

# ‘By Object’ or not ‘by Object’: More Issues Resolved?

Luc Peepkorn\*  
Frank Wijckmans\*\*

☞ Anti-competitive practices; Cartels; EU law

## Introduction

In our article previously published in E.C.L.R.<sup>1</sup> we provided a systematic overview of the caselaw dealing with the legal qualification of restrictions of competition as a ‘by object’ restriction within the meaning of arts 101 and 102 TFEU. The recent Grand Chamber judgments of the Court of Justice in *Superleague*, *ISU* and *RAFC*<sup>2</sup> played a central role in our assessment.

Based on the caselaw we distinguished two categories of conduct that qualify as a ‘by object’ restriction. The first category consisting of naked cartels and the second category comprising other types of horizontal and vertical conduct that are not necessarily equally harmful to competition, but which may also have an anticompetitive object.

We concluded the article with listing a number of issues that we considered resolved and we identified two questions, particularly relevant for the second category of ‘by object’ conduct, on which further guidance from the Court was considered welcome. The first question concerning the possible role of the market position and market power of the parties in the assessment of the economic context. The second concerning the way in which pro-competitive effects demonstrated by the parties should or may be factored into the ‘by object’ analysis.

Both the Court of Justice and the General Court adopted recent judgments providing additional clarifications on these two questions. We believe therefore

that an update of our article is appropriate so that the latest thinking coming from Luxemburg is properly included in our overview.

## Recent judgments concerning naked cartels

The judgments concerning naked cartels rendered following the aforesaid Grand Chamber judgments confirm what we already concluded in our article: that in the case of naked cartels the market position and market power of the parties do not play a role in the assessment as a ‘by object’ restriction and that the same applies for possible pro-competitive effects. In *Lietuvos*<sup>3</sup> and *Em akaunt BG EOOD*<sup>4</sup> horizontal price fixing was placed in the ‘by object’ box without much discussion. The same applied in *Crédit Agricole* with regard to both horizontal price fixing<sup>5</sup> and market sharing.<sup>6</sup> To consider that the market position and the market power of the parties involved play no meaningful role in the ‘by object’ assessment is consistent with both the definition of cartels and the presumption of harm included in respectively arts 2(14) and 17(2) of the Private Damages Directive. Furthermore, the caselaw guides the parties directly to art.101(3) TFEU if they wish to save their practice under the competition rules, confirming that also possible pro-competitive effects have no role to play in the ‘by object’ assessment.<sup>7</sup>

## Recent judgments concerning the second category of ‘by object’ conduct

With regard to the second category of conduct, the recent caselaw addressed both market exclusion practices and information exchanges between competitors. It is here that the Court seems to be offering additional guidance on our two questions. That guidance is relatively complex, but if well understood results in a coherent framework of analysis. The critical element in this context is the basis on which the forms (or types) of coordination are defined that are placed in the ‘by object’ box.

Building on earlier caselaw (including *Superleague*) the Court requires also in its most recent caselaw that the forms of collusion amounting to ‘by object’ restrictions must “reveal, in themselves and having regard to the content of their provisions, their objectives, and the

\* Professor at the Brussels School of Competition, previously Principal Expert Antitrust Policy, DG Competition of the European Commission, Brussels. Mail address: luc.peepkorn@gmail.com. The opinions expressed are strictly personal. While I previously worked for the European Commission, nothing in this article represents the views of the European Commission, DG COMP, or any other institution, entity, person, etc. I have no interests to declare except my own interest, as a European consumer, in a coherent and effective EU competition policy.

\*\* Partner, Faros (Brussels). Professor at the Brussels School of Competition. Assessor Belgian Competition Authority. Mail address: frank.wijckmans@faros.eu. The opinions expressed are strictly personal.

<sup>1</sup> L. Peepkorn and F. Wijckmans, “‘By Object’ or not ‘by Object’: Issues Resolved?”, 2025 46(4) E.C.L.R. 131–152.

<sup>2</sup> *European Superleague Company SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* (C-333/21) ECLI:EU:C:2023:1011, [2025] 4 C.M.L.R. 9 (hereinafter “*Superleague*”); *International Skating Union v European Commission* (C-124/21 P) ECLI:EU:C:2023:1012, [2024] 4 C.M.L.R. 17 (hereinafter “*ISU*”); *UL and SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL (URBSEA)* (C-680/21) ECLI:EU:C:2023:1010, [2024] 4 C.M.L.R. 18 (hereinafter “*RAFC*”).

