'By Object' or not 'by Object': Issues Resolved?

Luc Peeperkorn*

Frank Wijckmans**

Abuse of dominant position; Anti-competitive practices; EU law

1) Introduction

In recent judgments the European Courts have given further direction on certain fundamental aspects of Articles 101 and 102 TFEU: the definition of 'by object' as opposed to 'by effect' restrictions; the role of appreciability; the ability to rely on objective necessity arguments (the *Wouters* route); the relationship between 'by object' and hardcore restrictions; and the degree of analytical coherence regarding arts 101 and 102 TFEU. These issues are of critical importance for a correct application of the Treaty provisions. The flow of requests for a preliminary ruling under art.267 TFEU underscores that there was (and, as we will see, continues to be to some extent) a need for clarification even on some basic aspects related to the application of arts 101 and 102 TFEU.

This is a good time to take stock since the Court of Justice (also "the Court") convened in *Superleague*,[1] *ISU*[2] and *RAFC*[3] in Grand Chamber to address some of the heavily debated issues. Grand Chamber judgments are generally very important as they recapitulate the Court's case law, clear up issues and possibly change in part its direction (in the Court's language, to clarify some of its previous judgments).

The Grand Chamber judgments in *Post Denmark I*[4] and *Intel*[5] illustrate the significance of such judgments as they changed the law in respect of art.102 TFEU by requiring an effects-based approach for rebates and exclusive dealing and by introducing a full-blown efficiency defence in art.102 TFEU. In *Superleague, ISU* and *RAFC*, the Court ruled not only on certain specifics of these cases, but also, using identical wording, recapitulated and on some aspects clarified the concepts and consequences of 'by object' restrictions and 'by object' conduct under arts 101 and 102 TFEU.

What we intend to do with this article is to see where we have landed to date. On some points there is absolute legal certainty and those will be dealt with first. However, as we move on to the legal test underpinning the characterisation of certain conduct as a 'by object' restriction and its application *in concreto*, things become more difficult and the level of legal certainty declines. As always, the devil is in the detail and, also here, the final and most critical mile of the analysis remains the most challenging. Issues resolved? To a considerable extent, but certainly not entirely.

2) Starting point: firms are in principle free to contract as they see fit

Before addressing the 'by object' notion, it is important to emphasize the starting point of any proper competition law analysis, notably that firms are in principle free to contract as they see fit. Competition law does not dictate and cannot dictate that firms must act efficiently or rationally on the market. If firms believe that they should adopt conduct that is perceived by economists or business analysts as inefficient or even suicidal, that is their free choice. It is not unlike a soccer game. If a player decides to give a ridiculous and dangerous backward pass to the goalkeeper, rather than to launch immediately a meaningful attack, that is the absolute free choice of the player and neither the soccer regulations nor the referee can interfere with that freedom.

Competition law serves therefore as the exception to the rule and not the other way around. As long as an agreement[6] has only an insignificant effect on the market,[7] the general rule applies and (absent limitations resulting from mandatory legislation of a different nature) firms are free to proceed. Competition law can only intervene when the agreement or coordination has the object or effect of appreciably preventing, restricting or distorting competition within the internal market.[8] This means that for any agreement, to fall within and infringe art.101(1) TFEU, it must be shown or convincingly argued that competition is appreciably restricted. Furthermore, and this is entirely consistent with the starting point of the analysis, proof of such a restriction must be supplied by

* Professor at the Brussels School of Competition, previously Principal Expert Antitrust Policy, DG Competition of the European Commission, Brussels. Mail address: luc.peeperkorn@gmail.com. The opinions expressed are strictly personal. While I previously worked for the European Commission, nothing in this article represents the views of the European Commission, DG COMP or any other institution, entity, person, etc. I have no interests to declare except my own interest, as a European consumer, in a coherent and effective EU competition policy.

** Partner, Faros (Brussels), Professor at Brussels School of Competition, Assessor Belgian Competition Authority. Mail address: frank.wijckmans@faros.eu. The opinions expressed are strictly personal.

[1] *European Superleague Company SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* (C-333/21) EU:C:2023:1011 (hereinafter "*Superleague"*).

[2] *International Skating Union v European Commission* (C-124/21 P) EU:C:2023:1012(hereinafter "*ISU*").

[3] *UL and SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL (URBSFA)* (C-680/21) EU:C:2023:1010 (hereinafter "*RAFC*").

[4] *Post Danmark A/S v Konkurrencerådet* (C-209/10) EU:C:2012:172 (hereinafter "*Post Denmark I*").

[5] *Intel Corporation Inc. v European Commission* (C-413/14 P) EU:C:2017:632 (hereinafter "*Intel*").

[6] An agreement, in competition law terms, is a concurrence of wills to adapt or regulate the conduct on the market of at least one of the parties to the agreement.

[7] *Expedia Inc v Autorité de la concurrence* (C-226/11) EU:C:2012:795 (hereinafter "*Expedia*") at [16].

[8] *Expedia* at [17]; *Generics (UK) Ltd. v Competition and Markets Authority* (C-307/18) EU:C:2020:52 (hereinafter "*Generics UK")* at [31]; *SIA Visma Enterprise v Konkurences padome* (C-306/20) EU:C:2021:935 (hereinafter "*Visma")* at [54].

the enforcer or the party alleging the existence of such a restriction.[9] In other words, it is not for the firm engaging in the relevant conduct to justify that it does not appreciably restrict competition, but for the opposing side to put forward the required evidence and hence to bring art.101(1) TFEU into play.

Only once that has been done, are firms required to show that their agreement is nonetheless not prohibited under art.101(1) TFEU. It is at that time (and only at that time) that the burden of proof shifts and the firms must provide proof that all the conditions for exemption under art.101(3) TFEU are fulfilled. In short, it is at that stage of the assessment and analysis that firms are required by competition law to demonstrate that their agreement passes an efficiency test. The demonstration of appropriate efficiencies (in addition to the other conditions contained in art.101(3) TFEU) becomes at that stage mandatory in order to save the agreement from nullity (art.101(2) TFEU) and possible sanctions.

In addition to a proper understanding of the correct sequence of the assessment of agreements entered into by firms, it is obvious, but at the same time critical to remember that competition law is all about effects. As we will see, they may be actual or potential effects, but the application of arts 101 and 102 TFEU hinges on effects. The importance of this (seemingly obvious) statement lies in the fact that for the purposes of establishing a 'by object' restriction no effects analysis must be conducted, which implies that the presence or likelihood of actual or potential negative effects must be established in a different way.[10] How this is done, belongs to the core of the 'by object' debate.

3) 'By object' and 'by effect' are alternative requirements subject to different standards of proof

It was never a contentious point that 'by object' and 'by effect' are alternative and not cumulative requirements for meeting the test of art.101(1) TFEU.[11] This means that in order to fall under the prohibition of art.101(1) TFEU it is sufficient that a given agreement either constitutes an appreciable restriction by object or an appreciable restriction by effect. As stated in *Superleague* (§158): "…in order to find, in a given case, that an agreement, decision by an association of undertakings or a concerted practice is caught by the prohibition laid down in art.101(1) TFEU, it is necessary to demonstrate, in accordance with the very wording of that provision, *either* that that conduct has as its object the prevention, restriction or distortion of competition, *or* that that conduct has such an effect" (emphasis supplied).

Both concepts are however subject to different legal and evidentiary rules.[12] Hence, once a choice is made between a 'by object' and a 'by effect' assessment, the appropriate rules must be adhered to and they should not be mixed up. The relevant rules are however the same irrespective of whether an agreement, a concerted practice or a decision by an association of undertakings is involved.[13]

The difference in legal and evidentiary rules does not prevent a competition authority or court from applying both concepts in parallel as a sort of "double lock", but it must do so by having due regard to the different legal standards that apply to the two concepts. The Court confirmed this possibility in *Budapest Bank*:[14] "It follows that the fact that a finding of a restriction of competition 'by object' relieves the competent authority or court having jurisdiction of the need to examine the effects of that restriction in no way means that that authority or court cannot undertake such an examination where it considers it to be appropriate."

By demonstrating that the conduct has as its object to restrict competition and in addition that it also has that effect, the authority may render its decision more robust in case the 'by object' assessment is later challenged on appeal. However, in practice such double work does not seem efficient, unless the authority or court is not very sure about its finding that the agreement is 'by object'. In such a case (*inter alia*, in view of the policy considerations addressed further on in this article), it seems more correct for the authority or the court to proceed (directly) with a 'by effect' analysis. As of the moment that there is doubt, the balance should tilt towards a 'by effect' analysis.

The 'by object' concept does not constitute some form of exception to the 'by effect' concept[15] and hence it qualifies as a self-standing (alternative) condition for the application of art.101(1) TFEU. An immediate consequence is that a 'by object' finding does not amount to some form of presumption that can be rebutted by demonstrating the absence of actual effects.[16] Once a 'by object' finding has been made, it is not necessary to examine the effects of the agreement on competition.[17]

[9] Regulation 1/2003 art.2, on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2002] OJ L 001.
[10] This point is developed helpfully by Advocate-General Wahl in *Groupement des cartes bancaires (CB) v European Commission* (C-67/13 P) EU:C:2014:1958 (hereinafter "*Cartes Bancaires*"), opinion of AG Wahl, paras 26 ff.
[11] *Em akaunt BG EOOD v Zastrahovatelno aktsionerno druzhestvo Armeets AD* (C-438/22) EU:C:2024:71 (hereinafter "*BG EOOD*") at [47]; *Banco BPN/BIC Português SA v Autoridade da Concorrência* (C-298/22) EU:C:2024:638 (hereinafter "*Banco BPN*") at [40]; *Superleague* cit. at [158]; *ISU* at [117]; *RAFC* at [99]; *EDP — Energias de Portugal SA v Autoridade da Concorrência* (C-331/21) EU:C:2023:812 (hereinafter "*EDP*") at [97]; *Visma* at [55]; *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) EU:C:2009:343 (hereinafter "*T-Mobile*") at [28]; *Allianz Hungaria Biztosító Zrt v Gazdasági Versenyhivatal* (C-32/11) EU:C:2013:160 (hereinafter "*Allianz Hungaria*") at [33]; *Super Bock Bebidas SA v Autoridade da Concorrência* (C-211/22) EU:C:2023:529 (hereinafter "*Super Bock*") at [31]; *Société Technique Minière v Maschinenbau Ulm GmbH* (C-56/65) EU:C:1966:38 (hereinafter "*LTM*") at [249].
[12] *Superleague* at [160]; *ISU* at [100]; *RAFC* at [87]; *Generics UK* at [63].
[13] *T-Mobile* at [24]; *T-Mobile* (C-8/08) EU:C:2009:110, opinion of AG Kokott, para.38.
[14] *Gazdasági Versenyhivatal v Budapest Bank Nyrt.* (C-228/18) EU:C:2020:265 (hereinafter "*Budapest Bank*") at [40].
[15] *Superleague* at [161]; *ISU* at [101]; *RAFC* at [88].
[16] *T-Mobile*, opinion of AG Kokott, para.45; *Generics UK* (C-307/18) EU:C:2020:28, opinion of AG Kokott, para.162.
[17] *Superleague* at [159]; *ISU* at [99]; *RAFC* at [86].

