹⁵⁶ In cases where the anticompetitive effects on consumers and markets can be determined by someone with a basic knowledge of economics, competitive harm will be presumed.¹⁵⁷ The courts are basically called upon to apply a *rule of reason* analysis, but truncate its scope because of particular properties inherent in anticompetitive behaviour.¹⁵⁸ The defendant can subsequently still prove that procompetitive justifications exist in such a case.¹⁵⁹

4.1.2. *Towards a “contextual” object test?*

The abovementioned similarities identified between the Court’s reasoning in *Premier League*, *Pierre Fabre* and *Allianz Hungaria* and the U.S. Supreme Court’s “quick look” analysis serve as a helpful means to reconstruct and conceptualize the different stages underlying the Court’s “restriction by object” test. To the extent that the Court’s approach towards restrictions by object effectively resembles a quick look effects analysis, a cascaded “object restriction” test can indeed be read throughout the case law. Two alternative stages should in that regard be distinguished when appraising the existence of a restriction by object in EU competition law. Those stages are part of a cascade, where the second phase will only be considered if the first phase does not lead to the immediate conclusion that the agreement, decision or practice sufficiently and unjustifiably harms competition.

The restriction of object test is essentially concerned with an assessment of the facts underlying allegedly restrictive behaviour.¹⁶⁰ The first stage of the Court’s restriction by object test consists in an assessment of the content of the provisions of an agreement or decision.¹⁶¹ The Court at this stage mandates enforcement authorities to assess the scope and contents of any documentary evidence found that hints at anticompetitive practices. In order to derive a

155. Bailey, “Presumptions in EU competition law”, 31 ECLR (2010), 364.

156. Grush and Korenblit, “American needle and a ‘positive’ quick look approach in challenges to joint ventures”, 25 *Antitrust* (2011), 55.

157. Adkins, “Too much competition: The Supreme Court sacks the NFL’s single entity defense 9-0 in *American Needle, Inc. v. National Football League*”, 8 *Willamette Sports Law Journal* (2011), 25.

158. Hovenkamp, *Federal Antitrust Policy. The Law of Competition and its Practice* (Thomson, 2005), p. 265.

159. US Supreme Court, *California Dental Association v. FTC* (1999), 526 U.S. 756. The Court refers to “an intuitively obvious inference of anticompetitive effect”.

160. *Expedia*, cited *supra* note 78, para 34.

161. As reiterated consistently, see e.g. *Premier League*, cited *supra* note 144, para 135; *Allianz Hungária*, cited *supra* note 131, para 36; *Expedia*, cited *supra* note 78, para 21.

restriction from the mere content of the provisions, the restrictive scope of those provisions should be unequivocally obvious. In *Premier League*, it was held that the fact that the agreement “granted to a sole licensee the exclusive right to broadcast protected subject-matter from a Member State, and consequently to prohibit its transmission by others, during a specified period is not sufficient to justify the finding that such an agreement has an anti-competitive object”.¹⁶² At this stage, the lists of hardcore restrictions offered by the Commission in block exemption regulations or in the *de minimis* notice are most likely to be very helpful. If particular clauses or agreements do indeed fall within one of the hardcore categories, it would be less complicated for an enforcement authority to identify the object of an alleged restriction of competition. *T-Mobile* provided a clear example of this, as the Court was able to hold that an exchange of information which is capable of removing uncertainties between participants as regards the reduction in the standard commission paid to dealers (price fixing), must be considered a restriction by object.¹⁶³ In the June 2014 *de minimis* notice, the Commission appears firmly to qualify its lists of hardcore restrictions as restrictions by object.¹⁶⁴ As a result, it will not apply the safe harbour created by the notice to “agreements containing any of the restrictions that are listed as hardcore restrictions in any current or future Commission block exemption regulation, which are considered by the Commission to generally constitute restrictions by object”.¹⁶⁵ In doing so, the Commission at the very least succeeded in removing confusion on the scope of hardcore restrictions and their relationship to the restriction by object concept outlined in Article 101 TFEU.¹⁶⁶ The list of hardcore restrictions does not offer a closed list of object restrictions, however. As a result, the Courts may also identify other practices as constituting restrictions at this stage. At the very least, the list nevertheless provides some certainty as to practices that will most likely be considered restrictions by object.

If the content of the provisions does not immediately warrant the finding of a restriction, the second stage predicts that attention should be paid to the “*objectives* it seeks to attain and the *economic and legal context* of which it

162. *Premier League*, cited *supra* note 144, para 137.

163. *T-Mobile Netherlands*, cited *supra* note 6, para 41. The Court in that regard does not however refer to the notion of hardcore restriction, nor does it explicitly consider hardcore restrictions always to fall within the object restriction category. See, however, to that extent the 2004 *Commission Guidelines on the application of Article 81(3) of the Treaty*, para 23.

164. *de minimis* notice, cited *supra* note 80, para 2.

165. *Ibid.*, para 13.

166. On the interrelationship and distinctions between hard core and object restrictions, Goyder, “Cet obscur objet: Object restrictions in vertical agreements”, 2 *Journal of European Competition Law & Practice* (2011), 330–332.

forms a part”.¹⁶⁷ References to the objectives and the economic and legal context require the Commission to look into “the facts underlying the agreement and the specific circumstances in which it operates”.¹⁶⁸ Such a circumstantial analysis enables the Commission preliminarily to assess whether and to what extent the provisions of the agreement or decision are likely to affect competition despite not being phrased as such. Earlier case law additionally claimed that the actual or potential behaviour of the parties to the agreement or practice as well as the intent of the parties can be relevant in making that assessment.¹⁶⁹ *Allianz Hungaria* particularly added that the structure of the market, the existence of alternative distribution channels and their respective importance and the *market power* of the companies concerned as well as the real conditions of the functioning and structure of the market should be taken into account in such an assessment.¹⁷⁰

