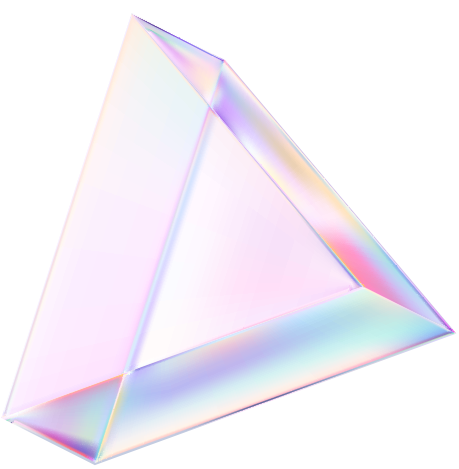
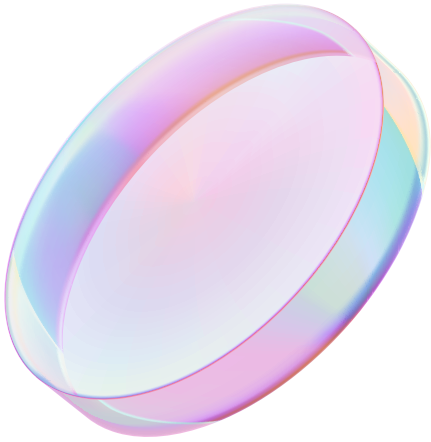
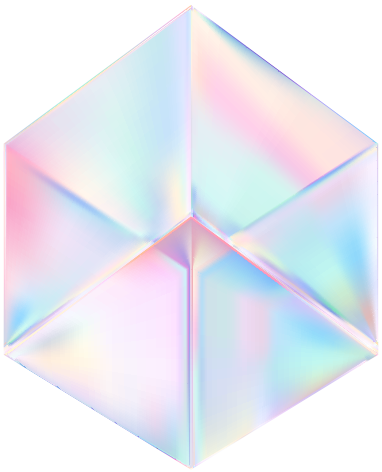
THE OBJECT IDENTITY







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THE OBJECT IDENTITY

By Giorgio Monti

In its recent case-law of the Court of Justice has sought to bring further clarity to the concept of restriction by object. Today a finding of object by the competition authority creates a rebuttable presumption that conduct is anticompetitive. This analytical framework applies to both Articles 101 and 102 TFEU. On the one hand, this serves to place the burden of proof in the hands of the defendant, the party best able to explain that its conduct is competition on the merits. On the other hand, allowing defendants to cast doubt on an object finding by reference to pro-competitive effects muddies the difference between proof of infringement and the efficiency defense. A more elegant approach to frame the object presumption is suggested.

I. INTRODUCTION

It is trite law that a competition authority applying Article 101 TFEU may condemn an agreement when it is restrictive by object. That said, aside from some clear instances of object restrictions, like price fixing cartels and collective boycotts, the precise meaning of the concept of a restriction of competition by object remains nebulous. The early case-law of the Court of Justice, meticulously considered by Saskia King, reveals at least two approaches.[2] On the one hand, object restrictions are those which by their very nature are detrimental to the proper functioning of normal competition. On the other, the Court also insists that a study of the legal and economic context of the agreement is essential to determine if the agreement is restrictive by object.

This second, more analytical approach, comes close to requiring an effects-analysis minus an assessment of the counterfactual, which is reserved for cases where the authority seeks to establish a restriction of competition by effect. In the language of law and economics, the first approach looks like a rule, while the second is a standard. In the past decade or so the Court of Justice has revisited its conceptualization of object restrictions. In my view, the result from this case-law means that the concept of object restrictions has been gradually transformed.

Essentially, as I will show below, we now have an object presumption, which applies just as much to Article 101 as to Article 102 TFEU. This does not resolve the problematic approach to object restrictions that characterizes the Court's case law – rather, it raises a host of new problems.

