EU Competition Law and the Rule of Reason Revisited

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ABSTRACT

In 1987, Richard Whish and Brenda Sufrin published an important comparison of EU and US antitrust law as applied to restrictive practices. They concluded that it would be unhelpful for the EU to borrow the language and the analytical framework developed in the US: the rule of reason is a phrase and a method suitable for the US only. This paper reviews the developments in EU and US antitrust law since then and, while sharing the same reluctance to describe EU competition law using US-based terminology, suggests that there are parallels between the two systems in that both have had to contend with similar challenges in calibrating antitrust enforcement. Comparing the two approaches to this problem allows us to view these efforts more clearly. In particular, it helps understand the significance of the paradigm shift found in Cartes Bancaires, Intel and Generics. While both systems have developed a comparable analytical framework, they continue to diverge when it comes to the interests protected by the two legal orders.

JEL: K21, L40

¹ This paper is an extended and preliminary version of a chapter to be published in Parcu, Monti and Botta (eds) Economic Analysis in EU Competition Policy (forthcoming 2021). Comments are welcome.
1. Introduction

Some forty years ago, scholars in Europe looked to the United States for inspiration on how to improve the application of Article 101 TFEU. At that time, the concern was that the Commission was too quick to condemn agreements as restrictive of competition, forcing parties to notify and wait for an exemption from the Commission. The burden of notification was combined with the anxiety resulting from the fact that the Commission issued relatively few exemption decisions, leaving parties vulnerable to challenge in national courts.² There was also frustration when, in the few decisions that exempted agreements, it appeared that they had no anti-competitive effects to begin with.³

One way of addressing this unsatisfactory state of affairs was to rein in the scope of Article 101(1), making a finding of a restriction of competition less automatic. The European Court of Justice began to chart this path since the late 1970s, culminating with the judgment in Delimitis in 1991.⁴ Some argued that these judicial developments could be synthesized by the ECJ embracing a ‘rule of reason’ approach to evaluating agreements, which had become ascendant in the United States. However, the European Courts have always declined to transplant terminology from the US. And this was for good reason: the attraction for those proposing the US approach was that courts there appeared to be more attentive to the overall impact of an agreement, weighing its pros and cons. However in the EU the analysis is bifurcated by the Treaty: Article 101(1) is a search for harmful effects, while Article 101(3) is a search for countervailing benefits. To require the Commission (or a national court) to balance positive and negative effects under the rubric of Article 101(1) would make a nonsense of the Treaty.⁵ Whish and Surfin’s paper made it clear that demands for the EU to adopt a rule of reason was uncalled for.⁶

In the years following Delimitis, the lure of the rule of reason faded as the system for applying EU competition law changed radically. First the Commission issued a new style of block exemption, whereby agreements between undertakings with little market power and which do not contain certain restrictions were deemed to satisfy the conditions of Article 101(3).⁷ This relieved a large number of parties from the burden of notification while allowing them considerable commercial freedom to design their agreements. Second, the Commission embraced a more economics-based approach to study restraints to competition.⁸ This reduced the number of cases that would raise competition concerns. Third, the notification/exemption system was removed: parties were

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² Some received comfort letters, but these are not binding on national courts.
⁵ Moreover, the notion of per se illegality is alien to EU competition law for every agreement found to be restrictive of competition may benefit from Article 101(3). Thus it is simplistic to equate per se illegal agreements in the US with agreements that are restrictive of competition by object in the EU. This had been recognized by AG Roemer in Établissements Consten S. à. R.L. and Grundig-Verkaufs-GmbH v Commission, Joined cases 56 and 58-64, EU:C:1966:19.
⁷ This new style was inaugurated by Regulation 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21.
asked to self-assess the anticompetitive risk their agreements might cause and were given guidance on this which emphasized that the parties should test for likely anticompetitive effects, using economic theory and evidence to determine the legality of their agreement. The result of these three reforms was generally welcomed: the standard for assessment was better suited to filter innocuous agreements and parties had more latitude to implement the contracts they wished.

However, in the last decade this system showed some weaknesses: most of the Article 101 cases taken by the Commission or national competition authorities were decided by finding that agreements were restrictive by object. While this would be understandable if they were cartels, a number of the investigations considered vertical agreements or ventures that did not strike one as prima facie anticompetitive. Commentators felt that the more economic approach had been just a mirage.⁹

In this chapter we argue that in recent judgments, the ECJ has revitalized the more economic approach, and that this can be best understood by reference to the discussions found in the United States with respect to the rule of reason. The claim is not that the EU should import the rule of reason now or that the EU has actually embraced the rule of reason: the arguments against this legal transplant are as valid today as they were in the 1980s. Rather, the claim is that by observing contemporary US debates we can secure some ideas that help make sense of the work of the ECJ in recent times and which can help sharpen this approach further.

The chapter is structured in the following way: in section 2 we provide a synthesis of the analytical framework deployed in US antitrust law. The aim is to illustrate the present operation of the antitrust rules in a manner that emphasizes key points for comparison. It will be shown that the analytical framework underpinning the rule of reason is rich and complex. Those who take the view that the rule of reason is a shorthand for balancing pro and anti-competitive effects are mistaken. Building up a picture of the analytical framework followed in the US allows us to draw certain lessons which we can then apply to address EU competition law in section 3. Section 4 summarizes the key insights form this comparative exercise.

2. The contemporary dimensions of the rule of reason

As is well-known, US antitrust distinguishes between agreements that are per se restrictive of competition (which are irrebuttably presumed to be anticompetitive) and agreements to be assessed under the rule of reason (where deeper analysis is required to determine legality).¹⁰ For much of the Twentieth Century the discussion was animated by two debates: the first was that the scope of the per se rule appeared excessive.¹¹ The second was the concern that by applying the rule of reason one ‘set sail upon a sea of doubt’ because the inquiry would be overly

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¹¹ The court retreated from a wide interpretation of the per se rule in the 1970s, see e.g. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U. S. 1 (1979).
complicated, the court having to assess all relevant circumstances and balance divergent policy considerations.\textsuperscript{12} This created an unpleasant equilibrium whereby classification risked being determinative: per se rules condemned practices too quickly and the rule of reason was too uncertain to yield predictable results.

In modern US antitrust law, however, these two weaknesses have been ameliorated. First, it is now tolerably clear that only small set of agreements are per se illegal: cartels (whether designed to fix prices or allocate territories), group boycotts, and some tying agreements.\textsuperscript{13} Second, the method by which the rule of reason standard is applied is now settled: before discussing this however, we need to confront a procedural consideration, which is relevant for understanding the US system but also for our subsequent discussion of EU competition law.

\textbf{2.1 Pre-trial procedures}

Before a dispute goes to trial, plaintiffs face two hurdles: first they must make a plea to establish the plausibility of their claim in order to obtain the power to discover evidence held by the defendants; second the defendant may seek summary dismissal of the case to prevent it from going to trial in the first place by claiming that there is no genuine issue even if the evidence is read in a manner most favourable to the plaintiff. Ostensibly, the purpose of these two hurdles is to avoid the costs of a trial when there is no prospect of success.\textsuperscript{14} However, during these two parts of the procedure, there will be cases where it is not known whether plaintiffs are able to claim that the agreement is per se illegal or whether this is a case for which they must plead under the rule of reason.

An illustrative example is \textit{Major League Baseball Properties v. Salvino, Inc.}\textsuperscript{15} Salvino is in the business of manufacturing sports merchandise: for baseball products it has to secure a trademark license from Major League Baseball Properties (MLBP), who is the exclusive licensing agent for major league clubs. A dispute arose when MLBP refused to license Salvino for a particular item of merchandise, as a result of which Salvino claimed that the arrangement among major league clubs and MLBP was per se illegal, or at least so obviously illegal that the burden should shift to MLBP to justify the licensing agreement. MLBP sought summary judgment, claiming that the arrangement was a joint venture which yielded a number of efficiencies, and the court agreed that this was not a per se case. It follows that if Salvino wished to continue the case he would have to run this case under the rule of reason standard.

Faced with this uncertainty, the plaintiff may make one of two choices: one is to spend considerable resources seeking discovery and securing expertise to show that the agreement is

\textsuperscript{12} United States v. Addyston Pipe & Steel Co 85 F. 271 (6th Cir. 1898), 283-284.
\textsuperscript{14} Bell Atlantic Corp. v. Twombly 550 U.S. 544, 558 (2007): “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.” see also Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 95 (2d Cir.1998): lengthy litigation chills pro-competitive market forces.
\textsuperscript{15} 542 F.3d 290 (2d Cir. 2008).
illegal under the rule of reason only to find that the court thinks this is a per se case. The alternative is that a plaintiff insists on applying the per se rule (as in Salvino) only to find that they have to start from scratch when the court decides that the facts before it indicate that the case merits rule of reason analysis. These choices are more costly for the plaintiff but the system is designed to reduce the social cost of lengthy trials. Repeat players, like the Federal Trade Commission, might invest in testing the per se rule, but others might, fearful of the costs of the rule of reason inquiry, decide not to commence litigation even if the claim is meritorious. Given the very high costs of the rule of reason standard, this may lead to under-enforcement.

2.2 The structure of the rule of reason

Once it is decided that the case is to be appraised under the rule of reason standard, there is a consensus that this triggers a burden-shifting analysis. While there are some slight differences among courts, there is some consensus among scholars that the analysis contains four stages. During the first stage the burden is on the plaintiff to show market power and anticompetitive effects. If this is demonstrated, then during the second stage the defendant is entitled to establish that the agreement brings some efficiencies that justify the restriction of competition. In the third stage the burden shifts back to the plaintiff to demonstrate that the efficiencies may be achieved in a manner which is less restrictive of competition than that selected by the defendant. If there are less restrictive alternatives the agreement is illegal, but if the restriction is necessary to yield the efficiencies then the final step is that the court balances the anti-competitive effects and the efficiencies to determine legality. This approach creates a framework which can be applied consistently, places the burden of proof in an appropriate manner (the defendant is best-placed to bring in evidence of efficiencies) and serves to limit the number of cases where the court is called to balance positive and negative effects, which judges are said to be ill-equipped to carry out.