The Court has only marginally provided insight into the actual boundaries of a contextual analysis focused on determining the “object” of an allegedly restrictive agreement, practice or decision. In *Premier League*, it concluded that “where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition”.¹⁷¹ In so stating, the Court basically maintained that context can shed light on the contents of an agreement. To the extent that the contextual investigation shows that the effects of an objectively restrictive provision are re-created through the context within which a seemingly non-problematic provision is being applied, the enforcement authority should still be able to maintain that a restriction by object is in place. In *Pierre Fabre*, the Court essentially considered the conditions under which the selective distribution network operated. Building on previous case law, the Court stated that restrictions could be in place if resellers are chosen on the basis of uniformly applicable and non-discriminatory objective criteria of a qualitative nature, if the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use, and if the

167. *BIDS*, cited *supra* note 127, paras. 16 and 21, *T-Mobile Netherlands*, cited *supra* note 6, para 27; *GlaxoSmithKline*, cited *supra* note 6, para 58; *Premier League*, cited *supra* note 144, para 136; *Pierre Fabre*, cited *supra* note 147, para 35. *Allianz Hungária*, cited *supra* note 131, para 36.

168. 2004 Commission Guidelines, cited *supra* note 163, para 22.

169. Joined Cases 96–102, 104, 105, 108 & 110/82, *IAZ International Belgium and Others v. Commission*, [1983] ECR 3369, paras. 23–25; *BIDS*, cited *supra* note 127, para 16; *Allianz Hungária*, cited *supra* note 131, para 37.

170. *Allianz Hungária*, *ibid.*, para 36.

171. *Premier League*, cited *supra* note 144, para 140.

criteria laid down do not go beyond what is necessary.¹⁷² Context in this particular case related to the conditions in accordance with which undertakings could participate in the selective distribution network. *Allianz Hungaria* focused on similar conditions, yet clearly extended the scope for objective justifications beyond the narrow confines of selective distribution agreements. In that case, the Court held that the context in which the insurers concluded agreements with repair shops ran contrary to domestic law requirements that “dealers...offer the policyholder the insurance which is the most suitable for him amongst the offers of various insurance companies”.¹⁷³ It thus argued that the context can also emerge from domestic legislation that gives shape to EU market integration ideals. The likely effect of an agreement such as those at stake in the case could therefore be considered to go against the structure of the market envisaged by the domestic legislature and could therefore be considered to have as its object the distortion of that market.¹⁷⁴ It is remarkable to say the least that the ECJ seamlessly considers that the objectives of the Hungarian legislature align with the objectives of EU competition law and that the agreements distort those objectives, without a more elaborate analysis as to what those EU objectives actually amount to. In this situation, the domestic provisions were considered to have provided sufficient context to assess the nature – i.e. the likely effects – of the particular car insurance schemes developed by Allianz and Generali.

4.1.3. *The problematic scope of “objective justification” analysis in relation to restrictions by object*

Once the existence of a restriction by object has been established, a presumption of sufficient and appreciable competitive harm arises.¹⁷⁵ If that is indeed the case, the enforcement authority can end the analysis of the alleged anticompetitive practice without continuing to assess the actual effects on the relevant market. The *Premier League*, *Pierre Fabre* and *Allianz Hungaria* judgments nevertheless also contend that *prima facie* established restrictions by object could still be “objectively justified” by reference to additional particular circumstances in which they came to being. Those particular circumstances should thus be able to remove the “object restriction” characteristics from particular agreements, decisions or practices. The Court nevertheless refrained from more explicitly developing the conception of “objective justification” in this context. Three fundamental questions remain in that regard. Those questions – all triggered by the Court’s reference to

172. *Pierre Fabre*, cited *supra* note 147, para 41.

173. *Allianz Hungária*, cited *supra* note 131, para 47.

174. *Ibid.*, paras. 47–48.

175. *Expedia*, cited *supra* note 78, paras. 36–37.

objective justifications in relation to restrictions by object – have so far remained unanswered in the Court’s case law.

Firstly, it cannot be inferred from the case law what justifications would be considered sufficiently objective to avoid behaviour being classified as restrictive by object. *Premier League* only hinted at other circumstances, without specifying them.¹⁷⁶ *Allianz Hungaria* seemed to rely on consumer protection objectives in national legislation as justifications acceptable under Article 101(1) TFEU, whereas *Pierre Fabre* confirmed the Court’s long-standing position in relation to selective distribution agreements. As a result, the scope and nature of justifications that can be adduced in the context of Article 101(1) TFEU remain elusive at this stage. Whilst taking into account diversified efficiency objectives¹⁷⁷ or even non-economic objectives¹⁷⁸ has been proposed in this context, the Courts have refrained from developing the scope of justifications further.

In arguing that the assessment of objective justifications – whatever their contents and scope – should be a part of the “restriction by object” test itself, the ECJ also maintains that the determination of a restriction (by object) in itself already requires a balancing between pro- and anticompetitive considerations. As such, an enforcement authority should only be able to conclude that a restriction of competition is in place once it is established that the anticompetitive nature (or preliminary effects) of the practice outweigh the procompetitive elements also attached to that practice. If that were indeed the case, the Court would further do away with long-standing EU case law stating that finding a restriction comes before justifying or exempting that restriction. As the Court did not particularly refer to earlier “justificatory” tests read in Article 101(1) TFEU – most directly appearing the *Wouters* and *Meca-Medina* judgments¹⁷⁹ as well as in the judicially developed ancillary restraints doctrine –,¹⁸⁰ the exact scope and extent of the objective justification test in this realm remains uncertain. In the latter tests, the Court analysed particular

176. *Premier League*, cited *supra* note 144, para 140.

177. See in that regard among others in the light of the *Wouters* judgment, Odudu, “A new economic approach to Article 81(1)?”, 27 *EL Rev.* (2002), 100–105 and see also his engagement with critics in Odudu, “The wider concerns of competition law”, 30 *Oxford Journal of Legal Studies* (2010), 599–613.

