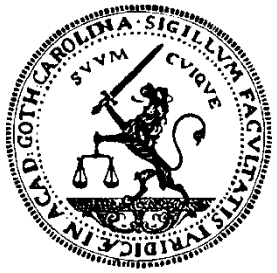

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Restriction by Object

A Restriction Based Purely on Experience or Also on Effects?

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Contents

Summary

Article 101 TFEU prohibits agreements between undertakings that restrict competition either by object or effect. Restricting competition by object or effect are alternative conditions. Problematically, both the concept of a restriction by object and its relation to restrictions by effect are obscure. The purpose of this thesis is to elucidate the applicability of restrictions by object, in means of answering whether an agreement incapable of having restrictive effects can be restrictive by object. A legal doctrinal method and a textual, contextual, and teleological interpretation are adopted.

From examining the requirements for finding a restriction by object, this thesis discerns that only one requirement exists. Namely, a disputed agreement must, based on experience, be subsumed under a by object *type* of collusion. By object types of collusion arise from experience, by the clustering of anti-competitive collusions based on common traits (common denominators). Agreements meeting the common denominators of a by object type of collusion can be subsumed under that type unless featuring contextual anomalies that adduce reasonable doubt to the experience that agreements featuring the common denominators entail anti-competitive effects. The requirement includes no assessment of actual or potential effects in casu.

For the assessment of whether an agreement is restrictive by object, the responsible competition authority needs to consider and prove only the circumstances necessary for meeting the common denominators of a by object type of collusion. Subsequently, it is for the defendant to invoke arguments adducing reasonable doubt as to reliance on experience in casu.

The thesis concludes that an agreement incapable of restricting competition can in principle be restrictive by object. However, while no assessment of effects in casu is relevant, such an agreement would only unlikely be classified as a by object type of collusion, to begin with.

Sammanfattning

Artikel 101 FEUF förbjuder avtal mellan företag som har till antingen syfte eller resultat att begränsa konkurrens. Syftes- och resultatöverträdelser är alternativa förbudsförutsättningar. Emellertid råder oklarhet kring konceptet syftesöverträdelse samt dess relation till resultatöverträdelser. Denna uppsats ämnar belysa tillämpligheten av konceptet syftesöverträdelse, för att besvara huruvida ett avtal som är inkapabelt att ha konkurrensbegränsande effekt kan utgöra en syftesöverträdelse. För ändamålet tillämpas en rättsdogmatisk metod samt en texttrogen, kontexttrogen och teleologisk lagtolkning.

Genom att undersöka förutsättningarna för att tillämpa syftesöverträdelser, finner denna uppsats att enbart ett rekvisit ställs upp. Ett omtvistat avtal måste, baserat på erfarenhet, utgöra en syftesbegränsande sammarbetstyp. Syftesbegränsande samarbetstyper skapas utifrån erfarenhet, genom att flertalet konkurrensbegränsande samarbeten sammanfogas utifrån deras gemensamma drag. Ett avtal som uppvisar de gemensamma dragen för en syftesbegränsande sammarbetstyp tillhör den typen, med mindre att avtalet uppvisar kontextuella atypier som tillför rimligt tvivel till erfarenheten att avtal med de gemensamma dragen orsakar konkurrensbegränsande effekter. Kravet förutsätter ingen analys av faktiska eller potentiella effekter in casu.

Vid bedömning av om ett avtal utgör en syftesöverträdelse, behöver den berörda myndigheten beakta och bevisa enbart de omständigheter som motsvarar de gemensamma dragen för en syftesbegränsande sammarbetstyp. Därefter åligger det svaranden att anföra argument som bringar rimligt tvivel till förlitan på erfarenhet in casu.

Slutsatsen är att ett avtal som är inkapabelt att ha konkurrensbegränsande effekter i princip kan utgöra en syftesöverträdelse. Även om effekter in casu inte är relevanta, är det emellertid osannolikt att ett sådant avtal skulle klassificeras som en syftesbegränsande sammarbetstyp, till att börja med.

Abbreviations

AG	Advocate General.
Article 101(3) Guidelines	Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97.
By Object Guidance	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.
CJ	Court of Justice.
CJEU	Court of Justice of the European Union.
CLJ	Cambridge Law Journal.
CML Rev	Common Market Law Review.
Comp Law	Competition Law Journal.
Damages Directive	Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for

	infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.
De Minimis Notice	Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/1.
ECN+ Directive	Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.
FEUF	The Swedish counterpart to the abbreviation TFEU.
GC	General Court.
Horizontal Co-operation Guidelines	Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1.

MJECL	Maastricht Journal of European and Comparative Law.
OJ C	Official Journal of the European Union, C series.
OJ L	Official Journal of the European Union, L series.
Reg. 1/2003	Council regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
Specialisation Block Exemption	Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.
SSRN	Social Science Research Network.
SWD	Staff Working Document.
Technology Transfer Guidelines	Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C 89/3.

TEU	Treaty on European Union.
TFEU	Treaty on the Functioning of the European Union.
Vertical Guidelines	Guidelines on Vertical Restraints [2010] OJ C 130/1.

1 Introduction

1.1 Background

Article 101 TFEU establishes a prohibition of agreements between undertakings[1] that have as their object or effect the restriction of competition on the internal market.[2] If a restriction by object or effect is established, the disputed agreement is void,[3] unless the defendant[4] proves that the agreement is justified according to Article 101(3) TFEU.[5]

Restrictions by object have been described as "the most serious violations"[6] of EU competition law. Still, it appears to exist confusion in the legal doctrine as to when an agreement is restrictive by object. Especially, confusion concerns the delimitation between restrictions by object and effect, which several doctrinal authors consider being blurred.[7] Simultaneously, the CJ appears satisfied with how things currently stand, by continuously resorting to practically standardised expressions on the definition of restrictions by object.[8]

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[1] In this thesis, the concept of agreements between undertakings includes also concerted practices and decisions by associations of undertakings.
[2] See Article 101(1) TFEU.
[3] See Article 101(2) TFEU.
[4] In this thesis, the concept of defendant refers to the undertaking alleged of an infringement of EU competition law.
[5] See Alison Jones, Brenda Sufrin, and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2019) 207 and 261ff.
[6] See Filippo Amato, 'Defining Agreements and Concerted Practices Restricting Competition in EU Competition Law' in Cortese B (ed), *EU competition law: Between Public and Private Enforcement* (Kluwer Law International 2013), 39.
[7] See Van Bael & Bellis, *Competition Law of the European Union* (6th edn, Kluwer Law International 2021) 63f.; Jones, Sufrin, and Dunne, 225ff.; David Bailey, 'Article 101(1)' in Bailey D, and John LE (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018), 167; Richard Whish, and David Bailey, *Competition Law* (8th edn, Oxford University Press 2018), 125f.; Maria Ioannidou, and Julian Nowag, 'Can two wrongs make it right? Reconsidering minimum resale price maintenance in the light of Allianz Hungária' (2015) 11(2–3) European Competition Journal 340.
[8] See eg Case C-591/16 P *Lundbeck v Commission* [2021] ECLI:EU:C:2021:243, para 112; Case C-228/18 *Budapest Bank and Others* [2020] ECLI:EU:C:2020:265, paras 51–55; Case C-307/18 *Generics (UK) and Others* [2020] ECLI:EU:C:2020:52, paras 64-68; Case C-345/14 *Maxima Latvija* [2015] ECLI:EU:C:2015:784, paras 16–20; Case C-67/13 P *CB v Commission* [2014] ECLI:EU:C:2014:2204, paras 48–53 and 58.

Irrespective of whether the CJ knows what it is doing, a wider interest in clarity assumptively exists, especially among undertakings and consulting lawyers. Legal certainty as to restrictions by object is particularly desirable considering the severe consequences that such restrictions may entail. Establishing a restriction not only means that the disputed agreement is void;[9] but also, it may lead to hefty fines[10] and facilitate considerable damage claims.[11] Besides, clarity may promote the right of defence[12] by illuminating considerations, and thus arguments, that may be of relevance for finding or avoiding a restriction by object.

1.2 Purpose and Research Question

The purpose is to elucidate the applicability of the concept of restriction by object under Article 101 TFEU. On this basis, the following research questions have been formulated:

1. The main question is whether an agreement can avoid being classified as a restriction by object because of being incapable of having restrictive effects in casu. Additionally, the following sub-questions are answered:
2. What is/are the legal requirement(s) for applying the concept of restriction by object to an agreement between undertakings?
3. Which party to a competition enforcement proceeding (the responsible competition authority or the defendant) is responsible for adducing proof of whether the requirement(s) is/are met or not?

[9] See Article 101(2) TFEU.
[10] See Reg. 1/2003, article 23(2)(a); ECN+ directive 2019/1/EU, articles 13–15.
[11] See eg Case C-453/99 *Courage and Crehan* [2001] ECLI:EU:C:2001:465, paras 26–28; Jones, Sufrin, and Dunne, 1033ff.; Damages directive 2014/104/EU; comp Reg. 1/2003, Article 16; Case C-547/16 *Gasorba and Others* [2017] ECLI:EU:C:2017:891, para 29.
[12] See for the right of defence eg Case 46/87 Hoechst v Commission [1989] ECLI:EU:C:1989:337, paras 14–15; Case C-534/07 P *Prym and Prym Consumer v Commission* [2009] ECLI:EU:C:2009:505, para 26; Case C-247/14 P *HeidelbergCement v Commission* [2016] ECLI:EU:C:2016:149, para 19; T-357/06 *Koninklijke Wegenbouw Stevin v Commission* [2012] ECLI:EU:T:2012:488, para 157.

1.3 Methodology and Material

A legal doctrinal (dogmatic) method is adopted since the thesis pursues a descriptive and justificatory function.[13] Legal doctrine interprets and systemises the existing law to clarify de lege lata. It adopts an internal perspective on the law, with the legal system as its theoretical framework.[14]

Problematically, the border between de lege lata and de lege ferenda and between an internal and external perspective of the legal system may be obscure. Also, normative elements intrinsic in legal interpretation may undermine objectivity. Jointly, these issues may hamper transparency.[15] Conflictingly, the results of legal research should be possible to recreate, like in other scientific areas.[16] Thus, it is, firstly, important to describe the specific legal system being the subject of investigation; the relevant legal sources, their hierarchy, as well as the relevant interpretative methods are to be outlined.[17] Secondly, it should be clarified if (and when) statements deviate from the defined legal framework.[18]

Concerning the latter, this thesis has no ambition of deviating from an internal perspective of the law. As regards the first, the relevant legal framework is that of EU competition law, and more specifically Article 101 TFEU.

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[13] See on descriptive and justificatory function Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W Micklitz, and Edward L. Rubin, *Rethinking Legal Scholarship A Transatlantic Dialogue* (Cambridge University Press 2017), 213ff. and 219ff.

[14] See Pauline C. Westerman, 'Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law' (SSRN 2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1609575> accessed 20 March 2021, 90; Aleksander Peczenik, 'A Theory of Legal Doctrine' (2001) 14(1) Ratio Juris 75, 75f. and 79f.; Smits, 210 ff.

[15] Comp Jan Kleinman, 'Rättsdogmatisk metod' in Maria Nääv, and Mauro Zamboni (eds), *Juridisk Metodlära* (2nd edn, Studentlitreratur AB 2018), 37f. and 44f.; Westerman, 94f.; Peczenik, 82ff.

[16] See Nils Jansen, 'Making Doctrine for European Law' in Rob van Gestel, Hans-W Micklitz, and Edward L. Rubin, *Rethinking Legal Scholarship A Transatlantic Dialogue* (Cambridge University Press 2017), 234.

[17] See Smits, 223ff.; comp Kleinman, 29ff.

[18] See Kleinman, 38.

The relevant sources of law, and their hierarchy, within EU competition law, are mainly aligned with EU law in general. The Treaties and the Charter are the highest authorities.[19] They are complemented by general principles of EU law which, in particular, have an interpretative function.[20] Hereinafter follows secondary law, composed of legislative, delegated, and implementing acts.[21] However, because of similarities with criminal law, competition law also features peculiarities; one peculiarity being central for this thesis is the principle of presumption of innocence, which entails that any doubt must benefit the defendant.[22]

The binding sources outlined in the preceding paragraph (hard law) are accompanied by soft law, which includes communications and notices common within EU competition law.[23] Although not binding per se, soft law may bind the issuing institution through the principle of legitimate expectation,[24] but only in absence of conflict with binding EU law.[25] Since soft law related to Article 101 TFEU merely scantily elaborates on the concept of restrictions by object,[26] it is not a focus of the present thesis.