Given that an assessment of the effects of a given agreement requires more resources, the caselaw underscores that it is logical to commence with the 'by object' analysis and to move on to the 'by effect' analysis once it is clear that the relevant conduct does not qualify as a 'by object' restriction.[18] As the Court put it,[19] "[t]o that end, it is appropriate to begin by examining the object of the conduct in question. If, at the end of that examination, that conduct proves to have an anticompetitive object, it is not necessary to examine its effect on competition. Thus, it is only if that conduct is found not to have an anticompetitive object that it will be necessary, in a second stage, to examine its effect".

4) Policy considerations related to the 'by object' approach

The 'by object' approach avoids that an effects assessment must be conducted prior to concluding on the application of the prohibition included in art.101(1) TEFU. Given that, as stated above, appreciable anti-competitive effects are the harm that competition law seeks to avoid and that, absent such effects, firms are free to conduct their business as they see fit, the switch from an effects assessment towards a 'by object' assessment calls for a proper justification as a matter of sound competition policy.

Such a justification is found in the general characterisation of the practices that qualify as 'by object' restrictions combined with certain policy considerations. As to the general characterisation, the relevant practices are those that reveal a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects because they can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.[20] This general characterisation has then been linked in several Opinions of Advocates-General to essentially three policy considerations.[21]

The first such policy consideration is that the 'by object' approach creates legal certainty and predictability. It enables firms to know in advance the legal consequences (including the risk of fines) triggered by their conduct. The second is the deterrent effect accompanying a 'by object' classification of the conduct. Such a classification helps to avoid certain anti-competitive conduct. The third is procedural economy. The 'by object' classification allows competition authorities and courts, when faced with certain forms of collusion, to establish their anti-competitive impact without any need for them to conduct the often complex and time-consuming examination of their potential or actual effects on the market concerned.

These policy considerations are however all dependent on the precision with which the relevant conduct can be identified. As stated by Advocate-General Wahl in his opinion in *Cartes Bancaires* (§36), "such advantages materialise only if recourse to the concept of restriction by object is clearly defined, failing which this could encompass conduct whose harmful effects on competition are not clearly established".[22] This position is endorsed in other Opinions where reference is made to the "serious" and "radical" consequences to which firms may be exposed when deemed to infringe art.101(1) TFEU.[23]

The need for precision is self-evident for the legal certainty and predictability on which the first policy consideration is based. In the light of the general starting point outlined above (i.e. the freedom for firms to determine their market conduct), also the second policy consideration depends on such precision. Lack of precision is bound to lead to overdeterrence and hence unjustified caution on the part of the firms concerned. Likewise, procedural economy does not offer a justification for shortcuts on the evidentiary burden imposed by art.2 of Regulation 1/2003 so that also from this angle precision and predictability are essential. Furthermore, given the relatively limited number of 'by object' cases that are handled by the Commission and the national competition authorities on an annual basis compared with the number of potentially restrictive agreements entered into by firms during such period, procedural economy can only be a valid consideration if the 'by object' classification displays a sufficient degree of precision and predictability.

5) Interim conclusions

Prior to diving into some of the more complex questions, it makes sense to summarize some interim conclusions which, in our view, may be helpful and necessary when proceeding with the next step of the analysis:

- The starting point is always that firms are free to engage in the conduct they deem appropriate. It is for the authority or party that wishes to sanction or curtail such conduct to prove that such opposition is justified on competition law grounds.

[18] *Banco BPN* at [42]; *Lietuvos notaru rumai v Lietuvos Respublikos konkurencijos taryba* (C-128/21) EU:C:2024:49 (hereinafter "*Lietuvos*") at [92]; *EDP* at [97]; *Allianz Hungaria* at [34]; *Super Bock* at [31].
[19] *Superleague* at [159]; *ISU* at [99]; *RAFC* at [86].
[20] This general characterisation is repeated in a long list of cases. See, *inter alia,F. Hoffmann-La Roche Ltd v Autorità Garante della Concorrenza e del Mercato* (C-179/16) EU:C:2018:25 (hereinafter "*Hoffmann-La Roche*") at [78]; *Generics UK* at [67]; *Superleague* at [162]; *ISU* at [99]; *RAFC* at [86]; *Dole Food Company, Inc. v European Commission* (C-286/13 P) EU:C:2015:184 (hereinafter "*Dole*") at [113]–[114]; *Cartes Bancaires* (C-67/13 P) EU:C:2014:2204 at [49]–[50].
[21] *T-Mobile*, opinion of AG Kokott at para.42; *Cartes Bancaires*, opinion of AG Wahl at para.35; *Toshiba Corporation v European Commission* (C-373/14 P) EU:C:2015:427 (hereinafter "*Toshiba*"), opinion of AG Wathelet at para.58.
[22] Advocate-General Wahl repeats this warning further on in his Opinion in *Cartes Bancaires*, where he states that "[o]nly conduct whose harmful nature is proven and easily identifiable" should be regarded as a restriction of competition 'by object' (para.56) and that "[a]n uncontrolled extension of conduct covered by restrictions 'by object' is dangerous having regard to the principles which must govern evidence and the burden of proof in relation to anticompetitive conduct" (para.57). He proposes therefore "that a relatively cautious attitude should be maintained in determining a restriction of competition 'by object'" (para 58).
[23] *T-Mobile*, opinion of AG Kokott, para.44; *Toshiba,* opinion of AG Wathelet, para.59.

- Authorities and parties challenging certain conduct do not need to prove actual or potential effects if they can establish that the conduct qualifies as a 'by object' restriction. Lack of proof of actual or potential effects will not constitute a valid defence against a (proper) 'by object' finding.
- On account of the aforesaid starting point and the policy considerations underpinning reliance on the 'by object' approach as opposed to a 'by effect' analysis, the conduct that may be placed in the 'by object' box must be clearly defined. Such a clear definition calls for precision and predictability or, as Advocate-General Wahl[24] put it, any by object classification should be reserved for "conduct whose harmful nature is proven and easily identifiable".

6) A general 'by object' test applied on the basis of experience

Building on these interim conclusions, it is appropriate to focus now on the 'by object' test. In this respect, the case law of the Court has developed a general test that conduct must meet in order to be qualified as a restriction of competition 'by object'. This test[25] provides that the 'by object' concept "must be interpreted as referring solely to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects. Indeed, certain types of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. … In order to determine, in a given case, whether an agreement, decision by an association of undertakings or a concerted practice reveals, by its very nature, a sufficient degree of harm to competition that it may be considered as having as its object the prevention, restriction or distortion thereof, it is necessary to examine, first, the content of the agreement, decision or practice in question; second, the economic and legal context of which it forms a part; and, third, its objectives ".[26] We will address some of the constituent elements of the test further on below, but will focus first on certain general aspects that are relevant to the application of the test and that seem to have been ironed out in the caselaw.

Restrictive interpretation

A first overarching feature is that the 'by object' concept must be interpreted "strictly" or, as it is stated in some judgments, "restrictively".[27] In *Cartes Bancaires* (§58) the Court corrected the General Court for stating the opposite. This requirement of a restrictive interpretation is reflected by the case law speaking of applying the by object classification *solely* to certain types of coordination/agreements/conduct, which is justified because a classification as a 'by object' restriction inverts the order of bringing forward evidence by allowing the authority to presume negative effects, thus representing a shortcut on the process to prove an infringement. Importantly, we believe that the need for a restrictive interpretation is consistent with the requirements of precision and predictability on which the policy considerations referred to above are based.

No mandatory link with consumer prices

A second overarching feature is that the characterisation of conduct as a 'by object' restriction does not depend on whether it has a direct link with consumer prices. The Court corrected the referring court in this respect in the *T-Mobile* judgment (§36–39). Relying on the opinion of Advocate-General Kokott (§55–60), the Court then confirmed that art.101 TFEU "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" (§38).[28] The same general position has been repeated in subsequent caselaw.[29]

Need for sufficiently reliable and robust experience

A third and important overarching feature is that the identification of the conduct that is placed in the 'by object' box must be based on experience.[30] The experience

[24] *Cartes Bancaires*, opinion of AG Wahl, para.56.
[25] It has been suggested that, with regard to the general test, a switch was made by the Court in *Cartes Bancaires* compared with *T-Mobile* and *Allianz Hungaria*. See R. Wesseling and M. van der Woude, *The Lawfulness and Acceptability of Enforcement of European Cartel Law*, World Competition (2012), No 4, pp.573–598: The authors suggest that the category of 'by object' restrictions should be limited to "those practices that, according to experience, will always or almost always result in the restriction of competition" and criticise the earlier judgments for defining 'by object' restrictions based on the capability of resulting in the restriction of competition. While it is certainly correct that *T-Mobile* and *Allianz Hungaria* (para. 38) refer to "*potentia*l" and "*capable*", we are not sure that *Cartes Bancaires* (para. 69) necessarily corrects the position in that respect. The relevant paragraph seems to correct the General Court for having failed to explain why a practice that is capable of restricting competition within the meaning of art.101(1) TEFU should in addition be classified as a restriction 'by object'. The criticism of the Court is that the General Court failed to apply the required legal test to arrive at such a (more severe) classification.
[26] See, inter alia, *Superleague* at 162–165; *Generics UK* at [67]; *Cartes Bancaires* at [49]–[50] and [53]; *Hoffmann-La Roche* at [78]; *ISU* at [102]; *RAFC* at [89].
[27] *Banco BPN* at [43]; *EDP* at [98]; *Superleague* at [161]; *ISU* at [101]; *RAFC* at [88]; *Visma* at [60]; *Generics UK* at [67]; *H. Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 (hereinafter "*Lundbeck*"), at [112]; *Super Bock* at [32]; *T-Mobile*, opinion of AG Kokott, para.44, supported by *Toshiba,* opinion of AG Wathelet, para.59 where AG Wathelet warns that such a restrictive interpretation may however not result in an "unduly strict interpretation" that risks to result in the concept of an infringement 'by object' being "erased through interpretation" from primary law.
[28] The reference to the protection of competition as such must be linked to the indirect harm consumers may suffer if such competition is hindered or distorted. See *Superleague* at [124].
[29] See, inter alia, *Dole* at [123]–[125]; *HSBC Holdings plc v European Commission* (C-883/19 P) EU:C:2023:11 (hereinafter "*HSBC*"), at [120]–[121].
[30] The Commission suggests in its Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2023] OJ C 259/1 (hereinafter "Horizontal Guidelines") at para.24 that, in addition to "sufficiently reliable and robust experience", a 'by object' classification may also be based on "the specific characteristics of the agreement, from which it is possible to infer its particular harmfulness for competition, where appropriate as a result of a detailed

requirement is logical. As a 'by object' assessment does not require any analysis of actual or potential effects in a given case, but (as stated above) competition law is effects-based by nature, experience is needed that as a rule (but not automatically, because still requiring an individual examination before final conclusions can be drawn) certain types of coordination are by their very nature injurious to the proper functioning of normal competition in order to bridge the analytical gap.

