

Vertical object restraints: Concurrence of wills, hardcore agreements and context in Case C-211/22 *Super Bock Bebidas*

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Abstract

Recently, the CJEU handed down an important ruling in *Super Bock Bebidas*, where it made three contributions to the case-law on vertical agreements and anti-competitive object. First, it revisited the question of vertical concurrence of wills, in particular the notion of tacit agreement. It held that it amounts to tacit acquiescence and, hence, it is an agreement, if the dealers comply with the producer's call; however, silence, in itself, implies no acceptance. Second, the Court addressed the status under Article 101(1) TFEU of restraints listed as hardcore in the block exemption regulations. It held that although the hardcore label may indicate serious competition concerns, it does not imply, at least not in itself, that the agreement is anti-competitive by object. Third, the Court clarified the role of context in object analysis and held that the legal and economic context has to be inspected also as to agreements that are specifically listed as anti-competitive by object in the case-law.

Keywords

Hardcore restrictions, Vertical agreement, Anti-competitive object, Resale price fixing, Legal and economic context

1. Introduction

Recently, the Court of Justice of the European Union (CJEU) handed down an important ruling in *Super Bock Bebidas*.¹ This was one of the rare cases where the Court adopted a preliminary ruling

1. Case C-211/22 *Super Bock Bebidas*, EU:C:2023:529.

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without the opinion of an advocate general (AG), indicating that it considered the matter to raise ‘no new point of law’.² Still, the ruling addressed some of the most important and controversial aspects of the law on vertical agreements and anti-competitive object and made important contributions to the case-law. This suggests that the Court considered these points to have been part of the jurisprudence and that the principles set out in the ruling do not add to, but simply clarify, the case-law. The lack of an opinion makes the interpretation of the ruling slightly more difficult, given that these opinions usually explore the factual, procedural and conceptual context of the decision. At the same time, it also guides the ruling’s interpretation: it is clear that the Court did not envisage departing from the existing judicial practice, and in particular it did not intend to overrule any parts of it; hence the ruling can be reconstructed only under the umbrella of the settled case-law.

The case emerged from a Portuguese court procedure concerning vertical resale price fixing. The CJEU addressed three key issues of Article 101. First, it revisited the question of vertical concurrence of wills, in particular the notion of tacit agreement. It held that it amounts to tacit acquiescence and hence it is an agreement if the dealers comply with the producer’s call; however, in the absence of a contractual provision to the contrary, silence, in itself, implies no acceptance. Hence the relevant question is whether the dealers’ conduct implies acceptance. Second, the Court addressed a long-standing uncertainty of interpretation concerning the status under Article 101(1) TFEU of restraints listed as hardcore in the block exemption regulations. For long, it has been debated whether the agreements designated as hardcore also qualify as anti-competitive by object. The Court held that these are distinct categories, notwithstanding the overlaps between them. A block exemption regulation’s hardcore label may indicate serious competition concerns; however, it does not necessarily mean that the agreement is anti-competitive by object. Third, the Court shed light on the role of context in object analysis and held that the legal and economic context has to be inspected also as to agreements that are specifically listed as anti-competitive by object in the case-law. The court clarified that the context of the agreement has to be inquired even if it concerns resale price fixing, which is generally anti-competitive by object.

2. Concurrence of wills in vertical agreements

The conception of vertical meeting of minds has seen a shift in the CJEU’s jurisprudence. Initially, the case-law featured an approach termed in this paper as ‘fictitious authorization’. A continuous business relationship was considered as authorizing the supplier to unilaterally determine the content of the vertical relationship. This implied that all the calls of the supplier could be treated as an agreement.³ The doctrine of fictitious authorization hallmarked the case-law until the end of the 90s. In the early 2000s, however, the CJEU overruled this case-law and replaced it with the idea that only real contractual authorization may turn the supplier’s unilateral decisions into an agreement and, failing this, the supplier’s call becomes part of the vertical agreement only if