178. On non-economic objectives in the context of Article 101 TFEU, see Monti, “Article 81 EC and public policy”, 39 *CML Rev.* (2002), 1060 and Townley, *Article 81 EC and Public Policy* (Hart Publishing, 2009), pp. 363 et seq.

179. See *Wouters*, cited *supra* note 97, para 97, questioning whether restrictions are inherent in the regulatory role engaged in by an association of undertakings. See also Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, [2006] ECR I-6991, para 42, repeating that argument.

180. The judgment in *Pronuptia* remains guiding in this respect, see Case 161/84, *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, [1986] ECR 353, paras.

contextual effects of allegedly restrictive measures with a view to establishing a restriction of competition. In doing so, it did not directly weigh the pro- and anticompetitive justifications to determine whether a restriction would outweigh the precompetitive elements, but weighed elements that could determine the existence of a restriction within a particular context. More fully-fledged pro-and anticompetitive balancing would remain the province of Article 101(3) TFEU analysis.¹⁸¹ However, by extending opportunities to consider objective justifications within the realm of Article 101(1) TFEU, the self-standing and distinctive role of Article 101(3) TFEU as an instrument to justify particular restrictions could also be significantly questioned in that regard. Alternatively, it could be argued that the Court's references to "objective justifications" implicitly referred to Article 101(3) TFEU. If that were the case, it nevertheless remains to be asked why the Court did not explicitly refer to that provision.¹⁸²

Secondly, the Court did not establish who should or could actually adduce evidence of such objective justifications. It was only stated that objective justifications could effectively be provided. Does this imply that if the enforcement authority argues on the basis of a contextual analysis that a restriction by object is presumed to be in place, the defendant undertakings can rebut such a presumption by arguing that objective justifications are in order? Or should the enforcement authority itself look for alternative explanations and make plausible that no objective justifications are present? The Court did not weigh in on those questions. Neither did it pronounce to what extent the rights of investigated undertakings should be safeguarded if the enforcement authority develops its own approach towards objective justifications.

Thirdly and most fundamentally, the legal consequences of objectively justified object restrictions have not been considered. If and to the extent that an object restriction is considered to be objectively justified, what does that mean for the enforcement authority's investigation? Does it imply that no restriction is in place or does it merely imply that no restriction *by object* is in place and that the enforcement authority should proceed in analysing the effects of the alleged anticompetitive practice? If it could then be argued that an objectively justified object restriction has detrimental effects on

14–15, arguing in favour of a contextual analysis of seemingly restrictive provisions. For background, see Nazzini, *op. cit. supra* note 124, 530–534 for examples.

181. Wesseling, "The rule of reason and competition law: Various rules, various reasons", in Schrauwen (Ed.), *Rule of Reason: Rethinking another classic of European legal doctrine* (Europa Law Publishing, 2005), pp. 59–76. See also explicitly, Case T-112/99, *M6 v. Commission*, [2001] ECR II-1557, para 76.

182. Cf. *BIDS*, cited *supra* note 127, para 21 with the cases discussed in this section.

competition within the relevant market, on the basis of what conditions could such a restriction be justified?

Conceptual and practical confusion surrounding the existence and scope of the objective justification scheme in relation to restrictions by object is enhanced by the lack of a clear and focused assessment framework within which the existence of restrictions of competition can be determined. Whereas recent case law somehow clarified the interaction between the different “object restriction” test *stages*, the actual testing *benchmarks* remain almost completely unaccounted for, resulting in continuous criticism being voiced over increasing legal uncertainty underlying the restriction by object concept.¹⁸³ In both *GlaxoSmithKline* and *T-Mobile*, the Court stated that Article 101 TFEU, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.¹⁸⁴ As a result, a direct connection between a particular practice and the harmful consequences of that practice for consumers or prices paid by consumers does not necessarily need to be demonstrated.¹⁸⁵ In so stating, the Court made clear that EU competition law does not only consider restrictions that affect consumers, but also restrictions that affect competitors and competition. The multiplicity of EU competition law goals particularly challenges the predictable application of a “restriction by object” test such as that presently underlying Article 101 TFEU. As the goals of competition law are unclear and multifocal and different objectives are taken into account, the potentially restrictive object of agreements, decisions or practices can be considered or perceived from multiple angles and thus result in conflicting outcomes depending on the goals of competition an enforcement authority or a court adheres to. As long as those goals are not clearly or at least predictably determined, the concept of restriction will remain very open-ended and so will the notion of (unjustifiable) restrictions by object. The determination of a restrictive object indeed presupposes clarity as to what can be deemed clearly

183. It should be no surprise that academic debates on the most appropriate goals for EU competition law have continued to flourish. See for a comprehensive overview, Parret, “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy”, 6 *European Competition Journal* (2010), 339–376; see also Andriychuk, “Rediscovering the spirit of competition: On the normative value of the competitive process”, 6 *European Competition Journal* (2010), 575–610 and Andriychuk, “The dialectics of competition law: Sketching the ordo-Austrian approach to antitrust”, 35 *World Comp.* (2012), 355–384; Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102* (OUP, 2012), pp. 11–50 (which also outlines the goals of EU competition law relevant for Art. 101 TFEU analysis). The Court did not however adopt a clear position in this regard.

184. See *supra* note 6.

185. *T-Mobile Netherlands*, cited *supra* note 6, para 36.

restrictive in the first place. By opting for a multiple goals approach, the Court chose to ignore or at least downplay this particular problem.