The caselaw of the Court attaches importance to the quality of the experience that is relied upon. Reference is often made to expressions such as "sufficiently reliable and robust experience".[31] Such experience may be anchored in economic analysis and precedents. In his Opinion in *Cartes Bancaires* (§79) Advocate-General Wahl defines "experience" as "what can traditionally be seen to follow from economic analysis, as confirmed by competition authorities and supported, if necessary, by case-law". He adds that "it is only when experience based on economic analysis shows that a restriction is constantly prohibited that it seems reasonable to penalise it directly for the sake of procedural economy" (§55). Advocate-General Bobek in *Budapest Bank* (§72) states that experience must be "based on methods, principles and standards recognized by the international economic community". We could summarise this as experience supported by economic logic and analyses, or more briefly, experience supported by economic research.

A separate issue related to the experience requirement is that of precedents in the caselaw. There seems to be no debate that the absence of a Commission precedent does not prevent the finding of a 'by object' infringement.[32] The availability of a precedent may facilitate the proof of a 'by object' restriction, but the absence of a precedent cannot prevent certain conduct from being classified as 'by object'.[33] However, if the Commission wants to classify certain conduct for the first time as by object, Advocate-General Rantos underscores that an individual, detailed examination of the practice at issue will be needed before it can be placed in the 'by object' box.[34]

Advocate-General Wahl goes one step further in his Opinion in *Cartes Bancaires* (§142) where he states that "[t]he fact that in the past the Commission did not take the view that a certain kind of agreement was, by virtue of its very object, restrictive of competition cannot in itself prevent it from doing so in the future following an individual, detailed examination of the measures at issue". This may be taken to mean that an earlier case in which certain conduct was labelled as restrictive 'by effect' does not prevent the adoption of a 'by object' finding for similar conduct provided that such different assessment is based on a detailed examination of the individual case.[35]

As cases are seldom identical, reliance on precedents may be delicate. In that respect, the Court corrected the General Court in *Cartes Bancaires* (§83) where it drew an analogy with the BIDS judgment. Conversely, Advocate-General Rantos observed in *Banco BPN*[36] that the fact that not all the characteristics of a given case are identical to a practice previously characterised as a 'by object' infringement, does not imply that there may not be sufficiently reliable and robust experience to place also that case in the 'by object' box.

An additional word of caution regarding precedents may be appropriate. It is not because competition authorities qualified a given practice as a 'by object' restriction in an earlier case that the required level of experience is automatically in place. It is indeed standard practice in competition decisions to cross-refer to earlier cases, some of which may present different characteristics. Such references provide relevant experience only if the effects in these cases were substantiated and supported by economic research. Otherwise it would suffice to simply find somewhere a "precedent" in which the 'by object' classification is stated. It is reasonable to assume that such an approach cannot be reconciled with the requirement of robust and reliable experience. This will not present a problem for naked cartels, but such caution may be relevant in other cases where a 'by object' classification is contemplated, as further explained below.

7) The 'by object' test and appreciability

An interesting question following the Court's judgment in *Expedia* is the role played by a standard of appreciability in the context of a 'by object' assessment. It may be good first to go back to the case itself. The question raised was whether a national competition

analysis of the agreement, its objectives and its economic and legal context". This formulation seems to be confusing certain aspects of the 'by object' discussion. The two cases which the Horizontal Guidelines refer to in respect of this second possibility (*Lundbeck* at 130–131 and *Sun Pharmaceutical Industries Ltd v European Commission* (C-586/16 P) EU:C:2021:241 (hereinafter "*Sun*"), at [86] deal with the question whether a 'by object' finding is possible in the absence of a prior Commission decision classifying the relevant conduct as a 'by object' restriction. The required level of experience is however not confined to the existence of Commission precedents. In fact, the Court referred to economic literature/research to assess whether reliable and robust experience is available to avoid any effects analysis and to place the conduct in the 'by object' box. We contend therefore that the additional possibility stated at para.24 of the Horizontal Guidelines must be collapsed into the first, notably the existence of sufficiently reliable and robust experience. *Lundbeck* and *Sun* do not provide support for a 'by object' box classification that is not based on sufficiently reliable and robust (economic) experience.

[31] *Budapest Bank* at [76]; Horizontal Guidelines at [24].

[32] *Lundbeck* at [130].

[33] *Banco BPN* at [41].

[34] *Banco BPN* (C-298/22) EU:C:2023:738, opinion of AG Rantos, para.35.

[35] Similarly, experience showing that an "old" 'by object' restriction is (increasingly) creating positive effects should be able to lead to the "declassification" of that type of restriction as not being 'by object' anymore. Such a reclassification of a type of 'by object' restriction should take into account not only final decisions by authorities and judgments by national courts, as these can be expected to be biased towards cases where net negative effects are established, given that in particular cases with serious effects may come before authorities and courts and authorities may concentrate their resources on prohibition decisions. To get a full picture of the likelihood that a certain type of restriction is in practice increasingly used to obtain efficiencies and not just to restrict competition, account should also be taken of the cases that authorities and courts dropped or dismissed, for instance because of an expected lack of (negative) effects, and more in general the expected use of these restrictions. The same logic may apply in cases where the conduct included in the 'by object' box may have been defined too widely in previous caselaw and experience shows that only a more narrowly defined category meets the 'by object' test.

[36] *Banco BPN*, opinion of AG Rantos, at para.39.

authority is prevented from prosecuting a case which affects trade between Member States but which fails to reach or exceed the market share limits of the Commission's *De Minimis* Notice.[37] The short answer to the question is obviously that the *De Minimis* Notice is not binding on national courts and national competition authorities and therefore leaves room for enforcement even if the market shares are below the limits of the Notice. However, the Court took its analysis one step further due to the fact that the referring court had reached the conclusion that a restriction 'by object' was involved. It may indeed be appropriate to emphasize that, in *Expedia*,[38] the characterisation of the practice as a 'by object' restriction was a given and not open to scrutiny by the Court. On that basis the Court held in §37 "… that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition".

It would be a mistake to summarize the Court's ruling in *Expedia* as not requiring any proof of appreciability in a 'by object' context. As the Court (§17) stated, "if it is to fall within the scope of the prohibition of art.101(1) TFEU, an agreement of undertakings must have the object or effect of perceptibly restricting competition".[39] In her opinion in the same case (§47), Advocate-General Kokott formulated the same principle as follows: "… the restriction of competition must in principle be appreciable in the case of both 'restrictions by object' and 'restrictions by effect'." She adds however that the requirements concerning proof of appreciable effect on competition are not the same in both cases (§48).[40]

To better understand these statements, it may be useful to go back to the interpretation given by the Court to the 'by object' concept. The Court has held on numerous occasions, as part of the 'by object' test described in the previous section, that this concept refers "solely to certain types of coordination between undertakings which reveal *a sufficient degree* of harm to competition for the view to be taken that it is not necessary to assess their effects" (emphasis added). This formulation implies that the concept of appreciability is automatically built into the characterisation as a 'by object' restriction. Conduct can only qualify as a 'by object' restriction if, by its very nature, it is injurious to the proper functioning of normal competition. As the Court pointed out in *Cartes Bancaires* (§69) it is insufficient that the conduct is capable of restricting competition, it must go further than that and reveal a *sufficient degree* of harm in order to qualify as a 'by object' restriction.

A further hint at the fact that appreciability is built into the 'by object' assessment is the statement by the Court that 'by object' implies that the conduct "… presents a sufficient degree of harm to competition *and is such as to affect different categories of users or consumers*" (emphasis added).[41] The same additional language was picked up in subsequent caselaw.[42] While one can debate the exact meaning and significance of these statements of the Court, it suggests that, while appreciability can be assumed once in a specific case the coordination is found to be 'by object', appreciability is inherently part of the required legal test to define certain types of coordination to be by object.

8) The by object test and experience supported by economic research

If experience must show that a particular type of coordination is overall harmful to competition, this effectively means that for these types of agreements experience must indicate that they will in general result in appreciable *net* negative effects[43] and that such effects reveal a sufficient degree of harm to competition. At the same time, economic theory and research indicate clearly that, as a rule, coordination by firms can only have (net) negative effects on the market, such as price increases or output limitations, if these firms have at least a minimum level of market power. So how can this be squared with the fact that certain types of coordination are 'by object' and that for these types of coordination it is not necessary to assess the effects?

This can be done by defining restrictively the types of coordination, as also required by the Court. This means in practice that the 'by object' category is (and should be) reserved for types of coordination which are highly unlikely to be used to create efficiencies, because they are not able to create efficiencies and/or because other less harmful restrictions are superior to create the

[37] *Expedia* at [13].
[38] *Expedia* at [34].
[39] See also *Expedia* at [20]: "*It follows that the competition authorities of the Member States can apply …. art.101 TFEU only where that agreement perceptibly restricts competition within the common market.*"
[40] This leads to a somewhat confusing debate in footnote 58 of the Opinion of Advocate-General Kokott in *Expedia* (C-226/11) EU:C:2012:544, opinion of AG Kokott, where a parallel is drawn with the standard of appreciability that applies to the required effect on interstate trade and reference is made to a market share of 5% that can, for instance, be found in the Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/81. The Advocate-General concludes (para.56) that "… the requirements concerning the proof that a restriction 'by object' is appreciable should under no circumstances be more stringent than the requirements concerning proof of an appreciable effect on trade between Member States for the purposes of art.[…] 101(1) TFEU." There is a genuine risk that concepts may be mixed up here. A classification as a restriction 'by object' requires a sufficient degree of harm to competition so that it is permissible to skip the effects analysis. Such sufficient harm must be assessed in relation to experience supported by economic research, which must in turn point at negative consequences to competition such as the ones referred to in the caselaw of the Court (price increases, output reductions, exclusion of competitors and, more generally, a poor allocation of resources to the detriment of users and consumers). In this context, a reference to the appreciability standard for purposes of assessing the required level of impact on interstate trade (justifying the applicability of EU competition law) seems inappropriate and lacking relevance.
[41] *Superleague* at [194]; *ISU* at [108]; *RAFC* at [123].
[42] *BG EOOD* at [33].
[43] "Appreciable net negative effects" means that experience indicates that the type of agreement either has only negative effects or that any positive effects are outweighed by the negative effects and that the net negative effect is appreciable.

concerned efficiencies. Naked cartel conduct is clearly a case in point. Based on its experience the European legislator has coupled in the Private Damages Directive naked cartel conduct to a presumption of harm.[44] It has done so without including any reference to market power. This lends support to the position that naked cartel conduct may be deemed to qualify as a type of coordination that, as a rule, produces harmful effects for consumers and falls as such within the by object category.[45]

On the one hand, in case a particular type of coordination can (also) be credibly used to create efficiencies, it will be applied both by firms with and without market power. In this case negative effects cannot (always) be expected and experience with, and economic research of that type of cooperation will thus not indicate that in general appreciable negative effects prevail. On the other hand, in case a particular type of coordination cannot be credibly used to create efficiencies, it will normally only be used by firms with market power to restrict competition to their own benefit and to the (appreciable) detriment of their customers. Firms without market power, as long as they act rationally, will not use such types of cooperation, as they lack the necessary market power to limit competition to their advantage; trying to limit competition would only hurt themselves as limiting output or choice and increasing prices will only drive consumers to alternative suppliers and will lead to a loss in their profitability instead of higher profits.