[19] See Paul Craig and Gráinne De Burca, *EU law: Text, Cases and Materials* (7th edn, Oxford University Press 2020), 141f.; Article 1 subparagraph 3 and Article 6(1) TEU; Article 263 TFEU; Jörgen Hettne and Ida Otken Eriksson (ed), *EU-rättslig Metod: Teori och Genomslag i Svensk Rättstillämpning* (2nd edn, Norstedts juridik 2011), 42f.; comp Jones, Sufrin, and Dunne, 90ff.
[20] See Craig and DeBurca, 142f.; Hettne, and Eriksson, 73.
[21] See Craig and DeBurca, 144ff.; Article 288-291 TFEU; comp Jones, Sufrin, and Dunne, 90ff.
[22] See T-442/08 *CISAC v Commission* [2013] ECLI:EU:T:2013:188, paras 92–93; Jones, Sufrin, and Dunne, 140; Case C-89/11 P *E.ON Energie v Commission* [2012] ECLI:EU:C:2012:738, para 72; C-593/18 P *ABB v Commission* [2019] ECLI:EU:C:2019:1027, para 100; see also on similarities with criminal law Jones, Sufrin, and Dunne, 882ff.; C-272/09 P *KME Germany and Others v Commission* [2011] ECLI:EU:C:2011:810, opinion of AG Sharpston, para 67; C-501/11 P *Schindler Holding and Others v Commission* [2013] ECLI:EU:C:2013:522, para 33.
[23] See Craig and DeBurca, 140; Article 288 subparagraph 4 TFEU; Jones, Sufrin, and Dunne, 93f.
[24] See Craig and DeBurca, 594; Case C-226/11 *Expedia* [2012] ECLI:EU:C:2012:795, para 38.
[25] See Case 188/82 *Thyssen AG v Commission* [1983] ECLI:EU:C:1983:329, para 11; T-2/93 *Air France v Commission* [1994] ECLI:EU:T:1994:55, para 102; Craig and DeBurca, 597; Hettne and Eriksson, 48; see for that effect T-99/04 *AC-Treuhand v Commission* [2008] ECLI:EU:T:2008:256, para 163.
[26] See Article 101(3) Guidelines; By Object Guidance; De Minimis Notice; Horizontal Co-operation Guidelines; Technology transfer Guidelines; Vertical guidelines.

In addition to hard and soft law, there is case law, opinions by AGs, legal doctrine, and preparatory works. Albeit judgments from the CJEU are not formal precedents, they have developed into de facto precedents with an appreciable influence on the interpretation of EU law.[27] Alike, neither opinions by AGs, doctrinal works, nor preparatory works, are binding, and the latter two have only limitedly been recognised expressly by the EU courts; yet, these sources may provide logical, nuanced, and convincing arguments, facilitating the understanding of EU law.[28] This thesis will depart from both the most recent case law of the CJ on the concept of restriction by object,[29] and the foundational literature of EU competition law.[30]

Lastly, as regards the interpretation of a provision of EU law, "it is necessary […] to consider its wording, its context and its aims".[31] Thus, three main interpretative branches may be discerned: literal interpretation (textualism), contextual interpretation (contextualism), and purposive (teleological) interpretation.[32] Textualism upholds legal certainty but is often insufficient because of the broadly formulated treaty provisions and the EU principle of linguistic equality.[33] Contextualism seeks coherence and consistency within the legal system, meaning that the interpretation should lead to neither conflicts of norms, nor duplications; the rationale is that protecting systemic

[27] See eg Craig and DeBurca, 530 and 537; Case 283/81 *CILFIT v Ministero della Sanità*, para 14; Cases 28–30/62 *Da Costa en Schaake NV and Others v Administratie der Belastingen* [1963] ECLI:EU:C:1963:6, 38; Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* [1996] ECLI:EU:C:1996:79, para 57; Hettne and Eriksson, 49ff.; comp Articles 19(1) and 267 TFEU.

[28] Comp Hettne and Eriksson, 113ff.; Craig and De Burca, 91 and 93f.; Lenaerts K, and Gutierrez-Fons J, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20(2) Columbia Journal of European Law 3, 23ff.

[29] See C-591/16 P *Lundbeck*; C-307/18 *Generics*; C-228/18 *Budapest Bank*.

[30] See Jones, Sufrin, and Dunne; Bailey, *Bellamy & Child*; Jonathan Faull and others, 'Article 101' in Jonathan Faull and Ali Nikpay (eds), *Faull & Nikpay: the EU law of competition* (3rd edn, Oxford University Press 2014); Van Bael & Bellis; Whish and Bailey.

[31] See Case 337/82 *St. Nikolaus Brennerei und Likörfabrik v Hauptzollamt Krefeld* [1984] ECLI:EU:C:1984:69, para 10.

[32] See Lenaerts and Gutierrez-Fons, 3ff.; Hettne and Eriksson, 159; Bailey, *Bellamy & Child*, 10.

[33] See Lenaerts and Gutierrez-Fons, 8ff.; Case 283/81 *CILFIT*, para 18; Hettne and Eriksson, 160f.

harmony facilitates the effectiveness of EU law.[34] Teleological interpretation consists of three principal functions: firstly, and least controversially, it may remedy ambiguity and incompleteness; secondly, it may facilitate effectiveness to the objectives pursued; thirdly, it may prevent the law from having unreasonable consequences.[35]

As to relate these general interpretative methods to Article 101 TFEU, it is necessary to recognise that the main objective of that article is to maintain effective competition, also expressed as to "ensure that competition remains undistorted within the common market."[36] Thus, competition law aims to prevent only anti-competitive conduct.[37] However, clarifying the meaning of 'anti-competitive' falls outside the scope of this thesis; that concept relates to the more specific goals of EU competition law, being a highly discussed topic without any evident conclusive answer.[38]

In this thesis, all three interpretative branches will be utilised. It would be artificial to strictly separate them, as they are interrelated; while the literal meaning in principle must be measured against the relevant context and objectives, effectiveness in the pursuit of certain objectives must be considered in the relevant context.[39] Furthermore, on this interpretative backdrop, this thesis follows the critical perspective expressed by the CJ that preference should be given to the interpretative alternative which best ensures the effectiveness of the interpreted provision considered in its context.[40]

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[34] See Lenaerts and Gutierrez-Fons, 17; Wolf Sauter, 'Coherence in EU Competition Law' (Oxford University Press 2016), 15.
[35] See Lenaerts and Gutierrez-Fons, 32; Hettne and Eriksson, 168f.
[36] See Case C-194/14 P *AC-Treuhand v Commission* [2015] ECLI:EU:C:2015:717, para 36; see also Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECLI:EU:C:1973:22, para 23–25; Protocol (No 27) on the internal market and competition [2008] OJ C 115/309; Bailey, *Bellamy & Child*, 10; Jones, Sufrin, and Dunne, 42.
[37] Comp Jones, Sufrin, and Dunne, 55f.
[38] See eg Jones, Sufrin, and Dunne, 42ff.; Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (SSRN 2013) CLES Working Paper Series 3/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875> accessed 2 April 2021, 359.
[39] Comp Lenaerts and Gutierrez-Fons, 3ff. and 61; Case 283/81 *CILFIT*, para 20.
[40] Comp Lenaerts and Gutierrez-Fons, 20; Case C-434/97 *Commission v France* [2000] ECLI:EU:C:2000:98, para 21; Peczenik, 82.

1.4 Delimitations

Firstly, this thesis is limited to considering the concept of restriction by object under Article 101 TFEU and does not examine Article 102 TFEU. The approach under Article 102 is not undoubtfully aligned with that under Article 101 and could be a suitable question for a thesis on its own, albeit not for this thesis.[41]

Secondly, this thesis is confined to assess the concept of restriction by object and will only examine restrictions by effect to the extent that appears necessary for explaining the prior concept. The rationale is simply that the two approaches are alternative and thus distinguishable subject matters.[42]

Thirdly, this thesis will not consider Article 101(3) TFEU more than what is necessary for explaining the concept of restriction by object. If a restriction by object is justified under Article 101(3), it does not cease to be a restriction by object but is merely not prohibited in casu.[43]

Fourthly, this thesis aims only at clarifying the applicability of the concept of restriction by object as an abstract legal concept and will neither research the specific goals of EU competition law nor economic theories related to competition law. Both the goals and economic theories are relevant for determining what conduct is anti-competitive.[44] However, my conceptual understanding is that for clarifying the concept of restriction by object as an abstract legal concept, there is no need in knowing what specific conduct is anti-competitive. Knowledge about the latter is required first in applying the concept of restriction by object in concreto, not being a matter of this thesis.

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[41] Comp Jones, Sufrin, and Dunne, 375ff.
[42] See eg Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECLI:EU:C:1966:38, 249; C-209/07 *Beef Industry Development and Barry Brothers* [2008] ECLI:EU:C:2008:643, para 15; C-67/13 P *CB*, para 52; Jones, Sufrin and Dunne, 218.
[43] See Luc Peeperkorn, 'Defining "By Object" restrictions' [2015] 3 Concurrences 40, 48.
[44] Comp Jones, Sufrin, and Dunne, 42ff. and 56; Whish and Bailey, 120.

Fifthly, this thesis will not explore the requisite standard of proof for finding a restriction by object under Article 101 TFEU. The standard of proof is not decisive for this thesis. Furthermore, the standard of proof in national competition proceedings is for national law to determine following the principle of national procedural autonomy.[45]

Lastly, this thesis is not interested in national law or national interpretations of EU law. EU law constitutes an independent, in other words autonomous, source of law, which enjoys primacy over national law.[46] EU law should be interpreted with consistency and uniformity[47] and "legal concepts do not necessarily have the same meaning in Community law and in the laws of the various Member States."[48] This thesis aims only at researching the autonomous EU definition of the concept of restriction by object.

1.5 Outline

Initially, in section 2.1, I place the concept of restrictions by object in its general context. This is done by describing restrictions by object and effect as alternative approaches (section 2.1.1), by explaining the purpose of restrictions by object (section 2.1.2), and by declaring that the interpretative approach to restrictions by object is restrictive (section 2.1.3).

Subsequently, in section 2.2, I explore the requirements for adopting a restriction by object. Firstly, I outline what (potential) requirements for by object types of collusion can be discerned from case law (section 2.2.2). A

[45] See C-8/08 *T-Mobile Netherlands and Others* [2009] ECLI:EU:C:2009:343, opinion of AG Kokott, para 80–86; comp Reg. 1/2003, recital 5; Craig and DeBurca, 263 and 276ff.; C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECLI:EU:C:2013:625, para 102; Case 33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECLI:EU:C:1976:188, para 5; Rob Widdershoven, 'National Procedural Autonomy and General EU Law Limits.' (2019) 12(2) Review of European Administrative Law 5.
[46] See C-6/64 *Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66, 594.
[47] See Opinion 2/13, paras 174–176.
[48] See Case 283/81 *CILFIT*, para 19; comp. Hettne and Eriksson, 161f.

first requirement discerned is that an agreement must be classified as a by object type of collusion. The concept of by object types of collusion is developed in section 2.2.3. It is explained that by object types of collusion can be described as general rules based on experience (section 2.2.3.1). The experience shows that collusive conduct featuring certain traits entail sufficient harm (section 2.2.3.2) with sufficient likeliness (section 2.2.3.3). A second (potential) requirement, developed in section 2.2.4, is that a disputed agreement, considering its contexts, should be capable of or likely to cause anti-competitive effects in casu. First, two understandings favouring consideration to effects in establishing a restriction by object are studied (section 2.2.4.2–3). Subsequently, I argue for the understanding that no requirement related to effects in casu exists; the only requirement for a restriction by object is that a disputed agreement can be subsumed under a by object type of collusion (section 2.2.4.4). Consequently, subsuming an agreement under a by object type of collusion irrebutably establishes a restriction by object, which constitutes a prohibition comparable to an inchoate offence (section 2.2.5).

Lastly, in section 2.3, I examine the approach to the assessment of whether a disputed agreement meets the requirement divulged in section 2.2. Rather than considering legal requirements, section 2.3 discerns what circumstances should be considered by whom for showing that the requirement for a restriction by object either is or is not met. Thus, the section may shed light on the practical working of the concept of restriction by object. Firstly, the concepts of ‘content of the provisions’, ‘objectives’, and ‘context’ of a disputed agreement are defined, as constituting the ‘what’ to be considered (section 2.3.2). Secondly, who is responsible for considering what is explained by investigating the interplay between the burden of proof on the responsible competition authority and the burden of counterproof on the defendant (section 2.3.3).

The thesis is concluded by a critical, pervasive, and explanatory analysis in chapter 3.