Despite remaining uncertainties and gaps underlying the distinctive role of the “object restriction” concept in Article 101(1) TFEU, it can also be submitted that the ECJ considers it to be a part of a more elaborate – yet so far invisible – restriction of competition test that focuses on the effects an agreement, decision or practice may have on the market. If the provisions of an agreement or decision or the practices engaged in restrict competition *prima facie*, a restriction by object can be established. In instances where such clarity is not available, a “contextual” analysis can nevertheless also still result in an object restriction classification. A contextual analysis basically amounts to a quick look at the actual or potential effects of the agreement, decision or practice. The parameters by which such effects-based analysis can be cut short on the basis of a “quick look” contextual object analysis are far from clear. Although the Court clearly distinguishes between the content and context stages of restrictions by object and seemingly only allows for objective justification claims to be filed once the enforcement authority investigates the context of an agreement, decision or practice, the lack of clear-cut testing benchmarks and guidelines as to how contextual object analysis differs from fully-fledged effects-focused analysis results in the distinctive position of “restrictions by object” being clouded in legal uncertainty.

4.2. *Blending object and effect?*

When a restriction by object cannot be identified, it is necessary for the enforcement authority “to examine the effect of the agreement and to prove to the requisite legal standard that it actually or potentially prevents, restricts or distorts competition”.¹⁸⁶ An effects analysis proceeds in two stages. First, the enforcement authority has to define the relevant market or markets affected by the agreement, decision or practice.¹⁸⁷ Second, that authority will be called upon to examine the actual or potential effects of the agreement on competition on the relevant market(s).¹⁸⁸

The Courts’ long-standing case law in this realm confirms the importance of an in-depth contextual inquiry prior to establishing a restriction by effect, without however clearly differentiating it from the “contextual” analysis

186. Case C-7/95 P, *John Deere v. Commission*, [1998] ECR I3111, paras. 75 and 77, referring to *Société La Technique Minière*, cited *supra* note 11, 249.

187. Case C-234/89, *Delimitis*, [1991] ECR I935, paras. 15, 16 and 18 and clearly distinguished in Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission*, [2006] ECR II-2969, para 148.

188. For a clear elaboration of this role, see 2004 Commission Guidelines, cited *supra* note 163, para 24, also referring to the requirement for the restriction to be appreciable.

simultaneously advocated in restrictions by object cases. In *OTOOC*, the ECJ held that:

“when assessing the effects of a decision of an association of undertakings in the light of Article 101 TFEU it is necessary to take into consideration the actual context in which it is situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question”.¹⁸⁹

The (Second Chamber of the) Court’s phrasing of the restrictions by effect test is startling to say the least, especially if compared with the restrictions by object test employed in (the First Chamber’s) *Allianz Hungaria*, which relied on the same criteria in outlining the contextual stage of the test underlying restrictions by object.¹⁹⁰ Both judgments refer to the same criteria, albeit applied to different categories of restrictions covered by Article 101 TFEU. The major difference between the two judgments and as a result between the two tests is that in *OTOOC* the Court proceeded to determine – albeit summarily – the relevant market and the likely effects on that particular market.¹⁹¹ whereas in *Allianz Hungaria* the Court only referred to the likelihood of markets being affected, as it could end its analysis by sufficiently establishing the existence of a restriction by object as apparent from the context within which the agreements were concluded.

Contrary to an object restriction assessment, the effects analysis test requires enforcement authorities to engage in a “counterfactual” analysis, which requires a comparison between the competitive situation resulting from the agreement, decision or practice and the situation that would exist in its absence.¹⁹² The Commission particularly argued that “[f]or an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability”.¹⁹³ The reference to “negative effects” does not as such imply a clear balancing test between pro-and anticompetitive considerations in order to determine the existence of a restriction. The General Court’s 2013 judgment in *Visa* nevertheless maintained that when an agreement containing *obvious* restrictions of competition such as price-fixing, market-sharing or the control of outlets, such restrictions may be

189. *OTOOC*, cited *supra* note 103, para 70 (emphasis added).

190. *Allianz Hungária*, cited *supra* note 131, para 36.

191. *OTOOC*, cited *supra* note 103, paras. 78–80.

192. Andreangeli, *op. cit. supra* note 125, 232–233.

193. 2004 Commission Guidelines, cited *supra* note 163, para 24.

weighed against their claimed pro-competitive effects *only* in the context of Article 101(3), with a view to granting an exemption from the prohibition in Article 101(1) TFEU.¹⁹⁴ An *a contrario* reading of that dictum implies that restrictions that cannot be considered “obvious” could be the subject of pro-versus anticompetitive weighing not only as part of Article 101(3) TFEU, but also as part of the contextual effects test on the basis of Article 101(1). The Court’s references to “objective justifications” in relation to restrictions by object appear to confirm that argument.

The Court did not however provide full clarity as to whether and to what extent pro-and anticompetitive balancing could or should be operationalized by the enforcement authorities in relation to the identification of effects restrictions. In September 2013, Alexander Italianer, Director-General for Competition within the Commission, proclaimed that “the contextual analysis [accompanying Article 101(1)] never goes as far as balancing the anti- and procompetitive effects. It only aims at gauging the negative consequences of the restraint for the process of competition, for which the Commission or plaintiff carries the burden of proof. In other words, the analysis under Article 101(1) deals exclusively with identifying competitive harm”.¹⁹⁵ In *MasterCard*, the GC reiterated that:

“examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as *objectively necessary* for its implementation”.¹⁹⁶

The General Court did not clarify whether this “necessity” test is equivalent to or different from the “objective justification” test applied in relation to restrictions by object. In its case law on restrictions by effect, the General Court did not refer to objective justifications. In maintaining a test of “objective necessity” however, the Court seems to presume that some attention to objective justifications – without it comprising a fully-fledged pro- and anticompetitive balancing – should take place to assess the restrictive nature of an agreement, decision or practice within the relevant market(s).

194. Case T-461/07, *Visa Europe Ltd and Visa International Service v. Commission*, [2011] ECR II-1729, para 67.

195. Italianer, *op. cit. supra* note 142, 7.

196. *MasterCard, Inc.*, cited *supra* note 91, para 80 (emphasis added).