Whereas finding a negative effect on competition in an individual case is no proof of a by object cooperation, evidence or indications that in a number of cases firms without market power are using a particular type of cooperation or that there are no likely or actual negative effects should lead an authority to reconsider the classification of that type of cooperation as a by object type of cooperation. Such evidence or indications seem in contradiction with the expectation, based on experience supported by economic research, that that type of cooperation generally leads to net negative effects.

Similarly, evidence or indications that in a particular case the investigated firms are without market power or that there are no likely or actual negative effects should lead an authority to consider carefully whether the conduct at hand can and should be classified as by object. To be clear, there may be no reason for doubting the by object classification where it concerns a clear cut by object cooperation, for instance a naked price cartel. The cartel may simply have failed to create negative effects because the cartel turned out to be less stable than the cartelists expected or may not yet have produced its negative effects. However, in case the classification is open to discussion, for instance because the cooperation is part of a wider agreement, clear evidence of a lack of market power or negative effects may indicate that a 'by object' classification would be in error. A careful consideration of the individual characteristics of each case is in particular of importance for what is described in sections 10 and 11 as the second category of 'by object' cooperation.

For similar reasons, finding that a particular agreement is not leading to any efficiencies is no proof of a 'by object' restriction. The characterisation as a 'by object' restriction is not dependent on proof of (lack of) efficiencies, but on the extent to which (based on economic experience) the relevant coordination may be deemed to inflict a sufficient degree of harm to competition. However, evidence that in a number of cases there are significant efficiencies created through a particular type of cooperation should lead an authority to reconsider classifying that type of cooperation as a 'by object' type of cooperation. Regular evidence of substantial efficiencies is difficult to square with finding that that type of cooperation will in general result in appreciable *net* negative effects and that such effects will reveal a sufficient degree of harm to competition.

Along the same lines again, evidence or indications that in a particular case the investigated cooperation leads to significant efficiencies should lead an authority to consider carefully whether the conduct at hand can and should be classified as by object. There may be no reason for a "reclassification" where the positive effects concern an exception to a long line of similar naked cartel cases where the net effects were negative. However, where the classification is open to discussion, for instance because the cooperation is part of a wider agreement, clear evidence of efficiencies may indicate that a by object classification would be in error. A careful consideration of the individual characteristics of each case is in particular of importance for what is described in ss.10 and 11 as the second category of by object cooperation.

9) Attempts to classify conduct

The Court has clearly established that the 'by object' concept applies only to certain types of coordination (see above). This means logically that in the case of a particular individual agreement, the finding that it contains 'by object' coordination means it must be possible either to show that the coordination in question falls within one of the types of coordination classified in previous case law as 'by object' and that that classification still holds, or, if the coordination at issue does not fall within any of the known 'by object' types of coordination, that a novel 'by object' classification is justified on account of experience supported by economic research.

[44] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States of the European Unions [2014] OJ L 349/1 art.17(2).

[45] This is a legal construct that does not entirely match with economic theory. Economic theory advances even with regard to cartels additional conditions before harm can be presumed. Such conditions include the degree of market coverage, the internal and external stability of the cartel and the ability to enforce the cartel. By putting all of these conditions aside, the law tends to move from presumed serious injury to the absence of any efficiencies linked to a potential of harmful effects and the experience of harmful effects occurring in practically all cases.

The usual case will be one of checking whether a particular agreement falls within one of the known types of 'by object' coordination. The finding of a new type of 'by object' coordination will be rare and exceptional, as most types of coordination are well known and have already been assessed in the past. However, this does not exclude the possibility that a new type of 'by object' coordination can be found where new market developments enable new types of restrictions to be used. This was one of the open questions when the first cases dealing with so-called price parity clauses, used by some digital platforms, were handled, even though this has not led to the finding of new types of by object restrictions.

In order to facilitate the classification of conduct as a 'by object' restriction, attempts have been made to come up with a sort of list or categorisation.

According to Advocate-General Wathelet in *Toshiba*[46] the list of practices included in art.101(1) TFEU could be considered to meet the "intrinsically harmful" requirement. He distinguishes between conduct falling within this list and conduct falling outside the list. We submit that this distinction is not particularly helpful as the practices reflected in art.101(1) TFEU are so broadly formulated that they do not offer any particular guidance as to whether any given conduct reveals a sufficient degree of harm to competition. Suggesting that a more thorough analysis of the economic and legal context is only required for cases not covered by the art.101(1) TFEU list seems therefore not the right methodology.

Another attempt to produce a list of 'by object' restrictions was made in a Staff Working Document of DG Competition ("Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice" (SWD (2014) 198 final).[47] This document was issued following the *Expedia* judgment of the Court and the adoption of a new De Minimis Notice.[48] DG Competition announced that it would amend the Staff Working Document as new 'by object' restrictions would result from practice. It updated the document once in 2015, a year after its adoption. The document contains an overview of all types of restrictions regarded by DG Competition to be by object, differentiating between by object restrictions in agreements between competitors and in agreements between non-competitors. In addition, in the Staff Working Document a clear link is made between the hardcore restrictions to be found in block exemption regulations and other guidance documents produced by the Commission, and a 'by object' classification: "hardcore" restrictions are generally restrictions 'by object' when assessed in an individual case".[49] It is undeniable that in many instances the hardcore restrictions listed in a block exemption do appear also in the caselaw of the Court as obvious candidates for a 'by object' classification. As a result, the Staff Working Document is a helpful tool for practitioners to identify possible 'by object' restrictions. However, as will be discussed below, it goes too far in assuming a complete overlap between hardcore restrictions and 'by object' restrictions and the absence of such a complete overlap will need to be factored in when attempting to systematise the approach towards 'by object' classifications. We will return to this issue below.

10) Classification of conduct by the Court

While the Court has (for obvious reasons) not issued any list of conduct that may qualify as a 'by object' restriction, its recent judgments in *Superleague,ISUandRAFC* offer some helpful guidance. The Court seems to be making a distinction between two groups of agreements when assessing by object coordination.

The first category consists of forms of collusion which are particularly harmful to competition, primarily horizontal cartels leading to price fixing, limitations on production capacity or allocation of customers.[50] This category comes as no surprise. It includes the classic naked price fixing, output reducing and market sharing cartels. Since the Court refers to these practices as examples ("primarily" and "such as") it is not excluded that other practices belong to this category. One could for instance think of collective boycotts, i.e. agreements between competitors to exclude from the market one or more other competitors. It would seem to be a reasonable assumption that cartels, as defined in art.2(14) of the Private Damages Directive, constitute the type of coordination that lands in the first category. This is consistent with the presumption of harm that is linked in the Directive to cartel conduct.

The second category consists of forms of coordination which are not necessarily equally harmful or damaging for competition. The Court refers in its case law to certain other types of horizontal agreements and to vertical agreements.

Referring to less harmful horizontal agreements the Court in its recent Grand Chamber judgments used the following wording: "Without necessarily being equally harmful to competition, other types of conduct may also be considered, *in certain cases*, to have an anticompetitive object. That is the case, inter alia, of certain types of horizontal agreements other than cartels, such as those leading to competing undertakings being excluded from the market …., or even certain types of decisions by

[46] *Toshiba*, opinion of AG Wathelet, at paras 73 ff. and paras 87 ff.
[47] *https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/legislation-notices_en*.
[48] It is important that the main purpose of the Staff Working Document was to provide legal certainty with regard to the application of the De Minimis Notice. If the exclusions from the benefit of the Notice are too open-ended (on account of their possible classification as a 'by object' restriction), much of the purpose of the De Minimis Notice (to secure a degree of legal certainty) disappears. While the Notice is only binding on the Commission (and hence reflects its own enforcement policy), it made sense for DG Competition to create clarity following *Expedia* as to the policy it intends to adopt going forward with regard to the *de minimis* market share limits.
[49] Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice [2014] SWD (2014) 198 final, p.5.
[50] *Superleague* at [163]; *ISU* at [103]; *RAFC* at [90].

associations of undertakings aimed at coordinating the conduct of their members, in particular in terms of prices ….” (emphasis added).[51] For instance, in *Superleague* and *ISU*, the Court judged that, where sport associations exercise economic sports activities and are not only dominant but also and more importantly have de jure or de facto the power to determine which other undertakings are also authorised to engage in that sports activity and to determine the conditions in which that activity may be exercised, not having transparent, precise and non-discriminatory rules on prior approval, participation and sanctions is a by object restriction.[52]

As regards vertical agreements the Court previously stated in various cases: “However, the fact that an agreement is a vertical agreement does not exclude the possibility that it comprises a “restriction of competition by object”. While vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, they can also, in some cases, have a particularly significant restrictive potential”.[53] This statement seems to distinguish vertical coordination from the coordination included in the first category. In *Super Bock* (§42) the Court added that the referring court could not dispense with carrying out a proper contextual assessment (see below and also the next section) “on the ground that a vertical agreement fixing minimum resale prices constitutes on any hypothesis or is deemed to constitute a restriction by object”.

The Court’s judgments do not provide any explicit clarity about the relevance and background of these (sub)categories. It seems that they introduce some sort of gradation within the by object box. Some by object types of coordination are apparently more by object than other by object types of coordination. The language used by the Court (“in certain cases”, “in a given case” and “in some cases”) suggests that for the second category the individual contextual features may play a greater role in the assessment compared to the first category where emphasis seems to be placed mainly or even only on the “form[…] of [the] collusive conduct” or, in other words, the type of coordination as such. We come back to this below, when discussing the methodology to apply the by object test.

