

**PROTECTION OF COMPETITION THROUGH THE PRINCIPLE OF LEGAL
CERTAINTY: THE ROLE OF THE COURT OF JUSTICE
OF THE EUROPEAN UNION**

*PROTEÇÃO À COMPETIÇÃO PELO PRINCÍPIO SEGURANÇA JURÍDICA: O PAPEL DA
CORTE DE JUSTIÇA DA UNIÃO EUROPEIA*

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ABSTRACT: The present work is concentrated on the analysis of the rule of reason of law in European Union law and especially in the sector of european competition law, where the rule of reason is a guarantee of the crystallization of the rules that constituted the normative basis for the law to access to the market, to the tariffs of regulated services rather than to the management of infrastructures, etc. The rule of reason stands as predictability of the consequences of behavior as we see from the analysis of the Court of Justice of the European Union and especially according to the preliminary ruling trying to guarantee the principle under examination as fundamental of the good functioning of the European market, both in the access phase and in the operational phase, to the point that any other Community law is applied only in coherence and full compatibility with the latter.

Keywords: Rule of reason; CJEU; european competition law; preliminary ruling.

RESUMO: O presente trabalho concentra-se na análise da regra da razão de Direito no Direito da União Europeia e especialmente no setor do Direito europeu da concorrência, onde a regra da razão é uma garantia da cristalização das regras que constituíram a base normativa para o direito ao acesso ao mercado, às tarifas dos serviços regulamentados, mais do que à gestão de infraestruturas etc. A regra da razão é a previsibilidade das consequências do comportamento, como vemos na análise do Tribunal de Justiça da União Europeia e, em especial, de acordo com a decisão preliminar, que tenta garantir o princípio em análise, como fundamental para o bom funcionamento do mercado europeu, tanto na fase de acesso, como na fase operacional, a ponto de qualquer outro Direito comunitário ser aplicado apenas em coerência e compatibilidade total com este último.

Palavras-chave: Regra da razão; CJUE; lei europeia da concorrência; decisão preliminar.

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1. INTRODUCTION

Compliance with the principle of legal certainty also plays a fundamental role in the application of the rules on free competition. It is important that companies operating within the single market are aware of the limits within which they can move in order to avoid that an excessive level of indeterminacy about the conduct that is considered illegitimate by European law does not result in a tightening by part of the traders, who would thus be less inclined to invest and to conclude commercial transactions.

Among the different meanings that the Court of Justice of the European Union (CJEU) has attributed to the principle of legal certainty,¹ under the law of competition the expression “legal certainty” has in fact become synonymous with predictability, (M. DREHER, M. ADAM, 2006, p. 259 *et seq.*) clarity and transparency of the procedures through which the European Commission (EC) comes to establish which behaviors are punishable and to what extent. (T.C. HARTLEY, 2010, p. 146 *et seq.*)

Among the rules of the Treaty on Functioning of the European Union (TFEU) that has most attracted attention in relation to the level of certainty of the law guaranteed to companies operating within the European Union, there is certainly art. 101 TFEU² “allowing”

¹ Among these the most relevant, i.e., those that have found greater application in the jurisprudence of the Court of Justice of the European Union, are: a) the prohibition of retroactivity of the rules (CJEU, 98/78, A. Racke v. Hauptzollamt Mainz of 25 January 1979, ECLI:EU:C:1979:211, ECR 00069; 99/78, Weingut Gustav Decker KG v. Hauptzollamt Landau of 25 January 1979, ECLI:EU:C:1979:15, ECR 00101; C-34/92, GruSa Fleisch GmbH & Co KG v. Hauptzollamt Hamburg-Jonas of 15 July 1993, ECLI:EU:C:1993:317, 1-4147; joined cases C-74 and 75/00, P Falck SpA and Acciaierie di Bolzano SpA v. Commission of 24 September 2002, ECLI:EU:C:2002:524, 1-7869; C-376/02, Stichting 'Goed Wonen v. Staatssecretaris van Financiën of 26 April 2004, ECLI:EU:C:2004:251, 1-3445; C-459/02, Willy Gerekens et Association Agricole pour la Promotion de la Commercialisation Laitière Procola v. Luxembourg of 15 July 2004, ECLI:EU:C:2004:454, 1-7315; C-161/06, Skoma-Lux sro v. Celní feditelství Olomouc of 12 May 2011, ECLI:EU:C:2011:773, 1-10841); b) the need to enact clear and specific law (C-63/93, Duff and others v. Minister for Agriculture and Food e Attorney General of 15 February 1996, ECLI:EU:C:1996:51, I-00569; 169/80, Gondrand Frères of 9 July 1981, ECLI:EU:C:1981:181, ECR 01931; joined cases 92 and 93/87, Commission v. France and United Kingdom of 22 February 1989, ECLI:EU:C:1989:77, ECR 00405); c) the protection of legitimate expectations (C-120/86, Mulder v. Minister van Landbouw en Visserij of 28 April 1988, ECLI:EU:C:1988:213, ECR 02321; C-333/08, European Commission v. Republic of France of 28 January 2010, ECLI:EU:C:2010:44, I-00757).

² See, *ex multis*, A. HARTKAMP, C. SIBURGH & W. DEVROE. *Cases, materials and text on European Union law and private law*. Oxford & Portland: Hart Publishing, 2017, p. 282 *et seq.*; K. LENAERTS, I. MASELIS & K. GUTMAN. *European Union procedural law*. Oxford: Oxford University Press, 2014, p. 133 *et seq.*; M. WIERZBOWSKI & A. GUBRYNOWICZ. *International investment law for the 21st century*, Oxford: Oxford University Press, 2015; A.H. TÜRK. *Judicial review in European Union law*. Cheltenham: Edward Elgar Publishers, 2010. L. WOODS & P. WATSON. *Steiner & Woods European Union law*. Oxford: Oxford University Press, 2017, p. 37 *et seq.* C. BARNARD & S. PEERS. *European Union law*. Oxford: Oxford University Press, 2017, p. 788 *et seq.* E. BERRY, M.Y. HOMEWOOD & B. BOGUSZ. *Complete European Union law*. Texts, cases and materials. Oxford: Oxford University Press, 2013; G. CONWAY. *European Union law*. London & New York: Routledge, 2015; F. NICOLA & B. DAVIES. *European Union law stories*. Cambridge: Cambridge University Press, 2017; J. USHERWOOD & S. PINDER. *The European*

the growth of various theories elaborated on the analysis of the restrictive agreements of competition, as well as the effects that these two different approaches have on the level of legal certainty. Each of these methods (european legislation and jurisprudence) responds to different needs, i) to ensure the economic operators of the market an adequate level of predictability and ii) not to sacrifice the flexibility that the rules on competition must have to reflect the best economic changes within the market. However, finding the right balance between the pros and cons of these two theories is far from easy.

While there is no doubt that the *per se* rule approach (J. PARISH, 2016, p. 464 *et seq.*) ensures full compliance with the principle of legal certainty, as it allows companies in the Member States to know in advance the legal consequences that derive from their actions without the need for particularly detailed assessments, it is equally true that such a rigid scheme runs the risk of leading to a generalization of the conduct under investigation, as well as to the adoption of unjust decisions by the EC. (E. EASTERBROOK, 1986, p. 135 *et seq.*; A.I. GAVIL, 2012, p. 738 *et seq.*)

On the other hand, the rule of reason, while allowing a more flexible and reasoned assessment that takes into account the relevant case factors in case to decide the legitimacy of the conduct, entails high defensive costs for companies as well as not ensuring sufficient predictability about the outcome of the decisions adopted. (H.J. HOVENKAMP, 2018, p. 298 *et seq.*)

2. PER SE RULE V. RULE OF REASON: ORIGIN AND DISTINCTIVE CHARACTER OF THE RULE OF REASON

The contraposition between *per se* rule and rule of reason (R.H. BORK, 1966, p. 374 *et seq.*; R.H. BORK, 1978; A. CHRISTIANSEN & W. KERBER, 2006, p. 215-244; E. BRUNET, 1984-1985, p. 5 *et seq.*; G.H. MONTAGUE, 1958, p. 70 *et seq.*; V. GHOSAL, 2011, p. 738 *et seq.*; J. NOWAG, 2016, p. 220 *et seq.*) has its origins in the US antitrust right in relation to the analysis of the conduct governed by Section 1 of the Sherman Act.³ This

Union. A very short introduction. Oxford: Oxford University Press, 2018. J.L. DA CRUZ VILAÇA. *European Union law and integration*. Twenty years of judicial application of European Union law. Oxford & Oregon: Hart Publishing, 2014; T.H. FOLSOM. *Principles of European Union law, including Brexit*. Minnesota: West Academic, 2017, p. 278 *et seq.* R. GEIGER, D.E. KHAN & M. KOTZUR. *EUV/AEUV*. München: C.H. Beck, 2016. M. DECHEVA. *Recht der europäischen Union*. Baden-Baden: Nomos, 2018.

³ In *Hartford Fire Ins. Co. v. California*, Justice Souter noted the American Banana cases but then said without explanation that “the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.” 509 U.S. 764, 795-896 (1993); see also *id.* at 814 (Scalia, J., dissenting) (stating that the presumption has been “overcome” in Sherman Act litigation and citing

distinction is based on the belief that agreements between companies can be divided into two very clear categories: anti-competitive and pro-competitive. (T.A. PIRAINO, 1990-1991, p. 685 *et seq.*) This implies that pre-competitive agreements can enjoy the benefit of the doubt about their legality thanks to the rule of reason approach, which takes into consideration any positive effects for the market that can justify them; on the contrary, following the method dictated by the *per se* rule, certainly anti-competitive agreements should be sanctioned without further evaluation and without giving companies the opportunity to demonstrate any benefits deriving from the agreement.⁴

These two different approaches presuppose very different methods of evaluation, to the point that traditionally (D.L. BESCHLE, 1987, p. 475 *et seq.*) the rule of reason leads to a decision of legality of the agreement, while following the *per se* rule you end up sanctioning the companies that have signed the agreement. (J. PARISH, 2016, p. 464 *et seq.*)

In fact, the jurisprudential evolution of the rule of reason, has shown that, despite this method allows to sanction in a more targeted and selective with respect to the rules *per se* effectively anti-competitive restrictions, has as its main “side effect” the increase of level of legal uncertainty in terms of scarce predictability of the outcome of court decisions. From its introduction to today there have been a multitude of formulations of the rule of reason by the US courts, sometimes more flexible sometimes more structured, which not only have not contributed to increase the level of predictability on the evaluation of the agreements, but

earlier decisions of the Court and the Second Circuit). Even when the Court declines to apply the Sherman Act to conduct abroad, it does not do so based on the presumption. see *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). Today, amendments to the Sherman Act may make its extraterritorial application clear, but the Court had already ruled that the statute applied extraterritorially in *Hartford Fire Ins. Co.* See W.N. ESKRIDGE & E.L. BAER. The continuum of deference: Supreme Court treatment of agency statutory interpretations from *Chevron* to *Hamdan*. In: *Georgetown Law Journal*, 96, 2008, p. 1083, 1111-1115. E.A. POSNER & C.R. SUNSTEIN. *Chevronizing foreign relations law*. In: *Yale Law Journal*, 116, 2007, p. 1170, 1198 (noting that: “[...] the Law has-peculiarly-not settled on a general principle of deference when an executive agency advances an interpretation of a statute that has foreign relations implications [...]”). The decision to impose a compliance monitor depends on the specific facts of the case. According to the Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA) by the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC), the following factors: “[...] determine whether a monitor is appropriate, namely: “seriousness of the offense; duration of the misconduct; pervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines; nature and size of the company; quality of the company’s compliance program at the time of the misconduct; subsequent remediation efforts [...]”. Department of Justice, Criminal Divise and security, Enft Divise, A Resource guide to the U.S. Foreign corrupt practices Act, at 71 (2012). J. JORDAN. Recent developments in the foreign corrupt practices act and the new UK Bribery Act: a global trend towards greater accountability in the prevention of foreign bribery. In: *New York Journal of Law & Business*, 2011, p. 853 *et seq.*

⁴ See the next cases: *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 344 (1982) and *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). For details see: E. ELHALGE & D. GERADIN. *Global competition law and economics*. Oxford & Portland: Hart Publishing, 2011.

have perhaps acutely the problem.

Even before the establishment of the Supreme Court, in *Mitchel v. Reynolds* case⁵ the Queen's Bench Court allowed some companies to provide a justification for the restriction of their trade, using standards of reasonableness that demonstrated the pro-competitive effects of their conduct, based on economic parameters and efficiency.

In 1911⁶ the Supreme Court applied the rule of reason to Section 1 of the Sherman Act⁷, for the first time, stating that the nature of such a general prohibition such as that in the section cited required an assessment of the restrictions of competition according to criteria of reasonableness. Using the Court's words: "the rule of reason becomes the guide". (N. ETCHEVERRY ESTÁZULAS; D.P. FERNÁNDEZ ARROYO, 2018)

A more detailed definition of the rule of reason was subsequently offered in the famous Chicago Board of Trade case:⁸ the Supreme Court made it clear that, unlike what happened in the *Mitchel* case, a restrictive conduct of the market can be justified solely on the basis of strictly economic reasons. In fact, after having found that in the case in question the restriction had not altered the market prices, but rather had strengthened the competition within it, the Court considered that it could authorize the agreement having passed the reasonableness test.

According to the interpretation of the rule of reason offered by the Supreme Court on

⁵ *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347 (Q.B. 1711). For details see: M.A. CRABER & H. GILMAN. *The complete american constitutionalism*. Oxford: Oxford University Press, 2015, p. 314 *et seq.*

⁶ *Case Standard Oil Co. v. United States*, 221 U.S. 1 (1911). *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) ("(Maximum RPM may) cripple the freedom of traders and thereby restrict their ability to sell in accordance with their own judgment."), overruled on other grounds by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); 29 390 U.S. 145 (1968), overruled by *State Oil Co. v. Khan*, 522 U.S. 3 (1997). The reasoning behind the Albrecht decision was flawed. In argument see: M.A. CARRIER. The rule of reason: An empirical update for the 21st Century. In: *George Mason Law Review*, 16, 2009, p. 828 *et seq.* See also: N. ETCHEVERRY ESTÁZULAS & D.P. FERNÁNDEZ ARROYO. *Enforcement and effectiveness of the law*. Berlin: Springer, 2018.

⁷ According to Section 1 dello Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished [...] or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court [...]"