2. Article 20(5) Statute of the Court of Justice of the European Union.

3. Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium SA and others v. Commission*, EU:C:1979:191, para. 28–30; Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission*, EU:C:1983:293, para. 38–39; Joined Cases 25-26/84 *Ford – Werke AG and Ford of Europe Inc. v. Commission*, EU:C:1985:340, para. 20–22; Case C-338/00 *Volkswagen v. Commission*, EU:C:2003:473, para. 64–65; Case C-277/87 *Sandoz prodotti farmaceutici SpA v. Commission*, EU:C:1990:6, para. 25; Case C 279/87 *Tipp-Ex v. Commission*, EU:C:1990:57.

it is positively accepted by the distributors. The key ruling was *Volkswagen II*,⁴ where the producer instructed its German dealers to limit the discounts offered. If reduced to an agreement, this would amount to resale price fixing, which is anti-competitive by object. The Commission based its case on the fictitious authorization theory and referred to the parties' 'continuous business relationship'.⁵ It did not inspect if the dealers actually complied with the producer's instruction. This omission proved to be fatal, as both the General Court⁶ and the ECJ rejected the notion of fictitious authorization and adopted a more demanding legal test termed in this paper as 'positive acceptance'.⁷

The CJEU held that the existence of an agreement may be based either on virtual authorization by the 'relevant contractual provisions' or 'the dealers' explicit or tacit acquiescence'.⁸ Nonetheless, it could not expand on the meaning of 'tacit acquiescence'. As 'the Commission did not rely on there being explicit or tacit acquiescence by the dealers', this issue had no relevance in the case.⁹ It could be deduced from the ruling, though, that silence implies no consent. The dealers were unresponsive and did not explicitly decline the call to limit discounts. Hence, if silence implied consent, the Commission would have succeeded.

The ruling in *Super Bock Bebidas* placed the capstone of this case-law. Although, as noted above, it could be inferred that silence implies no acceptance, *Volkswagen II* left the definition of tacit acquiescence open. In *Super Bock Bebidas*, the CJEU made it clear that positive acceptance may be based on affirmatory reaction or compliant conduct but not on mere silence.

The resale price fixing scheme run by Super Bock contained everything a producer could do unilaterally. Super Bock regularly transmitted lists of minimum prices and margins, the distributors sometimes requested price indications and did not hesitate to complain to Super Bock about the prices it transmitted. The price lists were accompanied by monitoring mechanisms and failure to comply could entail retaliatory measures and negative distribution margins.¹⁰

The CJEU held that these circumstances did not constitute an agreement, as tacit acquiescence requires actual compliance on the side of the distributors.

52 [T]he fact that a supplier regularly transmits to distributors lists indicating the minimum prices that it has determined and the distribution margins, as well as the fact that it asks them to comply with those prices, which it monitors, on pain of retaliatory measures and at the risk, in the event of non-compliance with those measures, of the application of negative distribution margins, are elements from which it may be concluded that that supplier seeks to impose minimum resale prices on its distributors. *While, in themselves, those facts appear to reflect an apparently unilateral conduct by that supplier, it would be otherwise if the distributors complied with those prices.* In that respect, the facts that the minimum resale prices are, in practice, *followed by the distributors, or that their indication is sought by the latter, who, whilst complaining to the supplier about the indicated prices, do not however apply other prices on their own initiative*, could be of such a nature as to reflect the acquiescence on the part of those distributors to minimum resale prices being fixed by the supplier.¹¹

4. Case C-74/04 P *Commission v. Volkswagen*, EU:C:2006:460. It has to be noted that the ruling in *Bayer*, Joined Cases C-2/01 and C-3/01, EU:C:2004:2, already indicated the changing tide.

5. 2001/711/EC *Volkswagen* [2001] OJ L 262/14.

6. Case T-208/01 *Volkswagen v. Commission*, EU:T:2003:326.

7. U. Wickihalder, 'The Distinction between an Agreement within the Meaning of Article 81(1) of the EC Treaty and Unilateral Conduct', 2 *European Competition Journal* (2006), p. 103.

8. Case C-74/04 P, *Commission v. Volkswagen*, EU:C:2006:460, para. 46. See also para. 48 and 52–53.

9. *Ibid.*, para. 47.

