

Can two wrongs make it right? Reconsidering minimum resale price
maintenance in the light of *Allianz Hungária*

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Abstract

Minimum resale price maintenance (RPM) agreements constitute hard-core vertical restraints and are treated as object restrictions in EU competition law. This article suggests that the time may have come where this approach is revised. After, first, discussing the economic theory behind RPM and the EU Court's approach to object restrictions, it argues that the recent widening of the object analysis and the concomitant blurring of the object and effect categories may aid EU competition law to reconceptualise the approach to minimum RPM.

Keywords: RPM, minimum RPM, object restrictions, anti-competitive effect, anti-competitive object, cartels, effects-analysis, object and effect distinction, per se illegality

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A. Introduction

This article proposes that a new evaluation of minimum resale price maintenance (RPM) may now be possible under EU competition law. In the light of recent EU Court of Justice (CJ) case law that has allowed for a wider treatment of object restrictions the time may soon come where minimum RPM is no longer treated as an object restriction. The article discusses the novel approach in *Allianz Hungária*¹ and argues that this can be constructively applied in the area of minimum RPM. It suggests that the analysis in *Allianz Hungária* could be a possible way forward to address issues raised by economic theory and would provide a superior approach in terms of the burden of proof. In addition, it will bring the EU competition law approach to minimum RPM agreements in line with the US approach following the seminal judgment in *Leegin*.² Given the CJ's approach in *Allianz Hungária* together with the heavier weight placed upon efficiencies by the Commission,³ this article opts for the formulation of a middle ground for the examination of minimum RPM. It further assesses whether this approach is preferable to the current one in the light of economic thinking and the need to formulate administrable legal rules.

First, this article discusses the current approach to RPM in EU competition law (section 2). Given that minimum RPM is classified as an object restriction, section 3 examines the CJ's approach to object

¹ Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal* [2013] 4 CMLR 25.

² *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Leegin Creative Leather Products Inc. v. PSKS Inc.*, 551 U.S. 877 (2007); 127 S. Ct. 2705 (2007).

³ An indication towards a more economics approach to RPM can be deduced from the 2010 Guidelines on Vertical Restraints discussing efficiencies in the context of fixed and minimum RPM. See Commission (EU), 'Guidelines on Vertical Restraints' [2010] OJ C130/1 ('Vertical Guidelines') para 225.

restrictions. Section 4 explains how the analysis in *Allianz Hungária* differs from previous case law and section 5 argues that post *Allianz Hungária* a novel ‘quick effects’ analysis has been adopted by the Court that can be constructively applied in the area of minimum RPM (section 6).

B. Resale Price Maintenance and its treatment in EU competition law

The treatment of RPM is hotly debated in EU competition law⁴ since the US Supreme Court in *Leegin*⁵ overturned the nearly one hundred year old *Dr. Miles*⁶ *per se* prohibition of minimum RPM. In 1911 the Supreme Court established that an agreement to maintain a minimum resale price between the drug company Dr Miles and its downstream retailers was illegal under the Sherman Act because it had the same effects as a horizontal price fixing agreement. This precedent was set aside almost a hundred years later in *Leegin*. This case concerned a minimum RPM arrangement between Leegin and its distributors. Leegin manufactured leather belts for women. These belts were priced in the middle range and had a small market share. After one of its retailers continued to sell below Leegin's suggested prices, Leegin ceased supplies. The subsequent damages claim by PSKS reached the Supreme Court. Leegin had been found to have engaged in illegal price fixing pursuant to the *Dr. Miles* rule before the first instance court and at the appellate stage. The Supreme Court majority overturned *Dr. Miles* and highlighted in particular the economic theory on the pro-competitive effects of RPM.

⁴ E Gippini-Fournier, 'Resale Price Maintenance in the EU: In Status Quo Ante Bellum?' in B Hawk (ed) *Fordham Corporate Law Institute- 36th Annual Conference on International Antitrust Law and Policy 2009* (Fordham 2011) 515; A Jones, 'Resale Price Maintenance: A Debate About Competition Policy in Europe?' (2009) 5 *European Competition Journal* 479. C Hofmann 'Vertical Price Fixing in Europe and the U.S. – The Way to a Uniform Approach for Both Markets' (2013) 24 *European Business Law Review* 699; A Font-Galarza, FP Maier-Rigaud & P Figueroa 'PRM under EU Competition Law: Some Considerations from a Business and Economic Perspective' (November 2013) (1) *CPI Antitrust Chronicle*.

⁵ *Dr. Miles Medical Co. v. John D. Park & Sons Co supra* n 2

⁶ *Leegin Creative Leather Products Inc. v. PSKS Inc. supra* n 2.

Since *Leegin*, federal US antitrust law no longer treats minimum RPM as prohibited *per se* but assesses it under the rule of reason. Thus, pressure has mounted in Europe to update its approach to RPM. While the Commission tried to renovate its approach with the 2010 Block Exemption Regulation on Vertical Restraints (VBER)⁷ and the Vertical Guidelines,⁸ criticism has persisted. The Commission has been urged to treat minimum RPM as an effect and not as an object restriction.⁹

The area of RPM is complex, in particular since RPM as a vertical phenomenon can take different forms. There are recommended prices, maximum resale prices, minimum resale prices and fixed resale prices. In general the different forms of RPM can range from harmless arrangements typically not within the scope of Article 101(1) TFEU to more problematic object restrictions. When assessing the restrictive effects of the different forms of RPM, recommended resale prices seem to be on the one end and fixed resale prices on the other end of a scale with fixed resale prices being the most restrictive form of RPM. Minimum resale prices seem closer to fixed while maximum resale prices seem closer to recommended resale prices.

⁷ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

⁸ Vertical Guidelines *supra* n 3. On the approach to vertical restraints in general see S Simon, 'Vertical Restraints: New BER and Guidelines Adopted' (2010) 1 *Journal of European Competition Law & Practice* 311.

⁹ See, for example, M Velez, 'The Tenuous Evolution of Resale Price Maintenance' (2011) 32 *European Competition Law Review* 302; HJ Hovenkamp, 'Leegin, the Rule of Reason, and Vertical Agreement' (2010) *U Iowa Legal Studies Research Paper* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1673519 accessed 25 July 2015; KG Elzinga and DE Mills, 'The Economics of Resale Price Maintenance' (2008) 3 *Issues in Competition Law and Policy* (ABA Section of Antitrust Law 2008) 1841; Gippini-Fournier *supra* n 4 515; Jones *supra* n 4 479. For a concise overview of the economic arguments for and against vertical price-fixing agreements see Hofmann *supra* n 4; Font-Galarza, Maier-Rigaud & Figueroa *supra* n 4.

1. RPM that are typically harmless

A typically harmless form of RPM is the setting of *maximum retail prices*. Maximum retail prices are in general set by the manufacturer/supplier to ensure that the retailer will not exceed them. Such agreements are not listed as hard-core restrictions under Article 4(a) VBER but are examined under the effects analysis. According to the Vertical Guidelines it would typically be difficult to find and prove any negative effect on competition.¹⁰ The setting of maximum retail price by the producer ensures that the retailers' market power on the downstream market cannot be exercised by overcharging. Producer welfare and the consumer welfare are aligned because such overcharging would reduce the total sales volume thereby harming consumer and producer welfare.¹¹

Another form of RPM that would typically not be caught by Article 101(1) TFEU are *genuine* recommended retail prices. Such prices are suggested by the manufacturer/supplier and should act as a guideline, but retailers remain free to determine the actual sale price. Advertising the recommended resale price can act as a benchmark against which a retailer can compare their price cut. Used in this way, recommended resale prices can increase *inter-* as well as *intra-brand*¹² competition and are thus

¹⁰ Vertical Guidelines *supra* n 3 para 227.

¹¹ Cf R van den Bergh and PD Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Sweet Maxwell 2006) 209ff. Maximum resale prices may only have negative effects if the retail level is not competitive. A competitive retail level should ensure that prices will not be excessive since both manufacturer/supplier and retailer have an interest in increased sales, see Communication from the Commission on the application of the Community competition rules to vertical restraints - Follow-up to the Green Paper on vertical restraints, COM(98) 544 final [1998] OJ C 365/3, 9; Font-Galarza, Maier-Rigaud & Figueroa *supra* n 4 4ff.