⁸ *Chicago Board of Trade v. United States*, 46 U.S. 231 (1918) (regulating grain traders): "[...] every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts [...]". For details see: L.P. SAWYER. California fair trade. Antitrust and the politics of fairness in U.S. competition policy. In: *Business History Review*, 90 (1), 2016, p. 32 *et seq.* H. HOVENKAMP. Leegin. The role of reason and vertical agreements, University of Iowa Legal studies research paper. N. 10-40, *College of Law*, University of Iowa, 2010.

this occasion, it is necessary that the company that has concluded the agreement or put in place the abusive conduct, concretely demonstrates its pro-competitive effects with reference to the relative market of reference and the demand/supply curve. In the Chicago Board of Trade, therefore, are specifically specified the criteria on which to assess whether a market restriction may or may not be justified in the light of the rule of reason: according to the Judge Brandeis, reference should be made to the specific circumstances of the business, the conditions of the market before and after the restriction of competition, the nature and purpose of the conduct under investigation and finally the effects that this had on competition within the market. (R.H. COASE, 1984, p. 230 *et seq.*)

With specific reference to vertical (D. DANIEL SOKOL, 2014, p. 1005 *et seq.*; F. WIJCKMANS & F. TUYTSCHAEVER, 2011; N. VETTAS, 2010, p. 844 *et seq.*) and horizontal agreements, their validity must be demonstrated exclusively through the analysis of the effects they have had in practice on demand and supply within the market: if following the agreement there is an increase in price, there is a violation of Section 1 of the Sherman Act, otherwise there is no reason not to justify it.

The rule of reason based on the purely economic analysis of restrictive conduct and their effects is at the basis of the doctrine elaborated by the Chicago School,⁹ which assumes that economic efficiency is in fact, for the rules of antitrust law, (H. FIRST & S. WEBER WALLER, 2013, p. 2545 *et seq.*) the goal to be achieved. The most immediate way of achieving this result is, on the one hand, in limiting the interference of the judicial and administrative authorities within the markets to the minimum necessary and, on the other hand, in ensuring that a particular conduct can not be declared contrary to the Sherman Act without showing the anti-competitive effects on the reference market. The companies must, therefore, have the opportunity to explain and demonstrate the reasonableness of the conduct under examination.

Both the Supreme Court and most of the Federal Courts have made extensive use of

⁹ Contrary to the achievement of more strictly political and social objectives which, according to the Chicago school, are irrelevant to antitrust law. In contrast to this vision is the Interventionist model, shared mainly by the Congress and public opinion, which underlines the importance of orienting the interpretation of the antitrust rules in favor of the pursuit of more socially useful ends such as technological innovation, the economic independence of small businesses, the diversification of the offer, etc. For a more in-depth look at the interventionist model, see: A. BOHLING. Simplified rule of reason for vertical restraints: integrating social goals, economic analysis, and sylvania. In: *Iowa Law Review*, 64 (4), 1979, p. 462 *et seq.* US. Department of Justice Vertical Restraints Guidelines, (Jan.-June) Antitrust & Trade Reg. Rep. (BNA) No. 1199 (Special Supp. Jan. 24, 1985); Conference Committee Clears Restriction on Justice Department's Advocacy on RPM, (July-Dec.) Antitrust & Trade Reg. Rep. (BNA) No. 1138, at 723-24 (Nov. 3, 1983).

the model of the so-called rule of reason, preferring it to the approach of the “rival” per se rule, (J. PARISH, 2016, p. 464 *et seq.*) on the assumption that the application of the antitrust rules by the courts must be flexible. He refused, in other words, to sanction an agreement because of its existence alone. The model elaborated by the Court in the Chicago Board of Trade case has caused some criticism because of the difficulty and the high costs that the companies had to support in order to demonstrate the reasonableness of their conduct. (F.H. EASTERBROOK, 1984, p. 4 *et seq.*)

In order to overcome these problems, in the following years different approaches of rule of reason¹⁰, were proposed, which proved to be unsatisfactory, since the Court failed to clarify to what conduct the rule of reason characterized by a more “lean” investigation is applied, compared to the more in-depth analysis, making it impossible to predict which type of analysis, and consequently the criteria, the Court would have used when assessing the restrictions.

The antitrust law commentators put forward hopes of obtaining clarity in the California Dental Association (CDA)¹¹ case, in which the Supreme Court was called upon to decide on the alleged violation of Section 1 of the Sherman Act by the CDA. Both the Federal Trade Commission and the Ninth Court at the appeal found the violation of Section 1 of the Sherman Act through an analysis based on a “quick look” rule of reason, applicable to those conducted that, although not attributable to the category of illegal restrictions per se, they produce with sufficient evidence anti-competitive effects that do not require a more in-depth investigation. The Supreme Court, however, held that such a summary investigation of the restriction was not appropriate in the case in question. While recognizing that the “quick look” analysis represents a valid approach to restrictions that are recognized as prima facie anti-competitive effects,¹² the Court found that the reasons that led the CDA to prohibit

¹⁰ The “structured”, the “truncated” rule of reason and the “quick look analysis” were proposed between the federal and state courts, depending on the level of in-depth analysis of the survey. The “quick look analysis” approach has also been endorsed by the Supreme Court in the following cases: *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). See in argument and for analysis: A. MEESE. In praise of all or nothing dichotomous categories: why antitrust law should reject the quick look. In: *Georgetown Law Journal*, 104, 2016, p. 840 *et seq.* S. VAHEESAN. The evolving populisms of antitrust. In: *Nebraska Law Review*, 93, 2014, p. 380 *et seq.* E.D. CANAVAGH. Whatever happened to quick look? In: *University Miami Business Law Review*, 26, 2017, p. 46 *et seq.*

¹¹ *California Dental Association v. FTC*, 526 U.S. 756, 119 S. Ct. 1604 (1999). See A. JONES & B. SUFRIN. *European Union competition law*. Text, cases and materials. Oxford: Oxford University Press, 2014.

¹² The Court held, in fact, that the “quick look” rule of reason is applicable “when the great likelihood of anticompetitive effects can easily be ascertained, i.e., where the anticompetitive effects are obvious”. See also: C. ISTVÁN NAGY. *European Union and United States competition law: divided in unity? The rule on restrictive agreements and vertical intra-brand restraints*. New York: Routledge, 2016.

certain advertising activities should be better explored since, apparently, they seemed to be linked to the need to avoid the increase in the information asymmetry between patient and doctor, through the dissemination of deceptive or misleading messages.¹³ The Court decided to re-issue the decision to the Ninth Court for a more in-depth examination, since the restriction put in place by the CDA could have been justified i) to avoid the information asymmetry between patient and doctor; ii) for the difficulties in making a comparison between the packages of professional services; iii) for the difficulties in verifying information on prices and services; iv) for the trust relationship that some patients have with their doctor. The Court has in fact given the endorsement both to the “quick look” rule of reason and to that based on a more in-depth analysis, leaving, therefore, unaltered the doubts about the criteria through which to decide from time to time which approach to follow. In an attempt to come up with a rule of reason that would be as coherent and predictable as possible, especially with regard to the reasons for justifying market restrictions, the Court has actually confused ideas even more, using reasonableness tests based on criteria that are always different because they are aimed at sometimes pursuing the protection of competition in general, sometimes the welfare of consumers and so on. (E. RAMIREZ, 2015, p. 2052 *et seq.*)

According to our opinion “[...] the case for the quick look does not withstand scrutiny. The quick look adds an additional layer to the analysis of restraints that avoid *per se* condemnation, namely, an inquiry into whether the challenged agreement is inherently suspect. The result of this inquiry is generally outcome determinative, and both plaintiffs and defendants will predictably invest significant resources in attempting to convince the tribunal that the challenged restraint is or is not inherently suspect. Tribunals, in turn, will expend significant resources assessing these contending arguments. The significant costs of this threshold inherently suspect inquiry will produce no offsetting benefits. In most cases, tribunals reject claims that a challenged restraint is inherently suspect, thereby confirming the traditional result: fullblown rule of reason analysis. Even though tribunals declare some restraints inherently suspect, they always reject defendants’ assertions that such restraints may produce cognizable economic benefits and thus invariably condemn such agreements. To be sure, such condemnation is less costly than condemnation after full-blown rule of reason

¹³ It is worth mentioning the dissenting opinion of Judge Justice Breyer, who proposed an alternative to the “quick look” which consists of answering four questions, namely: 1) is the restriction really a problem? 2) what are the most probable anti-competitive effects that derive from it? 3) are there any pro-competitive effects that can balance them? 4) Do the companies involved have sufficient market power to make the difference? It is sufficient to answer these questions to assess whether a restriction violates the Sherman Act or not.

analysis, suggesting that application of the quick look reduces the cost of condemning such restraints and enhances deterrence and accuracy as well. However, any such cost savings are illusory, given that a straightforward application of the traditional per se test (J. PARISH, 2016, p. 464 *et seq.*) - which consumes fewer resources than the quick look-would condemn the same restraints. Engrafting the quick look onto the traditional dichotomous approach thus increases the costs of enforcement and adjudication without producing any offsetting benefits. These costs are themselves a deadweight social loss, consuming resources that could produce social value elsewhere. Because defendants will bear some of these costs, the quick look also functions as a tax on numerous forms of concerted action that survive per se condemnation. This tax will induce some firms at the margin to abandon agreements that tribunals might conceivably deem inherently suspect, even if such agreements produce benefits for the parties and consumers compared to alternatives. The quick look is currently a lose-lose that imposes deadweight social losses and distorts underlying economic activity. The mere fact that the quick look, as currently structured, consumes agency, private, and judicial resources with no offsetting benefits does not establish that the traditional dichotomous approach is the best we can construct. We propose the next possible reforms of the quick look: (1) better integration of per se analysis with the quick look and (2) a more expansive definition of the inherently suspect category. Neither approach, it is shown, promises any improvement over the traditional dichotomous approach [...]" (D. LIAKOPOULOS, 2016)

In this way the investigation necessary to evaluate the legality of the restrictive conduct is particularly complex and long, because of the innumerable factors that the courts are called to take from time to time in consideration. This inevitably leads to uncertainty in relation to the outcome of the assessment, since the parameters used in relation to each case are not foreseeable: "[...] the increase focus on case facts under the rule of reason will [...] increase the uncertainty involved in litigation, and this uncertainty will increase the number of cases litigated because parties are unsure of what the outcome of a particular case will be". (M. BLECHER, 1985, p. 43 *et seq.*)

On the contrary, the Brown case¹⁴ is a further example of how the US courts have been far removed from the approach followed in the Chicago Trade of Board case. In fact, in the latter case, the test of reasonableness¹⁵ applied by the Supreme Court was strictly focused

¹⁴ United States v. Brown Univ., 5 F.2d 658 (3d Cir. 1993). See, C.L. SAGERS. *Examples & explanations for antitrust*. New York: Wolters Kluwer, 2014.

¹⁵ For details see: C. ISTVÁN NAGY. European Union and United States competition law: divided in unity?

on economic efficiency, in the case *Brown* the restrictive agreement was not sanctioned for the purposes of public protection that it pursued. Although the district court had sanctioned in the first instance the insight in question, the Third Circuit overturned the outcome of the decision in the appeal, stating that the restriction was susceptible to justification as directed to safeguard the right to education or otherwise, more generally, a public interest.

Although the method most used by the courts is that of the rule of reason based on the economic analysis of the effects of the restriction on the market, there have been several cases in which the reasons why the courts justified the restrictive practices pursued objectives no longer only of efficiency economic, but more generally of a public nature. Not surprisingly, therefore, are the criticisms related to the uncertainty that revolves around the application of the rule of reason, given that, since there are no predefined requirements, the courts are free to consider the elements that they consider more relevant to their discretion.

3. THE TRANSITION TO PER SE RULE AND THE SUBSEQUENT RETURN TO THE RULE OF REASON

Despite the fact that in the antitrust statute law the need to be able to count on an adequate level of legal certainty is not as well felt as in Europe the criticisms made in time to the rule of reason have led the courts to try different ways to make the analysis of the conduct less expensive and more predictable.

The recourse to per se rule (P. AREEDA, 1985, p. 28 *et seq.*; E.M. FOX, 1989, p. 202 *et seq.*; T.G. KRATTENMAKER, 1988, p. 166 *et seq.*; W.J. LIEBELER, 1985, p. 1021 *et seq.*; J.O. VON KALINOWSKI, 1963, p. 570 *et seq.*) has, therefore, utilitarian reasons, linked to the Supreme Court's need to dictate clearer and more defined guidelines for companies. (K.N. HYLTON, 2003, p. 116 *et seq.*) Faced with the vagueness of the rule of reason, the per se rule seemed to be the answer that saved time and money in litigation, to be an effective deterrent for companies and to ensure greater certainty about the outcome of decisions by the courts.

Unlike what happens with the rule of reason, in the per se rule rule there is no room for the justification by the companies of the restrictive practices implemented by them. (E. ELHAUGE, 2016, p. 464 *et seq.*) The Supreme Court has, in fact, identified some agreements whose anti-competitive effects are so evident that there is no need to further investigate the reasons that led companies to conclude them.¹⁶

The rule on restrictive agreements and vertical intra-brand restraints, *op. cit.*

¹⁶ According to the Supreme Court in the case: *Jefferson Parish Hospital Distt. No.2 v. Hyde* 26: “the rationale

Natural field of application of the per se rule were, therefore, the agreements that set prices: in the *Trenton Pottiers Co.* case,¹⁷ the Court affirmed that this type of agreement certainly has the effect of reducing at least part of the competition to the internal market and, for this reason, must be sanctioned without the need to ascertain its possible reasonableness.

A few years later, this approach was also extended to all agreements that, although not directly fixed, had the effect of altering prices on the market¹⁸ and for this reason were therefore considered by the Court to be illegal in themselves.

A further step forward in the application of the per se rule occurred with the *Topco Associates* case,¹⁹ in which the same approach reserved to price agreements was extended to agreements concerning the geographical distribution of the market.²⁰ The Court has ruled that such a geographic market restriction is illegal in itself and can not be justified by the need to incentivize competition in another part of the market.²¹ Under the pressure of the criticism

for “per se” rule, in part, is to avoid a burdensome inquiry into the actual market conditions in situations where the likelihood of anti-competitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anti-competitive conduct”.