10. *Ibid.*, para. 46.

11. Emphasis added. See also para. 57.

The ruling suggests that even if the pricelists are requested by the dealers and they complain about them, that constitutes no agreement in the absence of compliance. Furthermore, it also suggests that compliance is necessary but not necessarily sufficient to establish an agreement. The application of the prices circulated by the producer may be the result of an independent decision and not an agreement. After all, non-binding price recommendations are generally considered to be lawful under Article 101.¹² The ruling's operative part provides that tacit acquiescence may occur via compliance that 'reflects the expression of the concurrence of wills of those parties'.¹³

The notion of positive acceptance makes the enforcement of vertical object rules difficult and inefficient, while not being backed by any compelling doctrinal consideration. First, given that silence implies no consent, this approach places a heavy burden on competition authorities and plaintiffs to prove actual dealer compliance and increases enforcement costs. To prove a resale price fixing scheme, it is not sufficient to demonstrate that the supplier expected the dealers to comply with the minimum prices and used a 'stick and carrot' scheme to make them comply. It also needs to be proved that the supplier's strategy worked out. Second, the way the CJEU conceived positive acceptance obscures competition law's message about object restrictions. It suggests that, as a matter of practice, vertical restrictive efforts are not outright prohibited but the supplier may take its chance through proving no or insufficient dealer compliance. The uncertainties inherent in the CJEU's conception of positive acceptance go against competition law's clear expectation to stay away even from the suspicion of object restrictions. Third, it overlooks the attempts to implement an anti-competitive business policy but calls for intervention if it is successfully implemented. A producer can urge its dealers to comply with minimum resale prices, and Article 101 applies only as long as they comply with these. It is difficult to see the point in this notion. If fixing the resale price is *per se* anti-competitive, why should a determined and systematic attempt to fix the resale price be countenanced? A ban that extends to attempts would entail no false positives, as unsuccessful attempts to implement a *per se* violation have no economic benefits whatsoever while it would significantly reduce enforcement costs by dismissing the requirement to prove compliant conduct.

This development may also be assessed in light of the mounting criticism against the *per se* treatment of resale price fixing.¹⁴ One may applaud the narrowing of the concept of agreement, since this entails the narrowing of the purview of these *per se* rules. After all, what matters is that a resale price policy can be implemented. From a practical perspective, it matters less whether this is possible because it is lawful or because it is just difficult to prove. If EU competition law refuses to reconsider the substantive rule, at least it blunts it through evidentiary hurdles.

This assessment is underpinned by a very illustrative comparative precedent. In US antitrust law, it was the end-driven interpretation of agreement that blunted the *per se* rule on resale price fixing decades before it was actually overruled. The US Supreme Court pronounced resale price

12. See Case 161/84 *Pronuptia*, EU:C:1986:41, para. 25; Guidelines on Vertical Restraints, [2022] OJ C 248/1, para. 198–201.

13. Case C-211/22 *Super Bock Bebidas*, para. 53.

14. See e.g. A. Jones, 'Resale Price Maintenance: a Debate about Competition Policy in Europe', 5 *European Competition Journal* (2009), 479; S.M. Colino, *Vertical Agreements and Competition Law* (Hart Publishing, 2010), p. 183–194; Cs.I. Nagy, *EU and US Competition Law: Divided in Unity?* (Ashgate/Routledge, 2013), p. 131–138 and 159–162; Cs.I. Nagy, 'Resale Price Fixing after the Revision of the EU Vertical Regime – A Comparative Perspective', 54 *Acta Juridica Hungarica* (2013); I. Apostolakis, *Resale price maintenance and the limits of Article 101 TFEU: reconsidering the application of EU competition law to vertical price restraints*, PhD thesis, University of Glasgow (2016), <https://theses.gla.ac.uk/7101/>; Ch. Kollmar, *Resale Price Maintenance and the Law* (Routledge, 2023).