¹² *Inter-brand* competition describes the competition between different brands. Typically this form of competition takes place between different producers of products in the same market. *Intra-brand* competition describes the competition between different retailers which sell the same product/brand.

harmless from a competition perspective.¹³ In practice it may however be difficult to determine the dividing line between recommended retail prices as unilateral practices and agreements. A unilateral practice, that is to say cases of mere recommendations, is not caught by Article 101(1) TFEU. Yet, in a situation where a factual obligation exists to charge the recommended price, the measure is caught as agreement under Article 101(1) TFEU. Hence, the distinction within Article 101(1) TFEU is between *genuine* recommendations, which, as unilateral practice, remain outside its scope¹⁴ and agreements to charge a certain price. Establishing such agreements means that the prices are in fact not *recommended* but tacitly agreed upon, so that Article 101(1) TFEU applies.¹⁵ Thus, when price recommendations are enforced against retailers who undercut these prices¹⁶ the recommended retail prices are in reality fixed or minimum resale prices¹⁷ and should be treated as such.¹⁸

¹³ G Niels, H Jenkins and J Kavangh, *Economics for Competition Lawyers* (OUP 2011) 329.

¹⁴ Case 161/84 *Pronuptia de Paris v Schillgalis* [1986] ECR 353 para 25.

¹⁵ See eg Case COMP/37.975– PO/Yamaha Commission Decision of 16. June 2003 para 124ff; Case T-41/96 *Bayer v Commission* [2000] ECR II-3383; on appeal Case C-2/01P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-23; Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189. The Courts in *Volkswagen v Commission* highlighted that a form of acceptance must be established to find that a tacit agreement on resale prices has been reached. It is not sufficient that the manufacture/supplier issues lists with recommended prices/discounts and retailers/dealers subsequently sign a dealership agreement. Agreements can be found in particular where, for example, the margins, the maximum level of discount, the conditionality of rebates or reimbursement of promotional costs on the observance of pricing models were agreed, or where a link is made to the resale prices of competitors. Moreover, warnings, intimidation and threats or penalties, delays and the suspension of deliveries or even contract terminations in relation to price models suggested by the manufacture/supplier can be used to establish a tacit agreement. See Vertical Guidelines *supra* n 3 paras 48, 226ff, See also R Whish and D Bailey, *Competition Law* (OUP 2012) 664ff.

¹⁶ On reaction of manufactures towards disobeying retailers, R Livingston Steiner, ‘How Manufacturers Deal with the Price-Cutting Retailer: When are Vertical Restraints Efficient?’ (1997) 65 *Antitrust Law Journal* 407; EA Elias, ‘Dealer Termination or Exclusion, Intra-brand Competition and GTE Sylvania’ (1977) 29 *Baylor Law Review* 435.

¹⁷ Vertical Guidelines *supra* n 3 paras 226ff.

¹⁸ Unfortunately, the Commission's Guidelines are not sufficiently clear in this regard. The Guidelines explain in detail the competitive risk of recommended prices but fail to explain that genuine recommended prices are not covered by Article 101 TFEU, because no

2. Problematic forms of RPM

Highly problematic from a competition law perspective are fixed retail prices, which are considered object restrictions.¹⁹ Fixed retail prices constitute hard core restraints listed in Article 4(a) VBER, even if they cover only a small part of the relevant market. The Vertical Guidelines explain in detail the competitive risks. They stress that such agreements eliminate *intra*-brand competition facilitating collusion between suppliers and between distributors. Distributors with strong market power may be able to force or convince suppliers to fix their resale price above the competitive level helping them to stabilise or reach a collusive equilibrium. Moreover, competition between manufacturers and/or between retailers is generally softened, particularly where manufacturers use the same distributors for their products and fixed retail prices agreements are employed by all or many of the manufacturers. The obvious negative effect of fixed retail prices is that distributors are prevented from lowering their sales price for that particular brand. This prevents efficient retailers from acquiring sufficient scale with low prices.²⁰

agreement exists in the first place. Instead the Commission explains that the ‘possible competition risk of maximum and recommended prices is that they will work as a focal point for the resellers and might be followed by most or all of them and/or that maximum or recommended prices may soften competition or facilitate collusion between suppliers.’ (para 227 of the Vertical Guidelines *supra* n 3). This risk would be higher when the supplier holds a very strong market position, (see paras 227 and 228 of the Vertical Guidelines). The Commission then even seems to give the (false) impression that a recommended resale price will be subject to Article 101 (1) TFEU when distinguishing between maximum prices and recommended prices (paras 226 – 229 of the Vertical Guidelines). This is so because the Commission expresses the view that maximum resale prices should be treated more favourably than recommended prices since maximum resale prices may help to ensure that the brand in question competes more forcefully with other brands, including the manufacturer’s own label products (see para 229 of the Guidelines).

¹⁹ See in this regard eg Case 243/83 *Binon v AMP* [1985] ECR 2015 para 44.

²⁰ Vertical Guidelines *supra* n 3 para 224.

For the same reasons the Commission seems to classify minimum RPM agreements as hard-core restrictions (Article 4a VBER).²¹ The Commission as a response to the US *Leegin* decision made clear in its Vertical Guidelines that although minimum RPM agreements are considered to be object restrictions they may be exempted under Article 101 (3) TFEU.²² While this has always been true not only for minimum RPM agreements but for all object restrictions, the Commission for the first time expressly recognised the benefits that RPM may have. The Vertical Guidelines were therefore aimed at highlighting that the Commission would not adopt a *per se* approach addressing some of the criticism based on economic theory.

The difference between the EU and the US approach is the allocation of the burden of proof. Subjecting minimum RPM under the rule of reason in the US may have the effect of establishing a *per se* legality.²³ It is for the competition authority or the private claimant to establish the competitive harm. In contrast, in the EU the Commission or a private claimant would not have to establish such harm but it would be for the defendant to establish pro-competitive effects of the minimum RPM scheme.

²¹ See also Commission (EU), 'Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the *De Minimis* Notice' (Staff Working Document) (2014) 198 final (Brussels 25 June 2014) 2, 16-17.

²² Vertical Guidelines *supra* n 3 paras 48, 223.

²³ See Jones, *supra* n 4 495ff. Although, it needs to be seen how the lower courts will apply *Leegin* in terms of the burden of proof under the rule of reason, see *Leegin Creative Leather Products Inc. v. PSKS Inc.*, 551 U.S. 877 (2007); 127 S. Ct. 2705 (2007) p 19. Moreover, it needs to be taken into account that many US states have adopted legislation prohibiting minimum RPM schemes which may not necessarily be pre-empted by *Leegin*. See MLindsay, 'Resale Price Maintenance and the World After *Leegin*' (2007) *Antitrust* 1, A MacKay and D Smith, 'The Empirical Effects of Minimum Resale Price' (June 16, 2014) Kilts Booth Marketing series, Paper No. 1-009 <<http://ssrn.com/abstract=2513533>> (accessed 25 July 2015). For a critique of an earlier version of this paper see T Lambert and MI Sykuta 'Why the New Evidence on Minimum Resale Price Maintenance Does Not Justify a Per Se or Quick Look Approach' (Nov 13, 2013) Competition Policy International.

This difference stems from qualifying minimum RPM schemes as object restrictions. However, as will be explained in detail below only those restrictions should be qualified as restrictions by object that typically, that is to say in the majority of cases, have negative effects on competition. For minimum RPM schemes economic theory suggests that there are many cases where those schemes have positive effects. The Commission's approach has therefore come under criticism.²⁴

3. Should minimum RPM be treated as an object restriction?

The most visible effect which minimum RPM schemes may have are increased prices for final consumers.²⁵ The reduction of intra-brand competition through minimum RPM schemes can increase the supplier's margin²⁶ thereby reducing an important incentive for increasing productive efficiency in particular where the supplier has market power.²⁷ Moreover, minimum RPM schemes can be employed to co-ordinate and monitor cartels by offering a tool to easily detect price-cutters.²⁸ Such cartels can be formed

²⁴ See, for example, Jones, *supra* n 4; Hofmann *supra* n 4; Font-Galarza, Maier-Rigaud & Figueroa *supra* n 4; Gippini-Fournier *supra* n 4 515.

²⁵ See, eg the dissenting opinion of Justice Breyer in *Leegin* *supra* n 2. For an opposing view see P Ippolito 'RPM Myths That Muddy the Discussion (2010) 55 *Antitrust Bulletin* 154ff.

²⁶ It may also soften downstream competition or deter downstream entry, because of the reduction in downstream price competition, see Office of Fair Trading, 'An evaluation of the impact upon productivity of ending resale price maintenance on books' (2008) http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/economic_research/oft981.pdf accessed 24 July 2015. See also PW Dobson and M Waterson, 'The Competition Effect of Industry-Wide Vertical Price Fixing in Bilateral Oligopoly' (2007) 25 *International Journal of Industrial Organization*, 953–954.

²⁷ On the importance of intra-brand competition see RL Steiner, 'Intrabrand Competition-Stepchild of Antitrust' (1991) 36 *Antitrust Bulletin* 155.