¹⁷ *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). See also: F. ALESE. *Federal antitrust and EC competition law analysis*. New York: Routledge, 2016; J.L. CONTRERAS. *The cambridge handbook of technical standardization law*. Cambridge: Cambridge University Press, 2017; W. MAREIKE. *Die Preisbindung der zweiten Hand: Eine Neubewertung im Licht der ökonomischen, europäischen deutschen und schweizerischen Kartellrechts*. Tübingen: Mohr Siebeck, 2017, p. 173 *et seq.*

¹⁸ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940): “Any combination which tampers with price structures. [...] under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se [...]”. F. ALESE. *Federal antitrust and EC competition law analysis, op. cit.*

¹⁹ *United States v. Topco Associates*, 405 U.S. 596 (1972): (banning horizontal territorial allocations ancillary to otherwise legitimate joint venture); *Fortner Enters., Inc. v. U.S. Steel Co.*, 394 U.S. 495, 499 (1969) (banning ties by firms with “economic power”); *Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1968) (banning vertical maximum resale price maintenance), overruled by *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967) (banning nonprice vertical restraints, including exclusive territories, location clauses, and customer assignment clauses, whenever title had passed from the manufacturer to a wholesaler or dealer), overruled by *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) (banning horizontal maximum resale price maintenance), overruled by *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“To justify a per se prohibition a restraint must have “manifestly anticompetitive” effects, and “lack [...] any redeeming virtue” (alteration in original) (first quoting *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); then quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985))); *Khan*, 522 U.S. at 10 (“Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se”. *Nw. Wholesale Stationers*, 472 U.S. at 289 (certain agreements are unlawful per se “because of their pernicious effect on competition and lack of any redeeming virtue” (quoting *N. Pac. Ry.*, 356 U.S. at 5)); *Catalano, Inc. v. Target Sales*, 446 U.S. 643, 646 n.9 (1980) (same); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (describing agreements or practices as being so “plainly anticompetitive” and so often “lacking [...] any redeeming virtue” as to merit per se condemnation (quoting *N. Pac. Ry.*, 356 U.S. At 5)), for more analysis see: F. ALESE, *Federal antitrust and EC competition law analysis, op. cit.*

²⁰ *United States v. Sealy*, 388 U.S. 350 (1967), defining violations of the Sherman Act even more serious than price agreements. F. ALESE. *Federal antitrust and EC competition law analysis, op. cit.*

²¹ That conclusion did not agree with Mr. Burger, who, in his dissenting opinion, explained that, since the

also advanced by the Chicago School, the Supreme Court began to revise its orientation on the use of per se rule for the analysis of the agreements under Section 1 of the Sherman Act. In particular, with the *Sylvania* case,²² it is stated that the rule of reason must be the most used approach also in relation to the analysis of restrictive agreements of competition²³. Reaffirming the importance of analyzing the economic benefits that could potentially derive from restrictive agreements, the Court thus affirmed the supremacy of the economic analysis of antitrust law and, therefore, of the rule of reason approach. Although in the *Sylvania* case the Supreme Court had left room for analysis with the method of the per se rule at least in relation to the horizontal agreements, in two successive pronouncements, on the contrary, further expanded the scope of the rule of reason.

In *National Society of Professional Engineers v. United States*²⁴ what would have been an agreement declared prima facie illegal by the Court,²⁵ has instead been the subject of a more thorough examination of the circumstances in which it was concluded. The content of the agreement provided for the banning of contracting engineers to make competitive bids in order to protect public safety. Otherwise, in fact, there was the risk of choosing contractors only for the lower price offered and not on the basis of experience and quality of service.

agreement in question led to the creation of a new product, thereby increasing competition on the market, it should not be considered illegal in itself.

²² *Continental T.V v. G.T.E. Sylvania*, 433 U.S. 36 (1977). The Supreme Court went further and articulated the potential benefits of such restraints, stating: “[...] vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These “redeeming virtues” are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers [...]”. See in argument also: S. MARCO-COLINO. *Vertical agreements and competition law: a comparative study of the EU and US regimes*. Oxford & Portland: Hart Publishing, 2010, p. 84 *et seq.*; W.J. LIEBELER. *Intrabrand cartels under GTE sylvania*. In: *UCLA Law Review*, 30, 1982, p. 4 *et seq.*; M.B. LOUIS. *Restraints ancillary to joint ventures and licensing agreements: do sealy and topco logically survive sylvania and broadcast music?* In: *Virginia Law Review*, 66, 1980, p. 880 *et seq.*; P.R. PITOFSKY. *The “Sylvania” case: antitrust analysis of non-price vertical restrictions*. In: *Columbia Law Review*, 78 (1), 1978, p. 4 *et seq.* R.A. POSNER. *The rule of reason and the economic approach: reflections on the sylvania decision*. In: *The University of Chicago Law Review*, 44 (1), 1977, p. 3 *et seq.*; E.F. ZELEK, W.L. STERN & T.W. DUNFEE. *A rule of reason decision model after sylvania*. In: *California Law Review*, 68 (1), 1980, p. 14 *et seq.* R.C. FERRARA, K.T. ABIKOFF & L. LEEDY GANSLER. *Share holder derivative litigation: besieging the board*. New York: Law Journal Press, 2013, p. 19 *et seq.*

²³ According to the Court: “Departure from the rule-of-reason standard must be based upon demonstrable economic effect”.

²⁴ *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). For analysis see: A. EZRACHI. *Research handbook on international competition law*. Edward Elgar Publishers, 2012; D.F. BRODER. *U.S. Antitrust law and enforcement. A practice information*. Oxford: Oxford University Press, 2010, p. 298 *et seq.*; R.S. MARKOVITS. *Economics and the interpretation and application of U.S. and E.U. antitrust law*, New York: Springer, 2014, p. 87 *et seq.*

²⁵ As in the case: *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). See, A. EZRACHI. *Research handbook on international competition law, op. cit.*; R.S. MARKOVITS. *Economics and the interpretation and application of U.S. and E.U. antitrust law, op. cit.*

The Court, while not applying the per se rule in this case, however, came to sanction the agreement following a more in-depth analysis, as the only reason given by the national company of engineers was not supported by data that highlight the economic efficiency.

The transition from per se rule to the rule of reason in relation to price agreements was noted in the subsequent *Broadcast Music Inc.* case.²⁶ CBS has reported the violation of Section 1 of the Sherman Act by *Broadcast Music Inc.* (BMI) because the common price established for the use of copyrighted products, through BMI, was the result of an agreement, illegal per se, concluded between the copyright holders. The Court, while clearly recognizing BMI's conduct as a restrictive understanding of competition,²⁷ nevertheless considered that there were sufficient indications of the potential pro-competitive effects of the agreement that could be analyzed through the rule of reason.²⁸

The same desire to move from the rule-based approach to that of the rule of reason occurred shortly after in relation to another category typically defined as illegal in itself: the collective boycott.²⁹

²⁶ *Broadcast Music v. CBS*, 441 U.S. 1 (1979): “[...] not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not per se illegal [...]”); *Broad. Music, Inc.*, 441 U.S. at 20-23 (rejecting application of per se rule to a practice that was literally price fixing because the practice accompanied other forms of integration and “substantial lowering of costs” of distributing products governed by the arrangement); see also *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (refusing to declare vertically imposed exclusive territories that reduce competition unlawful per se because of lack of information about possible redeeming virtues [...] that not all literal price fixing is illegal per se, it means that once a plaintiff has proved that price fixing has occurred, the defendant nevertheless may escape liability by proving certain facts [...] lawyers do not necessarily violate the Sherman Act when they form a law firm and doctors who cooperate to establish clinics are not necessarily antitrust felons [...]). See A. EZRACHI. *Research handbook on international competition law, op. cit.*; R. WHISH & D. BAILEY. *Competition law*. Oxford: Oxford University Press, 2015.

²⁷ The Court affirmed that: “[...] our inquiry must focus on whether the effect and (...) purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output”.

²⁸ See *NCAA v. Board of Regents*, 468 U.S. 85 (1984). The NCAA, an association that included the major US colleges, had imposed the maximum number of times that football teams in each school were allowed to appear on TV and for which compensation. Judge Stevens recognized the conduct of the NCAA as a classic example of horizontal restrictive agreement, which traditionally has always been considered illegal in itself. However, the Court decided to use the rule of reason to allow the association to justify its conduct. According to the NCAA the restriction was necessary in order to allow all the colleges the same opportunities to appear on TV and to profit from them, but this reason did not convince the Court that it nevertheless came to the conclusion of prohibiting the agreement.

²⁹ See the next cases: *Radiant Burners v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914); *Fashion Originators' Guild of Am. v. FrC*, 312 U.S. 457 (1941). For details see: D.F. BRODER. *U.S. Antitrust law and enforcement. A practice introduction*. Oxford: Oxford University Press, 2012; R. JOLIET. *The rule of reason in antitrust law: American, German and common market laws in comparative perspective*. Berlin: Springer, 2014; R.D. BLAIR & D. DANIEL SOKOL. *The*

The transition to the rule of reason for the analysis of collective boycott practices took place in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*,³⁰ when the Court highlighted some possible benefits for the market in the conduct of Northwest Wholesale Stationers (NWS) consisting in having expelled one of its members from the association. Indeed, in the course of the procedure the applicant had not shown either the market power of NWS or that it exploited it to make access to its competitors more difficult or excluded.

The same reasoning about the importance of attaching proof of the market shares of the company responsible for the boycott was also taken up in *FTC v. Indiana Federation of Dentists*,³¹ in which the Court applied the rule of reason to conclude that the refusal to provide x-ray machines to insurance companies to assess the extent of the claimed damages, constitutes a violation of the Sherman Act. Even if it came to the same conclusion that would have come following the per se rule, the Court has made it clear that the analysis of collective boycotts through the per se rule is only possible in cases where companies exploit their market power to deter distributors or consumers from doing business with their competitors.

In relation to the vertical agreements, the transition from per se rule to the rule of reason was, instead, less clear but equally significant.³²

Even the federal courts have welcomed the Supreme Court's choice to increasingly restrict the use of per se rule in favor of the rule of reason.³³ Persuaded by the arguments of the Chicago School, even the federal judges shared the perplexities on such a rigid approach

oxford handbook of international antitrust economics. Oxford: Oxford University Press, 2014; R. GREAVES. *Competition law*. New York: Routledge, 2017; R.S. MARKOVITS. *Economics and the interpretation and application of U.S. and E.U. antitrust law*, *op. cit.*

³⁰ *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). T. KÄSEBERG. *Intellectual property, antitrust and cumulative innovation in the EU and the US*. Oxford & Portland: Hart Publishing, 2012.

³¹ *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). See I. SIMONSSON. *Legitimacy in EU cartel control*. Oxford & Portland: Hart Publishing, 2010; R.S. MARKOVITS. *Economics and the interpretation and application of U.S. and E.U. antitrust law*, *op. cit.*

³² See *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). J. DRATLER & S.M. MCJOHN. *Intellectual property law*. Commercial, creative and industries property. New York: Law Journal Press, 2018, p. 100 *et seq.*; J.R. VAN DEN BERGH. *Comparative competition law and economics*. Edward Elgar Publishers, 2017. R.D. BLAIR & D. DANIEL SOKOL. *The oxford handbook of international antitrust economics*, *op. cit.*; R.S. MARKOVITS. *Economics and the interpretation and application of U.S. and E.U. antitrust law*, *op. cit.*

³³ *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986); 479 U.S. 1033 (1987); *National Bancard Corp. v. Visa, U.S.A., Inc.*, 779 F.2d 592 (11th Cir.), 479 U.S. 923 (1986); *Polk Bros. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985). P. AREEDA & H. HOVENKAMP. *Fundamentals of antitrust law*. New York: Wolters Kluwer, 2011, p. 18 *et seq.*; R.D. BLAIR & D. DANIEL SOKOL. *The oxford handbook of international antitrust economics*, *op. cit.*; R.S. MARKOVITS. *Economics and the interpretation and application of U.S. and E.U. antitrust law*, *op. cit.*

as that of the per se rule, feeling the need to obtain from the companies explanations able to justify their conduct.

The efficiency guaranteed by the per se rule, in terms of reduction of time and costs, as well as a significant increase in the level of predictability of the decisions taken by the courts in relation to certain categories of conduct, were not considered sufficient to justify the arbitrariness and the excessive generalization that this approach implies. Both the commentators of the subject and the federal and supreme courts have shown, as we have seen, to prefer the existence of a “gray zone” allowed by the rule of reason, in which companies have space to explain the reasons for their conduct, rather than a more certain and predictable mechanism which, however, risks sanctioning restrictions that could instead hide positive effects for the market. The price to pay for more predictability was therefore considered too high for those who have never made the flag certainty of the right.

According to our opinion “[...] the antitrust law should seek to maximize economic efficiency or total welfare and ignore distributional consequences, antitrust enforcers and the courts should continue to apply the antitrust laws as a consumer protection regime. This consumer orientation has four primary grounds of support. First and foremost, American Congress, as revealed in the legislative histories of the antitrust laws, sought to prevent large firms from using their market power to raise prices and transfer wealth from consumers. In contrast, no one involved in the Congressional debates discussed total welfare-or probably even had an awareness of this academic concept. Consumer-oriented antitrust enforcement can be one important policy tool to contain the growing economic chasm between the rich and everyone else with market power by preventing wealth transfers from consumers to producers. Third, given how consumers often cannot organize politically on account of their vast numbers, the federal courts can serve as trustees for this group and protect its interests from better-organized producer groups. Last, just as antitrust can help consumers, consumers can provide needed political support for antitrust enforcement. By establishing a consumer constituency, antitrust enforcers can ensure the continued vitality of U.S. competition laws [...]”. (D. LIAKOPOULOS, 2016)

4. ARTICLE 101 TFEU AND THE RESTRICTIONS BY OBJECT AND EFFECT

Article 101 TFEU (A. JONES & B. SUFRIN, 2014, p. 122 et seq.; N. PETIT, 2013, p. 178 et seq.; R. WHISH & D. BAILEY, 2012, p. 83 *et seq.*) is divided into three paragraphs, the first of which prohibits all agreements between companies operating at the same level of the

production or distribution chain (horizontal agreements) or at different levels (vertical agreements), ii) decisions by business associations and iii) concerted practices which may affect trade between EU countries and which have as their object or effect the prevention, restriction or distortion of competition.

In addition to imposing the ban described above, the first paragraph of art. 101 TFEU lists some examples of anti-competitive conduct deemed prohibited because they are contrary to competition law.³⁴ It is good to specify that, being a merely illustrative list, nothing excludes that a conduct that does not fall within those expressly mentioned can be considered contrary to art. 101.1 TFEU. (R. WHISH, D. BAILEY, 2012, p. 83 *et seq.*) The law continues by declaring the nullity “of full right” of any agreement, decision or concerted practice concluded in violation of art. 101.1 TFEU. This sanction operates automatically and without a specific EC decision to that effect being required. The direct applicability of art. 101 TFEU means that the nullity can also be declared by the national authorities responsible for the protection of competition. This is an absolute nullity that deprives the agreement or the decision, even in relation to third parties, for any length of time for which the violation has continued. However, the European jurisprudence has clarified that the nullity extends only to the clauses that violate art. 101.1 TFEU,³⁵ the other parts of the agreement remaining valid and effective insofar as such possibility is provided for under national law.³⁶

There is the possibility that the conduct prohibited under the first paragraph of art. 101.1 TFEU are exempted from this prohibition and, consequently, from the penalty of nullity. Paragraph 3 of the provision in question provides, in fact, an exemption for agreements or decisions restricting competition which comply with the following requirements: (i) contribute to improving the production or distribution of products or to promoting technical or economic progress; ii) reserve a fair share of the resulting profit for users; iii) avoid imposing restrictions on the undertakings concerned which are not indispensable for achieving these objectives; (iv) do not give these companies the possibility of eliminating competition in

³⁴ This concerns in particular those agreements or concerted practices aimed at: “a) directly or indirectly fixing purchase or selling prices or other transaction conditions; b) limit or control production, outlets, technical development or investments; c) to share markets or sources of supply; d) apply, in commercial relations with other contractors, dissimilar conditions for equivalent services, so as to determine for them a disadvantage in competition; e) make the conclusion of contracts subject to acceptance by the other contractors of supplementary services which, by their nature or according to commercial usage, have no connection with the subject of the contracts themselves [...]”.