<sup>3</sup> *Lietuvos notaru rumai v Lietuvos Respublikos konkurencijos taryb* (C-128/21) ECLI:EU:C:2024:49, [2024] 4 C.M.L.R. 20 at [94].

<sup>4</sup> *Em akaunt BG EOOD v Zastrahovatelno akcionerno druzhestvo Armeets AD* (C-438/22) ECLI:EU:C:2024:7, [2024] 4 C.M.L.R. 23 at [48]–[51].

<sup>5</sup> *Crédit Agricole SA and Crédit Agricole Corporate and Investment Bank v European Commission* (T-386/21) ECLI:EU:T:2024:776, [2025] 4 C.M.L.R. 6 (hereinafter “*Crédit Agricole*”) at [636]–[637].

<sup>6</sup> *Crédit Agricole* at [639]–[647].

<sup>7</sup> *European Commission v KRKA, tovarna zdravlje* (C-151/19 P) ECLI:EU:C:2024:546, [2025] 4 C.M.L.R. 18 (hereinafter “*KRKA*”) at [65]; *Superleague* at [187]; *Competition Authority v Beef Industry Development Society and Barry Brothers* (C-209/07) EU:C:2008:643 at [21], [2009] 4 C.M.L.R. 6; L. Peepkorn and F. Wijckmans, “‘By Object’ or not ‘by Object’: Issues Resolved?”, E.C.L.R. 2025 (46), issue 4, 143.

economic and legal context of which they form part, a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects”.<sup>8</sup> As stated in our previous article, the Court requires furthermore that the concept of restriction of competition ‘by object’ is interpreted strictly and that the identification of the conduct that is placed in the ‘by object’ box must be based on sufficiently reliable and robust experience.

For cases other than naked cartels (the first category of forms of coordination caught by the ‘by object’ qualification) this represents a severe test. That explains why the Court in *Banco BPN*<sup>9</sup> (a case dealing with a standalone exchange of information) cautions that “[i]t may be that it is *only where certain specific conditions are satisfied* that it can be presumed that certain forms of coordination and, therefore, the agreements, decisions of associations and concerted practices forming part of them, are harmful to the proper functioning of normal competition” (italics added).

The recent caselaw demonstrates that the Court, for a form of coordination falling within the second category, carefully defines the conditions that must be met before the coordination in a particular case qualifies as a ‘by object’ restriction. Generally speaking, this definition consists of identifying relevant conditions that are included in the test for placing a particular form or type of coordination in the ‘by object’ box. Let us consider the two forms or types that were addressed in the most recent caselaw, notably patent dispute settlement agreements and standalone information exchanges.

### *Patent dispute settlement*

In its recent caselaw, most notably in the *Servier* judgment, the Court had to deal with a series of patent dispute settlement agreements.<sup>10</sup> These cases are very similar to *Generics UK*.<sup>11</sup> Patent dispute settlement agreements (at least those involved in the caselaw) concern, at first sight, market exclusion agreements. The manufacturer of the originator medicines agrees with the producer of the generic equivalents that the latter pulls back from the market, typically against payment of some form of compensation, in order to put the patent dispute to bed. This is not a naked cartel and hence falls within the second category.

It seems undeniable (and the Court seems to acknowledge the same) that patent dispute settlements may trigger efficiencies and hence be pro-competitive. Costly proceedings causing considerable uncertainty are put to an end and the parties can allocate time and resources to more productive matters. It is presumably

against this background that the Court has developed a very specific and refined test before such settlements are placed in the ‘by object’ box. Referring back to *Generics UK*, the Court explains carefully in its recent caselaw under which precise conditions the ‘by object’ treatment is justified.

The relevant steps for the assessment can be summarised as follows:

- It is necessary to examine first whether the payments made by the manufacturer of the originator medicines to the manufacturer of the generic version “may be fully justified by the need to compensate for the costs of or disruption caused by that dispute, such as the expenses and fees of the latter manufacturer’s advisers, or by the need to provide remuneration for the actual and proven supply of goods or services by the manufacturer of generic medicines to the manufacturer of the originator medicine”.<sup>12</sup> This situation may arise where the manufacturer of the generic medicines recognises the validity of the patent and waives the right to challenge it.<sup>13</sup>
- If that is not the case, the Court requires that it is “ascertained whether those transfers of value can have no explanation other than the commercial interest of those manufacturers of medicinal products not to engage in competition on the merits”.<sup>14</sup>
- For that purpose, it must be assessed in each individual case “whether the net gain from the transfers of value was sufficiently large actually to act as an incentive to the manufacturer of generic medicines to refrain from entering the market concerned and, therefore, not to compete on the merits with the manufacturer of originator medicines”.<sup>15</sup>

By putting forward a test based on these conditions, the Court brings a type of practice that typically would fall in the second category back to a market sharing scenario that closely resembles a category one practice. If there is no other explanation than the commercial interest not to compete on the merits, the agreement boils down to market sharing between the two manufacturers and even an extreme form of market sharing as one of the (potential) competitors agrees not to be active on the market. That is why they are also referred to as ‘pay-for-delay’ agreements.