Having said that, not all courts agree that the structure is composed of four stages. In a recent judgment, FTC v Qualcomm, the Ninth Circuit took the view that the stages were three, following other judgments in the same vein. What is perplexing is that while the court took the view that the burden-shifting framework under sections 1 and 2 of the Sherman Act is essentially the same, it then went on to articulate two frameworks that are different in one important aspect. In Section 1 cases the plaintiff has the initial burden to show a practice is anticompetitive, the defendant may then show a procompetitive rationale after which the plaintiff can try and show that procompetitive efficiencies could be reasonably achieved through less anticompetitive means. No fourth step balancing pro and anti-competitive effects is required by the court.

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17 Hovenkamp (above n.13) p.93.
18 H. Hovenkamp, The Antitrust Enterprise (2005), noting that rule of reason analysis is very costly.
20 FTC v Qualcomm, Ninth Circuit, judgment filed 11 August 2020.
21 See Carrier (above n 19) looking at other cases where the fourth step is missing.
sounds a bit odd because then any efficiency, however small, could trump a finding of very severe anticompetitive effects. In section 2 cases the Ninth Circuit thought that there were also three stages: the first two stages are consistent with the above: plaintiff must show anticompetitive effects, then defendants may show a procompetitive justification. In the third stage the burden shifts back to the plaintiff to rebut the defence and ‘if the plaintiff cannot rebut the monopolist’s procompetitive justification, “then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.’”\(^\text{22}\) Here there is balancing, but no assessment of less restrictive alternatives. Moreover, the court places the burden on the plaintiff to carry out the balancing while the literature suggests that it is for the court, having heard the two sides, to balance. With respect, it is not clear why the two frameworks differ given the court’s opening premise that the frameworks under the two sections of the statute are essentially the same. For the purposes of this paper we will continue with assuming that a four stage framework is conceptually more accurate.

Even though there are four stages in theory, it is worth bearing in mind Professor Carrier’s important empirical findings. In two studies of all rule of reason cases between 1977 and 2009 he shows that in the vast majority the plaintiff fails to satisfy the first stage of the test: between 1977 and 1999 84% of the cases fail at stage 1, and between 1999 and 2009 this rises to 97%\(^\text{23}\). Very few cases reach the balancing stage: 4% between 1977 and 1999 and 2% between 1999 and 2009, and of these balancing normally leads to victory for the defendant.\(^\text{24}\) In other words, while it is interesting to discuss all four stages of the rule of reason test, the principal lesson is how hard it is to win cases once a category of restraint is assessed under this standard. This is one of the reasons that has led a number of commentators to be critical of the current state of under-enforcement in the US, but such debates are outside the scope of this chapter.\(^\text{25}\) We now turn to consider each step in turn, emphasizing elements that will help our comparative account.

2.3 Stage 1: a sliding scale

One of the major problems with the rule of reason framework is that the initial burden on the plaintiff is very hard to dislodge, since courts are wary of condemning agreements and demand ever more expertise before passing the burden to the defendant to show justification. The result has been an attempt by plaintiffs to convince the court that there may be instances when less evidence may suffice to satisfy the first step. This has become known as the ‘quick look’ mode analysis, to which we now turn.

The quick look appears to be a tertium quid, sitting somewhere in between the per se illegality rule and the rule of reason standard. The Supreme Court judgment in *California Dental*

\(^{22}\) Above n 20 p.28. The court cites *US v Microsoft* 253 F.3d 34, 58-59 (D.C.C. 2001) but here the court merely said that the section 1 and 2 tests were similar, not the same.


\(^{24}\) Ibid.

Association v. Federal Trade Commission provides us with a helpful illustration. The association prohibited members from advertising the prices and quality of their services, and the Federal Trade Commission (FTC) considered that these restrictions were anticompetitive. The conduct was not per se illegal, but the FTC argued that it could discharge its burden of proof with minimal evidence because a moment’s reflection would reveal that an advertising restriction serves to limit competition among dentists as both price and quality are the kinds of parameters consumers use to choose a dentist. The FTC thus claimed that in a case where the restraint was so obvious, the burden should shift to the defendants to reveal the positive effects of such a restraint. Litigation hinged on whether the FTC was entitled to base this case on a quick look analysis. The majority explained that a quick look standard is appropriate when ‘an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.’ This view of the law is largely shared by the dissenters too, but there is some irony in the fact that the majority and dissent disagreed on the facts as to whether the restraint in question was obviously anticompetitive. The majority held that the FTC could not rely on a quick look analysis, but had to demonstrate anticompetitive effects. This was because of the informational asymmetries between dentists and patients warranted placing limits on advertising which could mislead the patient. In contrast the dissenting justices took the view that these arguments about informational asymmetry were for the defendant to discuss when pleading efficiencies and for the association to reveal that the restrictions were justified, a burden they had not discharged.

There are two important lessons from this judgment: the first is that judges have reasonable disagreements about whether to apply the quick look or not – what is an obvious restraint to one judge is a welfare ambiguous practice to another; the second is that the choice between quick look and rule of reason is simply about how heavy the evidentiary burden is for the plaintiff at stage one.

Some scholars have argued that speaking of the quick look as a stand-alone standard is misleading, and that a better view is that the rule of reason is best seen as a spectrum: in some cases the plaintiff’s burden of proof is relatively light, while in some instances the court will demand much more analysis from the plaintiff to be convinced that the facts reveal anticompetitive effects. The case law appears to bear this out. In FTC v Actavis the Supreme Court examined pay for delay settlements. It held that the rule of reason should apply rather than the quick look, but then the Court suggested that the plaintiff could discharge its burden of proof merely by showing market power and the size of the payment made by the defendant to the would-be entrant. We can contrast this with the judgment in PSKS v Leegin. As is well-known the Supreme Court held that a minimum RPM agreement should be evaluated using the rule of reason. After this judgment the plaintiff brought suit under the rule of reason and the 5th Circuit

27 Ibid. 770.
28 Hovenkamp (above n 13) p.123.
of the Court of Appeals reviewed a number of theories of harm.\textsuperscript{31} First the plaintiff argued that RPM increased the price of Leegin’s goods, second they argued that price competition among retailers was reduced. Both of these claims were rejected because the court found that there remained sufficient inter-brand competition in the market and that price was not the sole parameter for competition. Nor was there evidence to show that RPM was the result of a cartel by retailers, which used RPM as a means of keeping their cartel stable. In sum, making a showing of anticompetitive effects when challenging a vertical restraint is complex as the plaintiff has to find a way of showing how the restraint imposed by one brand owner without market power can risk reducing inter-brand competition. Conversely, in pay for delay settlements, the plaintiff’s burden is lighter because the anticompetitive risk is somewhat more obvious than in cases about vertical restraints.

The lesson from comparing these two cases is that labelling the approach used by the courts as a quick look or a full rule of reason is unhelpful: what matters is the court’s assessment of how much evidence the plaintiff should bring to the table to show that a practice restricts competition. When the harm to competition is more obvious less evidence will be required than when the harm is less clear and where the court is entitled to expect more expert evidence to be convinced of an anticompetitive risk. The tricky part is making the judgment call as to whether the restraint observed is obviously anticompetitive based on a relatively quick assessment, or welfare ambiguous.

2.4 Stage 2: defences

For the purposes of this paper we need not detain ourselves too long on this stage of the inquiry, save to make two observations. The first, is that the vast majority of cases that require the defendant to justify its conduct are about whether there are countervailing efficiencies. In vertical restraints cases, for example, the question confronted is whether the reduction in inter-brand competition is justified by a more efficient way of distributing goods, or that the restraint stimulates pre-sale services by eliminating the risk of free-riding. The second remark is that non-economic justifications tend to be excluded, but sometimes the courts are receptive to a wider public interest defence.\textsuperscript{32} For example in cases concerning the regulation of college football by the NCAA the courts accepted that the promotion of amateur sport and the integration of players in university life could serve as valid justifications.\textsuperscript{33}

It bears recalling that according to most authors the defendant must merely prove the existence of justifications, and not that the efficiencies outweigh the anticompetitive effects. Such balancing is left for the fourth limb of the rule of reason test.\textsuperscript{34}

\textsuperscript{31} PSKS, Inc. v. Leegin Creative Leather Products, 615 F.3d 412 (5th Cir. 2010).


\textsuperscript{33} NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984); O’Bannon v NCAA, 802 F.3d 1049 (9th Cir. 2015).