II. THE EFFECT SUPREMACY

A combination of two factors led the Court to insist that the capacity of competition authorities to find agreements restrictive by object should be limited. First, the move towards a more economics-based approach to the assessment of competition law generally indicated that one must be cautious about condemning agreements by object, in particular in the context of vertical restraints, which are likely to be welfare-enhancing rather than harmful to competition. The 1991 judgment in *Delimitis* is a good marker indicating the Court's understanding that not every restriction of conduct is a restriction of competition by object, specifically when considering vertical restraints.[3] This approach is markedly different from the attitude of the Commission in earlier decades. The second was that, with the decentralization of EU competition enforcement, the Court witnessed a swathe of cases where it appears that national authorities were somewhat trigger-happy in condemning conduct as a restriction by object.[4] These two trends led the Court to steer both the Commission and national authorities away from a wide interpretation of the concept of object restrictions.

For example, in *Cartes Bancaires* (a case where the Commission, in a belts-and-braces approach that reflects the legal uncertainty discussed in this article, tested the agreement under both the object and effect rubric) the Court of Justice criticized the General Court for saying that the categories of restrictions by object were not closed. The General Court "erred in finding… that the concept of restriction of competition by "object" must not be interpreted "restrictively""[5]. A wide reading, the Court feared, would lead the Commission to commit Type 1 errors by not having to prove the effects of agreements that are not by their very nature harmful to competition.[6] Likewise, in references for a preliminary ruling the Court of Justice reminded national courts that the concept of restriction of competition by object "must be interpreted restrictively."[7] However, the Court's signals to the national courts on what a restriction by object entails were not particularly clear, contrary to its guidance on what an effects analysis entails. For example, in Maxima Latvija the Court explained that in a vertical restraints case an effects analysis requires the identification of a plausible theory of harm and an assessment of the relevant economic features that indicate the capacity of the restraint to cause anticompetitive foreclosure. Conversely, the treatment of object restrictions is much less helpful. The Court's first piece of advice is "the need to consider the precise object of the agreement in the economic context in which it is to be applied."[8] And in some cases the Court specifies

2 S. King, *Agreements that restrict competition by object under Article 101(1) TFEU: past, present and future* (2015) PhD thesis, London School of Economics and Political Science. https://etheses.lse.ac.uk/3068/.

3 Case C-234/89, *Delimitis*, EU:C:1991:91.

4 These were the result of references for preliminary rulings from national courts and are discussed below. Some early examples include Case C-32*/11 Allianz Hungária Biztosító and Others*, EU:C:2013:160 and Case C-226/11 Expedia, EU:C:2012:795. Others are discussed in this article.

5 Case C-67/13 P, *CB v. Commission*, EU:C:2014:2204, para 58 ("CB").

6 CB, *supra*, para 58.

7 Case C-345/14, *Maxima Latvija,* EU:C:2015:784, para 18.

8 *Ibid.*, para 16.

that when determining the 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."[9] But this is in tension with what follows when the Court states that the label of object restriction applies "only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects."[10] This is later said to be the essential legal criterion.[11] But these two approaches fit uneasily: either you analyze the economic context or you decide that there are certain types of agreement that are deemed restrictive by object. Either you apply a standard or a rule. The Court seems to invite both at the same time.

To facilitate a reduction of the cases that fall under the object umbrella, and to make the scope of the object restriction more clear, the Court since 2014 has referred to an example of an agreement that is clearly restrictive by object: horizontal price fixing by cartels. According to the Court, "experience shows" that this kind of behavior leads to a misallocation of resources.[12] It later doubled-down on this suggesting that there "must be sufficiently reliable and robust experience" to be allowed to conclude that the agreement, by its very nature, is anticompetitive.[13] This echoes U.S. antitrust case-law which reserves findings that agreements are per se illegal when courts have had considerable experience with a particular restraint and can predict with confidence that the agreement will not pass a rule of reason test.[14] However, a recent Opinion by AG Rantos suggests that there is no need to rely on experience as this would be "tantamount to obstructing" the ability to discover new categories of restriction.[15] With respect, this may be somewhat exaggerated for it merely slows down the finding of an object restriction after the competition authority has had occasion to examine a few similar cases under the effects rubric before determining that it is unnecessary to do so in future.