maintenance *per se* illegal in *Dr. Miles* in 1911.¹⁵ This rule was invalidated a century later in response to the mounting economic criticism. In 1997, in *State Oil v. Khan*,¹⁶ the Court abolished the *per se* treatment of maximum resale prices and then, in 2007, in *Leegin*,¹⁷ a highly divided Supreme Court completely overruled *Dr. Miles* and provided for assessment under the rule of reason. However, the Supreme Court allowed suppliers to effectively fix the resale price decades before *Leegin*. In 1984, in *Monsanto*,¹⁸ it held that the agreement between the producer and a complaining distributor to expel a price-cutting dealer from the distribution network neither reveals nor qualifies as an agreement on resale price. The Court found that neither the exchange of pricing data nor the agreement to terminate a price-cutting dealer in response to other dealers' complaints constituted resale price fixing.¹⁹ It held that resale price fixing occurs only if there is a positive consensus specifically relating to the price.²⁰ The Court expressly acknowledged that this very narrow construction of agreement was heavily influenced by the considerations (free-riding, dealer-services etc.) that should have justified, and subsequently did justify, the complete abolition of the *per se* rule.

There is, however, a major difference between the US Supreme Court's judgment in *Monsanto* and the CJEU's rulings in *Volkswagen II* and *Super Bock Bebidas*. The US Supreme Court acknowledged the procompetitive arguments for resale price fixing and knowingly used the concept of agreement to enable it. In contrast, the CJEU's rulings are based on syllogistic deduction and indicate no such consciousness. Furthermore, the CJEU made no indication that this approach is specifically limited to resale price fixing schemes. Although it is difficult to imagine that the CJEU envisaged enabling suppliers to put in place distribution schemes involving absolute territorial exclusivity, the rulings apply to vertical restraints in general. Finally, although *Monsanto* provides a good comparative reference, this does not necessarily mean that its approach was correct. The *Monsanto* exception favoured producers with market power, while the textbook examples of harmful vertical restraints are cases where the producer has market power. Large producers can coerce compliance by threatening termination and hence are less reliant on legally enforceable contractual terms. Suppliers having no economic upper hand may have difficulties with making use of the possibilities *Monsanto* offers and need the arsenal of contract law to ensure dealers' compliance.

Although viewing *Super Bock Bebidas* as bringing the treatment of resale price fixing closer to sound economic considerations by limiting the purview of the *per se* rule has its merits, it is not reasonable to applaud the ineffectiveness of law enforcement just because of the discontent with certain rules of law. It is not law enforcement that should be crippled, but the rules should be amended. Narrowing the scope of agreement is a lawnmower. It applies to all vertical restraints, not only resale price fixing. Furthermore, it does not consider the pertinent substantive factors that distinguish anti-competitive from procompetitive cases. The same as the *Monsanto* exception, the narrow conception of vertical agreements does not distinguish between cases where resale price fixing is acceptable, for instance for lack of market power, and where it is not.

15. *Dr. Miles v. Park*, 220 U.S. 373. (1911).

16. *State Oil v. Khan*, 522 U.S. 3 (1997).

17. *Leegin v. PSKS*, 551 U.S. 877 (2007).

18. *Monsanto v. Spray-Rite*, 465 U.S. 752, 762–763 (1984). This was an extension of the doctrine established in *United State v. Colgate & Co.*, 250 U.S. 300 (1919), which considers it unilateral behaviour if the producer publicly discloses the conduct it expects from its dealers and breaks off business relations with the non-complying ones.

19. 465 U.S. 752, 763–764 (1984).

20. 465 U.S. 752, 768 (1984).

3. Hardcore restrictions and anti-competitive object

The term 'hardcore' is one of the most often used buzzwords of EU competition law, although its content and status is uncertain and has limited statutory basis. In competition parlance, this term has been often used as a rough equivalent of anti-competitive object.

In terms of positive law, hardcore restrictions are unknown for Article 101 and the term appears only in the various block exemption regulations (and in Commission guidelines and notices). From a strictly statutory perspective, the designation as hardcore simply means that the agreement cannot benefit from the block exemption. Technically speaking, hardcore agreements are not burdened by a presumption of illegality, they simply do not benefit from a presumption of legality. In terms of formal statutory interpretation, not meeting the conditions of presumed legality does not imply presumed illegality.