The exact scope of the underlying testing benchmarks have – like in case of object restrictions – also not clearly been defined by the Courts. In *Visa*, the GC restated that Article 101 aims to protect not only the interests of competitors or consumers but also to protect the structure of the market and thus competition as such. As a result, the Commission could take the envisaged effects on the structure of the market into account in defining the existence of a restriction by effect.¹⁹⁷ In addition, it has to be tested whether restrictive effects on competition are sufficiently appreciable in order to warrant the application of the Article 101(1) TFEU prohibition.¹⁹⁸

4.3. *Towards a single structured effects-oriented “restriction” test?*

It is clear from the previous subsections that the contextual effects analysis only differs from a contextual object analysis by virtue of the attention paid to market definition and to appreciability.¹⁹⁹ Aside from those two additional elements underlying the contextual effects analysis test, however, both tests are phrased in essentially the same manner and require the same kind of contextual analysis to establish a restriction of competition. The distinctions between obvious object restrictions, contextual object restrictions and contextual effects restrictions emerging from recent case law highlight that the Court is trying to make the object-effect distinction fit in an effects-focused assessment scheme. Restrictions clearly emerging from the contents of agreements, decisions or at face value apparent from concerted practices would still be excluded from the contextual test and could be classified as restrictions by object without further contextual investigation. A contextual assessment can nevertheless also demonstrate that particular provisions or actions within a specific context would essentially result in similar impediments to competition. Such brief contextual analysis could equally result in particular practices being considered restrictive by object. That classification would imply that no detailed market analysis needs to be conducted and the appreciability of the restriction does not have to be demonstrated. Only when a superficial contextual analysis does not allow to establish that a restriction is in place would the enforcement authority be required to assess the actual or potential effects on competition within a

197. *Visa Europe*, cited *supra* note 194, paras. 126–127.

198. *de minimis* notice, cited *supra* note 80, paras. 2 and 13.

199. Both tests can thus be said to comprise a single restriction test. For an argument in favour of the acknowledgement of such test, cf. *Allianz Hungária*, cited *supra* note 131, para 36 with *Expedia*, cited *supra* note 78, para 21, both referring to the same testing requirements. In the latter case however, the Court referred to the “real conditions” criterion in relation to the concept of restriction in general, not in relation to restrictions by object in particular, as it did in the former.

specified relevant market and the appreciability of those effects. Practices fulfilling the requirements of that test could then be classified in the restrictions by effect category. In that understanding, the Court seems to presuppose the existence of a restriction either by object or by effect to be identified on the basis of a “sliding scale” assessment of the content, context and effects of the agreement, decision or practice.²⁰⁰

The Courts’ sliding scale approach confirms that the distinction between both concepts is no longer considered to provide a legally sound divide once a contextual analysis of an agreement, decision or practice is initiated. Both the Court and the Commission rather consider a continuum between obvious and less obvious restrictions to exist, with the latter requiring a more elaborate contextual analysis, which is cut short once it is clear that a sufficient harm to competition can safely be presumed. Fully-fledged contextual effects analysis additionally warrants a more detailed market analysis and an appreciability assessment, but should only be embarked on if the analysis cannot be cut short in advance. The turning point at which moment such analysis can or should cut short is completely unclear, resulting in uncertainty as to what kind of agreements, decisions or practices should be considered restrictive by object and which ones should be restrictive by effect.

The Commission’s Article 101 TFEU assessment practice further presages a preference for a single structured contextual restriction test. In its 2013 *Telefonica* infringement Decision, the Commission determined – on the basis of a contextual assessment of the terms of an agreement between Telefónica and Portugal Telecom – that a non-compete obligation actually amounted to a market sharing clause, which constituted a restriction by object.²⁰¹ Somewhat remarkably, the Commission then proceeded to respond to claims related to the effects produced by the agreement. Those arguments amounted to the parties balancing the potential anticompetitive effects of the non-compete obligation with plausible alternative explanations demonstrating such effects to be absent in this case.²⁰² In the end, the Commission basically stated that the non-existence of effects did not matter since a restriction by object was in place.²⁰³ At the same time however, the Commission not only explicitly referred to the effects arguments in its decision, but also relied on those arguments to confirm that they hinted at the presence of a restriction by

200. An argument that has consistently been relied on to describe U.S. antitrust analytical frameworks, see US Supreme Court, *California Dental Association v. FTC* (1999), 526 U.S. 780. Arguing in favour of a sliding scale approach reflecting a “continuum” underlying Art. 101 TFEU, Andreangeli op. cit. *supra* note 125, 239.

201. Commission Decision of 23 Jan. 2013 (Case COMP/39.839 – Telefónica/Portugal Telecom), O.J. 2013, C 140/11, paras. 353 and 356.

202. *Ibid.*, para 359.

203. *Ibid.*, paras. 357–358.

object.²⁰⁴ In so stating, the Commission basically acknowledged that both categories are supported by a similar assessment framework, whereby restrictions by effect can only be established after a more in-depth contextual analysis of an agreement, decision or practice.²⁰⁵

Both the Commission and the Courts thus seek to fit Article 101(1)'s binary distinction between object and effect restrictions into a new reality where obvious object restrictions should be distinguished from contextual object and effects restrictions that are assessed in accordance with the same analytical "restriction of competition" test. By extending the scope of object restrictions beyond "obvious" cases and by imposing virtually the same contextual test on object and effect restrictions, the Courts are blurring the clear-cut distinction between the two concepts in order to attune the "restriction of competition" requirement to the realities of the more contextual and effects-oriented assessment scheme which the more economic approach seeks to embody. Whilst the Court of Justice seems to agree with the Commission that a blurring of dividing lines between object and effect should be seen as a way forward in EU competition analysis, the distinction between the two types of restrictions emerges directly from the text of Article 101 TFEU and cannot therefore be discarded by mere judicial proclamation. The result is a confusing "contextual" test that seemingly applies to both object and effect restrictions, and is in dire need of additional judicial clarification and crystallization.²⁰⁶

The confusion caused by the blurring of object and effect restrictions is essentially problematic in the light of the Court's commitment to enhancing the private enforcement of EU competition law.²⁰⁷ To the extent that private competitors and consumers should be able to file stand-alone Article 101 infringement claims by means of private litigation, predictable and readily applicable categories of illegal restrictive practices are most welcome. That is especially the case in situations where access to incriminating documents and contextual analyses conducted by competition authorities remains difficult,

204. *Ibid.*, paras. 364–365 exemplify such reasoning on behalf of the Commission.