³⁵ CJEU, C-56/65, *Société Technique Minière (L.T.M.) v. Société Maschinenbau Ulm GmbH (M.B.U.)* of 30 May 1966, ECLI:EU:C:1966:38, ECR 00262.

³⁶ CJEU, 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v. Kerpen & Kerpen GmbH und Co. KG*. Of 14 December 1983, ECLI:EU:C:1983:374, I-04173.

respect of a substantial part of the products in question. These requirements are cumulative, so if even one of them is not respected, the agreement or concerted practice can not be exempted from the prohibition referred to in paragraph 1.³⁷ These conditions must also persist for the duration of the agreement.

Before the entry into force of Regulation no. 1/2003³⁸ the EC had exclusive jurisdiction over the application of art. 101.3 TFEU: the legislation previously envisaged the obligation for the companies concerned to avail themselves of the exemption in question to notify the EC agreement for the latter to decide on its applicability.³⁹ Following the reform, this notification system has been abolished, making the provision referred to in paragraph 3 become a real legal exception that companies can assert in proceedings for violation of art. 101.1 TFEU. Art. 2 of Regulation n. 1/2003 clarifies that the burden of proving the fulfillment of the requirements set out in paragraph 3 lies with the companies that intend to use them. As can be seen from the text of the standard, an agreement or concerted practice can prevent, restrict or distort competition because of their object or their effect. These requirements are

³⁷ Communication from the Commission-Guidelines on the application of Article 81 (3) of the Treaty published in the Official Journal of 27.4.2004, C 101, p. 97, par. 42; see, T-213/00, CMA GCM and others v. European Commission of 19 March 2003, ECLI:EU:C:2003:76, II-00913.

³⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25. See in particular: Communication from the Commission-Ten years of antitrust enforcement under Regulation 1/2003: Achievements and future perspectives (COM(2014) 453, 9.7.2014); Commission staff working Document SWD (2014) 230-Ten years of antitrust enforcement under Regulation 1/2003 (SWD(2014) 230/2, 9.7.2014); Commission staff working Document SWD (2014) 231-Enhancing competition enforcement by the Member States' competition authorities: Institutional and procedural issues (SWD(2014) 231/2). For details and analysis see. P.J.W. WOUTER, Ten years of Regulation 1/2003-A retrospective, in *Journal of European Competition Law and Practice*, 4, 2013. In the case C-17/10, Toshiba of 14 February 2012, (ECLI:EU:C:2012:552, published in the electronic Reports of the cases), both Advocate General Kokott and the CJEU have stated, inter alia, that Article 11(6) of Regulation 1/2003 contains a rule of procedure such that the national competition authorities are automatically deprived of their competences to apply Article 101 or 102 TFEU as soon as the EC initiates proceedings for the adoption of a decision under the Regulation 1/2003. This does not definitively preclude further proceedings in the application of national competition law. In the case C-360/09, Pfeleiderer v. Bundeskartellamt of 14 June 2011, (ECLI:EU:C:2011:389, published in the electronic Reports of the cases) the CJEU interpreted artt. 11 and 12 of Regulation 1/2003 in the context of national proceedings concerning access to the file of a proceeding on the imposition of a fine (including the leniency procedure documents) which was sought in order to prepare a civil action for damages in front of a German court. The CJEU stated that such access might be granted to: “[...] a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages” but on the basis of national law, with due consideration for the “interests protected by European Union law”. This last judgment is of particular interest for the problem analysed in this article, as it clearly allows the EU Member States to retain their procedural provisions when applying Regulation 1/2003, even if it implies a different level of protection of the undertakings concerned. In the same spirit we notice also the case: C-536/11, Donau Chemie and others of 6 June 2013, (ECLI:EU:C:2013:366, published in the electronic Reports of the cases). For details see also: I. VANDENBORRE. European Union competition law procedural issues. In: *Journal of European Competition Law & Practice*, 4 (6), 2013, p. 508 et seq.; M. MARQUIS, R. CISOTTA (a cura di). *Litigation and arbitration in EU competition law*. Cheltenham: Edward Elgar Publishing, 2015.

³⁹ Article 4.1 of the Council Regulation (EEC) n. 17/1962: First regulation implementing Articles 85 and 86 of the Treaty.

alternative to each other and should therefore be considered separately. In fact, established case law established that the concrete effects should be examined only if the agreement does not have the object of restricting competition.⁴⁰

This approach has also been confirmed by the EC which, in paragraph 20 of the Guidelines on the application of article 81 (3) of the Treaty, states that: “once it has been established that an agreement has the object of restricting competition, it is not necessary to take account of its concrete effects. In other words, for the purpose of applying article 81 (1), it is not necessary to demonstrate the existence of anti-competitive effects if the agreement has as its object a restriction of competition”.⁴¹ The Communication then goes on to provide, in paragraph 21, the definition of restrictions by object, which are identified as those “which by their very nature can restrict competition. These are restrictions which, in the light of the objectives of the Community competition rules, have such a high potential to produce adverse effects on competition that it is unnecessary for the purposes of article 81 (1) to demonstrate the existence of specific effects on the market”. (J. TILLOTSON & N. FOSTER, 2013; M. HORSPOOL & M. HUMPHREYS, 2012, p. 552 *et seq.*)

Similarly to what has been seen regarding the application of the *per se* rule, the Community jurisprudence has also identified some types of agreements considered restrictive by object, which can not therefore be justified by the analysis of the economic context in which they were concluded.⁴²

In the European Night Services sentence⁴³ the Tribunal of First Instance (General Court (GC) after Lisbon), after stating that the assessment of an agreement must take into

⁴⁰ CJEU, C-56/65, *Société Technique Minière (L.T.M.) v. Société Maschinenbau Ulm GmbH (M.B.U.)* of 30 May 1966, ECLI:EU:C:1966:38, ECR 00262; C-56 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission* of 13 July 1966, ECLI:EU:C:1966:41, ECR 00458; C-277/87, *Sandoz prodotti farmaceutici v. Commission* of 11 January 1990, ECLI:EU:C:1990:363, I-00045; C-234/89, *Sterios Delimitis v. Henninger Bräu AG* of 28 February 1991, ECLI:EU:C:1991:91, I-00935; C-219/95 P, *Ferriere Nord v. Commission* of 17 July 1997, ECLI:EU:C:1997:375, I-04411; C-49/92 P, *Commission v. Anic Partecipazioni* of 8 July 1999, ECLI:EU:C:1999:356, ECR I-04125; T-65/98, *Van den Bergh Foods v. Commission* of 23 October 2003, ECLI:EU:C:2003:281, II-4653.

⁴¹ For details see: C. BARNARD, S. PEERS. *European Union law*. Oxford: Oxford University Press, 2017, p. 586 *et seq.*; N. FOSTER. *European Union law directions*. Oxford: Oxford University Press, 2016. A. THIES. *International trade disputes and European Union liability*. Cambridge: Cambridge University Press, 2013. D.A.O. EDWARD & R. LANE. *Edward and Lane on European Union law*. Cheltenham: Edward Elgar Publishers, 2013; C. NOWAK. *Europarecht nach Lissabon*. Baden-Baden: Nomos, 2011. D. CHALMERS; G. DAVIES & G. MONTI. *European Union law*. Cambridge: Cambridge University Press, 2014.

⁴² See in argument the joined cases T-67, T-68, T-71 and T-78/00, *JFE Engineering v. Commission* of 8 July 2004, ECLI:EU:C:2004:221, II-02501.

⁴³ See, joined cases T-374, T-375, T-384 and T-388/94, *European Night Services Ltd (ENS), Eurostar (UK) Ltd., Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v. Commission of the European Communities* of 15 September 1998, ECLI:EU:C:1998:198, II-03141.

account the specific context in which it produces its effects,⁴⁴ identified in the horizontal agreements that they set prices⁴⁵ and in the decisions that divide the market⁴⁶ two examples of manifest restrictions of competition which, as such, can not be justified in the context in which they were concluded.

A further case considered by the CJEU as a restriction by object is that of vertical agreements which prohibit exportation. The CJEU reached that conclusion in the General Motors decision⁴⁷ in which it was asked to judge an agreement concerning the application by a motor vehicle supplier, in the context of concession contracts, of a measure that excluded export sales from the system of premiums granted to dealers. On that occasion, the European judge also clarified that an agreement may have a restrictive object even if it does not have as its sole objective a restriction of competition, but also pursues the attainment of other legitimate objectives.

Still in relation to vertical agreements, in particular those that set resale prices between the supplier and the distributor,⁴⁸ the CJEU has recently confirmed that even if vertical agreements are often, by their nature, less harmful to competition than horizontal

⁴⁴ In case CRAM and Rheinzink joined cases 29 and 30/83, *Compagnie royale astimenne des mines SA e Rheinzink GmbH v. Commission of the European Communities* of 28 March 1984, ECLI:EU:C:1984:130, I-01679, the CJEU has clarified, with regard to the assessment of the restrictive agreements by object, that: “To determine whether an agreement has the object of restricting competition it is not necessary to ascertain which of the two contractors has taken the initiative to include this or that clause, or to check whether the parties had a common intention at the time the agreement was signed.

⁴⁵ See *ex multis*: T-224/00, *Archer Daniels Midland v. Commission* of 9 July 2003, ECLI:EU:C:2003:195, II-2597; joined cases T-202, T-204 and T-207/98, *Tate & Lyle v. Commission* of 12 July 2001, ECLI:EU:C:2001:185, II-2035; T-141/94, *Thyssen Stahl A.G. v. Commission* of 11 March 1999, ECLI:EU:C:1999:48, II-00347; T-148/89, *Trèfilunion v. Commission* of 6 April 1995, ECLI:EU:C:1995:68, II-01063. Price-fixing agreements are also classed as restrictions by the Commission which, in the aforementioned Guidelines on the application of Article 81 (3) of the Treaty, states in paragraph 20 that: “Restrictions by object, such as the fixing of prices and the distribution of the market, provoke reductions in production and price increases, leading to a poor allocation of resources, as the goods and services requested by consumers are not produced. These restrictions also lead to a reduction in the well-being of consumers, who have to pay a higher price for the goods and services in question.

⁴⁶ In the same spirit see the decisions from the European Commission of 24 January 2007, case COMP/F/38.899-Gas Insulated Switchgear; of 5 December 2001, case COMP/37.800/F3-Luxemburg Brewers; *Continental Can Company (IV/26 811) (1972) OJ L7/25 (8 January 1972)*; *Distillers Company Limited (IV.28.282) (1978) OJ L50/16 (22 February 1978)*; *Spain Pharma (IV/37.121/F3), BAI (IV/37.138/F3) and EAEP (IV/37.380/F3) (2001) OJ L302/1 (17 November 2001)*; *Grundig Verkaufs-GmbH (63/566/EEC) (1964) OJ L161/2545 (20 October 1964)*; *Konica (IV/31.502) (1988) OJ L78/34 (23 March 1988)*; *Mercedes-Benz (COMP/36.264) (2002) OJ L257/1 (25 September 2002)*; *Night Services (IV/34.600) (1994) OJ L259/20 (7 October 1994)*; *PO Video Games (COMP/35.587), PO Nintendo Distribution (COMP/37.706) and Omega-Nintendo (COMP/36.231) (2003) OJ L255/33 (8 October 2003)*; *SABA (IV/847) (1976) OJ L28/19 (3 February 1976)*; *Virgin/British Airways (IV/D2/34.780) (2000) OJ L10/1 (4 February 2000)* and the case T-30/91, *Solvay v. Commission* of 29 June 1995, ECLI:EU:C:1995:115, II-01775.

⁴⁷ CJEU, C-551/03 P, *General Motors v. Commission* of 6 April 2006, ECLI:EU:C:2006:229, I-03173.

⁴⁸ CJEU, C-243/83, *SA Binon Cie v. Sa Agence et messageries de la presse* of 3 July 1985, ECLI:EU:C:1985:284, ECR 02015.

agreements, they too may, under certain circumstances, have a particularly high restrictive potential.⁴⁹

In addition to the categories of agreements identified by the jurisprudence, although there is no EC communication containing an exhaustive list of agreements restricting competition by object, (D. BAILEY, 2012, p. 560 *et seq.*) they are generally considered to be those listed in the exemption regulations⁵⁰ or in the EC guidelines. Examples of this are the “Guidelines on the applicability of article 101 TFEU to horizontal cooperation agreements”, (L. MORITZ, 2013, p. 93 *et seq.*) which, in paragraph 74, state that “the exchanges of information made by competitors on individualized data on prices or quantities future should [...] be considered a restriction of competition by object [...]”.⁵¹

On the other hand, if an agreement does not have the object of restricting competition, we proceed to assess whether it may have anti-competitive effects in violation of art. 101.1 TFEU. (L. MORITZ, 2013, p. 93 *et seq.*) According to the EC, for an agreement to produce restrictive effects, “it must affect actual or potential competition to such an extent that, with reasonable probability, adverse effects on prices, production, innovation or the variety or quality of goods can be expected, and services offered on the relevant market”.⁵²

In order to establish whether an agreement has an anti-competitive effect or not, it is necessary to examine it in the legal and economic context in which it is to be applied, with the relevant market definition being of primary importance,⁵³ since a restriction of competition can have a more or less negative depending on whether they are agreements between competitors or non-competitors. (L. MORITZ, 2013, p. 93 *et seq.*) In *speciem*, in the O2 ruling, the European judge stressed that the analysis of the anti-competitive effects of the agreements must also take into account how the competition took place in the absence of the contested cartel.

⁴⁹ CJEU, C-56/64 and 58/64, *Consten and Grundig v. Commission* of 13 July 1966, ECLI:EU:C:1966:41, ECR 00429; C-243/83, *Binon v. AMP* of 3 July 1985, ECLI:EU:C:1985:284, ECR 02015; C-32/11, *Allianz Hungária Biztosító Zrt. And others v. Gazdasági Versenyhivatal* of 14 March 2013, ECLI:EU:C:2013:160, published in the electronic Reports of the cases.

⁵⁰ See, for example, the art. 4 of the Regulation (EC) no. 772/2004 of the Commission of 27 April 2004 on the application of Article 81 (3) of the EC Treaty to categories of technology transfer agreements, OJ of 27.4.2004, L 123, p. 11.

⁵¹ Communication from the Commission-Guidelines on the application of Article 81 (3) of the Treaty, *op. cit.*

⁵² Communication from the Commission-Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ of 14.1.2001, C 11/1

⁵³ Communication from the Commission-Guidelines on the application of Article 81 (3) of the Treaty published in the OJ of 27.4.2004, C 101, p. 97, par. 24.