<sup>8</sup> *Servier v European Commission* (C-201/19 P) ECLI:EU:C:2024:552, [2025] 4 C.M.L.R. 19 (hereinafter “*Servier*”) at [75].

<sup>9</sup> *Banco BPN/BIC Português SA v Autoridade da Concorrência* (C-298/22) ECLI:EU:C:2024:638, [2024] 5 C.M.L.R. 16 (hereinafter “*Banco BPN*”) at [48].

<sup>10</sup> *Servier; Lupin Ltd v European Commission* (C-144/19 P) ECLI:EU:C:2024:545; *Niche Generics Ltd v European Commission* (C-164/19 P) ECLI:EU:C:2024:547, [2025] 4 C.M.L.R. 1; *Unichem Laboratories Ltd v European Commission* (C-166/19 P) ECLI:EU:C:2024:548; *Teva UK Ltd v European Commission* (C-198/19 P) ECLI:EU:C:2024:551; *Mylan Laboratories Ltd and Mylan, Inc. v European Commission* (C-197/19 P) ECLI:EU:C:2024:550.

<sup>11</sup> *Generics (UK) Ltd. v Competition and Markets Authority* (C-307/18) ECLI:EU:C:2020:52, [2020] Bus. L.R. 1323 (hereinafter “*Generics UK*”) at [84]–[86].

<sup>12</sup> *Servier* at [83] and [164].

<sup>13</sup> *Servier* at [164].

<sup>14</sup> *Servier* at [83] and [165].

<sup>15</sup> *Servier* at [83] and [165].

This line of cases reflects in our view the careful assessment that is called for when defining forms or types of coordination that belong to the second category of ‘by object’ coordination. Once the conditions are defined, the next step is the assessment of the individual agreements as spelled out in the test. It concerns essentially the weight of the financial transfer as an incentive to forego competition on the merits. Hence, once patent dispute settlement agreements are likely to fall within the second category based on the general test of the Court, the final step is the individual assessment of the importance of the money transfer.

### *Standalone information exchange*

The starting point of the Court is that, for a market to operate under normal conditions, each market player must determine independently the policy which it intends to adopt on the market and be uncertain at least as to the timing, extent and details of any future changes in the conduct of its competitors on the market.<sup>16</sup> An exchange may remove such uncertainty if the information concerned is confidential and strategic.<sup>17</sup> Information is considered strategic by the Court if it may reveal, in some circumstances, once combined with other information already known to the participants, the strategy which some of them intend to implement with regard to what constitutes one or more parameters of competition.<sup>18</sup>

The Court then evaluates the different types of information that are exchanged against this generally formulated test and distinguishes in relation to the case at hand between future pricing intentions, (current) production volumes, past sales volumes and information concerning the best management or production methods. For each of these types of information, the Court evaluates carefully whether it risks to remove uncertainty on the future intentions of other market participants.

With regard to the exchange of future pricing intentions or factors determining those prices the Court has little mercy. Such a standalone information exchange is placed in the ‘by object’ box without further conditions being included in the test. With regard to production volumes a more nuanced approach is adopted. The Court observes that the exchange of such information may “in certain circumstances” amount to a ‘by object’ restriction, but seems to require a combination with other types of information (including information already freely available) before it may be taken to remove uncertainty on future intentions. With regard to past sales volumes and information concerning the best management or production methods, the Court considers it unlikely, when considered in isolation, that it can meet the general test. The Court adds, however, that the information exchange

must be considered as a whole and that account must be taken of the possibility of cross-referencing the different categories of information exchanged.

Again, the approach followed for placing conduct in this area in the ‘by object’ box is logical and coherent. The Court formulates first a general test based on the removal of uncertainty regarding future conduct of competitors as regards one or more of the parameters of competition. Depending on the type of information involved, the Court will then require more than the exchange of a particular type of information considered in isolation before it will consider the test met. This leaves room for individual assessments in order to determine whether the content of the information exchange placed in its economic context meets the general test for placing the relevant conduct in the second category of ‘by object’ restrictions.