205. Rather unsurprisingly, the Commission more explicitly chose to refer to both tests in Commitment Decisions it adopted, e.g. Commission Commitment Decision of 20 Dec. 2012 (Case AT. 39230 – Rio Tinto Alcan), para 97; Commission Commitment Decision of 23 May 2013 (Case AT.39595 – Continental/United/Lufthansa/Air Canada), paras. 38 and 40 and Commission Commitment Decision of 26 Feb. 2014 (Case AT.39398 – VISA MIF), para 23. As the Commission only makes a preliminary assessment of the legality of behaviour concerned, the precedence value of those Decisions in supporting a singularly structured "restriction" test is obviously limited.

206. For a historical perspective of the role of both concepts, see Chirita, "A legal-historical review of the competition rules", 63 *ICLQ* (2014), 291–304.

207. See to that extent, Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, [2011] ECR I-5161, para 29 and *Kone*, cited *supra* note 12, para 33.

impossible or uncertain.²⁰⁸ A clearly developed set of *ex ante* restrictions by object that do not warrant an in-depth contextual or incriminating documents analysis could effectively entice private parties to initiate private enforcement (damages, injunctive relief, restitution, etc.) claims as a matter of EU law. In the absence of such clear-cut prohibitions, however, private parties will be less inclined to initiate potentially long-lasting, procedurally complex and highly uncertain claims seeking to remedy competition law infringements. The present attention to “contextual analysis” in relation to object restrictions risks removing incentives from private parties to effectively start such claims, anticipating lengthy and costly court discussions relating to the justificatory nature of practices having as their object the restriction of competition.

From the point of view of private litigants, the lack of clear and easily litigable object restriction claims is most problematic. A solution to the blurring and private enforcement problems could lie in a formal judicial acknowledgement that the Commission’s list of hardcore restrictions by their very nature comprise “obvious object restrictions” that do not require an in-depth contextual analysis and could not therefore benefit from objective justifications. The Courts have so far refrained from equating hardcore restrictions – or even mentioning that term for that matter – with obvious object restrictions. Should the Court wish to include “objective justification” analysis in the restriction by object category, it would be helpful if the Court could clearly indicate for what types of restrictions such analysis would never be considered necessary.²⁰⁹ Cases falling outside the list of obvious (i.e. hardcore) object restrictions could then still be considered restrictions by object but only after a more contextual analysis and taking into account particular justifications. Such cases would then be less amenable to private enforcement, as they would require more in-depth and developed claims to be made. The Court would thus be able to create a clear dividing line between obvious and less obvious object restrictions, the latter being subject to a truncated effects analysis. Whilst a clear list of obvious object restrictions does not solve the issue of where to draw a line between less obvious object

208. Arts. 5–7 of the recently approved Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union impose a layered system for access to documents maintained by competition authorities. In stand-alone cases and cases unrelated to private damages claims, however, such documents will not readily be available, and the disclosure system will be considered less helpful. The European Parliament approved an amended version of the draft Directive on 17 Apr. 2014; formal approval by the Council and publication in the Official Journal is still pending; for information and background, see <ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.

209. As mentioned, the *de minimis* notice, cited *supra* note 80, para 13 is a promising sign on behalf of the Commission in that regard, waiting to be sanctioned by the EU Courts in an *obiter dicta* to a judgment.

restriction and effect restriction assessments, it at the very least enables private parties more easily to initiate stand-alone private enforcement actions.

4.4. *Article 101(3) TFEU as supplementary and ex post objective justification?*

To the extent that “objective justifications” or conditions relating to the necessity of a restriction gain importance within the scope of Article 101(1) TFEU analysis, it can be questioned what the added value of a distinct exception provision such as Article 101(3) TFEU would be.²¹⁰ Whereas the Commission acknowledges that both provisions could comprise elements of one “iterated” and continuous analysis,²¹¹ the EU Courts have solidly maintained that Article 101(1) and 101(3) TFEU incorporate different tests that should also be considered separately depending on the particularities of each case.²¹²

Recent case law particularly confirmed the different roles and assessment schemes underlying Article 101(1) and 101(3) tests, without however clearly pointing towards a differentiating criterion.²¹³ Whilst legal scholarship convincingly argued that Article 101(3) should allow for productive efficiency considerations to be weighed into the competition law analysis which is

210. Art. 101(3) allows restrictive agreements, decisions or practices to be exempted from the Art. 101(1) prohibition if four cumulative conditions are met: “[f]irstly, the agreement must contribute to improving the production or distribution of goods or promoting technical or economic progress, secondly, consumers must be allowed a fair share of the resulting benefit, thirdly, the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives and, fourthly, it must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question”. Those conditions are cumulative and it is the responsibility of the defendant undertaking to adduce sufficient relevant evidence in that regard. See also *OTOC*, cited *supra* note 103, para 102.

211. See e.g. Commission Notice – Guidelines on Vertical Restraints, O.J. 2010, C 30/1, para 47, where the Commission acknowledges that undertakings can adduce justifications for hardcore restrictions. In so stating, the Commission equally acknowledges that “[a]lthough, in legal terms, [Article 101(1) and 101(3) TFEU analyses] are two distinct steps, they may in practice be an iterative process where the parties and Commission in several steps enhance and improve their respective arguments”.