\textsuperscript{34} Hovenkamp (above n.13).
2.5 Stage 3: less restrictive alternatives

If there are efficiencies, then the burden returns to the plaintiff to show that the same benefits may be obtained by less restrictive means. An illustrative example of a less restrictive alternative are the rules of the American Society of Composers, Authors and Publishers (ASCAP): this is a collecting society to which authors may assign a right to license their works. This limits price competition among authors but it generates efficiencies because the rights are better protected and transaction costs are reduced significantly for TV and radio stations wishing to secure licenses to the works of multiple authors. Originally ASCAP rules provided that authors would assign their rights exclusively to ASCAP but the Department of Justice considered that a non-exclusive license would be a less-restrictive alternative that would still allow for the benefits of the agreement to be realized. Non-exclusivity allows authors to negotiate individual deals if they wish so, or to join another collecting society for negotiating certain deals, facilitating competition among authors as well as among collecting societies.35

There are some slight differences among appellate circuits regarding the precise contours of this test. One view is that the plaintiff must show that ‘a substantially less restrictive rule would further the same objectives equally well,’36 Another is that one must merely show that ‘comparable benefits could be achieved by a substantially less restrictive alternative.’37 Some commentators have even suggested that at times the court condemns conduct even if the alternative is not as effective.38 It also bears recalling that the alternative has to be realistic: it would be too simple for the plaintiff to find a less restrictive alternative that the defendant may never have considered.39

2.6 stage 4: balancing

As we have noted, it has been said that few cases show the courts balancing pro- and anti-competitive effects. A close look at the five recent cases which other commentators suggest the courts carried out balancing, however, reveal that even when balancing is mentioned, it does not happen.40 In US v Visa the plaintiff showed that Visa and Mastercard had enacted rules prohibiting their member banks from issuing cards using any payment system other than Visa or Mastercard and this exclusionary rule harmed competition by preventing market access by competing credit card companies. The defendants tried to show that the exclusionary rule promoted cohesion of the network, but the district court found that ‘defendants have offered no persuasive procompetitive justification’ for the rule.41 It is true that on appeal the court held,

36 O’Bannon v. NCAA, 802 F.3d 1049, 1064 (9th Cir. 2015).
37 US v Brown University, 5 F.3d 658, 679 (3d Cir. 1993).
38 Hemphill (above n.32) who suggests that courts may in effect be balancing between an option which is restrictive of competition but yields large benefits and conduct which is less restrictive of competition but yields lower benefits. He calls this balancing in disguise.
39 Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010), Section 10.
40 These cases are said to be about balancing by Carrier (above n 23).
summarizing the findings of the District Court, that ‘defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits.’ However, there is no balancing as such: the plaintiffs proved harm and the defendants failed to produce convincing evidence of efficiencies: the case stopped at stage 2. The same finding obtains when we look at *California Dental Association*: as discussed above the Supreme Court held that advertising restrictions should be evaluated using the rule of reason. When the case returned in the 9th Circuit the court concluded that the pro-competitive justifications were more persuasive than the plaintiff’s case. The court did not balance a negative effect on consumer welfare with a positive effect. Its conclusion was: ‘because CDA’s advertising restrictions do not harm consumer welfare, there is no antitrust violation. In other words, the FTC has failed to demonstrate substantial evidence of a net anticompetitive effect.’ The case failed at stage 1 because the court found the evidence of pro-competitive effects more compelling. The other three cases that are mentioned as being about balancing are similar: while the courts state that the balance is positive, they also find that the practices in question are not anticompetitive to start with. The Courts’ statements on balancing are at most obiter and provide no explanation of how to balance positive and negative effects. Balancing remains a myth.

### 2.7 Ancillary Restraints

The doctrine of ancillary restraints allows the court to examine what would otherwise be a per se violation of the Sherman Act under the rule of reason. This may be illustrated by *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.* Atlas runs a removals business for individuals and businesses. It employs a number of independent moving companies as its agents. Moving companies that cooperate with Atlas are forbidden from offering their services independently. Rothery Storage had been expelled from the Atlas business for offering its services independently and claimed that Atlas’ policy was a restriction of competition. Normally, a group boycott (here the group is Atlas and all agents who agreed to the rules set by Atlas) is per se illegal. However, the court took the view that the exclusivity required by Atlas was motivated by the wish to avoid free riding. Atlas invested in developing the network of removals services (e.g. training staff, advertising the Atlas brand, providing uniforms): if an agent were able to free ride on this and offer its services independently, Atlas’s business model would be under threat. In Judge Bork’s words: “when Atlas’ centralized services, equipment, and national image amount to a subsidy of competing carrier agents, this cuts down the marginal revenue derived from the provision of such things so that less will be offered than the market would reward.” As a result, this is not an agreement to boycott a rival but an ancillary horizontal restraint: it forms part of the joint venture and appears to enhance the efficiency of the business under consideration. If this is shown, then

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43 *California Dental Ass’n v. Federal Trade Commission*, 224 F.3d 942, 958 (9th Cir. 2000).
44 *County of Tuolumne v. Sonora Community Hospital* 236 F.3d 1148 (9th Cir. 2001); *Paladin Associates, Inc. v. Montana Power Co.*, 328 F. 3d 1145 (9th Circuit 2003); *Reifert v. South Central Wisconsin MLS Corp.*, 450 F.3d 312 (7th Cir. 2006).
45 792 F.2d 210 (1986).
46 Ibid at 223. I cite a judgment by Bork because he had put forward this interpretation of the doctrine of ancillary restraints in earlier writing, see R. Bork *The Antitrust Paradox* (1978).
the court must assess the restraint under the rule of reason. This means carrying of whether the agreement is capable of restricting competition, whether there are countervailing efficiencies, and if so whether the restraint is reasonably necessary to achieve those efficiencies. On the facts the court held that there restraint was not capable of harming competition for two reasons: first the Atlas venture had a fairly small percentage of the relevant market (6 per cent) which made it unlikely that it could harm consumer welfare, second the arrangement preserved the efficiencies of the Atlas system while avoiding the costs of free riding.

This approach has been applied to a number of other joint venture agreements.\textsuperscript{47} Some scholars have suggested that the doctrine of ancillary restraints is not useful because there are just two classes of antitrust assessment, per se illegality and rule of reason and all that this case-law on ancillary restraints shows is that there are circumstances when what looks like a per se illegal arrangement is best assessed under the rule of reason.\textsuperscript{48}

3. Articles 101 and 102 from the perspective of US antitrust law

As is well-known Article 101 distinguishes between agreements restrictive by object or effect. Likewise under Article 102, some abuses of dominance require little more from the plaintiff than the showing of a prohibited action (e.g. prices below a given measure of cost) while other abuses require a more detailed effects-based assessment (e.g. above-cost discounts).\textsuperscript{49} The presence of abuses by object appears to be confirmed by the \textit{Generics} judgment.\textsuperscript{50} Just like in US antitrust then, the plaintiff’s burden of proof is lighter in some cases than in others. However, a finding that the defendant’s conduct is restrictive by object is not the functional equivalent of per se illegality: in the US per se illegality denotes a setting whereby conduct is irrebuttablly presumed to be illegal, conversely every conduct which is prohibited under Article 101(1) may be justified on the basis of Article 101(3),\textsuperscript{51} likewise for Article 102 any conduct may benefit from an objective justification.

The Courts have been invited to consider the application of the US notion of the rule of reason on a number of occasions, but they have demurred.\textsuperscript{52} The Court has also always interpreted the

\textsuperscript{47} \textit{Northwest Wholesale Stationers, Inc. v. Pacific Stationery Printing Co.}, 472 U.S. 284, \textit{SCFC ILC, Inc. v. Visa USA, Inc.}, 36 F.3d 958 (10th Cir. 1994).

\textsuperscript{48} A. Gavil, W. Kovacic, J. Baker, J. Wright, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy pp.229-230 describing the doctrine of ancillary restraints an historical artifact.


\textsuperscript{52} Since 1966 in \textit{Consten and Grundig} (above n 5) and most recently \textit{Generics} (above n 45) para 104. Other cases where the rule of reason was raised but dismissed are: \textit{Montecatini v Commission}, C-235/92 P, ECLI:EU:C:1999:362 para 133 (doubting existence); \textit{Montedipe SpA v Commission} Case T-14/89, EU:T:1992:36, paragraph 265 (bizarrely the GC held that cartels are prohibited per se); \textit{Treflunion SA v Commission}, Case T-148/89, EU:T:1995:68 paragraph 109 ; \textit{Tetra Pak Rausing SA v Commission}, Opinion of AG Kirschner, Case T-51/89,
rule of reason as being ‘an examination balancing the pro- and anticompetitive effects of the
government at issue.’ \(^{53}\) And in \textit{M6 v Commission} it held that the balancing aspect of the rule of
reason is to be found in Article 101(3), thus no such balancing should be carried out under Article
101(1). \(^{54}\) The Commission echoed this when it claimed that Article 101(3) ‘contains all the
elements of the rule of reason.’ \(^{55}\) As will be clear from the discussion of US Law above, this is
quite a narrow interpretation of what the rule of reason method of analysis entails. So narrow as
to be misleading. The better view is that the rule of reason is a burden-shifting framework to
identify harmful restraints. We now turn to a more comprehensive comparative discussion of the
many elements of the US rule of reason and the light they may shed on EU competition law. We
follow the same structure as when we discussed the US cases to facilitate comparison.

\textbf{3.1 A lack of pre-decision procedures}

Unlike the US, where the agencies must pursue cases at trial as plaintiffs, the Commission makes
its own decisions. Thus the pre-trial procedures concerning discovery and striking out are not
found in the EU legal order. \(^{56}\) The uncertainty as to the precise contours over the notion of
restrictions by object has seen a number of instances where the Commission issues decisions
based both on a finding that the conduct is restrictive by object and by effect. Some authors
classified this as a ‘have your cake and eat it’ approach. \(^{57}\) This is different from the approach
of US-based plaintiffs who must choose the analytical method first: as we saw in \textit{California Dental}
the FTC first tried to run the case under the quick look and subsequently under the rule of reason.
This raises two questions: is the Commission entitled to issue decisions based on a finding of
object and effect and is this procedure efficient?