Nonetheless, in competition jargon and the Commission's various guidelines and notices, the term 'hardcore' is a telegraphese reference to agreements that are anti-competitive by object under Article 101(1) and are highly unlikely to be saved under Article 101(3).²¹ The Commission has generally treated hardcore as a synonym of anti-competitive object. The Notice on Agreements of Minor Importance²² expressly states that hardcore restrictions listed in block exemption regulations 'are considered by the Commission to generally constitute restrictions by object'.²³ Parties that have a low market share (10% in horizontal cases, 15% in vertical cases) are too small to harm and hence their agreements are pronounced compliant with Article 101(1). However, these safe harbour benefits only affect agreements, given that object agreements have an anti-competitive nature and are restrictive irrespective of their market context, and hence they breach Article 101(1) irrespective of the parties' market share. If the Commission treats object and hardcore restrictions alike in the application of the Notice on Agreements of Minor Importance, this implies that it considers them to be anti-competitive under all circumstances.

While in principle all agreements have the chance to meet the requirements of Article 101(3) and no type of agreement is automatically excluded from the exemption,²⁴ it is very unlikely that a hardcore agreement could fulfil these conditions.²⁵ In this conception, the meaning of 'hardcore' is wider than the purview of anti-competitive object. The latter relates only to Article 101(1), while

21. This distinguishes them from excluded clauses. Although the latter may also raise competition concerns, they are not generally considered to be anti-competitive by object under Article 101(1). Furthermore, excluded clauses are also excluded from the benefit of the block exemption, but, contrary to hardcore restraints, they do not drag down the entire agreement with themselves. If an agreement contains an excluded clause, it can still benefit from the block exemption, it is only the excluded clause that loses this benefit and needs to be defended under Article 101. On the contrary, a hardcore clause entails that the entire agreement loses the benefit of the block exemption and needs to be defended under Article 101.

22. Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), [2014] OJ C 291/1.

23. *Ibid.*, para 13.

24. Case T-17/93 *Matra Hachette*, EU:T:1994:89, para. 85; Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission*, EU:T:2006:265, para. 233. This proposition was reinforced in *BIDC*,²⁴ where the CJEU encountered a horizontal hardcore agreement (market sharing and output limitation) in a preliminary reference. The question submitted by the national court was whether such an agreement is anti-competitive by object and thus automatically contrary to Article 101(1) TFEU. Although the CJEU was not express in saying that even a horizontal hardcore agreement may be, at least theoretically, eligible for an exemption under Article 101(3), the language of the judgment suggests this clearly; but it also suggests that this is rather a theoretical possibility.

25. F. Wijkman, F. Tuytschaever and A. Vanderelst, *Vertical Agreements in EC Competition Law* (Oxford University Press, 2006), § 2.134 ('[H]ardcore restrictions (...) are almost by way of definition banned by EC competition law').

the concept of hardcore restrictions, although it designates the very same species of agreements, has a much broader application, as it is used under both Articles 101(1) and 101(3).²⁶

The CJEU's case-law had been unclear about the convergence between the two categories. In *Pierre Fabre*²⁷ and *Coty*,²⁸ the Court refrained from putting an equality sign between the hardcore restrictions set out in the block exemption regulation and anti-competitive object within the meaning of Article 101(1) TFEU. Still, the rulings could arguably be interpreted as suggesting that although the two categories do not always coincide, there is a general convergence between them. In *Pierre Fabre*, the CJEU found the arrangement to be both anti-competitive by object and hardcore. On the other hand, the restriction in *Coty* was found not to have an anti-competitive object and not to be hardcore.