What seems clear, and in line with the experience supported by economic research discussed in section 8 above, is that the first category of more serious types of coordination concerns coordination where the parties involved do not integrate any activities or assets, in other words there is no collective economic activity, but only coordination of individual conduct on a particular parameter of competition, such as the price of their products. While integration of assets or activities may lead to efficiencies (including innovation), this is not or much less the case where the parties only coordinate individual conduct. For instance, while it is difficult to imagine any efficiencies that could result from a naked price fixing cartel, it is easy to imagine possible efficiencies resulting from competitors setting up a joint venture to collectively produce and sell new products. While a joint venture may also have anti-competitive effects, it is generally considered not appropriate to put joint venture agreements in the by object box in light of the possible efficiencies and given that such coordination may also be attractive for firms without collective market power. The opposite is true for naked price cartels: the absence of possible efficiencies combined with the intrinsic capacity to severely harm competition means that such cartels are normally only agreed by firms having collectively sufficient market power to benefit from the anti-competitive effects, which makes it appropriate to put these agreements in the by object box.

What is interesting is that, if we place (naked) cartels in the first category, the second ‘by object’ category concerns types of coordination where the parties, to a certain extent at least, do integrate activities or assets. The types of coordination in this category are therefore usually part of wider agreements, arranging a wider set of elements of cooperation and coordination between the parties. For instance, in the *Superleague* case FIFA and UEFA are the organisers, together with national football associations and clubs, of a set of interlinked competitions. The Court acknowledges that in that context it may be necessary and efficient to agree on rules on prior approval, participation and sanctions. It therefore only puts such rules in the ‘by object’ box where such sports associations have de facto the power to determine which other undertakings are also authorised to engage in that sports activity and the rules are not transparent, precise and non-discriminatory.

Something similar applies to vertical agreements. While certain types of restrictions may be considered to make the agreement fall in the by object box, these restrictions are in general part of a wider agreement, where the parties, at least, agree to supply and purchase the contract product(s) and quite often agree on more complex supply and distribution arrangements. The result is that, here too, it may be justified to have a closer look at the wider context before deciding on the by object classification of a particular agreement.

11) Methodology for the application of the ‘by object’ test

Building on earlier caselaw, the Court has summarized the methodology that needs to be applied to arrive at a ‘by object’ finding in its recent judgments as follows: “In

[51] *RAFC* at [91]; See also *Superleague* at [164]; and *ISU* at [104]; The reference in these judgments to *Generics UK* and *Lundbeck* is misguided. The latter two judgments are about payments by a pharma company to a generic company in return for a delay of the latter’s market entry. This was rightly considered by the Court to be an extreme form of ‘by object’ market sharing and, in that sense, not really about foreclosure of competitors. The reference to [41] of the *Verband der Sachversicherer* judgment is remarkable as it regards a recommendation to fix prices established by competing insurance companies within the framework of the association. One could have expected this example to also fall within the first category.

[52] *Superleague* at [135], [172]–[173] and [176]; *ISU* at [125]–[128] and [131]–[135], with references to in particular *Ordem dos Técnicos Oficiais de Contas* and to *MOTOE*.

[53] *Super Bock* at [33]; See also *Allianz Hungaria* at [43]; *Visma* at [61].

order to determine, in a given case, whether an agreement, decision by an association of undertakings or a concerted practice reveals, by its very nature, a sufficient degree of harm to competition that it may be considered as having as its object the prevention, restriction or distortion thereof, it is necessary to examine, first, the content of the agreement, decision or practice in question; second, the economic and legal context of which it forms a part; and, third, its objectives".[54] The order referred to here differs from that mentioned in *Cartes Bancaires* (§53) to which the Court refers explicitly and where the objectives are mentioned before the economic and legal context. Given the structure of the subsequent paragraphs in the more recent judgments, it seems to be a deliberate choice to address the economic and legal context prior to turning to the objectives.

When applying the methodology, it seems undisputed that an individual (i.e. a case-by-case) assessment is called for. Several judgments refer explicitly to the need for an assessment of the "individual case". [55] Advocate-General Kokott states in this respect that the 'by object' character of an agreement should not be established in the abstract but in the circumstances of the individual case. Advocate-General Wahl refers in in his Opinion in *Cartes Bancaires* (§40) to a detailed, individual examination of the agreement in question. All of this goes to say that the methodology outlined by the Court must be applied to the individual case (and therefore taking into account the specific characteristics of that case) in order to be able to arrive at a sound 'by object' finding. In addition, as indicated in the previous section, the individual assessment may have to be more extensive for the second category of by object coordination than for the first category.

Content of the agreement, decision or practice

It is a logical first step of any such individual assessment that the content of the agreement (or decision or practice) is analysed. In order to be able to assess whether the agreement falls into one of the types of coordination considered to be by object, it is indispensable to understand the details of the agreement at hand. In so doing, it may be taken that it is not only the formalized details of the agreement, but the complete expression of the joint intention of the parties that must be taken into consideration.[56] To illustrate this with a simple example, if parties have included in their distribution contract a clause entitling the supplier to issue price recommendations, but in reality it is the joint intention of the parties that these recommendations are imposed minimum prices, the content of the agreement consists of an agreement on resale price maintenance and not just one on price recommendations.

The content of the agreement is thus the inevitable starting point of the 'by object' assessment. Already in *LTM* (§417) the Court observed that one must be able to deduce a restriction 'by object' from some or all of the clauses of the agreement considered in themselves. As Advocate-General Wahl observed in his Opinion in *Cartes Bancaires* (§45), "recourse to the economic and legal context in identifying a restriction by object cannot lead to a classification to the detriment of the undertakings concerned in the case of an agreement whose terms do not appear to be harmful to competition". The importance of an analysis of the terms of the agreement has likewise been stressed by Advocate-General Wathelet in *Toshiba* (§45).

In many cases the identification of the content is rather self-evident so that it will not be difficult to assess whether the agreement may fall in one of the 'by object' types of coordination. In other cases a detailed assessment of the content will be needed to have a solid basis for proceeding with the remainder of the individual assessment.[57] In certain cases it may be necessary to check whether an agreement which by its form does not seem to fall within one of the 'by object' types of coordination is not in reality a case of disguised 'by object' coordination. This was the case in *Generics UK*, a case concerning a "pay for delay" agreement in the context of a patent dispute between a pharmaceutical company and producers of generics, which the Court rightly assessed as a form of market sharing, where the generic firm in return for "the pay" delayed its entry on the market.

In *Visma* (§64 onwards) the Court stressed the need for the referring court to determine the precise content of the agreement at issue. In that case it was the "priority" concept included in the relevant agreements that required a more detailed understanding to appreciate the content of the agreement correctly. As the case demonstrates, in the absence of such a detailed understanding of the agreement, it is not possible to proceed meaningfully with the 'by object' assessment.

In *Maxima Latvija* (§21) the Court analysed the content of the agreement and clause at issue to determine that it did not concern coordination between competitors but between non-competitors and that it was not among those for which it is accepted that they may be considered, by their very nature, to be harmful to the proper functioning of competition.

In short, any 'by object' analysis is dependent on a detailed understanding of the content of the individual agreement at hand. This is important to place the agreement in one of the types of coordination considered to be by object and to determine whether sufficiently reliable and robust experience is available that justifies the continuation of the 'by object' assessment based on the other factors identified by the Court.

[54] *Superleague* at [165]; *ISU* at [105]; *RAFC* at [92]; *Banco BPN* at [44].
[55] *Allianz Hungaria* at [38]; *Visma* at [58]; *Lundbeck* at [115]; *T-Mobile* at [31]; See also very explicitly: *T-Mobile*, opinion of AG Kokott at paras 38, 46, 48 and 49 and *Cartes Bancaires*, opinion of AG Wahl at para.40.
[56] *Super Bock* at [53].
[57] *Cartes Bancaires* at [65] and [69].

Economic and legal context

Once the content of the relevant practice has been determined, the subsequent step of the assessment requires consideration of the economic and legal context. In *Superleague***(§166),***ISU***(§106)** and *RAFC***(§93)** the Court clarified that, with regard to "the economic and legal context of which the conduct forms a part, it is necessary to take into consideration the nature of the products or services concerned, as well as the real conditions of the structure and functioning of the sectors or markets in question".

This second step of the assessment represents probably the more contentious aspect of the methodology. Here there is always the risk of blurring the distinction between 'by object' and 'by effect' . The more elements of the economic and legal context need to be considered, the more the by object assessment will overlap with the effects assessment. The Court, aware of this risk, following the sentence quoted above, continues in the same paragraphs with: "It is not, however, necessary to examine nor, a fortiori, to prove the effects of that conduct on competition, be they actual or potential, or negative or positive …"

What is clear therefore is that the economic and legal context concerns general characteristics of the sector and market in question, including EU and national sectoral regulation, as well as general characteristics of the transactions and the products being traded on that market, and whether or not the parties to the coordination are competitors on that market.

For instance, in *Generics UK* the Court looked, not surprisingly in a case concerning possible market sharing, at whether or not the parties to the agreement were actual or potential competitors, but also took into account some general aspects of the pharma sector, in particular the usual role of generics producers to further price competition.

In *Toshiba*, equally a case of market sharing, the parties contended not to be competitors on the European market so that their Gentlemen's Agreement was not capable of restricting competition.[58] The General Court referred to the fact that there were no insurmountable barriers to entry so that there was in any event potential competition between the parties and thus (naked) market sharing was involved. The Court endorsed the analysis of the General Court and stated that the finding of a restriction 'by object' was justified …. without a more detailed analysis of the relevant economic and legal context being necessary.[59]

In *Cartes Bancaires* the Court took into account the two-sidedness of the market in question and judged that the agreement between banks to set a multilateral interchange fee should not be looked at as a price fixing cartel, but as an element inherent to set up and operate a bank card system. The economic and legal context may indeed be important to assess whether the agreement at issue is in fact an integral part of a wider agreement to integrate assets and activities, and therefore should not be assessed on its own as a 'by object' restriction (see also above).

The legal and economic context should in any event be understood as taking into account general characteristics of the markets and the products concerned. The same would not necessarily seem to hold for the market position and market power of individual firms or the parties to an agreement. Establishing market shares and market power of individual firms, including defining the relevant market, are important steps in establishing the effects of a particular coordination on competition and consumers. Whereas, as referred to above, for a by object assessment it should not be necessary to examine nor, a fortiori, to prove, the effects of the investigated conduct.