The Court has only confronted this question recently. Earlier case-law appeared to indicate that
one should start by considering the object of an agreement and move to an effects analysis if
there were no anticompetitive object, but it never forbade a finding on both grounds. \(^{58}\) Finally in
\textit{Budapest Bank} the Court confirmed explicitly that one may issue a decision finding that a practice
is restrictive by object and by effect. \(^{59}\) AG Bobek justified this by noting that there is no

\begin{itemize}
  \item Commission, ‘White paper on modernization of the rules implementing articles 85 and 85 of the EC-Treaty’
  \item The Commission’s powers to conduct searches are found in Regulation 1/2003.
  \item A. Jones, B. Sufrin and N. Dunne, \textit{Jones and Sufrin’s EU Competition Law} 7\textsuperscript{th} ed (2019) p. 435 (with reference to
    \textit{Intel}).
  \item \textit{T-Mobile and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit}, Case C-8/08,
  \item \textit{Gazdasági Versenyhivatal v Budapest Bank Nyr. and others}, C-228/18, EU:C:2020:265
\end{itemize}
ontological difference between the two types of restriction so that the distinction between object
and effects was procedural in nature, allowing the enforcer two options to test for an
infringement. He sided with the views of the Commission and the EFTA Supervisory Authority
that ‘procedural efficiency’ might militate in favour of a two-pronged approach in case an appeal
against the decision is made.\textsuperscript{60}

As a matter of policy this approach may be challenged: if the Commission does not know whether
a practice is restrictive by object or by effect this may be taken as an indicator that there is
something wrong with the legal system which is incapable of drawing clear dividing lines: after
all the Court in Cartes Bancaires has intimated that restrictions by object are self-evident. There
is a grain of truth in this but a comparative perspective reveals that when it comes to economic
assessment, judges disagree: in both California Dental and Cartes Bancaires we find one set of
judges (the dissenters and the General Court respectively) considering that the facts revealed a
restriction of competition and it was for the defendant to explain the efficiencies, while another
set of judges (the majority and the ECJ respectively) considering that the facts reveal the need
for a more attentive analysis. Given that there may be reasonable disagreement on whether a
practice may be classified as restrictive by object or effect, the question for an enforcer is how to
devise a litigation strategy to minimize its costs.

For the Commission it may be sensible to run cases as object and effect in order to ensure that it
survives an appeal.\textsuperscript{61} Some might argue that if the enforcer is uncertain about the
anticompetitive nature of a given type of conduct it should run an effects case only, but by
pursuing both it helps clarify which agreements may be classified as objet restrictions so that in
the long term this may save costs. As with the US system, repeat players may have an interest in
testing the boundaries of the notion of ‘object’ to understand how to approach new cases.

What appears inefficient in the EU system is that on appeal the General Court reviews the object
aspect of the decision first and stops there if it finds that the agreement has no anticompetitive
object. If an appeal to the ECJ is successful on this this point the General Court must review the
effects findings. This makes for a very lengthy appeals process, which should be abridged by the
General Court reviewing object and effects assessments at the same time.\textsuperscript{62}

3.2 the structure of inquiry

Much like the US, a burden-shifting approach is followed. At stage 1 the Commission has the
burden to demonstrate that the practice is restrictive of competition, whether by object or by
effect. As we explain in section 3.3 below, there are different ways by which this burden of proof
may be discharged. Still within the first stage, the defendant is entitled to query whether the

\textsuperscript{60} EU:C:2019:678, paras 20-28.
\textsuperscript{61} Ibid., paras 27 and 28 noting that the effects analysis is more resource intensive but also the Commission’s
submission that pleading both is ‘safer.’
\textsuperscript{62} For example in Cartes Bancaires the practices notified the agreement in 2002, the Commission issued its decision
in 2007 and the final ruling was in 2016, in Intel the Commission issued a decision in 2009 and at the time of
writing the General Court’s second judgment is still pending.
Commission has discharged its burden of proof. Stage 2 allows for the consideration of whether the agreement may be declared inapplicable. Defences are normally considered under Article 101(3). This provides that an agreement may be exempted if four conditions are met: (1) it ‘contributes to improving the production or distribution of goods or to promoting technical or economic progress’ (2) consumers secure a ‘fair share of the resulting benefit’; (3) it does not impose ‘restrictions which are not indispensable to the attainment of these objectives’ and (4) it does not ‘afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products.’ A very similar test is found in Article 102. There are some obvious affinities with the approach in the US: the first and the second condition consider the positive effects of the practice under review (stage 2 of the rule of reason) and the third condition is similar to the inquiry into the less restrictive alternative. Note however that the EU’s statutory text makes no express provision for balancing (stage 4 in the US).

In terms of the allocation of the burden of proof, there are differences. Article 2 of Regulation 1/2003 suggests that the burden at stage one is on the enforcer/plaintiff while it is for the defendant to prove the agreement may be justified. On this view the burden shifts once. However an alternative view is that the defendant merely has an evidentiary burden: they must adduce evidence to help the Commission decide if the conditions of Article 101(3) are met, but it is for the Commission to establish this. The Commission wears two hats: it is both the prosecutor (when establishing an infringement) and the decision-maker (when determining if, on balance, the agreement should be declared inapplicable). Matters may differ in cases of private enforcement when shifting the legal burden is more obvious, leaving it for the court to balance the positive and negative effects.

3.3 stage 1: a sliding scale?

The categories of object and effect have been puzzling for generations. This is not helped by the Court’s case law, which hovers between two approaches: on the one hand the court indicates that restrictions by object are those whose ‘very nature’ restricts competition, while in other passages in the same judgments it suggests that a restriction by object is found having regard to ‘the content of its provisions, its objectives and the economic and legal context of which it forms

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64 ‘it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.’ Post Danmark (above n 49) paragraph 42.
65 In Consten and Grundig (above n 5), the Court notes that the undertakings are entitled to have their request for an exemption assessed by the Commission but also that the Commission ‘must, as a matter of good administration, play its part, using the means available to it, in ascertaining the relevant facts and circumstances.’ (p.348) In GlaxoSmithKline Services Unlimited and others v Commission, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, at paragraphs 83 and 93 appears to confirm that the Commission assessment is merely based on facts in its possession, placing the onus of showing an advantage largely on the undertaking.
66 A. Kalintiri, Evidence and Standards in EU Competition Enforcement (Hart 2019) p.51

Electronic copy available at: https://ssrn.com/abstract=3686619
a part. When determining that context, it is also 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.\(^{67}\)

This second, more analytical approach, resembles an effects inquiry.\(^{68}\)

Here we suggest that, by reference to the evolution of the quick look and the rule of reason’s analytical continuum in the US, the role of object and effect analysis can be clarified. This is so in particular if we study three recent judgments, in this order: Cartes Bancaires, Generics, and Intel.

Cartes Bancaires is a judgment whose tone fits well with judgments of the Supreme Court in the 1970s, a time when the categories of conduct that fell into the per se rule began to be reduced. For example in Sylvania the Court recalled that the default analytical framework under the Sherman Act is the rule of reason and the application of a per se rule ‘must be based upon demonstrable economic effect, rather than […] upon formalistic line drawing.’\(^{69}\) The ECJ in its conceptual discussion of restrictions by object inserts a new reflection that echoes these sentiments:

> it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered *so likely to have negative effects*, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1) TFEU], to prove that they have actual effects on the market. *Experience shows* that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.\(^{70}\)

On the facts of the case, a decision by an association of banks that agreed a membership fee whereby banks who only issued bank cards without investing in developing acquiring services were asked to pay more than banks who invested in developing the acquiring side of the market, was not the kind of practice that is so likely to have anticompetitive effects as to qualify as a restriction by object. Having regard to the two-sided nature of the market and the importance for consumers that the bank cards they have can be utilized in a large number of shops, the measure was designed to create incentives for member banks to invest in developing the acquisition network. Here the efficiencies appeared more obvious than the restraint, this indicates that an effects analysis is required.

However, not all restrictions by object are as clear-cut as price-fixing cartels. Sometimes the Commission will need to dig a little deeper to deliver a convincing argument that a practice is restrictive by object. This is the lesson that emerges from the judgment in Generics, where a


\(^{68}\) S.F King, ‘The Object Box: Law, Policy or Myth?’ (2011) 7(2) European Competition Journal 269.


\(^{70}\) *CB* (above n 67) para 51 (emphasis added).
reverse payment settlement agreement may be found restrictive of competition by object if the following conditions are met: we are dealing with a process patent, the payment made to the would-be entrant has ‘no other explanation than the commercial interest of the parties to the agreement not to engage in competition on the merits’, and there are no pro-competitive effects that cast doubt as to the agreement’s harm to competition.\textsuperscript{71}

Bringing these two approaches together, we can suggest that there will be object cases which can be condemned fairly easily, while others will require a closer look at the legal and economic context before being clear that the agreement is restrictive by object. The two different definitions of restrictions by object in the case-law might then best be read as alternatives rather than as mutually exclusive options.

Even if a restriction seems clearly anticompetitive under either standard, the defendant may succeed in requesting an effects analysis. This is clear from the judgment in Generics just discussed: if the defendant brings evidence that a reverse-patent settlement is pro-competitive they ‘justify a reasonable doubt’ about the object of the agreement,\textsuperscript{72} and will require the Commission to demonstrate anti-competitive effects. This echoes the approach in Cartes Bancaires.

Another way for the defendant to require that the plaintiff carries out an effects analysis is found in the judgment in Intel. The case concerns a dominant undertaking grating rebates to its clients, which the Commission considered unlawful because they were awarded on the condition that the customers bought the dominant firm’s chips exclusively from it and as such foreclosed market access to rivals. The Court began by making a reference to the foundational judgment, Hoffman La Roche, which provides that ‘loyalty rebates, that is to say, discounts conditional on the customer’s obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position’ constitute an abuse of a dominant position.\textsuperscript{73} But it immediately followed this restatement of the law with this caveat:

However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.\textsuperscript{74}

In these cases, the Commission is obliged to study the effects of the rebate as well as any possible efficiency claim.\textsuperscript{75} The approach in Generics and Intel is largely consistent with the quick look/rule of reason framework we find in US antitrust: a plaintiff may argue that the conduct at hand is obviously anticompetitive such that a quick look suffices to shift the burden on the defendant to justify the conduct, but the court might conclude that the facts at hand ‘raise sufficient doubt

\textsuperscript{71} Generics (above n 50) para 111.
\textsuperscript{72} Generics (above n 50) para 107.
\textsuperscript{73} Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 89.
\textsuperscript{74} Intel v Commission, C-413/14 P, EU:C:2017:632, paragraph 138.
\textsuperscript{75} Ibid., paragraphs 139-140; we discuss these passages below.
about the anticompetitive nature of the agreement such that detailed scrutiny is required to understand its effects.\textsuperscript{76} The ECJ’s judgment in Intel is thus significant for indicating that a similar option exists for defendants in the EU.