²⁸ See, eg RA Posner, *Antitrust Law* (UCP 2001) 172; TR Overstreet, 'Resale Price Maintenance: Economic Theories and Empirical Evidence' (1983) FTC Bureau of Economics Staff Report 133; H Marvel and S McCafferty, 'Resale Price Maintenance and Quality Certification' (1984) 15 *Rand Journal of Economics* 346ff. P Jones Harbour/L Price, 'RPM and the Rule of Reason: Ready Or Not, Here We Come?' (2010) 55 *Antitrust Bulletin* 231. See eg *Argos Ltd. v Office of Fair Trading* [2006] EWCA (Civ) 1318, para 141.

at upstream level but it is equally possible that powerful retailers ‘negotiate’ the minimum RPM price with the supplier.²⁹

However, economic theory has stressed that minimum RPM can yield pro-competitive effects by boosting both intra-brand and inter-brand competition.³⁰ Free-riding is an important element in the minimum RPM debate.³¹ Minimum RPM schemes prevent cases where the consumer makes use of the additional services provided by one retailer and then buys the goods at another retailer that is cheaper as a result of not providing such services.³² A classical, often cited, example is competition between brick and mortar shops and internet shops, where consumers would examine the product and receive demonstrations of a product at a brick and mortar shop but would then buy it cheaper online.³³ Besides preventing the free-rider problem, minimum RPM schemes increase the likelihood that a product is stocked in sufficient quantities even where there are uncertainties about the demand³⁴ because the retailer does not have to fear declining prices.

While these issues concern *intra*-brand competition, minimum RPM schemes might also have pro-competitive effects on *inter*-brand competition.

²⁹ See also Vertical Guidelines *supra* n 3 para 224; J Lever and S Neubauer, ‘Vertical Restraints and Their Motivation and Justification’ (2000) *European Competition Law Review* 7ff; U Bernitz ‘Resale price maintenance in comparative perspective’ in A Ezrachi (ed), *Research Handbook On International Competition Law* (Edward Elgar 2012) 430. B Jullien & P Rey, ‘Resale Price Maintenance and Collusion’ (2007) 22 *RAND Journal of Economics* 983, 996.

³⁰ For a good overview on the possible positive and negative effect of resale price maintenance see OECD, Policy Roundtable: Resale Price Maintenance (2008) 29.

³¹ Challenging free rider justifications in support of RPM see M Lao, ‘The Internet Phenomenon and ‘Free Rider’ Issues’ (2010) 55 *Antitrust Bulletin* 473.

³² H Marvel, ‘The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom’ (1994) 63 *Antitrust Law Journal* 59; Marvel and McCafferty *supra* n 28.

³³ In this vein US amicus curiae in *Leegin supra* n 2. But also e.g. Hofmann *supra* n 4 704ff; Font-Galarza, Maier-Rigaud & Figueroa *supra* n 4 4. For the opposite view arguing that this is a too simplistic picture see eg, Lao, *supra* n 31, 473. See also GT Gundlach, JP Cannon and KC Manning, ‘Free riding and resale price maintenance: Insights from marketing research and practice’ (2010) 55 *Antitrust Bulletin* 381-422.

³⁴ See R Deneckere, H Marvel and J Peck, ‘Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition’ (1997) 87 *American Economic Review* 619.

Economic theory identified an interest of the manufactures in minimum RPM schemes as the extra margin of the retailers can encourage them to invest in additional services or promotions,³⁵ which help in *inter*-brand non-price competition.³⁶ Moreover, the US Supreme Court identified a greater choice ‘among low-price, low-service brands; high-price, high-service brands and brands falling in between’³⁷ as a consumer welfare gain and highlighted that minimum RPM schemes could facilitate market entry.³⁸ The mixed economic theory, which provides arguments for and against anti-competitive effects³⁹ led the US Supreme Court to find that a *per-se* prohibition would no longer be justified and a rule of reason approach should apply.⁴⁰

In a nutshell, economic theory suggests that minimum RPM, depending on the market context, may account for pro or anticompetitive effects⁴¹ and challenges its classification as object restriction. This is not to suggest that EU competition law does not accept that minimum RPM may exceptionally account for pro-competitive effects, in which case the parties can plead Article 101 (3) TFEU. Yet, it would be rather difficult to succeed with such a defence. While the Commission recognises the theoretical

³⁵ M Kneepkens, ‘Resale Price Maintenance: Economics Call for a More Balanced Approach’ (2007) 28 *European Competition Law Review* 656, 658, see also G Shaffer, ‘Slotting Allowances and Resale Price Maintenance: A Comparison of Facilitating Practices’ (1991) 22 *RAND Journal of Economics* 120, 130.

³⁶ See Posner *supra* n 28, 173.

³⁷ *Leegin Creative Leather Products Inc. v. PSKS Inc.* *supra* n 2 .

³⁸ *Ibid* at 11-12. See also Posner *supra* n 28, 172ff.; Marvel and McCafferty, *supra* n 28; See F Mathewson and R Winter, ‘The Law and Economics of Resale Price Maintenance’ (1998) 13 *Review of Industrial Organization* 74.

³⁹ See in particular M Bennett, A Fletcher, E Giovannetti and D Stallibrass, ‘Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy’ (2011) 33 *Fordham International Law Journal* 1278, 1287-1295

⁴⁰ *Leegin Creative Leather Products Inc. v. PSKS Inc.* *supra* n 2.

⁴¹ See, eg Bannett, Fletcher, Giovannetti and Stallibrass *supra* n 39, 1287-1295 .

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possibility of applying Article 101 (3) TFEU it seems rather reserved stating that

Including RPM in an agreement gives rise to the presumption that the agreement restricts competition and thus falls within Article 101(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case.⁴²

In light of this statement, minimum RPM will fall under the object category, with a low burden of proof for the Commission to discharge, while the undertakings have an almost insurmountable task, of proving efficiencies under 101(3) TFEU. With regard to economic theory it would appear better to heighten the Commission's burden of proof in object cases, where economic theory suggests that such agreements are not always harmful. The CJ case law to which we now turn may now pave the way in this direction.

⁴² Vertical Guidelines *supra* n 3 para 223.

C. CJ's approach to object cases

While economic thinking appears to suggest that the effects of minimum RPM are nuanced, the current EU legal framework only allows for the treatment of such agreements as object restrictions. In light of this state of affairs, this article moves on to show that recent case law of the CJ may account for a wider interpretation of object restrictions applicable constructively in the area of minimum RPM. This section discusses the approach to object restrictions in EU competition law and suggests that some limited consideration of effects is allowed in object cases. It presents the approach to object cases prior to *Allianz Hungária* that has arguably blurred the line between object and effect restrictions and allowed for a more detailed effects analysis in object cases. Section 4 presents the CJ's approach in *Allianz Hungária* and argues that while blurring the dividing line between object and effect restrictions is regrettable, it may be used constructively by applying it in the area of minimum RPM.

Background: object restrictions prior to *Allianz Hungária*

In the context of Article 101(1) TFEU, restrictions by object encompass the most serious distortions of competition. In general, Article 101(1) TFEU prohibits agreements restricting competition either by their object or effect. These are alternative and not cumulative conditions.⁴³ First, it is established

⁴³ Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and others v Commission* [2001] ECR II-2035 para 72; Joined Cases T-374/94, T-375/94, T-384/94 & T-388/94 *European Night Services and others v Commission* [1998] ECR II-3141, para 136; Case T-142/89 *Boël v Commission* [1995] ECR II-867 para 89; Case T-67/01 *JCB Service* [2004] ECR II-49 para 117; Case T-152/89 *ILRO v Commission* [1995] ECR II-1197 para 32; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529 para 28, 30; Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342; Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, 249; Case 45/85 *Verband der*

whether an agreement has the restriction of competition as its object, as ‘[...] 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’.⁴⁴ To determine whether an object restriction exists the purpose of the agreement has to be considered,⁴⁵ while taking into account its legal and economic context.⁴⁶ Hence, the specific legal or factual context is used to verify whether an alleged object restriction has in fact the *potential* to restrict competition.⁴⁷

In terms of enforcement, object restrictions have the advantage that there is no need to provide evidence of actual effects on competition.⁴⁸ Only

Sachversicherer v Commission [1987] ECR 405 para 39; Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969 para 55; Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935 para 13.

⁴⁴ Case C-68/12 *Slovenská sporiteľňa* [2013] para 75; Joined Cases C-238/99P, C-244/99P, C-245/99P, C-247/99P, C-250/99P, C-251/99P, C-252/99P and C-254/99P *Limburgse Vinyl Maatschappij and others* [2002] ECR I-8375 para 508; *Consten and Grundig supra* n [43](#), para 299.