However, in *Superleague* and *ISU* the Court took into account the individual position and power of the parties involved. In these judgments it not only found that FIFA, UEFA and ISU are dominant associations exercising economic sports activities, but also and more importantly for the 'by object' assessment, that those associations have de facto the power to determine which other undertakings are also authorised to engage in that sports activity and to determine the conditions in which that activity may be exercised. The Court states that where an undertaking is entrusted with "… the power to determine, de jure or even de facto, which other undertakings are also authorised to engage in that activity and to determine the conditions under which that activity may be exercised [this] gives rise to a conflict of interests and puts that undertaking at an obvious advantage over its competitors, by enabling it to deny them entry to the relevant market or to favour its own activity."[60] The Court does not make a distinction between whether the exclusive power is granted *de jure* by a Member State, or exercised de facto by the dominant undertaking: "… such a power may be conferred on a given undertaking only on condition that it is subject to restrictions, obligations and review, irrespective of whether that power originates from the grant, by a Member State, of exclusive or special rights …., from the autonomous behaviour of an undertaking in a dominant position …. or even from a decision by an association of undertakings …".[61] In that specific economic and legal context of a dominant undertaking having regulatory power over the market, not having transparent, objective, non-discriminatory and proportionate rules on prior approval, participation and sanctions was found to qualify as a 'by object' restriction.[62]

[58] *Toshiba* (C-373/14 P) EU:C:2016:26, at [31].
[59] *Toshiba* at [34].
[60] *ISU* at [125]; *Superleague* at [133].
[61] *ISU* at [126].
[62] *Superleague* at [135], [172]–[173] and [176] and *ISU* at [125]–[128] and [131]–[135], with references to in particular *Ordem dos Técnicos Oficiais de Contas* and *MOTOE*.

While it could be argued that the Court is merely extending here some of the consequences of the art.106 TFEU case law regarding legal monopolies to situations where an association or firm has the de facto power to regulate the market, the result is that in these cases a particular type of conduct (not having transparent, objective, non-discriminatory and proportionate rules on prior approval, participation and sanctions) was not considered by object in general, but only for a specified class of cases defined by the market position of the parties involved, namely where the parties have de jure or de facto the power to determine which other undertakings are also authorised to engage in that economic activity and to determine the conditions in which that activity may be exercised. In other words, market power played a crucial role in the by object assessment.

The *Superleague* and *ISU* cases raise the question whether more generally, beyond situations of de facto power to regulate the market, the market shares and market power of individual firms may play a role in the by object assessment. Most importantly from a practical business perspective, should (very) low market shares or other indications of the absence of market power and therewith absence of the capability to have anti-competitive effects on the market (see section 8), prevent classifying a particular conduct as by object? Phrased differently, does not having to take into account the actual or potential effects include not having to take into account the capability to have such effects due to the position of the parties on the market, or is assessing the capability to have such effects part of the by object assessment?[63]

The distinction between the two categories of by object coordination (see section 10) seems relevant here. For instance, where there is a price cartel between corn flakes producers it would not be helpful for the deterrent effect and also not an efficient use of the authority's or court's resources, and thus of public money, to have to investigate whether the correct market definition is the market for corn flakes, where the cartel members' market share may be 85%; the market for breakfast cereals, where the combined market share could be 18%; or the market for ready-to-eat breakfasts where it could be only 3%. Indeed, such investigations would be unproductive and hinder effective enforcement, given that experience has taught us that in the case of price cartels negative effects normally prevail.[64]

The case law supports the position that, once the content of an agreement places it in the first category of by object coordination, the analysis of the economic and legal context may be kept to a minimum to arrive at a 'by object' finding. In *Toshiba* (§28–29) the Court held, with reference to earlier caselaw, that "agreements which aim to share markets have, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by art.101(1) TFEU, and that such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned. In respect of such agreements, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object". Similar treatment is given to market sharing in *Allianz Hungaria***(§45)**, *RAFC***(§95)** and *EDP* (§100).

In his Opinion in *EDP*, Advocate-General Rantos extends this approach explicitly to horizontal price fixing and such extension finds support in cases such as *Dole* (§115), *Cartes Bancaires* (§51) and *Lietuvos* (§94). For (naked) output limitations this proposition is supported by the Court's judgment in *BIDS*.[65] While the firms involved in the case presented compelling economic arguments for the output reduction based on overcapacity in the Irish beef industry, the role played by imports and, more generally, the deplorable state of the sector, they were brushed aside in the context of the 'by object' assessment and redirected towards the art.101(3) TFEU assessment.[66]

While this would seem a reasonable position for the first category, described above, of forms of coordination which are particularly harmful to competition, the question can be raised whether the same should apply to the second category, of forms of coordination which are less harmful or damaging for competition.

In this respect it would be good for the Court to clarify in future case law, in particular for forms of cooperation of the second category, whether the finding in an individual case that the parties in question have no capability to bring about anti-competitive effects in view of their weak position on the market, may disqualify their cooperation from the by object box. Conversely, as confirmed by *Superleague* and *ISU*, it may well be that the existence of market power or a certain market position is of critical importance, at least for certain types of by object coordination, to arrive at a well-founded conclusion that serious harm to competition may reasonably be expected. In a sense we are circling back to the level of experience (founded in economic research) that is required to justify the position that particular conduct presents a sufficient degree of harm to competition. In *Superleague*, *ISU* and *RAFC* the Court concluded that experience

[63] In *Banco BPN*, opinion of AG Rantos, at [48], Advocate General Rantos suggests such a capability test (without having to examine the effects) as part of the 'by object' assessment. He refers to this as a "basic reality check" (at para.43).
[64] Even if by accident firms without market power would form a cartel, which because of the lack of market power cannot be expected to have significant negative effects, there is no harm to society if that cartel is prohibited as a result of the 'by object' assessment. Generally, cartels do not generate efficiencies of which society would be deprived by the prohibition.
[65] *Competition Authority v Beef Industry Development Society Ltd* (C-209/07) EU:C:2008:643 (hereinafter "*BIDS*"), at [16] and [21].
[66] *BIDS* at [21] and [39].

justified a by object classification only for cases where the sports associations have the power to regulate and determine access to the market.[67]

Similar questions apply in the context of vertical agreements. As already referred to in section 10, there is constant case law that the vertical nature of an agreement does not exclude it per se from the 'by object' box, but that in view of the less restrictive nature of vertical agreements they may fall into it only "in some cases": "However, the fact that an agreement is a vertical agreement does not exclude the possibility that it comprises a 'restriction of competition by object'. While vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, they can also, in some cases, have a particularly significant restrictive potential."[68] It would be helpful for the Court to clarify also for vertical agreements under which conditions the finding in an individual case that the parties in question have no capability to bring about anti-competitive effects in view of their weak position on the market or their lack of market power, might disqualify their cooperation from the by object box.[69]

While the aforesaid elements essentially concern the economic context of the agreement, the caselaw makes it clear that also the legal context may play a role. There are however not many examples where the legal context made a difference. Examples include the rather odd reference in *BG EOOD***(§34)** to the fact that national legislation may turn a horizontal pricing agreement into a by effects restriction, and the remarkable role attributed to national legislation in *Allianz Hungaria*. Presumably the most important "legal" issue is the link between 'by object' and hardcore restrictions. Given the debate on this issue to which *Super Bock* has given rise, we will return to this point separately.

A similar question about the necessary contextual analysis concerns whether alleged pro-competitive effects can play a role in the 'by object' assessment. In her opinion in *Generics UK***(§149 and 158)** Advocate-General Kokott stated that the assessment of such benefits may be relevant as they constitute contextual elements that must be considered. The Court followed this approach where it states that the "… pro-competitive effects must be sufficiently significant, so that they justify a reasonable doubt as to whether the […] agreement concerned caused a sufficient degree of harm to competition and, therefore, as to its anticompetitive object."[70] The Court added that this presupposes that "…the pro-competitive effects are not only demonstrated and relevant, but also specifically related to the agreement concerned".[71] This position was confirmed in *Lundbeck* (§136), *Super Bock* (§36) and *EDP* (§104). Hence, according to this caselaw pro-competitive effects may play a role in the 'by object' analysis as part of the economic and legal context, provided that they meet the above-referenced *Generics UK* test.

Dropping the words "pro-competitive effects" in the midst of a 'by object' analysis may create confusion and calls for an explanation as to how such an effects-based argument squares with the Court having stated often that the weighing of anti- and pro-competitive effects can only take place in the assessment under art.101(3) and not under art.101(1). The Court addressed this issue explicitly in *Generics UK***(§104)** and it had the occasion to clarify the position again in *HSBC***(§137)** where it had to deal with the position taken by the General Court that pro-competitive effects can only enter into the equation in the context of art.101(3) TFEU. The Court proved the General Court wrong and, relying on the same language as mentioned in *Generics UK,* stated as follows in *HSBC***(§140)**: "Since taking account of those procompetitive effects is intended not to undermine characterisation as 'restriction of competition' within the meaning of art.101(1) TFEU, but merely to appreciate the objective seriousness of the practice concerned and, consequently, to determine the means of proving it, that is in no way in conflict with the Court's settled caselaw that EU competition law does not recognise a 'rule of reason', by virtue of which there should be undertaken a weighing of the pro and anticompetitive effects of an agreement when it is to be characterised as a 'restriction of competition' under art.101(1) TFEU."[72]

In *Superleague,ISU* and *RAFC,* the three recent Grand Chamber judgments, the Court does not refer to pro-competitive effects as part of the 'by object' analysis. Instead, as referred to in the beginning of this sub-section, the Court stated: "It is not, however, necessary to examine nor, a fortiori, to prove the effects of that conduct on competition, be they actual or potential, or negative or positive …" The Court refers however in respect of this quote both to earlier cases in which the same statement is included and to cases mentioning the ability of the parties to invoke pro-competitive effects (provided certain conditions are met) to undermine a potential by object finding. Hence, the recent Grand Chamber judgments do not seem to invalidate the earlier caselaw and certainly

[67] It is undeniable that the injection of additional features (such as market power) in the assessment renders the exercise more complex and may render the outcome less predictable. *Superleague* and *ISU* underscore this proposition. Where the Court concluded that the admission rules of the sports associations considering their market position amounted to a restriction 'by object', Advocate-General Rantos arrived in his Opinion (para. 78) at the opposite conclusion. He assimilated the admission rules to non-competition/exclusivity clauses of which he stated that they do not belong to the types of agreements which, by their very nature and in the light of experience gained, belonged in the 'by object' box (paras 64–65). He stated furthermore that the mere existence of a pre-approval scheme, i.e. that access to the relevant market could be requested, should be enough to raise questions on the sufficiently harmful nature of the rules so that, in his opinion, an analysis of the anticompetitive effects was called for (para.66). Both the doubt on the part of Advocate-General Rantos and the nature of the assessment conducted by the Court in these recent cases underscore that the application of the 'by object' methodology with regard to the second category of horizontal practices may be less straightforward than with regard to the first category.
[68] *Super Bock* at [33]; *Visma* at [61]; *Maxima Latvija* at [21]; *Allianz Hungaria* at [43].
[69] See in this respect, Vertical Guidelines at [11], where a link is made between market power and the use of vertical restraints to pursue anticompetitive purposes that ultimately harm consumers.
[70] *Generics UK* at [107];*Super Bock* at [36].
[71] *Generics UK* at [105].
[72] *HSBC* at [140].

do not contradict explicitly what is stated in the earlier judgments, such as *Generics UK* and *HSBC* but further clarification as to how pro-competitive effects may influence the by object assessment would be helpful.