With specific regard to vertical agreements, in the *Delimitis* decision⁵⁴ the CJEU introduced the so-called parallel network theory: as suggested by the CJEU, the effects of an agreement, as well as individually, should also be examined in relation to other similar agreements already existing on the market, so as to assess whether this network of agreements allows access to the market by a new entrant or, on the contrary, prevent it. (L. MORITZ, 2013, p. 93 *et seq.*) In the latter case, it will be necessary to ascertain more specifically how much the agreement challenged to create this barrier to access the market contributes.⁵⁵

Further, in a line of cases frequently referred to in the EU as “ancillary restraints cases” the EU Courts, as explained in *Remia & Nutricia*,^{56, 57} consider what the state of competition would be if certain allegedly restrictive clauses did not exist. If it is found that individual restraints contained in a non-restrictive transaction are objectively necessary for, directly related and proportionate to it-i.e. without it the transaction (in that case the sale of a business together with its goodwill) would be unlikely to be implemented or proceed-it holds that they “are free of the prohibition of article 101(1) TFUE”.⁵⁸ The restraints, even if they do restrict competition, fall outside article 101(1) TFUE as, without them, the beneficial transaction would not take place. If the clauses are not found to be ancillary, however, it seems that they are not prohibited automatically but only if established to restrict competition-whether by object or effect (see also *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*⁵⁹ where the CJEU made it clear that restraints in the franchising agreement which were not considered to be ancillary to it had to be scrutinised to see if they restricted competition). It is clear, nonetheless, that each involve both some form of characterization exercise and some form of truncated analysis and burden shifting in the identification of restrictions of competition. The ancillary restraint cases assess first whether the restraints seem necessary to the legitimate agreement/objective-if this seems plausible they are not

⁵⁴ See, T-328/03, O2 (Germany) v. Commission of 2 May 2006, ECLI:EU:C:2006:116, II-01231. This same concept was also expressed by the Court of Justice in the aforementioned General Motors decision, where it was stated that, in order to decide on the legitimacy of the cartel, it is necessary to examine the competitive situation on the market for the supply of motor vehicles in the hypothesis export sales had not been excluded from the premium policy.

⁵⁵ CJEU, C-235/89, *Delimitis*, op. cit.

⁵⁶ CJEU, C-42/84, *Remia v. Commission* of 11 July 1985, ECLI:EU:C:1985:327, ECR 02545.

⁵⁷ CJEU, C-445/15 *Nutricia* of 5 October 2016, ECLI:EU:C:2016:106, not published.

⁵⁸ In the same spirit, *rectius* orientation see also: CJEU, order, C-516/18, *Sun Express Deutschland* of 2 August 2018, ECLI:EU:C:2018, not published; order C-411/18P, *Romantik Hotels & Restaurants v. EUIPO* of 3 August 2018, ECLI:EU:C:2018:823, published in the electronic reports of the cases; order C-340/18, *EK and others* of 3 July 2018, ECLI:EU:C:2018:577, not published.

⁵⁹ CJEU, C-161/84, *Pronuptia Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis* of 28 January 1986, ECLI:EU:C:1986:41, I-00353, par. 24;

considered to be restrictive of competition by object. The restraints are tested to see if they are ancillary. If they are necessary, they fall outside of article 101(1) TFUE altogether-it seems to be assumed that the legitimate objective pursued outweighs any restrictions which flow from the restraints identified. If they are not ancillary, a fuller analysis of the agreement's restrictive effects (under article 101(1)) TFUE and countervailing benefits (under article 101(3)) TFUE⁶⁰ is required. In objective necessity cases, in contrast, the objective necessity function seems to perform only a combined classification and truncated analysis function. If the restraints are not objectively necessary they are assumed to restrict competition (they are restrictive of competition by object). If they are objectively necessary however they do not restrict competition (by object or effect).

5. THE DEBATE ON ART. 101 AS CODIFICATION OF THE PER SE RULE AND OF THE RULE OF REASON

To the approaches per se rule and rule of reason, the law of the European Union contrasts therefore the categories of the so-called “by object” or “by effect” restrictions of competition. (E. FOX, 2008, p. 111 *et seq.*)

The debate on the contrast between these different methods has mainly developed around two issues: 1) if it is possible to identify in paragraph 1 of art. 101 a prohibition on the part of restrictive competition agreements; 2) if paragraph 3 of art. 101 represents a codification of the rule of reason. Regarding the first question, doubts about the possibility of classifying as per se the restrictions on competition prohibited under article 101.1 were born as a result of some rulings by CJEU⁶¹ and EC⁶² in which the ban is applied almost automatically and uncritically. Particularly representative of this approach is the Volkswagen judgment,⁶³ where the European judge, in evaluating an agreement to geographically share the market, has decided to sanction the car manufacturer for having adopted measures concerning the partitioning of the market, through an all similar to per se rule, stating that “such measures were in themselves such as to affect trade between Member States pursuant to

⁶⁰ As we can see in particular in the next cases: CJEU, C-326/18 P, *Safe Skies v. EUIPO* of 4 October 2018, ECLI:EU:C:2018:800; C-230/16, *Coty Germany* of 26 July 2017, ECLI:EU:C:2017:603; C-16/16 P, *Belgium v. Commission* of 12 December 2017, ECLI:EU:C:2017:959 and T-491/07 RENV, *CB v. Commission* of 30 June 2016, ECLI:EU:C:2016:379, all the above cases published in the electronic Reports of the cases.

⁶¹ See, T-19/91, *Société d'hygiène dermatologique de Vichy v. Commission* of 27 February 1992, ECLI:EU:C:1992:21, II-00415.

⁶² Decision of the European Commission of 16 December 1991, IV/33.242, *Yves Saint Laurent* publicata in GU L12 of 18 January 1992, p. 14.

⁶³ See, T-62/98, *Volkswagen AG v. European Commission* of 6 July 2000, ECLI:EU:C:2000:180, II-02707.

art. 85, n. 1, of the Treaty and that therefore the EC, in carrying out its investigation, “was not required to investigate the concrete effects of these measures on the game of competition within the common market”.⁶⁴

On the other hand, on other occasions the European judge, in assessing the anti-competitive nature of the cases listed in the list referred to in paragraph 1, instead of declaring the illegality tout court, recognized the need to carry out an analysis of the agreements taking into account the context in which they were concluded, taking into account different factors each time in order to assess the possible restrictive scope of competition.⁶⁵ In *Glaxo* sentence,⁶⁶ after confirming that agreements to restrict parallel trade or to compartmentalize the common market must in principle be regarded as intended to prevent competition, the GC adds that, however, the mere fact that an agreement aims to restrict parallel trade is not enough to conclude in the sense of a violation of article 81, n. 1, CE. The decision of the EC, which sanctioned the conduct of the pharmaceutical company GlaxoSmithKline, was declared flawed and, in the end, annulled precisely because it did not sufficiently take into account the positive effects that these conditions of sale had on the ability to invest in innovation and research of the company.

In the same spirit we recall the *Société Technique Minière* sentence⁶⁷ where the CJEU has established that the contract that contains a clause granting an exclusive right of sale within a given area “does not automatically fall under the prohibition set forth in art. 81 n. 1”, (L. MORITZ, 2013, p. 93 *et seq.*) since it is also necessary to analyze the relevant legal and economic context.

⁶⁴ CJEU, joined cases C-32/78 and from 36/78 at 82/78, *BMW Belgium v. Commission* of 12 July 1979, ECLI:EU:C:1979:191, ECR 02435, par. 32.

⁶⁵ CJEU, C-32/11, *Allianz Hungária Biztosító and others* of 13 March 2013, ECLI:EU:C:2013:160, published in the electronic reports of the cases.

⁶⁶ See, T-168/01, *GlaxoSmithKline Services Unlimited v. Commission* of 27 September 2006, ECLI:EU:C:2006:265, II-02969. For details see: E. DIENY. *Appréciation au regard du droit communautaire de la concurrence d'un accord visant à réduire le commerce parallèle des médicaments*. In: *La Semaine juridique-entreprise et affaires*, 2006, p. 2151 *et seq.* R. ECCLES. *Parallel exports in the pharmaceuticals sector: Take nothing for granted*. In: *European Competition Law Review*, 28, 2007, p. 134 *et seq.* L. IDOT. *Commerce parallèle de médicaments et spécificité du marché pharmaceutique*. In: *Europe*, 2006, n. 326, p. 28 *et seq.* V. JUNOD. *An end to parallel imports of medicines? Comments on the judgment of the Court of First Instance in GlaxoWellcome*. In: *World Competition*, 30, 2007, p. 292 *et seq.* C. ROBIN. *Accords de distribution*. In: *Revue Lamy de la Concurrence: droit, économie, régulation*, 10, 2007, p. 22 *et seq.* M. VAN DER WOUDE. *Le TPI annule la décision de la Commission rejetant une demande d'exemption pour un système de prix différenciés en fonction de la destination des produits pharmaceutiques*. In: *Concurrences: Revue des Droits de la Concurrence*, 4, 2006, p. 64 *et seq.* F. ZIVY. *Délimitation des preuves admissibles en justice à l'appui d'une demande d'annulation d'une décision d'application de l'article 81 CE*. In: *Concurrences: Revue des Droits de la Concurrence*, 4, 2006, p. 116 *et seq.*

⁶⁷ CJEU, C-56/65, *Société Technique Minière v. Maschinenbau Ulm GmbH* of 30 June 1966, ECLI:EU:C:1966:38, ECR 00377.

There are, then, cases in which the CJEU did not hesitate to exclude the application of competition law by virtue of principles or policies, external to the market, and therefore to the case under evaluation, to be considered prevalent in comparison between principles with circular contents. The most significant case, which certainly can not be traced back to the rule of reason, is offered by the Albany International decision,⁶⁸ where the CJEU decided not to sanction an agreement, stipulated in the form of a collective agreement, which established a supplementary pension scheme, the registration to which it could be made compulsory by the public authorities, since this scheme, as a whole, aimed at guaranteeing a certain level of pension to all workers in the sector concerned and directly contributed, therefore, to improving one of the working conditions of the employees. Also in the Wouters decision⁶⁹ the CJEU declared that not all agreements that restrict the freedom of action of the parties necessarily violate art. 101 TFEU (at the time, article 81 EC), since it must take into account the overall context in which the decision of the association of undertakings in question was adopted or its effects and, more particularly, its objectives, which in this case they concerned the proper exercise of the profession of lawyer.

This so flexible approach of CJEU in judging some of the cases listed in paragraph 1 has led some to rule out the possibility of talking about a prohibition per se and, at the same time, to consider that there is room to recognize within art. 101 an analysis in terms of rule of reason.⁷⁰

The analysis of the market within which the agreement operates, which characterizes the method of the rule of reason, has in fact been used as a criterion for evaluating a contract for the supply of beer from the CJEU in the aforementioned Delimitis sentence. (D. HILDEBRAND, 2002, p. 2018 et seq.) According to some authors, the fact that factors such as the number of competing producers on the market, the level of saturation of the same and the degree of consumer loyalty have been taken into consideration, represents a case of application of the rule of reason. There are those who have excluded this reading, arguing that

⁶⁸ CJEU, C-67/96, Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie of 21 September 1999, ECLI:EU:C:1999:430, I-05751.

⁶⁹ CJEU, C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten of 19 February 2002, ECLI:EU:C:2002:98, I-01577.

⁷⁰ In general, the Court of First Instance (General Court) and the CJEU gave more space to the economic analysis of the investigations, demanding from the Commission more convincing arguments not only in relation to the analysis of restrictive agreements, but also when assessing the abuses of dominant position (see, T-342/99, Airtours plc v. Commission of the European communities of 6 June 2002, ECLI:EU:C:2002:192, II-02585) and concentrations (T-80/02, Tetra Laval BV v. Commission of the European Communities of 25 October 2002, ECLI:EU:C:2002:264, II-04519).

the only place where it is possible to carry out a complete economic analysis within art. 101 is paragraph 3. The equation of art. 101.3 TFEU to the US rule of reason has attracted numerous criticisms. First of all, the different origin was highlighted, in the first normative case and in the second case law, of the two methods. Secondly, it was stressed that while the rule of reason is used in a case-by-case analysis of the restrictions, paragraph 3 refers to whole categories of agreements. Finally, it has been observed that, unlike what happens with the rule of reason, paragraph 3 makes it possible to carry out evaluations not only of an economic but also of political-social nature.

Overall we could say that the application of article 101(1) TFEU to agreements restricting parallel trade focused, by and large, on cases where EU competition law did not interfere with the exploitation of intellectual property rights. (L. MORITZ, 2013, p. 93 *et seq.*) The majority of such cases concerned instances where rights were already exhausted and thus where the agreements remained outside the substantive and geographic scope of the intellectual property right in question. Ongoing developments will contribute to the clarification of the aspects of the case law that remain controversial, or unclear.