In *Super Bock Bebidas*, however, the CJEU laid down two important tenets concerning the above distinction. First, there is no formal equivalence between anti-competitive object and the hardcore lists of block exemption regulations. Second, hardcore restrictions are very strong candidates for anti-competitive object. The Court expressly held that no equality sign may be put between hardcore restrictions and anti-competitive object. At the same time, it also established that although being listed as hardcore is not determinative as to the outcome of the object analysis, it is quite relevant in this context. As part of the object analysis, 'as an element of the legal context', it has to be taken into account that the restriction is listed as hardcore in a block exemption regulation.²⁹ 'However (...) that does not exempt the referring court from carrying out the assessment required by the object-analysis.'³⁰ The Court noted that anti-competitive object and the hardcore lists of the block exemption regulations serve different purposes. 'The [latter's] sole purpose is to exclude certain vertical restrictions from the scope of a block exemption', which 'benefits vertical agreements deemed not to be harmful to competition'.³¹ The hardcore lists of the block exemption regulations 'do not contain an indication as to whether those restrictions must be categorised as a restriction "by object" or "by effect"'. (...) It is therefore necessary to examine restrictions falling outside that exemption, on a case-by-case basis, with regard to Article 101(1) TFEU.³²

There are two compelling formal legal reasons that refute the requirement of a convergent construction of anti-competitive object and hardcore restrictions. First, as noted by the CJEU, the function of the hardcore lists is not to set out the purview of the prohibition of Article 101(1) but to draw the limits of the block exemption. Accordingly, as they limit a presumption of legality, they can create no presumption of illegality. Second, it has to be added that the equation of the two categories would also raise serious problems of constitutional authorization. The interpreter of Article 101 is the CJEU and not the Commission. The Commission's delegated legislative power is limited to the block exemption. It would be *ultra vires*, if it could use this legislative power to also legislate on the prohibitive purview of Article 101(1).

The lack of formal equivalence, however, does not exclude that the two categories, as a matter of practice, be treated as being roughly the same. The ruling in *Super Bock Bebidas* does not obviate

See also Case 28/77 *Tepea BV v. Commission*, EU:C:1978:133, para. 57; Case 35/83 *BAT Cigaretten-Fabriken GmbH v. Commission*, EU:C:1985:32, para. 41.

26. See Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97, para. 23.

27. Case C-439/09 *Pierre Fabre*, EU:C:2011:649.

28. Case C-230/16 *Coty*, EU:C:2017:941.

29. Case C-211/22 *Super Bock Bebidas*, para. 38.

30. *Ibid.*, para. 39.

31. *Ibid.*, para. 40.

32. *Ibid.*, para. 41.

this contradiction when it suggests that listing as hardcore may indicate anti-competitive object. The pivotal question is, of course, how strong this indication is and if its force is comparable to a presumption and, if it is, how strong that presumption is. An overly convergent construction would lead to salient contradictions and significantly increase the risk of false positives. The lists of hardcore restrictions set out in the block exemption regulations feature quite a few restrictions that have never been declared anti-competitive by object by the CJEU and are not considered to be always or almost always harmful to competition or define the hardcore restriction more widely than the congenial object category. For instance, the Vertical Block Exemption Regulation³³ treats the prohibition of passive sales the same way both in relation to territorial and customer protection, even though the CJEU's case-law pronounced only the former to be anti-competitive by object. The consideration that has determined this case-law is market integration, which expects market actors not to partition the internal market along the national borders that Member States are not allowed to maintain. Although the Commission extrapolated the CJEU's holding on territorial restrictions to customer restrictions, the purpose of market integration is not valid in the context of vertical customer restrictions, which, as a corollary, should not come under the same standard as territorial restrictions. In the same vein, the Vertical Block Exemption Regulation contains a requirement of reservation, which is unknown to the CJEU's case-law. The restrictions of active sales into a territory or to a customer group is acceptable if that territory was 'reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors'.³⁴ The CJEU case-law contains no such requirement of reservation.