If the earlier caselaw would be endorsed in post-Superleague judgments, the alleged pro-competitive effects only make a difference to the by object analysis if they create reasonable doubt that the agreement harms competition to a sufficient degree. This marks an important difference with the weighing of effects that is typically done in an art.101(3) TFEU context. Furthermore, only pro-competitive effects may be invoked that are demonstrated and relevant (which seems self-evident and places the burden in this respect on the parties).

Finally, the pro-competitive effects must be specifically related to the agreement concerned. This condition was put forward in the specific context of the *Generics UK* case,[73] but its exact legal content remained unclear and still raises questions of interpretation. A case in point would be where the supposedly 'by object' agreement being investigated forms part of a broader cooperation agreement. The condition seems to require that, in order to be able to cast doubt on the by object classification of the agreement, it must be possible to deduce that the pro-competitive effects result from the agreement and not from the wider cooperation. This appears to be confirmed in *EDP*,[74] where a link is made between the procompetitive effects invoked by the parties and the specific clause of which the 'by object' character is assessed and not the agreement in general. Hence, this condition seems to aim at some form of reduction of the scope of the pro-competitive effects that can be relied upon, but its exact parameters are still somewhat unclear.

Objectives

The Court lists as a final assessment factor the objective aims which the conduct seeks to achieve from a competition standpoint.[75] Such objective aims should not be confused with the subjective intentions of the parties.

The caselaw seems to indicate that the role that may be attributed to the objectives underlying certain conduct should not be exaggerated.[76] For instance, in both *Cartes Bancaires* (§70) and *Lietuvos* (§101-102) the legitimate objectives pursued by the parties were deemed quite readily insufficient to alter a 'by object' finding. It seems that, once the stage has been reached that based on the content of the agreement and its economic and legal context a 'by object' finding is on the table, the evaluation of the legitimate objectives will generally not make much of a difference in practice.

Finally, the role played by the subjective intentions of the parties merits some consideration. It is not a necessary factor for the assessment, but nothing prohibits a competition authority or court from taking it into account.[77] The fact that the parties did not intend to harm competition is however immaterial in the context of a 'by object' analysis.[78] Conversely, the intentions of the parties cannot in themselves be sufficient to establish the existence of an anti-competitive object.[79] This observation by the Court seems to build on the following statement by Advocate-General Wahl in his Opinion (§109) in *Cartes Bancaires*: "This possibility of taking into account the intention expressed by the parties is, it would seem, conceivable only as a subsidiary consideration or on a supplementary basis and cannot replace a detailed examination of the terms and the objectives of the conduct in question. Just as the parties to an agreement cannot rely on the absence of an intention to breach the prohibition laid down in art.[101(1) TFEU], it cannot be sufficient to show the existence of such an intention in order to conclude that the measures taken by them entail an anticompetitive object."[80]

Duty to motivate

Building on *Generics UK* (§69*)* the Court adds in *Superleague* (§168*),ISU(*§108*) andRAFC(*§98*)* fresh language to the 'by object' test, taking the form of an enhanced duty to motivate: "[T]he taking into consideration of all of the aspects referred to in the three preceding paragraphs [i.e. content, economic and legal context and objectives] must, at any rate, show the precise reasons why the conduct in question reveals a sufficient degree of harm to competition such as to justify a finding that it has as its object the prevention, restriction or distortion of competition".

This new and explicit reference to the need to advance precise reasons goes hand in hand with the need to conduct an individual (case-by-case) assessment of an agreement before it can be qualified as a 'by object' restriction and to apply a restrictive interpretation of the 'by object' concept. This new addition could be read as implicit criticism that, in certain past cases, courts and authorities may have jumped too quickly to a 'by object' finding without necessarily having gone through all steps nor having explained in sufficient detail on what basis the conduct met the 'by object' test. The requirement imposed by the Court sits well with the allocation of the burden of proof that is reflected in art.2 of Regulation 1/2003 and the need to satisfy the requisite standard of proof before such burden can be reversed.

[73] *Generics UK* at [105] ff.; *Generics UK*, opinion of AG Kokott at paras 144 ff.
[74] *EDP* at [105]; *EDP* (C-331/21) EU:C:2023:153, opinion of AG Rantos, para.119.
[75] *Superleague* at [167]; *ISU* at [107]; *RAFC* at [94].
[76] *Superleague* at [167]; *ISU* at [107]; *RAFC* at [94]; *Cartes Bancaires*, opinion of AG Wahl at para.122.
[77] *Cartes Bancaires* at [54]; *Dole* at [118]; *Visma* at [69]; *Allianz Hungaria* at [37].
[78] *Banco BPN* at [49].
[79] *Cartes Bancaires* at [88].
[80] *Cartes Bancaires*, opinion of AG Wahl at para.109.

12) By object and hardcore restrictions

In its Vertical Guidelines[81] (similarly to the 2014 Staff Working Document) the Commission creates a rather close link between hardcore restrictions and 'by object' restrictions. Hardcore restrictions are labelled "serious restrictions of competition which should in most cases be prohibited because of the harm that they cause to consumers" (VGL§177) and are "generally restrictions of competition by object within the meaning of art.101(1) TFEU" (VGL§179). The Vertical Guidelines (§179) underscore however that an individual assessment is needed to arrive at a 'by object' finding and that hardcore restrictions are a category of restrictions for which it is presumed that they generally result in a net harm to competition.

In *Super Bock(§38)* the Court stated that the characterisation of certain conduct as a hardcore restriction must be taken into account as part of the legal context of the relevant agreement. Such a characterisation does however not do away with the need to conduct the 'by object' assessment on a case-by-case basis in accordance with the methodology set forth by the Court (§39). This is the logical consequence of the fact that both concepts are not conceptually interchangeable and do not necessarily overlap (§41). On account of *Super Bock* the link between the concepts is in some cases less straightforward than suggested in the Vertical Guidelines.

Touching briefly upon the conceptual differences, it is clear that hardcore restrictions represent a formalistic and exhaustive list of practices that rule out the applicability of a given block exemption. Factors such as the economic or legal context, or the objectives pursued do not play a role in the classification as a hardcore restriction. It represents an in-or-out concept that must be applied in a formalistic manner. Given the policy objective underpinning a block exemption of providing legal certainty, this is a perfectly logical and desirable approach. Furthermore, when fixing the list of hardcore restrictions, the Commission must take into account that the block exemption applies to firms with insignificant market shares all the way up to firms holding market shares of 30% (and possibly even more, given the transitional rules). Additionally, the block exemption applies irrespective of the nature of the products or services, or the characteristics of the market. Hence, the hardcore list is established without in any manner taking into consideration the specifics of the case at hand.

The opposite is true for 'by object' restrictions. The classification as such a restriction is dependent on a case-by-case assessment where it is duly established that the agreement at hand presents a sufficient degree of harm to competition, taking into account the nature of its terms, the economic and legal context of which it forms part and the objectives that it seeks to attain.

Some additional nuance may be appropriate. Many of the hardcore restrictions (particularly those listed in the horizontal block exemption regulations)[82] are practices that fall as a rule within the first category of 'by object' restrictions identified by the Court (see section 10). As discussed in the previous section, the chances of escaping the 'by object' qualification once it is established based on its content that the agreement falls within this first category are very low. Hence, for these practices there will logically be a high degree of overlap between the qualification as a 'by object' restriction and as a hardcore restriction.

The position is different for the vertical block exemption regulations. On account of the vertical nature of the practices, we land automatically in what we labelled the second category identified by the Court. Here the jump from a hardcore restriction towards a 'by object' restriction is less self-evident. This is underscored by the attitude of the Court in *Super Bock* towards RPM, where the Court insisted (notwithstanding the high market share of Super Bock) on a standard full blown 'by object' assessment.

The need for such an individual assessment (in which the role as a hardcore restriction may serve at best as an element of the legal context) applies all the more for most of the other vertical hardcore restrictions. Take the example of the hardcore treatment of active sales restrictions, unless they are aimed at territories or customers reserved by the supplier for itself or granted on an exclusive basis to a maximum of five exclusive distributors. Given the formal approach on which a block exemption is based, it cannot be denied that such active sales restrictions are on the hardcore list if the supplier has granted the protected territory or customer group to more than five (for instance six or seven) exclusive distributors. It is inconceivable that, absent consideration of the specific circumstances of the case, the appointment of a sixth or seventh distributor can turn an automatically exempted set-up into a restriction 'by object'.

13) Finding of a by effect restriction

In case the outcome of the 'by object' assessment is negative, it will be necessary to turn to a 'by effect' analysis. In *Superleague* (§169) and *ISU* (§109) the Court makes it clear that "[t]he concept of conduct having an anticompetitive 'effect', for its part, comprises any conduct which cannot be regarded as having an anticompetitive 'object', provided that it is demonstrated that that conduct has as its actual or potential effect the prevention, restriction or distortion of competition, which must be appreciable." In other words, all agreements not being a 'by object' restriction of competition can in principle be a restriction 'by effect' , but only if the competition authority or complainant in court is able to

[81] Guidelines on vertical restraints [2022] OJ C 248/1 (hereinafter "VGL").
[82] Commission Regulation 2023/1066 on the application of art.101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2023] OJ L 143/9; Commission Regulation 2023/1067 on the application of art.101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2023] OJ L 143/20.

show that the agreement can be expected to have or have had actual or potential negative effects and that these effects are or were appreciable.

The Court makes it clear that an effects analysis requires to look at all relevant facts and aspects, and not just the three aspects mentioned for 'by object' purposes.[83] In the words of the Court: "That assessment itself entails that all relevant facts must be taken into account." In addition, as part of the effects analysis, the Court also requires an assessment of the relevant counterfactual: "To that end, it is necessary to assess the way the competition would operate within the actual context in which it would take place in the absence of the agreement …. ."[84]

This clarifies the difference between 'by object' and 'by effect' , which is helpful, as the Court in some past cases mentioned partly the same aspects to be looked at for both analyses which may have caused some confusion. For instance, in *Visma*, after having listed in §72 the three aspects mentioned above for the 'by object' assessment, the Court in §82 stated: "If such an agreement does not constitute a restriction of competition 'by object' within the meaning of art.101(1) TFEU, the national court must examine whether, in the light of all the relevant circumstances of the case in the main proceedings, namely, inter alia, the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, and the actual conditions of the functioning and structure of the market in question, that agreement may be regarded as restricting competition to a sufficiently appreciable degree due to its actual or potential effects." However, the similarity of the wording may not be misinterpreted as both the nature and the extent of the assessment to be made in a 'by effect' context differ from what needs to be considered in a 'by object' context.