Two issues arise that will require further elucidation: the first is whether the statement above is solely applicable to the category of agreements under discussion in Hoffman La Roche, or whether it may also apply to other conduct which is ordinarily condemned without reference to effects. For example, could a defendant in a case of predatory pricing raise an argument that its conduct is not capable of restricting competition? The second question is what ‘supporting evidence’ suffices to require the Commission to carry out a fuller analysis. The defendant cannot be asked to prove a negative, so all that appears necessary is some evidence to cast doubt on the presumption of anticompetitive effects would suffice. For example, the defendant might show that the rebates were not granted to all customers but only to new clients. This might suggest that more evidence is needed to prove the capacity of the dominant firm’s conduct to foreclose market access.

In sum, we make the following suggestions. First, there is a category of practices whose anticompetitive nature is so obvious such that the Commission can condemn them by object safely. There are other agreements which, after a review of the relevant economic context are also clearly anticompetitive and which may be deemed restrictive of competition by object. Finally, there are agreements where the impact on competition is ambiguous so that the Commission must examine the likelihood that the agreement will have anticompetitive effects. But these are not three distinct types of case, rather there is a continuum. As AG Bobek explained, the difference between an analysis by object or effect is ‘more of degree and depth than of kind. The two types of analysis are simply different ways, in the light of the knowledge and experience acquired by the authority, to answer one and the same question: whether the agreement at issue may prevent, restrict or distort competition in the internal market.’\textsuperscript{77} This is analogous to the sliding scale approach utilized in US antitrust.

The second suggestion is that when the Commission opts for an object assessment, the defendant can bring up evidence to show that the harm to competition is not as obvious as one might think. There are two ways for the defendant to challenge a finding that there is a restriction by object. One is to establish that the agreement may be efficient. We see this in Cartes Bancaires most clearly, and the approach is put in lapidary form in Generics. This approach is described well by AG Kokott: an effects-analysis is needed when the facts ‘reveal a complex arrangement with pro- and anticompetitive components, from which it would be impossible to determine whether, overall, it has an anticompetitive object.’\textsuperscript{78} The second is to bring up evidence that the agreement is not capable of harming competition, as intimated in Intel. Either of these showings, if demonstrated, forces the Commission to explore if the practice has anticompetitive effects. This is very similar to the opportunities open to defendants in the US when the plaintiff opts for a

\textsuperscript{76} California Ex Rel. Harris v. Safeway 651 F.3d 1118, 1138 (2011).
\textsuperscript{77} Above n 59, paragraph 32.
\textsuperscript{78} Generics (above n 50), paragraph 171.
quick look analysis: in most cases we see that the defendant tries to give an efficiency rationale for its conduct, but there are also cases where the defendant questions the anticompetitive nature of the agreement.\textsuperscript{79}

From a comparative law perspective we can also make the following observations: first the ECJ in \textit{Generics} is right to insist that the approach it prescribes is not a rule of reason when this is defined as a standard for balancing pro and anticompetitive effects; but when we observe that the rule of reason is about requiring the plaintiff to bring up sufficient evidence to meet its case then the affinities between the EU and US courts are much easier to see. More specifically it is interesting to compare how the two jurisdictions handle similar cases, for instance reverse payment settlements. As we noted above in \textit{Generics} the ECJ held that such settlements may be restrictive by object when the size of the payment leaves no doubt that it is a payment designed to share profits between the originator and the would-be entrant. The US Supreme Court in a similar dispute (\textit{FTC v Actavis}) held that these cases were not suitable for a quick look analysis but required a comprehensive analysis. However the court also found that the criteria to assess the legality of these agreements are linked to the payment’s ‘size, its scale in relation to the payor’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.\textsuperscript{80} In other words, rather than fixating on the precise label (object v effect or quick look v rule of reason) one had better study the degree of proof the court requires before the burden shifts to the other side. Viewed from this perspective we see that the two courts converge on the evidence required to examine reverse patent settlements even if they label these in ways that appear to suggest divergent approaches.

The point we make here however is not that convergence between the two legal systems is desirable or inevitable. Rather we seek to show that both legal orders have constructed an analytical framework that bypasses the formalities expressed in the statutory language in order to create a balanced system which allows for a conversation between the two sides to the dispute: on the one hand, plaintiffs are entitled to calibrate the depth of their analysis on the basis of their understanding of how obvious the restraint is. On the other defendants can challenge that by revealing that the restrictive nature of the practices are more complex than the plaintiffs believe. When defendants are successful, they force the plaintiff to carry out a deeper effects-based assessment.

It does not mean the system is perfect. First the ECJ’s insistence that the notion of restriction by object should be read narrowly is unnecessary once we put our focus on the burden of proof: as we suggested above, some analyses of the agreement’s restrictive object are fairly detailed. What should matter for an appeals court is not the label but the evidence supporting the claim. Second, it is not clear how far the procedural framework facilitates the conversation that we indicated

\textsuperscript{79} E.g. \textit{Safeway} (above n 76), \textit{California Dental} (above n 43).

\textsuperscript{80} \textit{FTC v. Actavis, Inc.}, 570 U.S. 136 (2013).
above, in particular as we see the Commission running cases as object and effect at the same time, meaning that the conversation occurs only when judgments are appealed, which is too late.

3.4 Defences

A comprehensive discussion of Article 101(3) is beyond the scope of this chapter. Our focus here is to juxtapose the EU and US analytical framework to tease out the differences and points where understanding these differences may help sharpen our analysis. However even with this more modest task, we face a difficulty because in 2004 the Commission made a policy choice to alter its approach.81

In exemption decisions issued up to 2004 the Commission reveals that it considered a wider range of actors in its decisions to exempt (e.g. industrial policy, environmental benefits, pluralism). How far those non-competition benefits played a role in its decisional practice is uncertain, but they were clearly mentioned.82 The Court has given indications that some such considerations fall within the scope of Article 101(3) but it has no furnished comprehensive guidance.83

Since the coming into force of Regulation 1/2003 the Commission’s policy has changed. It has not delivered any decision declaring that the criteria of Article 101(3) have been met. In part this is because it applies a more demanding standard of proof when assessing defences. In addition, the Commission’s soft law guidelines read previous decisional practice restrictively and declared that no weight would be given to benefits that were unrelated to efficiency. This restrictive approach is presently under challenge by those wanting a more lenient approach when examining agreements aimed at enhancing sustainability.84 The Commission has issued a number of decisions condemning multilateral interchange fees and pay for delay settlements: the parties’ approach to Article 101(3) has been to plead (unsuccessfully) that the agreements yield efficiencies. A comparison with earlier decisions also reveals that the Commission requests considerably more evidence from the parties.85 This new policy approach is broadly in line with the efficiency defence we see in the US case-law, however as we saw above in most of the US cases, efficiencies are pleaded at the stage of challenging a quick look approach, after which usually the plaintiff fails to discharge the burden of proof at stage 1.

82 Generally, see C. Townley Article 81 EC and Public Policy (2009).
3.5 Less restrictive alternatives

Here one assesses whether the restrictive practice is ‘reasonably necessary in order to achieve the efficiencies.’ This gives the undertaking a certain margin of appreciation, although the decisional practice is not systematic. In some cases it considers a range of alternatives and assesses how well these would deliver the same benefits, while in others it merely confirms that the arrangements are indispensable without considering alternatives. It has been noted that the more problematic the practice is from a competition law perspective the harder will the Commission test the necessity of the measure. However this view is hard to reconcile with decisions exempting crisis cartels where the Commission’s discussion of indispensability merely focuses on the limited duration of the agreement to limit production, while in other cases where the restraint is far from obvious the Commission looks at a range of alternatives. While, as suggested above, the burden is on the Commission to find that there are no less restrictive alternatives, parties are expected to provide information to assist the enforcer.

3.6 Balancing

According to the Commission, balancing is carried out under the second criterion in Article 101(3), when one considers if the agreement allows consumers a fair share of the resulting benefits. An alternative view is that balancing is carried out when one assesses the positive effects of the agreement. This draws support from the discussion in Consten & Grunding where the Court held that ‘this improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.’ Below we sketch these two competing positions in light of the Commission’s decisional practice.