2 Restriction by Object

2.1 Contextualisation

2.1.1 Relation Between Restriction by Object and Effect

Restrictions by object and effect are alternative and not cumulative. This is indicated already by Article 101(1) TFEU, prohibiting conduct that has an anti-competitive "object or effect".[49] Furthermore, it is settled case law that the assessment of restrictions by object and effect, respectively, are sequential, in that the latter is following the prior. First, it is considered whether there is a restriction by object, and only if the answer is negative, it is necessary to consider effects.[50] In other words, it appears unnecessary and incorrect to resort to an assessment of anti-competitive effects for establishing a restriction by object.[51] However, establishing a restriction by object does not prevent an examination also (but separately) of a restriction by effect.[52] Consequently, restrictions by object must at least in principle be distinguished from restrictions by effect, since the prior cannot be established based on effects. Yet, as will be seen in the following sections, the distinction is not unproblematic.[53]

[49] See Case 56/65 *STM*, 249; C-209/07 *BIDS*, para 15; C-172/14 *ING Pensii* [2015] ECLI:EU:C:2015:484, para 29; C-228/18 *Budapest Bank*, para 33.
[50] See eg C-8/08 *T-Mobile*, para 28; Case C-172/14 *ING Pensii*, para 30; Bailey, *Bellamy & Child*, 164f.; Technology Transfer Guidelines, paras 13–15.
[51] See C-67/13 P *CB*, paras 49, 58, and 82–83; C-591/16 *Lundbeck*, para 140; Case C-440/11 *Commission v Stichting Administratiekantoor Portielje* [2013] ECLI:EU:C:2013:514 [98]; Case C-382/12 P *MasterCard and Others v Commission* [2014] ECLI:EU:C:2014:2201 [186].
[52] See C-228/18 *Budapest Bank*, para 40.
[53] See eg Peeperkorn, 41.

2.1.2 Purpose of Restrictions by Object

As is clear from the preceding section, a restriction by object can be established irrespective of restrictive effects; what is the rationale for this? Likely, the concept of restriction by object has not only one objective. Tenable objectives that have been proposed are, firstly, legal certainty (including deterrence) by providing predictability and, secondly, procedural economy by easing the burden on responsible authorities.[54] Pursuing these objectives, the concept of restrictions by object may facilitate the combatting of anti-competitive conduct and may, thus, facilitate the overarching objective of Article 101 TFEU of ensuring that competition in the internal market remains undistorted.[55] However, simultaneously, the concept of restrictions by object may entail over enforcement by prohibiting conduct not being anti-competitive (so-called false positives). Thus, the concept is capable also of counteracting the overarching objective of Article 101 TFEU, and by itself distort competition. Accordingly, it is warranted to seek a balance between facilitating enforcement and preventing incorrect enforcement.[56]

2.1.3 Restrictive Interpretation of Restriction by Object

Whether the concept of restriction by object should be interpreted restrictively or expansively has not always been indubitable. Some have proposed that

[54] See C-67/13P *CB*, opinion of AG Wahl, para 35; C-8/08 *T-Mobile*, opinion of AG Kokott, para 43; Van Bael & Bellis, 62; Whish and Bailey, 127; Olga Stefanowicz, 'Guidance on the Limits for the Use of Restrictive Clauses in Commercial Lease Agreements: Once Again on Restrictions by Object' (2016) 9(14) Yearbook of Antitrust and Regulatory Studies 279, 286; comp. Maria-Corina Wahlin, 'Post-Cartes Bancaires: Restrictions by Object and the Concept of Vertical Hardcore Restrictions' (2014) 13(4) Comp Law 329, 340; David Bailey 'Restrictions of Competition by Object under Article 101 TFEU' (2012) 49(2) CML Rev 559, 560.
[55] See on the overarching objective C-194/14 P *AC Treuhand*, para 36; see also case 6/72 *Continental Can*, paras 23–25; protocol 27 to TFEU, relating to Article 3(1)(b) TFEU; Bailey, *Bellamy & Child*, 10; Jones, Sufrin, and Dunne, 42.
[56] See Jones, Sufrin, and Dunne, 55f., 215ff, and 234f.; comp. C-67/13 P *CB*, para 58.

certain cases[57] did indicate an extensive approach,[58] while others have proposed that the approach has always been strict.[59] Now, however, the court has undisputedly settled that the interpretation of restriction by object is to be strict.[60] A restriction by object "can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects".[61]

2.2 Requirements for Restriction by Object

2.2.1 Introduction

From the text of Article 101(1) TFEU the concept of restriction by object could prima facie appear plain – if the parties' intention with an agreement is anti-competitive, the agreement should be prohibited. Prohibited agreements are those which have as their "object or effect the prevention, restriction or distortion of competition within the internal market".[62] However, one must not be outwitted by assumed simplicity. Namely, and theoretically perplexing, the concept of restriction by object has been defined objectively. Subjective intentions of the parties merely constitute potential proof but cannot be decisive;[63] a finding of pro-competitive (and lack of anti-competitive) subjective intent does not as such prevent a finding of a restriction by object.[64] Instead, the concept of restriction by object is based

[57] See C-8/08 *T-Mobile*; Case C-32/11 *Allianz Hungária Biztosító and Others* [2013] ECLI:EU:C:2013:160.
[58] See Van Bael & Bellis, 64f.; Jones, Sufrin, and Dunne, 226ff.; Whish and Bailey, 124.
[59] See Bailey, *Bellamy & Child*, 165 and 170f.
[60] See eg C-67/13 P *CB*, para 58; C-307/18 *Generics*, para 68; C-228/18 *Budapest Bank*, para 54.
[61] See C-67/13 P *CB*, para 58.
[62] See Article 101(1) TFEU.
[63] See eg C-209/07 *BIDS*, para 21; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 578f.
[64] See Jones, Sufrin, and Dunne, 219f.; Bailey, *Bellamy & Child*, 169; Article 101(3) Guidelines, para 22; Peeperkorn, 49; Ola Kolstad, 'Object contra effect in Swedish and European competition law' (Uppdragsforskningsrapport 2009:3, Konkurrensverket: Swedish Competition Authority 2009), 13; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 578f.

on "the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied".[65] Accepting this objective definition, the question arises of what requirements must be met for establishing that an agreement objectively pursues the object of restricting competition (in other words an anti-competitive object). The remainder of section 2.2 is dedicated to that question.

2.2.2 The Potential Requirements Possible to Discern From Case Law

It appears that 'revealing a sufficient degree of harm to competition' constitutes the summarising epithet of what is required to establish a restriction by object. More specifically, in case C-228/18 *Budapest Bank*, the CJ proclaimed that "the essential legal criterion"[66] is that the agreement "reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects".[67] Read in its context, it appears that there are "certain types"[68] of collusion that reveal such harm. The rationale is that "certain collusive behaviour […] may be considered so likely to have negative effects […] that it may be considered redundant […] to prove that it has actual effects on the market."[69] The court explained that we can know this because "[e]xperience shows"[70] that so is the case.

One can discern a two-step procedure from the reasoning of the court. First, there are certain types of collusion that, based on experience, reveal a sufficient degree of harm to competition (in the following called 'by object types of collusion'). Secondly, the contested agreement in a particular case

[65] See Whish and Bailey, 123; Joined cases 29/83 and 30/83 *CRAM v Commission* [1984] ECLI:EU:C:1984:130, paras 25–26.
[66] See C-228/18 *Budapest Bank*, para 37.
[67] See C-228/18 *Budapest Bank*, para 37; see also eg Bailey, *Bellamy & Child*, 165; C-209/07 *BIDS*, para 15; C-8/08 *T-Mobile*, para 28; C-307/18 *Generics*, para 67.
[68] See C-228/18 *Budapest Bank*, para 35.
[69] See C-228/18 *Budapest Bank*, para 36.
[70] See C-228/18 *Budapest Bank*, para 36; comp Bailey, *Bellamy & Child*, 168; Article 101(3) Guidelines, para 21.

must be possible to subsume under one such type of collusion.[71] In hindsight, this appears not to be a new approach. It has been tenably proposed that it was adopted already in case C-67/13 P *CB*.[72] The traits of the approach can furthermore be traced back to at least Case 19/77 *Miller*, where the court held that "by its very nature, a clause prohibiting exports constitutes a restriction on competition".[73]

Still, these findings leave two questions unanswered. Firstly, and investigated in section 2.2.3, what are by object types of collusion? Secondly, and investigated in section 2.2.4, does one or two requirements for establishing a restriction by object exist? Namely, is it sufficient that a disputed agreement is subsumed under a by object type of collusion based on experience (as this thesis argues), or is it additionally required that the agreement is capable of entailing, or likely to entail anti-competitive effects in casu?[74] Arguments in favour of consideration to effects in casu have, in particular, been spurred by the cases C-8/08 *T-Mobile* and C-32/11 *Allianz Hungária*.[75] In the remainder of section 2.2, the presented questions are addressed in turn.

2.2.3 By Object Types of Collusion

2.2.3.1 A Concept Based on Experience

As discerned in the previous section, an agreement must be subsumed under a by object type of collusion to be restrictive by object. An agreement may be subsumed under a by object type of collusion if "[e]xperience shows that such

[71] See Peeperkorn, 50; Case C-611/16 P *Xellia Pharmaceuticals and Alpharma v Commission* [2021] ECLI:EU:C:2021:245, para 121; comp Kolstad, 6ff. and 19f.
[72] See Peeperkorn, 43.
[73] See Case 19/77 *Miller International Schallplatten GmbH v Commission* [1978] ECLI:EU:C:1978:19, para 7.
[74] Comp C-8/08 *T-Mobile*, para 31; Jones, Sufrin, and Dunne, 236.
[75] See C-228/18 Budapest Bank, opinion of AG Bobek, paras 48–50; Ioannidou and Nowag, 340ff.

behaviour leads to"[76] sufficient harm with sufficient likeliness.[77] Three questions arise. Firstly, and examined in this section, when is experience sufficient for allowing clustering of certain agreements into a 'type' of collusion that is considered sufficiently likely to be sufficiently harmful? Secondly, what is the substance of the conditions of sufficient harmfulness (section 2.2.3.2) and sufficient likeliness (section 2.2.3.3)? Thirdly, and examined in section 2.2.4, what does experience consist of?

As to the first question, on the sufficiency of the experience, it appears that the court has established four guiding conditions. For an agreement to be restrictive by object, the experience must be "sufficiently reliable and robust"[78] and "sufficiently general and consistent".[79] Only experience meeting those conditions may show that a type of collusion is sufficiently likely to cause sufficient harm as to be considered anti-competitive by its very nature.[80]

About the meaning of those four concepts, the following can be adduced. The requirement of 'reliable' and 'robust' experience appears to be related to whether the experience is substantial enough for doubtlessly considering a type of collusion to be sufficiently likely to entail sufficient harm.[81] As for generality and consistency, the implication is obscure since the concepts have not been defined by the court. However, the concepts could tenably be understood as subordinated to the requirement of reliable and robust experience.[82] As AG Bobek has expressed the matter, the question is whether

[76] See C-228/18 *Budapest Bank*, para 36 and 54; see also C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* [2015] ECLI:EU:C:2015:184, para 115; C-67/13 P *CB*, para 51; Article 101(3) Guidelines, para 21.
[77] See eg C-286/13 P *Dole*, paras 113–115; C-67/13 P *CB*, paras 49–51; C-307/18 *Generics*, paras 64–67; comp Jones, Sufrin, and Dunne, 281f.; Ioannidou and Nowag, 350.
[78] See C-228/18 *Budapest Bank*, para 76.
[79] See C-228/18 *Budapest Bank*, para 79.
[80] See C-228/18 *Budapest Bank*, paras 76 and 79 in relation to 35 and 36; see for that effect C-67/13 *CB*.
[81] See C-228/18 *Budapest Bank*, para 76 in relation to the presumption of innocence; see on the presumption of innocence n 22; see sections 2.2.3.2–2.2.3.3.
[82] See for indication of such subordination C-228/18 *Budapest Bank*, opinion of AG Bobek, paras 70–71.

the experience is sufficiently widespread and consistent for classifying the relevant type of collusion as "*generally* harmful to competition".[83]

As for the meaning of 'general', the concept could semantically be understood as requiring sufficient experience for the inductive creation of a generalised rule.[84] The experience that certain agreements sufficiently likely entail sufficient harm,[85] should allow for the clustering of those agreements into a 'type' of collusion based on discovered commonalities (common denominators).[86] Two important points should be made in this regard. Firstly, relevant experience appears not to be confined to previous case law but may include also other experiences such as economic theory.[87] Secondly, a type of collusion is not necessarily confined to a "specific category of an agreement in a particular sector";[88] instead, AG Kokott has described the experience-based rule in the following way:

> [C]ertain *forms of collusion*, such as the exclusion of competitors from the market, are, *in general and in view of the experience gained*, so likely to have negative effects on competition that it is not necessary to demonstrate that they had such effects in the particular case at hand.[89]

Consequently, a novel form of agreement can be found restrictive by object, if it features the common denominators of a (generally defined) by object type of collusion.[90]

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[83] See C-228/18 *Budapest Bank*, opinion of AG Bobek, para 63, seemingly followed by the court in C-228/18 *Budapest Bank*, para 77; see also Peeperkorn, 44.
[84] See for the definition of 'general' Cambridge dictionary – "involving or relating to most or all people, things, or places, especially when these are considered as a unit" < https://dictionary.cambridge.org/dictionary/english/general>, visited 2021-04-06; Merriam-Webster – "involving, relating to, or applicable to every member of a class, kind, or group" https://www.merriam-webster.com/dictionary/general, visited 2021-04-06.
[85] Comp C-591/16 P *Lundbeck*, opinion of AG Kokott, para 156.
[86] See on common denominators C-307/18 *Generics*, para 90–93; comp. C-611/16 P *Xellia Pharmaceuticals*, paras 96–99 and 121 – clarifying that there are certain categories of agreements, based on certain traits, being harmful to competition.
[87] See Case C-67/13 P *CB*, opinion of AG Wahl, para 56 and 79; Stina Tannenbaum, 'The concept of the restriction of competition 'by object' under article 101(1)' (2015) 22(1) MJECL 138, 143f.; Peeperkorn p. 44f.; comp. C-591/16 P *Lundbeck* [130].
[88] See C-591/16 P *Lundbeck*, opinion of AG Kokott, para 156.
[89] See C-591/16 P *Lundbeck*, opinion of AG Kokott, para 156 (emphasis added).
[90] See T-472/13 *Lundbeck v Commission* [2016] ECLI:EU:T:2016:449, paras 438 and 774, confirmed on appeal in C-591/16 P *Lundbeck*, para 130; comp Peeperkorn, 44f.

As for the meaning of 'consistency', in its turn, it could semantically be understood as concerning whether the overall result of the clustered collusions renders the type of collusion sufficiently likely to cause sufficient harm.[91] Experience that a type of collusion merely sporadically entails sufficient harm could barely be considered to reliably and robustly support the conclusion that that collusion is sufficiently likely harmful.[92]

In summary, it could be understood that experience is sufficiently reliable and robust for classifying an agreement as a by object type of collusion if the experience is sufficiently general and consistent. Experience is sufficiently general and consistent if common denominators can be discerned for agreements that are sufficiently likely to cause sufficient harm to competition.

2.2.3.2 Sufficiently Harmful to Competition

A general description of restrictions by object that has figured in case law is that by object types of collusion "reveal a sufficient degree of harm to competition to be regarded as being restrictions by object".[93] This is because they are "so likely to have negative effects"[94] as to render consideration to their actual effects redundant.[95] As discerned in section 2.2.3.1, sufficient likeliness and sufficient harm are determined based on experience. In this section, I examine the required degree of harm, while the required likeliness is investigated in section 2.2.3.3. The substance of a sufficient degree of harm is not apparent, but two constituent elements are tenable.

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[91] See for the definition of 'consistent' Cambridge dictionary – "always behaving or happening in a similar, especially positive, way" < https://dictionary.cambridge.org/dictionary/english/consistent>, visited 2021-04-06; Merriam-Webster – "marked by harmony, regularity, or steady continuity" < https://www.merriam-webster.com/dictionary/consistent>, visited 2021-04-06.
[92] Comp C-228/18 *Budapest Bank*, para 79; Mark Friend, 'Restrictions by Object Under EU Competition Law' (2020) 79(3) CLJ 423, 426f.; section 2.2.3.3.
[93] See C-228/18 *Budapest Bank*, para 35.
[94] See C-228/18 *Budapest Bank*, para 36.
[95] See eg C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* [2015] ECLI:EU:C:2015:184, paras 113–115; C-67/13 P *CB*, paras 49–51; C-307/18 *Generics*, paras 64–67; comp Jones, Sufrin, and Dunne, 281f.; Ioannidou and Nowag, 350.

As a first element, it has been proposed in the legal doctrine that a certain type of collusion is 'sufficiently harmful' only if experience shows that it entails not only negative effects on competition but *net negative* effects. The latter implies that the relevant type of collusion should be restrictive under Article 101(1) as well as not justified under Article 101(3) TFEU.[96] This understanding is tenable as endorsing consistency. Namely, and firstly, case law describes by object types of collusion as entailing a fall in competitive benefits, to the detriment of consumers,[97] which is ultimately the case only absent fully counteracting efficiency gains.[98] Secondly, the understanding explains and legitimises the perception that restrictions by object are only unlikely (albeit not impossibly) justified under Article 101(3) TFEU.[99] Thirdly, it harmonises with the proclaimed restrictive interpretation of restrictions by object[100] and accordingly reduces the risk of false positives.[101]

As a second and additional element, collusion being 'sufficiently harmful' could be interpreted as implying that the type of collusion should, by experience, have an appreciable effect on competition. Sufficient is when something amounts to at least what is required; since early days, it has been settled that agreements with merely an "insignificant effect"[102] on competition fall outside the scope of Article 101(1) TFEU. This condition has later been titled a requirement of appreciable effect on competition.[103] Naturally, it follows that by object types of collusion should entail at least an

[96] See Peeperkorn, 41f. and 49; Pablo Ibáñez Colomo and Alfonso Lamadrid, 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know' (SSRN 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849831> accessed 27 March 2021, 21; comp C-228/18 *Budapest Bank*, paras 35–36; C-228/18 *Budapest Bank*, opinion of AG Bobek, para 40.
[97] See C-228/18 *Budapest Bank*, para 36; C-57/13 P *CB*, para 51.
[98] Comp Article 101(3) Guidelines, para 85; Jones, Sufrin, and Dunne, 269.
[99] See Article 101(3) Guidelines, para 46; By Object Guidance, 4; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 593ff.; Filippo Amato, 'Defining Agreements and Concerted Practices Restricting Competition in EU Competition Law' in Cortese B (ed), *EU competition law: Between Public and Private Enforcement* (Kluwer Law International 2013), 40 and 46.
[100] See C-67/13 P *CB*, para 58; C-307/18 *Generics*, para 68; C-228/18 *Budapest Bank*, para 54.
[101] Comp Peeperkorn, 49.
[102] Case 5/69 *Voelk v Vervaecke* [1969] ECLI:EU:C:1969:35.
[103] See Jones, Sufrin, and Dunne, 196; Faull and others, 243; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 590ff.

appreciable restriction of competition. Including a condition of appreciable restriction in defining by object types of collusion would explain the notorious expression in case C-226/11 *Expedia* – the restriction caused by an agreement classified as a restriction by object is appreciable "by its nature".[104]

In summary, a palatable interpretation is that the expression about a sufficient degree of harm entails that the relevant type of collusion must, by experience, be sufficiently likely to entail both appreciable and net negative effects.

2.2.3.3 Sufficiently Likely to be Sufficiently Harmful

As clarified above, by object types of collusion are certain types of collusive behaviour that are "so likely"[105] to entail appreciable net negative effects as to render the proof of actual restrictive effects redundant.[106] The pressing question considered in this section is the meaning of sufficient likeliness.

A guiding reformulation of sufficient likeliness could be that experience shall render negative effects so likely that there can be no reasonable doubt as to their realisation.[107] A high requirement of likeliness would be consistent with both the restrictive interpretation of restrictions by object,[108] and the principle that any doubt must benefit the defendant.[109] Consonantly, the court has proclaimed that the likeliness shall render an assessment of effects superfluous, in other words, that "it may be considered redundant […] to prove that [the disputed agreement] has actual effects on the market".[110]

[104] See C-226/11 *Expedia*, para 37; comp. Bailey, *Bellamy & Child*, 171; Faull and others, 246f.; De Minimis Notice, paras 2 and 13.
[105] See C-228/18 *Budapest Bank*, para 36.
[106] See C-228/18 *Budapest Bank*, paras. 36 and 54; C-67/13 P *CB*, para 51; C-286/13 P *Dole*, paras 113–115.
[107] Comp Wahlin, 340.
[108] See C-67/13 P *CB*, para 58; C-307/18 *Generics*, para 68; C-228/18 *Budapest Bank*, para 54.
[109] See T-442/08 *CISAC*, paras 92–93; Jones, Sufrin and Dunne, 140; C-89/11 P *E.ON*, para 117.
[110] See C-228/18 *Budapest Bank*, para 36; C-67/13 P *CB*, para 51; C-345/14 *Maxima Latvija*, para 19.

It is important to note, however, that this requirement of likeliness relates only to the effects of the relevant type of collusion in general (by experience) and not of an individual disputed agreement.[111] Adopting a likeliness requirement in casu would amount to an alignment of restrictions by object and restrictions by effect since the latter is conditioned upon actual or potential (likely) anti-competitive effects in casu.[112]

In summary, the likeliness ought to be sufficient if experience precludes any reasonable doubt as to the realisation of restrictive effects of the type of collusion in general.

2.2.4 Context and Effects – Three Alternative Understandings of Whether One or Two Requirements Exist

2.2.4.1 Introduction – The Content of Experience

As discerned in the previous sections, restrictions by object are fundamentally about matching a disputed agreement with (subsume under) a by object type of collusion, based on experience. In establishing a restriction by object, the court has held that one must have regard to three factors: the agreement's content, its objectives, and its economic and legal context.[113] Thus, it reasonably follows that the same three factors should form constituents of the experience of by object types of collusion.[114] Yet, while it is relatively clear

[111] See C-67/13 P *CB*, para 51; C-228/18 *Budapest Bank*, para 36; C-307/18 *Generics*, opinion of AG Kokott, para 159.
[112] See Jones, Sufrin, and Dunne, 240; Ibáñez Colomo and Lamadrid, 35; T-347/94 *Mayr-Melnhof Kartongesellschaft v Commission* [1998] ECLI:EU:T:1998:101, para 136; Case C-67/13 P *CB*, paras 82–83; Faull and others, 284ff.; Bailey, *Bellamy & Child*, 176f.; Article 101(3) Guidelines, para 24; see about whether limited consideration to effects constitutes a part of restrictions by object section 2.2.4.
[113] See n 222; Peeperkorn, 50; comp C-67/13 P *CB*, para 53.
[114] Comp Tannenbaum, 142ff. and 148 – relating context to experience and distinguish it from effects; Peeperkorn, 45ff. and 50 – recognising context as a factor for matching with experience; See for example on content, objectives, and context in relation to experience C-307/18 *Generics*, opinion of AG Kokott, para 159 – "market sharing between competitors"; C-67/13 P *CB*, para 51 – "horizontal price-fixing by cartels"; Comp n 142–144, and text thereto.

that content and objectives are necessary for the matching procedure,[115] there appears to be less clarity in the role of context.

Namely, it has been proposed that the context analysis, rather than being part of the requirement of matching with experience, establishes a second requirement: a limited effects analysis, capable of rebutting an experience-based conclusion drawn from the content and objectives.[116] The origins are most clearly derived from case C-32/11 *Allianz Hungária*, based on case C-8/08 *T-Mobile*. In *Allianz Hungária*, the court proclaimed the following:

> "[I]t is sufficient that [an agreement] has the potential to have a negative impact on competition, that is to say, that it be *capable in an individual case* of resulting in the prevention, restriction or distortion of competition within the internal market."[117]

On this backdrop, it has been proposed that the context analysis includes consideration to effects and, thus, that the distinction between a context and effects analysis would be "more one of degree than of kind".[118]

In the following sections, I present three different understandings of the role of context and effects. The first two (an incapability defence and a 'quick effects' analysis) favour the possibility of limitedly considering effects in the by object assessment. Contrastingly, the last view presents a clean separation between consideration to object and effect, and view context as part of the experience of by object types of collusion.

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[115] See Peeperkorn, 46 – "While the wording of every agreement and its clauses may be different, an investigation of its content and objectives will usually make clear whether the agreement in question, for instance, is a price fixing agreement."; Friend, 425.
[116] See eg Jones, Sufrin, and Dunne, 236; C-228/18 *Budapest Bank*, opinion of AG Bobek, paras 49–50.
[117] See C-32/11 *Allianz Hungária*, para 38 (emphasis added); comp C-8/08 *T-Mobile*, para 31.
[118] See C-228/18 *Budapest Bank*, opinion of AG Bobek, para 50; comp Ioannidou and Nowag, 363; Faull and others, 242.