6. A FURTHER EXAMPLE OF THE INFLUENCE OF US THEORIES ON ART. 101 TFEU

The decisions taken respectively by the US Supreme Court in the *Actavis* case⁷¹ and

⁷¹ Federal Trade Commission v. Actavis, Inc., et al, 570 U.S (2013): (“[...] contending that the challenged restraint was inherently suspect, in so far as it was “facially anticompetitive,” and should thus be considered “presumptively unlawful”); Brief for Louisiana Wholesale Drug Co. et al. as Amici Curiae in Support of Petitioner at 12, Actavis, 133 S. Ct. 2223 (arguing that the challenged restraint should be treated as *prima facie* anticompetitive). Actavis, 133 S. Ct. at 2237-2238 (rejecting the contention by the FTC and several amici curiae briefs that reverse-patent settlements are inherently suspect); *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006) (rejecting plaintiff’s argument that restraint was properly subject to a quick look analysis); *Cal. Dental Assoc’n v. FTC*, 526 U.S. 756, 769-781 (1999) (rejecting contention that challenged restraint was inherently suspect and therefore subject to quick look analysis); *Cal. Dental Assoc’n*, 526 U.S. At 782-794 (Breyer, J., dissenting) (contending that the restraints in question were inherently suspect); *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137-1139 (9th Cir. 2011) (en banc) (rejecting plaintiff’s argument that restraint was properly subject to quick look); *California ex rel. Harris*, 651 F.3d at 1144-1162 (Reinhardt, J., dissenting) (taking issue with the majority’s determination); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829-832 (3d Cir. 2010) (affirming district court’s refusal to instruct the jury on plaintiff’s quick look theory); *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 332 (2d Cir. 2008) (rejecting plaintiff’s contention that challenged restraints were properly subject to quick look); *MLB Props., Inc.*, 542 F.3d at 337 (Sotomayor, J., concurring) (rejecting plaintiff’s quick look argument on different grounds); *N. Tex. Physicians Specialty v. FTC*, 528 F.3d 346, 360-362 (5th Cir. 2008) (articulating standards governing quick look analysis); *N. Tex. Physicians Specialty*, 528 F.3d at 363-368 (examining challenged restraint and finding it inherently suspect); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) (declining to subject exclusive dealing arrangement to quick look); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959-961 (6th Cir. 2004) (rejecting plaintiff’s claim that challenged restraint was subject to quick look analysis); *Cont’l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 511 (4th Cir. 2002) (rejecting lower court’s determination that challenged restraint was subject to quick look); *Orson, Inc. v. Miramax Film Corp.*,

by the EC in the *Lundbeck* case.⁷²

contributed to the debate on the influence of the American theories on art. 101 TFUE. (A. ITALIANER, 2013, p. 4 *et seq.*) In fact, the logical process that characterizes these two pronouncements appears very similar to the point that they have reopened the debate on the influence that the doctrines of the rule of reason and per se rule have had on art. 101 TFEU. The *Actavis* case,⁷³ decided by the Supreme Court of June 2013, focused on the agreement

79 F.3d 1358, 1367 (3d Cir. 1996) (declining to subject exclusive dealing arrangement to a quick look analysis); *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (rejecting previous determination that quick look applied and instead holding that proof of market power was necessary to establish a prima facie case); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993) (same); *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 337 F. Supp. 2d 563, 571-573 (S.D.N.Y. 2004) (rejecting plaintiff's contention that sports league restraint should be subject to a quick look); *Holmes Prods. Corp. v. Dana Lighting, Inc.*, 958 F. Supp. 27, 33-34 (D. Mass. 1997) (declining to subject exclusive distribution agreement to quick look analysis); see also *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824-827 (6th Cir. 2011) (declining to determine, after briefing and argument, whether to subject challenged restraints to a quick look). Supreme Court's NCAA conclusion that all restraints in such networks require rule of reason treatment because joint activity is needed to deliver product at all. See, e.g., *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010); *O'Bannon v. NCAA*, 802 F.3d 1049, 1064 (9th Cir. 2015), cert. denied, 137 S. Ct. 277 (2016); *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004) (holding "extensive market and cross-elasticity analysis is not necessarily required" under an abbreviated analysis but refusing to apply an abbreviated analysis because of lack of experience with the product market in question); *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (affirming application of a "quick look" rule of reason analysis); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992) (applying a "'quick look' version of the Rule of Reason" to an agreement among owners of NBA teams limiting broadcast rights to NBA games); *United States v. Apple, Inc.*, 791 F.3d 290, 321 (2d Cir. 2015), cert. denied, 136 S. Ct. 1376 (2016) (noting the need to balance is an element of rule of reason cases); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 273 (3d Cir. 2012) (suggesting that creation of price-cost tests in exclusive discounting cases was an effort at "balancing of the procompetitive justifications of above-cost pricing against its anticompetitive effects"); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) ("[...] Courts routinely apply a [...] balancing approach" requiring plaintiff to "demonstrate that the anticompetitive harm [...] outweighs the procompetitive benefit"); *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 789 (9th Cir. 1996) (rule of reason requires a showing that "the restraint is unreasonable as determined by balancing the restraint and any justifications or pro-competitive effects of the restraint"); see also *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 486-487 (1992) (Scalia, J., dissenting) (stating the difference between the rule of reason and the per se rule is that the former requires balancing). *Contra United States v. Am. Express Co.*, 838 F.3d 179, 194 (2d Cir. 2016); *Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017) (Second Circuit's requirement of "net harm" in a case involving a two-sided market would require balancing as early as plaintiff's prima facie case). According to our opinion after studied the cases above we could say that a better way to view balancing is as a last resort when the defendant has offered a procompetitive explanation for a prima facie anticompetitive restraint, but no less restrictive alternative has been shown. At that point the basic burden-shifting framework has gone as far as it can. The court must then determine whether the anticompetitive effects made out in the prima facie case are sufficiently offset by the proffered defense. Even here, a hard look at the quality of the evidence is important. The court needs to make sure that the market is well defined, with convincing evidence of power, and that the threat of higher prices or anticompetitive exclusion is clear. The same thing is true of evidentiary support for the offered justification. Hopefully, few cases will survive this hard look and still require balancing, although the possibility cannot be excluded. For analysis see also: J.W. MARKHAM. *Sailing a sea of doubt: A critique of the rule of reason in U.S. antitrust law*. In: *Fordham Journal of Corporate & Finance Law*, 17, 2012, p. 594 *et seq.* J.L. CONTRERAS. *The cambridge handbook of technical standardization law*, *op. cit.*; R.S. MARKOVITS, *Economics and the interpretation and application of U.S. and E.U. antitrust law*, *op. cit.*

⁷² Decision of the European Commission of 19 June 2013, *Lundbeck*, COMP/AT. 39.226.

⁷³ See H. HOVENKAMP. *Anticompetitive patent settlements and the Supreme Court's Actavis decision*. In: *Minnesota Journal of Law Sciences & Technology*, 15, 2014, p. 6 *et seq.* K.R. O'ROURKE; J. SALLET K.

between several generators manufacturers, including Actavis (then Watson Pharmaceuticals), who undertook not to sell the generic version of a drug called *AndroGel* until August 2015. The Supreme Court, in analyzing the contested sentence, instead considered that the judgment of the minor courts, which would have omitted to examine the anti-competitive effects, was unacceptable. According to the Supreme Court, the abandonment of the rule of reason in favor of an assumption-based analysis can, in fact, only be justified when even an observer with elementary knowledge of economics can conclude that the agreement in question would have anticompetitive effects on the market. Given the complexity of the case under consideration, in which the interests protected by federal antitrust rules had to be balanced with those protected by patent laws, the Supreme Court decided to refer the matter back to the Court of Appeals for the Eleventh Judicial Circuit to proceed to a more in-depth evaluation, applying the rule of reason.

Just two days after the ruling of Supreme Court, the EC has sanctioned the pharmaceutical company Lundbeck and other companies producing generic drugs for an agreement similar to that of the newly described *Actavis* case. (W. CHOI; B. DEN UYL & M. HUGHES, 2014, p. 46 *et seq.*; O. ZAFAR, 2014, p. 208 *et seq.*) Also on this occasion, in fact, the pharmaceutical company that holds the patent for an antidepressive, Citalopram, has signed an agreement with some generators to prevent them from entering the market with the generic version of the drug in exchange for the payment of around 10 million euros. In order to evaluate the anti-competitive potential of the agreement among pharmaceutical companies, the EC has taken into consideration the same factors on the basis of which the Supreme Court has adopted its decision, namely: i) the ability of producers of generic being potential competitors of Lundbeck; ii) the limit imposed on producers not to enter the market for the duration of the agreement; iii) the loss of incentives for producers to support the necessary efforts, in terms of research and development, to enter the market autonomously, having been shown that the sum paid by *Lundbeck* already corresponded to the potential gain that generators would have had successfully entering the market. (O. ZAFAR, 2014, p. 208 *et seq.*)

As in the *Actavis* case, the complexity of the story has also led the EC to consider an analysis that takes into account the legal and economic context, and therefore refuses to

ROBSON & FTC V. Actavis: Reconciling conflicts in rule of reason. In: *LexisNexis Advance* 7/2013. R. A. SAMP. The role of State antitrust law in the aftermath of Actavis. In: *Minnesota Journal of Law Sciences & Technology*, 15, 2014, p. 152 *et seq.*

automatically bring the agreement in question to a restriction by object pursuant to art. 101.1 TFEU. (W. CHOI, B. DEN UYL, M. HUGHES, 2014, p. 46 *et seq.*)

7. OBSERVATIONS ON THE EXISTENCE OF A EUROPEAN RULE OF REASON IN RELATION TO THE PRINCIPLE OF LEGAL CERTAINTY

It is considered necessary to share the approach of EC⁷⁴ and CJEU,⁷⁵ which have denied on several occasions the equation between art. 101 par. 3 and the rule of reason. If, in fact it is true that, the Community jurisprudence has shown a flexibility in the application of art. 101 such as to allow the justification of apparently anti-competitive agreements, such flexibility can not be interpreted as a legitimation of the existence of a rule of reasonableness in Community competition law. The aforementioned approach fits rather into an assessment that goes beyond the mere economic analysis of the effects, also including aspects of a public nature unknown to the traditional US rule of reason.

With respect to the doctrine, in light of the *Actavis* and *Lundbeck* judgments, it is necessary to recognize the validity of the arguments of those (M. MARQUIS, 2007, p. 44 *et seq.*; B. ROBERTSON, 2007, p. 262 *et seq.*; E. STEINDORFF, 1984, p. 649 *et seq.*) who

⁷⁴ In the White Paper on the modernization of the rules for the application of Articles 85 and 86 of the EC Treaty, published in the Official Journal no. C 132 of 12/05/1999 p. 0001, the Commission declares that it does not see in the rule of reason a solution to the enforcement problems linked to art. 85 EC. Having introduced an assessment of the pro and anti-competitive aspects does not mean that we can go further, since “more systematically, within the framework of Article 85 (1), an analysis of the pro- and anti-competitive aspects of a restrictive understanding would in fact lead to the deletion of its content paragraph 3 of the same article and only a revision of the treaty could introduce such a change. It would be at least paradoxical to deprive Article 85 (3) of its substance, where that provision actually contains all the elements of a “principle of reasonableness”.

⁷⁵ See, T-112/99, *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v. Commission of the European Communities* of 18 September 2001, ECLI:EU:C:2001:215, II-02459. The General Court, in denying the existence of a rule of reason in Community competition law, states that “in several judgments the Court and the Tribunal have been concerned with indicating the dubious nature of the existence of a rule of reasonableness in Community law in competition matters (CJEU, C-235/92 P, *Montecatini v. Commission* of 8 July 1999, ECLI:EU:C:1999:362, I-04539, par. 133 (“even admitting that the “rule of reason” plays a role in the art. 85, n. 1 of the Treaty”); T-14/89, *Montedipe v. Commission* of 10 March 1992, ECLI:EU:C:1992:36, II-01155, par. 265, and T-148/89, *Tréfilunion v. Commission* of 6 April 1995, ECLI:EU:C:1995:68, II-01063, par. 109). It would also be difficult, according to the judge's reasoning, to reconcile the existence of this interpretative criterion with the normative structure of art. 85 EC, which “explicitly provides, under n. 3, the possibility of exempting restrictive agreements in the field of competition if they meet a certain number of conditions, in particular when they are essential for achieving certain objectives and do not give companies the possibility of eliminating competition in respect of a substantial part of the products exam. Only in the precise context of this provision can a weighting be made of the pro- and anti-competitive aspects of a restriction (in this sense see, C-161/84, *Pronuptia Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis* of 28 January 1986, ECLI:EU:C:1986:41, I-00353, par. 24; T-17/93, *Matra Hachette v. Commission* of 15 July 1994, ECLI:EU:C:1994:89, II-00595, par. 48, art. 85, n. 3 of the Treaty would lose much of its useful effect if such an examination were to be carried out under Article 85, n. 1 of the Treaty. P. MANZINI. The european rule of reason-Crossing the sea of doubt. In: *European Competition Law Review*, 23, 2002, p. 392-399. O. ODUDU. A new economic approach to Artilec 81(1)? In: *European Law Review*, 6, 2002, p. 100-105.

explicitly recognize the influence that the doctrines of the rule of reason and per se rule (E. ELHAUGE, 2016, p. 464 *et seq.*) have had on the EU antitrust law, even though they did not reach the point to define art. 101.3 TFEU as an example of a European rule of reason.

The same tendency of the EC to expand the number of the so-called safe harbors, or those categories of agreements that are presumed to be legal in themselves and, consequently, exempt from the prohibition under art. 101, paragraph 1, TFEU,⁷⁶ very closely resembles the category of per se permission developed and applied overseas.

It should not, however, be forgotten that there are significant differences between the European system and the US, starting from the fact that Section 1 of the Sherman Act does not provide a list of behaviors deemed anti-competitive similar to that of article 101.1, nor does it provide for a system of exemptions such as the one referred to in art. 101.3. (A. ITALIANER, 2013, p. 4 *et seq.*) It seems, therefore, difficult to talk about a European rule of reason, because, for the purposes of the application of art. 101 TFEU, the analysis of the agreements never goes so far as to balance the pro and anti-competitive effects, regardless of whether they are restrictions by object or effect. (R. SCHÜTZE & T. TRIDIMAS, 2018) Moreover, unlike the provisions of the per se rule, art. 101.1 TFEU does not provide for hypotheses in which any restrictions are deemed automatically and necessarily unlawful, since such cases could still possibly be exempted as per paragraph 3.

If, on the one hand, it is inevitable to find in the judgments of the European judge some analogies with the American methods of evaluation of the agreements, it does not seem correct to classify the restrictions “by object” and “by effect” ex art. 101 TFEU (R. SCHÜTZE & T. TRIDIMAS, 2018) as mere transpositions of the doctrines per se rule and rule of reason. These parameters may in fact have represented a starting point for the European antitrust legislation, but have been further developed and adapted in line with the characteristics of the Community market, through a system of analysis of the agreements altogether different from that of overseas.

⁷⁶ This approach was adopted by the Commission with the Guidelines on the application of Article 81 (3) of the Treaty and, subsequently, with two different regulations in order to offer companies the requisite legal certainty by introducing an explicit exemption for certain categories which can be presumed, by virtue of their characteristics, which comply with the conditions set out in Article 101 (3) of the Treaty. This is the Regulation (EU) n. Commission Regulation (EC) No 1218/2010 of 14 December 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements published in OJ L 335, 18.12.2010, p. 43-47 and of the Regulation (EU) n. Commission Regulation (EC) No 1217/2010 of 14 December 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreement published in OJ L 335, 18.12.2010, p. 36-42.

In particular, the system of exemptions referred to in paragraph 101.3 has gone so far as to simply allow an assessment of the agreement in terms of economic efficiency, but also in terms of protection of public interests. It therefore seems out of place to try to bring the valuation methods of art. 101 TFEU with those of the *per se* rule and rule of reason, since these are different legal systems that have developed different approaches that better respond to the needs of the relevant market. Given, therefore, that it does not seem correct to talk about the European rule of reason in relation to art. 101, (R. SCHÜTZE & T. TRIDIMAS, 2018) it is however evident that the approach followed by the EC and from CJEU in evaluating restrictive agreements by effect provides few firm points to companies wishing to direct their conduct in advance in order to avoid antitrust penalties. The use of an economic analysis of the effects of the cartel is, in fact, both essential and problematic from the point of view of compliance with the principle of legal certainty. In conclusion, it is hoped that the economic models used in this type of analysis will be better defined and so that companies can have more certain parameters to be able to assess *ex ante* the possible illegitimacy of their conduct.