The Commission’s view is based on an assumption than one applies a consumer welfare test when determining if an agreement is anticompetitive under Article 101(1): ‘If a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits.’ The Commission is willing to accept that there may be other efficiencies that are not passed on to consumers, which are relevant for the first limb of the test, but it is clear that enough of the efficiencies must reach consumers. For example in clearing the Philips/Osram joint venture the Commission explained that there would be efficiencies from the reorganization of production which would yield economies of scale and reduced energy consumption (which were relevant for the first limb of the test), and that consumers would gain

86 Guidelines on Article 81(3) (above n 8) para 73
92 Above n 5, p.348.
93 Guidelines on Article 81(3) (above n 8) para 86.
from reduced air pollution and lower lamp prices.\(^\text{94}\) However, the Commission did not measure the precise impact of reduced competition and compare it with the beneficial effects. Even in cases where the calculation of the economic benefits is more precise, there is no measurement of the harm.\(^\text{95}\)

However, there is a more fundamental criticism we can make of the Commission’s interpretation in the Guidelines. In determining the negative effect on competition, one does not apply a consumer welfare standard. Under EU Law, an agreement is anticompetitive when it distorts the competitive process. A clear reminder of this is found in AG Kokott’s recent opinion in Generics: ‘competition law is designed to protect not uniquely the immediate interests of individual competitors or consumers, but also to protect the structure of the market and thereby competition as such.’\(^\text{96}\) This is why an agreement that forecloses market access is condemned without asking whether consumers suffer: foreclosure is prohibited because it prevents rivalry on the market. On the facts of Generics, the parties at one point argued that reverse-payment settlements served to reduce prices somewhat because the three generics manufacturers were given access to part of the UK market, and that such benefits had some relevance under Article 101(1). This was given short shrift by the AG: ‘what matters is not the entry of the generics onto the market at any price, but the fact that that entry takes place or does not take place through free competition...’\(^\text{97}\) This is a crucial passage: what matters is affording generics the opportunity to participate in the market, not that they should succeed. In other words we prefer a free market to a market which is not free but maximizes consumer welfare.

If we accept that actions are restrictive because they damage the competitive process, then it follows that the presence of Article 101(3) becomes problematic. In other words: if we believe that the disruption of the competitive process is undesirable why should we exempt any agreement at all? The answer to this question is political, not economic: the Treaty has put in place an exemption for what may broadly be called non-competition considerations. And it has however limited the grant of those exemptions subject to two requirements: that some of the economic benefits (note, not all, but just a fair share) go to consumers and that there is no elimination of competition. This final requirement is vital because the legislator insists on there being no elimination of the competitive process, which is the basic interest protected by competition law. The ‘balancing’ that takes place then is not about arithmetically comparing the same interest (e.g. positive and negative effects on prices/quality); on the contrary the Treaty simply provides that agreements that deliver certain benefits are tolerated subject to certain conditions being met which are designed to alleviate the impact on competition. This explains why in Consten & Grundig the Court held that balancing is between the distortion of competition and the agreement’s beneficial effects.

In sum, there are two competing visions on balancing: the modern interpretation is based on a balance between negative and positive effects on consumers, while a more traditional

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\(^{94}\) Philips-Osram (above n 87) paragraph 27.


\(^{96}\) Generics above n 50, paragraph 174.

\(^{97}\) Generics above n 50, paragraph 178.
interpretation looks to constitutional law principles and suggests that when considering two different interests (e.g. competition versus sustainability) one may give priority to sustainability provided the measure in question is the least harmful to the interests of competition. The modern approach is in line with the more economics-based approach, and we see in recent litigation parties emphasise efficiency gains, however evidence of actual balancing proves elusive as parties seldom manage to prove efficiencies so that the Commission seldom moves to consider the other requirements. Much like in the US, actual balancing is a myth.

3.7 Ancillary restraints

Early judgments of the ECJ make no mention of the notion of ancillary restraints, but many commentators and the Commission have retrospectively indicated that certain early cases represented a manifestation of this doctrine. The Commission has referred to it in merger cases since 1990, used the notion in a number of joint venture agreements, and codified in the Guidelines on Article 101(3) TFEU released in 2004. The ECJ then deployed this phrase in Mastercard. We start with the Guidelines and the Commission’s approach and then discuss the case-law.

The Guidelines draw a distinction between the assessment of the ‘main transaction’ and any ‘individual restraints’. When the main transaction is found not to harm competition then one should assess whether any individual restraints might be restrictive. If an individual restriction of competition is ‘directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it’, then the agreement is said to be ancillary and found not to infringe Article 101(1).

In a joint venture agreement by which a set of broadcasters create a new satellite channel that would compete against the dominant incumbent, a non-competition clause (by which these broadcasters agree to not compete against the joint venture that they are establishing) is treated as an ancillary restraint: the main transaction (the joint venture) brings about more competition in the relevant market, and the non-competition clause is necessary because without this commitment the parties would not invest in the joint venture. This approach suggests that some restraints to competition are authorized when they are ancillary.

However, this interpretation is not in line with the case-law of the ECJ in those cases that have been retro-fitted as belonging to the category of ancillary restraints. In Remia v Commission the court was reviewing a non-compete obligation in the context of the sale of a business: the seller undertook not to compete with the buyer for a period of ten years. The Commission however took the view that a non-compete obligation was only needed for four years. On appeal against

98 This approach comes with all the problems associate with balancing in constitutional law, see e.g. T.A. Alienikoff ‘Constitutional Law in the Age of Balancing’ [1987] 96 Yale Law Journal 943.
99 Guidelines on Article 81(3) (above n 8), paragraph 28
100 Ibid., para 29
101 Ibid., Para 36, with reference to Métropole télévision (M6) and others v Commission, T-112/99, EU:T:2001:215. Proportionality of the restraint often hinges on the duration of the clause. In this case the parties litigated because the Commission said that the clause could only be valid for the first three years and not for the duration of the agreement.
this, the court held that non-competition clauses should be assessed under Article 101(1) and the relevant question is what the state of competition would be absent the clause. The Court held that on without the non-compete agreement then the seller would easily be able to retain former customers and drive the buyer out of the market. ‘Against that background non-competition clauses incorporated in an agreement for the transfer of an undertaking in principle have the merit of ensuring that the transfer has the effect intended. By virtue of that very fact they contribute to the promotion of competition because they lead to an increase in the number of undertakings in the market in question.’ Here the court does not apply the notion of ancillary restraint: rather it analyses whether the ten year non-compete obligation causes a restriction of competition. In other words, it carries out an effects-based analysis. In so doing it considers the duration and scope of the non-compete obligation to see if they are limited to what is necessary to achieve the beneficial effect on competition.

The same approach is found in two other cases which the Commission and commentators have retro-fitted into the ancillary restraints category. In Pronuptia de Paris the approach by the court is to assess individual clauses in a franchising agreement under Article 101 TFEU. The ECJ is explicit: ‘The compatibility of franchise agreements for the distribution of goods with Article 85 (1) depends on the provisions contained therein and on their economic context.’ It then went on to explain for example that provisions in the agreement designed to ensure that the franchisor’s competitors do not secure its know-how are not restrictive of competition, while provisions to share markets among franchisor and franchisees would be restrictive. Each provision is judged within the context of the franchising agreement. In Oude Luttikhuis the ECJ dealt with the rules of a cooperative association which undertook to buy all the milk produced by its members who in exchange agreed to sell their milk exclusively via the cooperative. If a member were to withdraw or be expelled it would be subject to a fee. The question was about how to test if the withdrawal fee was anticompetitive. The court held that associations in general were efficiency enhancing but that if the fees were excessively high then this might restrict competition because they could deprive farmers of the possibility of approaching competitors:

Such clauses are liable to render excessively rigid a market in which a limited number of traders operate who enjoy a strong competitive position and impose similar clauses, and of consolidating or perpetuating that position of strength, thereby hindering access to that market by other competing traders.

Neither of these cases support the doctrine of ancillary restraints: they explain that each individual restraint in an agreement needs to be examined for its anticompetitive potential, even if the overall agreement is not anticompetitive. If anything these two judgments merely reveal

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102 Remia BV and others v Commission, Case 42/84, EU:C:1985:327, paragraph 18.
103 Ibid., paragraph 19.
104 Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis, Case 161/84, EU:C:1986:41, para 27
105 Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA, C-399/93, EU:C:1995:434, para 16.
that an analysis of the competitive effects of an agreement looks granularly at all its provisions while having regard to the agreement as a whole.

What makes these judgments unusual is that the Court asks whether a less restrictive provision would suffice to yield the pro-competitive effects. In other words it appears to apply one of the criteria normally associated with Article 101(3). This should not be so surprising, however. Recall that many of the early cases are notifications for exemption, which give the Commission the opportunity to issue exemptions subject to conditions. Thus, the Commission is able to require revisions to the agreement to secure compliance. Moreover, even in other cases without ancillary restraints, legality depends on the scope of the agreement. For example in Generics (which we discussed above) payments that are too high are forbidden, while lower payments may be allowed.

The Court’s most recent explanation of the doctrine of ancillary restraints (Mastercard) is confusing. This is the first time the court uses the phrase explicitly. In one passage of the judgment it appears to take the same position as the Commission:

if a given operation or activity is not covered by the prohibition rule laid down in Article [101 TEU], owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other.106

This suggests that the ancillary restraint is automatically cleared if the main agreement is not prohibited. However, in the paragraph that follows immediately from this the reasoning is different:

Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article 81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 81(1) EC.107

Here the court is more faithful to the case-law: when we study a non-compete obligation this is to be done having regard to the agreement as a whole and not in isolation. To put it in simple terms: if two competitors agree not to compete, this is usually a restriction by object. However, when the legal and economic context within which the non-compete obligation arises is the sale of a business (which is not an anti-competitive act), then the legality depends on an effects-based analysis. Read in this light, the finding of an ancillary restraint is simply an indicator that an

106 Mastercard (above n 85), para 89.
107 Ibid., para 90.
effects-analysis is required. From this perspective the notion is as useless in EU antitrust law as it is in the US.