⁴⁵ See in this regard *Société Technique Minière v Maschinenbau Ulm supra* n 43. For classical restrictions by object containing price-fixing, market-sharing or the control of outlets see Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063 para 109 but also restrictions that are designed to restrict parallel trade; Joined Cases C-501/06P, C-513/06P, C-515/06P and C-519/06P *GlaxoSmithKline Services v Commission* [2009] ECR I-9291 para 59. The intention of the parties is not an essential factor but can be taken into account, see *T-Mobile Netherlands and Others supra* n 43 para 27; See also Joined cases 96-102, 104, 105, 108 and 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, para 23-25. With regard to the restriction of competition by object see, eg, O Odudu, ‘Interpreting Article 81(1): the object requirement revisited’ (2001) 26 *European Law Review* 379–390; S King, The Object Box: Law, Policy or Myth? (2011) 7(2) *European Competition Journal* 269-296.

⁴⁶ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and others* [2011] ECR I-9083 para 136; *GlaxoSmithKline Services v Commission supra* n [45](#), para 58; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* 2011 ECR I-9419 para 35; *T-Mobile Netherlands and Others supra* n [43](#), para 27; Case 1/71 *Cadillon* 1971 ECR 351 para 8; *Société Technique Minière v Maschinenbau Ulm supra* n [43](#); *Allianz Hungária supra* n 1 para 33, 36; Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* (judgment of 13 December 2012) para 21.

⁴⁷ *Football Association Premier League and others supra* n [46](#), para 135; *Pierre Fabre Dermo-Cosmétique supra* n [46](#), para 34; *T-Mobile Netherlands and Others supra* n [43](#), paras 28, 30; *GlaxoSmithKline Services v Commission supra* n [45](#), para 55.

⁴⁸ See, for example, Case C-209/07 *Beef Industry Development and Barry Brothers* [2008] ECR I-8637 paras 16, 21; *Allianz Hungária supra* n [1](#), para 34; *T-Mobile Netherlands and Others supra* n [43](#), para 27; *NV IAZ and others v Commission (supra* [45](#), para 25;

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where no object restriction can be established, the agreement's effect on competition has to be assessed by an in-depth analysis. The Commission's approach to object restrictions reflects the Court's earlier jurisprudence and is summarised in its Guidelines on the application of Article [101(3)] TFEU.⁴⁹ It can be broken down in the following salient points.

First, object restrictions have *by their very nature* the potential to restrict competition. By their very nature these restrictions must demonstrate *such a high potential of negative effects* on competition that is futile to demonstrate actual effects. Effectively the nature of the restriction operates as a *presumption*. Based on the serious nature of the infringement and past experience, restrictions by object are likely to produce negative effects.⁵⁰ Second, the assessment is conducted based on a number of formalistic factors. Some of these factors, as it will be discussed below, allow some leeway for a cursory effects analysis.⁵¹ These factors include:

- i) the *content* of the agreement;
- ii) the *objectives/purposes* pursued by it; and
- iii) the context of the agreement and the actual conduct and behaviour of the parties on the market.⁵²

The case law suggests that there is no need to take account of the effects of an agreement when it has as its object the restriction of competition.⁵³ More

GlaxoSmithKline Services v Commission supra n [45](#), para 55; *Pierre Fabre Dermo-Cosmétique supra* n [46](#), para 34.

⁴⁹ Commission (EU), 'Guidelines on the application of Article [101(3)] of the Treaty' [2004] OJ C 101/97.

⁵⁰ *Ibid* para 21. See, for example, cases cited at *supra* n [48](#).

⁵¹ See text to *supra* [53](#), below. For a distinction between the 'orthodox approach' and the 'more analytical approach' to object restrictions see King *supra* n [45](#), 271.

⁵² Guidelines *supra* n [49](#), para 22.

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controversial remains the classification as object or effect infringement and the room, if any, for the analysis of effects under the object category. Indeed, despite of the above statement suggesting that concrete effects are disregarded in the object analysis, a number of object cases perform some analysis of effects, albeit to a different degree.⁵⁴ The Court has allowed some leeway for a limited effects analysis, a) when examining whether the agreement has an appreciable effect on competition and trade; and b) when looking at the context of the agreement.

a) Appreciable effect on competition and trade

The first option allowing for a limited effects evaluation in object cases is the ‘appreciability’ criterion, namely the examination of whether the agreement has an appreciable effect on competition and trade, though recent case law appears to have minimised this possibility. *Expedia* suggests that object restrictions will always be regarded as having an appreciable effect on competition.⁵⁵ Nevertheless, there may be some scope for the latter analysis, when assessing whether an agreement may have an appreciable effect on inter-state trade (rather than on competition). In *Louis Erauw-Jacquery* an

⁵³ See quote at *supra* n 44, and the cases cited therein.

⁵⁴ For a thorough discussion of the approach to ‘object’ restrictions see D Bailey, ‘Restrictions of Competition by Object under Article 101 TFEU’ (2012) 49 *Common Market Law Review* 559. Bailey argues that the EU courts have used three methods to assess whether an agreement is anticompetitive by object; a) by reference to the ‘hardcore restrictions’ listed in the Treaty competition provisions or Block Exemption Regulations and previously decided cases; b) by considering the purpose and economic context of the agreement and c) by undertaking an abridged competitive analysis. *Ibid* 570. See also P Van Cleynenbreugel, ‘Article 101 TFEU and the EU Courts: Adapting Legal Form to the Realities of Modernization?’ (2014) *CMLRev* 1381, 1409-1416 arguing that the case law on object restrictions allows a quick look’ analysis into effects.

⁵⁵ *Expedia Inc. v Autorité de la concurrence and Others supra* n 45 paras 35-7. The approach in *Expedia* is now incorporated in the new Commission 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 C(2014) 4136 final, (Brussels, 25 June 2014) para 2.

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export ban was held to be potentially outside Article 101(1) due to the financial commitment required for the development of the products.⁵⁶ In addition the agreement contained also a minimum RPM clause. The Court in a somewhat ambiguous statement held that “...those agreements have the same effects as a price system fixed by a horizontal agreement. In such circumstances the object and effect of such a provision is to restrict competition within the common market.”⁵⁷ Thus, the Court treated minimum RPM arrangements as object restrictions and the fact that it also mentioned effects is not relevant. However, the Court asked the referring court to ascertain whether the contested agreement had an appreciable effect on trade between Member States and in that regard account must be had on whether the agreement forms part of a cluster of similar agreements, on the breeder’s market share and on the ability of the producers bound by the agreement to export the seeds.⁵⁸ Therefore, it appears that in the analysis of appreciability the Court introduced elements of an effects analysis in order to evaluate the effect on cross-border trade of a prima facie object restriction.

b) Contextual analysis: limited role of ‘effects’

The second option for a limited effects analysis deserves a closer reading of the case law on object restrictions. It suggests that a limited effects analysis takes place at the assessment of the agreement’s economic context, which may have acted as a stepping-stone for the more elaborated analysis in *Allianz Hungária*, examined in section 4.

⁵⁶ Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919 para 9-11.

⁵⁷ *Ibid* para 15.

⁵⁸ *Ibid* para 17-19.

In *Consten and Grundig*, the Commission found that the agreement had as its object an adverse effect on competition, because it had the aim of protecting Consten from competition in the sale of Grundig products.⁵⁹ Nonetheless, a limited effects analysis was performed as the Court briefly considered the effects of absolute territorial protection upon competition between producers as well as competition between distributors. In particular, the Court held that the absolute territorial protection granted to Consten for Grundig products in the French market results

[...] in the isolation of the French market and makes it possible to charge for the products in question prices which are sheltered from all effective competition. In addition the more producers succeed in their efforts to render their own makes of products artificially distinct in the eyes of the consumer, *the more the effectiveness of competition between producers tends to diminish*. Because of the considerable impact of distribution costs on the aggregate cost price, it seems important that competition between dealers should also be stimulated. *The efforts of the dealer are stimulated by competition between distributors of products of the same make*. Since the agreement thus aims at isolating the French market for Grundig products and maintaining artificially for products of a very well-known brand, separate national markets within the Community, it is therefore such as to distort competition in the common market...No further consideration of economic data (price differences between France and Germany, representative character of the type of appliance considered, level of overheads born by Consten) [...] can in any way lead [...] to a different solution [...] (emphasis added).⁶⁰

In *GlaxoSmithKline* the General Court (GC) interpreted *Consten and Grundig* in the direction that not all agreements intended to limit parallel

⁵⁹ *Consten and Grundig supra* n 43, Opinion of AG Roemer, 358. It should be noted that AG Roemer advocated a more detailed effects analysis and considered the Commission analysis insufficiently based.

⁶⁰ *Consten and Grundig supra* n 43, 343.

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trade must be considered by their nature, that is to say, independently of any competitive analysis, to have as their object the restriction of competition. The GC rather performed ‘*an abridged but real*’⁶¹ economic analysis showing that the agreement sought to eliminate competition at the wholesale level. If account were to be taken of the legal and economic context of the agreement, then it could not be presumed that it would lead to anticompetitive effects.⁶² Thus, the GC suggested that the examination of the agreement in its legal and economic context allows for a limited consideration of *possible* effects.