A more useful approach was proposed by AG Bobek in *Budapest Bank*. Recognizing that the Court's case-law was unhelpful, he proposed a two-stage test that allowed him to reconstruct the judgments in this way. The first stage is the application of a rule-like approach, asking if the agreement is one of a category of agreement which is commonly accepted as being anticompetitive. The second stage is to carry out a "basic reality-check" by looking at the relevant legal and economic context to see if a finding of object on the specific facts of the case is unwarranted.[16] That is, a rule is applied first, and a standard is applied subsequently to verify the correctness of the inference drawn by applying the rule. This elegant approach is combined by an explanation that the depth of review under the second step will likely differ from case to case and in some instances, it will require nearly as much depth as an effects analysis. However, in his view, an effects analysis requires proof of a causal link between conduct and its net effects, something which is not required in object cases.[17] This might be too extreme a construction of effects cases – it is not clear that one has to establish actual effects, all the more so when an authority intervenes early to put a stop to an agreement which is capable of producing anticompetitive effects.

While this advice was not followed by the Court we find that the Commission's object analysis has become very detailed indeed, with a close attention to the economic context.[18] Even so parties have complained. In *Lundbeck*, the applicant took the view that by characterizing pay for delay agreements as restrictions by object the commission sought "to avoid the factual analysis and the burden of proof which it bears when it has to establish a restriction of competition based on the effects of an agreement."[19] The decision of the Commission in this case is over 400 pages long!

III. THE OBJECT RECONSTRUCTION

Notwithstanding the Court's efforts in the past decade to clarify its stance, doubts continued about the proper scope of the concept of a restriction by object. Unsurprisingly so, as the judgments discussed above reveal a high degree of conceptual confusion: they provide an incoherent account

9 *CB supra* n 5, para 53, Case C-228/18, *Budapest Bank*, EU:C:2020:265, para 51. Oddly in *Maxima Latvija* (*supra* n 7) the referring court had specifically asked about the role of the structure of the market (para 10, question 2) but the Court did not refer to it in explaining the meaning of object.

10 *Supra* n 7, para 18.

11 *Supra* n 7, para 20.

12 *CB, supra*, n. 4, paragraph 51.

13 *Budapest Bank, supra* n. 8, para 76.

14 *Leegin v. PSKS, Inc.,* 551 US 877, 886-887 (2007).

15 Case C-298/22, *Banco BPN/BIC Português SA and others*, EU:C:2023:738, para 35. The Court"s judgment is awaited.

16 Case C-228/19, *Budapest Bank* EU:C:2019:678, Opinion of AG Bobek para 49.

17 *Ibid.*, para 50.

18 See e.g. CB, *supra*, n. 5.

19 Case T-472/13, *H. Lundbeck A/S and Lundbeck Ltd v. European Commission Lundbeck*, EU:T:2016:449, para 432.

which relies more on repetition of statements in previous cases than a genuine attempt at synthesis. One other puzzling aspects of the case-law is the insistence that certain vertical agreements, such as those creating a system of absolute territorial protection by preventing retailers from selling outside the borders of the country where they are situated either directly or indirectly by banning online sales, should continue to be deemed restrictive by object absent any assessment of market power.[20] If a brand in a competitive market elects to ban online sales, it is either short-sighted and committing commercial suicide (because if all its rivals are selling online and this is an important channel to reach consumers then the brand not present online will lose market share rapidly) or it has a marketing strategy that relies on attracting consumers to brick-and-mortar stores. Either way, provided there is inter-brand competition, the choice of a single firm not to use online sales channels cannot damage competition.

Perhaps realizing that the case-law was not solving the conundrums faced by national courts in determining what a restriction by object is, in its more recent case-law some of the judgments appear to offer a novel way think rethink the framework for assessing allegations that conduct is restrictive by object. While, as I will show, this does some violence to the text of the Treaty, it may offer a valid approach. The approach is found in both *Generics* and *Super Bock*.[21] I will analyze the latter as the approach I see emerging is more clearly visible there.

The Portuguese competition authority imposed a fine on Super Bock, one of major companies in Portugal manufacturing beers, bottled waters, soft drinks, iced teas, wines, sangrias and ciders. In contracts with distributors who sold these products to hotels, bars, restaurants and similar outlets, Super Bock insisted on minimum resale prices, stifling intra-brand competition among distributors. In view of the competition authority this restriction would "directly and immediately harm consumer welfare."[22] On appeal, the Court of Justice, after restating the usual words and phrases discussed above, added the following caveat, which is worth quoting in full:

> In addition, where the parties to the agreement rely on its procompetitive effects, those effects must, as elements of the context of that agreement, be considered. Provided that they are demonstrated, relevant, intrinsic to the agreement concerned and sufficiently significant, those effects may give rise to reasonable doubt as to whether the agreement concerned caused a sufficient degree of harm to competition.[23]

How might one interpret this passage? One plausible reading is that, if a competition authority's analysis of the legal and economic context leads it to find that there is a clear harm to competition, then the defendant has an opportunity to rebut that conclusion. If it does so, this means that the competition authority has to reconsider the case and establish an anticompetitive effect in order to convict. This burden-shifting process is reminiscent of the rule of reason in U.S. antitrust.