4. Contextual analysis and the future of object inquiry

Context has played a significant role in the application of the object rule from the outset,³⁵ although its role has been somewhat unclear. The situation was further confused by the ruling in *Allianz*,³⁶ which could be interpreted as suggesting that the existence of anti-competitive object can be established only on a case-by-case basis. The CJEU held that those agreements are anti-competitive by object that reveal, after looking into agreement and its context, a sufficiently high anti-competitive risk.³⁷ Subsequently, it turned out that the *Allianz* doctrine did not supersede but supplemented the traditional categories of anti-competitive object.³⁸ In other words, established categories of anti-competitive object, such as horizontal price fixing, market sharing, restriction of output, vertical reserve price fixing and vertical territorial protection, have remained intact, and were supplemented by the possibility to declare an agreement that comes under none of these traditional categories as anti-competitive by object if the content and context of the agreement pointed to that. The CJEU produced a good deal of case-law on the contextual analysis to be carried out

33. Regulation 2022/720 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L 134/4.

34. Article 4(b)(i) and 4(c)(i)(1) of the Vertical Block Exemption Regulation.

35. Case 56/65 *Société Technique Minière v. Maschinenbau Ulm*, EU:C:1966:38, p 249. *BIDC*, para. 15; *GlaxoSmithKline*, para. 55 and 58. Case C-307/18 *Generics*, EU:C:2020:52, para. 80; C-591/16 P *Lundbeck*, EU:C:2021:243, para. 131.

36. Case C-32/11 *Allianz*, EU:C:2013:160.

37. See Cs.I. Nagy, 'The Distinction between Anti-Competitive Object and Effect after *Allianz*: The End of Coherence in Competition Analysis?', 36 *World Competition* (2013); Cs.I. Nagy, 'The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law', 36 *European Competition Law Review* (2015).

38. Cs. I. Nagy, 'EU Competition Law Devours Its Children: The Proliferation of Anti-Competitive Object and the Problem of False Positives', 23 *Cambridge Yearbook of European Legal Studies* (2021), pp. 290–310, 296.

concerning agreements that come under no specified object category and where anti-competitive object needs to be established on a case-by-case basis.³⁹ It has been, however, questionable what the role of context and contextual analysis is as to the established categories of anti-competitive object.

In *Super Bock Bebidas* the CJEU made it clear that however generally the anti-competitive nature of the given type of restriction is recognized and accepted, competition authorities and courts still have to look into the context and give an account of what they discovered in this regard.⁴⁰ The Court held that even a hardcore restriction like vertical resale price fixing can be declared anti-competitive by object only if and when a contextual analysis has been carried out:

43 [T]he finding that a vertical agreement fixing minimum resale prices entails a ‘restriction of competition by object’ may only be made after having determined that that agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterise the economic and legal context of which it forms part.

The court provided no explanation about what the contextual analysis is and what needs to be inspected in this frame. However, it made it clear that context and contextual analysis are relevant in all object cases, including the established categories of anti-competitive object. This implies that no agreement can be declared anti-competitive by object without looking into its context.

The ruling raises some important questions of interpretation. Does this usher the end of object in the traditional sense? Indeed, the ruling may also be interpreted as implying that object and effect agreements do not stand out in sharp contrast to each other but make up a colour gradient continuum. This would imply that all agreements are subject to an effects analysis, though to a varying degree. The effects analysis carried out under the label of context for agreements anti-competitive by object is less detailed and proceeds from a presumption of anti-competitiveness. On the other hand, the effects analysis carried out for agreements anti-competitive by effect is more detailed and harbours no such presumption. Although the ruling suggests a less formal approach to anti-competitive object and object analysis, the foregoing interpretation would be excessive. The ruling appears to bring no such revolutionary change; it may simply be seen as a rephrasing of the existing case-law.

First, context has always been part of the object inquiry, and the case-law has consistently repeated the mantra that the agreement’s legal and economic context has to be taken into account and the agreement has to be assessed in this context.⁴¹ In *Super Bock Bebidas* the national court simply asked whether this mantra actually means something, and the CJEU answered the question in the affirmative. Second, as noted above, no AG opinion was prepared in the case, which may happen if the case raises no new points of law. This implies that the CJEU envisaged no paradigmatic change in the judicial practice, whereas the above interpretation would amount

39. See Case C-67/13 P *Groupement des cartes bancaires*, EU:C:2014:2204; C-382/12 *MasterCard*, EU:C:2014:2201; C-228/18 *Budapest Bank*, EU:C:2020:265; C-345/14 *Maxima Latvija*, EU:C:2015:784; C-179/16 *Hoffmann-La Roche & Novartis*, EU:C:2018:25; Case C-306/20 *Visma Enterprise*, EU:C:2021:935; Case 883/19 P. *HSBC Holdings*, EU:C:2023:11; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010; Case C-333/21 *European Superleague*, EU:C:2023:1011; Case C-141/21 P *International Skating Union*, EU:C:2023:1012.