8. THE INTERPRETATION OF LEGAL CERTAINTY BY REFERENCE FOR A PRELIMINARY RULING: THE CASE/PROBLEM OF THE ARBITRATORS

If the preliminary ruling by the judges of ordinary or administrative courts does not pose particular problems, the more complex is the case in which it is an arbitrator or an arbitration body to want to appeal to the CJEU pursuant to art. 267 TFEU. (T. OPPERMANN, C.D. CLASSEN & M. NETTESHEIM, 2016) Despite the fact that the CJEU has already on several occasions expressly stated that the referee is not recognized the possibility of making a reference for a preliminary ruling,⁷⁷ this approach is still the subject of a heated debate in doctrine especially by those who criticize the reasoning by which Court concludes that it denies this authorization. (W.P. GORMLEY, 1968, p. 552 *et seq.*; G. BEBR, 1985, p. 490 *et seq.*; X. DE MELLO, 1982, p. 392 *et seq.*; M. FRIEND, 1983, p. 358 *et seq.*; L. IDOT, 1996, p. 562 *et seq.*; G. CHABOT, 2005, II, p. 10079; H. VAN HOUTTE, 2005, p. 432 *et seq.*; M. OLIK & D. FYBACH, 2011; S.H. ELSING, 2013, p. 46 *et seq.*)

⁷⁷ CJEU, C-102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, of 23 March 1982, ECLI:EU:C:1982:107, I-01095; C-393/92, *Gemeente Almelo and Others v. Energiebedrijf Ijsselmij* of 27 April 1994, ECLI:EU:C:1994:171, I-1477; C-125/04, *Guy Denuit and Betty Cordenier v. Transorient-Mosaïque Voyages et Culture SA* of 27 January 2005, ECLI:EU:C:2005:69, I-00923.

The consequences of the non-recognition of this possibility by the CJUE are significant if we consider the close link between the arbitration and the European Union law and the increasingly frequent use of this method of resolving disputes in commercial transactions due to the ever increasing influence that European Union law has on commercial operations. (C. BAUDENBACHER & I. HIGGINS, 2002, p. 16 *et seq.*)

The risk is, therefore, that this approach impedes a uniform application of the principle of legal certainty within the common market, since a significant number of decisions binding on the parties, such as those issued by the arbitrators. According to art. 267 TFEU, which regulates the request for preliminary ruling before the CJEU (R. BARENTS, 2009; B. MORTEN & F. NIELS, 2014) in order to guarantee a uniform interpretation and application of EU law, art. 267 TFEU confers to the jurisdiction of the Member States the possibility of turning to the CJEU for the latter to rule i) on the interpretation of the Treaties and ii) on the validity and interpretation of the acts carried out by the institutions, bodies or bodies of the Union. The main problem related to the scope of this rule is the vagueness of the term “jurisdiction” and, therefore, the uncertainty as to which courts are actually entitled to make the reference for a preliminary ruling. (B. MORTEN & F. NIELS, 2014)

In the *Vaassen* sentence,⁷⁸ the CJEU established the criteria for the first time in the light of the interpretation of this term, indicating the characteristics that a body must have in order to be considered a jurisdiction under article 267 TFEU. (B. MORTEN & F. NIELS, 2014) The CJEU referred in particular to the admissibility of the reference for a preliminary ruling by the *Scheidsgerecht van het Beambtenfonds voor her Mijnbedrijf*, the arbitral court in charge of settling disputes relating to social security in the Netherlands. On that occasion the CJEU affirmed that even legal bodies other than ordinary courts, such as an arbitration court, can make a preliminary reference if the following conditions are met: i) are established by law, ii) are permanent organs, iii) their jurisdiction is obligatory, iv) they apply norms of law and vi) they are independent.⁷⁹ On the basis of these criteria, the *Scheidsgerecht van het*

⁷⁸ CJEU, C-61/65, Sig.ra G. Gæbbels, vedova Vaassen v. Beambtenfonds voor het Mijnbedrijf of 30 June 1966, ECLI:EU:C:1966:39, I-00408.

⁷⁹ CJEU, order: C-49/13, MF 7 a.s. v. MAFRA a.s., of 14 November 2013, ECLI:EU:C:2013:767, published in the electronic Reports of the cases. According to settled case-law, in order to assess whether the remitting body possesses the characteristics of a” jurisdiction “within the meaning of Article 267 TFEU, a matter which is relevant only to EU law, the Court takes into account a number of elements such as legal origin of the body, its permanent nature, the binding nature of its jurisdiction, the contradictory nature of the proceedings, the fact that the body applies legal rules and that it is independent. In particular see, C-54/96, Dorsch Consult of 17 September 1997, ECLI:EU:C:1997:413, I-04961, par. 23; del 31 maggio 2005, C-

Beambtenfonds voor her Mijnbedrijf was considered in all respects a court pursuant to art. 267 TFEU, since it was constituted by a Dutch law, its jurisdiction is obligatory for the parties, is a permanent body and applies legal rules. (B. MORTEN & F. NIELS, 2014)

Following this same approach, the CJEU declared on other occasions the request for a preliminary ruling by jurisdictions other than ordinary courts. In the *Broekmeulen* decision,⁸⁰ the CJEU accepted the reference for a preliminary ruling from the Netherlands Commission of the complaints concerning generic medicine, using the conditions identified in the *Vaasseen* sentence.⁸¹ The Committee, in fact, was established with the consent and cooperation of the Dutch public authorities, provide for a procedure that takes place in respect of the adversarial between the parties and the decision is binding and final. Equally admissible were references for preliminary rulings made by an arbitration board responsible for resolving disputes between the parties to collective agreements stipulated between employers and workers organizations⁸² and by an independent office called Immigration adjudicator.⁸³

On the contrary, the CJEU has not recognized the status of jurisdiction pursuant to art. 267 TFEU compared to some administrative authorities: this is the case of the *Amtsgericht Heidelberg*, a local court responsible for keeping commercial records. According to the CJEU, at the time of the reference for a preliminary ruling there was no appeal pending before the *Amtsgericht* between the parties, a circumstance which contributes to the status of a non-judicial body but merely an administrative one.⁸⁴ Similarly, the preliminary reference by the

53/03, *Syfait and others* of 31 May 2005, ECLI:EU:C:2005:333, I-04609, par. 29; C-246/05, Häupl of 14 June 2007, ECLI:EU:C:2007:340, I-04673, par. 16; C-394/11, *Belov* of 31 January 2013, ECLI:EU:C:2013:48, published in the electronic reports of the cases, par. 38). See also: C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH* of 17 September 1997, ECLI:EU:C:1997:413, I-04961; C-516/99, *Berufungssenat V der Finanzlandesdirektion für Wien, Niederösterreich und Burgenland v. Austria* of 30 May 2002, ECLI:EU:C:2002:313, I-04573.

⁸⁰ CJEU, C-246/80, *C. Broekmeulen v. Huisarts Registratie Commissie* of 6 October 1981, ECLI:EU:C:1981:218, I-02311.

⁸¹ As we can see in the same spirit in the case: C-448/8, *Münchener Hypothekenbank* of 6 September 2018, ECLI:EU:C:2018:770, not published.

⁸² CJEU, C-109/88, *Handels-og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening* of 17 October 1989, ECLI:EU:C:1989:383, I-03199.

⁸³ CJEU, C-416/96, *Nour Eddline El-Yassini v. Secretary of State for Home Department* of 2 March 1999, ECLI:EU:C:1999:107, I-01209.

⁸⁴ CJEU, order C-86/00, *Amtsgericht Heidelberg v. Germany* of 10 July 2001, ECLI:EU:C:2001:394, I-05353. In the same spirit of orientation also in the next case: C-134/97, *Victoria Film A/S v. Sweden* of 12 November 1998, ECLI:EU:C:1998:535, I-07023: It should be borne in mind that it follows from settled case-law that national courts can refer the matter to the Court only if a dispute is pending before them and if they have been called upon to adjudicate in a procedure intended to result in a judgment of a judicial nature (see order, C-318/85, *Greis Unterweger* of 5 March 1986, ECLI:EU:C:1986:106, ECR 00955, par. 4; C-111/94, *Job Centre* of 19 October 1999, ECLI:EU:C:1999:340, I-03361, par. 9).

Bezirksgericht Bregenz, an Austrian registry office whose job it was simply to verify the correspondence of the requirements for the registration of trademarks and patents, without having any jurisdictional function was not considered to be admissible.⁸⁵

9. (FOLLOWS) REFERENCE FOR A PRELIMINARY RULING BY ARBITRATION COURTS

The CJEU attributes to the character of mandatory jurisdiction in order to consider satisfied the requirements of art. 267 TFEU. (R. SCHÜTZE & T. TRIDIMAS, 2018) This feature was used by the CJEU to assess the admissibility of a reference for a preliminary ruling also with reference to the arbitral tribunals.

In the *Nordsee* sentence,⁸⁶ ruling, the most significant on the subject, the CJEU stressed that when an arbitral tribunal is established and regulated by statutory norms it assumes a role much more similar to that played by ordinary courts, thus being able to fall within the notion of jurisdiction under art. 267 TFEU. If, on the contrary, there is no obligation, in fact or in law, for the parties to bring proceedings before the arbitral tribunal, but this choice depends only on a private agreement that does not involve public

⁸⁵ However, even if there are elements in this case which could suggest that *Skatterättsnämnden* exercises a judicial function, in particular the status of independence conferred upon it by its establishment by law and the power to issue decisions of a binding nature by applying the rules of law, other elements they lead to the conclusion that it basically plays an administrative role. “Since it is not in charge of making any decision with regard to *Victoria Film* but having to limit itself to issuing an opinion, the *Skatterättsnämnden* must be regarded as a body with exclusively administrative functions. See, C-178/99, *Bezirksgericht Bregenz v. Austria* of 14 June 2001, ECLI:EU:C:2001:331, I-04421.

⁸⁶ CJEU, 102/81, “*Nordsee*” *Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* of 23 March 1982, ECLI:EU:C:1982:107, I-01095. The commercial arbitration, in fact, originates in a contract and is aimed at resolving a dispute arising on the same; the involvement of the public authority is absent and the parties do not have an obligation-either in law or in fact-to refer the matter to the arbitrators, if not once they have agreed to insert the arbitration clause. It is considered that the tendency of the CJEU to exclude the postponement by courts of commercial arbitration is justified, in addition to the absence of the criteria mentioned above, also in light of the fact that, while excluding the postponement, the protection of the right Union is simply “delayed” in the sense that it can be guaranteed at the appeal stage. In this regard, the *Eco swiss* judgment states that: “the arbitrators, unlike a national court, cannot ask the CJEU to give preliminary rulings on matters relating to the interpretation of EU law. Now, the European legal order has manifestly an interest, in order to avoid future divergences of interpretation, to ensure a uniform interpretation of all the provisions of EU law, regardless of the conditions in which they will be applied [...] EU requires that questions concerning the interpretation of the prohibition set forth in art. 85, n. 1 of the Treaty can be examined by the national courts called to rule on the validity of an arbitration award and may be the subject, if necessary, of a reference for a preliminary ruling before the CJEU [...]”, sentence: *Eco Swiss*, op. cit., par. 40. See also: CJEU, C-377/13 *Ascendi Beiral Litoral* of 12 June 2014, ECLI:EU:C:2014:1754, published in the electronic Reports of the cases, parr. 97-98. The *Ascendi Beiral Litoral* cases-which decided that tribunals in legally mandatory arbitration have the possibility of referring issues of EU law interpretation to the CJEU for a preliminary ruling-cannot be transposed to investment arbitration tribunals. For details see: R. CARANTA, G. EDELSTRAM & M. TRYBUS. *European Union public contract law: public procurement and beyond*. Bruxelles: Bruylant, 2013.

administrations, the CJEU excludes that in this context the preliminary reference may be declared admissible. The same interpretative approach was taken up later in the *Eco Swiss*⁸⁷ decision, in which the CJEU reaffirmed that “the arbitrators, unlike a national judge, can not ask the Court to give preliminary rulings on matters relating to the interpretation of European law” (R. SCHÜTZE & T. TRIDIMAS, 2018) and in the *Denuit* sentence, in which the concept was once more reiterated that “since, in the case in the main proceedings, there is no obligation, either in law or in fact, to entrust the resolution of their disputes to arbitration and because public authorities of the Member State concerned are not involved in the choice of the way of arbitration, the *Collège d'arbitrage de la Commission de Litiges et Voyages* can not be considered national jurisdiction of a Member State under article 234 EC”.⁸⁸ In the specific case of arbitration in relation to investments, it is questioned whether the arbitration investment courts can make the reference referred to in art. 267 TFEU, considering that this duty-faculty was excluded for the commercial arbitration courts. This is supposed, in light of the fact that the arbitration in the matter of investments - unlike commercial arbitration-

⁸⁷ The CJEU has specified its position in the *Mostaza Clara* case when it was adjudicated to decide whether the National Court could determine whether the contested award was contrary to European public policy, although in the arbitration proceedings this exception had not been raised. On this point, the CJEU held that: “[...] the need for effectiveness of the arbitration proceeding justifies the fact that the control of arbitration awards is of a limited nature, and that the annulment of an award can be obtained only in exceptional cases [...]”, par. 34, case: C-168/05, *Mostaza Claro* of 26 October 2006, ECLI:EU:C:2006:675, I-10421. In its argument the CJEU confirms that the exception of European public order cannot be abused, with the risk of reducing the effectiveness of the prizes; however, this exception can be accepted when the appeals courts would accept it in order to avoid a violation of the national and European public order. In other words, the exception of public order also takes *ex officio*, when it concerns a violation of the legal system in which the award must be recognized. Inevitably, both the national public order and the European public order fall under the orders of a Member States. On this point, in the case of *Eco Swiss*, the CJEU ruled that: “[...] it should also be noted that the need for effectiveness of the arbitration procedure justifies the fact that the control of arbitral awards is of a limited nature and that an arbitration award can be declared void or the recognition is denied only in exceptional cases [...]”, case: C-126/97, *Eco Swiss* of 1st June 1999, ECLI:EU:C:1999:269, I-3055, par. 35. In the case of *Eco Swiss China*, the CJEU has declared a progressive tendency towards “communitarization of public order, which should find further moments of development also through the jurisprudence of the ECtHR”. The necessary application rules have been variously defined. According to the traditional approach: “with the exception of the necessary application rules are identified those substantially functional substantive rules aimed at safeguarding the political, social and economic organization of the State of the forum [...] it is self-limited rules as their field of application is established, unilaterally, by the state order of which they are expressed [...]”. According to Audit: “[...] on parle de lois de police pour designer le mécanisme Member States d’application d’une règle interne à une situation internationale en fonction de sa volonté et indépendamment de sa désignation par une règle de conflit”. B. AUDIT *Droit International privé*, LGDG, Paris, 2008, pp. 97. The necessary rules of application can have both a state and a supranational origin (*Buxelles Convention* 1974, *The Hague Convention*, 1978) and be linked to third-type sources (European Court of Justice, UN). See also: M. LÓPEZ-GALDOS. Arbitration and competition law. Integrating Europe through arbitration. In: *Journal of European Competition Law & Practice*, 7 (6), 2016, p. 384 *et seq.*

⁸⁸ CJEU, C-125/04, *Guy Denuit and Betty Cordenier v. Transorient-Mosaique Voyages and Culture SA* of 27 January 2005, ECLI:EU:C:2005:69, I-00923, par. 16. R. WHISH & D. BAILEY. *Competition law*. Oxford: Oxford University Press, 2012.

presents such peculiarities that could make it one of the jurisdictions for which the reference for a preliminary ruling as per art. 267 TFEU. (J. USHERWOOD & S. PINDER, 2018) More specifically, in the arbitrations now under discussion, questions relating to public law are raised-often, in fact, the conduct of a Member State is the subject of the dispute. These arbitrations, then, have their source in an international agreement concluded between two States and, also for this reason, the involvement of public authorities is clear. However, it does not appear that the public and non-private character, vice versa typical of commercial arbitrations, is sufficient to suggest that the arbitration boards in the field of investment are recognized powers, excluded from those that regulate a dispute in commercial matters. In favor of this conclusion, the jurisprudential interpretation of art. 267 TFEU (A. KACZOROWSKA-IRELAND, 2016) and, in particular, the concept of “court of a Member State” referred to by that provision. On the concept of belonging to a state legal system, the CJEU has established a series of conditions in the presence of which a court belongs to the national legal system.