However, the approach is puzzling – what does the court mean by pro-competitive effects? Readers will recall that a defendant can always justify an infringement of Article 101(1) by making reference to Article 101(3), which provides a statutory defense and which, it is widely agreed, applies irrespective of whether the agreement is restrictive by object or by effect, even if the recent case-law suggests that it may be more difficult to justify an exemption if the agreement is by object.[24] Whatever the possible breadth of the grounds for justification might be, it is clear that Article 101(3) can serve as an efficiency defense. If so, what kinds of pro-competitive effects may be raised to rebut a finding that the agreement restricts competition and which effects fall to be considered under Article 101(3)? Moreover, the proviso in the last sentence of the passage quoted above reflects some of the criteria in Article 101(3): "intrinsic to the agreement" feels like the requirement of indispensability, and the requirement that the procompetitive effects should be sufficiently significant looks like the requirement that the positive effects outweigh the negative ones. Some twenty years ago the General Court had tried to avoid this confusing result. In response to a plea by the applicant that the positive effects of an agreement were relevant under Article 101(1), it held that it is only in the precise framework of Article 101(3) "that the pro and anti-competitive aspects of a restriction may be weighed… Article [101(3)] of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article [101(3)] of the Treaty."[25] Today, some members of the Court of Justice have a different view, but they may be unaware of the difficulty they have created in failing to distinguish properly between what evidence matters in which subsection of Article 101 TFEU.

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20 Case C-439/09 *Pierre Fabre Dermo-Cosmétique*, EU:C:2011:649 and Case C-230/16 *Coty v. Akzente*, EU:C:2017:941. Even if the latter is a more economically-sensible judgment the court does not deem it relevant to explain that absent market power a platform ban is unlikely to be restrictive by object.

21 Case C-307/18, *Generics (UK) Ltd and Others v. Competition and Markets Authority*, EU:C:2020:52; Case C-211/22, *Super Bock,* EU:C:2023:529.

22 Press Release, Portuguese Competition Authority, Lisbon Court of Appeal confirms infringement by Super Bock sanctioned by the AdC (21-09-2023) https://www.concorrencia.pt/en/articles/lisbon-court-appeal-confirms-infringement-super-bock-sanctioned-adc (last visited 21 Jan 2024).

23 *Super Bock, supra*, n. 21, para 36.

24 *Budapest Bank, supra* n. 9, para 41, where the Court also adds that the penalties for an object restriction are likely higher than for effects restrictions.

25 Case T-112/99, *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v. Commission*, EU:T:2001:215, para 74.

Furthermore, the Court in *Super Bock* failed to cite (per incuriam?) the *Binon* judgment where the Court of Justice, in no uncertain terms, held that agreements setting the retail price "constitute, of themselves" a restriction of competition.[26] The applicant in this case was a press agency which distributed nearly 70% of Belgian newspapers and virtually all newspapers and periodicals published abroad.[27] It claimed that fixing the retail price for newspapers was necessary in order to achieve two objectives: to support the financial burden of taking back unsold copies and to ensure that a wide selection of newspapers and periodicals are made available to readers. The Court held that these considerations (the latter which looks like a procompetitive effect) can only be assessed under Article 101(3).[28]

Nevertheless, the idea that there is an object presumption is interesting and could be executed more elegantly, perhaps returning to AG Bobek's suggestion discussed above. The Court could simply state that during the procedure, when the Commission determines that the conduct is a restriction by object, the defendant is able to contest this finding by proving that the harm foreseen is not likely to occur. For example, the authority might have made a mistake in assessing the capacity of wholesalers to find alternative suppliers of drinks. If there is inter-brand rivalry then a set of RPM agreements by one producer is less clearly anticompetitive and an assessment of the likely effects is warranted. In sum, the defendant should be able to rebut the presumption by providing evidence to cast doubt on the object characterization. Evidence of pro-competitive effects is best relegated to Article 101(3).