2.2.4.2 Understanding 1 – Context as an Incapability Defence

AG Bobek has, in his opinion in *Budapest Bank*, proposed that the court has established a capability requirement, or rather an incapability defence.[119] He describes the context analysis as an "exception to the experience-based rule",[120] and more specifically as a "basic reality check"[121] of whether "there are any legal or factual circumstances that *preclude* the agreement or practice in question from restricting competition."[122] This would mean that even if a disputed agreement is established to be an example of a by object type of collusion, it is not restrictive by object if proven incapable of causing restrictive effects in casu.[123] An incapability defence, however, is untenable.

Firstly, an incapability defence establishes a problematic relation between consideration to object and effect, respectively. Concluding that effects are precluded in casu, would require a counterfactual assessment and thus an effects analysis.[124] As Bobek recognises, the view implies that there is no clear delimitation between an object analysis and an effects analysis – "the difference between the two is more one of degree than of kind".[125] However, an incapability defence would not merely blur the division between consideration to object and effects. Concerning the capability of an agreement to restrict competition, the view would extinguish any such distinction by abandoning the established two-step relation between restrictions by object and effects. Namely, a finding of incapability to restrict competition would

[119] See C-228/18 *Budapest Bank*, opinion of AG Bobek, paras 48–49; see for the same idea Okeoghene Odudu, 'Restriction of Competition by Object – What's the Beef?' (2009) 8(1) Comp Law 11, 15; comp Faull and others, 242.
[120] See C-228/18 *Budapest Bank*, opinion of AG Bobek, para 48.
[121] See C-228/18 *Budapest Bank*, opinion of AG Bobek, para 49.
[122] See C-228/18 *Budapest Bank*, opinion of AG Bobek, para 49 (emphasis added); comp Ioannidou and Nowag, 363.
[123] See Kolstad, 21.
[124] Comp C-591/16 P *Lundbeck*, para 140; Faull and others, 239; n 148.
[125] See C-228/18 *Budapest Bank*, opinion of AG Bobek, para 50 in relation to 49.

preclude not only a restriction by object but also any purpose of a subsequent effect analysis.[126]

Additionally, an incapability defence appears not to fit with case law. Case law succeeding *T-Mobile* and *Allianz Hungária* refer to 'doubt' as to the harmful nature of the disputed agreement as sufficient for preventing the finding of a restriction by object.[127] Requiring only doubt as to the harmful nature of an agreement to 'rebut' a finding of a restriction by object is preferable to requiring proof of its incapability of being restrictive. Firstly, and aligned with the restrictive interpretation, [128] it would further narrow (or at least not widen) the scope of such restrictions – it ought to be easier to raise sufficient doubt than proving incapability.[129] Secondly, the sufficiency of doubt as to rebut a restriction by object seems compatible with the burden of proof for establishing a restriction; if the harmful nature of the disputed agreement is doubtful, the burden of proof ought not to have been discharged.[130]

In the following, in contrast to the first understanding, I examine the two alternative understandings which recognise the sufficiency of doubt. Firstly, the understanding that a 'quick effects' analysis exists is investigated. Secondly, I probe into the understanding that an assessment of restriction by object is separate from an assessment of effects.

[126] See for the recognition of such a division Case 56/65 *STM*; C-32/11 *Allianz Hungária*, paras 33–34; C-345/14 *Maxima Latvija*, para 16; C-591/16 P *Lundbeck*, paras 140–141; Faull and others, 239.
[127] See C-591/16 P *Lundbeck*, paras 129 and 136; C-307/18 *Generics*, paras 107 and 111.
[128] Comp section 2.1.3.
[129] Comp C-67/13 P *CB*, paras 80–81.
[130] See on the burden of proof Reg. 1/2003, Article 2; see on the presumption of innocence n 22; Comp C-307/18 *Generics*, paras 66, 67, 103 and 107; C-591/16 P *Lundbeck*, para 112 in relation to 136.

2.2.4.3 Understanding 2 – Context as a Quick Effects Analysis

The academics Maria Ioannidou and Julian Nowag suggest that the context analysis constitutes a 'quick effects' analysis for exempting uncertain cases (borderline cases) from the ambit of restrictions by object, in favour of a full-fledged effect analysis. More specifically, the authors appear to suggest that effects can be briefly considered, if the harmful nature of an agreement is not apparent, in means of ascertaining whether restrictive effects in casu are sufficiently uncertain as to require a more profound assessment of effects.[131]

On the one hand, certain factors are favouring their suggested approach. Firstly, it has the advantage of not *eliminating* the two-step procedure of considering object and subsequently effects. Secondly, it pursues a restrictive interpretation of restrictions by object.[132] Thirdly, it could be understood as supported by the CJ in *Allianz Hungária*; the court held that it must be determined whether the disputed agreement "is likely"[133] to entail anti-competitive effects, having regard to the legal and economic context.[134]

On the other hand, there are at least two considerable problems with the presented approach. Firstly, if a restriction by object would be precluded by a finding that restrictive effects appear sufficiently uncertain in casu, the distinction between restrictions by object and effect would be blurred, even if effects are only considered to a limited extent.[135] Such a blur appears not warranted by the CJ.[136] For instance, in *CB*, the CJ criticized the GC for limitedly considering effects in establishing a restriction by object, since the GC was "thereby indicating itself that the measures at issue cannot be considered [restrictive by object]".[137] Secondly, the approach conflicts with

[131] See Ioannidou and Nowag, 361ff.; comp Bailey 'Restrictions of Competition by Object under Article 101 TFEU', 585ff.
[132] Comp Ioannidou and Nowag, 361; C-67/13 P *CB*, para 58.
[133] See C-32/11 *Allianz Hungária*, paras 47–48.
[134] See C-32/11 *Allianz Hungária*, paras 47–48; comp C-8/08 *T-Mobile*, para 31.
[135] Comp n 112 and text thereto.
[136] See eg C-611/16 P *Xellia Pharmaceuticals*, paras 115–117; C-601/16 P *Arrow Group and Arrow Generics v Commission* [2021] ECLI:EU:C:2021:244, para 85.
[137] See C-67/13 P *CB*, para 82.

the purpose of restrictions by object; relating restrictions by object to effects in casu would risk reducing both administrative efficiency, by presupposing more extensive assessments by the responsible competition authority, and legal certainty.[138]

An alternative reading of *Allianz Hungária* is that a restriction by object is precluded if consideration to the context renders doubtful the reliance in casu on experience of sufficiently likely negative effects.[139] This would align *Allianz Hungária* with later case law, such as C-307/18 *Generics*, where the court held that contextual considerations can cause "reasonable doubt as to whether the [disputed agreement] caused a sufficient degree of harm to competition, and, therefore, as to its anti-competitive object."[140] As is explored in section 2.2.4.4, the question would then not concern effects in casu at all, but merely whether the disputed agreement matches with the experience of a by object type of collusion.

2.2.4.4 Understanding 3 – Matching With Experience as the Only Requirement

2.2.4.4.1 A Theoretical Approach to Explaning the Matching With Experience

In contrast to the two above-considered understandings, the third understanding attributes no role to effects in casu for establishing a restriction by object. As is explained in the following, context and effect are distinct concepts. Consequently, the CJ appears to require only that a disputed

[138] See Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 586 – explaining that the approach "would diminish the certainty and administrability of infringements by object."
[139] See about restrictive effects being by experience sufficiently likely section 2.2.3.3.
[140] See C-307/18 *Generics*, para 107; see about sufficient degree of harm being a trait following by experience of by object types of collusion and not from assessment of effects section 2.2.3.2; Case C-601/16 P *Arrow*, para 87; see for further explanation of C-307/18 *Generics* section 2.2.4.4.2.

agreement – having regard to its content, objectives, *and* context, but not its effects – matches with the experience of a by object type of collusion.[141]

Analysing the context, as an observable setting, is an essential element of any restriction – by object as well as by effect – since no restrictions can occur in an economic or legal vacuum.[142] Thus, it is inevitable that our experience of restrictive collusions includes not only content and objectives, but also context.[143] For instance, by object types of collusion may vary depending on the competitive relation – horizontal or otherwise – between the colluding parties.[144]

An assessment of context (the observable setting) is separate from an assessment of effects (the result of a particular cause).[145] The latter requires both an observation of the context of the agreement, and a comparison with the context in a counterfactual scenario; the differences discerned are the effects.[146] In other words, while a restriction by object requires consideration to "the economic and legal context of which [the disputed agreement] forms a part",[147] a restriction by effect requires, additionally, that "competition should be assessed within the actual context in which it would occur *in the absence of the agreement* in dispute".[148]

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[141] See C-591/16 P *Lundbeck*, para 141; C-611/16 P *Xellia Pharmaceuticals*, paras 116–117; see about the two-step procedure discerned in section 2.2.2; see the following discussion in this section.
[142] See Bailey, *Bellamy & Child*, 153; see about restriction by object C-209/07 *BIDS*, para 16; C-31/11 *Allianz Hungária*, para 36; C-345/14 *Maxima Latvija*, para 16; C-591/16 P *Lundbeck*, para 112; see about restriction by effects C-345/14 *Maxima Latvija*, para 26; C-234/89 *Delimitis v Henninger Bräu* [1991] ECLI:EU:C:1991:91, para 14; Case 23/67 *Brasserie De Haecht v Wilkin Janssen* [1967] ECLI:EU:C:1967:54, 415.
[143] Comp Peeperkorn, 45 and 50; C-611/16 P *Xellia Pharmaceuticals*, paras 116, 117, 120, and 121; C-601/16 P *Arrow Group*, para 87; C-67/13 P *CB*, para 78; Tannenbaum, 143f. and 148.
[144] See Peeperkorn, 46; By Object guidance, 4; C-228/18 *Budapest bank*, para 36 – giving the example of "horizontal price-fixing by cartels" as a by object type of collusion.
[145] See C-611/16 P *Xellia Pharmaceuticals*, paras. 116–117; C-601/16 P *Arrow Group*, paras 85–87; see about an early conclusion on this matter Tannenbaum, 148.
[146] see Bailey, *Bellamy & Child*, 158f.; C-382/12 P *MasterCard*, paras 164–169; Horizontal Co-operation guidelines, para 29; Vertical Guidelines, para 97.
[147] See C-228/18 *Budapest Bank*, para 51; see also C-67/13 P *CB*, para 53; C-591/16 P *Lundbeck*, para 112.
[148] See C-307/18 *Generics*, para 118 (emphasis added); see also C-228/18 *Budapest Bank*, para 55; Case 42/84 *Remia BV and others v Commission* [1985] ECLI:EU:C:1985:327, para 18; C-382/12 P *MasterCard*, paras 164–169.

The presented division between consideration to context and effects is apparent from case C-591/16 P *Lundbeck*. In this case, the CJ held as follows:

> [U]nless the clear distinction between the concept of 'restriction by object' and the concept of 'restriction by effect' […] is to be held not to exist, an examination of the 'counterfactual scenario', the purpose of which is to make apparent the effects of a given concerted practice, cannot be required in order to characterise a concerted practice as a 'restriction by object'.[149]

Aligned with this expression in Lundbeck, and as must now be considered well-settled case law, "there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition."[150] In conclusion, and contrary to what has been proposed as a matter of legal consensus,[151] the finding of a restriction by object does not necessitate a counterfactual assessment, and (consequently) not an assessment of effects.[152]

Since context and effect are distinct concepts, consideration to the prior naturally does not justify consideration to the latter. It follows that only one requirement for establishing a restriction of competition by object appears to exist; all that is required is that disputed agreements "can in fact be classified as 'restrictions by object'".[153] An agreement can be classified as a restriction by object only if it "reveals a sufficient degree of harm to competition".[154] By experience, by object types of collusion reveal a sufficient degree of harm to competition.[155] Thus, an agreement can be classified as restrictive by object

[149] See C-591/16 P *Lundbeck*, para 140.
[150] See Joined cases 56 and 58/64 *Consten and Grundig v Commission of the EEC* [1966] ECLI:EU:C:1966:41, 342; see also C-209/07 *BIDS*, paras 16 and 18; C-228/18 *Budapest Bank*, paras 35, 34 and 54; C-307/18 *Generics*, para 64; C-591/16 P *Lundbeck*, para 141; C-68/12 *Slovenská sporiteľňa* [2013] ECLI:EU:C:2013:71, para 17; C-601/16 P *Arrow Group*, para 84–87; C-440/11 P *Stichting*; Bailey, *Bellamy & Child*, 170.
[151] See about proposed legal consensus Ibáñez Colomo and Lamadrid, 4, 8ff., and 44; comp Article 101(3) Guidelines, para 17.
[152] Comp C-382/12 P *MasterCard*, paras 186–192; n 148 and text thereto.
[153] C-307/67 Generics, para 65.
[154] See C-228/18 Budapest Bank, para 51.
[155] See C-228/18 Budapest Bank, paras 35–36.

only if the experience of a by object type of collusion is sufficiently robust and reliable for being applied to that agreement, having regard to its content, objectives, and context.[156] This assessment is limited to considering the possibility to rely on the experience of by object types of collusion; as the CJ held in Lundbeck, the Commission could declare an agreement restrictive by object solely based on its content, objectives, *and* context but "was not required, however, to examine the effects thereof."[157] Phrased differently, the scope of the assessment appears limited to whether the traits of the disputed agreement correlates (matches) with the common denominators of a by object type of collusion.[158]

This understanding of the case law appears by no means revolutionary. AG Kokott has already shed light in this direction. In her opinion in *Generics*, she explained that contextual elements, firstly, are necessary for classifying an agreement as a by object type of collusion[159] and, secondly, may cast doubt on that classification[160] without effects having to be considered.[161] Furthermore, in her opinion in *T-Mobile*, she framed the requirement for finding a restriction by object in the following way:

> [I]t is sufficient that a [disputed agreement] has the potential – *on the basis of existing experience* – to produce a negative impact on competition. In other words, the [disputed agreement] must simply be capable in an individual case, that is, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market.[162]

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[156] See, to that effect, C-228/18 *Budapest Bank;* C-67/13 *CB*; Comp Peeperkorn, 45f.; C-591/16 P *Lundbeck*, para 112; C-307/18 *Generics*, paras 64–67 and 103; C-345/14 *Maxima Latvija*, paras 16–20; C-307/18 *Generics*, opinion of AG Kokott, paras 100–101; see about required experience section 2.2.3.