212. At the same time, the Courts acknowledged that an Art. 101(3) TFEU exemption would be less likely if an object restriction is identified: see among others *BIDS*, cited *supra* note 127, para 39, where it was stated that non-competition arguments may at most be relevant for an Article 101(3) TFEU assessment. The Court’s reference to “at most” highlights that the fulfilment of all Art. 101(3) TFEU conditions to an object restriction will be difficult to maintain.

213. Berating the Court for its conservative approach in this regard, Gerard, *op. cit. supra* note 143, 37.

generally focused on allocative efficiency,²¹⁴ the Court never explicitly referred to those terms. The Court indeed only provided limited guidance on the scope of the efficiency defence outlined in that provision and the extent to which balancing under Article 101(3) differs from Article 101(1) “objective justifications”. In *Premier League*, the Court argued that Article 101(3) could not be applicable to the object restrictions identified, as the contract clauses were not considered to be proportionate to the aims they sought to pursue.²¹⁵ In justifying its reasoning, the Court referred to the proportionality assessment it had made regarding the alleged infringement of free movement rules, without clearly carving out how those rules could be transposed to the Article 101 TFEU context. The *Slovak Banks* case merely added that “Article 101(3) TFEU must be interpreted as meaning that it can apply to an agreement prohibited under Article 101(1) TFEU only when the undertaking which is relying on Article 101(3) TFEU has proved that the four cumulative conditions laid down therein are met”.²¹⁶ As the banks in that case agreed to terminate their contracts with a competing money transfer service in order to compel the latter to comply with Slovak banking law and to protect “the conditions for healthy competition and, in the broader sense, thus [sought] to promote economic progress”, the Court merely stated that a less restrictive alternative – lodging a complaint with the Slovak bank authority – could have resulted in the same outcome and should have been considered in the Article 101(3) TFEU analysis.²¹⁷

In the more recent *MasterCard* judgment, the General Court – in addition to confining the balancing of pro- and anticompetitive arguments exclusively to Article 101(3) TFEU²¹⁸ – reconfirmed case law stating that objective advantages adduced may “arise not only for the relevant market but also for every other market on which the agreement in question might have beneficial effects”.²¹⁹ The Commission had nevertheless argued that beneficial effects on another market could only be accepted “provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same”.²²⁰ As such, it would seem that the GC agrees that Article 101(3) guidelines can be deviated from for the benefit of the defendant

214. See for that argument, Odudu, *The Boundaries of EC Competition Law* (OUP, 2006), pp. 137–157.

215. *Premier League*, cited *supra* note 144, para 145.

216. Case C-68/12, *Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s.*, judgment of 7 Feb. 2013, nyr, para 36.

217. *Ibid.*, para 35. See for background, Kühnert and Augustinic, “Slovak bank case: Court of Justice rejects illegality defence for boycotts”, 4 *Journal of European Competition Law & Practice* (2013), 414–416.

218. *MasterCard, Inc.*, cited *supra* note 91, para 80.

219. *Ibid.*, para 228.

220. 2004 Commission Guidelines, cited *supra* note 163, para 43.

undertakings. Building upon that predicament, the Commission in a recent decision argued that such benefits do not need to affect the same groups of consumers, but that a sufficient commonality between consumers on the different markets should exist.²²¹ From that point of view, consumers harmed in one market should at least benefit in another related market in order for a successful Article 101(3) defence to be developed.²²²

The complete separation of the two tests also emerges from *Koninklijke Wegenbouw Stevin BV*. Here, the General Court held that the Commission cannot be obliged to conduct a detailed market analysis on the basis of Article 101(3) TFEU if it established that the restrictions in a particular case amount to object restrictions.²²³ As a result, defendant undertakings themselves are in principle required to adduce relevant and detailed market analysis to make their claim. The judgment additionally established that the Commission guidelines on the application of Article 101(3) TFEU need to be followed by the Commission and can produce legal effects on defendant undertakings.²²⁴

It is clear from the *MasterCard* judgment, moreover, that the General Court basically agreed with the Commission that undertakings have to adduce detailed and preferably quantifiable evidence to demonstrate that efficiency gains result from their arrangement, even in instances where the Commission can argue on the basis of a contents or “quick look” contextual analysis that a restrictive effect is to be presumed without proper market analysis or quantification.²²⁵ The GC indeed states that:

“it is reasonable to conclude that it was for the applicants...to identify the services provided by the banks issuing debit, charge or credit cards capable of constituting objective advantages for merchants. It was also for them to establish that there was a sufficiently clear correlation between the costs involved in the provision of those services and the level of the [multilateral interchange fee]”.²²⁶

In order to benefit from the Article 101(3) TFEU exemption, undertakings thus have to develop a fully-fledged effect-focused justificatory analysis that additionally engages with the proportionality of the identified restrictions in light of pro-competitive benefits resulting from the agreement, decision or practice.

221. Commission Decision of 23 May 2013 (Case AT.39595 – Continental/United/Lufthansa/Air Canada), paras. 60 and 75.

222. *Italianer*, op. cit. *supra* note 142, 11.

223. Case T-357/06, *Koninklijke Wegenbouw Stevin BV v. Commission*, judgment of 27 Sept. 2012, nyr, paras. 125–128.

224. *Ibid.*, para 122.

225. *MasterCard Inc.*, cited *supra* note 91, paras. 233–236.

226. *Ibid.*, para 233.