This finding is made less surprising when we dig into the historical origins of the notion of ancillary restraints. It comes from the common law on restraints of trade. The law on restraints of trade forbids a contract term like the non-competition clause discussed above on two grounds: first because the clause deprives one party of his freedom to use his skills, and second because society suffers as it is unable to reap the benefits of that person’s skills. \(^{108}\) The common law, however, recognised that certain restraints were ‘reasonable’, for example non-competition clauses attached to contracts for the sale of a business. \(^{109}\) Today we know that antitrust law is a novel form of economic regulation, but in the early years of the Sherman Act, American judges were divided as to whether the statute codified the common law on restraints of trade or whether it introduced a novel means to regulate agreements between firms, based on economic theories. Judge Taft, who supported the former interpretation, said that the Act, like the common law, did not prohibit restrictions of conduct like non-compete obligations when these were ancillary to the main subject matter of the agreement, and therefore reasonable. \(^{110}\) He introduced the phrase ‘ancillary restraint’ in US antitrust law to describe restrictions that were reasonable and outside the scope of the Sherman Act. However, as we saw above today the US case-law uses the concept of ancillary restraint in a different manner. It thus seems unhelpful to import this phrase into EU competition law when its original provenance has nothing to do with competition law and where its current application in the US is different.

In sum: according to the Commission the use of ancillary restrain provides an administrative shortcut: when the main agreement is lawful, then so is the ancillary restraint provided they are necessary and limited in scope. According to the Court however, the individual provisions of an agreement need to be assessed in their legal and economic context. Their necessity and scope are part of the assessment of its legality. As a matter of practice it may not matter too much which of these approaches is followed, but as a matter of analytical clarity the ECJ’s interpretation is to be preferred because it avoids the creation of a third analytical framework distinct from the object and effect analysis.

### 3.8 Reasonable restraints?

Finally, we must consider a category of judgments that does not fit in well with the comparative account we have carried out here. \(^{111}\) According to AG Kokott in *Generics*, these stand for the following principle:

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\(^{109}\) The seminal case is *Mitchel v. Reynolds* 24 ER 347 (1711).


\(^{111}\) Whish and Sufrin (above n 6) carry out a similar assessment of a similar spate of cases decided in the 1970s and 80s which others suggested were evidence of a rule of reason. The authors challenge that conclusion.
‘aspects of coordination between undertakings that are positive for competition can be taken into account when examining the applicability of Article 101(1) TFEU if those aspects are such as to call into question the very finding that there is a restriction of competition prohibited by that provision.’

The Advocate General divides these judgments in two categories. The first includes the jurisprudence on selective distribution. As is well-known, the Court has held that such agreements are restrictive of competition by object but there may be legitimate requirements ‘which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 101(1).’

This appears to conform with the view that at times the Court balances positive and negative effects of competition before determining that Article 101(1) is infringed. Here, for example, we trade off a reduction in price competition with an increase in competition based on non-price factors, for example better pre-sales services. However, it would be risky to generalize too much on the basis of this line of case-law, for two reasons. The first is that the criteria necessary to benefit from this rule are narrow; second most users of selective distribution systems now benefit from the Block Exemption Regulation.

The second category contains cases where the restriction ‘is necessary to ensure the implementation of legitimate objectives.’ This is exemplified by the DLG judgment where the rules of a farmers’ cooperative prohibited members from joining another cooperative for the purposes of purchasing fertilizers and plant protection products. The cooperative was set up to create sufficient buyer power to negotiate a lower price for these goods. Dual membership would weaken the cooperative’s bargaining power. For this reason the Court took the view that the ‘prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 85(1) of the Treaty and may even have beneficial effects on competition.’ The court insisted however that the restrictions must be limited to those necessary to make the cooperative function. This looks like the sort of rule of reason balancing that Courts say has no place in EU competition law, but the AG states that this line of cases is explained by the fact that the cooperation between parties ‘constitutes an indivisible whole’ which pursues a legitimate objective which can only be obtained ‘by imposing certain restrictions of competition which are indispensable to their realisation.’

The other cases that fall within this category are those where a decision of an association of undertakings prohibits multi-disciplinary practices between lawyers and accountants ‘necessary for the proper practice

112 Generics above n 50, paragraph 150
113 Pierre Fabre Dermo-Cosmétique, C-439/09, EU:C:2011:649, paragraph 40
114 Coty Germany GmbH v Parfümerie Akzente GmbH, C-230/16, EU:C:2017:941. Whish and Sufrin (above n 6) p.23, called this case law a ‘separate branch’ of EU competition law.
115 Generics above n 50, paragraph 152.
116 DLG, C-250/92, EU:C:1994:413, paragraph 34.
117 Generics (above n 50) paragraph 153.
of the legal profession’, or where anti-doping rules provide for the expulsion of athletes in order to ‘ensure the proper conduct of competitive sport.’

This category of cases is problematic: they all seem to be instances which appear suitable for assessment under Article 101(3): the rules of these associations have some negative effect on competition but may be justified by efficiency claims or other public interests like the proper conduct of sporting events. This is particularly so because in each of these judgments the Courts observe how markets function better as a result of these agreements. The danger then is that the court appears to undermine its statements in other cases that there is no balancing to be carried out under Article 101(1).

Some scholars have said that the second category of cases is a manifestation of the doctrine of ancillary restraints when applied to self-regulation. However as discussed above, it is not clear that talk of ancillary restraints is particularly helpful and the notion of ‘regulatory ancillarity’ just creates yet another category of cases whose scope is uncertain. My view is that DLG is a case which, like Oude Luittikus, reveals that there is no harm to competition having regard to the legal and economic context and the details of the decision of the association of undertakings, and that Wouters and Meca Medina are instances where Article 101 TFEU is rendered inapplicable because of a superior public policy justifications.

4. Comparative reflections

The aim of this chapter was to compare the analytical framework used in the US and the EU to evaluate whether business practices are restrictive of competition. As we have suggested, it is possible to see many similarities between the analytical framework adopted in the EU and the US, but that it is not helpful to describe the former as applying a rule of reason. This is so for two reasons: first most authors as well as the EU courts mistakenly equate rule of reason with balancing: so one is making the wrong comparison. Second because the analytical framework in the EU contains distinct specificities. The two systems offer broadly similar approaches (both provide a burden-shifting framework) but with significant differences (e.g. the category of per se illegality and the approach to balancing) which make it inappropriate to consider a legal transplant from one system to the other. On the other hand, an understanding of one system can sharpen our understanding of the other.

4.1 Similar problems, analogous solutions

Both systems have struggled with providing an appropriate balance between legal certainty (which would favour per se rules or well-defined categories of agreements that are always lawful or unlawful) and economic accuracy (which would favour extensive effects-based assessments),

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121 For elaboration, see Monti and Mulder (above n 83).
122 Whish and Sufrin (above n 6).
and between a system which favours defendants (risking type 2 errors) and one that favours plaintiffs (risking type 1 errors). And both have responded to these challenges in a similar manner: the narrowing down of the number of cases that are condemned per se or by a categorical object analysis has been carried out because of concerns that this risked too many type 1 errors. On the other hand, both legal systems offer some easing of the burden of proof on plaintiffs (e.g. quick look or object restrictions by reference to the economic and legal context) while affording defendants the chance to rebut any presumption by showing efficiencies or the absence of anticompetitive effects: the judgments in Generics and Intel are manifestations of this. The result of these two moves is a shift towards more analysis of the effects of the practice in question.\(^{123}\) From the perspective of EU antitrust, the experience in the US helps explain the trajectory taken by the Court to object restriction: just as the US courts resorted to the quick look method, so did the ECJ facilitate a finding of a restriction by object by allowing an abridged assessment of the market’s legal and economic context when this is appropriate.

To summarise the approach suggested here: the Commission is entitled to make a finding that a practice is restrictive by object and utilize however much economic assessment it deems sufficient to make a finding about the anticompetitive nature of the agreement. However, the defendant is given the option of rejecting this claim by either (i) showing evidence that there is no prima facie indication of harm to competition or (ii) by showing that there are likely efficiencies. If the defendant is successful the Commission may either carry out a more contextual object analysis or a more detailed assessment of the effects of the practice. As indicated, the difference between an object assessment that looks to the legal and economic context and an effects analysis are only distinguished by the amount of evidence and expertise that the plaintiff must bring to the table.

In theory this approach serves to strike a perfect balance between legal certainty and economic accuracy: the system reduces the need for over-investing in a detailed effects analysis when this is unnecessary taking into account the defendant’s information about the market. Simultaneously it reduces the risk of Type 1 and Type 2 errors. In practice, however, the significant costs of an effects analysis raises a risk of under-enforcement: it may deter plaintiffs and the Commission will need to devote greater resources for one decision so that it may take fewer cases than it wishes.

Moreover, this approach may not be easy to apply in the EU context: public enforcement procedures do not appear well-suited to the back-and-forth exchange suggested above, such that we see the Commission over-investing by stating, in the same decision, that a practice is both so clear that it is a restriction by object but at the same time not obvious enough that an effects analysis is also applied, ‘for the sake of completeness.’\(^{124}\) It might be preferable to facilitate a system whereby the Commission can make an informed choice as to whether to run a case under

\(^{123}\) Cf Lemley and Leslie (above n 16) writing about the US system consider that there is still too much time spent litigating the category into which the agreement falls.

\(^{124}\) Case AT.39612 – Perindopril (Servier) (30 September 2016), paragraph 1213.
the object or the effects heading. Alternatively, it might be preferable for the Commission to shift to an effects assessment exclusively.

4.2 Different understandings of competition

Even if the analytical framework is comparable, when it comes to the question of what a restriction of competition means the two systems diverge, for they protect different interests. We can see this when we consider at the cases discussed as a whole: the US case-law finds anticompetitive harm by a combination of market power and harm to consumer welfare. In contrast the EU case-law focuses on whether the conduct in question harms the competitive process. This emerges clearly from the discussion of pay for delay settlements by AG Kokott discussed above: even if a pay for delay settlement were to allow some entry by competitors which would serve to reduce the market price, the agreement would still be a restriction of competition because entry would not be free. Freedom to compete is the litmus test for legality. Concrete illustrations of these differences are the following: in looking at vertical restraints the US looks for a reduction of inter-brand competition, while the EU condemns agreements even when they just restrict intra-brand competition, and no market power screen is applied. In situations where the theory of harm is foreclosure, the US system condemns foreclosure when this causes harm to consumer welfare, while in the EU foreclosure is the competition concern. Finally, as is well-known, practices that damage the free movement of goods or services across borders are generally forbidden. This explains why the EU system appears capable of satisfying the first stage of the inquiry more frequently than similar cases in the US: the scope of conduct which is anti-competitive is larger than in the United States.