[157] See C-591/16 P *Lundbeck*, para 141; comp C-601/16 P *Arrow* [87]; C-382/12 P *MasterCard*, para 186 – the court concluded that the GC had not adopted a restriction by object because it had based its decision on effects.

[158] Comp with the understanding of by object types of collusion as deductively applicable general rules section 2.2.3.1.

[159] See C-307/18 *Generics*, opinion of AG Kokott, paras 158–159.

[160] See C-307/18 *Generics*, opinion of AG Kokott, paras 165, 166, and 180.

[161] See C-307/18 *Generics*, opinion of AG Kokott, para 164.

[162] See C-8/08 *T-Mobile*, opinion of AG Kokott, para 46 (emphasis added); see also Ibáñez Colomo and Lamadrid, 34f.

This expression does illuminate the nearly identical expressions about capability in *T-Mobile* and *Allianz Hungária*;[163] particularly considering that the CJ, in *T-Mobile*, adopted the approach "as pointed out by the Advocate General at point 46 of her Opinion".[164] Thus, maybe it has never been about effects – maybe it has always been about matching with experience. Indeed, that understanding is attractive considering the quite consequent assurance by the CJ that restrictions by object are separated from effects.[165]

2.2.4.4.2 A Practical Approach to Explaning the Matching With Experience

2.2.4.4.2.1 Introduction

Case C-307/18 *Generics* constitutes a favourable foundation for further explaining the understanding presented in section 2.2.4.4.1, as it touches upon several interesting questions in one sweep.[166] Essentially, the case exemplifies that a match with experience is based on two conditions. Firstly, that the disputed agreement exhibits the common denominators of a by object type of collusion (section 2.2.4.4.2.2). Secondly, that it lacks contextual anomalies that cast doubt as to the negative experience of agreements featuring the common denominators (section 2.2.4.4.2.3).[167]

Before delving into the judgement, some words on its background are suitable. GlaxoSmithKline ("GSK") produced a medicine to which it held related patents. Several (potential) competitors contemplated entering the relevant market with generic medicines, which led GSK to initiate genuine patent infringement proceedings.[168] The proceedings were concluded by

[163] See C-8/08 *T-Mobile*, para 31; C-32/11 *Allianz Hungária*, para 38; n 117 and text thereto.
[164] See C-8/08 *T-Mobile*, para 31.
[165] See n 150 and 152.
[166] See C-307/18 *Generics*, paras 64–111.
[167] See about common denominators and experience of sufficiently likely sufficiently harmful effects section 2.2.3.
[168] See about genuine disputes C-307/18 *Generics*, para 76.

settlement agreements. Through these agreements, the alleged patent infringers undertook, in return for substantial payments by GSK, to neither enter the relevant market nor challenge the patents of GSK. Simultaneously, the agreements included provisions that allowed for limited distribution of generics by the alleged patent infringers.[169]

2.2.4.4.2.2 Relevant Experience and Common Denominators

In abstract, the CJ in *Generics* explained that an agreement pursues an anti-competitive object, thus being restrictive by object, if it reveals a sufficient degree of harm – based on its content, objectives, and context – because certain types of collusion are by experience harmful by nature.[170]

In concrete, the CJ described the relevant experience for establishing that a dispute settlement agreement is harmful by nature. It held that such agreements are in principle not problematic.[171] However, a settlement agreement was considered restrictive by object if the value transferred by it "cannot have any explanation other than the commercial interest of both the holder of the patent and the party allegedly infringing the patent not to engage in competition on the merits".[172] The court outlined three conditions for making the latter finding. Firstly, there should be a settlement agreement between a patent holder and a (potential) competitor, where the latter undertakes not to enter the relevant market.[173] Secondly, the value transferred to the alleged infringers should not be justified by "any quid pro quo or waivers"[174] by the patent holder. Thirdly, the value transferred should appear sufficiently beneficial as to, irrespective of a counterfactual scenario, incentivise the alleged infringer to abstain from entering the market.[175]

[169] See C-307/18 *Generics*, para 75.
[170] See C-307/18 *Generics*, paras 64–67; comp n 67–70 and text thereto.
[171] See C-307/18 *Generics*, para 85–86.
[172] See C-307/18 *Generics*, para 87.
[173] See C-307/18 *Generics*, para 90.
[174] See C-307/18 *Generics*, para 92.
[175] See C-307/18 *Generics*, para 93; comp C-591/16 P *Lundbeck*, para 140.

The conditions outlined could be understood as the common denominators of the relevant by object type of collusion.[176] The common denominators are not as clearly outlined for all by object types of collusion. For instance, concerning horizontal price fixing, the conditions have been expressed in different terms, which, however, all boils down to (firstly) an agreement between competitors, that (secondly) aims at directly or indirectly removing uncertainty regarding future pricing.[177] If the common denominators are met by an agreement, it "must, *in principle*, be characterised as a 'restriction by object'".[178] Contrastingly, if not met, a restriction by object appears not possible to establish; the agreement cannot, in that case, be classified as a by object type of collusion.[179] In the following section, I address what the court in *Generics* meant by *in principle*.

2.2.4.4.2.3 Contextual Factors Bringing Doubt to Experience

2.2.4.4.2.3.1 General Explanation

Even if the common denominators are met, an agreement is only "in principle"[180] possible to subsume under a by object type of collusion. All the relevant factors of the individual case must be assessed; specific circumstances may exist which cast doubt on the reliability of experience in casu.[181] This section argues, firstly, that casting doubt on experience must be distinguished from rebutting a restriction by object, and secondly, that experience may pronounce what contextual factors may or may not cast doubt on it.

[176] Comp about common denominators n 86 – 90 and text thereto.
[177] See eg C-286/13 P *Dole*, paras 121, 122, 124 and 134; C-8/08 *T-Mobile*, para 43; By Object Guidance, 6; comp Article 101(1)(a) TFEU; C-228/18 Budapest Bank, para 36.
[178] See C-307/18 *Generics*, para 95 (emphasis added).
[179] Comp C-307/18 *Generics*, paras 85–87; n 84 – 90 and text thereto; See about agreement not meeting the common denominators C-345/14 *Maxima Latvija*, para 21.
[180] See C-307/18 *Generic, para 65.*
[181] See C-307/18 *Generics*, opinion of AG Kokott, paras 158–161; Comp C-307/18 Generics, para 67; C 601/16 P Arrow, para 87.

Firstly, the contextual factors considered in addition to the common denominators are frequently described as factors capable of 'rebutting' the characterisation of an agreement as a restriction by object.[182] However, it is not strictly a question of rebuttal, since a finding of a restriction by object is not a presumption. Once a restriction by object is established, that finding cannot be rebutted.[183] Instead of rebutting a finding of a restriction by object, the question appears to concern only whether the experience is sufficiently reliable and robust for fulfilling the standard of proof for finding that the disputed agreement is a by object type of collusion and thus restrictive by object.[184]

Secondly, and on the backdrop of the first, the CJ in *Generics* dismissed three factors as not precluding reliance on experience as to the restrictive object. Firstly, the court held as settled case law that a patent "does not permit its holder to enter into contracts that are contrary to Article 101 TFEU".[185] Secondly, the court dismissed any relevance of uncertainty as to the outcome of the court proceedings, and thus to the patent's strength – such uncertainty is, as settled, part of the competitive process.[186] Lastly, the court held that *alleged* pro-competitive effects cannot preclude a restriction by object unless the defendant demonstrates[187] that those effects are relevant,[188] specifically related to the agreement concerned,[189] and "sufficiently significant, so that they justify a reasonable doubt as to whether the [agreement] caused a sufficient degree of harm to competition, and, therefore, as to its

[182] See C-307/18 *Generics*, para 96; C-591/16 P *Lundbeck*, para 136.
[183] See C-307/18 *Generics*, opinion of AG Kokott, para 162.
[184] See C-307/18 *Generics*, opinion of AG Kokott, para 161 in relation to para 162; C-307/18 *Generics*, para 107 in relation to paras 67 and 111.
[185] See C-307/18 *Generics*, para 97; comp about Article 102 TFEU Case T-201/04 *Microsoft v Commission* [2007] ECLI:EU:T:2007:289, para 690.
[186] See C-307/18 *Generics*, para 100 in relation to para 81.
[187] See C-307/18 *Generics*, para 105 in relation to para 103.
[188] See C-307/18 *Generics*, para 105.
[189] See C-307/18 *Generics*, para 105.

anticompetitive object."[190] Consequently, experience can answer what contextual factors are irrelevant and, assumptively, also which are relevant.[191]

In the following section, I will probe into the third factor considered by the CJ, which prima facie appears to include an assessment of effects within the ambit of the by object analysis.

2.2.4.4.2.3.2 Alleged Pro-competitive Effects Precluding a Restriction by Object

In Generics, the court prima facie appears to have considered that effects in casu can rebut a finding of a restriction by object. This section explains three untenable interpretations of the judgment. Subsequently, one more attractive interpretation is explained, which does not recognise any role of effects in casu.

Firstly, the idea has figured that a restriction by object is a presumption that can be rebutted if the undertakings concerned prove that the disputed agreement is plausibly net pro-competitive.[192] If an agreement is proven to be net pro-competitive, there is either no restriction at all or a restriction that is counterweighed by positive effects. Rebutting a restriction by object in the latter scenario would bring a rule of reason to the assessment of restrictions by object. Such an order would both blur the distinction between Article 101(1) and 101(3) TFEU[193] and contradict expressions in case law that there exists no rule of reason under Article 101(1).[194] Factors other than those

[190] See C-307/18 *Generics*, para 107.
[191] See about contextual factors being relevant for instance specialisation agreements fixing prices for joint distribution to immediate customers Specialisation Block Exemption, Article 4(a); By Object Guidance, 7.
[192] See Ibáñez Colomo and Lamadrid, 24.
[193] See about Article 101(3) TFEU requiring net-positive effects Article 101(3) Guidelines, para 85; Jones, Sufrin, and Dunne, 269.
[194] See C-307/18 *Generics*, para 104; C-307/18 *Generics*, opinion of AG Kokott, para 148; Case T-208/13 *Portugal Telecom v Commission* [2016] ECLI:EU:T:2016:368, para 102; comp C-209/07 *BIDS*, opinion of AG Trstenjak, para. 55–58; see for the possibility of application of Article 101(3) to restrictions by object Wahlin, 330f.; Article 101(3) guidelines, paras 20 and 46; Jones, Sufrin, and Dunne, 262f.; Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECLI:EU:T:2006:265, upheld in the

calling in question the *existence* of a restriction should be considered only under Article 101(3).[195] Consequently, the idea appears too broad to be correct.

Secondly, the court cannot reasonably be understood as having considered the likelihood of certain effects (neither negative nor positive) in casu. Requiring sufficient certainty as to the restrictive effects in casu would undermine the established division between restrictions by object and effect;[196] one cannot overlook the clear statements by the CJ that an assessment of restriction by object, including consideration to context, "does not imply an assessment of the anticompetitive effects"[197] of the disputed agreement.