### **Returning to the two open questions for the second category of ‘by object’ conduct**

The careful definition of certain conditions for finding that a particular type of conduct falls within the second category of ‘by object’ restrictions provides the basis for answering the two open questions. Let us first have a look at the question regarding the possible role of pro-competitive effects in finding a ‘by object’ coordination.

#### *The role of pro-competitive effects*

*Superleague* at [166] constitutes clearly the starting point of the discussion on the role of pro-competitive effects in a ‘by object’ assessment. The Court of Justice stated that “it is not [...] necessary to examine, nor, a fortiori, to prove the effects of [the] conduct on competition, be they actual or potential, or negative or positive”. In our previous article we argued that this formulation could be understood to leave open the question whether parties are prevented from advancing pro-competitive effects as part of their defense against a possible ‘by object’ qualification. It is here that, in particular the judgment in *Servier*<sup>19</sup>, offers further guidance.

The *Servier* judgment (together with a number of other judgments rendered at the same time<sup>20</sup>) builds on *Superleague* at [166] and adds that “*Servier* cannot criticize the General Court for not having taken into account the positive or at least ambivalent effects on competition to which the agreements at issue would, according to *Servier*, be likely to give rise, since [...] an examination of the effects of those agreements is not

<sup>16</sup> *Banco BPN* at [54].

<sup>17</sup> *Banco BPN* at [62].

<sup>18</sup> *Banco BPN* at [63].

<sup>19</sup> *Servier* at [76] and [78].

<sup>20</sup> *Sun Pharmaceutical Industries and Ranbaxy (UK) v European Commission* (C-586/16 P) EU:C:2021:241 at [85]–[87]; *Lundbeck v European Commission* (C-591/16 P) EU:C:2021:243 at [130]–[131].

necessary, or even relevant, for the purpose of determining whether they may be characterized as a restriction of competition by object<sup>21</sup>.

Further on<sup>22</sup> the Court is even more explicit when it refers to the position of the General Court in the judgment under appeal that the Commission and the Courts of the European Union cannot, when examining whether the object of an agreement is restrictive “completely ignore its potential effects, with the result that agreements which, having regard to their context, have ambivalent potential effects on the market cannot be regarded as being a restriction of competition by object”. The Court responds that this position is contrary to the existing caselaw (and in particular *Superleague*)<sup>23</sup> and constitutes an “error of law”.<sup>24</sup> When addressing the individual agreements, the Court repeats its position in clear terms by stating that “any pro-competitive effects of an agreement are irrelevant in the context of the examination of its anticompetitive object, including for the purpose of ascertaining whether it is harmful”.<sup>25</sup>

The consequence of the position adopted by the Court of Justice is that, once an agreement qualifies for ‘by object’ treatment, the parties cannot escape such qualification by introducing arguments that in their individual case pro-competitive (or ambivalent) effects apply. Once the ‘by object’ qualification applies, any such arguments must be introduced in the context of art.101(3) TFEU, but they cannot help to escape the ‘by object’ characterisation under art.101(1) TFEU.

In other words, the recent caselaw makes it abundantly clear that arguments based on pro-competitive effects join the queue consisting of defense pleas relying on the lack of appreciability,<sup>26</sup> objective justifications (*Wouters* doctrine)<sup>27</sup> or the ancillary restraints theory.<sup>28</sup> None of them can save an individual case that falls within a type or form of coordination that qualifies as a ‘by object’ restriction. That may seem aggressive but, placed in the context of the framework of analysis developed in the caselaw of the Court, this approach is logical and coherent.

Logical and coherent in view of, in particular, the specific conditions and tests defined for different types of ‘by object’ cooperation. For instance, for the pay-for-delay agreements the test requires that no other explanation than the elimination of competition on the merits must be involved. In that case (and only in that case) it is logical and coherent that the parties cannot avoid a ‘by object’ classification by introducing

arguments based on pro-competitive effects. The validity of such arguments is undermined by the specific conditions included in the test formulated by the Court.

This does not mean that pro-competitive effects have no role to play in the ‘by object’ context. However, such a role is situated at a different level, notably the definition of the precise conditions that must be met by a type or form of coordination to make it land in the ‘by object’ box. The caselaw on patent dispute settlements illustrates that the Court has linked the test to specific conditions so that there is no room left to advance arguments based on pro-competitive effects. With its test the Court took into account that patent dispute settlements may trigger efficiencies and hence pro-competitive effects and it has phrased its test in such terms that only sufficiently narrowly defined cases—the ‘pay-for-delay’ segment—qualify as ‘by object’ restrictions, so that it lacks credibility that any conceivable pro-competitive effects may tilt the balance in the opposite direction. In any event, parties will still have a chance to advance such arguments in the context of art.101(3) TFEU.