However on appeal, the CJ reversed the GC’s analysis on the object point and resorted to a formalistic analysis of the object category which suggests that an agreement restricting parallel trade will in all instances amount to a restriction of competition by object. The difference in approach can be possibly explained in light of the different approach to the aims of EU competition law adopted by the CJ (compared to that of the GC) and the notion attributed to restrictions of competition, since the CJ held that

there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object [...] it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article [101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final

⁶¹ Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission supra* n 42 paras 120.

⁶² *Ibid* 122, 134, 147. This judgement has sparked the discussion on the aims and the appropriate enforcement standard in EU competition law. See, for example, V Korah, ‘Judgment of the Court of First Instance in *GlaxoSmithKline*’ (2007) 6 *CompLaw* 101.

consumers be deprived of the advantages of effective competition in terms of supply or price.⁶³

As AG Trstenjak noted in her Opinion “regard must be had, in particular, to existing experience according to which, in all probability, certain types of agreement have a negative impact in the market and jeopardise the objectives pursued by the Community’s competition legislation”.⁶⁴ Thus, if one takes a different view as to the objectives of EU competition law, then the analysis of an agreement in its legal and economic context may yield different outcomes. If one subscribes to the Court’s pronouncements that EU competition law aims at the protection of the market structure, an agreement that divides markets along national lines, clearly has the object of restricting competition, the latter taken to mean competitive market structure. On the contrary, if one accepts the consumer welfare goal of competition law, then the analysis of this agreement in its legal and economic context does not amount to a restriction of competition, i.e. adverse impact on final consumer prices.

The analysis in *Beef Industry* is in the same vein.⁶⁵ In this case the Court was asked whether an agreement between Irish beef processors to reduce overcapacity in the beef industry sector is to be regarded by reason of its object alone as anticompetitive. Irish beef processors argued that the arrangements in question were not restrictive by object since they lacked an anti-competitive aim and did not entail injurious consequences for

⁶³ *GlaxoSmithKline Services and Others v Commission supra* n 45, para 63. *T-Mobile Netherlands and Others supra* n 45, paras 38-39.

⁶⁴ *GlaxoSmithKline supra* n 45, Opinion of AG Trstenjak para 91.

⁶⁵ *Beef Industry supra* n 48.

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consumers and more generally for competition.⁶⁶ This argument was rejected by the Court that stated:

In fact, to determine whether an agreement comes within the prohibition laid down in Article [101(1) TFEU], close regard must be paid to *the wording of its provisions* and to *the objectives which it is intended to attain*. In that regard, even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, *but with the object of remedying the effects of a crisis in their sector*, such considerations are irrelevant for the purposes of applying that provision. Indeed, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives. It is only in connection with Article [101(3) TFEU] that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration... (emphasis added)⁶⁷

Even though the aim of the arrangements at issue was to remedy the effects of the crisis in the beef industry sector, this was to be achieved through a mechanism intended to encourage the withdrawal of competitors that would change the structure of the market appreciably.⁶⁸ Thus, the Court appears to have followed AG Trstenjak that noted that the agreed reduction in production capacity has as a necessary consequence the restriction of competition despite the “pro-competitive object or a primary objective of the [BIDS] agreements which is unobjectionable from a competition point of view”.⁶⁹ The latter seems to be a logical contradiction; how can agreements with a primary pro-competitive objective amount to a restriction of

⁶⁶ Ibid para 19.

⁶⁷ Ibid para 21.

⁶⁸ Ibid para 31.

⁶⁹ *Beef Industry supra* n 48, Opinion of AG Trstenjak para 94.

competition? Or is it merely that the latter is taken as synonymous to economic rivalry?

In this case, like in *GlaxoSmithKline*, the outcome may have been different had the Court opted for a more economic based approach. One could disagree with the outcome of this case, based on one's views as to the aims of competition law. This nonetheless does not detract from the fact that the Court in *Beef Industry* performed a contextual evaluation of the terms of the agreement in their market context.⁷⁰ In relation to this judgment, Andreangeli commented that “the Court of Justice went a step beyond its existing case law by emphasizing the need to analyse the BIDS agreements against the very structure of the market and especially against the degree of concentration that characterized it and to appraise its consequences for foreclosure as well as for current and future market shares”.⁷¹

Pierre Fabre provides another example of a limited effects examination in the contextual analysis. In this case, the Court was asked to ascertain whether an absolute prohibition on internet sales contained in a selective distribution agreement amounted to an object restriction.⁷² The Court after analysing legitimate requirements that improve non-price competition concluded that the ban on internet sales amounts to a restriction by object

[...] following an individual and specific examination of the content and objective of that contractual clause

⁷⁰ *Beef Industry supra* n 48, para 32-40. Andreangeli identified the Court's attempt to import a more economics guided approach in the analysis of object restrictions. See A Andreangeli, 'From Mobile Phones to Cattle: How the Court of Justice Is Reframing the Approach to Article 101 (Formerly 81 EC Treaty) of the EU Treaty' (2011) *Competition Law Review* 215, 234.

⁷¹ *Ibid* 235.

⁷² *Pierre Fabre supra* n 46, para 31.

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and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.⁷³

As AG Mazák observed in *Pierre Fabre*, the anticompetitive object of an agreement cannot be established in the abstract by using an abstract formula.⁷⁴ An individualised assessment is required and the fact that similar agreements were regarded as object restrictions in the past does not relieve the Commission and National Competition Authorities (NCAs) from their duty to conduct an individual examination.⁷⁵ This is further supported by AG Trstenjak in *GlaxoSmithKline* where she stated that

[...] regard must be had, in particular, to *existing experience* according to which, *in all probability*, certain types of agreement have a negative impact in the market and jeopardise the objectives pursued by the Community's competition legislation. Under this approach, the character of the restriction of competition by object as a form of inchoate offence becomes particularly clear, since certain types of agreement (such as price-fixing agreements, customer sharing or resale price maintenance) are classified, on the basis of existing experience, as restrictions of competition by object, without any specific analysis of their effects. This *standardised approach* certainly creates *legal certainty*. However, it is *always subject to the proviso that the legal and economic context of the agreement to be examined does not preclude application of this standardised assessment*. (emphasis added)⁷⁶

The above suggests that the contextual analysis of the agreement serves as a balancing factor in the standardised approach in object cases and allows for a

⁷³ Ibid 47.

⁷⁴ An observation useful for cases not fitting neatly in the traditional object category and in this case justified by the novelty of the case examining a ban on internet sales for the first time.

⁷⁵ *Pierre Fabre supra* n 46, Opinion of AG Mazák para 26-27.

⁷⁶ *GlaxoSmithKline supra* n 45, Opinion of AG Trstenjak para 91.

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limited evaluation of effects. The balancing role of the agreement's context appears to be supported also by the Opinion of AG Wahl in *Groupement des Cartes Bancaires v Commission*, where he commented that the examination of the legal and economic context can act as an aggravating or mitigating factor towards the finding of an anticompetitive agreement by object; namely that if the context and objective of the agreement suggest that it has negative effects then the contextual analysis can reinforce this finding, but it would not suffice to establish an anticompetitive object on its own.⁷⁷

Despite the fact that certain types of agreements such as price fixing, market sharing or minimum RPM are traditionally categorised as object restrictions, there is still room to advance the argument that based on their legal and economic context, they may not amount to an object restriction. *Allianz Hungária* has further expanded this contextual analysis, as will be highlighted in the following section 4.

⁷⁷ Case C-67/13P *Groupement des Cartes Bancaires v Commission* (judgment of 11 September 2014) Opinion of AG Wahl paras 44, 138-139.

D. Blurring the line: Allianz Hungária

The Court's approach in *Allianz Hungária* has expanded the contextual analysis for object restrictions, thereby allowing for a more detailed analysis of effects.⁷⁸ Thus, it can be viewed as a change to its position in *GlaxoSmithKline* where it rejected the GC's 'abridged but real analysis' of object restrictions.⁷⁹ At the same time it has (rightly) been criticised for blurring the line between object and effect cases.⁸⁰ This section examines whether the *Allianz Hungária* approach can nonetheless be viewed as at least providing some welcomed development as subsequently applied by the CJ in *Groupement des Cartes Bancaires v Commission*.⁸¹

1. Factual background

The case arose from a preliminary reference by the Hungarian Supreme Court and the request has been made in the context of a dispute between insurance companies (Allianz and Generali) and car dealers with the Hungarian Competition Authority that imposed fines for a number of agreements having the object of restricting competition in the car insurance contracts market and the car repair services market.⁸²

⁷⁸ See, for example, Guidelines on the application of Article [101(3)] of the Treaty *supra* n [49](#), para 13, 33; Commission (EU), 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the Union to Horizontal Co-operation Agreements' [2011] C 11/1 para 269; Commission(EG), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC of the Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C45/7 para 19; N Kroes, 'European Competition Policy – Delivering Better Markets and Better Choices' (2005) (Speech 05/512).