Thirdly, the court in Generics appears not to talk about objective justifications under Article 101(1) TFEU, such as the ancillary restraints doctrine.[198] The court refers to "doubt"[199] as to the harmful nature of the disputed agreement as a factor capable of excluding a restriction by object specifically;[200] however, the doubt referred to does not also exclude a restriction by effects – "where the anticompetitive object of [the disputed agreement] is not established, it is necessary to examine its effects".[201] Contrastingly, an objective justification excludes any finding of an unlawful restriction, by

relevant regard in joined cases C-501/06, 513/06, 515/06, and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECLI:EU:C:2009:610.

[195] See C-382/12 P *MasterCard*, paras 180–181; Article 101(3) Guidelines, para 11; Horizontal Co-operation Guidelines, para 20; C-307/18 *Generics*, opinion of AG Kokott, para 147; C-209/07 *BIDS*, opinion of AG Trstenjak, para 59.

[196] See section 2.1.1 and n 149–152.

[197] See C-611/16 P *Xellia Pharmaceuticals*, para 117; see also section 2.2.4.4.1 and particularly n 150.

[198] See about objective justifications eg Jones, Sufrin, and Dunne, 247ff.; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 580ff.; C-307/18 *Generics*, opinion of AG Kokott, paras 149–156; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECLI:EU:C:2011:649, para 39.

[199] See C-307/18 *Generics*, paras 107 and 110.

[200] See C-307/18 *Generics*, para 103.

[201] See C-307/18 *Generics*, para 66; comp C-307/18 *Generics*, opinion of AG Kokott, para 164.

object as well as by effect.[202] Thus, a distinction appears between objective justifications and calling a restriction by object into doubt.[203]

Instead of the above interpretations, the question seems to be whether the standard of proof required for establishing a restriction by object is (still) fulfilled[204] after having had regard to pro-competitive effects (or rather factors alleged to have such effects) *invoked* by the defendant.[205] In other words, the court assesses whether contextual deviations from the relevant experience of by object types of collusion exist, and whether – in accounting for those deviations – it is still possible to be (by experience) certain about how the common denominators will 'react', without having to assess the likelihood of certain effects in casu.[206] To theoretically exemplify by an analogy: imagine a flask containing three substances, the blend of which creates a familiar reaction. Imagine now that, for the first time, a new substance is to be added. Without experience (actual or theoretical)[207] that renders the new reaction sufficiently certain, actual mixing is required for determining the reaction. Assumptively, the new-gained knowledge can be added to the previously held experience.

In *Generics*, as for a real-world example, the court set out to assess whether the disputed settlement agreement pursued the object of allowing the parties' to, in their mutual commercial interest, not engage in competition on the merits. Undisputedly, the disputed settlement agreement, in addition to the common denominators, provided for a potentially pro-competitive

[202] See C-307/18 *Generics*, opinion of AG Kokott, paras 149–156; Faull and others, 251; Bailey, *Bellamy & Child*, 162; C-382/12 P *MasterCard*, paras 89–90; Jones, Sufrin, and Dunne, 247ff.
[203] See for that effect C-307/18 *Generics*, opinion of AG Kokott, paras 149–180; C-67/13 P *CB*, opinion of AG Wahl, para 56.
[204] Compare Reg. 1/2003, Article 2.
[205] See C-307/18 *Generics*, opinion of AG Kokott, paras 164–165 in relation to C-8/08 *T-Mobile*, opinion of AG Kokott, para 46; C-307/18 *Generics*, paras 103, 107, and 111 in relation to para 67.
[206] See C-307/18 *Generics*, para 107; C-228/18 *Budapest Bank*, paras 82–83; C-601/16 *Arrow Group*, para 87 – declaring that the context assessment concerns doubt but "does not also imply an assessment of the anticompetitive effects"; comp for early thoughts in this direction Tannenbaum, 143ff. and 148.
[207] Comp C-67/13 P *CB*, opinion of AG Wahl, para 56.

distribution of generics. However, this anomaly was merely a potential drop in the ocean that, even if the exact effects of the agreements were unknown, could safely be assumed not to cause an unanticipated reaction.[208] Consequently, a tenable alternative understanding of the agreement had not been sufficiently substantiated as to provide for "any explanation other"[209] than that the agreements pursued an anti-competitive object.

As for a second example, in case *CB*, a similar situation featured, albeit with a successful outcome for the defendant. In *CB*, the CJ set out to assess whether it was wrong of the GC to conclude that the disputed agreements "have as their object the restriction of competition […] in that, essentially, they hinder the competition of new entrants on the [relevant market]."[210] The court pinpointed that "that restrictive object must be established",[211] and found that in the present dispute it could not sufficiently be so.[212] The rationale appears to have been that there existed a contextual anomaly to the relevant experience;[213] namely, the agreements concerned two interrelated markets. Based on that anomaly, the defendants argued that the agreements pursued the legitimate objectives of creating a balance between the related markets and of combatting so-called free-riding.[214] The CJ recognised the argument and concluded that it could, in keeping with an experience-based assessment, neither be assumed nor ruled out that the agreement in casu was restrictive on competition; an assessment of effects would be necessary for such a finding.[215]

[208] See C-307/18 *Generics*, paras 107–110.
[209] See C-307/18 *Generics*, para 87.
[210] See C-67/13 P *CB*, para 60; comp C-209/07 *BIDS* – this is the case on which the Commission, in *CB*, based its allegations.
[211] See C-67/13 P *CB*, para 70.
[212] See C-67/13 P *CB*, paras 73–75.
[213] See about experience C-67/13 P *CB*, para 51; C-67/13 P *CB*, opinion of AG Wahl, paras 79 and 56; comp C-209/07 *BIDS* – this was the reference case constituting central experience in *CB*.
[214] See C-67/13 P *CB*, paras 75–76.
[215] See C-67/13 P *CB*, paras 80–81, in relation to 51; see C-67/13 P *CB*, opinion of AG Wahl, paras 56, 79, and 131.

2.2.5 Restriction by Object as an Inchoate Offence Based on Experience

It follows from the considerations above that effects in casu appear to be irrelevant. The only requirement for a restriction by object is that a disputed agreement, considering its content, objectives, *and* context, can be subsumed under a by object type of collusion. Such subsumption is possible provided a match with the common denominators and the absence of contextual factors that raises sufficient doubt as to whether it is possible to rely on the relevant experience. The implication is that restrictions by object constitute risk offences, or in other words inchoate offences. Actual or potential restrictive effects in casu are irrelevant.[216]

Once a restriction by object is established, the agreement is prohibited unless objectively justified under Article 101(1) TFEU or justified under Article 101(3) TFEU.[217] In this manner, the consequence of a restriction by object is not different from a finding of restriction by effect;[218] thus, classifying the prior as a presumption is no more reasonable than placing the same attribute on the latter. Furthermore, a restriction by object is not rendered a presumption by the fact that factors additional to the common denominators may 'rebut' reliance on experience in casu. It is first after considering those additional factors that a restriction by object can be established.[219] The logical consequence is that agreements being examples of by object types of

[216] See eg Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 561ff.; C-8/08 *T-Mobile*, opinion of AG Kokott, para 47; comp C-8/08 *T-Mobile*, para 31; Bailey, *Bellamy & Child*, 170f.
[217] See eg C-307/18 *Generics*, opinion of AG Kokott, paras 147–156 and 162; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 579ff. and 593ff.; By object guidance, 4.
[218] See about objective justification and Article 101(3) as the only escapes from a restriction by effects eg Jones, Sufrin, and Dunne, 247ff.; C-307/18 *Generics*, opinion of AG Kokott, paras 147–150.
[219] Comp C-307/18 *Generics*, opinion of AG Kokott, para 162 – here about irrebuttability; comp also C-67/13 P *CB* – in this case a restriction by object could not be established; C-307/18 *Generics*, para 107 – this case concerned the causing of uncertainty to the existence of a restrictive objective, to begin with.

collusion are always and irrebuttably prohibited under Article 101(1) TFEU unless objectively justified.[220]

2.3 Approach to the Assessment of Restriction by Object

2.3.1 Introduction

Before exploring the approach to the assessment of whether the legal requirements for applying a provision are met, the legal requirements must be known. As the court stated in Case 56/65 *STM*, the question is "whether, taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the said prohibition as set out in Article [101(1)]."[221] From section 2.2, it follows that the element (requirement) constituting the prohibition of restrictions by object is that a disputed agreement can be subsumed under a by object type of collusion. The remainder of section 2.3 explores the approach to the assessment of that requirement, by investigating what circumstances should be considered by whom for establishing whether a disputed agreement meets that requirement.

2.3.2 What Circumstances to Assess – The Concepts of Content, Objectives, and Context

It is now settled case law that, for establishing that an agreement constitutes a by object type of collusion, "regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part".[222] In this section, I explain the concepts of content, objectives,

[220] See C-439/09 *Pierre Fabre*, para 39.
[221] See Case 56/65 *STM*, 248.
[222] See C-228/18 *Budapest Bank*, para 51; see also C-67/13 P *CB*, para 53; Jones, Sufrin, and Dunne, 219f.; Faull and others, 236; Bailey, *Bellamy & Child*, 166; Article 101(3) Guidelines, para 22.

and context. In the subsequent section, I describe the interplay between the responsible competition authority and the defendant, as concerns proof of a restriction by object.

Firstly, the concept of content of the provisions addresses what the parties have agreed upon.[223] This is broadly defined and includes not only written clauses but any content such as oral content or content revealed by the actual implementation.[224] Simultaneously, content could be conceived as narrowly defined, addressing only the content necessary to find a match with experience.[225] For instance, in C-307/18 Generics, certain clauses of the restrictive agreement, additional to the clauses matching with experience, were considered not as content but as contextual factors.[226]

Secondly, as to objectives, it is not evident at first glance what should be considered. As clarified earlier, the objective (and not subjective) finding of an anti-competitive object is what defines a restriction of competition by object.[227] Consequently, the reasoning that objectives of an agreement are to be considered for determining whether that agreement is restrictive by object[228] appears somewhat circular. Furthermore, since the object of a disputed agreement is determined based on the agreement's content and context,[229] and since legitimate objectives do not preclude a restriction by object,[230] individual consideration to objectives as a means of establishing a restriction by object appears superfluous.

[223] Comp C-228/18 *Budapest Bank*, para 60.
[224] See eg Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 576; Bailey, *Bellamy & Child*, 166; Jones, Sufrin, and Dunne, 220; Article 101(3) Guidelines, para 22.
[225] Comp Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 571 – on agreements being partially or wholly restrictive by object.
[226] See C-307/18 *Generics*, paras 103–111.
[227] See section 2.2.1; Article 101(1) TFEU; C-307/18 *Generics*, paras 65–66; Jones, Sufrin, and Dunne, 219; Wahlin, 332.
[228] See C-67/13 P *CB*, para 53; C-286/13 P *Dole*, para 117; C-307/18 *Generics*, para 67.
[229] See C-228/18 *Budapest Bank*, paras 66–67; Jones, Sufrin, and Dunne, 219ff.; Kolstad, 14ff.
[230] See Bailey, *Bellamy & Child*, 169; Whish and Bailey, 123; C-209/07 *BIDS*, para 21; Case C-551/03 P *General Motors* [2006] ECLI:EU:C:2006:229, para 64.

However, at a closer look, a distinction between objectives and objectives appears necessary. While an anti-competitive objective as the factor defining a restriction by object appears to be abstractly defined based on experience (abstract anti-competitive objective),[231] the objectives considered as a means of establishing a restriction by object are defined concretely in casu (in casu objectives).[232] Thus, in casu objectives are compared with experience in means of deductively concluding whether the disputed agreement pursues an abstract anti-competitive objective.[233]

Lastly, the relevant context includes both economic and legal context, and in particular "it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question".[234] The context is not derived from any counterfactual assessment[235] and, instead, consists of the observable existing setting "of which [the agreement] forms a part".[236] It logically follows that the context is dependent on the individual case. This is not the same as saying that all contextual elements are unique for each case; it is for instance clear that a contextual common denominator for by object price-fixing is that the agreement should be horizontal.[237]

[231] Comp C-307/18 *Generics*, para 87; C-172/14 *ING Pensii*, para 32.
[232] Comp C-307/18 *Generics*, para 88; C-172/14 *ING Pensii*, paras 37–38.
[233] Comp C-228/18 *Budapest Bank*, paras 66–79; Peeperkorn, 46 – "an investigation of its content and objectives will usually make clear whether the agreement in question, for instance, is a price fixing agreement."; C-307/18 *Generics*, paras 87–88; see also above on inductively created by object type of collusion through experience; C-67/13 P *CB*, opinion of AG Wahl, para 116.
[234] See C-307/18 *Generics*, para 68.
[235] See C-591/16 P *Lundbeck*, para 140.
[236] See C-228/18 *Budapest Bank*, para 51; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 560; comp C-591/16 P *Lundbeck*, paras 130 and 139–141; see for a semantic definition of context Cambridge dictionary – "the situation within which something exists or happens, and that can help explain it" <https://dictionary.cambridge.org/dictionary/english/context>, visited 2021-04-07.
[237] See C-228/18 *Budapest bank*, para 36 – "horizontal price-fixing by cartels"; see on the role of competitive dimension also Peeperkorn, 46; By Object Guidance, 4.