In acknowledging that Article 101(3) TFEU continues to incorporate a self-standing justificatory test that requires defendant undertakings to develop a fully-fledged effects-focused analysis themselves *in any case*, the Courts clearly distinguish Article 101(1) and 101(3) tests as two different yet related assessment frameworks. The relationship between objective justifications under Article 101(1) TFEU and pro- and anticompetitive balancing under Article 101(3) nevertheless remains elusive. Does the undertaking necessarily have to develop a comprehensive effects-focused analysis in order to seek an exemption from a finding of a restriction? Or do similar “quick look” objective justifications exist which can be directly invoked by the defendant undertakings? If such justifications were to exist, it would be more predictable for undertakings to decide whether or not to build a case on Article 101(3) TFEU.²²⁷ So far, the Commission has mainly been vocal in maintaining the limited likelihood of an object restriction being capable of Article 101(3) exceptions, without however fundamentally excluding such exception. The Courts have so far not really intervened in this discussion by offering particular guidance,²²⁸ resulting in increasing uncertainty over the particular distinctive role – if any – of Article 101(3) in a more effects-focused Article 101(1) TFEU setting.²²⁹

5. Conclusion

This contribution analysed the EU Courts’ recent endeavours to strike a refined balance between the demands of effects-focused analysis and the need for clear, predictable and consistent legal concepts, tests and categories underlying Article 101 TFEU application. It demonstrated in particular that

227. As such, the “sliding scale” approach towards assessing the existence of restrictions of competition in Art. 101(1) TFEU could be replicated and complemented by an Art. 101(3) sliding justificatory scale approach. For a modest suggestion mirroring evolutions in Art. 101(1) TFEU in that regard, see *Italianer*, op. cit. *supra* note 142, 6.

228. The Commission provided significant guidance in its 2004 Guidelines on the application of Article 81(3) of the Treaty and additionally in its 2011 Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. 2011, C 11/1, providing detailed criteria in relation to specific types of information exchange agreements. The Court has not had the opportunity however to clarify, refine or refute particular assessment schemes developed in those guidelines.

229. Gerard identifies a shift towards a more developed efficiency defence in Art. 101(3) TFEU, albeit within the boundaries of a developed market integration project, see Gerard, op. cit. *supra* note 143, 29–30.

recent case law developments in relation to the concept of single economic entity/undertaking, the affectation of inter-state trade criterion, the notions of decisions by associations of undertakings and concerted practices, the categories of restrictions by object and by effect and the interrelationship between Articles 101(1) and 101(3) TFEU have attempted to conform to a more effective effects-focused enforcement environment, without clearly outlining what the proxies of such effects-focused enforcement environment are or should be. The case law developments discussed here particularly highlight that the EU Courts have sought to reconcile established legal concepts and the particular restriction/exemption dichotomy underlying Article 101 TFEU with calls for a more economic approach towards competition law analysis. Such a reconciliation resulted in the development of adapted legal presumptions or testing conditions that – whilst formally comprising a (re-)interpretation of EU competition law concepts – could affect profoundly their meaning and role in a modernized Article 101 TFEU enforcement setting.

As far as the undertaking and affectation of inter-state trade concepts are concerned, the EU Courts essentially confirmed the open-ended and functional nature of both concepts. Both concepts provide tools for competition authorities to proceed swiftly to the actual assessment of the competition law merits of a particular case. At the same time, however, the Courts equally developed or sustained refined presumptions of single economic entity status and affectation of inter-state trade on the basis of legal fictions (full ownership or control and market thresholds). Those presumptions do not replace the testing conditions and requirements already in place, but add to them form-based criteria that translate effects-focused standards into formal legal categories. As presumptions, they are nevertheless tailored to the Commission or national enforcement authorities. The latter can rely on those principles in order to establish that Article 101 TFEU would be applicable or could be enforced more effectively in any instance, whilst rebutting the principle of parent company liability has been shown to be nearly impossible if full control through ownership exists. As a result, both the single economic entity and affectation of inter-state trade presumptions predominantly serve to contribute to a more *effective* effects-focused competition law enforcement environment.

In relation to the decisions by an association of undertakings and concerted practices notions, the Courts equally continued to promote and develop an extended interpretation of both concepts. Doing so allows the Commission and national enforcement authorities to capture a wide array of market behaviour types within the scope of Article 101 TFEU. As far as decisions by associations of undertakings are concerned, the General Court introduced the

“commonality of interest” criterion to determine the (continued) existence of a decision by an association. The ECJ additionally confirmed that an association can adopt a potentially anticompetitive decision even on a market where the member undertakings are not engaged in economic activities themselves. A mere commonality of interests by the undertakings potentially to restrict competition in that market appears to be sufficient in that regard. As for the notion of concerted practice, the General Court seems to have established a new presumption on the basis of which the existence of a concerted practice can more easily be proven. By adding that parallel conduct plus additional elements establish a presumption in favour of the existence of a concerted practice, the General Court essentially agreed that the enforcement authorities could still consider such practice to be present in order more swiftly to proceed to the analysis whether or not a restriction on competition is in place.

The Court of Justice additionally and more confusingly intervened regarding the difference between restrictions by object and by effect as well as the legal tests employed to substantiate the classification of a restriction on competition. In distinguishing obvious object restrictions from contextual object restrictions and by applying the same contextual analysis test to contextual object *and* effect restrictions, the Courts essentially narrowed the gap between the two restriction types. Room was thereby created for very obvious anticompetitive terms to be prohibited on the basis of a quick look analysis of the contents of an agreement or decision. Referring to objective justifications forming part of the contextual analysis, the Court of Justice nevertheless created confusion as to how much balancing of pro-and anticompetitive considerations could or should already take place within the scope of Article 101(1) TFEU. Despite acknowledgements by the General Court and the Commission that pro- and anticompetitive balancing only occurs within the realm of Article 101(3) TFEU, some attention to objective justifications appears to be necessary prior to the classification of behaviour as restrictive of competition. By repeatedly referring to such justifications in the context of Article 101(1) TFEU object restrictions, the Court more than ever calls into question the distinctive roles Article 101(1) and 101(3) should retain in a modernized Article 101 TFEU assessment framework.