40. Case C-211/22 *Super Bock Bebidas*, para. 43.

41. In *Binon*, Case 243/83, EU:C:1985:284, the CJEU ruled that resale price fixing agreements ‘constitute, of themselves, a restriction of competition’ (emphasis added). Although the designation as anti-competitive by object is still good law, the term ‘of themselves’ had implicitly been overruled by the case-law and this was confirmed by *Super Bock Bebidas*.

to a fundamental change in the conceptual structure of Article 101(1). Third, it would be completely senseless to abolish the clear-cut rule of anti-competitive object and to conflate object and effects analysis, as it is the very essence of anti-competitive object that it prohibits agreements without the need for an effects analysis.

Taking the above considerations into account, a much more reasonable interpretation appears to be that the CJEU simply indicated that the national court should not cry anti-competitive object blindly, even if the arrangement before the bench formally comes under one of the established object categories. The object rule is categorical and relatively formal, after all; it is its chief merit that it requires no effects analysis. Still, looking into context cannot be avoided. Notably, the contextual analysis required by the object inquiry is not and cannot be the same as the effects analysis. The contrary approach would go against the distinction between object and effect, whose significance has been consistently underlined in the case-law. This distinction implies that the analysis required by the Court as part of the object inquiry should be different from the analysis required concerning agreements anti-competitive by effect.

The most that can be deduced from this strand of the ruling is that the CJEU established something resembling the US antitrust law's 'quick look' doctrine. According to this doctrine, the parties to a *per se* illegal agreement – which is otherwise automatically condemned, and the parties have no possibility to justify it – are given a highly limited chance to explain why the justification proffered by them should be considered at all. The court takes, however, only a quick look to see if the justification appears to be plausible at first glance. If it does, the floor will be open to a rule of reason analysis.⁴² Translating this to the terms of EU competition law, the ruling may be interpreted as saying that even agreements that formally come under one of the established categories and, hence, *prima facie* appear to have an anti-competitive object, should not be condemned automatically and should be subject to a substantive analysis. Although these agreements are suspicious in terms of impact on competition, one still needs to look into their context before the final conclusion about whether they automatically violate Article 101(1) or not.

5. Closing words

Although one may read the ruling in *Super Bock Bebidas* as suggesting changes in the construction of Article 101, the lack of an AG opinion sets up a restrictive framework of interpretation. The fact that the Court 'proceed[ed] to judgment without an Opinion' confirms that the ruling was considered not to do more than rehearsing the existing case-law. This is true, even though, in reality, the Court also provided important clarifications and these clarifications may be viewed as subtle but important changes. First, although this could also be deduced from *Volkswagen II*, the CJEU now made it clear that, in a vertical context, silence, at least in the absence of conduct showing acquiescence, implies no acceptance. Second, being listed as hardcore in a block exemption regulation may indicate anti-competitive object, but this is not an automatic conclusion. It seems that there is no general presumption that hardcore agreements are anti-competitive by object, although being listed as hardcore is a circumstance that certainly points into that direction. Third, the legal and economic context of the agreement has to be considered, even if the arrangement comes under a well-established object category. This, however, means neither that the automatism of

42. See e.g. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 US 85 (1984).

the object rule is discarded, nor that vertical resale price fixing is no longer considered to be anti-competitive by object. The ruling simply reiterates the Court's usual mantra that, as part of the object inquiry, the agreement's context needs to be taken into account. The only thing the ruling adds as clarification is that this mantra really means something.

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