⁷⁹ See text to *supra* n [62](#).

⁸⁰ AG Wahl *supra* n [77](#), paras 50-52. AG Wahl commented that it is difficult to distinguish between the analysis of the context in *Allianz Hungária* from an effects analysis.

⁸¹ *Groupement des Cartes Bancaires v Commission supra* n [77](#).

⁸² *Allianz Hungária supra* n [1](#), paras 2, 12.

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In particular, the agreements between the insurance companies and the dealers have been summarised by the Court as follows:

- i. horizontal agreements consisting of three decisions taken by the national car dealers association in the period 2003 and 2005 that set out ‘recommended prices’ to the authorised dealers for car repairs and which were applicable to the insurers;
- ii. framework agreements (in the period 2004 and 2005) between the national car dealers association and Allianz and individual agreements signed simultaneously between certain authorised dealers and Allianz and Generali respectively. These agreements made the hourly repair charge dependent on the number of insurance policies signed by the car dealers; and
- iii. various agreements (in the period 2000 and 2005) between Allianz and Generali, on the one part, and certain car dealers acting as insurance brokers, on the other, setting a minimum number or percentage of car insurance policies to be obtained by the broker over a given period of time and by providing that the broker’s remuneration be fixed according to the number of policies taken out with the insurer.⁸³

The parties challenged the decision by the Hungarian Competition Authority. The latter was partially reversed at first instance, but then was restored on appeal, following which the parties brought proceedings before

⁸³ Ibid, para 11.

the Hungarian Supreme Court that decided to stay its proceedings and refer the following question to the Court:

Do bilateral agreements between an insurance company and individual car repairers, or between an insurance company and a car repairers' association, under which the hourly repair charge paid by the insurance company to the repairer for the repair of vehicles insured by the insurance company depends, among other things, on the number and percentage of insurance policies taken out with the insurance company through the repairer, acting as the insurance broker for the insurance company in question, qualify as agreements which have as their object the prevention, restriction or distortion of competition, and thus contravene Article 101(1) TFEU?⁸⁴

2. The CJ's analysis

The Court resorted to its traditional formulated analysis for the assessment of object restrictions and stated that when determining whether an agreement involves a restriction of competition 'by object' regard must be paid to the content of the agreement's provisions, its objectives and its legal and economic context.⁸⁵ However, the Court proceeded to make a further statement that arguably allows for a broader interpretation of the Court's

⁸⁴ *Allianz Hungária supra* n 1, paras 13, 16.

⁸⁵ *Allianz Hungária supra* n 1, para 36. *IAZ and others v Commission supra* n 45, paras 23-25; *T-Mobile Netherlands and Others supra* n 45; *GlaxoSmithKline Services and Others v Commission supra* n 45, para 58; *Football Association Premier League and others supra* n 47, para 136; *Pierre Fabre Dermo – Cosmetique supra* n 46, para 35. Before addressing the preliminary question, the Court had to rule on admissibility, since Article 101(1) TFEU was not applicable in this case because the agreements at issue had no impact on intra-Community trade. *Allianz Hungária supra* n 1, paras 17-30. The Court disagreed with AG Cruz Villalon that considered the preliminary reference at issue as inadmissible; nonetheless, he went on to analyse the substance of the proceedings in the event the Court viewed the reference as admissible. Opinion of AG Cruz Villalon in *Allianz Hungária supra* n 1, para 49.

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approach to object restrictions that transcends the tripartite content – objective – context analysis and has attracted some criticism.⁸⁶ It stated that

When determining that context, it is also appropriate 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 (see Expedia, paragraph 21 and the case-law cited).⁸⁷

From a literal reading of the Court’s formulation, it seems that it has added more analytical rigour when examining the economic context of an agreement. As the analysis in section 3 above suggested, the Court quickly brushed aside the analysis of the legal and economic context in object restrictions, while following *Allianz Hungária* the latter may play a much more significant role. In what follows, we discuss the Court’s analysis in relation to the content, objectives and legal and economic context of the agreements at hand.

First, in assessing the content of the agreement, the Court remarks that the agreements relate to the hourly charge paid by insurance companies to car dealers acting as car repairers and link this remuneration with the number of insurance contracts sold by the dealers. It further noted the link between the car insurance and car repair markets and the dual capacity of car dealers as car repairers and car insurance brokers. While this link does not automatically mean that the agreement amounts to a restriction of competition by object, it does constitute an important factor in assessing that

⁸⁶ See P Harrison, ‘The Court of Justice’s Judgment in *Allianz Hungária* is Wrong and Needs Correcting’ (May 2013) CPI Antitrust Chronicle 1; C Graham, ‘Methods for Determining Whether an Agreement Restricts Competition: comment on *Allianz Hungária*’ (2013) 38 ELRev 542. C I Nagy, *The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?* (2013) 36 World Comp 541.

⁸⁷ *Allianz Hungária supra* n 1 para 36.

the agreement is by its very nature injurious to the proper functioning of normal competition.⁸⁸

All in all, in this case, the content of the agreements did not reveal on its own that the latter constituted object restrictions. Therefore, the Court proceeded to the next step of the tripartite test,⁸⁹ and examined the objective of the agreement. The Court analysis on the purpose of the agreements was misplaced. First, it remarked that in as much as the agreements affected both the car insurance and the car repair markets, their respective objectives should be assessed in relation to both markets.⁹⁰ However, following this and in respect to the car insurance market, the Court curiously observed that the objective of the agreement is to maintain or increase the insurers' market shares. It is respectfully submitted that this is not a questionable objective; to the contrary, the process of rivalry forms the very essence of competition.⁹¹ Further, in relation to the car repair market, the Court left this issue to the referring court.⁹²

Thus, the Court failed to identify an objective which is capable of tainting the agreement with an anticompetitive object. On the contrary, AG Cruz Villalon stated that “in the light of their content and objectives, the capacity of the agreements at issue to restrict competition is not as high as

⁸⁸ *Allianz Hungária supra* n 1, paras 39-41.

⁸⁹ Here it is interesting to note that AG Cruz Villalon was of the opinion that the content and the objectives of the said agreements (examined together in his opinion) did not warrant an object classification. AG Opinion in *Allianz Hungária supra* n 1 para 68.

⁹⁰ *Allianz Hungária supra* n 1, para 42.

⁹¹ *Ibid* para 44. See also AG Opinion in *Allianz Hungária supra* n 1, para 87.

⁹² *Allianz Hungária supra* n 1, paras 49-50.

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that of the vertical agreements which the case law has held in the past to be restrictions by object.”⁹³

The Court went on to assess the economic and legal context of the agreement. In assessing the legal context, it pointed to the existence of a domestic law requiring the dealers when acting as intermediaries or insurance brokers to act independently from insurance companies. Therefore, it appears that when the agreement at hand is in breach of domestic law, this will act as an aggravating factor in assessing the existence of an object restriction.⁹⁴ In relation to the economic context the Court invited the referring court to determine this by taking into account “the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned”.⁹⁵ In *Allianz Hungária*, and leaving aside potential objections to this approach (discussed in section 5) the Court reformulated the evaluation of the economic context in object cases by importing elements from an effects analysis, yet falling short of a full-fledged analysis. According to *Italianer*, this analysis resembles the US Supreme Court’s sliding scale approach situating the restraint within a continuum.⁹⁶

⁹³ AG Opinion in *Allianz Hungária supra* n 1, para 81.

⁹⁴ *Allianz Hungária supra* n 1, para 47.

⁹⁵ *Ibid* para 48 (emphasis added).

⁹⁶ See A Italianer, ‘Competitor Agreements under EU Competition Law’ (Speech, 26 September 2013) (40th Annual Conference on International Antitrust Law and Policy, Fordham Competition Law Institute) 5. See also Nagy *supra* n 86, 563.

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3. Subsequent developments: *Grouperment des Cartes Bancaires*

The Court has further affirmed its *Allianz Hungária* approach in *Grouperment des Cartes Bancaires v Commission*.⁹⁷ This constitutes the first case where the Court reverses the Commission's approach on object analysis. It concerned a grouping of French banks ('Grouping') established in 1984 in order to achieve interoperability for using the cards issued by its members (CB system). In practice this meant that a CB card could be used with all traders affiliated to the CB system through any member of the Grouping and also for making cash withdrawals from cash points operated by all other members. In 2002, the Grouping adopted three pricing mechanisms in order to balance the issuing side with the acquiring side. In a nutshell, these measures ensured that entrants to the group had to pay additional fees where they issued more CB cards (issuing side) as compared to affiliating new traders offering points (acquiring side) where these cards could be used.