2.3.3 By Whom – Burden of Proof and Counterproof

From defining content, objectives, and context it appears that these are all interrelated. The existence of an anti-competitive object cannot be found in the abstract; it can only be found by taking into consideration all the relevant factors in an individual case.[238] Thus, for a competition authority to discharge its burden of proof,[239] it must establish an anti-competitive object by jointly considering content, objectives, and context in relation to the relevant experience.[240] Context, like content, and objectives, serves an incriminatory function.[241] Without having all ingredients the cake cannot be baked.

However, albeit the burden of proof lies on the responsible competition authority, it is settled in case law that the assessment of context may "be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object".[242] This expression indicates an eased burden on the relevant competition authority but leaves unanswered to what extent context is necessary to consider.

AG Bobek has proposed that the expression should be understood as requiring that the relevant competition authority must "check that there are no specific circumstances that may cast doubt on the presumed harmful nature of the agreement in question."[243] A logical consequence would be that all circumstances are required to consider, since the existence of specific circumstances establishing doubt could otherwise not be ruled out. Arguably, consideration to all circumstances is not impeccably aligned with either the

[238] See Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 582f.; Bailey, *Bellamy & Child*, 153; C-67/13 P *CB*, opinion of AG Wahl, paras 40–41; C-551/03 P *General Motors*, para 66; C-307/18 *Generics*, opinion of AG Kokott, para 158.
[239] See Reg. 1/2003, Article 2.
[240] See to that effect C-228/18 *Budapest Bank*, paras 66–79; comp C-591/16 P *Lundbeck*, para 112; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 582f.
[241] See Bailey, 'Restrictions of Competition by Object under Article 101 TFEU', 582f.; Kolstad, 16; comp Jones, Sufrin, and Dunne, 225.
[242] See C-373/14 P *Toshiba Corporation v Commission* [2016] ECLI:EU:C:2016:26, para 29; see also C-469/15 P *FSL and Others v Commission* [2017] ECLI:EU:C:2017:308, para 107; Jones, Sufrin, and Dunne, 225; Bailey, *Bellamy & Child*, 167; Van Bael & Bellis, 65; Whish and Bailey, 126.
[243] See C-228/18 *Budapest Bank*, opinion of AG Bobek, para 48.

administrative efficiency objective of restrictions by object,[244] or the expression that contextual consideration may be limited to what is necessary.[245] These problems could not be remedied by considering context only in uncertain cases or, in other words, borderline cases.[246] Namely, whether the case is uncertain may depend on the context, to begin with.[247] Additionally, it is established that context must be considered in all cases.[248]

Another understanding emerges from the CJ's judgment in *Generics*. The court declared that once the responsible competition authority has proven, according to the requisite standard of proof, that the common denominators are met, the disputed agreement "must, in principle, be characterised as a 'restriction by object'".[249] Once that is accomplished, it is for the defendant to produce counterproof capable of causing reasonable doubt as to the reliance in casu on the experience of the effects of the common denominators and thus to the alleged anti-competitive object.[250] If the defendant produces such counterproof, the pendulum returns to the responsible authority that might have to undertake further necessary considerations to contextual factors to re-discharge the burden of proof.[251]

[244] Comp n 54.
[245] See n 242.
[246] See for such considerations Ioannidou and Nowag, 363; see section 2.2.4.3.
[247] Comp C-209/07 *BIDS*, opinion of AG Trstenjak, para 59; C-307/18 *Generics*, para 107; Kolstad, 16.
[248] See n 142 and 234.
[249] See C-307/18 *Generics*, para 95; see for closer investigation of the case section 2.2.4.4.2.
[250] See, for that effect, C-307/18 *Generics*, paras 96–111; C-307/18 *Generics*, opinion of AG Kokott, para 149; C-591/16 P *Lundbeck*, paras 119–128.
[251] Comp C-469/15 P *FSL*, para 108.

3 Analysis and Conclusion

3.1 Introduction

In the following, I outline my understanding of how the CJ applies restrictions by object. Generally, it appears possible to divide the concept of restriction by object into two steps. Firstly, there must exist by object types of collusion. Secondly, for an agreement to be restrictive by object, it must be subsumed under one such type of collusion.[252] Subsuming an agreement under a by object type of collusion is conclusive for establishing a restriction by object. No additional requirements exist, such as a requirement that the agreement is capable or sufficiently likely of having restrictive effects in casu.[253]

3.2 By Object Types of Collusion

A by object type of collusion can be described as an abstract and general rule created through inductive reasoning based on experience. The experience includes previous case law as well as other knowledge such as economic theory. Sufficiently reliable and robust, including sufficiently general and consistent, experience makes it possible to discern certain traits (common denominators) shared by several collusive conducts. These collusive conducts may be considered harmful by their nature if they are sufficiently likely to cause sufficient harm to competition. Through inductive reasoning, the common denominators discerned can be adopted as 'conditions' in a general rule (the by object type of collusion). This rule can be deductively applied on future agreements, rendering an effects assessment superfluous for establishing a restriction of competition.[254] This understanding does not appear peculiar; one cannot say that it is day because it is day – one can say

[252] See section 2.2.2.
[253] See section 2.2.5.
[254] See sections 2.2.3, 2.2.4.4.1, and 2.2.4.4.2.2.

that it is highly likely day because the sun is up. However, I reckon that in the interest of legal certainty it would not harm if the common denominators for different by object types of collusion could be clearly outlined by the CJ.

3.3 Burden of Proof on the Responsible Competition Authority

For an individual agreement to be considered restrictive by object, the responsible competition authority must prove that the disputed agreement meets the common denominators for a by object type of collusion. Achieving this is, in principle, sufficient for discharging the burden of proof and thus for classifying the agreement as restrictive by object. Further requirements on the responsible competition authority could decrease the administrative efficiency gains which the concept of restriction by object aims to generate.[255]

Discharging the burden on the competition authority does not require any assessment of effects. The competition authority is not to undertake any counterfactual assessment; it is only to consider the agreement's existing and observable content, objectives, and economic and legal context. Context and effect are separate concepts. For assessing effects, one must go beyond mere considerations to context and ask the question of what differences appear between the actual context (the context in which the factor the effect of which is to be assessed exists) and a counterfactual context (the context without that factor).[256]

3.4 Burden of Counterproof

Although a restriction by object should not be viewed as a rebuttable presumption, a match with the common denominators related to a by object

[255] See sections 2.1.2 and 2.3.3.
[256] See sections 2.2.4.4.1 and 2.1.1.

type of collusion is not necessarily conclusive for establishing a restriction by object. The burden of proof is no longer discharged if the defendant produces sufficiently substantiated arguments (counterproof) for rendering reasonably doubtful the reliance on experience in casu as to the effects of agreements featuring the common denominators (the experienced effects). This possibility of the defendant could be understood as ensuring a suitable balance between administrative efficiency and the strive to reduce false positives.[257]

An assessment of whether counterproof reverses the competition authority's discharge of the burden of proof does not require an assessment of effects. The question is not whether it is likely or unlikely that the disputed agreement will have specific effects. Such an order would blur or erase the distinction between restrictions by object and effect. Instead, relevant is only the possibility to *rely on the experienced effects*. If experience can be relied on, the agreement is subsumed under a by object type of collision, rendering it harmful by its nature and effects superfluous to consider. However, if there are reasonable doubts as to the experience, effects are necessary to examine for establishing a restriction.[258]

To rebut reliance on experience, the defendant's arguments must be relevant. Relevant arguments should be capable of bringing reasonable doubt to the experienced effects; any doubt must benefit the defendant. Such arguments should substantiate circumstances in casu being additional to the common denominators (contextual anomalies), which may be pro-competitive compared to the experienced effects; naturally, arguing that the contextual anomalies are aggravating (or not affecting) the experienced effects would not call the experienced harmful nature in question. Furthermore, it is insufficient for the defendant to argue that the contextual anomalies bring countervailing efficiencies – such efficiencies are assessed only under Article 101(3) TFEU. Instead, the arguments must question the experienced effects,

[257] See sections 2.1.2, 2.2.5, and 2.3.3.
[258] See section 2.2, particularly section 2.2.4.4.2.3.2.

to begin with. A restriction by object cannot be adopted if one cannot, after considering the arguments, confidently rely on experience as to the harmful nature of the agreement, without assessing effects to ensure whether the arguments are correct.[259]

Consideration to what arguments may rebut reliance on experience can be further nuanced. Namely, experience may provide not only for the common denominators defining a by object type of collusion but also for which contextual anomalies are relevant and which are irrelevant. For instance, uncertainty as to the outcome of a patent infringement proceeding is not relevant for the classification of a settlement agreement as restrictive by object.[260]

3.5 Incapability of Restricting Competition

No independent requirement for restrictions by object that relates to effects in casu appears to exist. The direct implication is that an agreement classified as a by object type of collusion is restrictive by object and prohibited under Article 101(1) TFEU, irrespective of its potential incapability of restricting competition. However, the risk for false positives should not be overstated. In general, the concept of restrictions by object should be interpreted restrictively. More specifically, it appears that the scope of by object types of collusion is limited to collusion which by experience almost always, or rather without reasonable doubt, entails sufficiently restrictive effects. Besides, even if a match with the common denominators of a by object type of collusion is proven, an agreement displaying contextual anomalies rendering reliance on the relevant experience doubtful should not be subsumed under a by object type of collusion. Consequently, it can be expected that agreements incapable

[259] See section 2.2.4.4.2.3.
[260] See section 2.2.4.4.2.3.1.

of restricting competition principally or invariably will fall outside the ambit of by object types of collusion.[261]

In practice, it is possible to discern two principal ways in which an agreement incapable of restricting competition may avoid being classified as restrictive by object. Firstly, the responsible competition authority might be unable to prove a match with the common denominators of a by object type of collusion. Secondly, the defendant may adduce substantiated arguments, based on contextual anomalies, which renders reliance on the experienced effects doubtful.[262]

3.6 Balance Between the Objectives

A strength of the approach favoured in this thesis is that it seemingly pursues the objectives of restrictions by object and Article 101 TFEU in a balanced manner. Firstly, it facilitates legal certainty, by adopting only one relatively simple and (possible to make) clear requirement. Secondly, it facilitates administrative efficiency, by requiring consideration to neither effects nor all circumstances of a case in full, but only to the reliability of experienced effects. Consequently, it facilitates effectiveness in prohibiting anti-competitive agreements. Simultaneously, it provides a possibility for defendants to avoid a by object restriction by merely adducing reasonable doubts, thus facilitating a restrictive interpretation and the avoidance of false positives. In sum, the approach appears to establish a reasonable balance between the relevant objectives.[263]

[261] See sections 2.1.2, 2.2.3.3, 2.1.3, 2.2.4, 2.3.3.
[262] See sections 2.3.3 and 2.2.4.4.2.3.
[263] See particularly sections 2.1.2, 2.1.3, 2.2.5, 2.3.3.

3.7 Conclusions

It appears to exist only one requirement for finding that a disputed agreement is restrictive by object; it must be possible to subsume the agreement under a by object type of collusion, based on experience. Any effects of the agreement are irrelevant. Relevant is whether it is doubtful in casu to rely on the experience that agreements featuring the common denominators of a by object type of collusion sufficiently likely entail anti-competitive effects.

The responsible competition authority bears the burden of proof. However, it is not required to consider all circumstances of the case; it is required only to prove that a disputed agreement meets the common denominators of a by object type of collusion. Subsequently, it is for the defendant to adduce substantiated arguments that the agreement features contextual anomalies which render reliance on experience doubtful. If there is no doubt as to reliance on experience in casu, the agreement must be subsumed under a by object type of collusion.

Once subsumed under a by object type of collusion, the capability of an agreement to restrict competition is irrelevant. The agreement cannot avoid being classified as a restriction by object. However, an agreement that is incapable of restricting competition would expectedly principally or invariably not be subsumed under a by object type of collusion, to begin with.

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