The approach in Super Bock however, may not be one that is shared by many members of the Court. In a set of three judgments in December 2023 regarding restrictive practices by sporting associations the Grand Chamber of the Court took yet a different approach.[29] The Court provided two additional examples of conduct which restricts competition by object. In addition to price-fixing cartels it found that object may also apply to conduct which is not equally harmful to competition, like decisions of associations of undertakings that coordinate the conduct of members, in particular in terms of prices. In stating this, the Court was teeing up a point which only became apparent in two judgments in January 2024 where this example was applied to rules of bar associations fixing prices.[30] The third example are agreements which partition national markets, recalling that market integration remains a core competition law value in the EU.[31] By providing examples the Court appears to reason by setting up a rule that applies to certain categories of agreement. However, this is followed up by the Court restating that an object restriction can only be found by reference to the content and the economic and legal context: a rule and a standard are applied simultaneously.

These three sports cases also contain one omission and one innovation. The omission is that in its object discussion the Court does not refer to the ability of the parties to bring up pro-competitive effects – is the Grand Chamber distancing itself from the judgment in Super Bock? The innovation is that the Court held that if an agreement is classified as a restriction by object then the parties cannot make a plea that the agreement is justified in the public interest by applying the rule in *Wouters*.[32] This seems mistaken because the fact that an association is tasked with protecting a public interest is part of the economic and legal context which is necessary to determine if there is a restriction by object in the first place. The Court might have been on safer ground to hold that a particularly severe restriction (e.g. fixing prices of members of an association) is a disproportionate way of safeguarding a public interest. But to exclude the Wouters rule from an inherently unclear category of cases seems mistaken. Not to mention that the judgment which gave rise to this justification contained a clear object restriction by preventing the establishment of multi-disciplinary practices in the Netherlands.

IV. THE OBJECT EXTENSION

Somewhat fortuitously, the Court of Justice in *Generics* considered both whether each individual pay for delay agreement by the patent holder constituted a restriction by object and then whether the combination of a set of pay for delay agreements could be considered as an abuse of dominance. In answering this question in the affirmative, the Court suggested that the settlements were part of a general strategy that had "if

26 Case C-243/83, *SA Binon & Cie v. SA Agence et messageries de la presse*, EU:C:1985:284, para 44.

27 *Supra* n. 26, para 4.

28 *Supra* n. 26, para 46.

29 Case C-124/21 P, *International Skating Union v. Commission*, EU:C:2023:1012; Case C-333/21, *European Superleague Company v. FIFA and UEFA*, EU:C:2023:1011; Case C 680/21, *UL and Royal Antwerp FC v. Union royale belge des sociétés de football association ASBL (URBSFA),* EU:C:2023:188. The object analysis is found in all three cases. For a discussion of the judgments, see G. Monti, "EU Competition Law after the Grand Chamber's December 2023 Sports Trilogy: European Superleague, International Skating Union and Royal Antwerp FC" (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4686842).

30 Case C-438/22, *Em akaunt BG EOOD*, EU:C:2024:471, Case C-128/21 *Lietuvos notary rumai*, EU:C:2024:49.

31 *Royal Antwerp FC, supra n. 29,* paras 90-97. The third example is not found in the other two judgments noted above.

32 Case C-309/99, *Wouters*, EU:C:2001:390.

not as its object, at least the effect" of delaying entry of generic medicines.[33] This reference to object abuses might have been due to the Court transposing its discussion on Article 101 TFEU but there is good sense in suggesting that there is some conduct where its characterization as not being competition on the merits is sufficient to condemn a practice as an abuse of dominance without having to show the capacity of that conduct to cause anticompetitive foreclosure. There may be some rules in the application of Article 102 TFEU as well. In my view, we can distinguish between two sets of rules.