14) Objective justification and 'by object' restrictions

From the case law and the enforcement practice we know that there are two forms of objective justification. The first is the so-called necessity test (including the Wouters route)[85], as a result of which agreements can be considered to fall outside art.101(1) TFEU. The second is the individual exemption possibility under art.101(3).

To qualify for the Wouters route, the examination of the economic and legal context must "…lead to a finding, first, that the agreement is justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature; second, that the specific means used to pursue those objectives are genuinely necessary for that purpose; and, third, that, even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition." The Court adds that this route is open in particular for agreements "… taking the form of rules adopted by an association such as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives and, more broadly, to regulate the exercise of a professional activity if the association concerned demonstrates that the aforementioned conditions are satisfied".[86]

However, in *Superleague* and *ISU* the Court subsequently "clarified" its previous case law and made clear that the *Wouters* route is not open to 'by object' restrictions, by stating that the Wouters case-law "… does not apply in situations involving conduct which … by its very nature infringes art.102 TFEU, as is, moreover, already implicitly but necessarily apparent from the Court's case-law" (referring to MOTOE).[87] The Court then continues in the next paragraph that "… arts 101 and 102 TFEU must be interpreted consistently" and that therefore the case law in question does also not apply in situations involving restrictions by object under art.101(1) TFEU. To conclude: "Thus, it is only if, following an examination of the conduct at issue in a given case, that conduct proves not to have as its object the prevention, restriction or distortion of competition, that it must then be determined whether it may come within the scope of that case-law."

The fact that the *Wouters* route is not/not anymore available for 'by object' restrictions means that restrictions such as an online sales ban cannot be justified with general interest reasons such as safety and security, unless such elements are included within the methodology governing the 'by object' test. Such an argument could be built on showing that, in view of the nature of the product, the object of the agreement is not to restrict competition. In this respect, the explicit reference by the Court to the fact that the nature of the products and the services is part of the economic and legal context is of considerable importance. For instance, while according to *Pierre Fabre*[88] an online sales ban is a by object restriction as its objective aim is to restrict a distributor in reaching more customers, in particular customers located farther away, and therewith to restrict where and to whom the distributor can sell, such an online ban in the case of the distribution of fire arms can possibly be defended by arguing that in that case, given the nature of the product, not only the subjective intention but also the objective aim of such a ban may be to help ensure the

[83] *Superleague* at [170]; *ISU* at [110].
[84] *Superleague* at [170]; *ISU* at [110].
[85] For a description of caselaw addressing the necessity test outside a regulatory context, see F. Wijckmans and F. Tuytschaever, *Vertical Agreements in EU Competition Law*, 3rd edn (Oxford University Press, 2018), paras 3.236–3.240.
[86] *Superleague* at [183], referring to *Wouters,Meca-Medina* and *Ordem dos Técnicos Oficiais de Contas*.
[87] *Superleague* at [185].
[88] *Pierre Fabre Dermo-Cosmétique SAS v Président de l"Autorité de la concurrence* (C-439/09) EU:C:2011:649 (hereinafter "*Pierre Fabre*"), at [47]; Given the evolution of the 'by object' caselaw, one may wonder whether a more elaborate discussion and assessment of the individual case would now not be required before arriving at a 'by object' classification in such a vertical case.

safe use of weapons. However, as of the moment that a 'by object' finding is made (notwithstanding these general interest reasons), the Wouters route is blocked.[89]

As a result, the only "way out" in case of 'by object' restrictions is an exemption under art.101(3): "As regards conduct having as its object the prevention, restriction or distortion of competition, it is thus only if art.101(3) TFEU applies and all of the conditions provided for in that provision are observed that it may be granted the benefit of an exemption from the prohibition laid down in art.101(1)*"*.[90] Such an exemption may be available both on the basis of a block exemption[91] or an individual assessment of the conditions stated in art.101(3) TFEU.

In addition to the issue of appreciability addressed in above, the elimination of the Wouters doctrine underscores that the characterisation of a given practice as a 'by object' infringement has serious legal implications due to the immediate reversal of the burden of proof. This can only reinforce the need to apply a restrictive interpretation of the concept and to rely demonstrably on robust and relevant economic experience before placing a practice in the 'by object' box.

15) Parallelism of the 'by object' concept under arts 101 and 102

After *Superleague* and *ISU* there is a high degree if not full symmetry across the 'by object' approach under arts 101 and 102. The judgments make it clear that also under art.102, with regard to unilateral conduct, the distinction between 'by object' and 'by effect' applies and that also under art.102 the 'by object' category, whilst not an exception, should be defined in a strict way. The Court refers to conduct that infringes art.102 by its very existence and by its very nature.[92] The Court indicates that conduct that is abusive by its very existence/nature must also be 'by object', if only because arts 101 and 102 TFEU can apply simultaneously to the same conduct (as was the case in *Superleague*) and the two articles must (therefore) be interpreted consistently.[93] It is in this light not surprising that the Court seems to suggest that also under art.102 the 'by object' finding must be done by looking into the same three aspects of content, context and objectives of the conduct that are well known since long for 'by object' findings under art.101.[94] Finally, as we saw in the previous section, the Court also made clear that, for conduct found to be 'by object', the Wouters route is not open and that unilateral conduct and coordination found to be 'by object' under respectively art.102 and 101 TFEU, can only escape from the prohibition of art.102 respectively 101 if all the conditions for exemption are fulfilled, and these conditions are completely the same under both articles since *Post Denmark I*.[95]

Superleague and *ISU* may therefore be taken to signify another step of the Court in bringing coherence between arts 101 and 102 TFEU, following in that sense the judgments in *Post Denmark I* and *Intel*, not by accident also two Grand Chamber judgments.

16) Conclusion

So, where do we land having considered the most recent caselaw of the Court? Several issues have been (re)confirmed and/or ironed out.

First, a number of overarching themes are firmly established in the caselaw:

- "By object" and 'by effect' are alternative requirements for the application of arts 101 and 102 TFEU;
- The 'by object' and 'by effect' tests are different and the 'by object' test does not require any analysis of actual or potential effects.
- Lack of proof of actual or potential effects does not constitute a valid defence against a (proper) 'by object' finding.
- The 'by object' concept calls for a strict or restrictive interpretation given the important consequences of a 'by object' finding.
- A 'by object' finding does not require proof of a direct link between the relevant conduct and consumer prices.
- A 'by object' finding must be based on reliable and robust experience supported by economic research. Such experience may stem from precedents.
- Since a 'by object' finding necessarily implies that the conduct reveals by its very nature a sufficient degree of harm to competition, no additional appreciability check is required once such a finding has been made.
- Once a "by object finding" has been made, the Wouters route (necessity-based argumentation) is no longer available and the relevant arguments must be advanced in the context of the efficiency defence available under art.102 or art.101(3) TFEU.

[89] The Wouters route may still be open for restrictions listed as hardcore restrictions in a block exemption regulation. As explained in above, hardcore restrictions are not necessarily 'by object' restrictions and therefore do not always fall within the prohibition of art.101(1) TFEU, as confirmed in para.180 of the Vertical Guidelines.
[90] *Superleague* at [187]; *ISU* at [114]; *RAFC* at [116].
[91] This is a consequence of the facts that only hardcore restrictions (and hence not all possible restrictions 'by object') prevent the application of a block exemption and that, unless a restriction is hardcore or excluded, the block exemption regulations provide a safe harbor to any other type of restriction (provided that the other conditions for the applicability of the block exemption, such as the market share limits, are met).
[92] Respectively *ISU* at [127] and *Superleague* at [185]; For instance, in *Post Denmark I* and *Intel* and *Servizio Elettrico Nazionale v Autorita Garante della Concorrenza e del Mercato* (C-377/20) EU:C:2022:379 (hereinafter ("*SEN*") the Court has already made clear that exclusive purchasing and loyalty rebates are not falling into the 'by object' category.
[93] *ISU* at [128]; *Superleague* at [186].
[94] *ISU* at [130].
[95] *Post Denmark I* at [41].

- There is overall consistency between the approach for finding 'by object' conduct under arts 101 and 102 TFEU.

Second, the caselaw confirms the following in respect of the assessment of conduct in a specific case as a possible restriction of competition 'by object':

- The 'by object' concept applies only to certain types of coordination. This implies that the starting point of the assessment is whether the relevant conduct fits within one of the types of coordination typically attracting a 'by object' finding or, more exceptionally, whether it falls within a novel type of coordination which, based on economic experience, is newly added as a by object type of coordination.
- A 'by object' assessment should be based on the content of the practice (so that it can be linked to a relevant 'by object' type of coordination), its economic and legal context and its objectives.
- The extent to which the contextual elements (economic and legal context, and the objectives pursued) should play a role differs depending on the category of 'by object' conduct in which the conduct must be placed, distinguishing between on the one hand naked cartels (which we labelled the first category) and on the other hand other horizontal practices and vertical practices (which we labelled the second category). In case of naked cartels the analysis of the economic and legal context may be kept to a minimum. For the second category, the individual case must be assessed in more detail and more importance must be attached to the contextual elements.

The requirement that a 'by object' finding must be based on reliable and robust experience would seem to imply that evidence, that in a number of cases firms without market power are using a particular type of cooperation or that there are no likely or actual negative effects or that significant efficiencies are created through a particular type of cooperation, should lead an authority to reconsider the classification of that type of cooperation as a by object type of cooperation.

On some points it is (still) less clear where we have landed. It is here that future case law may further strengthen legal certainty for firms and the enforcement of arts 101 and 102 TFEU, particularly as regards practices falling within the second category. The areas where such (additional) clarification would be welcomed are the role of the market position and market power of the parties in the assessment of the economic context and the way in which pro-competitive effects demonstrated by the parties should or may be factored into the analysis.

Finally, the fact that authorities and courts have a particular duty of care when conducting 'by object' assessments is underscored by the explicit warning in *Superleague,ISUandRAFC* that the taking into consideration of the content, the context and the objectives related to the conduct "… must, at any rate, show the precise reasons why the conduct in question reveals a sufficient degree of harm to competition such as to justify a finding that it has as its object the prevention, restriction or distortion of competition". The underlying message seems to be that, as competition is in the end all about effects, jumping to a 'by object' classification requires the utmost of care.