The Court first reiterated its approach to object restrictions, namely that in order for an agreement to qualify as a restriction by object regard must be had to its content, objectives and the relevant legal and economic context. In determining the context, the Court invoked the contested formulation in *Allianz Hungária*.⁹⁸ Second, the Court in line with AG Wahl and contrary to the GC underlined that object restrictions must be interpreted restrictively and that "the concept of restriction of competition 'by object'

⁹⁷ *Grouperment des Cartes Bancaires v Commission supra* n 76.

⁹⁸ *Grouperment des Cartes Bancaires v Commission supra* n 77, para 53.

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can be applied only to certain types of coordination between undertakings which reveal a *sufficient degree of harm to competition*” (emphasis added).⁹⁹

The GC found that the object of the contested measures restricted competition of new entrants in the French issuing card market as these required the banks to pay a fee or limit their card issuing activity.¹⁰⁰ The Court criticised the GC for failing to establish how the contested measures could reveal a sufficient degree of harm in order to be classified as object restrictions.¹⁰¹ It also commented that the GC rejected the appellants’ arguments that the measures aimed at developing the acquisition activities of the member banks in order to achieve an optimal balance between acquiring and issuing activities and conflated the analysis of the relevant market (two sided payment systems market) with the analysis of the context of the agreement and wrongfully classified it as a restriction by object.¹⁰² It also pointed to the legitimate objective of the measures to combat free-riding, which was also acknowledged by the GC.¹⁰³ Although this objective alone does not suffice to bring a practice outside the object classification,¹⁰⁴ it appears that it can play a role when assessing the context of an apparent restriction.

The Court then explained why the contested measures differed from the measures under the *BIDS* scheme. The analysis of the Court suggests that the Commission, following *Allianz Hungária* and *Groupement des Cartes Bancaires v Commission*, should be more cautious when examining the legal

⁹⁹ Ibid para 58.

¹⁰⁰ Ibid para 68.

¹⁰¹ Ibid para 69.

¹⁰² Ibid paras 72-77.

¹⁰³ Ibid para 75.

¹⁰⁴ Ibid para 70.

and economic context of the agreement before the latter is classified as an object restriction. The CJ explained that the GC could not draw on *BIDS*, as it had not shown how the measure would have changed the market structure.¹⁰⁵ In general, the GC had failed to establish that “the measures at issue, in the light of their wording, objectives and context, displayed *a sufficient degree of harm to competition* to be regarded as having as their object a restriction of competition.”¹⁰⁶

Overall, the Court in *Groupement des Cartes Bancaires v Commission* has clarified an important point of principle, namely that object restrictions need to be interpreted restrictively. Nonetheless, it applied the *Allianz Hungária* formula and discussed the economic context and the legitimate objective of the agreement in some detail. Its approach, even if it appears as blurring the line between object and effect categories¹⁰⁷ is sensible and can be applied constructively in certain cases, as it will be discussed by employing the minimum RPM example.

¹⁰⁵ Ibid para 85

¹⁰⁶ Ibid para 90 (emphasis added).

¹⁰⁷ P Harper, ‘Groupement des Cartes Bancaires Judgement – Rolling Back on the Expansion of by Object Infringements’ [2014] CompLaw 321, 326-327.

E. In defence of *Allianz Hungária*: towards a ‘quick effects’ analysis for object restrictions?

Allianz Hungária may be seen as a shift in the Court’s jurisprudence that to date has adopted a narrower view to the contextual analysis. Commentators have - justifiably- criticized the Court for an imprudent widening of the object category that unnecessarily blurs the distinction between ‘object’ and ‘effect’ and will enable the Commission to classify more restrictions under the object category.¹⁰⁸ *Allianz Hungária* can be read as a wrongful classification of vertical agreements under the object category that potentially enables the Commission and NCAs to invoke the object restriction and evade a more detailed and time/resource intensive effects analysis in vertical as well as horizontal cases. Further, this approach, not yet tested or applied by the Commission, may complicate competition law enforcement by NCAs as it seems to further complicate the identification of object restrictions.

Allianz Hungária may have been decided in this way in light of the potential covert horizontal agreement between the insurance companies (Allianz and Generali). The Court expressly referred to the possibility that if a horizontal agreement existed between the latter companies, then such an agreement would have amounted to market partitioning (object restriction) that would have also resulted in the unlawfulness of the vertical agreements.¹⁰⁹ Therefore, the fact that both the Court and the AG mentioned

¹⁰⁸ See Harrison *supra* n 86; Nagy *supra* n 86; Graham *supra* n 86; Van Cleynenbreugel *supra* n 531409-1430.

¹⁰⁹ *Allianz Hungária supra* n 1, para 45. The Hungarian Government and the Commission disputed the vertical nature of the agreements. Opinion of AG Cruz Villalon in *Allianz Hungária supra* n 1, para 70. Note that AG Cruz Villalon was of the opinion that in order to

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that the number of vertical agreements at issue may have been influenced by a horizontal agreement, thereby suggesting a “hybrid” nature of the respective agreements, could have affected the analysis. Though, despite this observation both the AG and the Court have classified the agreements as vertical. The clear classification of the respective agreements as vertical and their treatment as object restrictions may be seen as contrary to current economic thinking and the Commission approach to vertical restraints as depicted in the block exemption and guidelines. The latter approach suggests that vertical restraints are problematic when coupled with market power, an issue not discussed in detail by the CJ in *Allianz Hungária*.

Further, it is true that the Court made a mistaken reference to *Expedia*.¹¹⁰ Whether this was merely a short sight or rather a deliberate choice is hard to tell. In any event though, the Court is entitled to depart from its previous jurisprudence and it may well be the case that *Allianz Hungária* forms one of the rare instances that the Court has chosen to do so.¹¹¹

Contrary to the above criticism, we submit that *Allianz Hungária* can also be read in a different way. The Court required a quick-effects approach to be performed in the assessment of the economic context, i.e. looking at the nature of the goods or services affected and the real conditions of the functioning and structure of the markets in question.¹¹² This could

establish a restriction by object in the insurance market, it would be necessary to establish an anti-competitive horizontal agreement/concerted practice between Allianz and Generali. Opinion of AG Cruz Villalon *supra* n 1, para 88.

¹¹⁰ Harrison *supra* n 86, 5-7, Nagy *supra* n 86, 554ff.

¹¹¹ For other instances where the Court departed from previous jurisprudence see for example, Case 267 and 268/91 *Keck & Mithouard* [1993] ECR I-6097 para 15-16. A Jones, ‘Left Behind by Modernisation? Restrictions by Object under Article 101(1)’ (2010) 6 *European Competition Journal* 649, 662.

¹¹² See text to *supra* n 86.

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potentially prevent the classification of an agreement as object restriction by providing a defence to alleged infringers. Essentially this happened in *Groupement des Cartes Bancaires v Commission*. The Court applied the *Allianz Hungária* formula and annulled the GC's judgment, thereby not classifying the contested agreement as an object restriction. This judgment therefore further supports the idea that the approach in *Allianz Hungária* not only serves so as to include a measure in the object category that were previously examined under the effects category but also vice versa. Thus, so as to exclude certain object restrictions from the object category.

Allianz Hungária does not go as far as the GC in *GlaxoSmithKline* requiring an examination of the potential effects on final consumers. Yet, the CJ seems to move away from its categorical rejection in *GlaxoSmithKline* by examining the extent to which the agreement's potential anticompetitive effects might occur within the given market structure. Thus, it furthers the CJ's analysis for object restrictions where it assumes that there will be potential anticompetitive effects. It does so by requiring that the competition enforcer examines the market structure as part of the legal and economic context.¹¹³ Therefore, it performs a quick effects analysis which is different from the 'abridged but real economic analysis' that the GC claimed to have applied in *GlaxoSmithKline*. This might again be explained by the different ideas about the aims of EU competition law. The CJ's quick effects approach does not examine possible effects on final consumer but rather on the market as such. Arguably this broader contextual analysis would be more appropriate for vertical agreements since, as the Commission concedes, as a

¹¹³ See text to *supra* n 85ff..

general rule and subject to exceptions, Article 101(1) TFEU does not apply to vertical agreements.¹¹⁴ The quick effects analysis could thus be applied in borderline cases, not to include but rather to exclude them from the object category as it would raise the evidential threshold for the Commission in object cases.

¹¹⁴ AG Opinion in *Allianz Hungária supra* n 1, para 69. See *VBER supra* n 7 Article 2.