The first set is where a finding of certain practices creates a presumption of abuse of dominance: exclusive purchasing agreements, rebates in exchange for exclusivity and prices below average variable cost. When this conduct is assessed in its legal and economic content, it is clear that this has the potential to foreclose rivals. The defendant may rebut the presumption by showing the inability of the conduct to foreclose, thereby requiring the competition authority to dig deeper and establish the capacity to cause harm with more evidence.[34]

The second set is conduct which is simply objectionable because it makes no economic sense except for its exclusionary effects. The Commission triggered this in its latest *Intel* decision, holding firm that the payments made to original equipment manufacturers to halt the launch of products containing the rival's chip and limiting the sales channel for these products constituted a naked restraint.[35] Other conduct falling within this category is misleading statements to a regulator that extend dominance (as in *Astra Zeneca*)[36] and where the dominant undertaking forbids customers from testing the products of rivals.[37] These forms of conduct also raise a rebuttable presumption of abuse but a rebuttal seems much harder to make.

In an epoch when the Commission appears to have second thoughts about the value of carrying out the fullest effects-based assessment possible for all cases, the capacity to find categories of abuse by object creates the possibility of enhanced enforcement while assigning the burden of proof to the party best able to explain why its conduct should be considered competition on the merits – the dominant undertaking.

V. THE OBJECT ULTIMATUM

There are some things about restrictions by object that are clear: object does not mean intent, but intention may be relevant to a finding of object even if not sufficient. A competition authority may proceed by finding conduct restrictive both by object and by effect if it wishes. It is also clear that the concept of a restriction by object is not comparable to the rule of per se illegality found in U.S. antitrust. *Per se* rules create an irrebuttable presumption of illegality while as shown here, object restrictions are always rebuttable.[38] Finally, it is also clear that cartels, the main staple of a competition authority's output is conduct which is restrictive by object. The difficulties addressed in this paper constitute a small fraction of cases where the competition authority is keen to convict without deploying what it considers to be excessive resources. The ambiguities and tensions in the case-law do not therefore cause a collapse of competition law enforcement. Nevertheless, it is legitimate to expect better guidance from the EU courts. The following might ameliorate enforcement.

First, the Court should advise, contrary to the early case-law,[39] that a competition authority should, by default, start by assuming that a case should be brought by showing effects. If the authority begins by constructing a clearly articulated theory of harm, it will become apparent relatively quickly in its assessment of the legal and economic context whether it is possible to condemn a practice on the basis of an object restriction or whether the conduct is welfare-ambiguous and requires a full effects assessment. For example, is there market power? Is it clear that entry barriers are high? Is there countervailing buyer power? This will create the correct incentive for competition authorities by forcing them to begin with explaining their hypothesis about the adverse anticompetitive effects and the evidence necessary to sustain that hypothesis.

33 *Paroxetine, supra* n 21, para 155.

34 This is clear for rebates (Case C-413/14 P, *Intel*, EU:C:2017:632, para 138-139) and exclusivity (Case C-680/20, *Unilever*, EU:C:2023:33, paras 47-48) and it is submitted that the same logic should apply to predatory pricing because a host of factors may affect the capacity of below cost pricing to cause harm.

35 Case AT.37990, *Intel* (22 September 2023).

36 Case C-457/10 P, *AstraZeneca*, EU:C:2012:770.

37 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 22.

38 For a more general comparison of the two legal systems, see G. Monti "EU Competition Law and the Rule of Reason Revisited" TILEC Discussion Paper DP 2020-021.

39 Case 56/66, LTM EU:C:1966:38.

Second, the Court should clarify that some object cases will be more complex than others. Not all object cases can simply rely on the identification of a kind of agreement: for some cases a deeper look at the economic context is warranted than for others. This is not something that can be determined a priori. Being clear on this should prevent needless requests for further preliminary rulings on what object means: there may be easy and complex assessments required, all of which allow legitimate inferences that the restriction is by object. National courts should not be ed to expect greater clarity than this.

Third, the Court should confirm that all object findings are mere presumptions, but it should jettison the approach by which a defendant can rebut this by showing procompetitive effects. This creates unnecessary confusion between the object and effect analysis on the one hand and the possible justifications on the other. Rebuttals allow the defendant to establish that the conduct is not capable of causing the harm alleged.

Overall, these recommendations share a common thread: if competition authorities, national and EU courts, all begin with economics and shape the law around it, we may achieve more than by abstract legalistic reasoning and the reproduction of words and phrases from one judgment to another.

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