A specific illustration to serve as representative of these general remarks may be found in the approach of the two jurisdictions when it comes to exclusive dealing by a dominant undertaking. As we know from Intel, the Commission may condemn exclusivity upon a mere showing that the undertaking is dominant and that the customer must buy goods exclusively from the dominant undertaking. The burden then shifts to the defendant to show either efficiencies or that its conduct is incapable of foreclosing the market. In contrast under US antitrust, exclusive dealing is said to have well-recognised economic benefits and it is for the plaintiff to show anticompetitive effects by proving substantial foreclosure plus ‘direct evidence that the challenged conduct has affected price or output, along with other indirect evidence, such as the degree of rivals’ exclusion, the duration of the exclusive deals, and the existence of alternative channels of distribution.’

125 In other words, while Intel moves the EU a little in the direction of US antitrust, the major difference remains that a plaintiff in the EU may run an exclusive dealing case as an ‘object’ restriction while the US must start the case with an effects-based analysis which appears fairly demanding. Satisfying the first stage of the burden-shifting framework is thus relatively easier in the EU than the US. This difference has nothing to do with the analytical framework and

125 McWane v. FTC 783 F.3d 814, 835 (11th Cir. 2015); Department of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act (2008) ch.8 (the report has been withdrawn so it is not representative of current policy but remains a helpful discussion of the case-law.)
everything to do with the different purposes assigned to the competition rules in the two jurisdictions.

4.3 Defences

Finally, when it comes to defences, we see convergence in methods because of a policy shift by the Commission in 2004. Both systems seem to also converge in their inability to do any balancing, but for different reasons. In the US this is largely the result of courts dismissing anticompetitive risks early on often by giving more credence to the efficiency claims in stage 1, while in the EU recent Commission decisions set a very high standard for defendants to prove the existence of efficiencies.

One aspect where there is a divergence is that in the US system the plaintiff has the burden of proof when determining the proportionality of an efficiency-enhancing agreement, while in the EU it seems as if it is for the defendant to show that there are no less restrictive ways of designing the agreement so as to yield the promised efficiencies. Does this matter? The defendant is best placed to explore other options, but they may have little incentive to explain what alternatives there are. The plaintiff may largely be ignorant of the defendant’s business (unless they compete in the same market) and might too easily exaggerate the ease of achieving the same effects by a less restrictive alternative. More generally, it may at times feel invidious to second-guess the business choice of defendants, in particular when the welfare effects of an agreement are ambiguous. In these contexts firms may not spend much time figuring out less restrictive alternatives. Perhaps the precise allocation of the burden of proof is less important than the court or the Commission being relatively more lenient with enforcing this requirement the less harmful the restraint is.

5. Conclusion: the sacred and the profane

The sanctity of Article 101 precludes a direct transfer of the notion of the rule of reason, however as I have tried to show in this paper both systems have a complex burden-shifting structure which is very similar. This is because both systems are trying to solve the same problem: how to determine the legality of practices whose welfare effects are ambiguous. Moreover, in both systems most of the work is done at stage 1, and the courts in the last few years have largely tried to fix this first level of inquiry. This reveals that it is unhelpful to speak of the rule of reason as if it were only about balancing positive and negative effects. If anything, the analytical framework which we see in both legal systems is best seen as being about filtering: what is the most effective way to identify anticompetitive agreements?

In this light, US enforcement or private enforcement in the EU has an advantage over Commission enforcement: when the legality of a restraint has to be determined by a judge, this creates a more interactive procedure for stage 1: the plaintiff may start by saying that the agreement is obviously anticompetitive, which the defendant may rebut; if the court deems this successful

126 This is the subtitle of Evelyn Waugh’s novel Brideshead Revisited, from which the title of this paper borrows.
then the plaintiff may try again with more evidence. In a system of public enforcement, this iterative process cannot be set up which is why we see a number of cases where the Commission runs cases as object or effect restrictions. This is less effective in shaping an efficient process of analysis for each case and prevents the identification of the correct standard for each case.

However, and this is the profane suggestion which I venture in this paper, the best way to read the recent jurisprudence of the ECJ is the following: reacting against a concern that the criteria for stage 1 are met too easily by the plaintiff, the court has created pathways for the defendant to challenge a simple object analysis. The defendant may show (i) that there are plausible efficiencies (Cartes Bancaires) and/or (ii) that the likely harm may be doubted (Intel, Generics). If either of these pleas are successful, the plaintiff will have to provide more evidence in order to satisfy the first stage of the inquiry. As suggested before, the Commission may still do so under the rubric of ‘restriction by object’ since the difference between object and effect is about the amount of evidence and not about the nature of the finding. It remains to be seen whether, if this approach is implemented, it will make it too difficult for plaintiffs and the Commission to bring successful cases against anything other than obviously harmful practices.
Appendix 1: Functional Equivalents in step 1

In comparative law, one approach when looking at two legal systems is to find doctrines that serve as each other’s functional equivalents. In other words two rules of law may look different, but actually serve the same function. The table below tries to put alongside the three approaches to step 1 found in the US case-law and commentary with EU standards. The first column explains what the plaintiff must show and the second what options the defendant has to respond. As I explain below, the comparison is not watertight but it helps see the logic of the two systems.

<table>
<thead>
<tr>
<th>US: plaintiff’s burden</th>
<th>Defendant’s options</th>
<th>EU: COM/plaintiff’s burden</th>
<th>Defendant’s options</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per se illegality</td>
<td>Defendant may rebut by (i) doubting anticompetitive nature of the practice; (ii) indicating credible efficiencies that cast doubt on the object classification. If these rebuttals fail, the conduct is illegal. If successful, the plaintiff may run this case as a quick look or a rule of reason.</td>
<td><strong>Restriction by object:</strong> very obvious cases where harm is self-evident</td>
<td>Defendant may rebut by (i) doubting anticompetitive nature of the practice; (ii) indicating credible efficiencies that cast doubt on the object classification. If these rebuttals fail, defendant may plead Article 101(3) If successful, the plaintiff may run this case with a more comprehensive assessment.</td>
</tr>
<tr>
<td>Quick look: fairly obvious case of a restriction which suffices to shift the burden to the defendant to show efficiencies.</td>
<td>Defendant may rebut by (i) doubting anticompetitive nature of the practice; (ii) indicating credible efficiencies that cast doubt on the quick look approach. If defendant is not successful then they have to prove efficiencies to escape liability (step 2) If defendant is successful then plaintiff must run a full rule of reason case.</td>
<td><strong>Restriction by object:</strong> fairly obvious cases by reference to legal and economic context</td>
<td>Defendant may rebut by (i) doubting anticompetitive nature of the practice; (ii) indicating credible efficiencies that cast doubt on the object classification. If these rebuttals fail, defendant may plead Article 101(3) If successful, the plaintiff may run this case with a more comprehensive assessment.</td>
</tr>
<tr>
<td>Rule of reason: full assessment of the likely harm of the practice</td>
<td>Defendant may challenge findings of effects with additional evidence/expertise.</td>
<td><strong>Restriction by effect:</strong> full assessment of the likely harm of the practice</td>
<td>Defendant may challenge findings of effects with additional evidence/expertise.</td>
</tr>
</tbody>
</table>
The first row covers restrictions which are obviously anti-competitive (e.g. price-fixing cartels). As we have said in the paper there is a major difference between the two systems in that in US antitrust these lead to an infringement while in the EU an exemption may be considered. The final row sketches the full rule of reason approach which maps well with the effects-based approach with the caveat that the two legal systems work with different ideas about what is an anticompetitive effect.

The second row is where the trouble lies in both legal systems. These are agreements which are not obviously anti-competitive but a moment’s reflection suggests that they are. Examples may include: rivals agree not to advertise prices for experience goods, rivals who enter into a joint venture to make a new product agree not to advertise their older products which are good substitutes for the new product they are putting on the market.\(^{127}\)

In the US some courts refer to these as cases which merit a quick look assessment, however the view I favor in the article (which others also support) is that this category should not exist: what this category shows is simply that at times applying the first step of the rule of reason the plaintiff may shift the burden with little more than an intuitive case showing that the conduct restricts competition. To a degree the EU courts in my view are launching a similar message: at times the Commission may challenge a practice as restrictive by object provided they furnish sufficient legal and economic analysis to reveal the likely harm. Whether we call these kinds of cases findings of a restriction by object using a more analytical approach or findings of a restriction by effect is largely irrelevant. How much evidence is needed is also a matter of reasonable disagreement, as we showed above. Thus, crafting a legal category like ‘quick look’ when judges are unable to fill this category with sufficient unanimity reveals that it is a poor category.

Comparatively speaking, this middle category has different sources: while in the US the quick look category was meant to be a simpler rule of reason inquiry, in the EU the analytical object analysis is a more in depth object assessment. They both result from excesses in the system: in the US the excess was that the rule of reason was too complex for plaintiffs, while in the EU the excess was that one condemned agreements too easily. These different derivations of the middle category also show that the key point is whether the plaintiff has brought sufficient evidence to meet the case. The structure of the analysis proffered by the ECJ aims to test this question. This is why, after bringing an abridged effects/extended object (the two terms being interchangeable) assessment the defendant is able to rebut the finding by either showing that the agreement does not look as harmful as the Commission fears or that there are plausible efficiencies as well that cast doubt on the illegality of the practice. Either showing requires more in-depth analysis.