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F. ‘Quick effects’ analysis and its application to minimum RPM agreements

Minimum RPM can be viewed as a borderline object restriction, since, as explained above, economic theory does not suggest that such arrangements are by their nature harmful to competition. On the contrary, the above cursory exposition of the economics related to minimum RPM does not suggest that the EU needs to adopt a full-fledged effects analysis for minimum RPM schemes;¹¹⁵ instead the quick effects analysis in *Allianz Hungária* may provide a useful middle ground.¹¹⁶ As explained above the distinction between object and effect cases should in general rest on whether such agreements are typically more likely to produce anti-competitive effects. Absent hard economic evidence, minimum RPM arrangements should not be classified outright as object restrictions. Instead, the European Commission and NCAs should follow the traditional three-step analysis for object restrictions,¹¹⁷ namely address the content of the agreement, its objective and then its legal and economic context. Given that minimum RPM arrangements can be harmful but also beneficial, the third step may be particularly relevant. It may allow some limited examination of effects as suggested by the Court in *Allianz Hungária*, where the Court explained that the “context [...] the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market”¹¹⁸ need to be examined.

¹¹⁵ Bennett, Fletcher, Giovannetti and Stallibrass *supra* n 39, 1295.

¹¹⁶ For a different analysis and a critical approach to the ‘quick effects’ approach see Van Cleynenbreugel *supra* n 108, 1423.

¹¹⁷ See text to *supra* n 51.

¹¹⁸ *Allianz Hungária supra* n 1, para 36.

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The US Supreme Court in *Leegin* highlighted a number of cases in which minimum RPM schemes might be of particular concern that can also inform the analysis on this side of the Atlantic, namely where market shows the widespread use of minimum RPM, where the market is characterised by undertakings with market power, or where the driving force behind the introducing of minimum RPM were retailers.¹¹⁹ These factors were also considered important by the Court when examining the agreement in *Allianz Hungária*. It held that “in particular, the structure of the respective market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned”¹²⁰ should be explored when examining the economic context. The focusing on these aspects is also in line with insights from behavioural economics. In concentrated markets, where the undertakings possess significant market power or in markets where minimum RPM is wide spread, the demise of such practices will be less likely due to bounded rationality.¹²¹

The suggested ‘quick effects’ analysis to minimum RPM following *Allianz Hungária* examines therefore factors, which are typically part of the effects examination. Yet the ‘quick effects’ analysis means that no general effects analysis needs to take place in the object category. Thus, the distinction between object and effect would not be abolished *in toto*. The test is more akin to a structured rule of reason approach¹²² and underlines the

¹¹⁹ *Leegin Creative Leather Products Inc. v. PSKS Inc supra* n 2 p 17-18.

¹²⁰ *Allianz Hungária supra* n 1, para 48.

¹²¹ A Tor and WJ Rinner, ‘Behavioral Antitrust: A New Approach to the Rule of Reason after *Leegin*’ (December 1, 2009). University of Haifa Faculty of Law Legal Studies Research Paper Series <http://ssrn.com/abstract=1522948> accessed 25 July 2015 65-67.

¹²² On such an approach in the US see *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). With regard to minimum RPM schemes see, eg C Varney, Assistant Attorney

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importance of the correct allocation of the burden of proof.¹²³ *Allianz Hungária* thereby establishes a middle ground between object and effect restrictions. Whether this middle ground is seen as closer to an effects analysis or an object approach depends on whether one sees the requirement of examining the ‘context [...] the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market’¹²⁴ as being close to an effect analysis or as a mere extension of the examination of the context of the agreement. If minimum RPM is subjected to a ‘quick effects’ analysis then the European Commission, NCAs or private claimants will have to prove under 101(1) TFEU that the content and objective of the agreement is clearly anticompetitive. If that is not clear from the outset then they will have to provide additional evidence on the legal and economic context of the agreement that points to its problematic nature or a problematic market structure,¹²⁵ although without delving into a detailed effects analysis.

If the Commission’s quest for a more economics based analysis is taken at face value, then *Allianz Hungária* can be read as supporting such an approach. Rather than being easier for the Commission to find an ‘object’ restriction, it may actually have the opposite effect as it can raise the stakes

General Antitrust Division U.S. Department of Justice, ‘Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks Prepared for the National Association of Attorneys General (Columbia Law School, Oct 2009) 10ff who suggests that the lower courts (as indicated by the Supreme Court in *Leegin*) should develop a structured rule of reason where the plaintiff has to show that a) the manufacturer or retailer has sufficient market power b) the usage of RPM is widespread c) the RPM seems plausible to significantly foreclose the market up or downstream. After establishing these factors it would be for the defendant to provide evidence for the pro-competitive nature.

¹²³ See A Kuenzler, ‘Presumptions as Appropriate Means to Regulate Resale Price Maintenance: in Defence of Structuring the Rule of Reason’ (2012) 8 *European Competition Journal* 497, 501-502.

¹²⁴ *Allianz Hungária supra* n 1 para 36

¹²⁵ For example an indication that retailers forced manufactures to adopt such a policy or that the market is characterised by significant market power up or downstream.

for the Commission to engage in a more detailed contextual analysis.¹²⁶ For example, if the Commission would engage only in a ‘pre-Allianz’ contextual analysis, then in theory, it should now be open for the parties to argue that the Commission failed to take into account the nature of the goods and the conditions of the functioning and structure of the market in question.¹²⁷ In other words, the Allianz contextual approach could in theory tip the balance in favour of the parties in border-line object cases.

Apart from bringing the European approach to minimum RPM more in line with the US approach, the *Allianz Hungária* quick effects analysis involves further advantages. It will reduce the risk of Type I errors (over enforcement), because it requires the Commission to examine in more detail the context, nature of the product and structure of the market before it can find an object restriction.¹²⁸ Moreover, the quick effects analysis also mitigates the problems that a full effects approach entails. A full effects approach to minimum RPM would require the competition authority to prove the inefficiency of minimum RPM and thereby increase regulatory costs¹²⁹ and act as disincentive for private claimants.

¹²⁶ See *Italianer supra* n 96 5 stating that “apart from classic restrictions like price fixing, output limitations and sharing of markets and customers, there are other, more ambivalent situations, where a contextual analysis can either cast doubt on or confirm the anticompetitive object of an agreement”.

¹²⁷ Cf van Cleynebreugel *supra* n [108](#), 1419, 1421 who appears to advance a similar argument based on the concept of objective justifications, while questioning who should adduce the necessary evidence in this regard.

¹²⁸ See in detail the examination above, *supra* n [85-114](#).

¹²⁹ For such criticism see F Van Doorn, ‘Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach’ (November 6, 2009) <http://ssrn.com/abstract=1501070> accessed 25 July 2015 20.

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G. Conclusion

This article has discussed the impact of *Allianz Hungária* and its recent impact on the analysis in *Groupement des Cartes Bancaires v Commission* in a bid to ascertain whether the CJ's approach in these cases can be applied to minimum RPM. *Allianz Hungária* has been criticized for bringing within the object box¹³⁰ potential competition law infringements that should be analyzed under the full effects test. Arguably, this would make it easier for the Commission to meet the burden of proof and classify more practices as object restrictions. On the contrary, we have submitted that *Allianz Hungária* may also have a positive side. It offers room for employing a 'quick effects' analysis. The 'quick effects' analysis could perform the opposite function for minimum RPM agreements. Thus, the contextual analysis suggested by *Allianz Hungária* could remove these agreements from the object into the effects category. If minimum RPM is subjected to a 'quick effects' analysis, then the European Commission, NCAs or private claimants will have to prove under 101(1) TFEU that the content and objective of the agreement is clearly anticompetitive. If that is not clear from the outset then they will have to additionally provide evidence on the legal and economic context of the agreement and show problematic nature or structure of the market,¹³¹ without delving into a detailed effects analysis. Therefore, for a narrow category of competition law violations, such as minimum RPM, the 'quick effects' analysis might make it more difficult to prove and classify them as object restrictions. This appears to be in line with economic theory and narrows the gap between EU and US competition law regarding the analysis

¹³⁰ A term used very eloquently by Whish and Bailey, *supra* n 15, 120-21.

¹³¹ Eg a regulated/concentrated market or a case where significant market power exists.

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of minimum RPM. The adopted approach does not ask for broadening the ‘object’ category. On the contrary, it appears to suggest that certain competition law violations can be safely removed from the latter category in favour of incorporating some effects elements in their analysis. The ‘quick effects’ analysis is not a benchmark that should be applied to all object cases. It should be applied in cases where economic theory and current antitrust thinking question their anti-competitive effects.¹³²

¹³² For example, there may be room to test the ‘quick effects’ test’ analysis in cases involving pay for delay agreements between branded (originators) and generic drug manufacturers, though this question involves complex issues of competition, regulation and patent policy that remain outside the scope of this article. Interestingly, the US Supreme Court subjected the relevant agreements under a rule of reason test, thereby adopting a middle ground test between the suggested FTC’s ‘quick look’ approach and the per se legality approach suggested by the minority opinion of Justice Scalia. See *FTC v Actavis* 133 S. Ct. 2223 (2013). In Europe, see case COMP/ AT. 39226 – Lundbeck Commission Decision of 19 June 2013 (not yet published) and case COMP/AT. 39685 Fentanyl Commission decision of 10 December 2013 (not yet published).