By the same token, if the definition of a type or form of coordination that is placed in the second category leaves room for significant efficiencies, it may prove necessary to evaluate whether such definition is sufficiently precise and narrow. It is interesting in this respect that the Court in *Banco BPN*<sup>29</sup> states that “[t]he purpose of taking the [economic and legal] context into account is thus to ascertain that no particular circumstance surrounding the agreement, decision or concerted practice at issue is such as to rebut the presumption *that the form of coordination to which it belongs is harmful to competition*” (italics added). This statement is fully consistent with the conceptual distinction that needs to be made between forms of coordination and the individual agreements covered by such a form. Hence, pro-competitive effects or efficiencies may have a role to play when it comes to the definition of the form or type of coordination. However, once the definition is in place and an individual agreement belongs to such a form or type, arguments based on pro-competitive effects are to no avail.

In conclusion, a sufficiently precise and carefully balanced definition of the types or forms of coordination that fall in the second category justifies that pro-competitive effects (like arguments concerning lack of appreciability, objective justifications or ancillary restraints) have no place in the assessment of individual

<sup>21</sup> *Servier* at [145].

<sup>22</sup> *Servier* at [153].

<sup>23</sup> *Servier* at [154].

<sup>24</sup> *Servier* at [155]; However, the Court concluded that the error of law had no consequence, in principle, for the legality of the judgment under appeal, since, in any event, the General Court rejected all the arguments relating to the allegedly pro-competitive or ambivalent effects of the agreements at issue, put forward by *Servier* at first instance, on other grounds.

<sup>25</sup> *Servier* at [272].

<sup>26</sup> L. Peepkorn and F. Wijckmans, “‘By Object’ or not ‘by Object’: Issues Resolved?”, E.C.L.R. 2025 (46), issue 4, 136–137, 149.

<sup>27</sup> L. Peepkorn and F. Wijckmans, “‘By Object’ or not ‘by Object’: Issues Resolved?”, E.C.L.R. 2025 (46), issue 4, 148.

<sup>28</sup> *Servier* at [278].

<sup>29</sup> *Banco BPN* at [48].

conduct that meets all of the conditions of the definition. The (enhanced) duty to motivate that is spelled out in *Superleague* makes eminent sense from that perspective.

### ***The role of market power and the market position of the parties***

This brings us to the second question, notably the role of market power and the market position of the parties in a ‘by object’ assessment for the second category of ‘by object’ conduct. With regard to the first category (naked cartels), as already explained in the second section above, there seems to be no place for arguments based on lack of market power or the position on the market of the parties involved. This seems, however, different for the second category.

*Superleague* is a case where the individual position and market power of the parties—FIFA and UEFA having a (super) dominant position with a de facto power to regulate the market—played an essential role in the Court’s definition of the form of conduct that qualifies as a ‘by object’ restriction. While not having transparent, objective, non-discriminatory and proportionate rules on prior approval, participation and sanctions is not considered ‘by object’ in general, it is considered to be ‘by object’ for a specified class of cases defined by the market position of the parties involved, namely where the parties have de jure or de facto the power to determine which other undertakings are also authorised to engage in that economic activity and to determine the conditions in which that activity may be exercised.

This indicates that, depending on the conditions that need to be injected in the test to meet the general ‘by object’ standard spelled out in the caselaw (i.e. that the ‘by object’ concept must be interpreted as referring solely to types of coordination revealing a sufficient degree of harm to competition so that they can be regarded, by their

very nature, as being injurious to the proper functioning of normal competition), issues of market power and the market position of the parties may have a role to play if they help to mark the dividing line between forms of coordination meeting and not meeting the general test. And in order to remain logical and coherent, it is only where such a condition is defined as part of the test for a particular type of coordination, that the parties may rely in their individual case on arguments that their market power or position in the market should exclude that their coordination is found to be ‘by object’.

### **Conclusion**

We believe that, based on the clarifications offered by the most recent caselaw, our conclusion in the previous article can be completed as follows:

- In the case of an individual agreement that is covered by a type or form of coordination that qualifies as a ‘by object’ restriction, arguments based on efficiencies and pro-competitive effects are to no avail in order to keep the individual agreement out of the ‘by object’ box.
- If the definition of a type or form of coordination leaves room for significant efficiencies or pro-competitive effects to be realised, it may be necessary to refine the test regarding such type or form of coordination (e.g. by adding conditions).
- Arguments based on market power or the market position of the parties may play a role, but only if they are included as condition(s) in the test governing the qualification of a type or form of coordination as a ‘by object’ restriction.