Although the position taken by the European judge seems to be clear, as will be better explained in the following paragraph, it is recognized by some as the possibility of “circumventing” the refusal to carry out the preliminary ruling by reminding the so-called golden bridge, (S.H. ELSING, 2013, p. 50 *et seq.*) which consists of the examination of the preliminary questions by the national courts both in the revision of the arbitration award and by providing assistance to the arbitrators during the proceedings. It would therefore be a matter of indirectly appealing to the CJEU on the most problematic issues concerning the law of the European Union.

It emerges from the jurisprudence of the CJEU that only in very circumstantial cases the reference for a preliminary ruling from an arbitral tribunal was declared admissible, whereas in most cases, when the resolution of the disputes by an arbitrator is the result of a discretionary choice by the parties, this authorization is denied. This approach of the CJEU is still debated in doctrine among those who favor this interpretation (G. BEBR, 1985, p. 489 *et seq.*; M. SCHWAIGER, 2007, p. 304 *et seq.*) and who, on the contrary, provide arguments to support a different conclusion. (M. BENEDETTELLI, 2011, p. 584 *et seq.*)

The main arguments supporting the position of the CJEU concern i) the literal interpretation of article 267 TFEU; ii) the risk of an excessive increase in the Court's workload; iii) the risk of manipulation of the preliminary reference instrument and, finally, iv) the risk of eliminating the characteristics of effectiveness and speed of the arbitration. (A.

KACZOROWSKA-IRELAND, 2016)

As regards the first observation, this was proposed by the British Government in the *Nordsee* case relying on the fact that the language used in article 267 TFEU⁸⁹ refers exclusively to jurisdictions officially recognized by the Member States, thus excluding those courts, such as arbitration, established through private agreements.

The second argument is based on the concern that, declaring admissibility references from arbitrators also admissible, the CJEU finds itself having to cope with an excessive number of requests, also due to the lack of knowledge of the EU law by the referees which, as is well known, do not necessarily have to be lawyers or jurists. (S.H. ELSING, 2013, p. 52 *et seq.*) Advancing this fear was the Advocate General Reischl in the aforementioned *Nordsee* case, who said that “we must consider the risk of a workload, difficult to assess, for the CJEU that in this way would be distracted from their duties principal, in favor of private disputes that are often of minor importance [...]”. (R. CARANTA, G. EDELSTRAM & M. TRYBUS, 2013)

A further argument in favor of the refusal to grant a preliminary ruling by the arbitrator concerns the fact that, since the parties have more control over the proceedings before the arbitrator than the one established before ordinary courts, they could decide to end it only to avoid being bound by the decision of the CJEU if the outcome was not what they had hoped. (M. SCHWAIGER, 2007, p. 307 *et seq.*)

Finally, it was highlighted how the procedure pursuant to art. 267 TFEU before the CJEU can last for years and may not guarantee an adequate level of confidentiality, thus undermining those characteristics of arbitration that in most cases encourage the parties to opt for that solution rather than establish a judgment before the ordinary judge. (S.H. ELSING, 2013, p. 54 *et seq.*)

These arguments have not convinced that part of the academic community that, on the contrary, believes that even the arbitrators chosen contractually by the parties should be able to sue the Court pursuant to art. 267 TFEU. Indeed, it has been pointed out that in arbitrations concerning international trade law, arbitration is often not a free choice of the parties but rather an almost obligatory choice. Therefore, ensuring compliance with EU law in

⁸⁹ In the same spirit see, C-393/92, *Gemeente Almelo et al. v. NV Energiebedrijf Ijsselmij* of 27 April 1994, ECLI:EU:C:1994:171, I-1277, “[...] it follows from the principles of the primacy of Community law and of its uniform application, in conjunction with Article 5 of the Treaty, that a court of a Member State to which an appeal against an arbitration award is made pursuant to national law must, even where it gives judgement having regard to fairness, observe the rules of Community law, in particular those relating to competition law [...]”.

an ever-increasing number of arbitration decisions binding on the parties becomes crucial.

With respect to the risks of an excessive workload for the CJEU or that the parties do not follow the decision of the CJEU interrupting the proceedings before the arbitrator considering it decisive from the moment the objections could be raised also in relation to the references for preliminary rulings raised by ordinary courts when they act in support of the arbitral tribunals or in the review of the decisions.

In fact, the hypothesis of using the so-called “golden bridge” as an alternative for the referees to indirectly resort to the CJEU does not convince. In this way, in fact, the possible problem of a greater workload for the CJEU would be simply postponed, thus causing a waste of time and resources. Moreover, this mechanism presupposes that the procedural rules of the Member States provide for the possibility for arbitrators to seek assistance from ordinary courts, as happens for example in the German system, otherwise there is no real alternative to the preliminary ruling regulated by art. 267 TFEU. (R. SCHÜTZE & T. TRIDIMAS, 2018) The relevance attributed to the private nature that distinguishes the choice of arbitrators by the parties and, consequently, to the absence of statutory norms that regulate the procedure (S.H. ELSING, 2013, p. 56 *et seq.*) is also called into question: in many Member States, in fact, the possibility of Arbitration tribunal in place of an ordinary judge is provided for by codified rules that authorize the arbitrators to issue rulings with effects similar to those of ordinary court rulings.

In conclusion, the arguments supporting the traditional CJEU approach do not fully convince, contrary to the more pertinent need to contribute to the correct and uniform application of the principle of legal certainty. It may therefore be more worthwhile to extend the time limit for the arbitration to have a decision that respects the principle of legal certainty, and more generally the law of the European Union, given the increasingly widespread use of operators and commercial investors to this method of resolving disputes within the single market. It is therefore hoped that the CJEU will review its approach in the sense of allowing even the arbitrators contractually appointed by the parties to raise questions for a preliminary ruling pursuant to art. 267 TFEU. (R. SCHÜTZE & T. TRIDIMAS, 2018)

10. CONCLUDING REMARKS

Precisely the stability of the market constitutes the objective of protecting legal certainty. The identification of the legal value of legal certainty. What was controversial was

the coordination of the same principle with respect to the other norms of primary law.

The identification of proportionality, as a criterion for applying legal certainty, as a general principle of European Union law, has led to the identification of the concrete forms of protection of the stability of the legal and economic framework. Consequently, the same legal treatment of protection against foreign investors whose investment risks being frustrated by unforeseen and/or unpredictable interventions by Member States, must now be recognized also by companies that only operate within the National territory. In any case, it will be fundamental to balance the aforementioned legal certainty with the additional general requirements that underlie the adoption of the authoritative measures: the suitability to achieve the public goal and the impossibility of adopting less invasive measures they constitute the two parameters of detail that allow to respect proportionality and, therefore, to consider legitimate the intervention of the State in the market. On the contrary, the certainty of the law is different in relation to the phase of execution of economic activities. If, in fact, the competition law seems to guarantee the freedom of companies also by the undue intrusion of public administrations, as well as by abuses, the same rules discount certain differences in the jurisprudential application that oscillate between the definition of the strict prohibition of conduct and agreements between companies up to the evaluation of the reasonableness of the same with respect to the further objectives of a public nature: also in this case, the CJEU even if it has never recognized a complete application of the US rule of reason, has led to the application of a sort of proportionality adapted to the requirements of protection of competition. In this way, agreements are justified between companies, concerted practices or abuses of a dominant position that result in the benefiting of consumers or of better protection of further publicity needs that must be balanced with free competition.

In any case, whether it is access to the market or protection of competition, legal certainty remains an absolute prerogative for companies that needs constant balancing with the further provisions of the Treaties. The national judges are called to the material exercise of reconciliation, which, through the examined procedural instruments, can directly apply the principles set out in the body of work and provide an effective protection to companies whose rights have suffered a compression.

There remains, however, a large limit to the effectiveness of legal certainty: its European source means that its direct application can only be invoked in matters falling within the scope of European Union law.

In the EU, although there has recently been a greater acceptance that article 101,

article 102 TFUE⁹⁰ and merger analysis (D. LIAKOPOULOS, 2010) should converge around a single analytical framework based on uniform concepts, it has been seen that the system governing agreement in fact continues to rely much more heavily on presumptions of both illegality and legality than in the US and in the EU's own dominance and merger frameworks. In consequence, few agreement cases exist in which a balancing of actual or likely restrictions on parameters of competition against efficiencies is actually required. Our analysis proposes that EU decision-takers should become more willing to analyse whether theory, experience and especially context justifies a finding that an agreement is restrictive by object. Up until now, they have been more disposed to have regard to experience and context as a mechanism for expanding the by object category than as a means of narrowing it. To ensure that the object category is not overinclusive, it is essential that it be confined to agreements demonstrating a high likelihood of anticompetitive effects (capability, potential or likelihood of anticompetitive is insufficient) and that it should not be applied in cases where the restraint on competition is not obvious.

If the breadth of the object category is more realistically limited, a claimant will more frequently be required to demonstrate restrictive effects (actual or likely) before the parties can be required to provide a robust justification of the efficiencies within article 101(3) TFUE. The EU administrative framework provides a flexible forum for the competing effects of agreements to be scrutinised and balanced. If the EC were to bring more effect cases, resources could be concentrated on developing the article 101 framework (rather than the limits of the by object category) and clarifying important issues such as the role of the EU ancillary restraints and objective necessity principles. Although these doctrines may have made sense in the pre-modernized era (and when getting an article 101(3) TFUE exemption for an agreement was frequently impractical) and make sense as characterization mechanisms,

⁹⁰ For analysis see: L. LOVDAHL GORMSEN. *A principled approach to abuse of dominance in European competition law*. Cambridge: Cambridge University Press, 2010; R. NAZZINI. *The foundations of European Union competition law: the objective and principles of article 102*. Oxford: Oxford University Press, 2011; R. O'DONOGHUE & J. PADILLA. *The law and economics of article 102 TFEU*. Oxford & Portland: Hart Publishing, 2013; P. NIHOUL. The ruling of the General Court in intel: Towards the end of an effect-based approach in European competition law? In: *Journal of European Competition Law & Practice*, 5, 2014, p. 52 *et seq.*; J. BOURGEOIS & D. WAELBROECK (eds). *Ten years of effects-based approach in EU competition law: State of play and perspectives*. Bruxelles: Bruylant, 2012; J. DREXL, W. KERBER & R. PODSZUN (eds). *Competition policy and the economic approach: Foundations and limitations*. Cheltenham: Edward Elgar Publishers, 2011; L. LOVDAHL GORMSEN. Are anti-competitive effects necessary for an analysis under article 102 TFEU? In: *World Competition*, 36, 2013, p. 224 *et seq.*; A. KACZOROWSKA-IRELAND. *European Union Law*. London & New York: Routledge, 2016; F. MARTUCCI. *Droit de l'Union Européenne*. Paris: LGDG, 2017; M. POIARES MADURO & M. WIND. *The transformation of Europe: twenty-five years on*. Cambridge: Cambridge University Press, 2017, p. 321 *et seq.*; A. MANGAS MARTÍN. *Tratado de la Unión Europea - Tratado de Funcionamiento*. Madrid: Marcial Pons, 2018.

they are harder to rationalise within a modernized framework which requires economic analysis at both the article 101(1) and article 101(3) TFUE stage of the assessment.⁹¹ Not only do the cases seem to miss some important steps in competition analysis but they appear to demand inquiries under article 101(1) TFUE which duplicate or overlap with analysis required in the process of applying article 101(3) TFUE.⁹²

We see a larger purpose for courts and antitrust enforcement agencies in the EU and the US to focus additional attention upon the framework for assessing restrictive agreements. Intense discussions about disparities in how the two jurisdictions treat unilateral conduct seem to eclipse important differences in the evolution of the essential tools for assessing concerted action. Mutual reflection on the different evolutionary paths could deepen understanding about possible doctrinal options and inform improvements in both regimes. This also could be the occasion for a broader examination of how experience across all of the shared areas of competition law-agreements, dominant firm conduct, and mergers-could guide the establishment of a unified analytical framework that ensures that the assessment of all forms of antitrust-relevant conduct is liberated from the need to place behaviour in certain historical categories and instead concentrates upon core concepts involving the presence of actual or likely anticompetitive effects and the existence of valid business justifications.

It may become clear at a subsequent stage that a standard-based approach more accurately captures the nature and the likely effects of the practice in question. This fact does not mean, however, that legal change is easy, even in the absence of a formal doctrine of *stare decisis*. By the same token, the fact that CJEU (and national Courts, too) stick to a particular line of case law cannot in any way be interpreted as meaning that judges are not familiar with contemporary debates. If there is something that stems from the analysis above, it is that EU courts have a very solid grasp of mainstream economics and have regularly displayed remarkable intuition about the logic behind corporate strategies. Adherence to a well-established precedent simply reveals that there are typically other factors at play when the convenience of overruling it is considered. The question is as a result far more complex in practice. Judges, regardless of the discipline, are routinely asked to rule in instances in which previous judgments sit at odds with each other. Refining doctrines and addressing contradictions between individual cases are essential tasks fulfilled by courts. Much could be

⁹¹ D. LIAKOPOULOS, *The regulatory autonomy in the EU and WTO after Lisbon Treaty and the need of reform of the EU Institutions for the commercial disputes*, op. cit.

⁹² R. SCHÜTZE, T. TRIDIMAS, *Oxford principles of European Union law*, op. cit.

gained-more, it is submitted, than what would be gained by sticking to precedent-if the two lines of case law Delimitis converged into the approach (standard-based) that is now known to be more appropriate and that has decidedly been endorsed by the CJUE in future. (D. LIAKOPOULOS, 2016)

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